

RRT Bulletin

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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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Albania

V0618399

22 June 2006, Melbourne

Mr D Smyth, Member

ALBANIA– PARTICULAR SOCIAL GROUP – WOMEN IN NORTHERN ALBANIA WHO HAVE FAILED TO HONOR AN ARRANGED MARRIAGE– STATE PROTECTION – The applicant feared persecution from her family, her former fiancé and his family because she had brought shame upon them by escaping from an arranged marriage. She claimed that her former fiance took her to live in Italy, forced her to work as a prostitute and beat her. The applicant claimed that under the customary law, the Kanun, a man's failure to keep his wife or to exact obedience from her allowed for extreme forms of punishment on the errant woman. She claimed that within the framework of the Kanun, the women were seen as mere chattels and as the property of their fathers and husbands. The applicant claimed that her family had ignored her plight and her own father would kill her himself if he ever saw again because she had brought shame upon the family. She claimed that if she were to return to Albania, she would be killed by her own family or the family of her former fiance and that neither the police nor any other authorities would be willing or able to afford her protection.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was forced to enter into an abusive marriage against her will. It accepted the applicant's claim that her former fiancé subjected her to regular domestic violence and forced her to work as a prostitute. The Tribunal accepted that "women in northern Albania who have failed to honour an arranged marriage" were a particular social group and that if the applicant were to return to Albania, she would face a real chance of suffering persecution as a result of her membership of this group. It noted independent information on continued application of the Kanun to justify a subservient status and role for women in northern Albania. It found that the Albanian State failed to provide adequate protection to women who were subjected to violence, particularly in the family context. Accordingly, the Tribunal found that the applicant was a person to whom Australia had protection obligations.

Bahrain

060311468

16 June 2006, Melbourne

Ms W Boddison, Member

BAHRAIN – POLITICAL OPINION – SHIA MUSLIM – The applicant, a religious leader in the Shia community claimed to fear persecution from the government. The applicant claimed he taught religious studies at his local mosque. He gave lectures at the mosque and distributed pamphlets on Shia Islam, encouraging Shiites to stand up for their rights. The applicant claimed he was detained and tortured for several months in the early 1990s and that he later travelled to another country where he undertook Islamic Studies for two years. He returned to Bahrain and was warned not to participate in political activities. In the mid 1990s he was detained and tortured for months after participating in a demonstration. He claimed he continued to take part in demonstrations and speak at the mosque and was later arrested and held for over a week. He continued to participate in demonstrations almost until he left Bahrain. The applicant feared for his personal safety, believing he would be arrested if he returned.

Held: Decision under review set aside.

The Tribunal accepted the applicant had undertaken Shia religious studies in another country and that he was a leader in his local mosque and well known in his Shia community. It accepted that he was arrested, tortured and detained. It noted that the applicant continued to be active in advocating his religious and political opinions and suffered no ill treatment in Bahrain for over a year prior to his departure but referred to the current

situation in Bahrain and accepted that Shias are discriminated against. The Tribunal found if the applicant were to return to Bahrain, he would continue as a religious leader to be politically active. The Tribunal found that despite the period of respite before he left Bahrain, it was not a remote or farfetched possibility he would be persecuted in the reasonably foreseeable future if he returned. The applicant would not be able to relocate to avoid the risk of persecution as the attitudes of the authorities were prevalent throughout Bahrain. Accordingly, it held the applicant would be persecuted in the reasonably foreseeable future for reasons of political opinion and that his fear was well founded for a Convention reason.

China

N06/53249
8 June 2006, Sydney
Mr R Derewlany, Member

CHINA – RELIGION – CHRISTIAN – The applicant feared persecution as a practising Christian. He claimed that he was baptised as a Christian, practised Christianity and had been a member of an underground evangelical church in China. The applicant claimed that he was involved in evangelical activities and distribution of religious materials. He claimed that he was arrested and detained on two occasions for religious gathering and possession of religious materials. The applicant also claimed that he was beaten whilst detained. He claimed that he fled to Australia after his second detention and obtained a passport with the assistance of his friends. The applicant claimed that he had been a member of, and regularly attended, a local Australian church upon his arrival. The applicant feared arrest and detention if he were to return to China and could not continue to practise his religion.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was baptised, practised as a Christian and was involved in evangelical activities in an underground church in China. Although the Tribunal did not accept that the applicant was detained on two occasions, it was satisfied that the applicant would face serious harm as a Christian in China involved in evangelical work. The Tribunal accepted that the applicant was a church member and that he regularly attended a local Australian church shortly after his arrival otherwise than for the purpose of strengthening his claim to be a refugee. The Tribunal found that the applicant was likely to be harassed and physically abused and accordingly found that he had a well founded fear of persecution for reasons of his religion.

N05/52964
3 April 2006
Mr J Silva, Member

CHINA – RELIGION – ROMAN CATHOLIC – The applicant claimed to fear persecution for reasons of his religion, namely as a Roman Catholic who was a member of an unauthorised church and associated youth society. He claimed authorities seized religious materials and gave him a written warning. He also claimed he was assaulted by police and residents following a Mass and was detained on a number of occasions. The applicant claimed he was detained for a number of days and physically abused after attending a prayer session. He claimed an arrest warrant had been issued and authorities were looking for him. More generally, he claimed that he had not been able to practise his religious beliefs in safety and that he would wish to continue his “leadership” role if he were to return.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a practising Roman Catholic and that his continuing practice in Australia was not conduct engaged in for the purpose of strengthening his claim to be a refugee. The Tribunal had concerns about the applicant’s credibility, but despite those concerns it was not certain that his claims were fabricated. It accepted that his church may have been viewed as “unauthorised” and it was prepared to give him the benefit of the doubt that he came to the adverse attention of authorities. However, it did not accept that incidents described by the applicant resulted in any arrest, detention, assault or other harm, or that

he was subject to an arrest warrant. The Tribunal rejected the suggestion that the mere fact of being Roman Catholic, or adherence to an unregistered church, established a well-founded fear. It held that the applicant's particular circumstances established to the Tribunal's satisfaction a small, but nevertheless real chance, that he would be arrested, detained and/or beaten if he returned to China. The Tribunal was satisfied that such treatment amounted to persecution and was for the essential and significant reason of his religion. As such it was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

060294220
4 July 2006, Sydney
Mr R Inder, Member

CHINA – RELIGION – CHRISTIAN – The applicant claimed to fear persecution in China for reasons of his Christian religion. He claimed that he organised a special network to distribute Bibles and other religious material to different underground churches. The applicant claimed that he learnt that the Public Security Bureau (PSB) was looking for his network, so he hid with a distant relative before obtaining travel documentation with the help of a close friend in the PSB. He claimed that as he organised the transportation and distribution of Bibles and religious materials into China, he would be arrested and put into gaol on his return.

