THE REASONABLE AND BALANCED APPLICATION OF THE GENUINE TEMPORARY ENTRANT REQUIREMENT IN STUDENT VISA APPLICATIONS: *EROS V MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS* [2020] FCA 1061

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I INTRODUCTION

The Genuine Temporary Entrant ('GTE') requirement exists for most temporary visa categories, but the consideration and application of the GTE criterion are significantly different. For student visas, all applicants 'must show they are coming to Australia temporarily to gain a quality education'.[1] The GTE criterion for students, students' family members and guardians are regulated under clauses 500.212,[2] 500.312[3] and 590.215[4] in Schedule 2 of the *Migration Regulations 1994* (Cth),[5] which requires that the applicant intends genuinely to stay in Australia temporarily. The then Minister for Immigration and Border Protection has also given *Direction Number 69* in assessing the GTE requirement for a student visa by considering the applicant's potential circumstances in

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1 'Genuine Temporary Entrant Requirement', *Department of Home Affairs: Immigration and Citizenship* (Web Page, 8 April 2019) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500/genuine-temporary-entrant>.

2 *Migration Regulations 1994* (Cth) sch 2 cl 500.212 states:
'The applicant is a genuine applicant for entry and stay as a student because:
(a) the applicant intends genuinely to stay in Australia temporarily, having regard to:
(i) the applicant's circumstances; and
(ii) the applicant's immigration history; and
(iii) if the applicant is a minor – the intentions of a parent, legal guardian or spouse of the applicant; and
(iv) any other relevant matter; and
(b) the applicant intends to comply with any conditions subject to which the visa is granted, having regard to:
(i) the applicant's record of compliance with any condition of a visa previously held by the applicant (if any); and
(ii) the applicant's stated intention to comply with any conditions to which the visa may be subject; and
(c) of any other relevant matter'.

3 Clause 500.312 applies to the applicant as a member of the family unit of a person who holds a student visa. The provisions of criteria are the same as clause 500.212: *Migration Regulations 1994* (Cth) sch 2.

4 Clause 590.215 applies to the applicant as a student guardian. The provisions of criteria are the same as clause 500.212: ibid.

5 Ibid.

Australia, circumstances in their home country, immigration history, and other relevant matters.[6] However, the GTE requirement has been questioned for its subjective and inconsistent application, which affects the integrity of the student visa system.

Statistics from the Administrative Appeals Tribunal ('AAT') show that the appeal lodgements of student visa refusals were 7,713 in 2017–18, 5,499 in 2018–19 and 5,984 in 2019–20.[7] In approximately 50% of appeals, the visa refusal was affirmed by the AAT.[8] The failure to satisfy the GTE requirement is one of the main reasons leading to student visa refusals.[9] While the GTE requirement continually impacts on student visa refusals by delegates of the Minister, it keeps arising as an issue in AAT reviews and the courts. In 2021, there were more than 300 AAT decisions, 59 judgments of the Federal Circuit Court of Australia ('FCCA') and 11 judgments of the Federal Court referring to the GTE requirement.[10]

A recent Federal Court decision offers significant new insights on the GTE requirement. The purpose of this case note is to analyse the meaningful judgment in *Eros v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1061 ('*Eros*')[11] and to consider its implications on the application of the GTE requirement. Following the Introduction, this case note discusses the judgment of *Eros* in Part II. Part III analyses the application of the GTE requirement, compares the decision in *Eros* with the application of the GTE requirement in previous cases and then explores the ramifications of *Eros*, particularly with respect to the integrity of visa grants and the effect on the societal context of skilled migration. The discussion and analysis then conclude whether *Eros* provides a reasonable and balanced application of the GTE requirement for student visa applications.

The application of the GTE criterion in previous cases can be divided into two streams. One stream only requires the applicant has an intention to leave Australia

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6 Minister for Immigration and Border Protection (Cth), *Direction Number 69: Assessing the Genuine Temporary Entrant Criterion for Student Visa and Student Guardian Visa Applications* (1 July 2016) pt 2 ('*Direction Number 69*').

7 Administrative Appeals Tribunal, *Annual Report 2019–20* (Report, 24 September 2020) 43; Administrative Appeals Tribunal, *Annual Report 2018–19* (Report, 25 September 2019) 35.

8 Ibid.

9 The Department of Home Affairs releases biannual reports providing statistics on student visas. Failure to meet the Genuine Temporary Entrant ('GTE') requirement is listed as a reason for refusal of student visa applications: see, eg, Department of Home Affairs, *Student Visa and Temporary Graduate Visa Program* (Report, 30 June 2021) 4, 5; Department of Home Affairs, *Student Visa and Temporary Graduate Visa Program* (Report, 31 December 2020) 4, 5. See also Administrative Appeals Tribunal, 'Student Visa Refusals (Genuine Stay)' (Fact Sheet, July 2018) <https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Factsheets/FS06-Student-Visa-Refusals-Genuine-Stay.pdf>.

10 This is based on a search on the Australian Legal Information Institute ('AustLII'). A search of the term 'Genuine Temporary Entrant' between 1 January and 31 December 2021 through the Commonwealth of Australia Case Law database yields these results: 'Genuine Temporary Entrant Search: 2021', *AustLII* (Web Page) <http://www.austlii.edu.au/cgi-bin/sinosrch.cgi?method=auto;query=%27Genuine%20Temporary%20Entrant%27;day1=;month1=01;year1=2021;day2=31;month2=12;year2=2021;mask_path=au%2Fcases%2Fcth;view=database>.

