[2013] AATA 817

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) |  2013/0831 |
| Re | Julianna Lim |
|  | APPLICANT |
| And | Secretary, Department of Social Services |
|  | RESPONDENT |

# Decision

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| Tribunal |  **Senior Member A K Britton** |
| Date |  **18 November 2013** |
| Place | **Sydney** |

The Decision under review is affirmed.

.........................[SGD]...............................................

# Catchwords

*SOCIAL SECURITY—Parental Leave Pay—Whether the Australian residency test is satisfied—For what period the Australian residency test must be satisfied—Special Category Visa—Applicant ineligible for Parental Leave Pay*

# Legislation

*Migration Act 1958 (Cth) - ss 5; 30(2)(c); 32; 32(1); 68(3); 77;* *82;*

*Migration Regulations 1994 (Cth) - Schedule 2; reg 444.5; 444.511*

*Parental Leave Act 2010 (Cth) - ss 11; 13; 31(2)(c); 45(1); 46; 57(1)*

*Social Security Act 1991 (Cth) - ss 7(2)*

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# REASONS FOR DECISION

**Senior Member A K Britton**

**18 November 2013**

1. Julianna Lim seeks review of the decision made by a Centrelink Authorised Review Officer and affirmed by the Social Security Appeals Tribunal, to refuse her claim for parental leave pay (PLP) made under the *Parental Leave Act 2010* (Cth) (the Act). Parental leave pay is payable to eligible claimants for a maximum period of 18 weeks at the national minimum wage.
2. To be eligible to receive PLP, among other things, the claimant must satisfy the “Australian residency test” (s 31(2)(c)). The Secretary contends that Ms Lim does not satisfy that test. Ms Lim disagrees.
3. Whether Ms Lim satisfies Australian residency test turns on the answers to the following questions:

What is the period during which Ms Lim must satisfy the Australian residency test?

Was Ms Lim a “special category visa holder residing in Australia”, or, an “Australian resident” throughout that period?

If so, by the operation of s 46 of the Act does Ms Lim fail to satisfy the Australian residency test?

## What is the period during which Ms Lim must satisfy the Australian residency test?

1. The parties disagree about the scope of the period Ms Lim must satisfy the Australian residency test. The Secretary contends that it commences on the date of the birth of Ms Lim’s daughter, 19 April 2012, and ends on 3 November 2012. (Ms Lim’s daughter will be referred to as “the child” in these Reasons.) Ms Lim agrees that the period ends on 3 November 2012 but contends that it starts on the “nominated start date”, 1 July 2012. (The “nominated start date”, is the date nominated by Ms Lim in her claim for PLP as the date she wanted payments to commence (s 57(1).) As will become apparent, this issue is critical to whether Ms Lim is eligible to receive PLP.
2. Ms Lim left Australia shortly before the birth of her daughter and returned on 1 July 2012. She remained in Australia until 11 November 2012.
3. Any determination that PLP is payable to Ms Lim for her child, must specify the period for which PLP is payable, the “PPL period” (s 11(1)). A person’s PPL period is the same as, or within, the maximum PPL period for their child (s 11(2)). A child’s maximum PPL period is determined by identifying their “maximum PPL period start day” and “maximum PPL period end day”. Because Ms Lim made a claim for PLP before the “relevant day” (28 days after the date of the birth of the child, 17 May 2012) but did not “verify” the birth until after that day (4 June 2012), the child’s maximum PPL start day is the nominated start date, 1 July 2012 (s 11(4)(b) of the Act).
4. The child’s “maximum PPL period end day” is 125 days after the child’s maximum PPL start day, i.e. 3 November 2012 (s 11(5)). Therefore the child’s maximum PPL period commenced on 1 July 2012 and ended on 3 November 2012.
5. Ms Lim’s claim must be determined under s 13 of the Act because she made an effective claim for PLP and an effective secondary claim was not made at the same time (s 13(1) of the Act). Section 13(3) provides that Ms Lim’s PPL period will correspond to the child’s maximum PPL period, 1 July 2012 to 3 November 2012, providing that the decision-maker is satisfied that she was eligible for PLP on each day in that period (s 13(3)). It is agreed that Ms Lim was eligible for PLP on each day in the period from 1 July 2012 to 3 November 2012.
6. However before determining Ms Lim’s claim, the decision-maker must also be satisfied that Ms Lim was eligible for parental leave *on each day* commencing from the day the child was born and ending on the last day of Ms Lim’s PPL period (s 13(2)). Section 13(2) must be read together with s 13(4). For convenience both provisions are set out in full below:

When parental leave pay is payable to primary claimant

1. The Secretary must determine that parental leave pay is payable to the primary claimant for the primary claimant's PPL period if, when making the determination, the Secretary is satisfied that the primary claimant was or will be eligible for parental leave pay on each day in the period that:
	1. starts on the day the child was born; and
	2. ends on the last day of the primary claimant's PPL period.

Note: The Secretary is prevented from making a determination under this subsection in certain circumstances: see Division 3.

…

When parental leave pay is not payable to primary claimant

1. The Secretary must determine that parental leave pay is not payable to the primary claimant if the Secretary is not satisfied of the matters in subsection (2).
2. Section 31 sets out the eligibility requirements for PLP:

When a person is eligible for parental leave pay

1. This section sets out when a person is eligible for parental leave pay for a child on a day.

Eligible

1. First, a person is eligible for parental leave pay for a child on a day if, on that day:

…

* 1. the person satisfies the Australian residency test (see Division 5);

…

1. By the combined operation of ss 13(2), 13(4) and 31(2), before a decision can be made that Ms Lim is eligible for PLP she must satisfy the Australian residency test on each day throughout the period commencing on the date of the child’s birth and ending on the last day of her PPL period, 19 April 2012 to 3 November 2012. In these reasons I will refer to that period as “the relevant period”.