Held: Decision under review affirmed.

The Tribunal found that the applicant's claims were vague and general and revealed no knowledge of Christianity, Jesus' teaching, or the Bible. It did not accept that the applicant was a Christian or a member of the underground church in China, that he organised and distributed religious material there, or that he had a well-founded fear of persecution on this basis. Noting the applicant's lack of knowledge of the information he claimed to be distributing, the Tribunal found that he was not a credible witness. It did not accept that the applicant wanted to be a real Christian or that he would practise the Christian faith if he returned. Accordingly, the Tribunal found that the applicant was not a refugee.

060417246
29 June 2006, Sydney
Mr R Wilson, Member

CHINA– RELIGION –FALUN GONG – The applicant claimed to fear persecution as a result of his Falun Gong beliefs. He claimed to have been a believer since the 1990's and that he was dismissed from his job as a result. The applicant claimed he continued to practise in private. He attended a group meeting at the home of a Falun Gong official and the Police broke into the meeting, interrogated them, confiscated their Falun Gong material and detained him for a few hours. The police threatened him with gaol if he continued to practise Falun Gong. The police discovered he distributed Falun Gong brochures in his neighbourhood. Following his departure from China, the police visited his house twice to obtain information about him. The applicant claimed he continued to practice Falun Gong in Australia and that he distributed Falun Gong material and collected signatures for a petition about the treatment of Falun Gong practitioners. He claimed that he would continue to practise if he returned to China and that as a result he would be persecuted, arrested and possibly sentenced.

Held: Decision under review set aside.

The Tribunal accepted the applicant's claims and evidence provided in support of those claims. It found the applicant was a committed Falun Gong practitioner and he was not motivated to practise Falun Gong in Australia to create a sur place claim, rather he was motivated by his desire to learn and practise Falun Gong and to support practitioners in China. The Tribunal found the applicant's activities in Australia would come to the attention of the Chinese authorities and that he would continue to practise Falun Gong if he returned to China. It was satisfied the applicant faced a real chance of persecution in the reasonably foreseeable future if he were to return to China. The Tribunal found the applicant's religion was the essential and significant reason for the feared persecution.

060417331
28 June 2006, Sydney
Mr R Inder, Member

CHINA – POLITICAL OPINION – FALUN GONG – The applicant claimed to fear persecution as a Falun Gong practitioner. She claimed that she had practised Falun Gong since 1997 and that she did the exercises almost every day. The applicant also claimed that she had taught Falun Gong to others and distributed related books. She claimed that Public Security Bureau officers came to her place and confiscated Falun Gong books and tapes and requested her to attend a re-education class. The applicant claimed that when she refused to attend, she was arrested, detained and urged to sign a written statement of renunciation. She claimed to have been made to clean the floors and the toilets when she refused. The applicant claimed that she continued to practise Falun Gong after she arrived in Australia and had attended a number of protests and demonstrations against the persecution of Falun Gong practitioners in China. She feared that if she returned she would not have the freedom to do her Falun Gong exercises and she would be mistreated by the authorities because Falun Gong is illegal.

Held: Decision under review set aside

The Tribunal accepted that the applicant was an experienced Falun Gong practitioner in China before coming to Australia and that she continued to practise it in Australia. It accepted independent information that ordinary Falun Gong practitioners returning to China were not likely to be subjected to serious harm amounting to persecution for a Convention reason. However, the Tribunal found that it was possible that the Chinese authorities may know that the applicant had been involved in Falun Gong activities by participating in anti-Chinese government activities and demonstrations here. Further, it was satisfied that the applicant would continue to practise Falun Gong if she were to return to China and that this could again result in her being detained and subjected to serious harm. Accordingly, the Tribunal was satisfied that the applicant's fear of persecution was well-founded.

Croatia

N05/52634
14 June 2006, Sydney
Mr R Inder, Member

CROATIA – RACE – SERBIAN – The applicant feared persecution in Croatia due to his Serbian ethnicity. He claimed his citizenship at birth was Yugoslavian and he was a Christian. The applicant claimed that his parents brought him to Australia and he had lived in Australia for 35 years. He claimed that he was illiterate and believed he was an Australian citizen until his permanent Australian visa was cancelled and he was detained. The applicant claimed that his children and family were Australian citizens; he formed a sense of identity in Australia and he considered himself an Australian. He further claimed that he only speaks English and that he does not remember anything about the former Yugoslavia. The applicant claimed that he had been advised that he could not get Serbian citizenship and that he might be entitled to Croatian citizenship on the basis of his birthplace. He claimed that he would be persecuted in Croatia as he is a Serb and that he was beaten up at a party by some Croatians because he was a Serb. He also claimed there were no former Yugoslavia authorities and that Croatian authorities would not protect him.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was ethnically a Serb. The Tribunal was satisfied that the applicant travelled to Australia on his father's Yugoslavian passport and had lived in Australia since then. It accepted that the applicant had close ties in Australia and his children and family were Australian citizens. The Tribunal also accepted that the applicant formed a sense of identity in Australia and that he did not remember anything about the former Yugoslavia. However, the Tribunal found the applicant's claims very vague and general. While it accepted that returning to Croatia would be difficult as the applicant did not speak the language and had grown up and spent so many years in Australia, the Tribunal was not satisfied that the essential and significant reason for any difficulties he might have would be serious harm amounting to persecution for a Convention

reason. Accordingly, the Tribunal was not satisfied that there was a real chance that the applicant would be subjected to serious harm amounting to persecution for a Convention reason if he were to return to Croatia.

