FEDERAL COURT OF AUSTRALIA

Nguyen v Minister for Immigration, Citizenship and Multicultural Affairs [2019] FCA 934

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| Appeal from: | *Nguyen v Minister for Immigration & Anor* [2018] FCCA 3790 |
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| File number: |  |
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| Judge: | **KERR J** |
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| Date of judgment: | 18 June 2019 |
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| Catchwords: | **MIGRATION –** appeal from a decision of the Federal Circuit Court of Australia dismissing an application for judicial review of a decision of the Administrative Appeals Tribunal affirming a decision of a delegate of the First Respondent not to grant the appellant an Other Family (Residence) (Class BU) Subclass 836 visa **–** whether “the assistance” in reg 1.15AA(1)(e) of the *Migration Regulations 1994* (Cth) is linked to “two years” in reg 1.15AA(1)(b)(iv) **–** provisions linked – jurisdictional error established – appeal allowed |
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| Legislation: | *Migration Regulations 1994* (Cth) r 1.15AA |
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| Cases cited: | *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; 43 FCR 280  *Lacey v Attorney-General (Queensland)* [2011] HCA 10; 242 CLR 573  *Nguyen v Minister for Immigration & Anor* [2018] FCCA 3790  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 |
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| Date of hearing: | 8 May 2019 |
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| Counsel for the Appellant: | Mr S A McDonald |
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| Solicitor for the Appellant: | MSM Legal |
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| Counsel for the Respondents: | Ms N Milutinovic |
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| Solicitor for the Respondents: | Sparke Helmore |

ORDERS

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|  | | SAD 20 of 2019 |
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| BETWEEN: | THI DAO NGUYEN  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | KERR J |
| DATE OF ORDER: | 18 June 2019 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Circuit Court of Australia made on 20 December 2018 be set aside, and in lieu thereof the following orders be substituted:
   1. A writ of certiorari issue, directed to the Second Respondent, quashing its decision of 23 August 2016 to refuse to grant the applicant an Other Family (Residence) (Class BU) Subclass 836 visa.
   2. A writ of mandamus issue, directed to the Second Respondent, requiring it to determine according to law the applicant’s application for review of the decision of the delegate of the First Respondent dated 26 August 2015, refusing to grant the applicant an Other Family (Residence) (Class BU) Subclass 836 visa.
   3. The First Respondent pay the applicant’s costs of the action for judicial review.
3. The First Respondent pay the Appellant’s costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KERR J:

1. Ms Thi Thoa Ton is a frail elderly widow of Vietnamese descent. She was born in 1931. Ms Ton became an Australian citizen in 2008.
2. In March 2015 Ms Ton’s daughter, Thi Dao Nguyen (the Appellant) applied for an Other Family (Residence) (Class BU) Subclass 836 visa (**Carer’s Visa)** to enable her to provide assistance to her mother. Ms Ton was the Appellant’s sponsor for the Carer’s Visa.
3. Ms Ton’s medical condition was the subject of a Carer Visa Assessment Certificate (**Certificate**) provided by Dr Lim dated 18 February 2015. I will return to the detail of that Certificate later in these reasons. It is sufficient to note at this point that in that Certificate, Dr Lim diagnosed Ms Ton as suffering from chronic bilateral weakness of the lower limbs and atrial fibrillation (a form of heart arrhythmia). He stated his opinion that, in consequence, Ms Ton met the requirements for a carer because, inter alia, as she had “the need for direct assistance in attending to the practical aspects of daily life that will continue for at least two years.”
4. A delegate of the First Respondent (**Minister**) refused Ms Nguyen a Carer’s Visa. She then applied for merits review of that decision in the Administrative Appeals Tribunal **(Tribunal).**
5. At the time of the Tribunal’s decision, Ms Ton was aged 85. She shared a household with her son, Hung; her daughter, Anh; and the Appellant at their home in Waterloo Corner, South Australia. Anh’s husband, Binh and their daughter, Vy also lived at that premises.
6. Ms Nguyen told the Tribunal that she had originally come to Australia in November 2014 to assist her married daughter (not a member of the Waterloo Corner household) who had given birth to a premature baby. Ms Nguyen had subsequently moved to Waterloo Corner in May 2015.
7. Ms Nguyen had worked as a nurse in Vietnam for more than twenty years. She told the Tribunal that since June 2015, shortly after moving into Waterloo Corner, she had provided her mother with full time, “around the clock” care.
8. It is not in dispute that to provide that care Ms Nguyen slept in her mother’s room. The care she provided included monitoring her mother’s blood pressure, checking her blood sugar levels, administering her medicines, toileting her with a pan, feeding her and taking her outside in a wheelchair during the day for a sunbath. During the evening, she would read a Buddhist text to her.
9. The Tribunal affirmed the decision of the Minister’s delegate to refuse Ms Nguyen a Carer’s Visa on the basis that it was not satisfied that other relatives resident in Australia could not reasonably provide the direct assistance that Ms Ton required.
10. Ms Nguyen sought judicial review of the Tribunal’s decision in the Federal Circuit Court of Australia (**FCCA**). Her application was unsuccessful. This is an appeal from the FCCA’s decision: see *Nguyen v Minister for Immigration & Anor* [2018] FCCA 3790.
11. In order to provide some context to the issues agitated in the appeal, it is appropriate to summarise some of the evidence and findings of the Tribunal.
12. It was uncontentious that for some time before Ms Nguyen had moved to Waterloo Corner, Ms Ton’s son, Hung, had provided the overnight direct care his mother had required. For that purpose he had slept in Ms Ton’s room, as Ms Nguyen would later do.
13. Hung’s claim that it was culturally inappropriate for a Vietnamese man to have to sleep in the same room to provide intimate caring assistance to his mother was rejected by the Tribunal. No ground of appeal was, or has been, advanced on the premise that that conclusion was not open to the Tribunal to draw.
14. It was uncontentious before the Tribunal that Ms Ton’s daughter Anh herself was frail and suffered from medical conditions that limited the amount of direct care that she could provide to her mother. Nonetheless, the Tribunal concluded that Anh would be able to provide her mother with some assistance.
15. Because Anh’s husband Binh was not a relative of Ms Ton, the Tribunal was not entitled to consider any direct assistance he might reasonably be expected to provide his mother-in-law. In any event, the evidence before the Tribunal was that Binh would have had only limited capacity in that regard because of his having to provide direct assistance to his wife Anh.
16. Ms Ton’s granddaughter Vy was then in her early twenties and still living at home. She worked as a hairdresser. The Tribunal rejected that she worked every day of the week. The Tribunal concluded Vy had Sundays and Wednesdays off, and only worked half a day on Thursdays. It further concluded she could provide her grandmother with direct assistance when she was not at work.
17. The Tribunal also found that Ms Ton had other relatives who, although having primary responsibility to their own families, could provide Ms Ton with some additional assistance from time to time during lunch breaks or on weekends.
18. The Tribunal accepted that the option of Ms Ton being provided with nursing home care was unsuitable for cultural reasons.
19. The critical passages of the Tribunal’s reasoning which were the focus of the judicial review proceedings in the court below, and are in turn the subject of this appeal, relate to its findings regarding the direct care that Ms Ton’s relatives could provide at night time.
20. At [45] the Tribunal recorded that Ms Ton’s son Hung had provided a statement indicating that he had recently married and his wife was expecting their child. He provided the Tribunal with a copy of his Vietnamese marriage certificate. He had sponsored his wife for migration to Australia but she had not yet arrived from Vietnam.
21. Under the heading “Whether assistance cannot reasonably be provided by the Australian relatives who reside with Mrs Ton”, the Tribunal reasoned as follows:

73. In relation to Hung, the Tribunal accepts that he resides with Mrs Ton. The Tribunal acknowledges the evidence that Hung is married to a Vietnamese whom it is claimed he has sponsored to Australia. While that may be so, at time of decision, no material has been put to the Tribunal that Hung's wife has entered Australia.

74. …

75. The evidence is incontrovertible that before the arrival of the applicant, Hung slept in Mrs Ton’s room and assisted her during the evenings. Hung now claims his commitments to his wife and business that render him unable to provide care to Mrs Ton in the evenings. The Tribunal rejects that claim owing to the evidence that before the applicant took on caring for Mrs Ton at night that role was his responsibility. Hung has not demonstrated that he cannot continue to provide his mother with assistance at night time. Furthermore, as his market garden is at Waterloo Corner, being the same suburb as Mrs Ton’s home, Hung can also reasonably provide additional assistance if required during the day by his sister, Anh.

1. At [85] the Tribunal recorded the following finding:

85. … the Tribunal considers that Vy is reasonably able to provide some assistance to Mrs Ton during her non-working hours. Furthermore, the Tribunal considers that Vy could also assist Mrs Ton from time to time in the evenings, for example, when Hung is absent overseas.

1. At [95] the Tribunal concluded:

95. On the basis of its findings the Tribunal considers that the majority of assistance required by Mr Ton can reasonably be provided by the three Australian relatives who live [with] her in combination with assistance of a lesser degree from Australian relatives who do not reside with her but live in the outer Adelaide area and from Domiciliary Care.

1. Ms Nguyen’s application for judicial review in the FCCA relied on a single ground, recited by the primary judge as follows:

12. In the application that was filed in this Court on 21 September 2016, there were two grounds of review. However, when the applicant filed her outline of submissions on 27 July 2017, those grounds were abandoned. I gave leave for the applicant to file an amended application which relied on a single ground as follows:

*“The decision of the tribunal was affected by jurisdictional error, in that, when considering whether “the assistance” for which the applicant’s mother had a need could reasonably be provided by a relative, etc, the Tribunal misconstrued reg.1.15AA(1)(e) of the Migration Regulations 1994, in that the Tribunal treated “the assistance” as being only that for which the applicant’s mother had a need at the time of the decision, when on the proper construction of reg.1.15AA(1)(e) “the assistance” was that for which the applicant’s mother had a need at the time of the assistance and for a period of at least two years from the date of the certificate referred to in reg.1.15AA. In doing so, the Tribunal failed to form the relevant state of satisfaction and made an error of law which caused it to identify a wrong issue, ask itself a wrong question, and/or ignore relevant material.”*

1. His Honour addressed that ground as follows:

13. To understand this ground it is necessary to look at reg.1.15AA(1) of the Migration Regulations 1994 (Cth) (‘the Regulations’).

