RRT Bulletin

The Refugee Review Tribunal decisions digest

Issue No. 5/2006

1 May 2006

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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Afghanistan

N05/52591
6 February 2006, Sydney
Ms J Morris, Member

AFGHANISTAN – HAZARA – RELIGION – SHIA MUSLIM – SECULAR LIFESTYLE – RELOCATION – FURTHER PROTECTION VISA - The Hazara Shia applicant from Ghazni had previously been recognised as a refugee in Australia on the basis that he had a well-founded fear of persecution from the Taliban. Since coming to Australia the applicant claimed that he behaved differently by going to bars, cinemas and pubs. He stated that he also visited the library to use the Internet. The applicant claimed that he did not go to the Mosque or observe Ramadan and felt as if he had rejected Islam. He claimed that his changed attitudes and behaviour would put his life in danger if he were to return to Afghanistan.

Held: Decision under review set aside.

The Tribunal found it unnecessary to consider the effect of Article 1C(5) of the Refugees Convention because it was satisfied that he met Article 1A(2). It noted that the applicant had undergone significant changes in his life by abandoning Islam and living a secular and non-Islamic lifestyle. The Tribunal noted that there was an intolerant attitude to secularisation in Afghanistan and that Muslims behaving in a secular manner were in danger of reprisals. It found that the applicant would face harm amounting to persecution from non-state parties, namely people within the Afghan community. However, the Tribunal was satisfied that the authorities would be unable or unwilling to protect him from this harm. It was also satisfied that relocation to another part of Afghanistan was not a viable or reasonable option for the applicant. Accordingly, it was satisfied that his fear of persecution was well-founded.

China

N05/51775
8 December 2005, Sydney
Ms L Nicholls, Member

CHINA – ONE CHILD POLICY – RELIGION – CHRISTIAN – The applicant feared persecution arising from her Christian religion and her failure to comply with the "one child" policy. She claimed that she was harassed and detained by Chinese officials and forced to have an abortion. The applicant claimed that if she returned to China she would be punished for her failure to undergo a pregnancy prevention operation and would be forced to undergo the procedure. In addition the applicant claimed that she would be subject to a risk of persecution as a member of an underground Christian Church whose members had been arrested.

Held: Decision under review affirmed.

The Tribunal did not accept that the applicant had been detained and forced to have an abortion against her will. It noted her personal circumstances and independent information indicating that the government had repudiated forced abortion and sterilisation. The Tribunal found there was not a real chance that the applicant would be forced to undergo sterilisation if she returned to her village. It did not accept the applicant's claims that she was a member of an underground church in China and found that if she continued her interest in Christianity upon return she would not be attracted to prohibited churches. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for any Convention reason.

N05/52646
10 January 2006, Sydney
Mr A Jacovides, Member

CHINA – POLITICAL OPINION – FALUN GONG – HARASSMENT – The applicant feared persecution because he was a Falun Gong practitioner. He claimed that he and his family were targeted by the authorities because they refused to renounce Falun Gong after it was banned in 1999. He claimed that his parents were demoted and suspended by their employers, forced to report their activities and subjected to on-going re-education classes. In Australia the applicant had practised Falun Gong privately because he feared his activities could result in further harassment by the authorities for his family in China. However, he now attended weekly practice sessions and had become involved in protest activities. The applicant claimed he would continue to participate in similar activities in the future.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a committed Falun Gong practitioner. It accepted that the Chinese authorities attributed an adverse political opinion to Falun Gong practitioners who were arbitrarily detained, tortured, sent to labour camps and psychiatric institutions, and suffered persistent harassment from the authorities. The Tribunal was satisfied the applicant was at risk of serious harm amounting to persecution because he would seek to participate in Falun Gong activities in the reasonably foreseeable future. The Tribunal found that the enforcement of the law on banning Falun Gong was discriminatory in that it targeted individuals seeking to express a political opinion against the government. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution for reasons of political opinion.

N05/52711
6 February 2006, Sydney
Mr L Hardy, Member

CHINA – RELIGION – POLITICAL OPINION – FALUN GONG PRACTITIONER – The applicant feared persecution as a Falun Gong practitioner who had started following Falun Gong in early 1999. He claimed he lost his job as a professional after the movement was banned in response to his having taught Falun Gong exercise to others. The applicant claimed that he was detained and forced to write self-critical statements to be used against him in the event of repeated offences. He claimed he was an active covert disseminator of Falun Gong literature for a number of years. The applicant claimed that he was able to obtain a passport to leave China because the authorities did not find any evidence against him. He claimed he had made and maintained contact with the Falun Gong movement in Australia and had attended public protests on behalf of the movement.

Held: Decision under review set aside.

The Tribunal found that many of the applicant's claims about his experience in China were implausible and contradictory. However, the Tribunal accepted that the applicant had been a genuine practitioner of Falun Gong at least since arriving in Australia and that he engaged in this practice otherwise than for the purpose of strengthening his claim to be a refugee. It accepted that were he to return to China he would feel compelled to continue practising Falun Gong and were he to practise openly in China he would face a real chance of persecution for the Convention-related reason of challenging the political and social authority of the Chinese Communist Party. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

Egypt

N05/52863
31 January 2006, Sydney
Mr R Wilson, Member

EGYPT – RELIGION – CHRISTIAN – POLITICAL OPINION – ARAB SOCIALIST PARTY – The applicant feared persecution because of his association with a Christian friend and because they were members of the Arab Socialist Party. He claimed that he was arrested and detained by the police three times. He also claimed

that he was beaten and tortured by the police and he became suicidal. The applicant claimed that he was arrested for no reason and that the arrests were done when the authorities needed to increase their statistics by fabricating arrests. He claimed that there are ongoing cases against him and his Christian friend. The applicant claimed that he feared being humiliated again and jailed if he returned to Egypt.

Held: Decision under review affirmed.

The Tribunal noted that the applicant did not apply for refugee status for several years after arriving in Australia and found that the applicant's evidence regarding the delay was not credible. The Tribunal also noted that he renewed his Egyptian passport with the Egyptian authorities and found that this act indicated that he was still availing himself of the protection of Egypt. The Tribunal found discrepancies in claims made in relation to his arrests. It preferred claims the police arrested him when they needed to expand their statistics over his claims he was arrested for his friendship with a Christian friend or his membership of the Socialist Party. The Tribunal accepted that the applicant was arrested, humiliated and detained pursuant to the Egyptian Emergency Law. However, the Tribunal found that this law was not applied in a discriminatory way for a Convention reason. Accordingly, it was not satisfied that the applicant's fear of persecution was well-founded.