Lebanon

N06/53117

11 April 2006, Sydney

Ms R Mathlin, Member

LEBANON – RELIGION – CHRISTIAN – The applicants were children and their claims were presented on their behalf by their father, who said that any persecution they faced in Lebanon was because of him. He claimed that he was persecuted by Syrian military forces and feared that they may persecute him again and that he could be arrested or taken into custody by intelligence services. The applicants' father claimed that many years ago he was slapped by a Syrian soldier at a checkpoint and the soldier's superior officer took action in relation to this incident. He claimed that the officer really humiliated that soldier and others involved and that he was afraid that if they were still in Lebanon they would seek revenge if he returned. He further claimed that, after he left Lebanon, intelligence officers came to his home asking about him because he used to play music in the church and they thought he was plotting with Christian groups. The applicants also claimed that they would be persecuted by Islamic groups, especially Hezbollah, because they were Christian.

Held: Decision under review affirmed.

The Tribunal accepted that the applicants' father was slapped by a Syrian soldier and that the soldier's superior took action in response. However, independent evidence established that Syrian forces have now withdrawn from Lebanon. The Tribunal therefore considered the possibility that the soldiers with whom the applicant's father had problems would still be in Lebanon to be remote. It was satisfied that, even if they did seek to harm him, it would not be for a Convention reason. The Tribunal noted that the applicants' father's evidence indicated that he merely identified with Christian youth groups but was not actually involved with activities on behalf of these groups. It was satisfied that there was no real chance that the applicants themselves, or their family, would be subjected to persecution by Hezbollah or other terrorist groups, for reason of their religion. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Malaysia

N06/53415

14 June 2006, Sydney

Ms P Leehy, Member

MALAYSIA – RELIGION – CHRISTIAN – The applicant, of Tamil ethnicity, claimed to fear persecution for reasons of his Christian religion by Malaysian authorities, Muslim fanatical groups and Hindu fanatical groups. He claimed that he worked full-time with a church group for five years and that he preached the Bible to Muslims, Hindus and Chinese. The applicant claimed that police raided his house and detained him for propagation of Christianity. He claimed that he was burned with cigarette ends and beaten up by police authorities during detention. The applicant claimed that he stayed underground and had escaped to Singapore twice to avoid persecution. He claimed that he was targeted by an Islamic fanatic group which kept his family under surveillance. The applicant also claimed that Muslim extremists had burnt down part of his house and harassed his family. He claimed that he was actively involved in activities among a Christian congregation in Australia and that he feared being charged and tortured if he were to return.

Held: Decision under review set aside.

The Tribunal accepted that the applicant had been active on behalf of an evangelical church in Malaysia for several years. It accepted that the applicant was arrested, detained and mistreated by police authorities after he was accused of attempting to convert Muslims. The Tribunal accepted that the applicant had suffered

serious harm from mistreatment during detention sufficiently serious to amount to persecution. It also accepted that the applicant was harassed by Muslim extremists for his religious beliefs. The Tribunal was satisfied that there was a real chance that the applicant would be persecuted for his religious beliefs and activities. In considering whether the applicant could avoid persecution by the authorities by relocating to another area of Malaysia, the Tribunal noted that the applicant's preaching activities were against the law throughout Malaysia. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution for reasons of religion.

Occupied Territories

N05/52844
15 May 2006, Sydney
Ms J Morris, Member

OCCUPIED TERRITORIES – POLITICAL OPINION – CHRISTIAN – COLLABORATOR – The applicant feared persecution in Palestine as a Christian and a member of a particular social group. The applicant claimed that she worked for an organisation which provided assistance to families that were going through grief after a loss of a family member. She claimed that the Islamic community objected to being assisted by a female and by a Christian. The applicant claimed that she was threatened by Hamas on many occasions and was accused of advocating Christianity through her role. She claimed to have been held in custody by various families on numerous occasions and to have been accused of filtering information to the Israeli Government and siding with the Zionists. The applicant claimed that she was in constant fear of being kidnapped or killed.

Held: Decision under review set aside.

The Tribunal accepted that the applicant, through her activities, had fallen foul of Hamas and that she was considered to be against them. It also accepted that she was threatened by them as a collaborator. The Tribunal noted independent evidence which suggested that there was considerable animosity by Hamas towards Palestinian Christians and that they harmed those they consider to be evangelists or collaborators with Israel. The Tribunal was satisfied that the applicant would face treatment which could include arbitrary detention and or arbitrary death for the reasons of her perceived opposition to Hamas. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for reasons of her imputed political opinion.

Pakistan

N0653376
8 June 2006, Sydney
Dr I O'Connell, Member

PAKISTAN – POLITICAL OPINION – PAKISTAN PEOPLES PARTY – The applicant claimed he feared harm both from his political opponents and the Pakistani authorities on the basis of his political opinion. He claimed to have been actively involved with the Pakistan Peoples Party (PPP) as a follower, organiser and recruiter, that he was harmed in the past by members of the Muslim League; that he was subject to ongoing threats; that he feared for his life and was not able to avail himself of state protection because the state authorities are partisan and that he has been subject to arrest because of his political opinion. The applicant claimed that he received threatening phone calls after leaving his home town. He also claimed at hearing that he had been arrested and assaulted on occasions other than those set out in his Statutory Declaration to the Tribunal.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant had an association with PPP and was involved in incidents of harm as a result of his political activity during the 1990s. However, the Tribunal did not accept that the applicant had any recent and particular involvement with PPP or that he had been subject to recent acts of violence, arrest

or threats. The Tribunal found the applicant credible, detailed, clear and straightforward in presenting evidence regarding earlier events but non-descript and equivocal in providing details of his political activities in the last few years and vague and non-committal about recent threats of harm. Accordingly, the Tribunal did not accept that the applicant faced threats to his life from political opponents and that his life was in danger because of his political opinion should he return to Pakistan. The Tribunal did not accept his claim to have been subject to arrest by reason of his political activities because it was only raised at the closing of the hearing. It was not satisfied that there was a real chance that the applicant would suffer serious harm on return to Pakistan from either political opponents or government authorities because of his association with PPP. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution within the meaning of the Convention.