*“(1) An applicant for a visa is a carer of a person who is an Australian citizen usually resident in Australia, an Australian permanent resident or an eligible New Zealand citizen ( the resident ) if:*

*(a) the applicant is a relative of the resident; and*

*(b) according to a certificate that meets the requirements of subregulation (2):*

*(i) a person (being the resident or a member of the family unit of the resident) has a medical condition; and*

*(ii) the medical condition is causing physical, intellectual or sensory impairment of the ability of that person to attend to the practical aspects of daily life; and*

*(iii) the impairment has, under the Impairment Tables (within the meaning of subsection 23(1) of the*[*Social Security Act 1991*](http://www.austlii.edu.au/au/legis/cth/consol_act/ssa1991186/)*), the rating that is specified in the certificate; and*

*(iv) because of the medical condition, the person has, and will continue* ***for at least 2 years*** *to have, a need for* ***direct assistance*** *in attending to the practical aspects of daily life; and*

*(ba) the person mentioned in subparagraph (b)(i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and*

*(c) the rating mentioned in subparagraph (b)(iii) is equal to, or exceeds, the impairment rating specified in a legislative instrument made by the Minister for this*[*paragraph*](http://classic.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s1.15f.html#paragraph)*; and*

*(d) if the person to whom the certificate relates is not the resident, the resident has a permanent or long-term need for assistance in providing the direct assistance mentioned in subparagraph (b)(iv); and*

*(e) the* ***assistance*** *cannot reasonably be:*

*(i) provided by any other relative of the resident, being a relative who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; or*

*(ii) obtained from welfare, hospital, nursing or community services in Australia; and*

*(f) the applicant is willing and able to provide to the resident substantial and continuing assistance of the kind needed under subparagraph (b)(iv) or*[*paragraph*](http://classic.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s1.15f.html#paragraph)*(d), as the case requires.”*

**Submission of the Applicant**

14. The gist of the ground is that the Tribunal did not assess whether the persons could give the assistance that was needed for the period of two years (as per subparagraph (b)(iv)). When the Tribunal, in paragraph 95, said that it considered that, “*the majority of assistance required by Mrs Ton can reasonably be provided by the three Australian relatives who live with her…*”, the Tribunal did not consider whether that assistance was for at least two years.

15. The submission of the applicant is that the Tribunal misunderstood the nature of “*the assistance*” which it was required to assess the capacity of family members to provide. It is the contention of the applicant that the Tribunal has only referred to the assistance which Mrs Ton needs at the present point in time rather than the assistance that she will continue to need for at least two years.

16. The ultimate submission of the applicant is that this misunderstanding constitutes a jurisdictional error because the Tribunal has failed to assess the criteria properly.

17. In the submission of the first respondent, the applicant has inverted the relevant test with respect to the criteria relating to being a ‘carer’. The question is not whether the relevant assistance could reasonably be provided by, for example, a relative. The Regulation required the Tribunal to ask whether the assistance cannot be reasonably provided. It was submitted the Tribunal asked itself the right question and did not ignore the temporal aspect of the test. The first respondent submitted that the “*two years*” referred to in reg.1.15AA(1)(b)(iv) related to the severity of the medical condition.

**Discussion**

18. The argument of the applicant is contingent upon the period of “*two years*” being linked with the availability of the “*assistance*” that is needed. I do not accept that submission.

19. This regulation is meant to capture the medical condition that is a long-term medical condition and thus one that will need a degree of care that will be of an ongoing rather than temporary nature. The legislation has given a guide to persons, who would issue such a certificate, that a medical condition that would continue for at least two years, is a medical condition that would enliven the Minister considering the issue of a visa to a relative who can assist an Australian citizen with such a condition.

20. I accept the submission of the first respondent that the “*two years*” is not linked to “*the assistance”* but is instead linked to the “*medical condition*”. The assistance to be given is to be assessed against the medical condition rather than any temporal criteria for which the assistance could be provided.

21. In this case, it was obvious that the medical condition suffered by Mrs Ton was one that required assistance of a type that was ongoing. The Tribunal has assessed the ability of the relatives of Mrs Ton that are already resident in Australia as well as the availability of domiciliary care. In making that assessment, the Tribunal has concluded that it was not satisfied that the assistance cannot reasonably be provided by those relatives. It appeared to thoroughly consider the matters put to it on behalf of the applicant and understood her contentions. I am satisfied the conclusion it reached was open to it. It clearly applied the correct test.

(Citations omitted.)

