

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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Bangladesh

N05/52886
20 March 2006, Sydney
Mr S Norman, Member

BANGLADESH – MIXED MARRIAGE – MUSLIM – CHRISTIAN - The Muslim applicant and his Christian wife claimed to fear persecution because of their mixed marriage. The applicant claimed that whilst working in Bangladesh he had married a Christian woman. He claimed that he was blamed for being unable to convert his Catholic wife and daughter to Islam and that they had been subject to previous harm, death threats and an attempt was made to kidnap their daughter. The applicants claimed that they were supported by a Christian Church group in Australia that they attended. The applicants further claimed that they may continue to come to the adverse attention of their families, friends or Islamic fundamentalists in Bangladesh for reasons related to their mixed marriage.

Held: Decision under review set aside.

The Tribunal found the applicants to be credible and accepted their claims as plausible. It noted that not all persons in a Muslim/Christian marriage would have a real chance of persecution in Bangladesh, however, it accepted that the applicants had been subject to previous harm for reasons of their mixed marriage. The Tribunal also accepted that their daughter did not practice Islam and they were supported by a Christian Church group in Australia. The Tribunal found there was a real chance of harm and that the applicants would be targeted for harm which would at least constitute significant physical harassment or physical ill-treatment. It was satisfied that relocation was neither safe nor reasonable. As such it found the applicant had a well-founded fear of persecution for a Convention reason.

Brazil

N05/52701
21 February 2006, Sydney
Mr J Silva, Member

BRAZIL – PARTICULAR SOCIAL GROUP – SINGLE WOMEN IN BRAZIL – DOMESTIC VIOLENCE – The applicant claimed to fear persecution from her former boyfriend who had abused her during their relationship. She claimed she had been physically and emotionally abused and that after the relationship ended he harassed her and her family. The applicant also claimed to fear persecution from Brazilian society because of her status as a woman who had left a relationship for reasons of domestic violence and as a woman in general. She claimed women who left violent relationships faced discrimination and had poor access to services. The applicant further claimed that societal attitudes towards women were generally poor, that domestic violence was prevalent and there was inadequate protection from such violence.

Held: Decision under review affirmed.

The Tribunal accepted the applicant had experienced domestic violence. However, taking into account the circumstances surrounding the cessation of the relationship; the fact police acted on her complaints of abuse; that authorities would not decline to protect her in the future; and looking at her conduct in Brazil and Australia, the Tribunal found the applicant did not have a subjective fear of persecution at the time of her departure from Brazil. It further found that she did not have a genuine well founded fear of persecution for reasons arising out of her former relationship. The Tribunal was also not satisfied the applicant would face discrimination or denial of support services because of her abandonment of the relationship. It further found that the applicant's personal circumstances and respective support bases indicated she did not possess the risk factors which might otherwise raise questions about her potential vulnerability in society. The Tribunal was therefore, not satisfied the applicant faced a real chance of Convention-related persecution, now or in the reasonably foreseeable future, arising out of her former relationship or her general status as a single woman.



Burma

N06/53057

27 February 2006, Sydney

Dr R Witton, Member

BURMA (MYANMAR) – RACE – PARTICULAR SOCIAL GROUP – WOMAN – The applicant claimed she was born in apparently disputed territory in Burma. She believed she was Burmese but she had no evidence her nationality was acknowledged or could be gained from the Burmese authorities. The applicant was of an ethnic minority and did not speak Burmese. She feared persecution in Burma because she was in an arranged marriage and feared recriminations from her former spouse's father. She also fears persecution because of her gender. She claimed the authorities would not protect her because of her ethnicity and she was a woman. She claimed to be a member of the particular social group women who have been or are involved in an arranged marriage and, separately as a woman.

Held: Decision under review set aside.

The Tribunal accepted the applicant must be assumed to be Burmese although she had no documentary evidence. It was satisfied that she was a single woman of minority ethnic status. The Tribunal considered independent information attesting to the vulnerable situation of women and ethnic minorities in Burma. It noted that the Burmese authorities engage in discriminatory and harassing behaviour towards ethnic minorities and women were at particular risk of rape and sexual violence from soldiers. The Tribunal found that the applicant would face harm not only from the Burmese authorities but also from males in general. It acknowledged that serious harm for personal reasons does not attract Convention protection, but refusal or failure by law enforcement to protect a member of a particular social group amounts to persecution for a Convention reason. It accepted the applicant's claim that given her minority status and gender she could not engage the attention and continuing protection of the authorities. The Tribunal found that the applicant fitted the profile of someone now at risk and was satisfied there was a real chance she would face serious harm for reason of her ethnicity and membership of a particular social group. It therefore was satisfied her fear of persecution for a Convention reason upon return to Burma was well founded.



China

N06/53123

23 March 2006, Sydney

Ms A O'Toole, Member

CHINA – FALUN GONG – ANTI-GOVERNMENT – POLITICAL OPINION – The applicant feared persecution for reasons of his Catholic religion and his practice of and involvement in Falun Gong. He claimed that he was born into a Catholic family, became a religious activist and as a result he came to the attention of the authorities. He also claimed that since arriving in Australia he discovered that Falun Gong helped to alleviate his physical and emotional pain. He became a dedicated member of the movement and was actively involved in protests in Australia denouncing the treatment of Falun Gong practitioners in China. He claimed that he will become a target of the Chinese government should he returned to china.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a genuine practitioner of Falun Gong. It further accepted that he was active in advocating against human rights abuses of Falun Gong practitioners in China and participated in prominent Falun Gong activities in Australia. The Tribunal held the applicant's adoption and practice of Falun Gong in Australia was genuine and not for the purpose of strengthening his claim to be a refugee. It was satisfied that there was a real chance he would be at risk of arrest, detention and serious harm amounting to persecution for the reason of anti-government and political opinions which may be imputed to him because of his involvement in Falun Gong. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Ghana

N06/53120
20 March 2006, Sydney
Ms S Zelinka, Member

GHANA – POLITICAL OPINION – NDC – MURDER – The applicant claimed to fear persecution by the new NPP government because he had held a position of note in the NDC until it lost power following the December 2000 election. He claimed that on the day of the election NPP electoral workers said things like “*Now we are going to do away with the NDC*”, and that a crowd of NPP supporters turned up at his family’s house and threw objects at it. The applicant claimed that his family came out fighting and that the police arrived and arrested his father, a key NDC strategist. He further claimed that his father was detained for about a month, and subsequently died. The applicant claimed that he went into hiding, but that after several attempts were made to kill him, he escaped the country by disguising himself and bribing airport officers. He claimed to fear secret agents employed by the government, believing that they unlawfully detained NDC members without a trial and that they would kill him as they had killed his father.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant had experienced some distress when his family home was attacked by supporters of another political party. It noted that the harm was not serious as the family continued to live in the same house, the applicant himself continued to live there until moving to the capital to take up a good job, and he returned to his home town frequently, where he attended NDC meetings. Noting that no harm had befallen the applicant at the last general elections in 2004, the Tribunal was satisfied that the December 2000 incident was random and one-off. Accordingly, it found that the applicant had not suffered serious harm for reason of his political opinion, and it was not satisfied that he had a well-founded fear of persecution.

Hungary

N05/51887
31 January 2006, Sydney
Ms M O’Brien, Member

HUNGARY – RACE – ROM – The applicant feared persecution from her father and/or some of his family because she had run away with a “*white Hungarian*”, that is a person who is not of Rom ethnicity, and was living with him. She claimed that although the Government did not practise persecution openly, police had the power to physically harm ethnic Roms and did not intervene if they saw a Rom person being beaten up, spat on or verbally abused. The applicant also claimed that her father and his family would physically harm her spouse because he was a non-Rom. The applicant stated that she never introduced her spouse to her father because she did not want him to have trouble. She claimed that even if she never went back to her hometown, her father would know through people that she had returned to Hungary.

Held: Decision under review affirmed.

The Tribunal noted that the applicant’s mother was a non-Rom person and that there was nothing to suggest that the father’s family had harmed him as a result of that relationship. It, therefore, was not satisfied that the applicant’s fear of harm from her father, or members of his family, because of her relationship with her spouse was well founded. The Tribunal found that even if it was satisfied that the applicant had a well-founded fear of persecution within the meaning of the Convention, s.36(3) applied and Australia did not owe the applicant protection obligations because she had not taken all possible steps to avail herself of an existing legally enforceable right to enter and reside in any one of the other 24 European Union countries. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

India

N05/52883

28 February 2006, Sydney

Ms M Males, Member

INDIA – RELIGION – HINDU – MUSLIM EMPLOYEES – BABBAR KHALSA – The applicant claimed he was a Hindu who owned a business which employed a number of Muslim employees. He claimed that a local Babbar Khalsa group demanded he ‘expel’ his Muslim employees and stop trading with Muslims. They threatened him and looted and burnt his business. The applicant lodged a report with the police naming the Babbar Khalsa member he had been approached by and the next day was approached by a Babbar Khalsa member who became aware of the complaint. He then made urgent arrangements to leave and discovered that a number of other people in the local business community had also been threatened and killed.