Papua New Guinea

V06/18479
13 July 2006, Melbourne
Ms K Synon, Member

PAPUA NEW GUINEA – RACE – PARTICULAR SOCIAL GROUP – TRIBE – PEOPLE LIABLE TO PAY COMPENSATION – The applicant claimed a fear of persecution for reasons of his ethnicity and membership of a particular social group. He claimed that his uncle was driving the applicant's family car when it was involved in an accident in which a passenger, a young man from a neighbouring tribe, was killed. His uncle ran away and has not been heard from since. The applicant claimed that the neighbouring tribe took revenge on his tribe as "payback" for the accident by burning down his village and killing his mother in the raid. He claimed that the neighbouring tribe still required compensation and that he would be responsible for paying the compensation because he was the owner of the car and he would be perceived to be wealthy as he was in Australia. The applicant claimed that he could not afford to pay the amount set for compensation and then the fighting would start all over again and he would be killed.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was imputed with a degree of responsibility for a car accident in which his uncle was driving the applicant's mother's car and that in the accident a young man from a neighbouring tribe was killed. It accepted that compensation was demanded of him, that the neighbouring tribe took revenge on his tribe as "payback" for the accident and that his village was destroyed and his mother killed in the raid. It accepted that should he return to Papua New Guinea without paying at least a portion of the compensation that tribal warfare would resume and that there was a real chance that he might be seriously harmed or killed. Further it accepted that the applicant did not have the means to pay the compensation. The Tribunal found that "people liable to pay compensation" was not a particular social group for the purposes of the Convention. The Tribunal did not accept that the applicant as a member of his tribe was of a different ethnicity to members of the neighbouring tribe. However, it did find that the applicant's tribe was a particular social group and that the applicant's membership of such group was the essential and significant reason for the likely harm. Accordingly, it was satisfied that he had a well-founded fear of persecution for a Convention reason.

Philippines

N06/53160
19 April 2006
Mr J Silva, Member

PHILIPPINES – PARTICULAR SOCIAL GROUP – RETIRED OFFICIALS – RELIGION – MUSLIM – The applicants claimed a fear of persecution because of their status as retired former officials. The applicant husband feared mainly Muslim government officials against whom he had conducted investigations. He claimed he had received threats on a regular basis including serious death threats. He also claimed he lived in constant fear which resulted in the applicants frequently staying overnight with relatives. The applicant wife feared local officials who bore her a grudge because she had been incorruptible while working as a government official in a remote area. She claimed she had been forced to wear Muslim garb to protect herself from the Muslims

present in the area and she had been kidnapped by Muslim rebels. She also claimed there had been an arson attack on her family home. The applicants claimed the police were unable to protect them because they were under resourced, corrupt and did not place a priority on retired officials, only VIPs, unless they could pay bribes which the applicants could not afford.

Held: Decision under review affirmed.

The Tribunal found the applicants' claims to be exaggerated and that there was no more than a remote and insubstantial chance they would be targeted for reasons of their status as retired former officials. It accepted the applicant husband undertook investigations and that this work entailed some risk of revenge. However, the Tribunal found the applicant husband's conduct prior to his departure led it to conclude that his fear was not genuine. While it accepted he had received death threats, it did not accept they were sustained and credible or presented an ongoing risk. It held his evidence of his degree of apprehension and the alleged ongoing threats was exaggerated and unreliable. The Tribunal accepted the applicant wife's claims were largely based on fact, but found their link to her refugee claim was improvised and her fears unfounded. It accepted she had been kidnapped while working in a remote area and that the family home had been burned down, but was not convinced the applicant wife had disguised herself as a Muslim or taken anything more than routine security measures. It also noted she had retired and moved away and that she had not been subject to subsequent targeting. The Tribunal was not satisfied that such acts of past harm as the applicants had suffered established a well-founded fear. It also found that their evidence and generalisations about a fear of Muslims were contrived and aimed at lending their claims gravity and a politico-religious flavour. The Tribunal found that the applicants did not have a well-founded fear of persecution for a Convention reason.

Taiwan

N06/53283

7 June 2006, Sydney

Mr B MacCarthy, Senior Member

TAIWAN – CHINA – POLITICAL OPINION – PRO-REUNIFICATION – FALUN GONG – The applicant husband feared persecution in Taiwan on the grounds of political opinion. The applicant husband claimed that he held views in favour of re-unification of the two Chinas and that in future his views might become so unpopular as to place him at risk of persecution. The applicant wife made no claims in her own right in the protection visa application, but on review claimed to fear persecution in China as a Falun Gong practitioner. The applicant wife claimed that she learned Falun Gong from her mother when she visited China in the late 1990s and that she discontinued practising on her return to Australia because of her pregnancy and at her husband's instigation. She claimed to have resumed her practice and to have started practising in public last year.

Held: Decision under review affirmed.

The Tribunal found that the applicant husband's fears were only based upon speculation and that his fear of persecution was not well-founded. It noted his acknowledgment to the Tribunal that his political views did not cause him to be persecuted in the past. The Tribunal noted that when the application for Protection visa was lodged, only the applicant husband made Convention claims. It therefore found that she did not meet clause 866.222 of Schedule 2 to the Migration Regulations 1994, because her husband was not granted a protection visa. The Tribunal went on to consider her claims in the event that it was wrong in this analysis. It found that she commenced her practice in response to the decision to refuse the protection visa application, with the aim of strengthening a claim for protection. It further found that were she return to China she would not continue her practice, the motivation for it having ended. Accordingly, the Tribunal found that she would not come to the adverse attention of the PRC authorities and that she did not have a well-founded fear of persecution.

FEDERAL COURT JUDGMENTS

SZEPZ v MIMA

[2006] FCAFC 107

Federal Court of Australia, Emmett, Siopis, Rares JJ, NSD2229 of 2005, 30 June 2006

Immigration – Protection Visa – Federal Magistrates Court remittal – Tribunal to be differently constituted – Whether Federal Magistrate had the power to make such an order – Whether first Tribunal’s compliance with s.424A of the *Migration Act* 1958 covered second Tribunal.

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, a Bangladeshi national, had previously sought judicial review of a decision of the Tribunal that he was not a person to whom Australia had protection obligations. That decision was remitted by consent (the first decision). The Court made Consent Orders that included that the matter be remitted to the Tribunal differently constituted for reconsideration according to law. The Tribunal differently constituted again affirmed the decision of the delegate (the second decision). The applicant sought judicial review of the second decision.

Information gained from the High Commission in Bangladesh comprised part of the reason for affirming the delegate’s decision in the first decision. That information was put to the appellant for comment in a s.424A letter. That information also comprised part of the reason for affirming the delegate’s decision in the second decision. The Tribunal as subsequently constituted did not put the information to the appellant for comment.