Hong Kong

N05/52745
31 January 2006, Sydney
Ms S Zelinka, Member

HONG KONG – SHOUTERS SECT – BIBLE SMUGGLER – The applicant feared persecution arising from his fear that the Chinese authorities would harm him because he had smuggled bibles into China to give to a Christian sect called the Shouters. The applicant claimed that on a visit to China he stayed with a friend who belonged to the Shouters, and he had taken bibles with him. He claimed that the Public Security Bureau (PSB) arrested this friend, and put him into gaol. The friend told the PSB that the applicant was supplying bibles to China, and the applicant was subsequently questioned and detained by the PSB. He was released and then returned to Hong Kong. The applicant claimed that the PSB monitored him in Hong Kong, stealing documents from his car and his house.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant carried bibles into China, but noted that he would have carried such small numbers that they would have never been noticed by the Chinese authorities. The Tribunal accepted that the PSB arrested the applicant's friend who belonged to the Shouters, and took the applicant to the PSB offices. The Tribunal was satisfied that the applicant was detained because he was staying in the house of a friend who belonged to the Shouters and that he was of no further interest to the authorities. The Tribunal was satisfied that the PSB was not able to supervise Hong Kong citizens or break into their homes and rejected the applicant's claims that he was monitored or otherwise subject to the adverse attention of Chinese authorities in Hong Kong. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Iraq

N05/51435
19 January 2006, Sydney
Ms M O'Brien, Member

IRAQ – RACE – IRANIAN DESCENT – POLITICAL OPINION – IRANIAN/COALITION SPY – FURTHER PROTECTION VISA – The applicant, a Shia Muslim of Iranian descent, was previously recognised as a refugee on the basis of his ethnicity, religion and the circumstances then prevailing in Iraq. When the applicant was a child his family was deported to Iran and he was not recognised as either an Iraqi or Iran citizen. He claimed to have lived and worked illegally as a professional in Iran until he came to Australia, where he also works in his

profession. He claimed that due to the tension between Iraq and Iran, he would be perceived as an Iranian and/or Australian spy because of his lengthy stays in Iran and Australia.

Held: Decision under review set aside.

The Tribunal found it unnecessary to consider the effect of Article 1C(5) of the Refugees Convention because it was satisfied that he met Article 1A(2). The Tribunal was satisfied that the applicant was an Iraqi citizen. It accepted that with a professional occupation and the ability to speak, read and write some English, the applicant would readily find employment with the Iraqi government. The Tribunal further accepted that such employment could add to his profile and increase the risk of him suffering harm amounting to persecution. Given the applicant's lengthy residence in Iran and Australia, as well as his status as a professional, it was satisfied he may be regarded as a spy and/or traitor and collaborator. It also accepted that support of Iran and/or the Coalition and the new government, thus hostility to the formation of an Islamic state, may be imputed to him. It found there was a real chance he would be targeted by insurgents and their supporters for reason of his imputed political opinion. The Tribunal was therefore satisfied that the applicant could be seriously harmed or killed by those he feared and that his fear of persecution was well-founded.

N05/52493
30 January 2006, Sydney
Mr R Wilson, Member

IRAQ – RELIGION – CHRISTIAN – POLITICAL OPINION – ANTI-BA'ATHIST REGIME – FURTHER PROTECTION VISA - The applicant was previously recognised as a refugee on the basis of a well-founded fear of persecution by the Ba'athist regime for reason of his Christian religion and imputed anti-regime political opinion. The applicant claimed that he continued to fear persecution by ex Ba'athists, Islamic extremists, terrorists and whoever was in power for reason of his religion and political opinion. In addition, the applicant feared that these groups would perceive him as a spy due to his long absence from Iraq.

Held: Decision under review set aside.

The Tribunal found that ex-Ba-athists continued to constitute a threat to persons such as the applicant who were perceived to hold anti-Ba'athist political opinions. It accepted that his fear would be exacerbated by his further imputed political profile created by residing outside Iraq for many years and becoming Westernized. The Tribunal accepted that the applicant would face serious harm from terrorists, extremists and persons in power for reason of his imputed political profile and religion. It was not satisfied that the Iraqi security bodies and foreign troops, in the context of the general lack of law and order and absence of a properly functioning judicial system, would be able to provide adequate protection. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

N05/52635
7 February 2006, Sydney
Mr R Wilson, Member

IRAQ – RELIGION – NON-PRACTISING SHIA MUSLIM – POLITICAL OPINION – UNWILLING TO JOIN MAHDI ARMY – FURTHER PROTECTION VISA – The Shia Muslim applicant was granted a temporary protection visa as a member of the family unit when his father was previously recognised as a refugee. The applicant claimed that his father took the family when he fled Iraq for Iran to avoid persecution as a hostile Shi'ite by the Ba'athist regime. He claimed that they fled Iran for Australia to avoid being deported and killed by Iranian authorities when he was young. The applicant now feared persecution on the basis of his religion as a non-practising Shia Muslim and an imputed political profile for refusing to join the Mahdi army in Iraq. The applicant claimed that when his family went to Iraq some years ago for several months two of his siblings were required to join the Mahdi Army. Further, the applicant claimed that he was of mixed Iranian-Iraqi heritage and had been Westernized over many years in Australia.

Held: Decision under review set aside.

Having regard to independent information, the Tribunal accepted that the applicant would be seen as one who did not support the Mahdi army which had been blamed for vigilante actions enforcing its strict Islamic code. It was satisfied that the applicant would come to the adverse attention of followers of the leader of the Mahdi army Moqtada, Al Sadr, for reasons of religion and imputed political profile. The Tribunal was satisfied that the

applicant would be targeted for harm which would at least constitute significant physical harassment or ill-treatment. It was satisfied that relocation was neither safe nor reasonable and that the applicant had a well-founded fear of persecution for reasons of his religion and imputed political profile.