11 *Eros v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1061 ('*Eros Appeal*').

when they have no legitimate way to stay.[12] However, this may provide an opportunity for the applicant to utilise the visa system to stay in Australia for purposes other than study. The other stream excludes the applicant who has an intention other than temporary residence at the time of decision, even though the applicant also has a genuine intention to study.[13] The exclusion is inconsistent with the skilled stream of the migration program and may affect the industry of education services. While the migration program seeks 'to attract overseas students through immigration policy measures which [provide] a pathway to permanent residency',[14] the exclusion denies the possible transition from a temporary visa to a permanent visa.

Alternatively, the application of the GTE requirement in *Eros* successfully maintains the integrity of the visa system and coheres with the migration program. The Court explored the contemporary understanding of the notion 'genuinely intends to stay temporarily'[15] and applied all the criteria of clause 500.212 based on the factors before it.[16] Since then, the application in *Eros* has been cited in a number of cases decided by the FCCA concerning the meaning of the aforementioned notion.[17] In these cases, the Court has considered the decision in *Eros* when assessing whether the Tribunal correctly construed clause 500.212. The Court has also looked at the peculiar facts in *Eros* and considered whether the facts in *Eros* were distinguishable from the present cases. Even though there were no findings that the AAT erred in the sense described in *Eros*, the judges agreed with the conclusions reached by Allsop CJ.

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12 See Part III(A) for the lenient application in *Khanna v Minister for Immigration and Border Protection* (2015) 298 FLR 388 ('*Khanna*').

13 See Part III(A) for the stringent application in *Saini v Minister for Immigration and Border Protection* (2016) 245 FCR 238 ('*Saini*').

14 Harriet Spinks, 'Overseas Students: Immigration Policy Changes 1997–2015' (Research Paper, Parliamentary Library, Parliament of Australia, 25 February 2016) 1.

15 See *Eros Appeal* [2020] FCA 1061, [16] (Allsop CJ).

16 See ibid [13].

17 See, eg, *Shoji v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1920, [79]–[82], [86]–[87] (Kendall J); *Uwizeye v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 640, [44] (Kendall J); *Kaur v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 515, [23] (Egan J); *Sapkota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 91, [25] (Wheelahan J); *Bhullar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3174, [33], [39], [42], [45], [48], [50], [53] (Kelly J); *Saleem v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3275, [51]–[52], [54]–[56] (Vasta J); *Solanki v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 2918, [49]–[51], [57]–[58] (Kendall J); *Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 2833, [50] (Kendall J); *Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 2799, [24], [35]–[38], [41]–[42], [44], [46] (Kendall J); *Beejadhur v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 2238, [91]–[94], [96]–[97] (Kendall J).

II CASE SUMMARY

A Facts

Eros (the first appellant) was a 45 year-old Hungarian. She initially arrived in Australia on a tourist visa on 2 November 2016 with the intention to take a two month holiday with her family.[18] Shortly after arriving, on 9 November 2016, she submitted a 'genuine temporary entrant criterion statement' with the intention to study an English language course from 14 November 2016 to 19 May 2017.[19] To complete the study, she applied for a Student (Temporary) (Class TU) Subclass 500 (Student) visa under section 65 of the *Migration Act 1958* (Cth) ('*Migration Act*').[20]

The visa application was denied by a delegate of the Minister in 2017 and the decision was affirmed by the Tribunal in 2019.[21] During this period, Eros completed the English course in 2017 and the vocational level Certificate III in Business on 1 July 2018.[22] Subsequently, she enrolled in a vocational level Certificate IV in Marketing and Communication which commenced on 23 July 2018, claiming that the study would enhance the family business and it would be difficult to find a similar course in Hungary.[23]

Eros's daughter had recently completed a master's degree in Australia and wanted to stay in Australia for at least two years.[24] Even though her son returned to Romania after completing a diploma in Australia, her husband (the secondary applicant) worked in self-employed carpentry jobs in Australia.[25]

B Procedural History

Eros arrived in Australia for a short holiday and decided to study within a week. For this matter, the Tribunal accepted that plans could change.[26] However, the Tribunal did not accept Eros's evidence and considered that she 'used the visitor visa program to circumvent the more rigorous student visa assessment process'.[27] The Tribunal was concerned that the pattern of Eros's behaviour proposed to use the student visa program primarily in order to maintain ongoing residence in Australia,[28] and was not satisfied that she intended genuinely to stay in Australia temporarily.[29] The Tribunal concluded that Eros did not meet the GTE requirement under clause 500.212(a).[30]

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18 *Tothne Eros (Migration)* [2019] AATA 1152, [11]–[13] (Members Millbank and Wood), quoted in *Eros Appeal* [2020] FCA 1061, [19] (Allsop CJ).
19 *Tothne Eros (Migration)* [2019] AATA 1152, [15], quoted in *Eros Appeal* [2020] FCA 1061, [19].
20 *Eros Appeal* [2020] FCA 1061, [5].
21 *Tothne Eros (Migration)* [2019] AATA 1152, [3], [32] (Members Millbank and Wood).
22 Ibid [19].
23 Ibid [17].
24 Ibid [20].
25 Ibid [24].
26 Ibid [13].
27 Ibid.
28 Ibid [19].
29 Ibid [31].
30 Ibid.

