

RRT Bulletin

The Refugee Review Tribunal decisions digest

This bulletin covers recently published Tribunal decisions. The decisions summarised represent a cross-section of published decisions of the Tribunal. Selected summaries of High Court, Federal Court and Federal Magistrates Court judgments, of interest to the Tribunal, are also included.

The Refugee Review Tribunal shall not be liable for any reliance by any person on the summaries contained in this Bulletin. Each summary provides a guide only to each decision and should not, under any circumstance, be used as a substitute for the full text of a decision.

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▶ Algeria

N05/52275
31 January 2006, Sydney
Mr J Silva, Member

ALGERIA - RACE - BERBER - RELIGION - NON-MUSLIM - PARTICULAR SOCIAL GROUP - YOUNG BERBER MALES FROM KABYLIA - The applicant feared persecution as a young Berber male from Kabylia who had been involved with a Berber cultural organisation and with “Laruc”, also known as the Citizens Movement. He claimed that this group organised marches and demonstrations against police attacks on Berber people. The applicant claimed he did not observe the religion of most people in his village, who were Muslims. He claimed that he was eating in a coffee shop during Ramadan and was taken by the police to the barracks where he was mistreated and accused of not following Ramadan and Muslim practices. The applicant claimed he was beaten, threatened and forced to undertake demeaning tasks. He also claimed that his village had been attacked many times by “terrorists” who were Arab Muslims. People were physically attacked and demands and threats were made against families.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was a member of the Citizens Movement, but not that he was a person with any profile in the group. It accepted that he was present at a number of demonstrations, but was not satisfied that mere presence at these established a real chance of prospective persecution. The Tribunal accepted as plausible that a young male Berber in Kabylia could be arrested and interrogated by the authorities on the pretext that he was not observing Ramadan. The Tribunal accepted that the applicant was so arrested, interrogated, threatened and humiliated on one occasion. It also accepted that he may have been subject to other discriminatory treatment by the authorities but was not satisfied that such incidents cumulatively amounted to persecution for a Convention reason. The Tribunal accepted that young Berber males from Kabylia with past involvement in political and cultural activities constituted a particular social group. However, it did not accept that such persons were persecuted for that reason. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

▶ Bangladesh

V05/18182
9 January 2006, Melbourne
Ms S Muling, Member

BANGLADESH - RELIGION - NON-PRACTISING MUSLIM - MARRIAGE TO CHRISTIAN WOMAN - The Muslim applicant claimed to fear persecution on the grounds of religion. He claimed that whilst studying in Australia he had married a Christian woman and had attended a Catholic Church. The applicant claimed he also intended to formally convert to Christianity and that a friend had told his family without his permission. The applicant claimed that his family was extremely religious and that a relative was affiliated with Jamaat Islami, a fundamentalist organisation. He claimed his family believed that he had converted to Christianity and had threatened to kill him because he was no longer a practising Muslim and because he had married a Christian woman.

Held: Decision under review set aside.

The Tribunal accepted the applicant was not a practising Muslim and that he attended a Catholic church. However, noting that he had not been baptised into any Christian church, it did not accept there was a real chance he would convert to Christianity if he returned to Bangladesh now or in the reasonably foreseeable future. The Tribunal accepted that the applicant was from a strong Muslim family with links to Jamaat Islami. It accepted that his family was aware of his feelings towards his Muslim faith and that this, coupled with his marriage to a Christian woman, would confirm their perceptions that he had converted to Christianity. The

Tribunal found there was more than a remote chance that the applicant would face persecution from his family, in particular his relative and his associates in the Jamaat Islami for reasons of imputed religion. The Tribunal was satisfied that state protection would not be forthcoming and that it would not be reasonable for the applicant to re-locate. On this basis it found that the applicant's fear of persecution was well-founded.

China

N05/52361

28 November 2005, Sydney

Mr J Cipolla, Member

CHINA - RELIGION - FALUN GONG - MISTREATMENT - RE-EDUCATION - The applicant feared persecution arising from his long standing practice of Falun Gong. He claimed that he was attacked by the police whilst practising Falun Gong at a park and was hospitalised as a result. The applicant claimed that he was later arrested, beaten and detained by the police for carrying Falun Gong literature. He claimed that after his release from prison he was forced to attend training classes to learn the harms of Falun Gong. The applicant claimed that he was classified as a Falun Gong practitioner who should be under the control of local police. He claimed that since his arrival in Australia he practised Falun Gong all the time and had participated in Falun Gong activities openly by attending group exercises and studies.

Held: Decision under review set aside.

The Tribunal found the applicant had a genuine belief in and commitment to Falun Gong. It noted that he was not a high profile practitioner and referred to independent information in accepting the applicant's claim that ordinary practitioners of Falun Gong were increasingly the target of persecution. Based on the evidence before it, the Tribunal accepted that the applicant was arrested, detained and mistreated and subjected to transformation and re-education sessions. It accepted that the applicant had a profile with relevant Public Security Bureau authorities and there was a real chance that he would be subjected to serious harm if he returned to China now or in the reasonably foreseeable future. Accordingly, the Tribunal found that the applicant's fear of persecution was well-founded for reason of his religion.

N05/51822

30 November 2005, Sydney

Ms P Pope, Member

CHINA - RELIGION - CHRISTIAN - The applicant feared persecution as a practising Christian. She claimed that she had been a Christian since the early 1990s and regularly attended underground religious meetings. The applicant claimed that the local committee and the Communist Party mistakenly called the group Huhan Pai (the Shouters). She claimed that on one occasion the police came to a meeting and arrested, questioned and detained five or six people, including herself. The applicant claimed that some years later the authorities detained and imprisoned more members, though she managed to escape their attention in the confusion. The applicant fled to Australia and claimed she had become part of a Christian congregation. The applicant stated that if she had to return to China, she would be under threat every day. She further claimed that the authorities now had a list of the members of the underground church which included her name.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a devout and practising Christian. It accepted that the applicant's practice of the Christian faith in an underground church had attracted the adverse attention of local authorities. The Tribunal accepted that this group had come under increasing and intense scrutiny by the authorities and found it was possible that the local party officials mistakenly believed that they were Shouters. The Tribunal accepted that the group had kept a written record of its members. It found that the applicant's commitment to the Christian religion continued and that she had become part of a Christian congregation in Australia. The Tribunal accepted that if she were to return to China, she would attract the adverse attention of the authorities. The Tribunal was satisfied there was a real chance that the applicant could be arrested, gaoled and mistreated and accordingly found that she had a well-founded fear of persecution.

N05/52888
13 January 2006, Sydney
Mr R Wilson, Member

CHINA - RELIGION - PARTICULAR SOCIAL GROUP - FALUN GONG PRACTITIONERS - The applicant feared persecution on the basis of her practice of Falun Gong since the early 1990s. She claimed that she was arrested by police after a protest demonstration and was interrogated and detained for several weeks during which she was subjected to physical mistreatment. The applicant claimed that after her release she was informed that she had been dismissed from her job and received threats and demands from the street committee to give up Falun Gong. The applicant claimed that she was arrested, interrogated and detained for the second time as a result of claims that fellow practitioners had named her as a distributor of Falun Gong materials. She claimed that after this she was closely monitored by the police and was regularly summoned to the police station to report. The applicant claimed that in Australia she publicly practised Falun Gong consistently and if she returned to China would continue to do so.