Held: Decision under review affirmed.

The Tribunal did not find the applicant or his claims to be credible. It found that his claims that Babbar Khalsa targeted him because he employed Muslims and had Muslim customers were not believable in light of independent evidence, particularly evidence of Babbar Khalsa’s significant support from Pakistan, a Muslim country. It noted the matters concerning the Tribunal would not individually have led it to make an adverse credibility finding. However, it concluded that cumulatively the applicant’s claims were not credible and that he was not threatened or assaulted, nor was his business burnt down. The Tribunal found that there was no real chance that the applicant would be subjected to harm of any kind from Babbar Khalsa in the reasonably foreseeable future and as such was not satisfied he had a well-founded fear of Convention related persecution in India.

Iraq

N05/52929

20 February 2006, Sydney

Mr R Wilson, Member

IRAQ – FPV – RELIGION – NON-BELIEVER – POLITICAL OPINION – WESTERNIZED – The applicant was from Basra province and was previously recognised as a refugee on the basis of circumstances then prevailing in Iraq. The applicant claimed to be a secular non-believer who drank alcohol, expressed his views and did not support the Al Sadr’s Mahdi army. He claimed that the religious extremists in his area would see him as Westernized or pro-Western. He also claimed he would be seen as supporting the Australian and other military presence in Iraq and as such he would be at risk of attack by fundamental groups. He claimed to fear persecution from numerous political groups that emerged from the broader Sunni and Shi’ite groups including the followers of radical Shia cleric Moqtada Al Sadr.

Held: Decision under review set aside

The Tribunal found it unnecessary to consider the effect of Article 1C(5) of the Convention because it was satisfied the applicant’s new claims brought him within Article 1A(2) of the Convention. The Tribunal accepted independent information of violence and instability in Basra. It noted the continued strong presence of Al Sadr and the Mahdi Army who had been blamed for vigilante actions enforcing its strict Islamic code. It found that the applicant would come to the adverse attention of the followers of Al Sadr for reason of being a non-practising Shi’ite who did not support the Mahdi Army. The Tribunal also found that the applicant would be seen to be associated with the West and killed. It found that adequate state protection was not available against actions by Al Sadr followers and the Mahdi Army. Accordingly, the Tribunal was satisfied that the applicant has a well-founded fear of persecution for a Convention reason.

Nepal

N05/52941
8 March 2006
Prof S Blay, Member

NEPAL – POLITICAL OPINION – MAOISTS – The applicant, a businessman, claimed he was targeted by Maoist forces. He claimed that his business supplied goods to a government body and as a result of his business activities Maoists demanded money from him to assist them in their campaign against the government. He refused to pay them any extortion money because he did not want those funds to be used to kill his brothers and sisters. The Maoists threatened him and he was compelled to leave the country. Even though he no longer had a business in Nepal he claimed if he returned to Nepal he would be viewed as an informer with close ties to the government.

Held: Decision under review set aside.

The Tribunal found the applicant was a businessman in Nepal and that his company was engaged in the supply of goods to a specific government body. It found it plausible Maoists demanded money from him and noted any person targeted by the Maoists for extortion who failed to pay was likely to meet with severe retribution. It, therefore, gave him the benefit of the doubt and accepted that the Maoist Party may have warned him that failure to meet their demands would have fatal consequences. The Tribunal was persuaded that the applicant would be viewed as having close ties to the government. It also found Maoists, in their desperate efforts to raise funds, were likely to make an example of businessmen failing to pay them, making their punishment known publicly. It held that if he returned to Nepal the applicant was more likely than not to be targeted by Maoists for previously failing to meet their demands. As such it was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Sri Lanka

N06/53166
28 March 2006, Sydney
Ms A Younes, Member

SRI LANKA – TAMIL – LTTE – PARTICULAR SOCIAL GROUP – The applicant claimed that members of the LTTE and other militant groups demanded money from her as she had a relative living abroad. She claimed she was brought a letter from the LTTE requesting her attendance at their camp where they held her for a whole day. They demanded 300,000 Rupees. She paid 50,000 Rupees and signed a letter saying that the rest of the money would be paid within one month. About 20 days later the LTTE came looking for her as she had not been able to pay the balance. The applicant claimed that after her departure from Sri Lanka, the LTTE went looking for her and told her relatives that if she were to return she would face the consequences. The applicant feared persecution arising from her race, imputed political opinion and membership of a particular social group. She fears being tortured and killed by the LTTE if she returns to Sri Lanka and fears threats to her freedom and liberty from other military groups.

Held: Decision under review set aside.

The Tribunal accepted the applicant's claims and found them to be consistent with independent country information. It was satisfied that the applicant had problems with the LTTE and other militant groups, members of which demanded money from her. It found that the serious harm suffered by the applicant was essentially and significantly for reasons of her Tamil race, imputed anti-LTTE political opinion and her membership to the particular social group elderly Tamil females perceived to be in a position to pay money to the LTTE. The Tribunal found that the harm suffered by the applicant was not at the hands of State agents, but was satisfied that the applicant would not be able to obtain state protection that would accord with international standards. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

 **Syria**

N05/52764

23 February 2006, Sydney

Ms P Leehy, Member

SYRIA – IRAQI BA’ATH PARTY – CHRISTIAN ORTHODOX – WOMEN IN SYRIA – The applicant, a Syrian national who previously resided in Iraq, claimed to fear persecution due to an imputed political opinion. She claimed she had been interrogated by the Syrian Ba’ath Party because she attended the University of Baghdad, known for the activities of the Iraqi Ba’ath Party. She also claimed that she was discriminated against in Syria, unable to gain employment or attend university. The applicant further claimed to fear persecution by Muslim fanatics due to her Christian Orthodox religion. She also claimed that as a woman in Syria, she was at risk of suffering serious harm from which she would not be protected by the authorities.

Held: Decision under review affirmed.

The Tribunal accepted the applicant’s claims that she had been imputed with the political opinions of the Iraqi Ba’ath party, but found that as independent evidence supported good relations between Syria and Iraq, there was not a real chance she would be persecuted on this ground. The Tribunal referred to country information, noting there was little evidence of serious harm against persons of Orthodox religion and that the applicant had not provided evidence she had suffered harm on this basis or from fanatical Muslims. The Tribunal found the applicant had not suffered serious harm in the past, nor was there a real chance she would be persecuted on these grounds in the foreseeable future. It further found there had been efforts to overcome discrimination against women in Syria. Consequently, there was not a real chance she would be persecuted for her membership of a particular social group or that her capacity to subsist would be denied for a Convention reason if she returned to Syria in the foreseeable future. The Tribunal was not satisfied the applicant had a well-founded fear of Convention based persecution in Syria.

 **Turkey**

V05/18350

31 March 2006, Sydney

Mr G Hamilton, Member

TURKEY – KURDISH ALEVI – POLITICAL OPINION – PKK – HADEP/DEHAP – HBVA – The applicant feared persecution as a Kurdish Alevi. She stated that she was discriminated against and suffered harassment by Sunnis. She also claimed she lost her employment due to her religion and ethnicity. The applicant further claimed that she feared harm due to her political opinion. She claimed that she was detained and at risk of persecution as a relative of someone who was jailed in connection with the Kurdish Workers’ Party (PKK). She claimed she was harmed because of her participation in demonstrations and other events in support of the HADEP/DEHAP. She also claimed a rock was thrown through her window with a threat against her and her family due to her connection with Haci Bektas Veli Association (HBVA).