The appellant claimed that the “particular review” leading to the first decision came to an end and the Consent Orders required the Principal Member to constitute a second “particular review” pursuant to s.421 of the *Migration Act* 1958 (the Act). As a second review commenced constituted by a different Member, the s.424A information should have been given to the applicant again.

The appellant argued on appeal that the primary judge erred in construing s.424A of the Act as permitting the giving of notice under s.424A for the purposes of the first decision as being compliance with s.424A for the purpose of the second decision.

Held: Appeal dismissed

- (i) Before the second decision the appellant had been given particulars of the relevant information and invited to comment. Accordingly, there was no failure to comply with s.424A in relation to the making of the second decision.
- (ii) An invalid decision by the Tribunal is no decision at all, but it does not follow that all steps and procedures taken in arriving at that invalid decision are themselves invalid. The Tribunal still has before it the material that was obtained when the decision that had been set aside was made.
- (iii) Assuming the effect of the Consent Orders was to quash or set aside the first decision, it was incumbent upon the Tribunal to embark upon a review of the delegate’s decision according to law. It was a review by the Tribunal that is required, not a review by a particular Member. It was a decision of the Tribunal that was set aside, not a decision of a particular Member. Where ss.421, 422, and 422A of the Act refer to a “particular review” they identify the review initiated under s.414(1) and culminating in a decision in accordance with s.430. The expression does not depend upon the identity of the particular Member constituting the Tribunal. Rather it refers to the function of the Tribunal to review a decision. Until the Tribunal has made a valid decision on the review it has a duty to perform that “particular review”.
- (iv) In so far as s.424A(1)(a) refers to a state of mind or mental process of determining if the information is information that is the reason or part of the reason for affirming the delegate’s decision, it must be taken to refer to the state of mind or mental process of the particular Member. However, the

Tribunal must give the information by one of the methods in s.441A, all of which contemplate it being given by the Registrar or an officer of the Tribunal or an authorised person, as well as a Member.

Obiter:

- (v) There must be real doubt whether the Federal Magistrates Court could direct how the Tribunal be constituted having regard to the express power conferred on the Principal Member by s.420 as even an express statutory power to give directions might not override the provision of s.420.
- (vi) It is incumbent upon parties who propose orders by consent setting aside administrative decisions to set out clearly and cogently the basis upon which the Court is being asked to act. The judicial officer will then be in a position to make a properly considered decision as to whether to make the orders.

SBBC v MIMA

[2006] FCA 925

Federal Court of Australia, Mansfield J, SAD 98 of 2005, 25 July 2006

Immigration – Protection Visa – Whether failure to consider well-founded fear of persecution by reason of the renewed activities of the Taliban as non-state agents – Whether failure to accord procedural fairness

The applicant 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, an ethnic Hazara and a Shia Muslim, was granted a Temporary Protection Visa on the basis that he had a well founded fear of persecution from the (then) Taliban Government. He was subsequently refused a further Protection Visa by a delegate of the Department. In affirming the primary decision, the Tribunal found that the reasons for the grant of the Temporary Protection Visa had ceased to exist, finding that the Taliban would not re-emerge as a political power in Afghanistan. The Tribunal also considered other grounds for protection and noted that the applicant was “unlikely to be persecuted by Pashtuns (and/or Taliban remnants)”.

The applicant contended, among other things, that the Tribunal wrongly asked itself whether there was a real chance the Taliban might re-assume political power in Afghanistan and failed to consider whether the applicant might nevertheless be at risk from the Taliban and whether the Afghani authorities had taken reasonable measures to protect him. The applicant further contended the Tribunal erred when addressing Art IC(5) of the Refugees Convention in that it failed to consider whether the change in circumstances in Afghanistan was durable and substantial and instead applied the test established by Art IA(2).

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal committed a jurisdictional error in failing to address a particular of the applicant’s claim. The Tribunal did not have regard to the applicant’s claimed fear of persecution by reason of the renewed activities of the Taliban, even if (as found) the Taliban was unlikely to re-assume political power.
- (ii) If it were a real possibility that the Taliban might pose a serious threat to the applicant if he were to return to Afghanistan because the Taliban (on the Tribunal’s findings) would be a non-State entity, it would also be necessary for the Tribunal to address the capacity of the Afghani authorities to protect the applicant from the Taliban.
- (iii) The failure of the Tribunal to address that particular of the applicant’s claim is apparent from the reasons of the Tribunal. The brief reference to the Taliban in the relevant passage was merely incidental and did not represent a conclusion of the Tribunal based on a consideration of the applicant’s claims.
- (iv) Even if the Tribunal simply applied Art IC(5) as a mirror of the Art IA(2) test to the applicant’s permanent protection visa application, the Tribunal had not committed a jurisdictional error on this basis.

SZCME v MIMA
[2006] FCA 932
Federal Court of Australia, Kiefel J, NSD 244 of 2006, 25 July 2006

Immigration – Protection Visa – Failure to comply with s.424A of the *Migration Act 1958*– Whether alternate finding independent of failure to comply with 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, a national of India, claimed to fear persecution by Hindu extremists and the government as a result of his activities as a member of the Tamil Nadu Muslim Munnetra Kazhagam (TMMK) party. The Tribunal found that the appellant had not suffered persecution in India because of either his political opinions or his religion and did not have a well founded fear of persecution in the reasonably foreseeable future. The Tribunal further found that if the appellant did have a well-founded fear of Convention-related persecution he could relocate to any of the places (such as Chennai, Bombay or Delhi) where he had previously resided and conducted his business.

The Minister conceded that s.424A of the *Migration Act 1958* (the Act) had been breached in relation to the Tribunal's credibility findings which turned on perceived inconsistencies in the appellant's evidence including the fact that he had not repeated to the Tribunal a claim made in his protection visa application to have been arrested and beaten. The Minister submitted, however that the Tribunal's finding that the appellant could relocate to other places in India stood as an alternative, and independent, basis for the decision.