1. Accordingly, his Honour rejected the proposition that the Tribunal had fallen into jurisdictional error. He dismissed Ms Nguyen’s application.
2. Ms Nguyen’s appeal to this Court is identically premised. She relies on a single ground of appeal, stated in the following terms:

1. The Federal Circuit Court erred in holding that the decision of the Tribunal was not affected by jurisdictional error. In particular:

a. the decision of the Tribunal was affected by jurisdictional error in that, when considering whether "the assistance" for which the applicant's mother had a need could reasonably be provided by a relative, etc, the Tribunal misconstrued reg 1.15AA(1)(e) of the *Migration Regulations 1994,* in that the Tribunal treated "the assistance" as being only that for which the applicant's mother had a need at the time of the decision, when on the proper construction of reg 1.15AA(1)(e) "the assistance" was, relevantly, that for which the applicant's mother had a need at the time of the assistance and for a period of at least two years from the date of the certificate referred to in reg 1.15AA; and

b. in so doing, the Tribunal failed to form the relevant state of satisfaction and made an error of law which caused it to identify a wrong issue, ask itself a wrong question, and/or ignore relevant material.

## The Appellant’s submissions

1. Mr McDonald filed written submissions on Ms Nguyen’s behalf.
2. As to the relevant statutory framework and the requirements of reg 1.15AA of the *Migration Regulations 1994* (Cth) (***Regulations***), the Appellant submitted:

24. Section 65 of the *Migration Act 1958* (Cth) (“**the Act**”) required the Minister (or his delegate) to grant the appellant the Class BU visa if satisfied that the criteria for the visa were satisfied, and to refuse to grant the visa if not so satisfied. The Tribunal relevantly stood in the shoes of the Minister.

25. Criteria for a Class BU (Carer Other Family – Residence) (Subclass 836) visa are prescribed by cl 836 of Schedule 2 to the Regulations. This is a permanent visa.

26. Relevantly to the present appeal, one criterion to be satisfied at the time of decision (cl 836.223) is that “[t]he applicant is a carer of a person referred to in clause 836.212”. Clause 836.12 refers to “an Australian relative”, which is defined in cl 836.111 to mean “a relative of the applicant who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen”. (Mrs Ton is undoubtedly a “relative of the applicant” and an Australian citizen, and thus an “Australian relative”.)

27. The relevant criterion was a criterion that had to be satisfied as at the “time of decision”. That meant, of course, that the date of the Tribunal’s decision was the date at which satisfaction of the criteria was to be assessed. It does not, however, necessarily indicate that the content of the criterion itself is concerned only with facts as they exist on the date of the decision. The content of the criterion is a question of construction.

28. Regulation 1.15AA(1) sets out the relevant definition of “carer” for the purposes of the Regulations …[for text see as set out at [13] of the reasons of the primary judge, reproduced above at [25]].

29. The paragraph of this definition on which the decision of the Tribunal turned was par (e). The subject of that paragraph, identified by its opening two words, is “the assistance”. That expression must be understood as a reference to the “assistance” identified in the earlier subregulations, and in particular, in subpar (b)(iv) and par (d).

30. In summary, par (b) requires that there be a certificate which states that:

30.1. the resident (here, Mrs Ton) has a medical condition (subpar (i));

30.2. the medical condition is causing an impairment (subpar (ii));

30.3. the impediment has a particular rating under the Impairment Tables (subpar (iii); and

30.4. because of the medical condition, the resident has and will continue for at least two years (from the date of issue of the certificate) to have, a need for direct assistance in attending to the practical aspects of daily life.

(The relevant certificate in the present case is that which appears at AB 79, and was issued on 18 February 2015.)

31. The “assistance” referred to in subpar (b)(iv) is “direct assistance in attending to the practical aspects of daily life” for which the resident “has, and will continue for at least two years to have” a “need”. In other words, the “assistance” is that which is “needed” by the resident and which will continue to be the subject of such a “need” for at least two years from the date of the certificate.

32. Paragraph (d) applies only if “the person to whom the certificate relates” is not “the resident”. In the present case, par (d) has no direct application because the person to whom the certificate relates is the resident, Mrs Ton. Paragraph (d) is relevant here only because it bears incidentally on the construction of par (e).

33. The flow of reg 1.15AA, when read as a whole, makes it plain that the words “the assistance” in par (e) must be understood as a referring distributively, as the particular case requires, to:

33.1. the “direct assistance” that is identified in par (b)(iv) and referred to in par (d)); or

33.2. the (indirect) assistance identified in the middle of par (d).

34. As par (d) had no application in the present case, the only relevant “assistance” was the “direct assistance” referred to in par (d); that is, “the “assistance” for which the resident “has, and will continue for at least two years to have”, a need.

35. It follows, from the nature of “the assistance” in contemplation, that the reasonable capacity of another relative or relatives to provide the assistance — the matter dealt with in subpar (e)(i) — is to be assessed by reference to the “need” of the resident for assistance over the whole of the period of at least two years from the date of the certificate.