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was a Kurdish Alevi, but noted country information that this ethnic/religious profile did not lead to persecution in Turkey. Although the Tribunal accepted that she may have experienced social discrimination as an Alevi, it did not accept that this constituted harassment, let alone persecution. It also rejected the claim that the applicant lost her employment due to being Kurdish. The Tribunal accepted the claim that the applicant’s relative was imprisoned for connection with PKK, he shared her last name, and lived in the same city. It did not accept that she had been detained or, given that her relative was not harmed and released seven years ago, that she would suffer harm as a result of her connection with him. The Tribunal further found that the applicant did not face a real chance of persecution due to her political opinion. It found that her claimed involvement with the HADEP/DEHAP was not credible and that the HBVA was an accepted organisation. Further, it was not satisfied that the applicant’s ethnic, religious and political profile cumulatively generated a real chance of persecution. Accordingly, the Tribunal found that the applicant did not have a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

NBGM v MIMIA
[2006] FCAFC 60

Federal Court of Australia, Black CJ, Marshall, Mansfield, Stone & Allsop JJ, NSD 1643 of 2004, 12 May 2006

Immigration – Further Protection Visa – Appellant recognised as a refugee – Proper approach to determine whether Australia has protection obligations – Articles 1A(2) and 1C(5) of the Refugees Convention – Whether appellant continued to have a well-founded fear of persecution – circumstances in connection with which appellant was recognised as a refugee ceased to exist – Sub-sections 36(3) and (4) of the *Migration Act* – Whether Australia taken not to have protection obligations unless decision-maker is satisfied appellant has current well-founded fear

This was an appeal from a judgment of Emmett J dismissing an application for judicial review of a decision of the Refugee Review Tribunal (“the Tribunal”) that the appellant, a young Hazara Afghani national, was not a person to whom Australia had protection obligations.

The appellant had been granted a temporary protection visa as a refugee in March 2000. In affirming a decision to refuse to grant a further protection visa, the Tribunal did not accept that there was a real chance that the applicant would be persecuted by the remnants of the Taliban by reason of his being a Hazara and therefore, found that Article 1C(5) applied as the circumstances in connection with which he had been recognised in Australia as a refugee had ceased to exist. Alternatively, s.36(3) applied in relation to those circumstances. The Tribunal also found that the applicant did not have a well-founded fear of being persecuted by reason of additional matters raised for the first time at the hearing before it.

At first instance, Emmett J held that Article 1A(2) and 1C had some symmetry in their effect, and that it was open to the Tribunal, on the material before it, to conclude that the applicant, at the time of its decision, did not have a well-founded fear of persecution.

Held: per Black CJ, Mansfield & Stone JJ (Marshall & Allsop JJ dissenting) appeal dismissed

per Black CJ, Mansfield & Stone JJ (Marshall & Allsop JJ dissenting):

- (i) The Tribunal’s reasons for its conclusion provided a foundation for the rejection of the appellant’s application for a permanent protection visa.

per Black CJ & Mansfield J: The Tribunal’s alternative reasons for its conclusion disclose that it properly addressed its task under s.36(4) of the Act and that it neither misunderstood nor misapplied the law in fulfilling that task. The application of s.36 provided an independent foundation for the rejection of the appellant’s application for a permanent protection visa.

per Stone J: The Tribunal’s reasons concerning the application of Article 1C(5) to the appellant’s case did not reveal jurisdictional error.

per Marshall & Allsop JJ (dissenting): The Tribunal failed to direct itself to the correct question.

per Black CJ, Mansfield & Stone JJ:

- (ii) In relation to an application for a permanent protection visa where the relevant circumstances are said to have changed since the applicant was granted a temporary protection visa, s.36 mandates that the decision-maker must be satisfied that, at the time the decision is made, the applicant for a permanent protection visa then has a well-founded fear of persecution for a Convention reason. The circumstance that a previous decision-maker was satisfied that the applicant had such a fear when a temporary protection visa was granted is not sufficient to establish what s.36 requires.

Application of s.36(3)

per Black CJ, Marshall, Mansfield & Allsop JJ

- (iii) Section 36(3) expressly encompasses the country of nationality as among those in respect of which it can apply. It cannot be confined to ‘third countries’ of which the applicant is not a national.

per Black CJ & Mansfield J:

- (iv) Subsections 36(3)-(7) are directed to protection visas generally; they cannot be confined in their operation to only one class of visa.

per Black CJ:

- (v) There is no requirement for a decision-maker to be satisfied as to whether or not Australia has “*protection obligations*” pursuant to s.36(2) before considering the qualification in s.36(3). In an appropriate case, it may indeed be proper for a decision-maker to consider first whether or not Australia is taken not to have protection obligations to the applicant by reason of the operation of s.36(3).

Construction of s.36(3)-(5)

per Black CJ & Mansfield J:

- (vi) Whilst ss.36(2) and (3) refer to “*protection obligations*” – which directs attention to the whole of Article I of the Refugees Convention – s.36(4) only refers to the concept (stated in Article 1A(2)) of a well-founded fear of being persecuted for a Convention reason.

per Black CJ: Section 36(4) requires a decision-maker to consider whether an applicant for a visa “*has a well-founded fear*”. A current assessment is required for the purposes of this provision. That assessment is not to be made by considering whether a previously established well-founded fear has been brought to an end by changed circumstances.

per Allsop & Marshall JJ (dissenting): The fact that ss.36(4) and (5) use language taken from Article 1A(2) does not lead to the conclusion that Parliament was intending to vary the operation of the Convention and dispense with the proper approach to Article 1C(5). Where there has been a recognition of the applicant’s position as a refugee by the applicability of Article 1A(2), that fact can be recognised to exist, unless the Convention ceases to apply by the operation of Article 1C(5). By the operation of the Act and the Convention s.36(4) is satisfied, thereby making s.36(3) irrelevant. Unless and until the Convention ceases to apply by operation of Article 1C(5), s.36(3) does not operate in respect of the appellant because s.36(4) makes it inapplicable, there being an existing recognition of the matters with which s.36(4) is concerned.

Application of Article 1C(5)

per curiam

- (vii) The terms of s.36(2)(a) pick up the whole of Article I of the Convention.
- (viii) The Convention adopts a two-stage rather than composite approach to 1A(2) and 1C(5). Article 1C(5) assumes an existing recognition of the applicant as a refugee.

Per Marshall, Mansfield & Allsop JJ: At the point of decision in respect of an application for a temporary visa, the relevant issue (absent other matters arising under Article I) involved in the Minister being satisfied, or not, that Australia had protection obligations to the person is whether the applicant has a relevant well-founded fear of persecution for the application of Article 1A(2). At the stage of the decision whether to grant a permanent visa, the relevant analysis would be (assuming that there are no fresh claims to be assessed under Article 1A(2)) whether the Minister was satisfied that the Convention had ceased to apply by reason of Article 1C(5).

Per Stone J: Theoretically both articles must be considered although the circumstances of an individual case may be such that it is evident from the outset that one or other can be given cursory attention. There is no necessary order in which the decision-maker must consider these articles.
[140]

Construction of Article 1C(5)

per curiam:

- (ix) The considerations to which Article 1C(5) is addressed can be seen as the mirror, or converse, of the reasons for granting refugee status.

per Allsop J (Black CJ, Marshall & Mansfield JJ agreeing):

- (x) Although Articles 1A(2) and 1C(5) deal with issues which may be seen to mirror each other, the approach to the determination of the question whether the applicant is a refugee is different from the approach to the removal of the protections afforded by the Convention. The enquiry under Article 1C(5) is whether the circumstances in connection with which the applicant has been recognised as a refugee have ceased to exist. The approach is not to ask whether a claim of a well-founded fear has been made out, but to ask whether circumstances have so changed as to warrant the conclusion that the well-founded fear which previously existed can no longer be maintained as a basis for refusing to avail himself or herself of the protection of the country of nationality. That task should be approached requiring demonstrable clarity in the durability of the relevant changes. A lack of demonstrable clarity in the reality and durability of the change in relevant circumstances will lead to the grounds for cessation not being established.

per Stone J: The cessation clause should only be invoked where the change in circumstances is fundamental and durable. For Article 1C(5) to apply, the relevant circumstances must have ceased to exist. It would be difficult to reach that conclusion with confidence if the change in circumstances were merely transitory. However, it may assist to avoid error if one focuses on the actual words used in Article 1C(5) and the change to which they refer.

per Allsop J (Black CJ, Marshall & Mansfield JJ agreeing)

- (xi) The terms of Article 1C(5) contain a degree of flexibility adaptable to the individual case. What must cease to exist are “*the circumstances in connection with which [the applicant] has been recognised as a refugee*”: that is, where that recognition has arisen because the applicant is a person described in Article 1A(2), the circumstances in connection with which the applicant has been recognised as having a well-founded fear of persecution for a relevant reason. The identification of the extent of what has to be assessed as having ceased will depend upon the nature of the claims made, their basis or bases and extent, and all the surrounding circumstances. If a person’s claims (found previously to be valid) can be seen to be narrowly based on certain facts, it may be enough that those underlying facts no longer exist. If those facts, however, are only indicative of a more broadly based fear, the circumstances giving rise to that more broadly based fear will need to be examined. Normally, the relevant circumstances will be the general political conditions in the person’s country of origin which have caused him or her to become a refugee. However, the circumstances referred to in Article 1C(5) include both the objective facts giving rise to the fear held by the applicant and the subjective fear of the applicant himself or herself.