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

- (i) The Court is obliged to accept the Minister's concession concerning the requirements of s.424A. It could not be concluded that the Tribunal's decision concerning relocation was entirely independent of what arose from the failure to follow s.424A.
- (ii) No objective reason, unrelated to credit, was given for the conclusion that the appellant could relocate. It is not possible to say that the Tribunal's finding is in no way connected to the use made of inconsistencies in his evidence, including those arising from his earlier statements to the Department. It may be inferred that the Tribunal considered that the reason the appellant could live in the places it mentioned was that he had lived there before.

SZEXQ v MIMA
[2006] FCA 927
Federal Court of Australia, Cowdroy J, NSD 2166 of 2005, 21 July 2006

Immigration – Protection Visa – Whether Tribunal relied upon information to which s.424A(1) of the *Migration Act 1958* applied – Whether applicant provided information to the Tribunal 'for the purpose of the application' in accordance with s.424A(3) – Whether the Court can draw an inference that information not provided from the reasons of the Tribunal – Whether the Tribunal failed to consider the probable result if its findings were wrong

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 to fear persecution by the Pakistan Muslim League (PML) on the basis of his involvement with the Pakistan People's Party (PPP) and affiliations with a Sunni extremist group known as the SSP. The Tribunal accepted that the applicant was involved with the PPP but found that the fact that the appellant did not leave Pakistan until 'the late 1990s' did not suggest that he had been persecuted by the PML after they came to power in 1997. The Tribunal noted that the PML had been ousted in a coup and were no longer in

power. Additionally the Tribunal found that in view of the appellant's family's "longstanding affiliation" with the PPP he would not be perceived as belonging to the SSP.

The appellant raised two issues on appeal which were not before the Federal Magistrate. The first was that the Tribunal breached s.424A of the *Migration Act 1958* (the Act) by relying upon information which had not been given to it by the appellant, without providing that information in writing to the appellant. The appellant submitted that there were two such items of information, one relating to his family's political activities and one to his date of departure. His second contention was that the Tribunal's statement that the timing of his departure 'did not suggest that he had been persecuted' was indicative of a tentative finding, and that the Tribunal therefore erred in failing to consider the possibility that the PML would win scheduled elections, in which case the appellant may have faced a real chance of future persecution.

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

- (i) The Tribunal did not comply with the requirements of s.424A. The Tribunal specifically stated that the appellant was unable to recall when he had left Pakistan and specifically referred to the application form as containing the accurate date of departure. Its reasons themselves directly point to the conclusion that the Tribunal relied upon information from the application form, in circumstances where that information had not been provided by the appellant orally at hearing. The Tribunal did not provide this information to the appellant in writing as required by s.424A(2)(a) and s.441A of the Act.
- (ii) The appellant was entitled to rely upon the reasons as evidence that the information had not been provided under s.424A(3)(b). In the absence of the transcript, the reasons of the Tribunal themselves provide sufficient evidence for the Court to arrive at a conclusion that the information had not been provided to the Tribunal by the appellant as contemplated by s.424A(3)(b). Where the Court is unable to directly draw a conclusion from a Tribunal's reasons as to the source of the Tribunal's information, it is ultimately the responsibility of an appellant to ensure the transcript is provided if he or she wishes to argue that the information could only have been sourced from documents to which obligations under s.424A(1) and (2) applied.
- (iii) Some information on the appellant's family's political activities was clearly provided orally by the appellant to the Tribunal, and accordingly it could not be concluded that the Tribunal's finding was not based upon information which was provided during the hearing.
- (iv) The word 'suggest' in the Tribunal's statement that the time of the applicant's departure 'did not suggest that he had been persecuted...', in its context, does not show that the Tribunal was ambivalent in its conclusion. The finding was not attended by any significant doubt. Accordingly, the Tribunal was not required to adopt the approach referred to in *MIMA v Rajalingam and Ors* (1999) 93 FCR 220 by considering whether the finding might be wrong.

FEDERAL MAGISTRATES COURT JUDGMENTS

MZWKN v MIMA

[2006] FMCA 413

Federal Magistrates Court of Australia, McInnis FM, MLG 640 of 2004, 24 March 2006

Immigration – Protection Visa – relevant standard of interpretation – issue raised concerning political philosophy – essential integer of case – denial of procedural fairness

The applicant, a national of Georgia, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that he was not a person to whom Australia owed protection obligations. The applicant claimed to fear persecution on the basis that he would be persecuted by Georgian law enforcement agencies because he was trying to establish a political party.

The application for a protection visa was refused and on 21 May 2002 the Tribunal affirmed the delegates decision (the first Tribunal decision). The applicant then applied to the Federal Magistrates Court for judicial review of that decision. The central issue before the Courts was the quality of the Georgian interpreter that had been provided by the first Tribunal, and a transcript of the first hearing was provided to the Federal Court by a translator. The matter was remitted for reconsideration.

The second Tribunal went to considerable efforts to locate another, accredited, Georgian translator, but was unsuccessful. An accredited Russian translator was supplied by the Tribunal on the understanding that the applicant spoke Russian to some degree, although it was a second language, as he could not read or write it. The second Tribunal went to some lengths to ensure that when the applicant appeared to have difficulty, there was further discussion of the questions put and answers.

The second Tribunal found that the applicant had not provided sufficient details of the political party he was allegedly involved with, and in particular did not appear to know which part of the political spectrum the party was located on. The Tribunal also found that the applicant's role in the political party was minor and insufficient to bring him to the attention of the authorities, and that the general country information suggested the Georgian authorities were tolerant of political parties. The second Tribunal affirmed the decision of the delegate.

The applicant contended that the Tribunal had erred by placing weight on his lack of clarity in answering questions on the political party. The applicant submitted that this was due to the difficulties he had communicating in the Russian language.

Held: RRT decision set aside and remitted for reconsideration.

- (i) There was a departure from the relevant standards of interpretation which related to matters significant to the applicant's case before the Tribunal. The discussion of the philosophy of the political party was central to the application and by failing to provide a relevant standard of interpretation, and not seeking further written submissions, the Tribunal denied the applicant procedural fairness and made a jurisdictional error.
- (ii) The Tribunal's reasoning that the applicant did not display "any real awareness of the idea of a political party", or of the political spectrum was difficult to extricate from the other adverse findings of the Tribunal, and was determinative of the application.
- (iii) The error was not cured by the applicant continuing with the hearing and not objecting.