Held: Decision under review set aside

The Tribunal, having regard to the written statements and oral evidence provided by the applicant, accepted the summary of facts provided by her and was satisfied that these matters gave rise to past persecution. It found that the applicant was a committed and knowledgeable Falun Gong practitioner. The Tribunal accepted that the applicant openly practised Falun Gong consistently in Australia and if she returned to China she would disseminate information and ideas to others in an attempt to persuade them to become Falun Gong practitioners. It noted independent information on the treatment of Falun Gong practitioners in China and was satisfied there was a real chance of persecution of the applicant if she returned. The Tribunal was satisfied that the applicant's political opinion, religion and membership of a particular social group were the reasons for the persecution she feared. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

N05/52696
20 January 2006, Sydney
Dr I O'Connell, Member

CHINA - RELIGION - CHRISTIAN - UNDERGROUND CHURCH - DETENTION - MODIFYING CONDUCT - The applicant feared persecution based on her religion as a Protestant Christian. She claimed that she was detained for two days and fined for attending a religious service at unregistered premises. The applicant claimed that she was warned never to attend underground church again. She also claimed she had been involved in a Bible printing activity for the church and while she was on a business trip overseas the manager of the printing company was arrested before being sentenced to a re education labour camp. The applicant feared the same might happen to her. She claimed that, on hearing of the arrest, she became fearful and went into hiding. The applicant said she thought the manager might divulge her name.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a Christian who had attended various Christian activities at an underground church. It did not accept that she faced arrest on her return by reason of her part in the Bible printing activity. The Tribunal did accept that the applicant was detained, fined and warned not to persist in attending home church meetings. It accepted that the applicant exercised discretion in the practice of her religious beliefs and attendance at an underground church by changing venues and pretending to be attending a party rather than a religious gathering. The Tribunal accepted that this modifying conduct was due to the threats that she would be detained should she continue to attend underground church meetings. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution on the basis of her religion.



Guatemala

V05/18288

27 January 2006, Melbourne

Mr D Smyth, Member

GUATEMALA - RACE - LADINO - PARTICULAR SOCIAL GROUP - BUSINESSMEN - NON-INDIGENOUS BUSINESSPEOPLE - POLITICAL OPINION - The applicant feared persecution due to his race, his membership of a particular social group comprising businessmen or non-indigenous businesspeople, as well as an imputed political opinion. He claimed that he was targeted by the Mara Salvatrucha (MS) who approached him on several occasions seeking money. The applicant claimed that he was threatened and beaten when he refused their demands and that he feared for his life and that of his family. He claimed that the MS targeted him because he was Ladino and a non-indigenous business man. The applicant claimed he was also targeted because he was seen as a class enemy and politically conservative.

Held: Decision under review affirmed.

The Tribunal referred to independent evidence to find the objectives of the MS were criminal and they were not discriminating in terms of those they targeted. It also noted that the MS were not politically motivated. On this basis, the Tribunal found the applicant was not harmed in the past for reasons of his ethnicity or an imputed political opinion. Even if it accepted that non-indigenous businesspeople constituted a particular social group, the Tribunal found the applicant was not targeted for his membership of that group or for reasons of being a businessman. Rather, the applicant was seen as a suitable target for the criminal activity of the MS. Accordingly, the Tribunal found the applicant had not been harmed in the past for a Convention reason. Looking to the reasonably foreseeable future, it found the chance to be remote that he would suffer persecution for any Convention reason. Accordingly, the Tribunal found that the applicant's fear of persecution was not well founded.



India

N05/52487

25 November 2005, Sydney

Mr R Wilson, Member

INDIA - RELIGION - HINDU - INTER-COMMUNAL VIOLENCE - MUSLIM THREATS - The applicant feared persecution as a Hindu who owned a business in a Muslim-dominated area. He claimed that riots broke out in the vicinity of his shop and the shop was set on fire. The applicant claimed he was beaten by a Muslim gang, warned not to reopen the shop and told to leave the area. He claimed that after he lodged a report with the police he received several telephone calls from Muslim fundamentalists threatening him with death and warning him not to reopen his business in that area. The applicant claimed that if he returned to India he would be killed and that the Indian authorities could not protect him as they had already failed to do so.

Held: Decision under review affirmed.

The Tribunal accepted the applicant's claims regarding the riots, the burning of his shop, the beating and threats against his life should he reopen his shop. It found that in relation to these events the applicant had a well-founded fear of persecution localised to his home state. However, the Tribunal rejected the applicant's claim that due to the threats he would be killed wherever he went in India and relied on his own evidence of specific threats not to reopen his shop in the Muslim-dominated part of the town. The Tribunal found that the applicant could reasonably be expected to relocate to another area of India and that he would enjoy the meaningful protection of the security institutions outside his home state. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.



Indonesia

N05/52042

5 December 2005, Sydney

Mr J Blount, Deputy Principal Member

INDONESIA - RACE - CHINESE - RELIGION - CHRISTIAN - The Chinese applicant feared persecution arising from her views regarding social and political injustice. She claimed that she left because of political imbalance, severe racism between ethnic Chinese and ethnic Indonesians, strong social jealousy and persecution at the hands of Muslims due to her Christian religion. The applicant claimed that during the 1998 riots the family store and home had been attacked and damaged by looters and the family fled leaving behind most of their possessions. She claimed that indigenous Indonesians and Muslims were intent on eliminating all Chinese from Indonesia by raping and burning innocent women and that crime activities were mostly targeted at ethnic Chinese. She claimed that it was virtually impossible for her to obtain protection to express an opinion about political reform.

Held: Decision under review affirmed.

The Tribunal found the applicant to be a credible witness in her evidence about her past experiences and accepted that she had a genuine subjective fear. As documented in independent information, the Tribunal noted that there had been fundamental changes in Indonesia since the events of 1998, including significant steps towards the removal of discrimination against Chinese and in political reform. Thus, the Tribunal found there was no evidence that persons in Indonesia were persecuted for expressing an opinion advocating political reform or that Chinese or Christians or women were being targeted for that reason or for expressing an opinion. The Tribunal was satisfied that these apprehensions, expressed by the applicant in the context of her experiences in 1998, were not now well-founded. Further, the Tribunal was not satisfied that Christians were persecuted or prevented from worshiping or that they were denied protection by the authorities. Accordingly, the applicant was not found to face a real chance of persecution for a Convention reason upon return.

N05/52659

23 January 2006, Sydney

Dr R Witton, Member

INDONESIA - RACE - CHINESE - RELIGION - CHRISTIAN - DISCRIMINATION - RIOTS - The applicant feared persecution as an ethnic Chinese and a Christian. She claimed that she suffered discrimination which restricted her education and that she suffered harassment in the form of extortion for money while running a business. She claimed that her business in Jakarta was looted during the May 1998 riots. The applicant claimed that in 1998 her church had been destroyed and that she had since then attended a different church. She claimed that she feared there could be riots again. The applicant claimed that it was hard to start a business again and that after 1998 she lived on her savings and on assistance from her sister. The applicant claimed that if she returned to Indonesia she would be harmed and that the authorities would not protect her.