per Stone J:

- (xii) The application of Article 1C(5) to persons who have been recognised under Article 1A(2), necessarily involves determining whether the person continues to have a well-founded fear of persecution on the basis he or she was recognised as a refugee previously. The ‘circumstances’ referred to in Article 1C(5) are those that led to the requirements of Article 1A(2) being satisfied.

per Allsop J (Marshall & Mansfield J agreeing):

- (xiii) The Tribunal erred in its application of Article 1C(5) of the Convention. The Tribunal, correctly, identified the first question before it as whether circumstances in connection with which the applicant had been recognised as a refugee had ceased to exist. However it did not exhibit an appreciation of the need to be satisfied that there had been made out a demonstrably clear and durable change of circumstances to warrant the likely permanent cessation of application of the Convention. Further, its reasons exhibited an approach whereby it was for the applicant to show that there was a real chance of persecution, rather than it being necessary for the Tribunal to be satisfied that durable change in the relevant circumstances had been revealed with the necessary clarity.

Immigration – Protection Visa – Membership to the particular social group male homosexuals in Bangladesh – Tribunal’s conclusion based on identification of two sub-groups and assignment of visa applicant to one of those groups – failure to give the applicant an opportunity to deal with a source of country information which distinguished between the sub-groups – Credible, relevant and significant – denial of procedural fairness

This was a Minister’s appeal from a judgment of the Federal Magistrates Court upholding an application for judicial review of a Refugee Review Tribunal (“the Tribunal”) decision that the respondent was not a person to whom Australia had protection obligations.

The respondent claimed to fear persecution in Bangladesh by reason of his homosexuality. The Tribunal’s ultimate conclusion that the respondent did not have a well-founded fear of persecution for a Convention reason, was at least partly based on its reliance on country information contained in a report that the Tribunal obtained itself (“the 1997 Naz report”). The report identified two sub-groups of homosexuals in Bangladesh, *kothis* and *panthis*, and indicated that it was only the former who were significantly at risk of harassment and physical abuse by police or thugs in Bangladesh. The Tribunal used the information in this report to conclude that the respondent was not a *kothi* and would not be perceived by police or thugs in Bangladesh as a *kothi* and, therefore, was not subject to a risk of persecution in the Convention sense.

The Federal Magistrate held that certain findings of fact by the Tribunal were unsupported by evidence and the making of those findings amounted to jurisdictional error. The Minister argued on appeal, inter alia, that the no evidence ground was not available because the findings to which they related could not be characterised as “*jurisdictional facts*”. The respondent, in a notice of contention, put forward a further four grounds in addition to the jurisdictional errors found at first instance. Included among these was that the Tribunal breached procedural fairness by failing to disclose country information upon which it placed reliance in its decision.

Held: Appeal dismissed. Decision of Federal Magistrates Court affirmed; Tribunal decision quashed; matter remitted for reconsideration

- (i) The Tribunal failed to give the respondent an opportunity to deal with the specific information in the 1997 Naz Report which the Tribunal proposed to take into account (regarding the distinction between *kothis* and *panthis* among homosexuals in Bangladesh, and that only persons in the former category were at risk of persecution in the Convention sense) or an opportunity to deal with the Tribunal’s perception that the visa applicant did not identify himself as a *kothi* and would not be so perceived by police or *mastaans* in Bangladesh. The Tribunal’s process of reasoning and its recourse, without reference to the visa applicant or his adviser, to material in the 1997 Naz Report, amounted to a denial of natural justice in the sense identified by the majority of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 (at [43], [53], [55]).
- (ii) That information was “*credible, relevant and significant*” to the decision made by the Tribunal, in the sense explained by the High Court in Applicant *VEAL of 2002 v MIMIA* (2005) 222 ALR 411 (at [51]).

Obiter:

- (iii) In light of the conclusion reached, it was unnecessary to consider whether the Tribunal’s failure to accord procedural fairness was compounded, or contributed to, by its apparent disregard of the representation or assurance given to the visa applicant’s solicitor. In any event however, the demonstration of a positive unfairness flowing from the accepted denial of natural justice does not require affirmative evidence that, but for the denial, the visa applicant would have taken, or refrained from taking, a particular course. It is sufficient that the denial of natural justice deprived [the respondent] of *the possibility* of a successful outcome (at [56]).

Immigration – Protection Visa – Whether behaviour modification – Whether claim put to Tribunal – Whether Tribunal failed to consider the claim – Explicit claims, implicit claims and claims that emerge from Tribunal findings and conclusions

This was an appeal from a judgment of Phipps FM 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 Burma (Myanmar), claimed to fear persecution because of his political opinions and his Mon ethnicity. The Tribunal was not satisfied that his political activities in Australia would cause him to be persecuted in Burma, or that he had a profile in Burma which had brought him to the adverse interest of officials in Burma. It was satisfied that the appellant, “*who knows and understands the political situation there and who does not have a record of consistent political activity in Burma*”, would not act in such a way as to bring himself to the adverse attention of the authorities.

The issues that arose on appeal were whether a behaviour modification claim arose from the evidence before the Tribunal and, if so, whether the Tribunal’s failure to consider it amounted to jurisdictional error.

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

- (i) The Tribunal failed to consider the real question it had to decide. It raised the issue of whether the appellant had modified his behaviour to avoid persecution and indeed implicitly recognised that he had done so. Accordingly, it was obliged to specifically address the merits of that claim in its decision. It did not do so.
- (ii) It is a natural consequence of the inquisitorial process that the Tribunal must consider the case that arises from the evidence before it, regardless of how that case is specifically put by the applicant. While the Tribunal is not required to make the applicant’s case, it is bound to consider a case on a basis not articulated by the applicant if it is raised by the evidentiary material that is before the Tribunal or by the Tribunal’s findings based on that evidence. It is not an obligation that can be discharged simply by reference to the terms in which the applicant articulates his claim.
- (iii) On the authorities, the Tribunal is obliged to consider at least three types of claim: first, those that are explicitly put by the applicant; secondly, those that are implicit in the material before the Tribunal; and thirdly, those that emerge from the Tribunal’s findings or conclusions. In each type of case, the Tribunal must ask itself the right question - whether the applicant has a well-founded fear of persecution for a Convention reason. Where the material before the Tribunal, or the Tribunal’s own findings or reasoning process, indicates that the applicant has modified or would modify his or her behaviour if returned to the country of citizenship, the question must be asked why the applicant would do so.

Obiter:

- (iv) The Tribunal’s conclusion that, even if the appellant’s activities in Burma and Australia are considered cumulatively it was not satisfied that the appellant would have an adverse profile with Burmese authorities, indicated that the Tribunal approached the issue on the basis of the balance of probabilities, rather than by appropriately assessing the possibilities of future persecution. An applicant will have a well-founded fear of persecution if the applicant holds a genuine fear of persecution that is founded on a real chance that he would be persecuted for one of the reasons stipulated in the Convention if he returned to the country of his nationality.
- (v) There is a degree of artificiality or stereotyping about the process of categorising an applicant as either ‘high-profile’ or ‘low-profile’. This process carries with it a risk of obscuring the fundamental question that the Tribunal is required to consider, namely whether an applicant has a well-founded fear of persecution for a Convention reason.

MZWEL v MIMA

[2006] FCA 442

Federal Court of Australia, Kenny J, VID 105 of 2005, 8 May 2006

Immigration – Protection Visa – Section 424A of the Migration Act – Whether content of a letter constitutes “information” under s.424A – Confidentiality – Whether there was an alternative basis for Tribunal decision – Implausibility and recent invention -

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 national of Sri Lanka, claimed to fear being persecuted by both the Liberation Tigers of Tamil Elam (“LTTE”) and the Sri Lankan authorities due to his background as a half-Tamil who used to live in Jaffna and because of his mother’s involvement with the LTTE. At the hearing before the Tribunal, the appellant claimed, for the first time, that he had also been involved with the LTTE. The Tribunal found that the appellant’s account was not credible because, if genuine, the applicant would have the claim to the delegate or in his application for review. The Tribunal concluded that neither the appellant nor his mother had been involved with the LTTE.