Eros applied for judicial review to the FCCA based on the ground that the Tribunal had misconstrued clause 500.212 and failed to make a reasonable decision considering the evidence supporting the claim.[31] Her application was dismissed.[32]

Then, Eros appealed against the orders of the FCCA to the Federal Court.[33] Specifically, the appeal had five grounds: the primary judge failed to find the Tribunal had misconstrued clause 500.212 (ground one),[34] the primary judge failed to find that the review was contaminated by the 'group introduction' process (ground two),[35] the primary judge failed to find that the Tribunal's decision was infected with jurisdictional error through the decision being unreasonable (ground three),[36] the primary judge failed to find that the Tribunal did not give a proper, genuine and realistic consideration of the merits (ground four),[37] and the primary judge failed to provide settled written reasons for his extempore judgment on a timely basis (ground five).[38]

C The Federal Court Judgment

The Federal Court handed down its decision in July 2020 and accepted grounds one, three and four, but rejected grounds two and five.[39]

Regarding the primary purpose of staying in Australia to be with her daughter, there was no finding that she genuinely intended to stay indefinitely, but for a defined period.[40] On the subject of circumstances in her home country and immigration history, Eros openly placed her circumstances before the Tribunal.[41] No findings were made about this matter or that she did not genuinely intend to stay as a student.[42] Regarding ground one, the value of the course, the Tribunal failed to deal with the consideration that Eros dutifully undertook the enrolled courses and genuinely wanted to do the courses.[43] At its foundation, the Tribunal misdirected its consideration of clause 500.212 'by asking the wrong question, and by failing to reveal a rational and intelligible reasoning process to its conclusion'.[44]

The Tribunal's decision was set aside, and Eros's application was remitted to the AAT for rehearing. The Provider Registration and International Student Management System database search showed that Eros was not currently enrolled in any registered course of study.[45] After inviting her to comment on or respond to

31 *Eros v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCCA 3805, [18] (Vasta J) ('*Eros Review*').
32 Ibid [61].
33 See *Eros Appeal* [2020] FCA 1061.
34 Ibid [27] (Allsop CJ).
35 Ibid [35].
36 Ibid [27].
37 Ibid.
38 Ibid [39].
39 Ibid [34], [37], [40].
40 Ibid [22].
41 Ibid [19].
42 Ibid [18], [20].
43 Ibid [22].
44 Ibid [33].
45 *Tothne Eros (Migration)* [2020] AATA 5412, [18] (Member Harkess).

the information, the Tribunal did not receive any substantive response.[46] The consideration of whether criteria contained in clause 500.212 is met is premised on the enrolment criterion in clause 500.211 being met.[47] As Eros failed to meet clause 500.212 by not currently enrolling in a registered course of study, the Tribunal affirmed the decision not to grant a student visa.[48]

D Reasoning

1 Grounds One, Three and Four

Chief Justice Allsop identified three key principles when assessing the GTE criterion: (1) the application of GTE 'requires an appreciation of … cl 500.212 in subcll (a), (b) and (c), and the whole question [requires] evaluation in the chapeau';[49] (2) the concept of 'temporary' is concerned with how long the applicant intends to stay,[50] and the 'duration will be either defined in advance or be related to the fulfilment of a specific, passing purpose';[51] and (3) the consideration of features taken from *Direction Number 69* would also be relevant to subclause (c) and the chapeau.[52]

(a) Looking at Clause 500.212 as a Whole

Chief Justice Allsop emphasised that clause 500.212 should be looked at as a whole in subclauses (a), (b), (c) and the chapeau to consider whether the applicant was genuine for entry and stay as a student. There are many considerations which are relevant to assessing whether an applicant is genuine in their intention to stay temporarily or for entry and stay as a student, including how long they intend to stay (subclause (a)), and whether they are genuine in their desire to be a student (subclauses (b) and (c), especially (c)).[53]

The criterion of genuineness to enter and stay as a student under the chapeau of clause 500.212 sets out 'a whole idea or conception' and 'should not be disconnected from the text, structure and purpose of the whole clause'.[54] The chapeau gives guidance as to how a provision needs to be interpreted. The whole conception under the chapeau is reached through the particular criteria in clause 500.212, subclauses (a), (b) and (c), which 'requires an appreciation of the relationship between the disaggregated elements'[55] and also demands separate attention to each element.[56] In particular, the terms and structure of clause 500.212 require careful treatment of the intention concerning the length of stay (subclause (a)),

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46 Ibid.
47 Ibid [23].
48 Ibid [23], [28].
49 *Eros Appeal* [2020] FCA 1061, [13].
50 Ibid [12].
51 *Saini* (2016) 245 FCR 238, 243 [20] (Logan J), quoted in ibid [21].
52 *Eros Appeal* [2020] FCA 1061, [17]–[18].
53 Ibid [13].
54 Ibid [8].
55 Ibid [13].
56 Ibid [14].

the intention to comply with any visa condition (subclause (b)), and any other matters relevant to the subject matter (subclause (c)), scope and purpose of the clause and grant of the underlying visa.[57]

However, the Tribunal's decision was entirely based on whether Eros intended genuinely to stay in Australia temporarily under subclause (a).[58] The Tribunal and the primary judge failed to make findings or conclusions about whether the applicant was a genuine student or intended to undertake a course of study under subclause (c).[59] The Court held that consideration should have also been made regarding subclause (c) to the effect that the chapeau was not met, but no findings were made to reach the conclusion that Eros did not genuinely intend to be a student for the purposes in the chapeau.[60]

(b) Stay in Australia Temporarily, Clause 500.212(a)