1. Mr McDonald thus submitted that the primary judge had misunderstood the effect of reg 1.15AA and erred in accepting the Minister’s submission that the “two years” was not linked to “the assistance”, but was instead related to the “medical condition” delinked from the temporal criteria for which the assistance was to be provided.
2. The Appellant submitted that the same misunderstanding of the law had caused the Tribunal to identify a wrong issue and ask itself a wrong question by not taking into account the whole of the period to which the Certificate applied.
3. Mr McDonald submitted that in making its finding regarding Hung’s capacity to provide assistance to Ms Ton, the Tribunal had been prepared to assume his wife (who was pregnant with their first child) might be joining him in Australia in the near future. However, it had then disregarded that prospect because, at the time of the decision, his wife had not entered Australia:

15. Importantly, given the issue of statutory construction that arises, the Tribunal made no finding about the future effect on Hung’s capacity to care for Mrs Ton in the event that Hung’s wife (and their new child) joined him in Australia. The arrival of Hung’s wife was obviously apt to impact upon the reasonableness of night-time care which assumed that Hung could and would sleep in Mrs Ton’s room as he had done previously.

…

40. The Tribunal gave no consideration to what would or might happen to Hung’s ability to provide assistance to Mrs Ton once his wife arrived in Australia (or the reasonableness of expecting him to provide the kind of assistance contemplated by the Tribunal, which seems to have been premised on the finding that he could again commence sleeping in Mrs Ton’s room at night, as he had done previously, or at least attending to her needs during the night).

41. The Tribunal assessed the capacity for Hung to provide assistance to Mrs Ton by reference to the assistance which Mrs Ton “ha[d] a need” at the point in time when the decision was made. It did not take into account the assistance that she would “continue for at least two years” to have a need for and, in particular, did not take into account Hung’s capacity to continue to provide assistance beyond his wife’s arrival in Australia.

42. If the constructional analysis presented above in respect of reg 1.15AA(1) is accepted, it is submitted that the Tribunal has misconstrued reg 1.15AA(1) and, consequently, has misunderstood the criteria to be applied.

(Citations omitted.)

1. In his oral submissions, Mr McDonald crystallised the Appellant’s contention to the proposition that the Tribunal’s error was to have limited its analysis to the “continuous present”. It had not undertaken any realistic assessment of Ms Ton’s relatives’ future capacity to provide her with the direct assistance she would require. By restricting its attention exclusively to projections of the future derived solely from the present circumstances of Ms Ton’s family at the time of its decision, the Tribunal had failed to fulfil its statutory task.

## The First Respondent’s submissions

1. The Minister’s written submissions were that “as the primary judge found”, on a fair reading the “Tribunal applied the correct law in accordance with the requirements of ‘carer’ at reg 1.15AA and made findings (which were a matter for it) that were open on the evidence and material before it”.
2. The Minister’s submissions on the statutory construction question were limited to the following:

31 Contrary to the appellant’s assertion, the primary judge’s interpretation of reg 1.15AA(1)(e) was correct for the reasons given. In particular, the primary judge correctly found that the period of “two years” in reg 1.15AA(1)(iv) is meant to capture the medical condition that is a medical condition that is a long-term medical condition and thus one that will need a degree of care that will be of ongoing rather than temporary nature (**SAB 9, [19]**). As the primary judge found, the “two years” is therefore not linked to “the assistance” but is instead linked to the “medical condition”. Further, the primary judge correctly found that the assistance to be given is to be assessed against the medical condition rather than any temporal criteria for which the assistance could be provided (**SAB 9, [20]**).

1. In oral submissions Ms Milutinovic, on behalf of the Minister, accepted that reg 1.15AA(1)(e) must be read “as looking to the future”. However, the Tribunal had not been required to look to the future in the manner submitted for by Mr McDonald. That was because, in her submission, the phrase “the assistance” referred only to the kind of assistance that Ms Ton required because of her condition. No attention had to be given to the future availability of those presently capable of providing that assistance for the period of at least two years from the date of a certificate issued for the purposes of reg 1.15AA(1)(b).
2. For the same reason, the primary judge had not erred. His Honour had been correct to accept the Minister’s submission that the words “two years” were not linked to “the assistance”, but were instead linked to the “medical condition”.The primary judge was correct to have reasoned that it had been open to the Tribunal to have declined to speculate as to whether Hung’s wife would be able to obtain a visa.

## Refining the issues

1. Regulation 1.15AA(1) is drafted such that to be a “carer” and as such entitled to obtain a Carer’s Visa, an applicant must satisfy all of the relevant criteria prescribed. It is uncontentious that the criterion prescribed in reg 1.15AA(1)(d) is conditional on particular circumstances applying that are not presently engaged. It is thus of no relevance to this appeal.
2. It is not in dispute that the Tribunal (correctly) found in Ms Nguyen’s instance, that the requirements of the chapeau of reg 1.15AA(1) and each of the specific criteria save as provided for in reg 1.15AA(1)(e) were satisfied.
3. The area of contention thus was narrowed to the proper construction of reg 1.15AA(1)(e) and, in particular, the meaning of the expression “the assistance” in that provision.