Held: Decision under review affirmed.

The Tribunal accepted that Chinese people were affected in the 1998 riots and accepted that the applicant personally suffered harm in that her business was destroyed. It accepted that it would have been a frightening experience for the applicant but noted the virtual absence of anti-Chinese riots since then. The Tribunal accepted that Chinese people faced discriminatory bureaucratic procedures but noted that the Indonesian Government was making progress in removing such discriminatory provisions from the law. It also accepted that the applicant suffered some level of trepidation as a Christian and noted that religious freedom was guaranteed by the constitution and that the government took an active role in protecting citizens from sectarian strife. The Tribunal found that any trepidation experienced by the applicant in regard to her religion was not sufficiently serious to constitute persecution. It therefore found that there was no real chance of the applicant suffering harm in the reasonably foreseeable future if she returned to Indonesia.



Iran

N05/52640
20 January 2006, Sydney
Dr I O'Connell, Member

IRAN - RELIGION - BAHA'I - HARASSMENT - The applicant feared persecution as an elderly woman on the basis of her Baha'i religion. She claimed she had experienced ongoing persecution and harassment because of her faith. The applicant claimed that following the Islamic Revolution in 1979 her home was raided by the authorities, religious books were confiscated and her husband was summonsed and detained for a brief period. The applicant also claimed that she was harassed by her neighbours but had no redress as the Iranian authorities sanctioned persecution against persons of her faith. She claimed the new President had vowed to turn Iran into "a perfect Islamic country" and that members of the Baha'i faith would be persecuted and victimised more than before. The applicant claimed she feared for her life and freedom in Iran and did not wish to return.

Held: Decision under review set aside.

The Tribunal accepted the applicant's claims of ongoing harassment from the authorities and her neighbours by reason of her Baha'i faith and that she had been denied effective state protection because of her religion. Further, the Tribunal accepted the independent information on the treatment of Baha'is in Iran and noted there had been no reprieve in their ongoing mistreatment. It was satisfied that given the increasing hardline Islamic disposition of the new President, the applicant would be unable and unwilling to avail herself of effective state protection in respect of any mistreatment suffered. The Tribunal noted that the applicant was elderly and found that harassment from her neighbours and the possibility of arrest by the authorities constituted serious harm. Accordingly, the Tribunal was satisfied that the applicant's fear of persecution was well-founded.

Iraq

N05/51042
13 December 2005, Sydney
Ms M O'Brien, Member

IRAQ - RACE - SHIA MUSLIM - POLITICAL OPINION - SUPPORTER OF COALITION - RETURNEE FROM THE WEST- AL-DULAYMI TRIBE - FURTHER PROTECTION VISA - The Shi'ite Muslim applicant was previously recognised as a refugee on the basis of an imputed political opinion against Saddam Hussein's regime. He had been arrested and tortured for information about members of his discussion group. The applicant claimed that he now feared persecution from Islamic extremists and ex-Ba'athists as a perceived stooge of western colonialism and a collaborator with the occupying forces. He claimed that his family lived in hiding following a clash with the Al Dulaymi tribe, during which a former Ba'ath party official responsible for his arrest was killed. The applicant claimed that members of this tribe which was linked to Iraqi insurgents retaliated by burning a relative's house, killing another, and threatening the family. He claimed that the problem with the Al Dulaymi tribe was political and religious as the tribe members were ex Ba'athist and mainly Sunni. The applicant feared being perceived as a collaborator because of his tertiary qualification and because he had been in Australia.

Held: Decision under review set aside.

The Tribunal accepted that the applicant would readily find employment with the Iraqi Government, the coalition, foreign or local agencies or companies, or in private practice. It accepted that such employment could add to his profile and increase the risk of him suffering harm amounting to persecution. Given the applicant's background, such as his relatives' problems with the Al-Dulaymi tribe and his long absence from Iraq and time in Australia, the Tribunal was satisfied there was a real chance that he would be regarded as a traitor and/or collaborator and targeted by Al Dulaymi or by insurgents. This would be for reason of an imputed political opinion in support of the Coalition and the new Government. The Tribunal was also satisfied that the applicant could be seriously harmed or killed by those he feared and that his fear of persecution was well-founded.

Israel

N05/52200
28 November 2005, Sydney
Ms A Younes, Member

ISRAEL - POLITICAL OPINION - MILITARY SERVICE - OCCUPATION OF PALESTINE - The applicant feared persecution arising from his political views and his performance of further military service requirements. He claimed that he was against Israel's occupation of Palestine and believed that the Israeli government had not tried hard enough to resolve the issues between the Israelis and the Palestinians. The applicant claimed he had told a senior officer he did not wish to serve in Gaza and do "dirty jobs". The applicant also claimed he was involved in demonstrations where he was attacked by Jewish extremists and beaten by police when they tried to separate the crowd. He claimed he felt uncomfortable in Israel and that a friend had warned him that talk in his old army unit about him was extremely negative and the commanding officer was annoyed with him.

Held: Decision under review affirmed

The Tribunal accepted that the applicant did not support Israel's occupation and that he believed the government had not tried hard enough to resolve the issues between Israelis and Palestinians. However, it found that his views were moderate and balanced rather than extreme. The Tribunal accepted that the applicant was attacked by the police in demonstrations, but did not accept that his political views were the reasons for any harm he suffered. Rather, it found that he was targeted because he was involved in a situation that led to civil disturbance. Based on the applicant's evidence that he did not take seriously his friend's warning in relation to his old army unit, the Tribunal was satisfied that he did not have a genuine fear of persecution. Further, the Tribunal was satisfied that if he returned to Israel and performed military service, this would not result in him suffering Convention persecution. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

Nepal

N05/52535
16 December 2005, Sydney
Dr R Witton, Member

NEPAL - RELIGION - EVANGELICAL CHRISTIAN - POLITICAL OPINION - MAOIST - The applicant feared persecution from the authorities due to her evangelical Christian commitment which would contravene the Nepalese law against proselytising. Having converted from Hinduism to evangelical Christianity, the applicant feared harm from militant Hindus and claimed that the authorities would not or could not protect her in such a situation. The applicant claimed that she also feared harm from the government for reason of imputed political opinion through her association with her husband, a former Maoist adherent. She feared that the Maoists would kill her and her children because of her unwillingness to join their cause. In addition, the applicant claimed that she would be seriously harmed or killed for sharing her faith with non-Christians in Nepal.

Held: Decision under review set aside.

Having regard to independent information, the Tribunal accepted that both Maoist insurgency and militant Hinduism had increased recently in Nepal. It accepted that evangelical Christians and members of other religious minorities had been the target of attacks. The Tribunal also accepted that Hindus who converted to another faith may be socially ostracised or abused. It accepted that the applicant had converted to evangelical Christianity, would upon return be active in promoting her evangelical beliefs and may not be able to access state protection. It accepted there was a real chance that she may be harmed either by the Maoists or by the authorities acting in accordance with the laws against proselytising and for her imputed pro-Maoist political opinion through her association with her husband. The Tribunal noted the agreement which allowed citizens of Nepal to live in India. However, it found, given reports of increasing violence in India against evangelical

Christians, that the applicant would not have effective protection in India. Accordingly, the Tribunal found that the applicant's fear of persecution was well-founded for reasons of religion and imputed political opinion.