The essential contention in the appeal was that the Tribunal failed to comply with s424A of the Act in that it failed to seek comments from the appellant on certain information, including country information and assurance of privacy contained in a standard letter from the Department to the appellant.

Held: Appeal allowed. FMC orders set aside. Tribunal decision quashed. Matter remitted for redetermination according to law.

- (i) The Tribunal’s decision was affected by jurisdictional error by reason of a failure to follow the mandatory procedure required by s.424A(1).
- (ii) The Tribunal rejected the appellant’s explanation for his failure to mention the claim, that he was involved with the LTTE, earlier on the joint bases of importance and confidentiality. In relation to confidentiality the Tribunal referred to the assurance given by the delegate at the interview and in a standard letter. The Tribunal’s knowledge that the standard letter contained an assurance of privacy and confidentiality was knowledge that was a part of the reason it affirmed the decision under review. This was ‘information’ for the purposes of s.424A because it constituted knowledge of relevant facts or circumstances communicated to or received by the Tribunal (*SZEEU v MIMIA* [2006] FCAFC 2).
- (iii) The Tribunal decision was not supportable on the independent basis that the appellant’s account was not credible because the Tribunal did not find his evidence plausible. Reading the decision as a whole, the Tribunal relied on “*recent invention*” and “*implausibility*” as jointly or cumulatively founding its credibility finding. The Tribunal did not treat “*implausibility*” as a stand-alone basis for rejecting the claim on credibility grounds.
- (iv) There was no breach of s.424A or denial of procedural fairness arising from the fact that the appellant was not given the country information referred to in the Tribunal’s reasons before the Tribunal made its decisions. The country information was not specifically about the appellant but was about a class of persons and thus, by virtue of s.424A(3) the Tribunal was not obliged to give particulars of that information to the appellant.

SZFCX v MIMIA

[2006] FCA 394

Federal Court of Australia, Bennett J, NSD762 of 2005, 11 April 2006

Immigration – Protection Visa – Whether the Tribunal failed to consider claim of persecution by reason of desertion from army – Claim not submitted in the more general claim persecution by reason of former membership to the army -

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 was not a person to whom Australia had protection obligations. The Tribunal found that the only reason the appellant feared persecution in Lebanon was because he was a soldier in the Lebanese Armed Forces (LAF) under General Aoun, and that his former service with General Aoun did not give rise to a real chance that he would be persecuted.

On appeal, a question arose as to whether the Tribunal had considered each of the appellant’s claims, including a claim that he was in a different position from men who had served with General Aoun who were serving in the reconstituted LAF under General Lahoud with no apparent problems, because he was with Lahoud in Tripoli, then he deserted and joined Aoun’s forces in Beirut, and joined the Christian Lebanese Forces (LF), which meant that he would be regarded as a traitor.

Held: Appeal allowed. Tribunal decision quashed; matter remitted for reconsideration

- (i) The Tribunal’s decision was infected with jurisdictional error. The appellant had an outstanding claim to persecution as a member of General Aoun’s army who had deserted the LAF army, which was not addressed by the Tribunal. The Tribunal was required, but failed, to consider and make findings in respect of the desertion aspect of the appellant’s claim, which was not subsumed in the more general claim.
- (ii) There was nothing to indicate that the Tribunal’s statement that it had “*looked at all the papers relating to your application*” was incorrect. Nor was there any evidence to indicate, if that statement were incorrect, that the appellant relied on it in any way that led to him being denied an opportunity to advance his case.
- (iii) The Tribunal did not fail to provide the appellant a reasonable chance to respond to material taken into consideration.
- (iv) There was probative evidence to found the Tribunal’s conclusion that the appellant would not face serious harm should he return to Lebanon.

SZGDB v MIMIA

[2006] FCA 431

Federal Court of Australia, Rares J, NSD 2092 of 2005, 21 April 2006

Immigration – Protection Visa – Section 424A(1) of the *Migration Act* – Information before the delegate in the visa application – Reframing claim by materially altering it and then proceeding to decide reframed claim overlooking actual claim made – Erroneous understanding of claim

This was an appeal from a judgment of the Federal Magistrates Court (“the FMC”) 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 Indonesia, claimed to fear persecution on account of her Chinese ethnicity. The Tribunal found that the appellant was not a credible witness on the basis that the appellant had not mentioned the loss of her house in her original application for a protection visa. The Tribunal concluded that there was no harm directed at the appellant for a Convention reason.

Before the FMC the appellant contended, amongst other things, that the Tribunal made an error of fact in stating that she had not, when in fact she had, made a claim in her original application for her visa that her house had been burned down.

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

- (i) The Tribunal breached s.424A of the *Migration Act 1958* (“the Act”) when it failed to give the appellant particulars in accordance with s.424A(1) in coming to the conclusion that the appellant had not suffered harm, inter alia, because she had been untruthful regarding the destruction of her house. That conclusion was based, at least in part, on the Tribunal taking into account the information which the appellant originally put before the delegate in the visa application. If the Tribunal had told the

appellant of its erroneous understanding that her original application was relevant for the review because there was no assertion of harm, she would have been able to point out that she had claimed that her house had been burnt.

- (ii) Having “*got*” the Departmental file, the Tribunal fell in jurisdictional error when it failed to have regard to information in the file pursuant to s.424(1) of the Act. Nothing in s.424(1) permitted the Tribunal to ignore or use information in the file, as here, by wrongly asserting that the appellant’s original claim did not refer to the loss of her house.
- (iii) The Tribunal identified a wrong issue by failing to identify the appellant’s original claim in relation to the burning of the house and instead attributed to the appellant a claim of a markedly different character, namely one in which that assertion had not been made. This error was material in the Tribunal’s conclusion that it had “*no doubt that the [appellant] was untruthful regarding the destruction of her house*”. The function of the Tribunal is to review the decision of the Minister on the claim made, it is not entitled to reframe that claim by materially altering it and then proceeding to decide that reframed claim while overlooking the claim actually made. Therefore, the Tribunal committed a jurisdictional error, and did not simply make an error of fact, because the actual claim made by the appellant was never considered.

SZGGT v MIMIA

[2006] FCA 435

Federal Court of Australia, Rares J, NSD 2220 of 2005, 21 April 2006

Immigration – Protection Visa – Application of s.424A(1) of the *Migration Act* – Reference in Tribunal decision to material provided to delegate in visa application – Meaning of “information” in s.424A – incorporation by reference in review application – Whether information incorporated by reference is “information” given for the purpose of application – Objective test to be applied – Positive finding of elaboration – Treatment of omissions in evidence – Whether considered “information” for s.424A

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 was not a person to whom Australia had protection obligations.

The appellant claimed that he was at risk of persecution because he was aware of corruption in his work unit in China and because of a sur place claim that he became a Falun Gong practitioner in Australia. The Tribunal considered that most aspects of the appellant’s evidence were vague, generalised and lacked specific detail in coming to the view that the appellant elaborated and fabricated his claims to bring himself within the definition of a refugee.

The issue raised by this appeal from the Federal Magistrates Court was whether the Tribunal was entitled to proceed to the conclusion it did without giving the appellant notice in writing under s.424A of the *Migration Act 1958* (“the Act”) in respect of the material in the departmental file. A related issue was whether certain expressions “*As I explained before*” and “*I gave full explanations in my previous statement*”, contained in a letter in support of the review application, incorporated by reference for the purposes of s.424A(3)(b) everything that the appellant had put before the delegate or just so much of the material as related to the events surrounding his leaving China.

Held: Tribunal decision quashed and remitted for reconsideration

- (i) The Tribunal failed to comply with s.424A and committed a jurisdictional error.
- (ii) The question whether an applicant for review has given information for the purpose of the application within the meaning of s.424A(3)(b) when it is sought to say that he or she “*republished*” something which had been provided at a different time by him or her, it is necessary to make an objective assessment as to what a reasonable person in the position of an observer of the interchange would have understood.
- (iii) An objective person in the position of observing what was in the application for review in the present case would have understood the appellant to have been referring, and referring only, to his earlier

explanation as to his circumstances in China, and not to his explanation of his Australian *sur place* claim which he elaborated in different words. There was no “*republication*” of the material the applicant had provided to the delegate relating to his activities in Australia and no incorporation of the entirety of the information contained in the departmental file. This defect in procedure was not cured by the fact that the Tribunal told the appellant that it would be in receipt of the departmental file.