## Consideration

1. In order that the competing contentions of the parties can be addressed in context, it is appropriate to set out the complete text of reg 1.15AA:

**1.15AA Carer**

(1) An applicant for a visa is a ***carer*** of a person who is an Australian citizen usually resident in Australia, an Australian permanent resident or an eligible New Zealand citizen (***the resident***) if:

(a) the applicant is a relative of the resident; and

(b) according to a certificate that meets the requirements of subregulation (2):

(i) a person (being the resident or a member of the family unit of the resident) has a medical condition; and

(ii) the medical condition is causing physical, intellectual or sensory impairment of the ability of that person to attend to the practical aspects of daily life; and

(iii) the impairment has, under the Impairment Tables (within the meaning of subsection 23(1) of the *Social Security Act 1991*), the rating that is specified in the certificate; and

(iv) because of the medical condition, the person has, and will continue for at least 2 years to have, a need for direct assistance in attending to the practical aspects of daily life; and

(ba)  the person mentioned in subparagraph (b)(i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and

(c)  the rating mentioned in subparagraph (b)(iii) is equal to, or exceeds, the impairment rating specified in a legislative instrument made by the Minister for this paragraph; and

(d) if the person to whom the certificate relates is not the resident, the resident has a permanent or long‑term need for assistance in providing the direct assistance mentioned in subparagraph (b)(iv); and

(e) the assistance cannot reasonably be:

(i) provided by any other relative of the resident, being a relative who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; or

(ii) obtained from welfare, hospital, nursing or community services in Australia; and

(f) the applicant is willing and able to provide to the resident substantial and continuing assistance of the kind needed under subparagraph (b)(iv) or paragraph (d), as the case requires.

(2) A certificate meets the requirements of this subregulation if:

(a) it is a certificate:

(i) in relation to a medical assessment carried out on behalf of a health service provider specified by the Minister in an instrument in writing; and

(ii) signed by the medical adviser who carried it out; or

(b)  it is a certificate issued by a health service provider specified by the Minister in an instrument in writing in relation to a review of an opinion in a certificate mentioned in paragraph (a), that was carried out by the health services provider in accordance with its procedures.

(3) The Minister is to take the opinion in a certificate that meets the requirements of subregulation (2) on a matter mentioned in paragraph (1)(b) to be correct for the purposes of deciding whether an applicant satisfies a criterion that the applicant is a carer.

1. The text of reg 1.15AA(1)(b) read in its ordinary grammatical sense states a single criterion for eligibility, albeit one attendant with some complexity: it requires there to be a certificate “that meets the requirements of subregulation (2)” in which (that is “according to” in the language of the regulation) the four circumstances contained in subregulation (1)(b) are stated to be satisfied by an appropriately qualified medical assessor. No submission was advanced by either party as would require the Court to consider the possibility of that provision being given any other construction.
2. The criterion provided for by reg 15AA(1)(b) thus must be understood to mean that a person cannot be a carer unless according to the medical opinion expressed in such a certificate:

…

(i) a person (being the resident or a member of the family unit of the resident) has a medical condition; and

(ii) the medical condition is causing physical, intellectual or sensory impairment of the ability of that person to attend to the practical aspects of daily life; and

(iii) the impairment has, under the Impairment Tables, the rating that is specified in the certificate; and

(iv) because of the medical condition, the person has, and will continue for at least 2 years to have, a need for direct assistance in attending to the practical aspects of daily life …