N05/52813

23 January 2006, Sydney

Mr J Blount, Deputy Principal Member

NEPAL - PARTICULAR SOCIAL GROUP - BUSINESSMEN - POLITICAL OPINION - MEMBER OF NEPAL TARUN DAL - The applicant feared persecution as a political party activist and also as a businessman who was targeted by Maoists. He claimed that the Maoists had been extorting money from him and he had given the amounts demanded. The applicant claimed, however, that a year ago the Maoists sent him a letter demanding a large sum of money and threatened that, if the money was not paid, unspecified actions might be taken. The applicant claimed that the authorities did nothing to protect him and his business despite him reporting the threat to the police. He claimed that if he returned to Nepal, he would be kidnapped, tortured and killed and that his business and other properties would be destroyed for non-payment of the demand. The applicant also claimed that he was an active member of Nepal Tarun Dal, a youth wing of Nepali Congress and that as a result the authorities would not protect him.

Held: Decision under review set aside.

The Tribunal found that the applicant was a credible witness and accepted that insurgent Maoists had demanded monetary payments, accompanied by non-specific threats. It noted that there were reports of business persons, including in the applicant's own area, being harmed, kidnapped or killed by the Maoists under similar circumstances. The Tribunal was not satisfied that the applicant faced a real chance of persecution as a member of the youth wing of Nepali Congress. However, it found there was a real chance that he would be seriously harmed by the Maoists for non-payment of their demands should he return to Nepal. The Tribunal found on the issue of effective protection in India, it appeared that practical access to and enjoyment of notional rights in India could not be assumed in practice. Accordingly, it found that the applicant had a real chance of persecution for reasons of political opinion combined with membership of a particular social group such as businessmen aligned with Nepali Congress.

Pakistan

V05/18165

16 January 2006, Melbourne

Ms I Tsiakas, Member

PAKISTAN - POLITICAL OPINION - PAKISTAN MUSLIM LEAGUE - The applicant feared persecution for reasons of his membership of the Pakistan Muslim League (PML). He claimed he would be killed by extremist members of the Muttahida Quami Movement party (MQM) for his political opinion and he also feared the police. The applicant claimed that he and his relative had been detained and tortured, that he was forced to go underground and his family were harassed to determine his location. The applicant later rescinded his claims that he and a relative were detained and tortured but maintained that he would be persecuted by the MQM for his political opinion. He also claimed to fear persecution for an imputed political opinion because of his relative's political profile and his sibling's limited involvement with the PML.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was a member of the PML from the mid to late 1990s. However, it found that he was not a politically active member and therefore did not accept his claims that he and his family experienced persecution and harassment by the MQM or the police. The Tribunal accepted that the applicant's relative was Secretary of the PML for his village area and that he experienced some harassment when he left the party. It also accepted that his sibling helped his relative in the village but was not really involved in the PML. On this basis, the Tribunal did not accept that the applicant faced a real chance of persecution because of his, his sibling's, or his relative's involvement in the PML if he returned to Pakistan. Accordingly, it was satisfied that the applicant did not have a well-founded fear of persecution for his actual or implied political opinion or any other Convention reason.

Philippines

N05/52501

22 December 2005, Sydney

Ms R Mathlin, Member

PHILIPPINES - PARTICULAR SOCIAL GROUP - WOMEN WHO HAVE ANNULLED THEIR MARRIAGE - POLITICAL OPINION - ANNULMENT - CORRUPT POLICE - DENIAL OF STATE PROTECTION - The applicant feared persecution from her former husband and claimed that she would not obtain protection from the authorities because of her membership of a particular social group or her political opinion arising from having annulled her marriage. She claimed she had been seriously harmed by her former husband, a criminal with connections in the police force, the church and with politicians. The applicant claimed she had previously been unable to obtain protection from police or the Catholic Church and that corrupt police had threatened her. She claimed she would be harmed by her former husband's criminal gang and would face harm from the Church and the government because she criticised the Church for supporting her husband and had her marriage annulled. The applicant also claimed a priest had threatened her because she defamed the church.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant had been unable to obtain protection from the police or the church against the harm inflicted by her former husband. It found there was a real chance that she would face serious harm from him in the future. However, the Tribunal found the harm inflicted and any further harm the applicant may face was not Convention related. It found her inability to obtain protection was because of her husband's financial and other influence with state institutions including police. The Tribunal did not accept that the authorities or the Church withheld protection because of the applicant's political opinion by reason of her seeking an annulment of her marriage, or that a particular social group comprising such women existed. It was not satisfied the priest's threats alone constituted persecution and found the applicant's fear that she would be persecuted for her opposition to the Catholic Church was not well-founded. The Tribunal found the claims that she feared harm from corrupt police who previously threatened her were not related to the Convention. Accordingly, it found that the applicant's fear of persecution was not well-founded.

Solomon Islands

N05/52566

7 February 2006, Sydney

Ms P McIntosh, Member

SOLOMON ISLANDS - PARTICULAR SOCIAL GROUP - WOMEN - DOMESTIC VIOLENCE - LACK OF STATE PROTECTION - The applicant feared she would face persecution as a single woman without her Australian husband and children. She claimed that she had been a victim of domestic violence inflicted by her ex-husband. The applicant claimed that she lodged a complaint with the police after her husband first assaulted her but they laughed and joked about her plight and did nothing to help her. She also claimed that her step-brothers threatened her with physical abuse because their father had left their mother to marry her mother. The applicant claimed that because she was divorced and returning without her husband and children, her relatives would see her as an outcast and would not protect her from "predatory males" generally and her step-brothers in particular. She claimed that in the Solomon Islands it was regarded as normal for men to strike women. The applicant claimed that the State would be ineffective in protecting her from harm.

Held: Decision under review set aside.

The Tribunal found that the applicant was a credible witness. It found that her ex-husband was not in the Solomon Islands and the chance was remote that he might harm her again. However, the Tribunal accepted that the chance the applicant may be assaulted or sexually harassed by male neighbours, step-brothers or other male relatives was far from remote and was satisfied that she may be subjected to serious harm. Based on independent information the Tribunal found that female victims of violence from husbands and men in their communities were unlikely to obtain protection from the State. It was satisfied that there was a discriminatory and systematic withholding of state protection from

women in the Solomon Islands, who formed a particular social group. Accordingly, the Tribunal found that the applicant had a well-founded fear of Convention-related persecution.

FEDERAL COURT JUDGMENTS

QAAT v MIMIA

[2006] FCAFC 18

Federal Court of Australia, Dowsett, Allsop, Edmonds JJ, QUD 244 of 2005, 24 February 2006

Immigration - Protection Visa application - claim of particular social group of “family” - where finding that appellant the only member of family subject to harassment - where finding that appellant not member of particular social group - whether Tribunal misconstrued Refugees Convention - whether jurisdictional error.

This was an appeal from a judgment of the Federal Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations.

The appellant, a national of Afghanistan, claimed to fear persecution at the hands of the local commander (the appellant’s ex-brother-in-law) by reason of his membership of a familial particular social group. The appellant claimed that he feared persecution by the commander because of his relationship with his sister, as a result of the commander’s humiliation and anger at the appellant’s sister refusing to continue in a marriage with the commander.