The Tribunal doubted that Eros would not genuinely intend to stay temporarily in Australia and that her primary or motivating purpose was to be with her daughter who wanted to stay for two years after completing a master's degree.[61]

The primary judge agreed with the Tribunal and interpreted subclause (a) as 'where persons keep studying for the sake of studying, so it is that they can stay in Australia longer … it means that they are not genuinely here temporarily'.[62] The word 'temporarily' should mean that 'they will be here to complete a genuine course of study, and then will leave once the course of study is done'.[63]

However, Allsop CJ considered that temporary should be defined as 'lasting for a limited time' by reference to the decision in *Hafza v Director-General of Social Security*.[64] The Tribunal found that Eros intended to stay 'for a defined, relatively short period related to an apparent desire to be near her daughter and to study'.[65] In fact, the Tribunal acknowledged Eros's intention was to remain in Australia with her daughter, which was a period of two years as evidenced.[66] Thus, the Court considered that it was just an expression of concern by the Tribunal, but not a finding that Eros intended to stay indefinitely in Australia.

In view of this, Allsop CJ confirmed the concept of 'temporary' as 'the absence will be relatively short and that its duration will be either defined in advance or be related to the fulfilment of a specific, passing purpose'.[67] He also agreed in relation to the equivalent words in subclause (a) that the words 'are concerned with how long the

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[57] Ibid [13]. See also *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J).
[58] *Eros Appeal* [2020] FCA 1061, [16] (Allsop CJ).
[59] Ibid [20].
[60] Ibid [20], [26].
[61] *Tothne Eros (Migration)* [2019] AATA 1152, [21] (Members Millbank and Wood).
[62] *Eros Review* [2019] FCCA 3805, [31] (Vasta J).
[63] Ibid [30].
[64] *Eros Appeal* [2020] FCA 1061, [21]; *Hafza v Director-General of Social Security* (1985) 6 FCR 444, 451 (Wilcox J).
[65] *Eros Appeal* [2020] FCA 1061, [22] (Allsop CJ).
[66] Ibid [20]–[21].
[67] Ibid [21].

visa applicant intends to stay in Australia and nothing else'.[68] In other words, a temporary visa applicant should be able to define their stay 'to a particular date or to the happening of an event or the fulfillment of a purpose', whatever the purpose is at the time of the decision to seek a visa.[69]

The reasoning of the Tribunal and the primary judge were based on doubts about the primary or motivating purpose of staying in Australia and treated it as relevant to the meaning of 'temporary stay'.[70] In contrast, the Court determined that Eros's incentive of being with her family, specifically her daughter, was not a relevant basis to conclude that she was not a genuine applicant to stay as a student over a temporary period.[71] The fact was Eros had dutifully undertaken the various courses as a student and she intended to stay 'for a defined relatively short period related to an apparent desire to be near her daughter and to study'.[72] Therefore, the Tribunal misconstrued clause 500.212 by misdirecting its consideration and 'by failing to reveal a rational and intelligible reasoning process to its conclusion'.[73]

(c) Direction Number 69

The Minister has the right under section 499 of the *Migration Act* to give a written direction to a person or body who have functions or powers under the *Act* if the direction concerns the performance or exercise of those functions or powers. Accordingly, the Minister can give *Direction Number 69* which applies to 'delegates performing functions or exercising powers under section 65 of the [*Migration Act*]' and also applies to 'members of the [AAT] who review the decisions of primary decision-makers in relation to a student visa'.[74]

Regarding *Direction Number 69*, the Tribunal commenced its reasons by identifying a few features: (a) Eros's circumstances in her home country and in Australia, and the value of the course to her future; (b) Eros's immigration history; (c) the intention of Eros's spouse; and (d) any other information provided by Eros.[75]

Eros claimed that 'improved knowledge of the English language coupled with greater business, marketing and communication skills [would] enhance the family business and lead to greater opportunities throughout Europe'.[76] She also provided evidence that the balance of her family and friends remained in Hungary,[77] and she had 'real estate holdings in Hungary, including a small business'.[78] She told the

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[68] Ibid [12]; *Saini v Minister for Immigration and Border Protection* (2015) 300 FLR 72, 76 [18] (Cameron J), quoted in *Saini* (2016) 245 FCR 238, 245 [28] (Logan J).

[69] Lorenzo Boccabella, 'Genuine Temporary Entrant', *CPE Migration* (Web Page, 20 August 2020) <https://www.cpemigration.com.au/blogs/genuine-temporary-entrant>.

[70] *Eros Appeal* [2020] FCA 1061, [22] (Allsop CJ).

[71] Ibid.

[72] Ibid.

[73] Ibid [33].

[74] Minister for Immigration and Border Protection (Cth), *Direction Number 69* (1 July 2016) 2.

[75] *Eros Appeal* [2020] FCA 1061, [17] (Allsop CJ).

[76] *Tothne Eros (Migration)* [2019] AATA 1152, [17] (Members Millbank and Wood), quoted in ibid [19].

[77] *Tothne Eros (Migration)* [2019] AATA 1152, [21], quoted in *Eros Appeal* [2020] FCA 1061, [19].

[78] *Tothne Eros (Migration)* [2019] AATA 1152, [22], quoted in *Eros Appeal* [2020] FCA 1061, [19].