Malaysia

V05/18212
28 February 2006, Melbourne
Ms K Boland, Senior Member

MALAYSIA – RELIGION – HINDU – CASTE – The husband and wife applicants, of Indian ethnicity and the Hindu religion, claimed to fear persecution from the applicant wife's uncle, a police inspector. They claimed he disapproved of their relationship because of the applicant husband's career and as he was of a lower caste than his wife. The applicants claimed the applicant husband had been gaoled and was only released when he promised to discontinue their relationship. The parties further claimed the uncle forced the applicant wife to have an abortion and that he paid a 'gangster' to kill them. The parties claimed to fear persecution from Islamic religious leader, Hali Yusoff, whose son was allegedly betrothed to the applicant wife. They claimed they had been kidnapped by his people and threatened with harm if they did not convert to Islam.

Held: Decision under review affirmed.

The Tribunal did not accept there was evidence to indicate either of the parties would be forced to convert to Islam or that they would be seriously harmed by the religious leader, Haji Yusoff. It also found that even if the applicants were to experience harm from the uncle or his agent, the essential and significant reason for that harm would be the disapproval for their continued relationship, rather than a Convention related reason. The Tribunal held that the applicant husband could have sought and obtained state protection in the past and that, in the event of harm from the uncle, they could avail themselves of the protection of higher authorities. The Tribunal was not satisfied there was a real chance the applicants would face persecution for a Convention related reason in the reasonably foreseeable future. Therefore, it was not satisfied the applicants had a well founded fear of persecution.

Nepal

N05/52834
31 January 2006, Sydney
Ms C Long, Member

NEPAL - POLITICAL OPINION - NEPALESE CONGRESS PARTY - MAOIST THREATS - The applicant feared persecution as a member of the Nepalese Congress Party who had actively demonstrated against the Maoists. He claimed that his business property was damaged and the business had to be closed because of threats and demands for donations by the Maoists. The applicant claimed that because he had supported the Nepalese Congress Party and spoken against the Maoists he had been threatened by their District Command and donations demanded had been doubled. He claimed that a second business also closed because of demands for donations by the Maoists. The applicant claimed he had been living in hiding for a year before travelling to Australia, that his name was on a Maoist blacklist and that he would be tortured and killed on return.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant had trouble from Maoists who damaged his business property causing him to decide to close the business. It also accepted that he closed his second business because he had to pay donations to the Maoists. However, the Tribunal did not accept that this amounted to serious harm given that the applicant and his family derived income from a farming business. The Tribunal accepted that the applicant was a member of the Nepalese Congress Party and that he spoke against the Maoists. However, it did not accept that he left Nepal due to the threats or fear of harm which he claimed. The Tribunal found there was not a real chance that the applicant would face serious harm from Maoists or anyone else because of his

political opinion or any other Convention reason. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

N05/52887
16 February 2006, Sydney
Mr A Jacovides, Member

NEPAL - POLITICAL OPINION - COMMUNIST PARTY OF NEPAL - ANTI-MONARCHIST - The applicant feared persecution arising from his political opinion. He claimed that he had joined the Communist Party of Nepal, worked for it on a volunteer basis and received a small living allowance. The applicant claimed that although he did not wish to be involved in politics he would not be able to avoid politics in Nepal in the current political climate and would be compelled to express his views against the monarchy. He claimed he had strong views against King Gyanendra and his oppressive rule. The applicant claimed that the army imprisoned and mistreated individuals who expressed views against the king and he feared he would be similarly mistreated when he expressed his views against the monarchy. The applicant claimed that he would be imprisoned and physically mistreated by authorities for expressing his political opinion.

Held: Decision under review set aside.

The Tribunal found that the applicant had provided contradictory claims as to whether he would express his political views in the future. It doubted that the applicant would be compelled to participate in any political activities in Nepal if he did not wish to be involved in politics. The Tribunal gave the applicant the benefit of the doubt and accepted his claim that he had political views against the monarchy and that he would seek to express those views if he returned. It found that citizens of Nepal who expressed views against the king risked serious harm by the army, including imprisonment and other forms of physical violence and was satisfied that this amounted to persecution. The Tribunal accepted that the applicant would seek to express those views in the reasonably foreseeable future. Accordingly, the Tribunal found that the applicant's fear of persecution was well-founded.

Sri Lanka

N05/52018
16 February 2006, Sydney
Ms M O'Brien, Member

SRI LANKA – RACE – TAMIL – POLITICAL OPINION – LIBERATION TIGERS OF TAMIL ELAM – FORCIBLE RECRUITMENT – MISTREATMENT BY SECURITY FORCES – The applicant feared persecution as a young Tamil male. He claimed he would be forcibly recruited by the Liberation Tigers of Tamil Elam (LTTE) and would also face persecution from the security forces. The applicant claimed that his family fled fighting between the Army and the LTTE in Jaffna and relocated to the Vanni, where they lived under LTTE control. He claimed that the LTTE forcibly recruited at his school and that his family left the area to escape this, surrendered to the Sri Lankan armed forces in Jaffna and were detained, interrogated and assaulted. The applicant claimed that if he did not co-operate with the security forces he would be in danger from them and he would be in danger from the LTTE if he did. He claimed that the security forces had no effective control in his home area, could not protect him from persecution by the LTTE and would themselves torture and mistreat him as a young Tamil male from Jaffna.

Held: Decision under review set aside.

The Tribunal accepted that the LTTE had tried to forcibly recruit the applicant and that this was why his family returned to Jaffna. It accepted that he and his family were detained and interrogated by security forces and that he and his father were questioned and assaulted. The Tribunal accepted that the applicant had been pressured by the LTTE to stay and join. It was satisfied there was a real chance that the applicant would be detained and mistreated by the security forces because he was a young Tamil who had had years of contact with the LTTE. The Tribunal found this was because he had visited or lived in an LTTE controlled area and because he had scars that the security forces often assumed were the result of injuries sustained in fighting them. Accordingly, the Tribunal was satisfied that the treatment the applicant feared amounted to persecution and the reason he

would be targeted by the LTTE or the security forces was his Tamil ethnicity and his actual or imputed political opinion.

Syria

N05/52154
11 November 2005, Sydney
Ms A Younes, Member

SYRIA – POLITICAL OPINION – ANTI-REGIME – RELIGION – SUNNI MUSLIM – CONSCIENTIOUS OBJECTOR – The Sunni Muslim applicant feared persecution as a conscientious objector. He claimed that he would be forced to undertake military service and would suffer persecution because of his political beliefs and his Sunni religion. The applicant claimed that he opposed war and violence and did not support Syria's control of Lebanon. He claimed that Sunnis suffered gross discrimination and Sunni lives were considered expendable. The applicant claimed that in the army, Sunnis were subjected to tougher treatment than Alawites and their training period was longer. He also claimed that members of his family had been detained or had disappeared over the years.