The Tribunal accepted the commander was harassing the appellant’s family but found that the appellant was not a member of a social group because his father had deflected blame towards him. Therefore, there was no family group which would be subject to harassment on this account, only the appellant was likely to be. The Tribunal found that the essential and significant reason for the commander’s conduct was his anger and humiliation because of his ex-wife’s refusal to continue in their marriage.

The primary judge (Kiefel J) held that to be persecuted, the conduct of the commander towards the family must be for the reason that they are members of the family. However, in this case the harassment was because the commander was angry and humiliated about his domestic situation. His Honour found no jurisdictional error in the way the Tribunal dealt with the question of particular social group.

Held: per curiam, appeal allowed.

- (i) The Tribunal’s findings displayed jurisdictional error due to a number of fundamental errors in the application of the Convention.
- (ii) There was in effect, a misconstruction of the Convention by requiring more than the humiliation as the motivating factor, and there was an additional error, that the social group seems to have been eliminated merely because one member of the social group was not a factual target of the conduct.
- (iii) The commander was humiliated and angry about his ex-wife’s conduct and the appellant feared that the humiliation and anger would be vented on him. If it was vented on him because he was his sister’s brother, that is, because he was a member, in that capacity, of the family, there is a plain foundation for the operation of section 1A(2) of the Refugees Convention. The fact that the commander was not prepared to direct conduct to one member of the group, did not destroy the existence of that group. The proposition that conduct is not directed to one member of the group does not deny the fact that it is being directed to the other member of the group because he or she is a member of the group.

SZEEU v MIMIA

[2006] FCAFC 2

Federal Court of Australia, Moore, Weinberg, Allsop JJ, NSD 521 of 2005, 24 February 2006

SZEEZ v MIMIA, NSD 556 of 2005

SZXDA v MIMIA, NSD 1067 of 2005

SZEOP v MIMIA, NSD 858 of 2005

SZBMI v MIMIA, NSD 1353 of 2005

Immigration - Protection Visa application - circumstances in which later Full Court can depart from earlier Full Court decision - *stare decisis* - determining *ratio decidendi* - application of *MIMIA v Al Shamry* (2001) 110 FCR 27 - application of s.424A(1) of *Migration Act 1958*.

This judgment concerned five appeals from judgments of lower courts dismissing applications for judicial review of Refugee Review Tribunal decisions that the appellants were not persons to whom Australia had protection obligations. Each appeal raised as a legal issue the operation of s.424A of the *Migration Act 1958* (the Act) having regard to the judgment of the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27 (Al Shamry) and the later judgment of the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 (SAAP). In particular, the Court was called upon to consider whether *Al Shamry* should not be followed on the basis that it is plainly wrong and, if it is to be followed, how s.424A operated on the facts of each of the appeals.

In *SZBMI*, the appellant, a national of Bangladesh, claimed to fear persecution by reason of his religion and political opinion. The Tribunal found he was not credible and had been untruthful. The appellant identified two pieces of "information" particulars of which should have been, but were not, provided in writing for comment. The first concerned a statement by the appellant that he had fled overseas (the flight information), which was contained in his written statement in support of his protection visa application. The second piece of information was that the Tribunal had received essentially the same claims in the same words by several other applicants with the same migration agent (the similar claims information).

In *SZEEU*, the appellant, a national of Bangladesh, claimed to fear persecution by reasons of his claimed association with the Awami League (AL) and, separately, his homosexuality. The appellant identified four pieces of information that were not dealt with as required by s.424A. In the course of the appeal the Minister conceded that one of these pieces of information, concerning his answer on the original protection visa application about his education history, was information that formed part of the reasons for the decision.

In *SZEEZ*, the appellant, a national of India, claimed to fear persecution as a result of being falsely implicated, through a friend, with the activities of the LTTE. He claimed as a result of this that he was gaoled by police; and in retaliation for informing on his friend, his mother was hanged and his son was murdered. The Tribunal did not accept most of what he said about his experiences in India. The appellant argued that six pieces of information were not dealt with in conformity with s.424A of the Act. Relevantly to the outcome of the appeal, one of these pieces of information was the appellant's answers to questions 47 and 48 of his application for a protection visa (the manner of exit information). In its decision the Tribunal recorded that at the hearing, the appellant had been referred to his answers to the two questions. The answers were read to the appellant and he accepted them. The Tribunal indicated that it preferred the appellant's answers in questions 47 and 48 and rejected as not credible his later evidence to the Tribunal as to how he left India.

In *SZEOP*, the appellant, a national of Bangladesh, claimed to fear persecution on the grounds of his involvement, as a student, with the AL, and for speaking out on issues including religious tolerance, prostitution and gay rights. He also claimed to have had casual relationships with men. In this appeal the appellant raised numerous grounds, including failure of the Tribunal to make inquiries arising from the appellant's claims; the presence of a detention centre guard at the hearing; and five pieces of information for which particulars were not provided under s.424A of the Act. Of relevance to the outcome of the appeal was the piece of information that the appellant had not made any claims for refugee status before making the application for a protection visa in August 2004 (the date of application information).

In *SZDXA*, the appellant, a national of Bangladesh, claimed to have been a member of the AL and to have held positions in the party, and to fear persecution on the basis of his political activities and associations. The Tribunal concluded that the appellant's evidence was inherently unreliable and the appellant was not a credible witness. It found his claims were false. The appellant argued breach of s.424A in respect of four pieces of information. Relevant to the outcome of this appeal was the information that the appellant's migration advisor

was known to the Tribunal to play a prominent role in the AL in Australia and the Tribunal's concern that this made the appellant's non involvement in AL activities in Australia strange (the Haque information).

Held: Tribunal decisions in all five appeals set aside and remitted for reconsideration.

Whether Al Shamry was correctly decided and should be followed

per curium:

- (i) The Court should not depart from the construction of s.424A(3)(b) of the Act as expressed by Ryan and Conti JJ in *Al Shamry* at [17] that the term “applicant” in s.424A(3)(b) of the Act means “applicant for review by the Tribunal of a Ministerial decision” and “application” correspondingly means the “proceeding before the Tribunal which is the vehicle for such a claim for review”. The reasoning of the Full Court in reaching this conclusion is cogent and persuasive. It is not clearly, plainly or manifestly wrong. (at [9] *per Moore J*, [154] *per Weinberg J*, [184], [199] *per Allsop J*)

Combined impact of Al Shamry and SAAP on operation of s.424A(3)(b)

per Weinberg J

- (ii) If *Al Shamry* stood alone and no actual unfairness could be demonstrated relief would simply be denied in the exercise of judicial discretion. *SAAP* seemingly precludes this approach from being adopted. Henceforth any decision based on information adverse to the applicant where such information does not fall within any of the exceptions in s.424A(3) is likely to be set aside irrespective of whether there has been any actual unfairness. (at [122])