Tribunal that she had no reason for not returning to Hungary and did 'not have any concerns in relation to military service, political or civil unrest'.[79]

Whilst Eros openly disclosed her circumstances,[80] the Tribunal did not accept the evidence and considered that she used the visitor visa program to avoid the more rigorous student visa assessment process.[81] Conversely, the Court concluded that apparently no findings were made about the above features in *Direction Number 69* and how they informed the conclusion that Eros did not genuinely intend to be a student.[82]

2 Grounds Two and Five

As Eros did not point to any injustice, unfairness or defect in the hearing, there was no basis to impugn the decision.[83] Furthermore, the extempore judgment had been delivered to the counsel and solicitor and settled reasons were supplied.[84] There was no suggestion that the settled reasons departed from the oral reasons in any material respect. The Court dismissed these two grounds.[85]

III ANALYSIS

In 2011, the Government implemented the GTE requirement for student visa applicants 'to help reduce immigration risk and maintain the integrity of the student visa programme'.[86] All primary and secondary student visa applicants are assessed against a number of factors detailed in *Direction Number 69*, which provides guidance to identify applicants who do not genuinely intend to stay in Australia temporarily at the time of decision.[87] However, the guidance facilitates subjectivity and flippancy in the capacities of decision-makers, so that two similar

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79 *Tothne Eros (Migration)* [2019] AATA 1152, [26], quoted in *Eros Appeal* [2020] FCA 1061, [19].

80 'The applicant provided a document entitled "genuine temporary entrant criterion statement" dated 9 November 2016 to the Department … She [explained] that, as at 9 November 2016, her son and daughter were due to begin their own studies in Australia and "I would like to be next to them in the first few months to ensure a smoother adjustment to this new environment and culture". The applicant asserted that English language study would assist her in her own business back in Hungary': *Tothne Eros (Migration)* [2019] AATA 1152, [15], quoted in *Eros Appeal* [2020] FCA 1061, [19].

81 *Tothne Eros* (Migration) [2019] AATA 1152, [13], quoted in *Eros Appeal* [2020] FCA 1061, [19].

82 *Eros Appeal* [2020] FCA 1061, [18].

83 Ibid [37].

84 Ibid [40]. Chief Justice Allsop provided obiter dicta relating to the delivery of an extempore judgment. 'A settled and accurate written record of an extempore judgment may, however, in many cases, be important for the litigant to understand why he or she has won or lost, the latter in particular … In a busy practice court with knowledgeable and skilled practitioners, the need for the reduction of extempore judgments to settled written reasons can, perhaps, be seen as unnecessary as a matter of course, depending on the nature of the list and the relationship between bench and bar. But applications for the review of refusals of visas are not matters of practice and procedure, they are important substantive matters, affecting (quite often fundamentally and irrevocably) the rights, liabilities, lives and futures of litigants, and their families': at [41].

85 Ibid [37], [40].

86 Department of Immigration and Border Protection (Cth), *Future Directions for Streamlined Visa Processing* (Report, June 2015) 8 ('*Future Directions*').

87 Minister for Immigration and Border Protection (Cth), *Direction Number 69* (1 July 2016) 3.

applicants may reveal different outcomes where one is successful in satisfying the GTE requirement and the other fails.[88]

Accordingly, the GTE criterion as the primary integrity safeguard has been frequently litigated in court over the past few years.[89] There are two streams of cases which show an emerging division of opinion – one takes the view that an intention to seek a permanent visa would not prevent the satisfaction of the GTE requirement if the applicant intends to leave without any legitimate way to stay; the other takes the opposite view that having a settled intention to seek a permanent visa would fail the GTE requirement. The former applies the GTE requirement leniently, while the latter interprets the GTE requirement stringently.

The lenient application gives a broad definition of GTE. The GTE criterion can be satisfied as long as the applicant has the intention to leave Australia when they have exhausted a legitimate pathway to stay. The intention at the time of applying for a student visa can be to study in Australia and/or seek permanent residency. In contrast, the stringent application defines it in a narrow way and requires the applicant to have a settled intention of staying in Australia temporarily at the time of decision. If the applicant has an intention to seek permanent residency, the GTE criterion cannot be satisfied.

The distinction between the lenient and stringent application shows the different interpretations by the court and presents inconsistencies in the determinative factors. The difference leads to contradictory outcomes when decision makers adopt different applications. Instead, the application in *Eros* considered the purpose of stay neutrally, and all factors holistically, which could ensure coherent and sound reasoning so as to achieve the integrity of the student visa system.

A Lenient and Stringent Application of the GTE Requirement

In *Khanna v Minister for Immigration and Border Protection* (2015) 298 FLR 388 (‘*Khanna*’), Manousaridis J interpreted a GTE as an applicant intending to stay in Australia temporarily if the applicant’s intention would be to return to their country if they did not obtain permanent residency or some other visa.[90] The applicant, ‘who intends to stay permanently in Australia, if qualified to do so, does not by itself imply the person does not intend to stay in Australia temporarily’ because there is ‘no inconsistency between these two intentions’.[91] The applicant is a genuine temporary entrant ‘who will come, study and go home afterwards (unless there is a legitimate pathway to stay longer)’, which reflects the recommendations made in the *Strategic Review of the Student Visa Program 2011*.[92]

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[88] Nishadee Perera, ‘Australian Student Visas: Assessing How the GTE Requirement Is Assessed’ [2015] 7 *Australian National University Undergraduate Research Journal* 75, 79.

[89] Department of Home Affairs (Cth), ‘Simplified Student Visa Framework (SSVF)’ (Appraisal, May 2018) 13.

[90] *Khanna* (2015) 298 FLR 388, 393–4 [28].

[91] Ibid 394 [29].