Held: Decision under review set aside.

The Tribunal was satisfied that the applicant was a credible witness. It was satisfied that he was a conscientious objector and that he opposed war and violence. The Tribunal was satisfied that the applicant did not support Syria's previous occupation of Lebanon and that he held anti-regime views in that regard. It was satisfied that out of fear of harm by the authorities, he did not publicly express his anti-regime political views. The Tribunal was satisfied that as a Sunni, the applicant experienced discrimination. It accepted that for religious reasons, members of the applicant's family had been detained or had disappeared. The Tribunal was satisfied that his anti-regime opinions, particularly his views about Syria's occupation of Lebanon, his conscientious objection and Sunni religion would result in him receiving disproportionate punishment if he were forced to perform compulsory military service. It found that he would be subjected to serious discrimination amounting to persecution. Accordingly, the Tribunal was satisfied that the applicant's fear of persecution was well-founded.

FEDERAL COURT JUDGMENTS

SZDTM v MIMIA

[2006] FCA 188

Federal Court of Australia, Bennett J, NSD1069 of 2005, 9 March 2006

Immigration - Protection Visa application – whether Tribunal properly considered each of appellant's claims – whether failure to consider accepted claims personal to appellant in context of Refugees Convention and *Migration Act* 1958 – where Tribunal found that action taken against Chinese community in Indonesia because of economic position or perceived wealth did not attract Convention protection – persecution because of characteristic of or attributed to racial group is for a Convention reason – jurisdictional error.

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, an Indonesian national, was not a person to whom Australia had protection obligations.

The appellant made personal claims of harm relating to her race and religion, and claims about offences committed against ethnic Chinese in Indonesia.

The Tribunal accepted the appellant's claims of harm, but found that the ethnic Chinese community was targeted because of their economic position or perceived wealth which did not attract the protection of the Refugees Convention (the Convention).

The appellant claimed the Tribunal was wrong in its finding that anti-Chinese "criminal offences" did not attract the protection of the Convention. She also claimed it did not consider each of her claims of persecution due to race; did not properly apply s.91R of the *Migration Act* 1958 (the Act) to her claims on religion; and that it demonstrated apprehended bias.

Held: Tribunal decision set aside and remitted for reconsideration.

(i) The Tribunal erred in concluding that persecution because of a characteristic of a racial group does not attract the protection of the Convention. It also made a jurisdictional error by failing to properly consider all the applicant's claims and the effect of the totality of those claims on a well-founded fear of persecution.

(ii) The Tribunal's finding that, although there were racial elements to the acts committed against the Chinese community, they were "criminal offences" linked only to wealth and did not attract the protection of the Convention, was untenable. Its conclusion that offences perpetrated on a community because of its economic position are merely criminal in nature and not racially based, is a statement about the kinds of offences that give rise to the Convention itself. If action is taken against members of a racial group **because of** a characteristic, actual or perceived, that is common to and attributed to the racial group, the action is based on the race of that group. It is irrelevant whether the reason for the action is disapproval or resentment of that characteristic. If such action amounts to persecution and gives rise to a well-founded fear of persecution on the part of a member of that race, the protection of the Convention may be sought.

(iii) The Tribunal failed to consider the appellant's personal claims (as distinct from her claims relating to ethnic Chinese in Indonesia generally) in the context of the Convention and the Act. The Tribunal did not consider the adequacy of state protection in relation to the personal claims or whether they amounted to persecution under s.91R of the Act. An analysis of well-founded fear of persecution and entitlement to protection needed to take those claims into account.

S1983 of 2003 v MIMA

[2006] FCA 209
Federal Court of Australia, Graham J, NSD 2418 of 2005, 13 March 2006

Immigration – Protection Visa application – where Indian appellant feared persecution as a Sindhi and low class Hindu – where Tribunal found appellant could relocate to areas where discrimination not so prevalent – whether government had willingness and ability to control violence – jurisdictional error.

The applicant, a national of India, 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 appellant claimed to fear persecution based upon his membership of the Sindhi community and his being a low caste Hindu.

The Tribunal relied on independent country information to find that there were areas of India where discrimination on the basis of caste or of being a Sindhi is "not so prevalent" and does not have the degree of state government support as in Maharashtra, and therefore it was reasonable for the appellant to relocate to an area of India where state protection was available.

The application lodged with the Federal Magistrates Court was dismissed. On appeal, the appellant contended, among other things, that the Tribunal used the wrong test in finding that state protection was available for the appellant and that it was reasonable for the applicant to relocate in India.

Held: Appeal allowed. Tribunal decision set aside and matter remitted for reconsideration.

(i) The Tribunal did not properly consider whether the appellant had a well-founded fear of persecution for a Convention reason in circumstances where it found relocation to another area within India to be reasonable but did not address whether in such an area the state was willing and able to provide protection to the appellant as a member of the Sindhi community and being of low caste. The fact that attempts have been made to control violence is not the same as a finding of a willingness and ability to control violence. Its failure to address the appropriate question constituted jurisdictional error on its behalf.

(ii) In relation to the question of whether or not the Appellant could, by relocating, avail himself of the protection of India, there are two tests that needed to be addressed. Firstly, in determining whether or not state protection was available in areas of India outside Maharashtra, the question was whether in those areas the state was willing and able to provide protection for persons living there. Secondly, as to whether or not a person experiencing difficulties in a particular part of India should relocate, the question was, "Would it be reasonable for the person to do so?"

(iii) The fact that there may be parts of India where caste discrimination or community based discrimination is not as bad as it is in other areas does not allow a conclusion that in the "better" areas a fear of persecution for race or membership of a particular social group could be said to be other than well-founded.

(iv) The correct test was considered and applied at least in terms of the practical realities of physical relocation.

VSAB v MIMIA

[2006] FCA 239
Federal Court of Australia, Weinberg J, VID1076 of 2004, 17 March 2006

Immigration - Protection Visa application – definition of "nationality" - whether Tribunal bound to act only upon direct evidence, such as text of statute or expert evidence, when determining questions of "derivative acquisition of nationality" – whether distinction to be drawn between "original acquisition of nationality" and "derivative acquisition of nationality" – no jurisdictional error.