1. Regulation 1.15AA(2) defines the kind of certificate that is required to satisfy the provisions of reg 1.15AA(1)(b). Such a certificate is one that has been provided in writing by either a medical advisor approved by the Minister for that purpose, or a health service provider similarly approved. In the case before the Court, there is no suggestion that the certificate provided by Dr Lim did not satisfy that requirement.
2. Regulation 1.15AA(3) provides that “the Minister is to take the opinion in [such a certificate] on a matter mentioned in paragraph (1)(b) to be correct for the purposes of deciding whether an applicant satisfies a criterion that the applicant is a carer.” That requirement applies equally to the Tribunal, standing in the shoes of the Minister, in any review.
3. What then is meant by “the assistance” referred to in reg 1.15AA(1)(e) is unintelligible if read in isolation from what a medical assessor is required to certify. The subregulation makes no grammatical sense at all if read commencing directly from the text of the chapeau.
4. Read in context of the regulation as a whole, I am satisfied that “the assistance” referred to in reg 1.15AA(1)(e) must be a reference to the assistance the person to be cared for needs “according to” an opinion that the Minister must accept to be correct because it has been expressed in a certificate that satisfies the requirements of reg 1.15AA(2).
5. In turn, that opinion must refer the matters mentioned in reg 1.15AA(1)(b)(iv). No other subregulation refers to any assistance required.
6. The opinion required to be expressed in the certificate in order to inform a finding that the criterion provided for in reg 1.15AA(1)(e) has been satisfied therefore is that because of their medical condition a person has, and will continue to have, a need for direct assistance in attending to the practical aspects of their daily life for a continuing period of at least two years.
7. Necessarily, the formation of such an opinion involves the medical assessor making both a present diagnosis and a future looking prognosis. Once this is understood, the analysis of reg 1.15AA(1)e by the Tribunal and the primary judge cannot be accepted.
8. It will be recalled that that analysis found that the words “two years” were not linked to “the assistance”, but were instead linked to the “medical condition.”
9. I reject that analysis. First, the text itself stands against such a construction. On its face it is inconsistent with the sense of what the medical assessor is required to certify. What he or she is required to certify is that because of their medical condition a person will have a need for assistance for a continuing period of at least two years.
10. Secondly, the analysis relies on the validity of an unarticulated premise: that the medical condition of a person who requires direct assistance in daily living for a period of at least two years can somehow be divorced from the care they will need over that period.
11. That premise need only be stated to be revealed to be unsound. Some serious medical conditions will improve over time, notwithstanding that the sufferer requires direct personal assistance with daily life for at least two years. Other medical conditions can be expected to worsen and evolve so as to manifest increasingly detrimental symptoms giving rise to ever increasing dependency over a period of not less than two years. The condition a person suffers from and the nature of the direct assistance that person will require, its quality and quantity, over a period of not less than two years, are not independent variables.
12. In the Court’s opinion there is nothing in the terms of reg 1.15AA(1)(b)(iv) as would preclude a medical assessor opining that because of a person’s medical condition, they will have significantly changing, but continuing, needs for direct assistance in attending to the practical aspects of their daily life over a period of at least two years. There is nothing to prevent a medical assessor opining that a person’s medical condition will undergo changes over that period of time. The Tribunal must take the assessor’s opinion as to what that person’s need for direct assistance will be over that period to be correct for the purposes of reg 1.15AA(1)(e).
13. The construction advanced by Ms Milutinovic on the Minister’s behalf not only gains no foothold in the text of the regulation, but understood in its statutory context it would also seem contrary to its purpose.
14. The identification of the purpose of legislation involves an examination of the text of the legislation by reference to common law and statutory rules of construction: *Lacey v Attorney-General (Queensland)* [2011] HCA 10; 242 CLR 573 at [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
15. In *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14] Kiefel CJ, Nettle and Gordon JJ (in the majority) confirmed that context should be considered at the first stage of construction, and not some later stage:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

(Citations omitted.)

1. To construe “the assistance” in reg 1.15AA(e) as referring only to a person’s medical condition at a particular moment of time and not to the capacity of their relatives to provide direct assistance over the period of time covered by a certificate, in the Court’s opinion, is inconsistent with the purpose of the regulation as is capable of being ascertained from its text and context.
2. Ms Milutinovic accepted that a Carer’s Visa is a permanent visa. Such a visa, if granted, provides an entitlement for a person to remain in Australia indefinitely, including beyond the life of the person for whom they have undertaken to provide direct assistance.
3. The evident purpose of reg 1.15AA is to provide criteria for the grant of such a visa. That purpose supports a construction of reg 1.15AA(1)(e) that proceeds from the premise that a person’s medical condition, and the minimum period for which it will incapacitate them so as to require direct care, are inextricably linked.
4. The meaning of the expression “the assistance” is thus to be understood by reference to the purpose and object of the regulation, which is to permit a visa to be issued to a relative who is willing to care for a resident needing direct assistance, where that assistance cannot otherwise be reasonably provided by the resident’s relatives who already live in Australia. The promotion of that object and purpose favours a construction informed by the understanding that the need for direct assistance for a Carer’s Visa to be granted must extend, at a minimum, for a period of no less than two years. It favours a construction that takes into account the practical realities involved in a person’s care, and takes into account the period over which that assistance will be required, including any foreseeable changes in the resident’s care needs and the circumstances of his or her family members. It favours a construction informed by an understanding that that the visa, if granted, will be permanent.
5. To construe the words “the assistance” in reg 1.15AA(1)(e) as referring only to a person’s medical condition as divorced from the period of time for which direct assistance has been certified by a medical practitioner to be needed would be, in the Court’s opinion, inconsistent with the purpose of the regulation.
6. Such a conclusion is entirely consistent with reg 1.15AA(1)(f), which requires a person seeking a Carer’s Visa to be willing and able to provide substantial and continuing care of the kind the medical assessor has opined will be needed. The person applying for the visa must undertake to provide the direct assistance that is required by his or her relative’s condition.
7. For those reasons, the Court is satisfied that the primary judge erred in accepting the submissions of the Minister that there is no link between “the assistance”   
    and the period (of “at least two years”) for which direct assistance will be required.