[92] Michael Knight, *Strategic Review of the Student Visa Program 2011* (Report, 30 June 2011) 25, quoted in ibid 394 [30].

The Minister appealed the decision to the Federal Court, and the Court held that Manousaridis J erred in his conclusion that the Tribunal had demonstrated jurisdictional error in the decision record.[93] However, the Federal Court did not address the question of whether a person holding a subjective intention to permanently stay in Australia could be a GTE.

The question was left open until *Saini v Minister for Immigration and Border Protection* (2016) 245 FCR 238 (‘*Saini*’). Justice Logan in *Saini* interpreted the GTE criterion as the following: (a) the regulations ‘permit the holder of a Student visa to seek a visa [permitting] a longer stay for further study or for employment’ because there is ‘potential for an intention to change, depending on later circumstances’; (b) ‘at the time of decision, an intention to seek some further visa … will nonetheless lead to nothing more than further temporary residence’; for example, at the time of decision, an applicant may hope to undertake postgraduate study but ‘still leave once any further study is completed’; and (c) however, if the applicant has ‘a settled intention, at the time of decision, later to seek a visa … [leading] other than to temporary residence’, the applicant does not intend to genuinely stay in Australia temporarily.[94] The application in *Saini* allows the applicant to seek a further temporary visa but denies the genuine intention of study if the applicant has an intention to seek permanent residency in Australia at the time of decision.

In the recent case of *Inderjit v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2019) 272 FCR 528 (‘*Inderjit*’), the applicant claimed that *Saini* was ‘wrongly decided in respect of what Logan J had held’,[95] and the decision of Manousaridis J in *Khanna* was preferred.[96] The Full Court held that Logan J’s reasons in *Saini* would not necessarily negate the entitlement of the applicant if the settled intention was later to seek a visa that would lead other than temporary residence.[97] The applicant entertained a genuine intention to stay temporarily, even though at the time of decision they remained ‘open to pursuing in the future, what the person considers to be unlikely, an opportunity, if it presents itself, to seek a permanent visa to do so’.[98] The decision confirms the lenient application in *Khanna*, but it does not recognise the satisfaction of the GTE requirement merely because the applicant intends to leave Australia without a legitimate pathway.

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93 *Minister for Immigration and Border Protection v Khanna* [2016] FCA 142, [25] (Reeves J).

94 *Saini* (2016) 245 FCR 238, 245–6 [30].

95 (2019) 272 FCR 528, 533 [24] (Rares, Burley and O’Bryan JJ) (‘*Inderjit*’).

96 Ibid 533 [25].

97 Ibid 537 [39]: ‘But as we read Logan J’s reasons, he did not hold that the decision-maker had to decide that the existence of the settled intention, at the time of the decision, if the opportunity to do so arose, later to seek a visa that would lead other than temporary residence, necessarily negated the entitlement to seek a visa’.

98 Ibid 537 [41].

B Pros and Cons of Applying the GTE Requirement Leniently or Stringently

1 Lenient Application

The positive side of the lenient application in *Khanna* is that it recognises an applicant may concurrently have multiple intentions to study in Australia to reside permanently if qualified, or to leave without a further visa.[99] However, it overemphasises the criterion of whether the applicant intends to comply with the visa condition of leaving Australia at the end of the visa period.[100] The GTE criterion requires decision makers to consider all factors on balance,[101] but the intention to leave Australia is only relevant to the factor of complying with visa conditions.

Moreover, the lenient application allows the applicant to exhaust all legitimate pathways to stay in Australia, which provides an opportunity for the applicant to exploit the visa system. For example, applicants without a genuine desire to study may stay in Australia for far longer than they are entitled to stay. It also allows these applicants to exploit the student visa to achieve other purposes such as working, visiting family, investing in business, and continuing residency, for which other visa types are applicable, but with either short stay or strict requirements. However, the integrity of the visa system aims to ensure that: (a) 'applicants are genuinely applying for the visa for the purpose for which it was intended'; and (b) 'applicants apply for the visa that is most suitable for them'.[102] Such 'visa shopping' may also damage the reputation and long-term interests of the Australian international education sector.

The improved lenient application in *Inderjit* overcomes the issue of overemphasising one criterion. The Full Court held that the decision maker must 'take each criterion into account … as a fundamental element',[103] and give no 'fixed' or 'presumptive' weight to any of them.[104] It also disallowed the applicants to utilise student visas to pursue permanent residency.[105] Nonetheless, the Court neither specified the criteria nor defined GTE.

2 Stringent Application

The stringent application in *Saini* excludes the applicant who has the settled intention of other than temporary residence at the time of decision. The exclusion may prevent non-genuine applicants, but it also denies the possibility that an

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[99] See *Khanna* (2015) 298 FLR 388, 394 [29] (Manousaridis J).

[100] *Migration Regulations 1994* (Cth) sch 2 cls 500.212(a)(iv), (c).

[101] Ibid cl 500.212(a)(i)–(iii); Minister for Immigration and Border Protection (Cth), *Direction Number 69* (1 July 2016).

[102] Department of Immigration and Border Protection (Cth), *Managing Immigration Risk: Strategies for Education Providers* (Report) 3 <https://www.mia.org.au/documents/item/891>.

[103] *Inderjit* (2019) 272 FCR 528, 534 [29] (Rares, Burley and O'Bryan JJ), citing *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322, 329 (Mason J).

[104] *Inderjit* (2019) 272 FCR 528, 535 [30].

[105] Ibid 537 [42].

applicant may intend to genuinely enter and stay as a student and later seek permanent residency if they are qualified.