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a Refugee Review Tribunal (the Tribunal) decision that the appellant husband, wife and children were not persons to whom Australia had protection obligations. The appellant husband (the appellant) claimed to fear persecution in Bosnia-Herzegovina on the basis of his mixed marriage and political opinion.

The appellant arrived in Australia on a FYROM passport but from the outset maintained that he was a national of Bosnia-Herzegovina and not a national of FYROM. The appellant claimed to fear persecution in Bosnia-Herzegovina from Serb nationalists for reason of his opposition to their policies and his "mixed marriage" to a national of FYROM.

The Tribunal found that irrespective of whether the appellant was a national of Bosnia-Herzegovina, he was also a national of FYROM. It reached this finding on the basis of the appellant's passport, notwithstanding that he may have paid a bribe to obtain it, the fact he had lived in FYROM, his marriage to a national of FYROM, the appellant wife's assertion after arriving in Australia that her husband had the right to enter and reside in FYROM and DFAT country information suggesting that the husband met the requirements for acquiring FYROM citizenship. In light of this finding and the fact that the appellant made no claims to fear persecution for a Convention reason in FYROM, the Tribunal found that it was unnecessary to assess whether the applicant held a well-founded fear of persecution in Bosnia-Herzegovina.

In the Federal Magistrates Court, Connolly FM rejected the appellant's contentions that the Tribunal failed to determine whether he was a national of Bosnia-Herzegovina, misunderstood the requirements which had to be established to find that he had acquired FYROM nationality and had reached its findings on no or insufficient evidence.

On appeal to the Federal Court, the appellant contended that there was no evidence to support the conclusion that the appellant husband was a national of FYROM and that the Tribunal should have had regard to the domestic statute governing the acquisition of FYROM nationality, or at least expert evidence, of some type, as to that matter.

Held: Appeal dismissed.

(i) The Tribunal did not reach its findings on "no evidence". It properly came to its conclusion, not on the basis of the FYROM passport alone, but also on the basis of the evidence relating to the husband having lived in FYROM, being married to a FYROM national and satisfying other criteria specified in the country information relating to derivative acquisition of citizenship.

(ii) While the possession and regular use of a passport may not amount to conclusive evidence of citizenship, it does provide some evidence of the fact.

(iii) There is no rule that when nationality is disputed, in a case of derivative acquisition of nationality, that the Tribunal can act only upon direct evidence as to the law regarding such acquisition of the foreign country and is required to disregard circumstantial evidence that bears upon that question. If there is a question of fact to be resolved, there is no reason why one type of evidence should be preferred to another.

(iv) It was open to the Tribunal to use secondary sources of a non-scholarly nature, including country information of the type utilised in this case. While the availability of better sources of information may be a basis for criticism of the Tribunal, such criticism goes largely to the merits of the Tribunal's decision and does not, of itself, demonstrate jurisdictional error.

(v) While the Tribunal's finding regarding the payment of bribes in connection with obtaining the passport was by no means clear or unambiguous, the Tribunal did not accept or reject the claim. It said no more than if bribes were paid, it did not follow that the passport could not be used as some evidence of nationality.

VWFP & VWFQ v MIMIA

[2006] FCA 231
Federal Court of Australia, Young J, VID 534 of 2005, 16 March 2006

Immigration – Protection Visa application – section 424A of *Migration Act* 1958 – where Turkish national claimed persecution because of human rights activities – information given for the purpose of the application – whether information a part of the reasons for Tribunal's decision – way Tribunal used information – whether Tribunal's findings illogical or unsupported – no jurisdictional error.

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) affirming a decision not to grant protection visas, having found that the first appellant was not a person to whom Australia had protection obligations.

The first appellant, a Turkish national and an Alevi, claimed to fear persecution in Turkey by reason of her actual/imputed political opinion because of her membership of and activities for the Turkish Human Rights Association (the HRA). In support of her application she had submitted to the Department of Immigration a letter from the Istanbul branch of the HRA (the HRA letter). In reaching its decision, the Tribunal relied in part upon the appellant's lack of knowledge about the profession of Eren Keskin, former president of the Istanbul branch of the HRA, and the reason why Ms Keskin had been the subject of an Amnesty International campaign (the Keskin information). On the whole, the Tribunal considered that the various factors which indicated that she was not an active member of the HRA were "not outweighed" by the HRA letter.

The appellants contended that the Tribunal had committed a jurisdictional error by failing to comply with s.424A of the *Migration Act* 1958 (the Act), in that it failed to give particulars of (a) the Keskin information and (b) the HRA letter. It was also submitted that the Tribunal had failed to consider the appellant's claim to fear persecution because of her membership of a group of politically left wing Alevi people, and/or her actual or imputed political opinions arising from that membership, and that the Tribunal's findings were not supported by any probative material or logical grounds.

Held: Appeal dismissed.

(i) The Keskin information did not attract s.424A of the Act. Nor would it be consistent with the statutory purpose underpinning s.424A for the section to be construed so that it extended to that information. By itself, the information was not adverse to the appellant. It was simply factual information that might assist in testing the extent of the appellant's knowledge and the veracity of her claims. It could not be characterised as the reason, or as a part of the reason, for the Tribunal's affirmation of the decision under review. The relevant fact that the Tribunal relied upon in its reasons for decision was the appellant's lack of knowledge about the Keskin information, rather than that information itself.

(ii) The HRA letter did not fall within the scope of s.424A. There is a valid distinction between the HRA letter and the Tribunal's subjective evaluation of the weight that should be attached to it in the light of the appellant's oral evidence to the Tribunal. By itself, the HRA letter was not the reason, or a part of the reason, for the Tribunal's affirmation of the delegate's decision. Nor was there any point of time prior to the Tribunal's decision at which the Tribunal would have considered that the HRA letter might have constituted the reason, or a part of the reason, for affirming the delegate's decision.

(iii) It was doubtful that any claim based on the appellant's status as an Alevi and her residence in a left wing Alevi area was ever made to the Tribunal but in any event the Tribunal addressed the possibility of a claim on that basis. On a fair reading of the Tribunal's reasons, its ultimate conclusion took all relevant matters into account.

