Administrative Appeals Tribunal

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Ge Zhang
CASE NUMBER:	1805384
DIBP REFERENCE(S):	BCC2017/4559400
MEMBER:	Kira Raif
DATE:	15 May 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 573 Higher Education Sector visa.

Statement made on 15 May 2018 at 2:59pm

The Tribunal directs that information that would identify the applicant (including information about family, friends or associates) not be published (under s.378 of the *Migration Act 1958*). This means that if this decision is published, names and other identifying material must be removed from or modified in the published version of the decision.

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision dated 22 February 2018 made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 573 Higher Education Sector visa under s.116 of the *Migration Act 1958* (the Act).

2. The applicant is a national of China, born in October 1994. She was last granted the Student visa in October 2015 and that visa was to be in effect until March 2019. On 5 January 2018 the applicant was issued with a Notice of Intention to Consider Cancellation (NOICC) under s. 116(1)(e) of the Act. The applicant provided her written response to the Notice and her visa was cancelled on 22 February 2018. The applicant seeks review of the delegate's decision.

3. The applicant appeared before the Tribunal on 15 May 2018 to give evidence and present arguments. The applicant was represented in relation to the review by her registered migration agent. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

Relevant law

4. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(e). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

5. A visa may be cancelled under s.116(1)(e) if the Minister or the Tribunal is satisfied that the presence of the visa holder in Australia is or may be, or would or might be, a risk to: the health, safety or good order of the Australian community or a segment of the Australian community; or the health or safety of an individual or individuals.

6. The expression 'good order of the Australian community' is not defined in the Act. Although considering an earlier version of s.116(1)(e), the reasoning in *Tien v MIMA* (1998) 89 FCR 80 is still relevant. The Court held (at 94) that the term must be construed in the context in which it appears, that is juxtaposed to the words 'the health, safety' of the Australian community. That is, it contains a public order element and concerns activities which have an impact on public activities or which manifest themselves in a public way. It requires that there be an element of risk that the person's presence in Australia might be disruptive to the proper administration or observance of the law or might create difficulties or public disruption in relation to the values, balance and equilibrium of Australian society.

7. There is no definition of 'risk' in the Act or Regulations and as such the plain English meaning applies, namely the chance of injury, or loss, or hazard (Macquarie Dictionary, revised 3rd edition, 2001). The expression 'may' connotes something 'to be possible' (Macquarie Dictionary, revised 3rd edition, 2001). The concept of 'risk' entails an element of futurity, and in considering the question of whether a visa holder 'may' be a risk within the meaning of s.116(1)(e), it is relevant to consider past conduct, including the possibility that an event occurred in the past. The laying of criminal charges may support a finding that an event occurred in the past or, at least, that there is a possibility the events which are the subject of the charges occurred. It does not impinge on the presumption of innocence to have regard to those unproven charges in making an assessment of risk (*Gong v Minister for Immigration* [2016] FCCA 561 at [41] (*Gong*)).

8. As noted in *MZAJA v Minister for Immigration* [2017] FCCA 448 at [15], the task of the Tribunal in respect of s.116(1)(e) is to assess the risk to the community based on all of the information available to the Tribunal.

Does the ground for cancellation exist?

9. The applicant provided to the Tribunal a copy of the primary decision record. It indicates that in November 2017 the Department received information from the Victoria Police that on 26 December 2016 the applicant was charged with the following offences:

    a. Enter building to commit offence- assault
    b. Aggravated burglary – offensive weapon
    c. Handle / receive / retention of stolen goods
    d. Use a carriage service to harass
    e. Use a carriage service to menace
    f. Make threat to kill – intending fear
    g. Aggravated burglary person present
    h. Blackmail
    i. False imprisonment (common law)
    j. Theft
    k. Assault by kicking
    l. Recklessly cause injury
    m. Intentionally cause injury
    n. Cause unauthorised computer function

10. It is noted that the charges were laid on 26 December 2016 and the applicant was due to appear at a committal hearing on 18 July 2018 at Melbourne Magistrates Court. The applicant's evidence is that she intends to defend the charges.

11. In her written response to the NOICC the applicant argues that there is no ground for cancelling her visa because the charges arise from a specific and isolated incident when she has been sexually assaulted by the alleged victim, Mr Qiu, and she intends to plead not guilty to the charges. The applicant refers to the sexual assault and the evidence supporting its occurrence. The applicant claims that at the time of the incident, she was trying to manage her extreme distress and anxiety arising from the assault. The applicant notes that the ground for cancellation arises only in relation to Mr Qiu and there is no evidence to support any other individual may be at risk as this was an isolated event of sexual assault that resulted in criminal charges and it is unlikely to occur again. The applicant notes that the circumstances underlying the charges do not comprise serious violent crimes, as her criminal lawyer confirms. The applicant also notes that despite the appearance that she has been charged with a large number of offences, some of these are alternatives to each other and she could only be found guilty of three charges. The applicant also notes that she has been granted bail, indicating she has not been considered by the police to be a risk.

12. In her written submission to the Tribunal of 10 May 2018 the applicant argues that the only evidence for a finding with respect to the application of s. 116(1)(e) is the police record and the police documents are of no probative value for the purpose of establishing the ground for cancellation. The applicant argues that the police record is not an impartial document but a statement made by the prosecution witness and may not be accepted upon the hearing of evidence. The Tribunal acknowledges, and accepts that the police report itself is insufficient to establish the ground for cancellation. As noted above, the Tribunal must consider the totality of the circumstances in establishing whether the ground for cancellation exists and the Tribunal's deliberations are not limited to the evidence in the police report. The applicant argues that the police record should not be relied upon unless the police documents have been disclosed to the applicant and the maker of any allegations has been examined by the

Tribunal. The Tribunal does not accept these arguments. The Tribunal does not consider that the fact of the charge establishes the ground for cancellation. Neither does the existence of the police record. However, neither does the Tribunal consider that the police record is of no probative value because the Tribunal has not had the opportunity to question the witnesses. It is not the role of this Tribunal to determine the veracity of the statements made in the police record, nor to establish the applicant's guilt or innocence. The application of s. 116(1)(e) does not depend on such a finding.