MZWTX & Anor v MIMA & Anor

Immigration – Protection Visa – Failure to address a Convention related ground – Imputed political belief – Whether Tribunal considered the claim before it – Whether obligation to consider claim not argued by the applicant - Imputed political belief inferred by facts although not expressly the basis of applicant's case – Convention ground “squarely raised” on the material – Discrete finding of adequate state protection

The applicant and his family, nationals of Sri Lanka, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that they were not persons to whom Australia had protection obligations. The applicant who was a Colonel in the Sri Lankan army, claimed to fear persecution for reasons of his Sinhalese race. He claimed that as a consequence of his involvement in the prosecution and successful conviction of Sinhalese soldiers, who had murdered some Tamils, he was accused of being a traitor to his Sinhalese race and was, along with his family, subjected to threats and acts of violence.

The Tribunal found that the applicant and his family faced life-threatening harm from unidentifiable persons, who may have been of Sinhalese ethnicity and associated with individuals involved in the Tamil murder case. However, it found that the threat to the applicant and his family did not arise from race, but from unrelated attempts for revenge. Further the Tribunal found that state protection would be afforded to the applicants should they return to Sri Lanka. It concluded that the applicants did not have a well-founded fear of persecution for reason of their race, or any other Convention reason.

The applicants contended that the Tribunal committed jurisdictional error by not dealing with the case on the Convention ground of imputed political opinion, which was squarely raised on the material before it, although not expressly articulated, and by the way it treated the issue of state protection.

Held: RRT decision set aside and remitted for reconsideration.

- (i) There was jurisdictional error on the part of the Tribunal in respect of the failure to consider the Convention ground of imputed political opinion; and the failure to examine the issue of adequate state protection in light of the potential Convention based persecution and the significant, accepted history of failed state protection.
- (ii) The language used by the Tribunal exhibited some recognition by it of the political context in which the persecution was perpetrated and the political nexus between the persecution and the role played by the applicant in the prosecution of the Sinhalese soldiers. Whilst it was understandable the Tribunal's focus was on the ground of race as it certainly was the main assertion by the applicant, it was incumbent upon the Tribunal to explore the question of other Convention related grounds, including that of an imputed political opinion being ascribed by the persecutors to the applicant. There was no assessment of the issue, which was squarely raised.
- (iii) The perfunctory treatment of the issue of “other Convention grounds” by the Tribunal could not stand as an examination and rejection of the ground in question.
- (iv) The analysis by the Tribunal of the question of adequate state protection was misconceived because it was done with a framework predicated on no nexus with the Convention being established and therefore only considered the inadequacy of protection in the context where it must be shown, and could not, be that the state itself was acting discriminatorily on a Convention ground.

[2006] FMCA 1035

Federal Magistrates Court, McInnis FM, MLG 44 of 2006, 27 July 2006

Immigration – Protection Visa – Falun Gong – s.351 of *Migration Act* – Relevance of failure to mention activities in Falun Gong in application pursuant to s.351 – Whether public interest considerations in application under s.351 relevant for purposes of protection visa application – irrelevant consideration

The applicant, a national of China, 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 was refused the grant of a resolution of status visa by the Migration Review Tribunal and applied to the Minister for a more favourable decision pursuant to s.351 of the *Migration Act* 1958 (the Act). The Minister refused to exercise the discretion to grant the applicant a visa. The applicant then applied for a protection visa but this was refused by the delegate. The Tribunal in affirming the delegate's decision relied upon the failure of the applicant to refer to his membership of Falun Gong when making his application to the Minister under s.351.

Counsel for the applicant submitted that the mere fact that an applicant had a claim to protection within the Refugees Convention had no relationship to the migration visa claims in question, or any aspect of the s.351 application. Counsel for the Minister submitted that the failure to mention the membership of Falun Gong was a consideration one would reasonably expect the applicant to mention and therefore was a matter that the RRT was entitled to take into account in making an adverse finding about credibility.

Held: RRT decision quashed and remitted for reconsideration.

- (i) By referring to and placing clear emphasis upon the applicant's failure to mention membership of Falun Gong when making his s.351 application, the Tribunal had taken into account an irrelevant factor sufficient to constitute jurisdictional error.
- (ii) The issues that may or may not have been raised by an applicant seeking to persuade the Minister to make a more favourable decision under s.351 would not be reasonably expected to include factors relevant to an application for a protection visa which in a separate part of the Act is dealt with, and more particularly, in a separate division provides for a separate power which the Minister may exercise pursuant to s.417

SZDAG v MIMA & ANOR

[2006] FMCA 987

Federal Magistrates Court of Australia, Nicholls FM, SYG 751 of 2004, 13 July 2006

SZDAI & ORS v MIMA & ANOR

[2006] FMCA 988

Federal Magistrates Court of Australia, Nicholls FM, SYG 754 of 2004, 13 July 2006

Immigration – Protection Visa – “Black child” – Laws of general application – Question of “serious harm” – Tribunal restricted its consideration of the elements relevant to what constitutes “serious harm” with reference only to s.91R(2) of the *Migration Act* 1958

The applicants, two brothers, who were nationals of the People's Republic of China, sought judicial review of separate decisions of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations. The applicants claimed to fear persecution because they were members of a particular social group in China (“heimin” or “black children”) and would consequently suffer discrimination and be denied benefits such as access to household registration, entrance to state schools, health benefits and employment in the government sector.

The Tribunal found that the question to be addressed was whether the applicants' lack of “automatic registration” would result in treatment towards them that would cause them serious harm if they were to

return to China. The Tribunal was not satisfied that even if the applicants remained unregistered, they would suffer serious harm such as significant economic hardship or denial of basic services or denial of capacity to earn a livelihood. The Tribunal also found that the family planning regulations in China were not discriminatory as they applied equally to all Chinese citizens and had been imposed with a 'legitimate purpose' of slowing population growth.

The applicants contended, among other things, that the Tribunal's finding that the law regarding 'black children' was not discriminatory amounted to a misunderstanding of the requirements necessary for determining whether there was discrimination, and that the Tribunal incorrectly treated s.91R(2) of the *Migration Act 1958* (the Act) as an exhaustive list of the circumstances involving serious harm.

Held: Appeal allowed. RRT decisions set aside and matters remitted for reconsideration.