At the time the GTE criterion was introduced, it aimed to maintain the integrity of the visa system and to ensure the student visa was not being 'undermined by people seeking a migration outcome rather than an educational outcome'.[106] The stringent application reflects the aim of assessing and managing immigration risk.

However, there is an apparent connection between a student visa and post-study options, including other temporary and permanent migration visa programs.[107] The applicants are likely to consider their post-study options when they initiate the early decision of international study. For some of them, the post-study option of permanent residency, among other things, can affect their ultimate decision as to whether or not to study in Australia.[108] This does not mean the only purpose is to 'buy' permanent residency for the cost of studying a course.[109] The applicants can have a genuine intention to stay and study in Australia temporarily, meanwhile, they are open to the opportunity of remaining in Australia permanently if qualified. The preamble of *Direction Number 69* also clearly states that an applicant can be a GTE, 'notwithstanding the potential for this intention to change over time to an intention to utilise lawful means to remain in Australia for an extended period of time or permanently'.[110]

The exclusion is also inconsistent with the skilled migration program that is 'designed to attract migrants … [making] a significant contribution to the Australian economy, and fill positions where no Australian workers are available'.[111] In their report and recommendations, *Future Directions for Streamlined Visa Processing*, the then Department of Immigration and Border Protection stated that the GTE requirement is not 'designed to exclude genuine students or those students who, after studying in Australia, go on to develop the skills required by the Australian labour market and apply to obtain permanent residency'.[112]

The skilled migration program has 'provided significant advantages' to applicants who have completed studies in an Australian educational institution.[113] For example, the general skilled migration program is points tested, and provides more points to the applicant who has studied in Australia.[114] At the time of

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106 Knight (n 92) xi.

107 Sudrishti Reich, 'Changes in the Student Visa Program – Expected and Other Consequences' (2012) 51 *Immigration Review – Bulletin* 1, 5.

108 Productivity Commission, 'International Education Services' (Research Paper, April 2015) 90.

109 Reich (n 107) 6.

110 Minister for Immigration and Border Protection (Cth), *Direction Number 69* (1 July 2016) 3.

111 'Skilled Migration Program', *Department of Home Affairs: Immigration and Citizenship* (Web Page) <https://immi.homeaffairs.gov.au/what-we-do/skilled-migration-program>.

112 *Future Directions* (n 86) 35.

113 Productivity Commission (n 108) 90.

114 See generally five points for having at least one degree from an Australian educational institution that meets the Australian study requirement; five points for living and studying in an eligible area of regional Australia; five points for completion of a professional year in Australia; and 10 points for a master's degree by research or a doctorate degree from an Australian educational institution that included at least two academic years of study in a relevant field: 'Points Calculator', *Department*

decision, the applicant can have a subjective desire to stay in Australia permanently if a legitimate pathway arises.[115] The skilled stream reflects the lenient application that the intentions of study and permanent residency can be two mutually exclusive states of affairs. On the other hand, the stringent application is inconsistent with the skilled stream by denying the coexistence of multiple intentions.

C Application of *Eros* and Its Significance

The application in *Eros* reconciles the issues in the lenient and stringent applications by providing a neutral way of defining the purpose of staying and by considering all criteria holistically under the chapeau of clause 500.212. On the one hand, it coheres with the societal context of skilled migration and guarantees the competitiveness of Australian international education. On the other hand, it also manages the immigration risk to ensure the integrity of the student visa system.

1 Defines the Purpose of 'Staying' in a Neutral Way

The approach in *Eros* is relatively neutral and is broader than the stringent application and narrower than the lenient application. Chief Justice Allsop stated that doubts about the primary or motivating purpose of staying in Australia should not be treated as relevant to the meaning of 'temporary stay', and those matters could be relevant if they informed a finding that the applicant intended to stay indefinitely.[116] Subclause (a) is only concerned with the intention as to the length of stay,[117] so the purpose or motivation does not dilute the facts of temporary stay as a genuine student.

Unlike the stringent application, the neutral approach in *Eros* does not exclude an applicant who has a genuine intention to study, as well as other intentions, including seeking permanent residency as a post-study option. International students can be trained to fill skill shortages, their qualifications are suitable for Australian standards, and they have a better awareness of Australian culture compared to a newly arrived migrant.[118] It has been clearly stated by the Department of Home Affairs that 'the GTE requirement is not intended to exclude students who, after studying in Australia, develop skills Australia needs and who then go on to apply for permanent residence'.[119] Moreover, the stringent exclusion would diminish the competitiveness of the Australian international education industry. A significant driver of international student enrolments is the link

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of Home Affairs: Immigration and Citizenship (Web Page) <https://immi.homeaffairs.gov.au/help-support/tools/points-calculator>.

115 Michael Arch, 'Hugely Significant Decision on Temporary Entrant Requirement for Student Visa Applicants', *Migration Alliance* (Blog Post, 23 July 2015) <https://migrationalliance.com.au/immigration-daily-news/entry/2015-07-hugely-significant-decision-on-temporary-entrant-requirement-for-student-visa-applicants.html>.

116 *Eros Appeal* [2020] FCA 1061, [22].