“a part of the reason”

per Allsop and Weinberg JJ,

- (iii) In respect of whether or not information is the reason or part of the reason for affirming the decision, following the decision in *SAAP*, the question to ask, by reference to the reasons of the Tribunal, in the context in which one finds them, is whether the information in question was a part (that is, any part) of the reason for affirming the decision. To the extent that the reasons of the relevant majorities in *Paul v MIMIA* (2001) 113 FCR 396 and *VAF v MIMIA* (2004) ALR 471 suggested that the relevant part of the reason have a stature or importance or be of a character which would make it unfair not to invoke the procedures of s.424A, following *SAAP*, this approach must be rejected. It is only necessary that the information be a part of the reason. (at [215] *per Allsop J*)
- (iv) Taking into account the rigorous approach of the High Court [in *SAAP*] when considering the consequences of a breach of natural justice, the expression “a part of the reason” in s.424A of the Act should be read benevolently, in favour of an applicant for review. If there is any doubt as to whether information that is adverse to an applicant did form part of the reason for decision that doubt should generally be resolved in favour of the applicant. (at [163] *per Weinberg J*)

per Moore J (dissenting)

- (v) The reasoning in *SAAP* does not indicate that the approach of Finn and Stone JJ in *VAF* should not be followed (at [26]). On that approach it is necessary, in an appropriate case, to consider the significance of the information to the reasoning process adopted by the Tribunal and evaluate whether the information may be properly characterised as forming part of the reason for affirming the delegate's decision. (at [23])

Effect of adoption or affirmation of earlier statements at hearing

per Moore J

- (vi) The approach of Jacobson J in *NAZY v MIMIA* [2005] FCA 744 was correct. Mere adoption of an earlier made statement at the hearing before the Tribunal does not transform that information into information provided by the appellant in his application for review. Different considerations could arise if it was clear that the Tribunal treated only the adoption of the earlier information as the fact relevant to its consideration of the application in review. (at [20])

“information” vs “mental processes”

per Allsop J:

- (vii) If a tribunal says that it does not believe an applicant for reasons that can be seen to include the fact that one thing was said in the prior statement and another at the hearing, or the fact that if what is now being asserted is true it would have been in the prior statement in that form, the information

would be part of the reason. The information is the knowledge imparted to the tribunal of a prior statement in a particular form. The significance given to it by considering it in light of the evidence is the product of mental processes. This significance and those mental processes are not information, but rather are why the information is relevant for s.424A(1)(b) of the Act. (at [221]).

Effect of independent basis for decision

per Allsop J:

- (viii) If it can be shown that there was a basis for the Tribunal's decision which can be seen to be entirely independent of the failure to follow s.424A, that is sufficiently analogous to the first of the alternatives referred to in [58] of *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (utility) to warrant the withholding of relief. (at [233]).

SZBMI

per Weinberg and Allsop JJ:

- (ix) Both the "flight information" and the "similar claims information" constituted information that was a part of the reason for the decision and therefore s.424A applied to them.

per Weinberg J:

- (x) Although the Tribunal dealt with the "similar claims information" as though it simply bolstered a conclusion that it had already arrived at, it does not follow that it did not play "a part". It would be both artificial, and dangerous, to determine whether there is a causal link between a piece of information that is seriously adverse to a claimant, and a decision rejecting that person's claim, by focussing largely upon where in the reasons for decision, the information is discussed.

per Moore J (dissenting):

- (xi) The "flight information" was information for the purposes of s.424A(1). It was knowledge used by the Tribunal in assessing the credibility of the appellant and assessing the veracity of the account given by the appellant to the Tribunal. However, it was not of sufficient significance to warrant a conclusion that it formed a part of the Tribunal's reasons for affirming the decision (applying the approach of Finn and Stone JJ in *VAF*). In respect of the "similar claims" information, assuming it constituted "information" for the purposes of s.424A, the fact that there were similarities was not relied on by the Tribunal. Rather the Tribunal rejected the appellant's central claims by a process of reasoning not dependant on the observed similarities. Accordingly, no obligation arose under s.424A(1) in respect of this information.

SZEEU

per curium:

- (xii) By concession of the Minister, the "education information" was information which formed part of the reason for the Tribunal's decision.

SZEEZ

per Allsop J and Weinberg JJ:

- (xiii) The requirements of s.424A were not met in respect of the "manner of exit information". The answers to questions 47 and 48 of the visa application was information for the purposes of s.424A(1) and it was a part of the Tribunal's reasons for affirming the decision.

per Weinberg J:

- (xiv) The distinction drawn by Moore J, that the Tribunal acted upon the adoption or affirmation at hearing of the answers in respect of the "manner of exit" information rather than the answers on the visa application form itself, is subtle and difficult to apply.

per Moore J (dissenting):

- (xv) Each of the grounds of possible s.424A "information" came within the exception in s.424A(3)(b) - information the applicant gave for the purposes of the application. In relation to the "manner of exit" information, the Tribunal acted on the appellant's affirmation of the answers to the questions on the protection visa application given at the hearing rather than the fact that the application contained those answers.

SZEOP

per Weinberg and Allsop JJ:

- (xvi) The “date of application” information was a part of the reason for the decision to the extent that it related to the delay in applying for the protection visa.

per Allsop J:

- (xvii) Whilst it is undoubted that the Tribunal had regard to what it considered the unsatisfactory explanation for the delay in seeking a protection visa, the Tribunal’s reasons reveal reliance on the fact that the visa was not applied for until 2004 in its conclusion that he held no fear of persecution.
- (xviii) An additional ground upholding the appeal was the failure to put information concerning photos on the internet sighted by the Tribunal as a result of its own inquiries. The photos were information. Although reflecting only a lack of corroborative evidence, that lack of evidence was a part of the reason for the decision.

per Moore J (dissenting):

- (xix) The Tribunal did not found its decision, even in part, on the fact that the appellant had applied for a protection visa more than three years after entering Australia. Rather, the decision was founded, in part, on the failure of the appellant to provide the Tribunal with an explanation for the delay which was reasonable, rational, and consistent with a fear of persecution.

SZDXA

per curium:

- (xx) The information regarding the Tribunal’s knowledge of the applicant’s migration advisor was information that formed part of the reason for decision, and failure to put this to the applicant in writing constituted a breach of s.424A.

SZEPQ v MIMIA

[2006] FCA 133

Federal Court of Australia, Tamberlin J, N2109 of 2005, 10 February 2006

Immigration - Protection Visa application - where appellant claimed to fear persecution as member of Khalistan Liberation Army - whether Tribunal took into account erroneous fact - whether jurisdictional error.

This was an appeal from a judgment of the Federal Magistrates Court affirming a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations.

The appellant, a citizen of India, claimed to fear persecution on the basis of his membership of the Khalistan Liberation Army. He claimed that he had been tortured by the police because of his involvement with that group and that the police had blacklisted him. The Tribunal referred to independent sources to find that no such organisation as the Khalistan Liberation Army existed. On this basis the Tribunal found that the appellant’s claims lacked credibility and did not accept that he was on a police blacklist because of his membership of the Khalistan Liberation Army. In addition the Tribunal found that country information suggested the appellant could relocate in India. Amongst the material before the Tribunal was a communication from the Australian Department of Foreign Affairs and Trade (DFAT) which stated that no such organisation as the Khalistan Liberation Army was known. However the document continued, stating, “[t]he Khalistan Liberation Army operates out of Pakistan along the border region with the Punjab and promotes and uses violence to achieve its objections which are unclear beyond the establishment of Khalistan’.