- (iv) The reason or a part of the reason for affirming the decision the subject of the review included what the applicant had said and failed to say in the material placed before the delegate in relation to his application as a refugee *sur place*.
- (v) The Tribunal, in coming to its positive finding in its reasons that the appellant “*elaborated and fabricated his claims to bring himself within the definition of a refugee*”, took into account what it said was before it, namely all of what was in the departmental file in the applicant’s letter accompanying his application for a protection visa. If all of that was not information ‘that the applicant gave for the purpose of the application’ for review for the purposes of s.424A(3)(b) because it had not been incorporated by reference in his application for review, then the appellant had to be given particulars of the balance of that information to which the Tribunal was having regard contained on the departmental file but not incorporated into the application for review.
- (vi) A conclusion of fabrication and elaboration of claims is substantively different from a finding that the Tribunal was not satisfied as to the claims. It is one thing for a body, such as the Tribunal, where the question for its decision, in accordance with s.65(1) of the Act, is whether a person has satisfied it, to reach a decision on the material before it, that it is not so satisfied. In such a case, the decision may not necessarily be invalid if, as here, the Tribunal considered other material together with what the appellant had given it and, without complying with s.424A, was still not satisfied that he had made out his claim. This is because the reason why it was not so satisfied would be and would remain that what the appellant had “*given*” it was insufficient. The extra material would not be a reason or a part of the reason for that state of mind since it did not affect it. But, it is another thing for such a body to use material not properly before it in coming to a positive conclusion of fabrication or elaboration.
- (vii) The reasoning of Allsop J in *SZECF v MIMIA* [2005] FCA 1200 and *SZEEU v MIMIA* [2006] FCAFC 2 on the characterisation of omissions, is the appropriate way to analyse the Tribunal’s use of the initial claim of the appellant in this matter. Because no particulars were provided to the appellant pursuant to s.424A(1) in relation to the information in his initial claim, namely that it contained or conveyed an implication or inference that it was a complete account of his claim, the Tribunal committed a jurisdictional error.

FEDERAL MAGISTRATES COURT JUDGMENTS

SZBFM & Anor v MIMIA

[2005] FMCA 451

Federal Magistrates Court of Australia, Raphael FM, SYG1626 of 2003, 13 April 2005

Immigration – Protection Visa – Where second applicant was requested to leave hearing during first applicant’s evidence – Where second applicant wished to be heard – Whether failure to permit second applicant to remain in hearing breach of s.425 of *Migration Act* - Credibility

The applicant husband and wife, nationals of Lebanon, sought judicial review of a Refugee Review Tribunal decision that they were not persons to whom Australia had protection obligations.

The applicant husband applied for the protection visa as the primary applicant and the applicant wife applied as a family member with no claims of her own. In his response to the Tribunal’s hearing invitation the applicant husband indicated he did not want a separate hearing for other family members. During the hearing, the Tribunal, referring to the applicant wife as an “*observer*”, told her to leave the hearing room for about an hour and then proceeded to ask the applicant husband a number of questions about the wife. The applicant wife did not return to the hearing room, but waited outside the whole time the applicant husband gave evidence. Although she did not tell the Tribunal she wished to speak, the “*response to hearing invitation*” form noted the applicant wife would be present at the hearing, a request was made for a female interpreter, and the applicant wife gave evidence before the Court that she thought both she and her husband would be given an opportunity to give evidence.

The Tribunal rejected the applicants’ claims on the basis of the applicant husband’s lack of credibility.

Held: RRT decision set aside and remitted for reconsideration

- (i) The actions of the Tribunal were in breach of s.425 of the Act and constitute a jurisdictional error. The wife, an applicant to the Tribunal, who may have given evidence corroborating her husband’s, whose credibility the Tribunal impugned, was not given an opportunity to attend a hearing.
- (ii) The invitation extended under s.425 of the Act must not be an empty gesture. The applicant must be provided a real opportunity to do that which he or she is invited to do, namely give evidence and present arguments. An applicant who is not present in the hearing room for the whole of the hearing can not do either of those things. The Tribunal was aware of the applicant wife’s identity and that she was not an observer. The applicant wife was told to leave the hearing room for at least an hour. She did not tell the Tribunal she wished to give evidence or insist on returning to the room after that hour, but it is the duty of the Tribunal to provide her with the opportunity and not upon her to insist upon her rights.

SZCPD v MIMA & Anor

[2006] FMCA 391

Federal Magistrates Court, Driver FM, SYG236 of 2004, 21 March 2006

Immigration – Protection Visa – Applicant declined hearing invitation – Tribunal unable to establish relevant facts – Unsupported finding applicant not a refugee – Where no evidence applicant “does not” have a well-founded fear – Where evidence the Tribunal not satisfied applicant has a well-founded fear – Jurisdictional error – Refusal of relief in exercise of discretion – Presumption applicant, having declined hearing, has nothing further to say

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

The applicant gave written statements to the Tribunal that were identical to those he gave to the Department in support of his claims. The Tribunal noted that based on the available information it was unable to make a favourable decision and invited the applicant to give oral evidence and present arguments at a hearing. The

applicant advised the Tribunal in writing that he did not wish to provide oral evidence and consented to the Tribunal proceeding to make a decision in his absence.

The Tribunal found that:

Without more detailed information from him, I am unable to establish the relevant facts, and do not accept that he has been the target of any police ill-treatment, or suspected of any anti-government activities in India.

For the above reasons I find that [the applicant] does not have a well-founded fear of Convention-related persecution in India.

The applicant applied for judicial review claiming the Tribunal made a jurisdictional error when it failed to consider his claim and submitted that the manner in which the Tribunal dealt with his claim discloses a failure to give any meaningful consideration to them.

Held: application dismissed.

- (i) The Tribunal considered the applicant's claims in a meaningful way and formed the view that there was insufficient detail in the claims to support a decision in his favour.
- (ii) The Tribunal's reasoning could not have supported either a finding that the applicant did have a well-founded fear of Convention related persecution in India or a finding that the applicant did not have a well-founded fear of Convention related persecution in India. The Tribunal's reasoning supports a conclusion that the Tribunal was not satisfied that the applicant had a well-founded fear of Convention related persecution in India.
- (iii) On its face, the Tribunal's principal finding that the applicant was not a refugee is not supported by the Tribunal's reasoning. The Tribunal found that the applicant was not a refugee based on reasoning which on any logical view could only have supported a finding of lack of satisfaction that the applicant was a refugee. In this regard, the Tribunal made a jurisdictional error.
- (iv) Relief should be withheld in this case on the basis that it would be futile to remit this matter to the Tribunal for a fresh hearing because the material could only have supported a negative finding that the decision-maker could not be satisfied that the applicant was a refugee.

SZDED v MIMIA & ANOR

[2006] FMCA 96

Federal Magistrates Court of Australia, Nicholls FM, SZ 946 of 2004, 9 March 2006

Immigration – Protection Visa – Failure to attend Tribunal hearing – Whether reasonable notice of the hearing was given – Sections 425 and 426 of the *Migration Act* – Failure to take all reasonable steps to notify the applicant of the hearing – Whether a telephone call should have been made to fulfil obligation to provide a real opportunity to appear

The applicant, a national of Nepal, sought judicial review of a decision of the Refugee Review Tribunal that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution because he supported the Communist party and had been the leader of a group that killed a Congress party member.

On 11 June 1998, the Tribunal wrote to the applicant at the address that was provided in the application for review inviting him to a hearing and advising him that if he did not respond within 14 days, the Tribunal would assume that he did not want to come to a hearing and may make a decision based on the information it had. No response to the hearing invitation was received and the Tribunal proceeded to make a decision on the review. The Tribunal's hearing invitation letter was returned to the Tribunal unclaimed on 14 July 1998, a day after the Tribunal member had made his decision. The Tribunal found the applicant's claims were unreliable and found that the evidence provided was unconvincing. In its reasons for decision, the Tribunal noted, "*It goes against the Applicant that he is apparently not prepared to address his claims in an oral hearing*".

The applicant contended, among other things, that he was denied procedural fairness for reasons including that the Tribunal did not take reasonable steps to ensure that the applicant had been given an opportunity to be heard. The applicant gave evidence that he moved to a new address in December 1997, had phoned the Tribunal to advise of the change of address and was told by an RRT officer that he would put the applicant's new address in the computer. The applicant contended that he heard nothing more until 20 August 1999 when he was taken into immigration detention and was then advised that the Tribunal had affirmed the delegate's decision on 14 July 1998.