(iv) The impugned findings did not disclose jurisdictional error or indicate that the Tribunal failed to properly exercise its jurisdiction. Illogical reasoning does not of itself constitute an error of law or jurisdictional error, or necessarily indicate that there had only been a purported exercise of power. Opinions can vary about what is inherently improbable or unacceptable as evidence of the fact, or what evidence makes sense, that is whether evidence is probative in relation to a particular fact. In the absence of perversity or manifest error, sufficient in each case to give rise to jurisdictional error, the Court cannot intervene.

SZBJI v MIMIA

[2006] FCA 216
Federal Court of Australia, Allsop J, NSD 870 of 2005, 17 March 2006

Immigration – Protection Visa application – where national of Nepal claimed connection with Maoist – affiliated group – fear of arrest by army – where Tribunal found that applicant could relocate to his home town – whether relocation reasonable – whether practical application of relocation had been addressed – jurisdictional error.

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 Nepalese national, claimed to fear persecution arising from his connection with the Maoists through his membership of the Maoist-affiliated All Nepal National Independent Student Union. He claimed that the army was searching for Maoists in Kathmandu in October 2001. As he feared arrest, he hid in areas away from the city, including his home town, before returning to Kathmandu in November 2001, from where he fled to Australia in February 2002. The Tribunal found that the appellant's Maoist political involvement could only be described as minor, that his Maoist profile was confined to Kathmandu and that it was reasonable for him to relocate to his home town.

On appeal, the applicant contended that the principles discussed in *NAIZ v MIMIA* [2005] FCAFC 37 and *Randhawa v MIMIA* (1994) 52 FCR 437 had not been applied by the Tribunal in considering the applicant's ability to relocate to another part of Nepal.

Held: Tribunal decision quashed and remitted for reconsideration.

(i) The Tribunal failed to complete its jurisdictional task. There was a failure to address an essential element of the question of avoidance of possible future persecution by relocation.

(ii) The Tribunal's findings were sufficiently ambiguous to leave one with the view that the Tribunal accepted that the appellant had political involvement of a low profile which would have placed the appellant at some risk in Kathmandu. Thus it was necessary to consider relocation. What was not raised with the appellant and what was not broached by the Tribunal in its reasons was the practicality and reasonableness in all the circumstances of the appellant relocating outside Kathmandu for the foreseeable future.

(iii) The Tribunal is not required in addressing relocation to elaborate on every aspect of its practical application. However, if from the reasons and the material, it does not appear that the practical application of relocation has been addressed, it would be wrong to assume that it has been.

SZDSC v MIMA

[2006] FCA 217
Federal Court of Australia, Allsop J, NSD 607 of 2005, 17 March 2006

Immigration - Protection Visa application – where national of India claimed persecution by Hindu militants and police because of following Muslim Saint Peer Baba – whether Tribunal must direct itself to whole of the appellant's claims – whether the Tribunal ignored that fundamental claim in considering relocation – jurisdictional error.

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a Refugee Review Tribunal (the Tribunal) decision that affirmed a decision of the delegate of the Minister that the appellant, a national of India, was not a person to whom Australia has protection obligations. The appellant claimed to fear persecution by Hindu militants and local police because of his and his family's tradition of following the Muslim saint Peer Baba.

The Tribunal examined firstly, the claims of the appellant and, secondly, the question of relocation. The Tribunal found the applicant's evidence less than persuasive and less than fully credible but stopped short of dealing with the matter on the basis of the claims. The reason for the affirmation of the decision by the Tribunal was the view that the appellant could relocate.

Held: Appeal allowed. Tribunal decision set aside and remitted for reconsideration.

(i) The Federal Magistrate was in error in failing to identify the fact that the Tribunal did not direct itself to the whole of the claims of the appellant: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 and *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 (at [9]). In so doing, the Tribunal failed to direct itself to all the questions required of it and in that respect did not complete its jurisdictional task (at [11]).

(ii) The Tribunal's analysis of whether the appellant could relocate was predicated upon the claims of the appellant being locally based in his area of Haryana. It ignored one fundamental element of the claims of the appellant. Not only were the appellant's claims based on the particular difficulties experienced at Haryana, but they were also based upon the appellant and his family being believers in Peer Baba. What is not analysed is the position of the appellant as a Hindu adherent to this practice, in particular should he relocate. It may be that the answer is simply that there is a lack of likelihood of persecution in other parts of India or the availability of state protection. However, these issues were not addressed because of the disposition of the claims by reference to relocation on a limited and incomplete hypothesis (at [8]).

SZFML v MIMIA & Anor (No.2)

[2005] FMCA 1947
Federal Magistrates Court of Australia, Scarlett FM, SYG 118 of 2005, 20 December 2005

Immigration – Protection Visa application – whether the applicant consented to the Tribunal deciding the review without the applicant appearing before it – whether applicant consented to migration agent to act on her behalf or merely to receive correspondence – where migration agent gave oral evidence – s.425A of the *Migration Act* 1958 (Cth) and Reg 4.35D of the *Migration Regulations* 1994 (Cth) – jurisdictional error.

The applicant, a national of Mongolia, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that she was not a person to whom Australia had protection obligations. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution if she returned to Mongolia because her claims of being mistreated as a lesbian or bisexual were very general and inconsistent and because the Tribunal did not have the opportunity to test her claims.

The Tribunal invited the applicant to attend a hearing on 9 November 2004 which the applicant through her migration agent advised that she would attend. The Tribunal rescheduled the hearing to 25 November 2004, because of difficulty in engaging the services of an interpreter in the Mongolian language. On 24 November 2004, the migration agent informed the Tribunal both orally and in writing that the applicant did not want to attend the rescheduled hearing.

The applicant claimed that she did not authorise her migration agent to inform the Tribunal that she did not wish to attend a hearing. Under cross-examination, the applicant claimed that she had been receiving the assistance of friends who spoke English in dealing with the agent. The migration agent gave evidence to the Court that a friend of the applicant phoned him saying that the applicant did not wish to attend the hearing.

Counsel for the respondent submitted that the applicant had given the agent the authority to act on her behalf in the case and that the agent had specific authority to complete the form advising non-attendance. It was argued that the agent had no incentive to fill out the form in the negative and there was nothing in the evidence that would cause doubt that he communicated with the applicant through a bilingual friend.

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

(i) There was a breach of s.425A of the *Migration Act 1958* (the Act) and r.4.35D of the *Migration Regulations 1994*. The rescheduled hearing date should not have been before 3 December 2004. The judgments in *SZDQO v MIMIA* [2005] FCA 1026 (Conti J, 27 July 2005) and *SZBAZ v MIMIA* [2004] FMCA 790 (Barnes FM, 24 November 2004) can be distinguished because in each of those cases the variation of the hearing date was sought by the applicant and not the Tribunal.