At first instance the Federal Magistrates Court affirmed the decision of the Tribunal. The issues on appeal included whether the Tribunal took into account an erroneous fact which amounted to a jurisdictional error and whether the Tribunal breached the rules of procedural fairness, either in a statutory form or according to the ordinary applicable administrative law principles.

Held: Appeal allowed and the matter remitted for reconsideration.

- (i) The document provided by DFAT constituted clear evidence that the Khalistan Liberation Army did exist, therefore one of the principal reasons, if not the principal and most important reason for the Tribunal’s finding of lack of credibility was based on a clearly erroneous fact. This constituted a sufficiently basic error amounting to an error of jurisdiction.

- (ii) The Tribunal based the finding of relocation on the fact that the applicant has been disbelieved in this case. If an appellant's claim of persecution is disbelieved, then of course it is easier to reach a conclusion that there is a real chance of relocation. Therefore the question of relocation is not a sufficient answer to the error which existed and which amounts to a jurisdictional fact.
- (iii) The Tribunal did not breach its obligations to provide procedural fairness to the appellant. The appellant was on clear notice that his story was disbelieved and he had an opportunity to put forward his case to the Tribunal.

VWBU v MIMIA

[2006] FCA 39

Federal Court of Australia, Merkel J, VID 591 of 2005, 3 February 2006

Immigration - Protection Visa application - whether Tribunal failed to consider claim made by appellant - whether independent finding of adequate state protection - whether failure to exercise jurisdiction.

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations.

The appellant, a citizen of Turkey, claimed to fear being persecuted by members of the Partiya Karkeren Kurdistan (PKK) because her and her husband's names were on a PKK "blacklist" as a result of her husband's activities in the Turkish Army's Special Forces operations against the PKK. Whilst the Tribunal was satisfied that the appellant had a subjective fear of persecution, it found that her fear of persecution was not well-founded. Based on country information the Tribunal found that there was no information to indicate that PKK members are killing or otherwise attacking members of the armed forces or their families, particularly when they are off duty.

The essential contention in the appeal was that the Tribunal failed to address and deal with the claim articulated by the appellant that she had a well-founded fear of persecution based on her membership of a particular social group namely that she was the wife of a person on a PKK blacklist and /or was herself on a blacklist and that the Tribunal constructively failed to exercise its jurisdiction or ignored relevant material.

Held: Appeal allowed. Tribunal decision quashed. Matter remitted for redetermination according to law.

- (i) The Tribunal failed to exercise its jurisdiction by failing to consider and make findings in respect of the claims made by the appellant.
- (ii) As the Tribunal accepted that the appellant had a subjective fear of persecution by reason of "the blacklist claim", it was bound to determine whether the subjective fear was well-founded and whether the fear was for reasons of an actual or imputed political opinion or as a member of a particular social group being that she was a person on a PKK blacklist or she is the wife of a person on a PKK blacklist. However, the Tribunal considered a different claim, namely whether a fear of persecution held by a member of the armed forces or a family member of the armed forces was well-founded.
- (iii) The Tribunal's finding of adequate state protection related to members of the Turkish armed forces and their families. The Tribunal did not address the question of whether a person in the appellant's position was able to obtain adequate protection. The Tribunal's failure to deal with the appellant's specific claim that the Turkish authorities stated they could only provide her with protection for 3 months but no longer, supports the view that it was dealing with a different claim.

FEDERAL MAGISTRATES COURT JUDGMENTS

[QAAP v Minister for Immigration](#)

[2005] FMCA 1908

Federal Magistrates Court of Australia, Jarrett FM, BRG 439 of 2004, 21 December 2005

Immigration - Protection Visa application - Shia Muslim earlier recognised as refugee due to fear of Taliban - further Protection Visa - whether Tribunal failed to identify circumstances in respect of which refugee status first granted - where Tribunal found Taliban no longer in power and unable to form government - where no investigation of capacity of Taliban to persecute individuals for religious or ethnic reasons - whether Tribunal asked wrong question and failed to take into account relevant information.

The applicant, a national of Afghanistan, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations.

The applicant, a Shi'a Muslim of Hazara ethnicity, was granted a temporary protection (class XA) subclass 785 visa in August 2000 on the basis that there was a real chance that "he could be recruited or face other adverse actions by the Taliban on the basis of his ethnicity or religion." The applicant made an application for a further protection visa in August 2000 which was refused by a delegate of the Minister in February 2004.

In affirming the delegate's decision, the Tribunal found that Article 1C(5) of the Refugees Convention applied to the applicant because the circumstances in connection with which he was recognised as a refugee had ceased to exist. Specifically, the Tribunal found that at the time of its decision the Taliban were no longer in power in Afghanistan and would not re-emerge and either be able to form a government or be a powerful political movement in Afghanistan in the reasonably foreseeable future. Considering the possible application of Article 1A(2) of the Convention in respect of claims not put forward in the applicant's initial application for a class XA visa, the Tribunal accepted independent country information and was not satisfied that there was a real chance that the applicant would be subjected to persecution "because of his Hazara ethnicity, his Shi'a religion, or for any other Convention-related reason."

The applicant contended that the Tribunal fell into jurisdictional error by asking the wrong question and failing to take into account relevant information, namely information relied on by the Tribunal member in other decisions.

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) The Tribunal fell into jurisdictional error by failing to address the correct question raised by Article 1C(5) of the Refugees Convention. The Tribunal failed to accurately identify the circumstances in respect of which refugee status was first granted: *QAAH v MIMIA* [2005] FCAFC 136.
- (ii) The basis for the claims by the applicant of persecution by the Taliban were not properly recognised by the Tribunal as based in his ethnicity and religion alone. No investigation of the capacity of the Taliban to persecute individuals in Kabul for religious or ethnic reasons was undertaken by the Tribunal - the focus was on the capacity of the Taliban to return to power in government.
- (iii) The decision is not saved by the Tribunal's finding that the applicant was not otherwise entitled to the protection of the Refugees Convention and the *Migration Act* 1958 by reason of claims made that were unrelated to the circumstances in connection with which he was recognised as a refugee. That finding could not have been made if the Tribunal had correctly addressed the first issue that arose with respect to Article 1C(5).

[Applicant M93 of 2004 v MIMIA & Anor](#)

Immigration - Protection Visa application - where child applicant from Thailand - particular social group "abandoned young girls" - prostitution and abuse - whether denial of opportunity for education constitutes serious harm - jurisdictional error.

The applicant, a national of Thailand, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that she was not a person to whom Australia had protection obligations.

The applicant, a 13 year old child, assisted by her paternal grandfather, claimed to face persecution because of her membership of a particular social group variously described as "young abandoned unprotected girls", "abandoned young girls in Thailand at risk of child prostitution and abuse" or "abandoned young girls". She lived on a farm with relatives as her parents were poor and itinerant.