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

- (i) The Tribunal did not take, in the circumstances, all reasonable steps as expected by legislation in force at the time, of notifying the applicant of the hearing it had scheduled for him. It clearly did not turn its mind as to whether a telephone call should be made to the applicant in fulfilling its obligation to provide him with a real opportunity to appear before it. The telephone call, if made, may not have resulted in contact with the applicant, let alone his appearing at the hearing. But, in all the circumstances, the Tribunal's failure to pursue this avenue, a measure well within its control, means that the Tribunal did not provide a reasonable opportunity for the applicant to appear at the hearing as was expected by the legislation in force at the relevant time.
- (ii) It was reasonable for the Tribunal to attempt to contact the applicant by telephone given the great importance that the Tribunal itself placed on the applicant's failure to attend the hearing in its Findings and Reasons.

SZDGB v MIMA

[2006] FMCA 341

Federal Magistrates Court of Australia, Driver FM, SYG1033 of 2004, 24 March 2006

Immigration – Protection Visa – Applicant claimed political persecution in China –Voluntary return to China not independent and unimpeachable basis to support Tribunal decision – Section 424A of *Migration Act* – Observations on desirability of disclosure of Tribunal concerns at time hearing invitation issued

The applicant, a national of China, sought judicial review of a Refugee Review Tribunal decision that he was not a person to whom Australia had protection obligations. The applicant claimed to have a well-founded fear of persecution for reasons of political opinion.

In its reasons for decision, the Tribunal indicated that from the outset it was unable to make a favourable decision on the basis of the information in the Departmental file alone, because of concerns it had relating to the fact that the applicant was issued with and retained use of a passport after supposedly being detained for stirring dissent. After conducting a hearing, the Tribunal found the applicant to be an unreliable witness. It rejected his core claims as implausible and found inconsistencies between the evidence in the applicant's protection visa application and the applicant's evidence at the Tribunal hearing. In addition, the Tribunal concluded that the applicant had acted like a person who had no fear of persecution because he had voluntarily returned to China and his home city in 2003.

The Minister conceded that the Tribunal had relied in its reasons for decision on information in the applicant's protection visa application that was not given to the Tribunal for the purposes of the review application. Such information was not disclosed pursuant to s.424A(1), however, the Minister contended that the Tribunal decision was supported by an alternate finding which was not based on information derived from the protection visa application and which was not required to be disclosed. On this basis, it was argued that despite the breach of s.424A(1) relief should be refused.

Held: RRT decision quashed and matter remitted for reconsideration.

- (i) The Tribunal's conclusion that the applicant acted like a person with no fear of persecution because he had returned voluntarily to China was not an independent and unimpeachable basis to support the Tribunal decision. The reasoning was linked to the adverse credibility findings based upon information that should have been disclosed and was not. Furthermore, the finding, considered in isolation did not and could not support the decision to affirm the delegate's decision.

- (ii) It is one thing to say that an applicant's conduct is not consistent with a well-founded fear of persecution. It is another thing to say that a person's conduct is not consistent with fear (in the sense of trepidation). The former may support a decision affirming a delegate's decision. The latter could not. A past lack of trepidation is not necessarily inconsistent with a well-founded present apprehension of a risk of harm in the future.

Obiter:

- (iii) It can be strongly argued from the presiding member's reasons for decision that at the time the hearing invitation was issued an obligation of disclosure arose pursuant to s.424A(1) in relation to information contained in the copy of the applicant's passport that was attached to his protection visa application. However by the time of the Tribunal's decision, the source of information changed from the protection visa application to the original passport produced by the applicant at the hearing. *VAF v MIMIA* (2004) 206 ALR 471 still stands for the proposition that one must analyse the issue of jurisdictional error based upon asserted breach of s.424A by reference to the Tribunal's reasons for decision. It follows that while a past breach of s.424A can be identified at the time the hearing invitation was issued, the "information" thought at that time to be determinative ultimately turned out not to be so and hence jurisdictional error is not established by that breach.
- (iv) If the review tribunals adopted as a universal practice, written disclosure of the concerns held by the tribunal about a review application at the time a hearing invitation is issued, it would enable applicants to prepare properly for their hearing, ensure s.425 is complied with by providing applicants with a genuine hearing opportunity and generally ensure that s.424A is complied with.

SZFDE & Ors v MIMIA & Anor

[2005] FMCA 1979

Federal Magistrates Court, Scarlett FM, SYG 3495 of 2004, 20 December 2005

Immigration – Protection Visa – Where applicants did not attend Tribunal hearing – Allegations of fraud by third party purporting to be solicitor and migration agent – Where Tribunal aware agent's registration had been cancelled – Where letter to applicants advising agent's registration was cancelled returned to Tribunal – Where Tribunal continued to correspond with agent whose registration was cancelled

The applicants, a husband, wife and their two children, all nationals of Lebanon, sought judicial review of a Refugee Review Tribunal decision that they were not persons to whom Australia had protection obligations. Only the applicant wife made claims under the Refugees Convention, with the husband and two children relying on their membership of her family unit. The applicant wife claimed to have worked as a journalist and to have written articles which were critical of a fundamentalist political party. The applicant wife also claimed to fear persecution on return to Lebanon as a result of her public rejection of Islam after the attacks in New York and Washington on 11 September 2001.

In the course of the review, it came to the Tribunal's attention that the applicants' authorised recipient was no longer registered as a migration agent. On 17 March 2003, the Tribunal wrote to the applicants at the residential address provided on their application for review form asking whether they wished to change their authorised recipient. That letter was returned unopened and the applicants made no further direct contact with the Tribunal. The Tribunal continued to send correspondence to the authorised recipient including an invitation to attend a hearing. The authorised recipient faxed a response to the hearing invitation indicating that the applicants did not wish to attend. The Tribunal proceeded to make its decision, finding that the applicant wife's claims lacked sufficient detail for it to be satisfied that she had a well-founded fear of Convention-related persecution.

The applicants gave evidence to the Court that their authorised recipient had fraudulently represented to them that he was a solicitor and registered migration agent. He had persuaded them that it would be against their interests to attend the Tribunal hearing. The applicants contended that the Tribunal decision should be quashed because the Tribunal procedure had been tainted by the fraudulent conduct of their authorised recipient.

Held: RRT decision quashed and matter remitted for reconsideration

- (i) The Tribunal made a jurisdictional error by continuing to send correspondence to the authorised recipient knowing that his migration agent's registration had been cancelled. If the Tribunal becomes

aware that a migration agent has had his or her registration cancelled, it should not continue to communicate with an applicant through that former agent.

- (ii) The Tribunal knew that the applicants had not received its letter of 17 March 2003, as it was returned unclaimed. It was not open to the Tribunal to assume that no response meant that the applicants were aware of the authorised recipient's de-registered status but did not wish to withdraw or vary their nomination of him as their authorised recipient. On the contrary, the Tribunal had proof that the applicants were not aware of that fact. The Tribunal was put on notice by a document received on 24 June 2003 that the applicants understood their authorised recipient to be a practising solicitor.

SZFIQ v MIMIA

[2006] FMCA 671

Federal Magistrates Court, Scarlett FM, SYG 10 of 2005, 27 April 2006

Immigration – Protection Visa – Nationality – Stateless – Whether sufficient to find on nationality based on person's claim – Finding on nationality fundamental to Tribunal jurisdiction

The applicant, who claimed to be a national of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal that he was not a person to whom Australia had protection obligations.

The applicant (an infant) was born in Australia to Bangladeshi parents who had sought judicial review of a separate Tribunal decision (differently constituted) that they were not persons to whom Australia had protection obligations. The applicant was unable to join those proceedings as he was not born until the year after the Tribunal's review of the decision relating to the parents.

The applicant claimed to fear persecution for reasons of his father's political activities in Bangladesh. On the basis of the applicant's birth certificate and the passbooks of his parents, the Tribunal accepted that he was born in Australia but was a national of Bangladesh. It then went on to assess the applicant's claims against his claimed country of nationality, Bangladesh, and affirmed the delegate's decision to refuse the protection visa.

Before the Court, the applicant's father produced a letter from the Minister's solicitors in the parents' matter indicating that consent orders remitting their matter to the Tribunal for reconsideration would be signed.

Held: RRT decision quashed and remitted for reconsideration

- (i) The Tribunal failed to make a finding on appropriate proof as to the applicant's nationality and therefore committed a jurisdictional error.
- (ii) It is not sufficient to make a finding of nationality on the basis of a claim made by a person. The nationality of the parents is not necessarily determinative of the nationality of the child.
- (iii) It is fundamental to the jurisdiction of the Tribunal that it must make a finding as to the nationality of a person or a finding as to whether the person has a nationality or not. If an applicant provides that he or she is a national of a particular country then he or she must be assessed, for Convention reasons, against that country. If however, the person does not have a nationality and is outside the country of his or her former habitual residence, then a different set of criteria lie.