117 Ibid.

118 Knight (n 92) 14.

119 'Genuine Temporary Entrant Requirement' (n 1).

between international education and migration.[120] The Department of Home Affairs has acknowledged that permanent migration has played a part in the increase of student visas.[121]

Unlike the lenient application, the neutral approach denies non-genuine applicants who intend to stay in Australia indefinitely without the apparent genuineness of study, even though the applicant intends to leave without a legitimate pathway to stay. The lenient application not only impairs the integrity of the student visa system but also damages the reputation of the international education sector. It fuels the perception by non-genuine students that student visas are a device for permanent entry.[122] By applying the neutral approach in *Eros*, the student visa system would not be undermined by people intending to stay permanently rather than genuinely intending to achieve an educational outcome.

While the application in *Eros* recognises the applicant may entertain a genuine intention to stay temporarily and remain open to seek a permanent visa, it ensures there should be no finding that the applicant genuinely intends to stay indefinitely.[123] The applicant would not genuinely intend to stay temporarily in Australia if all factors informed a finding that the applicant intends to stay indefinitely. For example, in *Inderjit*, the factors pointed to the conclusion that the applicant intended to stay permanently and was using the student visa program to maintain residence in Australia until they had the opportunity to pursue permanent residency.[124] If the applicant only intends to stay indefinitely, they are not a genuine applicant to study and will utilise the student visa as a tool to achieve their purpose. If the applicant genuinely intends to be a student, they will not use the student visa to continue residence in Australia and will embrace the opportunity of permanent residency if qualified. Regardless, to make that finding the Tribunal 'would have to grapple with the apparent genuineness of [the applicant] in undertaking the courses, even if [there] were a way [the applicant] would be able to remain in Australia'.[125]

2 Holistic Application of the GTE Criterion

To assess the genuineness of study, the *Eros* approach focuses on neither the criterion of temporary stay under subclause (a) like in *Saini*, nor the criterion of complying with visa conditions under subclause (b) like in *Khanna*. The applicant's 'intention is a question of fact for the decision-maker, applying [all the criteria of] cl 500.212, based on all of the material before it'.[126]

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[120] Knight (n 92) 14.

[121] Productivity Commission (n 108) 90.

[122] Department of Immigration and Citizenship (Cth), *Student Visas: Fraud, Malpractice and Error in the International Education Sector* (Interim Report, V Draft 0.4, 1 October 2007) 38.

[123] See *Eros Appeal* [2020] FCA 1061, [22] (Allsop CJ).

[124] *Inderjit* (2019) 272 FCR 528, 537 [42] (Rares, Burley and O'Bryan JJ); *Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 2674, [45] (Vasta J) ('*Singh*').

[125] *Eros Appeal* [2020] FCA 1061, [20] (Allsop CJ).

[126] *Inderjit* (2019) 272 FCR 528, 537 [41] (Rares, Burley and O'Bryan JJ), quoted in *Singh* [2020] FCCA 2674, [45] (Vasta J).

To 'grapple' with the apparent genuineness of study, the intended length of stay under subclause (a), the intention to comply with visa conditions under subclause (b), and any other relevant circumstances under subclause (c), all need to be assessed to the effect that the chapeau is met – 'the applicant is a genuine applicant for entry and stay as a student'.[127] One would have to evaluate all factors to decide whether the applicant intends to undertake a course of study. If the applicant has dutifully undertaken the various courses that they have enrolled in, they may genuinely want to do the courses.[128]

By focusing on 'temporary stay' in the stringent application, an applicant who is likely to return home might satisfy the GTE requirement and be granted a student visa. However, the GTE requirement should not be satisfied if the applicant plans to work illegally instead of seriously committing to study. The criterion of 'genuine student' should 'focus on intention to study rather than it being a surrogate measure for whether or not the applicant will return home'.[129] The lenient application's focus on the intention of an applicant only leaving Australia after exhausting other legitimate pathways also fails to fulfill the criterion of 'genuine student'. As stated above, the lenient application leaves a loophole for non-genuine students to manipulate the student visa program for migration purposes.

The holistic application in *Eros* confirms that the applicant must be both a GTE and a 'genuine student', which corresponds with the initial recommendations of introducing the GTE requirement into the eligibility criteria for a student visa.[130] It is also coherent with *Direction Number 69*, which states that the factors specified should not be used as a checklist, but rather, 'are intended only to guide decision-makers when considering the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the [GTE] criterion'.[131]

IV CONCLUSION

The judgment in *Eros* provides a neutral and holistic application of the GTE criterion by defining 'temporary stay' and specifying each criterion under clause 500.212. Compared with the lenient and stringent application in previous cases, the approach in *Eros* defines the purpose of staying by admitting the multiple purposes of genuine study and permanent residence. It overcomes the disadvantages in other applications and achieves the balance of maintaining the integrity of the student visa system and enhancing the skilled migration stream. The application in *Eros* also provides a careful and holistic treatment of the chapeau and the three distinct criteria under clause 500.212. None of the criteria should be overemphasised as the decisive element, and the assessment should include the catch-all criterion of 'any other relevant matter' under subclause (c). 'A successful applicant for a

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127 *Migration Regulations 1994* (Cth) sch 2 cl 500.212.

128 *Eros Appeal* [2020] FCA 1061, [22] (Allsop CJ).

129 Knight (n 92) 25.

130 Ibid xiii.

131 Minister for Immigration and Border Protection (Cth), *Direction Number 69* (1 July 2016) 4 [1].

student visa should be both a genuine temporary entrant and a genuine student',[132] who is seriously committed to a course of study and not manipulating the student visa program for permanent residency. Overall, the *Eros* judgment is significant in defining the GTE requirement in student visa applications and in enhancing the merits of the GTE requirement by guiding decision makers to take a reasonable and balanced approach.

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132 Knight (n 92) x, 25.