The Tribunal accepted the applicant's claims in relation to living arrangements on the farm, that child prostitution in Thailand was a serious problem and that corruption was rife and laws were not enforced at street level. The Tribunal did not accept that the applicant's living conditions involved "serious harm" as required by s.91R(1)(b) of the *Migration Act 1958* (the Act). It was not satisfied that the applicant's relatives would allow her to be raped or sold into prostitution and was not satisfied there was a real chance the applicant would be persecuted. The Tribunal found that those who may persecute the applicant were not motivated by her membership of any particular social group, but rather they would be motivated by financial reasons or personal gratification. The Tribunal found that the Thai Government did not condone or tolerate the rape or sale into prostitution of "abandoned young girls", nor that there was a systematic failure to protect "abandoned young girls".

The applicant contended that the Tribunal: erred in its application of the definition of serious harm under s.91R; erred in its consideration and application of the real chance test; erred in its consideration of Convention nexus; and erred in its consideration of State protection.

Held: Tribunal decision quashed and remitted for reconsideration according to law.

- (i) The Tribunal decision was affected by jurisdictional error as the Tribunal misdirected itself in relation to the issue of "serious harm", it failed to address essential integers of the applicant's claim; it misdirected itself as to Convention nexus; and it erred in its consideration of State protection.
- (ii) The Tribunal misdirected itself as to the meaning of serious harm required by s.91R(1)(b) of the Act. The concept of serious harm must include denial of education to a child. This is not to expand the instances of harm referred to in s.91R(2), but to give full meaning and effect to the notion that children are entitled to an education and denial of education may constitute serious harm. It can constitute by its denial a deprivation of physical and mental development of the child. It has the potential to provide the basis for significant economic hardship or denial of access to basic services where in both instances that denial threatens the person's capacity to subsist.
- (iii) In assessing whether the applicant faced a real chance of persecution for a Convention reason the Tribunal failed to address essential integers of the applicant's claim. The issues raised in the case for the applicant went beyond the risk identified in the Tribunal's reasons of being "raped or forced into child prostitution and as a result contracting HIV or AIDS". The integers included poor living conditions, lack of schooling and homelessness.
- (iv) Having dismissed the Convention nexus due to the financial motivation of the perpetrators of the persecution, the Tribunal misdirected itself and fell into error. The Tribunal focused on the motivation of those inflicting harm rather than considering as required that financial motivation does not detract from or necessarily lead to a conclusion that there is no Convention nexus.
- (v) The Tribunal fell into error in its consideration of State protection in that it confined its enquiry to the narrow issue of whether or not the State condoned or tolerated the relevant harm. The Tribunal was bound to consider the issue relevant in this instance as to whether or not the Government of Thailand could provide a reasonably effective and impartial police force and justice system to protect the applicant, in accordance with the High Court authority in *MIMA v Respondents S152/2003* (2004)

205 ALR 487.

LEGISLATION UPDATE

Legislative developments of relevance to the work of the Refugee Review Tribunal are noted below

Regulations made

Migration Amendment Regulations 2006 (No.1) (SLI 10 of 2006)

The *Migration Amendment Regulations 2006 (No.1)* (SLI 10 of 2006) (the Regulations) were made on 15 February 2006 and commenced on 1 March 2006.

Amongst other things, the purpose of the Regulations is to broaden aspects of the national security ground for cancelling a visa under s.116 (1) (g) of the *Migration Act 1958* and r.243 (1) (a) of the Regulations but narrow the subclasses of visas to which part of it applies.

The previous provision provided that a determination could be made where the person's presence in Australia is prejudicial to Australia's relationship with another country. Under the amended provision, actual prejudice to Australia's relations with a foreign country does not have to be shown.

To ensure that Australia's international non refoulement obligations are not adversely affected, certain humanitarian and protection visas specified as relevant visas such as subclass 447,449,451, 785, 786 and 866 are excluded from the operation of the amendment.

Instead, applicants for subclass 447, 449, 451, 785, 786 and 866 visas must satisfy a new Public Interest Criterion 4003A (rather than PIC 4003) which provides that the applicant is not determined by the Foreign Minister to be a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction. It does not include the requirement in the amended PIC 4003 that the person's presence in Australia must not be determined to be contrary to Australia's foreign policy interests.

A copy of the regulations and the Explanatory Statement can be found at

<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/asmade/bytitle/1F6D05EACF642678CA25710F002045F9?OpenDocument>

CASELOAD OVERVIEW

RRT Decisions – March 2006

Country	Primary decision affirmed	Primary decision set aside	No jurisdiction	Withdrawn	Other	Total
Afghanistan	0	2	0	0	0	2
Bangladesh	3	1	21	0	0	25
Belarus	1	0	0	0	0	1
Brazil	2	0	0	0	0	2
Bulgaria	2	0	0	0	0	2
Burma (Myanmar)	1	3	0	0	0	4
Cambodia	1	0	0	0	0	1
China (PRC)	48	15	2	0	0	65
Congo Democratic Republic of	1	0	0	0	0	1
East Timor	0	0	0	0	1	1
Egypt	4	2	0	0	0	6
El Salvador	1	0	0	0	0	1
Ethiopia	0	1	0	0	0	1
Fiji	1	1	0	0	0	2
Ghana	0	2	0	0	0	2
India	23	0	8	0	0	31
Indonesia	10	0	0	0	0	10
Iran	1	1	0	0	0	2
Iraq	0	4	0	0	0	4
Jordan	0	1	0	0	0	1
Kyrgyzstan	2	0	0	0	0	2
Lebanon	2	1	0	0	0	3
Libya	0	1	0	0	0	1
Malaysia	14	0	0	0	0	14
Mongolia	2	0	0	0	0	2
Nepal	3	2	0	0	0	5
Nigeria	1	0	0	0	0	1
Pakistan	5	1	0	0	0	6
Palestinian Terr (W Bank/gaza)	1	0	0	0	0	1
Papua New Guinea	4	0	5	0	0	9
Philippines	3	0	0	0	0	3
Russian Federation	1	0	0	0	0	1
Serbia & Montenegro	0	1	0	0	0	1
Sierra Leone	0	2	0	0	0	2

Singapore	1	0	0	0	0	1
South Korea	6	0	1	0	0	7
Sri Lanka	7	4	0	0	0	11
Stateless	1	0	0	0	0	1
Sudan	3	0	0	0	0	3
Syria	1	0	0	0	0	1
Thailand	7	0	0	0	0	7
Tonga	1	0	0	0	0	1
Turkey	1	2	0	4	0	7
Vietnam	1	0	0	0	0	1
Zimbabwe	1	0	0	0	0	1

ACCESSING TRIBUNAL DECISIONS

Access on Tribunal Premises

Access to published decisions of the Refugee Review Tribunal can be obtained from the Sydney and Melbourne Registries of the Tribunal.

The Sydney Registry is located at: Level 11
83 Clarence St
Sydney NSW 2000

The Melbourne Registry is located at: Level 12
460 Lonsdale St
Melbourne VIC 3000

Access via the Internet

A selection of Tribunal decisions is also currently available on the Refugee Review Tribunal's World Wide Web site located at <http://www.rrt.gov.au>.

The web site also contains information about how to apply to the Tribunal, how the Tribunal is organised, the function of the Tribunal and what it aims to achieve, caseload statistics, as well as copies of this and previous RRT Bulletins.

The RRT web site is updated on a regular basis.

The Tribunal's Email address is: rrtinfo@rrt.gov.au

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