13. The applicant also argues that the Tribunal would fail to comply with its hearing and procedural fairness obligations if it were to proceed on the basis of police records that had not been released to the applicant due to the s. 375A certificate. However, the Tribunal is mindful that the applicant is well aware of the charges and is familiar with the information that is the subject of the certificate and that is contained in the police charge sheet. The applicant provided to the delegate a statement from a criminal lawyer, Lethbridges dated 19 January 2018 which sets out the nature of the charges and the incidents that are alleged to have occurred. The lawyer's advice suggests that the applicant has a good prospect of defending the charges and suggests the nature of the defence.

14. The Tribunal also considers it significant that in her response to the delegate dated 19 January 2018 the applicant refers to the charges and the incident that, in her submission, gave rise to the charges. The applicant is clearly well aware of the circumstances that led to the charges and, it appears, familiar with the information contained in the police summary of circumstances. Indeed, the applicant included in her submission to the delegate the Summary of Circumstances that is the subject of the s. 375A certificate, with handwritten notes. Thus, the applicant appears to have been given the document and is fully aware of its content, contrary to the submission from her representative. In these circumstances, the argument that the applicant would be disadvantaged by the Tribunal's reliance on the Summary of Circumstances because it is the subject of the non-disclosure Certificate is, with respect, baseless.

15. The Tribunal has considered the applicant's circumstances. The Tribunal considers the nature of the conduct that led to the charges to be significant. The charges refer to conduct that is likely to have included violent behaviour, such as false imprisonment, assault and causing injury. While the Tribunal acknowledges that the evidence has not been tested and the charges are yet to be considered as part of the criminal process, the Tribunal is also of the view that the fact that the charges have been laid is a relevant consideration and may be indicative of the fact that the prosecuting authority considered there to be sufficient evidence to charge the applicant with the various offences. As noted elsewhere, it is not for this Tribunal to determine the applicant's guilt or innocence and the Tribunal is not required to do so for the purpose of s. 116(1)(e). The Tribunal also places weight on the psychological report from PsychoCare which describes the applicant's circumstances, presumably based on the applicant's own reference to events in her session with the psychologist. The applicant appears to have admitted that she was present at Mr Qiu's place of residence and that there was an altercation between Mr Que and Mr Xie which resulted in injuries to the participants.

16. Nevertheless, and the Tribunal considers it significant, it is not apparent from any of the evidence before the Tribunal, including the police report, that the applicant herself had engaged in violent conduct towards Mr Qiu, even if she was present during the altercation. If the violent conduct was perpetrated by the applicant, it is possible that the Tribunal would have formed the view that the applicant's presence in Australia was or may be a risk to others. However, it is not apparent from the presented evidence that the applicant herself engaged in violent conduct.

17. The Tribunal acknowledge the applicant's evidence, which is supported by various reports, that the applicant believes she was the victim of sexual assault and that the incident occurred a few days after such assault when the applicant made an attempt to resolve the issues with Mr Qiu. While it is problematic in the Tribunal's view that the applicant chose to deal with the situation herself rather than report the matter to the police (there is evidence that she wanted to obtain monetary compensation), the Tribunal accepts that if the applicant believed she was subjected to rape or sexual assault, her mental state may have influenced her decision-making and her actions at the time. The Tribunal also considers it significant that the events on the day in question appear to be an isolated occurrence. There is no suggestion that the applicant had ever engaged in violent or otherwise criminal conduct before or since that incident.

18. The Tribunal also places considerable weight on the fact that the event in question occurred in December 2016 and the applicant remained in the community until the cancellation of her visa in February 2018. There is nothing to suggest she had breached her bail conditions – which include having no contact with Mr Qiu – or that she engaged in any inappropriate behaviour during this lengthy period. The Tribunal is mindful that if the applicant does engage in inappropriate conduct, she may be in breach of her bail conditions and that may result in the applicant being placed into custody. In the applicant's particular circumstances, the Tribunal considers this will be a strong incentive that will ensure the applicant's compliance with bail undertakings. In particular, the Tribunal accepts that the applicant has been receiving medical treatment and has been prescribed medication, was hospitalised on two occasions with suicidal ideations and that she has been receiving regular counselling for a period exceeding one year. In the Tribunal's view, and in light of the applicant's particular circumstances, the Tribunal is of the view that the applicant's desire to avoid detention or incarceration will ensure her compliance with bail undertakings and good behaviour in the future.

19. The Tribunal has considered the particular circumstances of the incident that led to the charges, as set out in the police report, the applicant's evidence to the psychologist and her various submissions to the delegate and the Tribunal. The Tribunal places weight on the fact that the events relate to an isolated incident and that the applicant may have been affected by the claimed sexual assault, that the applicant remained in the community for a period exceeding one year without breaching bail conditions and causing harm to any individual or the community, and the fact that the applicant does not appear to be a person who readily engages in violent or inappropriate behaviour. Having regard to the totality of the applicant's circumstances, the Tribunal is not convinced that her presence in Australia is or may be a risk to any other person or the community.

20. The Tribunal is not satisfied that the presence of the applicant in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the community or the health or safety or an individual or individuals. The Tribunal is not satisfied that the ground for cancellation in s.116(1)(e) exists. It follows that the power to cancel the applicant's visa does not arise

DECISION

21. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 573 Higher Education Sector visa.

Kira Raif
Senior Member