## Was the error material?

1. The Minister did not file a notice of contention seeking to have the primary judge’s decision upheld on another basis, assuming the regulation was to be construed as has been determined in this appeal.
2. Mr McDonald takes no issue with that omission. He accepts that an error will not be jurisdictional if it is not material. His written submissions responding to such a proposition are as follows:

43. The Tribunal commits jurisdictional error if it misconstrues the criteria which it is required to apply in determining whether to grant or refuse to grant a visa. “[A] decision-maker cannot be said to be satisfied or not satisfied if effect is not given to those criteria because, for example, they have been misconstrued or overlooked.” The Tribunal commits jurisdictional error if it “misconstrues that statute [ie, the statute ‘conferring its jurisdiction’: here, the Act] … and thereby misconceives the nature of the function which it is performing …”

…

46. Similarly, the nature of the true inquiry required of the Tribunal made it imperative that the Tribunal have regard to material bearing on the capacity of Hung (and other family members) to provide the assistance required by Mrs Ton not just at the time of the decision itself but over a period of at least two years. The Tribunal ignored relevant material relating to the likely arrival in Australia of Hung’s wife (and soon-to-be-born child), expressly putting it to one side as not bearing on the Tribunal’s decision because there was no evidence that his wife had, as at the date of decision, arrived in Australia.

47. Hung’s capacity to provide assistance for Mrs Ton at night time was critical to the Tribunal’s determinative finding that “the assistance” which the appellant proposed to provide “could not relevantly be provided by a relevant relative” and, consequently, that the appellant “is not a carer of Mrs Ton”. It cannot be said that the error did not affect the Tribunal’s decision; nor can it be said that the same result was inevitable had the Tribunal properly appreciated the question which reg 1.15AA(1)(e) required it to address.

(Citations omitted.)

1. Mr McDonald submits that it is unambiguously plain from the Tribunal’s reasons as stated at [73] that it did not apply a forward looking analysis to whether Hung could not reasonably provide direct assistance during the night in circumstances where he had recently married, was expecting his first child and had sponsored his wife to be with him in Australia.
2. I accept that submission.
3. In any evaluation of whether Hung could reasonably resume his former role, the Tribunal had been bound to proceed on the basis that the Certificate contained Dr Lim’s opinion that Ms Ton suffered from, inter alia, atrial fibrillation. It had to proceed on the basis that Dr Lim had answered “Yes” to the question: “Does the medical condition [suffered by Ms Ton] result in the need for constant supervision or monitoring because the person requiring care may be a danger to themselves or another?”
4. Ms Milutinovic pointed to nothing in the Tribunal’s reasons to suggest it did not accept the need for Ms Ton’s carer to maintain a nightly vigil over her by sleeping in the same room. That is what Hung and the Appellant had been doing. That is what the Tribunal concluded at [75] that Hung would be required to resume doing in the future.
5. The reasons of an administrative decision maker are not to be read with an eye keenly attuned to the perception of error: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; 43 FCR 280. However, it is impossible to construe what the Tribunal stated at [73] other than as Mr McDonald submits it is to be read.
6. Contrary to the submissions Ms Milutinovic advances on the Minister’s behalf, I reject that the reasons Hung advanced as to why it would not be reasonable for him to provide that care were matters of mere speculation, because of the fact that his wife had not yet entered Australia.
7. Hung’s recent marriage, his expecting a child, and his sponsorship of his wife to live with him in Australia were, combined, significant factors. This obliged the Tribunal to make findings as to whether those factors would over the relevant time period impact on his capacity to resume and continue providing the overnight care he had previously provided his mother before Ms Nguyen had taken over that role. The Tribunal did not do so. What decision it might have made had I done so cannot be predicted. There is no basis for this Court to proceed on the basis that a different outcome might not have been reached.
8. By failing to undertake its task according to law, the Tribunal fell into jurisdictional error. It is unavailable to suggest that the error made was not material. The appeal must be allowed.

## Utility of remittal

1. Mr McDonald conceded in oral argument that the Certificate issued by Dr Lim that was provided to the Tribunal to satisfy reg 1.15AA(1)(b) has since expired.
2. If it were necessary for an applicant for a Carer’s Visa to satisfy the criterion provided for in reg 1.15AA(1)(b) as at the time of application, there would be no utility in remitting the matter to the Tribunal for decision according to law.
3. However, the provisions of Sch 2 of the *Regulations* provide that a person’s status as a carer is to be determined as at the date of decision: cl 836.22. On the remittal of her review, it will accordingly be open to Ms Nguyen to apply to the Tribunal for a short adjournment to permit her to seek an updated certificate. In the circumstances applying, I would not assume that the Tribunal would reject such a request.

## Disposition

1. I would make the following orders:
2. The appeal be allowed.
3. The orders of the Federal Circuit Court of Australia made on 20 December 2018 be set aside and in lieu thereof the following orders be substituted:
   1. A writ of certiorari issue, directed to the Second Respondent, quashing its decision of 23 August 2016 to refuse to grant the applicant an Other Family (Residence) (Class BU) Subclass 836 visa.
   2. A writ of mandamus issue, directed to the Second Respondent, requiring it to determine according to law the applicant’s application for review of the decision of the delegate of the First Respondent dated 26 August 2015, refusing to grant the applicant an Other Family (Residence) (Class BU) Subclass 836 visa.
   3. The First Respondent pay the applicant’s costs of the action for judicial review.
4. The First Respondent pay the Appellant’s costs of the appeal.

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| I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kerr. |

Associate:

Dated: 18 June 2019