(ii) The migration agent did not have the authority to inform the Tribunal that the applicant did not wish to attend the hearing. Section 425(2)(b) of the Act did not apply.

(iv) The applicant gave her evidence honestly and her actions were consistent with a person who at all times wanted to attend a hearing so she could put her case. The evidence of the migration agent was at times vague. He could not remember the names of the applicant's friends and was unable to tell the court any details of the person (including their gender) he said had telephoned him to say that the applicant no longer wished to attend a hearing. The evidence of the applicant was preferred.

SZDCG v MIMIA

[2006] FMCA 148
Federal Magistrates Court of Australia, Driver FM, SYG 844of 2004, 7 February 2006

Immigration – Protection Visa application – where a national of India claimed persecution because of his political opinion and his homosexuality – where the Tribunal found the applicant could avoid persecution through relocation – whether the Tribunal applied the correct test for relocation – whether the Tribunal failed to consider whether the applicant's Australian fiancé would return with the applicant – jurisdictional error.

The applicant, a national of India, sought judicial review of a Refugee Review Tribunal (The Tribunal) decision that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of his political opinion and his homosexuality.

The applicant claimed to be a member of the homosexual community in India but also to be in a heterosexual relationship with an Australian fiancée who did not want to live in India. The Tribunal noted that the applicant was planning to marry his heterosexual fiancée and found that if he relocated to big cities such as Calcutta, Bombay or Delhi, where a gay lifestyle was more tolerated, he faced a remote chance of persecution for a Convention reason.

The applicant contended that the Tribunal did not apply or apply properly the correct test for relocation set out in the decision of *Randhawa v MILGEA* [1994] 52 FCR 437.

Held: The Tribunal decision quashed and remitted for reconsideration.

(i) The Tribunal committed jurisdictional error by failing to apply the correct test of relocation derived from the decision of *Randhawa*.

(ii) The Tribunal's consideration of the practicality of relocation was ineffective because no consideration was given in the reasoning to the likelihood of the applicant's relationship with his fiancée surviving a return to India and the likelihood and practicality of her relocating with him. The Tribunal could not assume the intention to marry would continue if he had to return to India, nor that she would travel to the particular locality with him.

Obiter:

(iv) The principle to be derived from *Randhawa* is that Australian protection is not required by an applicant who can genuinely access domestic protection and for whom the reality of protection is reasonable. The Tribunal has approached the problem not so much from the standpoint of the availability of state protection but from the standpoint of risk of persecution in certain localities. Logically one can accept that if there is no, or only a minimal risk of persecution in a particular location then access to state protection is not required in that location and hence relocation is at least a hypothetical option. It seems to me that this is a gloss on the reasoning in *Randhawa* but nevertheless a rational and necessary gloss.

SZCAQ & Ors v MIMIA

[2006] FMCA 229
Federal Magistrates Court of Australia, Raphael FM, SYG2600 of 2003, 24 February 2006

Immigration – Protection Visa application – whether the Tribunal made a mistake as to the effect of a foreign law – whether the Tribunal had a duty to enquire into the content and effect of the foreign law – whether failure to have regard to the terms of the foreign law was a failure to take account of relevant material – jurisdictional error.

The applicant, a national of India, 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 claimed to fear persecution arising from his active membership of the New India Democracy Movement (NIDM). He claimed to have been picked up by the police on about eighteen occasions between 1995 and 1998. The applicant claimed that in February 1998 he was arrested under the National Security Act and spent four months in prison. He claimed he was then taken back to the Magistrates Court and the term

was extended for another six months. However he had listed no convictions or charges in his visa application form.

The Tribunal found that the applicant gave unsatisfactory evidence about a range of matters including his membership of NIDM, charges laid against him under the National Security Act and his time in prison. It found a contradiction in the statement that no convictions or charges had been laid against him as it found there was a clear implication that in being detained under the National Security Act he was tried in a court of law, found guilty of an offence, sentenced by a magistrate and then had the sentence extended by a magistrate.

The applicant contended, amongst other things, that the Tribunal erred in its findings arising out of the applicant's arrest under the National Security Act. It was contended that the Tribunal relied on a fact that did not exist to draw inferences and make material findings adverse to the applicant; failed to take into account a relevant consideration; or failed to make necessary investigations.

Held: Tribunal decision set aside and remitted for reconsideration.

(i) The Tribunal committed jurisdictional error by failing to take into account relevant material.

(ii) The National Security Act 1980 does not require arrest, charge, trial, finding of guilt and punishment by way of detention. The Tribunal's failure to have regard to the National Security Act caused it to come to a negative view about the applicant's credibility. The applicant's lack of credibility was given by the Tribunal as the reason for not accepting his story and therefore not considering him to be a person to whom Australia owes protection obligations.

Obiter:

(iii) Generally speaking, a Tribunal is not under a duty to enquire. However, the Tribunal is under an obligation to conduct hearings according to the rules of procedural fairness, which require it to enquire as to unclear facts where it would not be unreasonably difficult to do so.

(iv) Failure to make an enquiry that consists merely of checking the wording of foreign legislation written in English, readily available on the internet, will amount to a failure to accord procedural fairness.

SZBUU v MIMIA & ANOR

[2006] FMCA 197
Federal Magistrates Court of Australia, Barnes FM, SYG2342 of 2003, 28 February 2006

Immigration – Protection Visa application – where more than one foundation for applicant's fear – whether Tribunal failed to deal with all integers of applicant's claim – whether failure to exercise jurisdiction – where applicant confirmed information to the Department was correct – whether failure to comply with s.424A of *Migration Act* 1958 – jurisdictional error.

The applicant, a national of India, 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 claimed to fear persecution on the basis of his Muslim faith and his involvement with the Student Islamic Movement of India (SIMI). He claimed to have a "further fear" that as a Muslim who spent a lot of time travelling outside India he would be perceived as a fundraiser and/or propagandist for Muslim radical groups.

The Tribunal was not satisfied the applicant's claims had any credibility or veracity. The Tribunal was not satisfied that the applicant was subject to religious or political persecution because it was not satisfied that the applicant was ever a trustee or member of SIMI.