### Did Ms Lim satisfy the Australian residency test?

1. Section 45(1) of the Act states:

When a person satisfies the Australian residency test

1. A person satisfies the Australian residency test on a day if, on that day, the person:
	1. is an Australian resident; or
	2. is a special category visa holder residing in Australia; or
	3. satisfies subsection (2).
2. It is agreed that Ms Lim does not satisfy s 45(2).

## Was Ms Lim a special category visa holder on each day of the relevant period?

1. On her arrival in Australia in January 2011 Ms Lim was granted a Special Category Subclass 444 visa (Subclass 444 visa). While no issue that Ms Lim was the holder of Subclass 444 visa during that part of the relevant period she was present in Australia the Secretary contends that Ms Lim did not hold that visa during that part of the relevant period she was absent from Australia. Ms Lim disagrees.
2. The Act gives the terms “special category visa” and “holder of a visa” the same meaning as given by the *Migration Act 1958* (Cth).
3. Section 32 of the Migration Act states:

Special category visas

1. There is a class of temporary visas to be known as special category visas.
2. A criterion for a special category visa is that the Minister is satisfied the applicant is:
	1. a non-citizen:
		1. who is a New Zealand citizen and holds, and has presented to an officer or an authorised system, a New Zealand passport that is in force; and
		2. is neither a behaviour concern non-citizen nor a health concern non-citizen; or

…

1. The Migration Act defines holder in relation to a visa to mean, subject to s 77 (visas held during visa period), the person to whom it was granted or a person included in it.
2. A visa is only in effect during the visa period (s 68(3) of the Migration Act). The visa period runs from the time the visa is granted until it ceases to be in effect (s 5 of the Migration Act). A non-citizen holds a visa at all times during the visa period for the visa (s 77 of the Migration Act).
3. Section 82 of the Migration Act addresses when visas cease to be in effect and relevantly provides:
4. A visa to remain in, but not re-enter, Australia that is granted to a non-citizen in Australia ceases to be in effect if the holder leaves Australia.
5. Schedule 2 of the *Migration Regulations 1994* (Cth) (the Regulation) sets out the criteria for, among other things, determining when a Subclass 444 visa is in effect and states:

Subclass 444 -- Special Category

…

444.5--When visa is in effect

444.511

Temporary visa permitting the holder to remain in Australia while the holder is a New Zealand citizen.

1. Regulation 444.511 permits a Sub-class 444 visa holder to remain in Australia. By the combined operation of ss 82(8) and 68(3) of the Migration Act and reg 444.511 of the Regulations Ms Lim’s visa ceased to be in effect when she departed Australia on 2 March 2012. It follows that she did not hold a Subclass 444 visa during that part of the relevant period she was absent from Australia, 19 April to 1 July 2012. Accordingly she was not a special category visa holder residing in Australia on each day in the relevant period.

### Was Ms Lim an Australian resident on each day during the relevant period?

1. In the interest of completeness I will consider whether during the relevant period Ms Lim was an “Australian resident” for the purpose of s 45(1)(a) of the Act.
2. The Act gives the term “Australian resident” the same meaning as in the *Social Security Act 1991* (Cth). Section 7(2) of the Social Security Act defines an Australian resident to be a person who resides in Australia; and is one of the following: (i) an Australian citizen; (ii) the holder of a permanent visa; or (iii) a special category visa holder who is a protected SCV holder. During the relevant period Ms Lim was neither an Australian citizen, nor a special category visa holder who was a protected SCV holder. Therefore whether she was an Australian resident during that period turns on whether she was the “holder of a permanent visa”.
3. The Social Security Act gives the term “permanent visa” the same meaning as that in the Migration Act (s 7 of the Social Security Act). Headed “Kinds of visas” s 30 of the Migration Act provides:
4. A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.
5. A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:
	1. during a specified period; or
	2. until a specified event happens; or
	3. while the holder has a specified status.
6. A Subclass 444 visa does not constitute a permanent visa for the purposes of the Migration Act because, first, it does not permit the holder to remain in Australia indefinitely but only while they have a specified status, namely New Zealand citizenship (s 30(2)(c) of the Migration Act and reg 444.511 of the Regulations); second, a Subclass 444 visa is described by both the Migration Act and the Regulations as a *temporary visa* (s 32(1) of the Migration Act and reg 444.511 of the Regulations).
7. Because a Subclass 444 visa is not a permanent visa and, in any event, Ms Lim was not the holder of Subclass 444 visa on all days throughout the relevant period, she cannot be considered to be an Australian resident for the purpose of s 45(1)(a) of the Act.

### Decision

1. Ms Lim did not satisfy the Australian residency test on each day in the relevant period. Therefore parental leave pay is not payable to her in relation to her claim made on 20 February 2012 and it is not necessary to consider whether by the operation of s 46 she does not satisfy the Australian residency test on account of being absent from Australia at various times before the relevant period. It follows that the correct decision is to refuse to grant Ms Lim’s claim for PLP and to affirm the decision under review.

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| I certify that the preceding 27 (twenty seven) paragraphs are a true copy of the reasons for the decision herein of Senior Member A K Britton. |

.............................[SGD]...........................................

Dated 18 November 2013

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| Date(s) of hearing | **23 September 2013** |
| Date final submissions received | **2 October 2013** |
| Solicitors for the Applicant | **Stephen Hodges Solicitor** |
| Solicitors for the Respondent | **Department of Human Services (Program Litigation and Review)** |