SZHAY v MIMA

[2006] FMCA 261

Federal Magistrates Court of Australia, Driver FM, SYG2426 of 2005, 21 April 2006

Immigration – Protection Visa – Whether Tribunal overlooked relevant consideration – Where applicant claimed memory loss following torture – Whether breach of s.91R(3) of *Migration Act* taking into account applicant's conduct in Australia – Whether s.91R(3) limited to *sur place* claims – s.424A of *Migration Act*

The applicant, a national of China, sought judicial review of a Refugee Review Tribunal decision that he was not a person to whom Australia had protection obligations. The applicant claimed to have a well-founded fear of persecution on the basis of his practising Falun Gong.

The Tribunal found that the applicant's evidence was confused and implausible, and did not consider it to be credible. In rejecting the applicant's claims, it noted that he claimed to remember the exact date he was arrested, but that he could not remember the day of the week; and that his lack of interest in Falun Gong after arriving in Australia was not consistent with a person who was genuinely committed to Falun Gong.

The applicant contended that the Tribunal failed to take into account an integer of his claim or a relevant consideration in relation to his memory loss, that it had misapplied s.91R(3) of the *Migration Act 1958* (the Act) by having regard to his actions (or inaction) in Australia that did not assist a refugee claim; and that it breached s.424A.

Held: RRT decision quashed and matter remitted for reconsideration.

- (i) The Tribunal gave no consideration to the issue arising from the applicant's claims of the effect that severe and prolonged physical deprivation and torture might have on an applicant's memory. This was an element or integer of the applicant's claims. By failing to give any meaningful consideration to that element, the Tribunal committed jurisdictional error.
- (ii) It was implicit that the Tribunal was satisfied that the applicant's conduct in Australia was not engaged in for the purpose of strengthening his claims to be a refugee. The Tribunal did not breach s.91R(3) by failing to disregard the applicant's conduct in Australia. It is implicit in the terms of s.91R(3) that a decision maker may take into account actions or inaction that does not support a claim to be a refugee if satisfied that the applicant's conduct was not engaged in for the purposes of enhancing his or her claims.
- (iii) Section 91R(3) of the Act is not expressly limited to *sur place* claims.
- (iv) Where an applicant seeks to introduce conduct engaged in Australia in support of his or her application, she or he bears the onus of satisfying the decision maker that the conduct was engaged in otherwise than for the purpose of strengthening his or her claims.
- (v) There was no breach of s.424A.

Obiter:

- (vi) Unless a decision maker can be said to have been satisfied that the conduct was engaged in otherwise than for the purpose of strengthening his or her protection visa claims, expressly or by necessary implication, the conduct sought to be relied upon by an applicant must be disregarded.
- (vii) If an applicant introduces information about his or her conduct in Australia, and the Tribunal is not satisfied that the conduct was engaged in otherwise than for the purposes of enhancing an applicant's refugee claims, decision makers are not entitled to use that information to reject an application. If information is required to be disregarded pursuant to s.91R(3) it must be disregarded for all purposes.

VVRE v MIMIA

[2006] FMCA 430

Federal Magistrates Court of Australia, McInnis FM, MLG 1343 of 2004, 30 March 2006

Immigration – Protection Visa – “Real chance” test – Whether error in applying wrong test – Reference to “possibility” – Whether expression of “doubt” in Tribunal findings – Failure to call witness

The applicant, a national of Ethiopia, sought judicial review of a Refugee Review Tribunal decision that she was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of her Oromo ethnicity and her support for the Oromo Liberation Front (OLF).

Prior to the hearing the applicant forwarded the “*Response to Hearing Invitation*” form to the Tribunal. This requested the Tribunal to take evidence from a witness who it was claimed could refute adverse evidence obtained by DIMA. Written correspondence from the witness was also submitted with the form. The Tribunal did not take evidence from the witness at the hearing but supplied a copy of its draft decision to the applicant

for written comment. In response, the applicant again requested the Tribunal to take evidence from the witness. In affirming the delegate's decision, the Tribunal stated that it "*placed significant weight*" on the "*implausibility*" of the written correspondence provided by the witness.

The applicant contended, among other things, that the Tribunal failed to call a witness nominated by the applicant and thereby committed a jurisdictional error. Further the applicant contended that the Tribunal failed to apply the 'real chance' test espoused in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) CLR 379, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 and *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, in its assessment of the applicant's claims.

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal committed a jurisdictional error in its refusal of the applicant's request for the witness to be adduced. In refusing that request and then proceeding to make significant and adverse findings on an issue which was a crucial matter for determination, the Tribunal denied the applicant procedural fairness.
- (ii) There is no formal obligation on the Tribunal to accede to an applicant's request to call a witness; however, having indicated significant issues with the documentary evidence from that witness which relates to a crucial issue for the Tribunal's determination, the Tribunal should do more than simply refer to that request. A denial of procedural fairness will occur where it is clear that the witness is readily available, the Tribunal has already has a preliminary view in relation to documentary evidence provided by that witness and it is not satisfied with that evidence.
- (iii) Procedural fairness requires a proper and fair consideration of the request to call the witness at a hearing. In this case, there was no material before the Court which indicated any or any proper basis for the Tribunal's refusal to meet the applicant's request.
- (iv) The Tribunal did not fail to apply the real chance test. The Tribunal recited the test in clear terms as requiring it to consider whether the real chance is "*not remote or insubstantial or a far-fetched possibility*". Simply referring to a possibility does not provide any or any sufficient basis upon which the court could conclude that the Tribunal had any real doubt in relation to its substantive adverse findings.

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

Legislation Pending

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

The Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 was introduced to the House of Representatives on 11 May 2006. On the same day, the provisions of the Bill were referred by the Selection of Bills Committee to the Senate Legal and Constitutional Committee for inquiry and report by 13 June 2006.

The Bill seeks to amend the *Migration Act 1958* (the Act) by expanding the offshore processing regime introduced in 2001 currently applying to offshore entry persons and transitory persons to include all persons arriving at mainland Australia unlawfully by sea on or after 13 April 2006. The concept of *offshore entry persons* will be replaced by the concept of *designated unauthorised arrivals*.

Certain persons not intended to be caught by the regime will be exempted from the definition of designated unauthorised arrivals. The Bill also allows the Minister to declare that specified persons or classes of persons are exempt.

Existing arrangements which may allow for the temporary transfer to Australia of persons being processed offshore at a declared country will remain in place. The right of a transitory person (a person who has been transferred offshore to a declared place) who returns temporarily and who has been in Australia for 6 months continuously to seek assessment from the Refugee Review Tribunal, as to whether the person is a refugee under the Convention, will also remain in place for designated unauthorised arrivals.

It is intended that regulations will be made under the Act amending the *Migration Regulations 1994* relating to certain humanitarian visa subclasses. These changes will be needed to adapt the existing criteria for certain visas to reflect the new arrangements for designated unauthorised arrivals.

A copy of the Bill can be found at:

http://parlinfoweb.aph.gov.au/PIWeb//view_document.aspx?TABLE=BILLS&ID=2239

Further information about the inquiry can also be found at:

<http://parlinfoweb.aph.gov.au/piweb/>

CASELOAD OVERVIEW

▶ RRT Decisions – April 2006

Country	Primary decision affirmed	Primary decision set aside	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	0	1	1	0	2
Algeria	1	0	0	0	1
Bangladesh	3	1	0	1	5
Burma (Myanmar)	2	1	0	0	3
Egypt	0	3	0	0	3
Eritrea	0	1	0	0	1
Ethiopia	1	0	0	0	1
Fiji	1	1	0	0	2
Ghana	2	0	0	0	2
India	6	0	0	0	6
Indonesia	5	0	0	1	6
Iran	3	0	0	0	3
Israel	1	0	0	0	1
Laos	0	1	0	0	1
Latvia	1	0	0	0	1
Lebanon	0	1	0	0	1
Malaysia	4	0	0	0	4
Nepal	3	0	0	0	3
New Zealand	1	0	0	0	1
Nigeria	3	0	0	0	3
Pakistan	1	0	0	1	2
Papua New Guinea	1	0	0	0	1
South Africa	1	0	0	0	1
South Korea	1	0	0	0	1
Sri Lanka	8	4	0	0	12
Thailand	2	0	0	0	2
The People's Republic of China	50	8	0	1	59
Turkey	2	0	0	0	2
Uganda	0	1	0	0	1
United Kingdom	1	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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