The applicant contended, among other things, that the Tribunal failed to exercise jurisdiction as it failed to take into account part of his claims, namely that he feared persecution as a member of a social group being Indian Muslims who spent a lot of time travelling outside of India. Also the applicant contended that the Tribunal failed to comply with s.424A of the *Migration Act 1958* (the Act) in that it did not seek comments from him on information about his travel details.

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

(i) The Tribunal failed to exercise its jurisdiction by failing to address and deal with all the component integers of the claims made by the appellant.

(ii) The applicant's claim to fear persecution as a Muslim radical or sympathiser was based on more than one foundation. It was not based solely on his actual (or even perceived) association with SIMI, but also on his being a Muslim who spent most of his time travelling outside India. The Tribunal's findings in relation to SIMI did not address the second and distinct basis for the applicant's fear.

(iii) Further, the Tribunal referred to religion as a Convention ground but it is clear from the whole of the decision including the summary of the applicant's claims, the summary of the delegate's decision and the country information to which it referred, that it did not understand that one aspect of the case brought by the applicant was his religion *per se* and not simply his religion in light of perceptions of him as a radical or as involved with SIMI, or even as a Muslim traveller.

(iv) The information that the applicant was in possession of a passport and that he made several travels was an integral part, or at least a part, of the Tribunal's reason for rejecting his claims and affirming the decision. This information was provided by the applicant in his protection visa application. The applicant's confirmation at the Tribunal hearing that all the information he provided to the Department was correct does not transform the information into information provided by the applicant to the Tribunal 'for the purpose of his application'. Further, although the applicant was requested to bring his passport to the Tribunal hearing, the hearing was conducted by video link. Clearly he could not hand the passport to the Tribunal member and there is no reference in the transcript to the applicant giving the Tribunal his passport or a copy. Thus, a duty arises under s.424A(1) of the Act and a breach of that duty is established. This constitutes jurisdictional error.

SZGMF v MIMA & Anor
[2006] FMCA 283
Federal Magistrates Court of Australia, Driver FM, SYG 1474 of 2005, 1 March 2006

Immigration – Protection Visa application – where application rejected as not credible – apprehended bias – Tribunal enquiring as to the authenticity of documents – adverse information disclosed to the applicant after hearing – other information that could have assisted the applicant to deal with withheld adverse information – implication that the presiding member may have formed an immoveable adverse credibility view about the applicant by the time adverse information was disclosed

The applicant, a national of Bangladesh, 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 claimed to fear persecution from the Bangladesh National Party (BNP) based on his political opinion and active involvement and support for the Awami League.

The applicant had presented to the Tribunal documents purportedly from the Awami League as well as documents supporting his claim to have been subjected to false criminal charges. The Tribunal received two reports from the Department of Foreign Affairs and Trade (DFAT) in relation to the authenticity of the documents and sent the applicant a s.424A letter in relation to these reports. The Tribunal found that the documents were not genuine and that although the applicant was an active supporter of the Awami League, his own behaviour while still in Bangladesh was not that of someone who fears for his life. The Tribunal did not accept that the applicant was persecuted before he left Bangladesh and found that he did not have a well founded fear of persecution in Bangladesh for reason of his political opinion or for any other Convention reason.

In his application for judicial review, the applicant contended, among other things, that the Tribunal's adverse findings as to the authenticity of the documents provided by him were not based on evidence.

Held: Tribunal decision set aside and the matter remitted for reconsideration.

(i) The circumstances of the case, when viewed overall, would lead a fair-minded observer to form the view that the presiding member had already made up his mind when the s.424A letter was written. A reasonable apprehension of bias is thereby established.

(ii) The decision of the presiding member contained statements that were indicative of a strong view that the applicant's false charges claim was not genuine, at the time the extension of time to respond to the s.424A letter was sought by the applicant.

(iii) The s.424A letter failed to mention that the DFAT informant had ventured the opinion that the documents were genuine. Although the DFAT report described the informant as a 'reliable senior Awami League member', that information was converted in the s.424A letter to 'reliable information'. That reference is open to an interpretation that the member already accepted the information. The belief of the DFAT informant that the applicant may have left the Awami League because of personal disagreements was not disclosed to the applicant. Such information gave rise to the possibility that the informant knew the applicant. If the significance of that possibility and the particular comments of the informant had been disclosed it could have enabled the applicant to respond effectively to the s.424A letter. The implication of withholding such information is that the presiding member preferred not to give the applicant the opportunity to use such information to assist his case.

(iv) The Tribunal met its statutory obligation under s.424A of the *Migration Act* 1958.

SZIIV v MIMA & Anor
[2006] FMCA 322
Federal Magistrates Court, Driver FM, SYG469 of 2006, 8 March 2006

Immigration – Protection Visa application – Minister's delegate's decision previously reviewed by the Tribunal and the courts – no jurisdiction – no jurisdictional error.

The applicant, a national of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that it does not have jurisdiction to review the decision refusing to grant him a protection visa.

The applicant first applied to the Tribunal for review of the decision on 20 February 2001. The Tribunal affirmed the decision under review and the courts dismissed the applicant's application for judicial review of the first Tribunal's decision and subsequent appeals. The applicant made a second application to the Tribunal for review on 12 October 2005.

The Tribunal decided on 23 January 2006 that it had no jurisdiction to review the decision because the second application was lodged outside the prescribed time limit and the Tribunal had already discharged its functions under the Act to review the primary decision.

The applicant applied for judicial review of the Tribunal's 2006 decision and the grounds for review asserted bore no relationship to the Tribunal's decision. The court ordered an immediate show cause hearing, over the applicant's objections.

Held: Application dismissed.

(i) The applicant was properly notified of the primary decision and the second application for review by the Tribunal was lodged outside the 28 day time limit.

(ii) It is undoubtedly correct that the Tribunal had no jurisdiction to review the delegate's decision twice where the first Tribunal decision was validly made. The Tribunal was *functus officio* after it had reviewed the primary decision the first time.

(iii) The inability on the part of a review tribunal to review decisions more than once is apparent from the terms of the *Migration Act* 1958. It is underscored by ss.48B and 417 which exist to permit the Minister for Immigration to deal with exceptional circumstances.

(iv) The second application to the Tribunal for review is an abuse of the Tribunal's process and the application to the Court is an abuse of the Court's process.

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

Statistics for the month of April were not available at the time of publication. The RRT caseload overview for April will appear in the RRT Bulletin 6/2006.

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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