- (i) In looking at the situation of the applicants remaining in China as unregistered children, the Tribunal did not address the applicants' claim that they would suffer low self esteem from the perception of them as unregistered children. Whether this was a failure by the Tribunal to consider all relevant claims, in all the circumstances, or is indicative of an approach to the issue of serious harm which was confined to the matters set out in s.91R(2) of the Act makes little difference. Both reveal jurisdictional error.
- (ii) Notwithstanding that the Tribunal set out the correct test at the beginning of its decision record, and used the phrase "such as", the use of those words by the Tribunal in its decision record was unclear, and could equally be a conjunction between the Tribunal's lack of satisfaction and the matters from which it derives such a lack of satisfaction. On balance, the argument that the Tribunal did not see the matters set out at s.91R(2) as exhaustive of what it was considering in s.91R(1) should not be accepted.
- (iii) Even though China's one child policy may be constituted in laws of general application, that does not mean that the laws, or practices, that apply to children born in contravention of that policy (as separately applied to children generally in China) are applied indiscriminately. The Tribunal did not express (ultimately) its relevant findings with reference to a law of general application. It correctly addressed the issue of what was likely to happen to the applicants given their current unregistered status and was not satisfied that the applicants would face discrimination let alone severe harm.

SZDHG & Ors v MIMA & Anor

[2006] FMCA 943

Federal Magistrates Court, Scarlett FM, SYG 1081 of 2004, 30 June 2006

Immigration – Protection Visa – Husband and wife found by Tribunal to be stateless – No finding as to nationality of third applicant – Decision incomplete – Making a finding in respect of whether an applicant is a citizen of a country or stateless is fundamental to the review process

The applicants, being a husband, wife and child (the third applicant), who claimed to be stateless and formerly resident in Latvia, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the first mentioned applicant was not a person to whom Australia has protection obligations.

Only the first mentioned applicant made specific claims under the Refugees Convention, his wife and the third applicant relying on their membership of his family. The Tribunal found that the first mentioned applicant and his wife are stateless and stated that it had assessed "their" claims against Latvia as their country of former habitual residence. The Tribunal rejected the first mentioned applicant's claims and found that he did not have a well founded fear of persecution for a Convention reason. As a consequence, the Tribunal found that the applicant wife and third applicant did not satisfy the alternative criterion set out in s.36(2)(b) of the *Migration Act 1958*.

Held: RRT decision set aside and remitted for reconsideration.

- (i) No finding was made about the third applicant. A presumption that she too is stateless is not sufficient. A finding as to nationality or statelessness is fundamental to deciding whether an applicant is a person to whom Australia has protection obligations.

- (ii) The Tribunal needs to make a finding about the nationality or otherwise of each applicant and the Tribunal, in failing to make a determination about the third applicant's nationality, made a jurisdictional error.

SZDXZ & ORS v MIMIA & Anor

[2006] FMCA 971

Federal Magistrates Court of Australia, Mowbray FM, SYG 1963 of 2004, 7 July 2006

Immigration – Protection Visa – Information provided to Department prior to application to Tribunal – Part of reason for decision – No invitation to comment under s.424A of *Migration Act 1958*

The applicant, a national of Fiji, 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 being persecuted by indigenous Fijians as an Indo-Fijian. The applicant claimed to own land with his brother, which indigenous Fijians wanted to take. He claimed that he received threatening phone calls to get off the land. The applicant claimed that indigenous Fijians attacked his brother, broke into his brother's house and stole his property to the value of \$5,000, and that the applicant feared similar future attacks.

The Tribunal found that the assault and robbery of the applicant's brother was neither for Convention reasons nor connected with any campaign of harassment to drive the family off the land, but was a random criminal act because the applicant's brother was perceived to be suitably wealthy.

The applicant contended, among other things, that the Tribunal breached its obligations under s.424A of the *Migration Act 1958* (the Act) by failing to give the applicant, in writing, particulars of a press report about the robbery that was provided to the Department with his protection visa application.

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

- (i) The Tribunal committed jurisdictional error by breaching s.424A of the Act in relation to the newspaper information provided by the applicant to the Department.
- (ii) The information that the brother's stolen goods were of significant value and worth \$5,000 was central to the Tribunal's finding that the robbery was a random criminal act and not for Convention reasons. This, the Tribunal said, was the motivation for the robbery. At the Tribunal hearing the applicant did tell the Tribunal that the robbers took all the jewellery and the money. However, nothing in the transcript of the Tribunal hearing suggests the items stolen were of significant financial value. There was no mention about \$5,000. The source of this information for the Tribunal was clearly the press report as the Tribunal itself said in its reasons for decision. This information was not given for the purpose of the Tribunal review application and was not put to the applicant in writing under s.424A.

SZEEF v MIMIA

[2006] FMCA 661

Federal Magistrates Court, Barnes FM, SYG2534 of 2004, 11 July 2006

Immigration – Protection Visa – Procedural fairness – s.422B of the *Migration Act 1958*– Whether Tribunal obliged to make inquiries – Whether Tribunal failed to comply with s.424A

The applicant, a national of Ghana, 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 that he had a well founded fear of persecution because of his membership of a cultural performance group which had been established and sponsored by Nana Kwaku Obour, a family head of the Tafo Ashanti traditional area of Ghana. On 28 August 2002, the Tribunal received several documents by facsimile from a Sydney fax number under cover of a letter which purported to come from a named person

writing on behalf of Nana Kwaku Obour stating that four named members of the cultural group to which the applicant claimed to belong (which did not include the applicant) were 'concerned with the case' and pleading for their protection. A covering letter also stated that two named persons, including the applicant were not concerned with the case and "can come to Ghana at any time" as they "have nothing to explain or any more judgment to face in Ghana and it is very very safe for them to come back".

The Tribunal had indicated at hearing that it proposed to ignore the documents faxed to it on 28 August 2002. However, in its reasons for decision it recorded receipt of the documents and the discussion at the hearing. It also recorded that it had considered the joint post-hearing submission that the correspondence was sent by his enemies to force him to return to Ghana and the request that the origin of the letter be traced. It found that even if it accepted the applicant's claim about involvement in the dispute at face value (which it stated that it did not) this claim about his enemies was far-fetched.

The applicant claimed that he was denied procedural fairness as the Tribunal had not given him an opportunity to respond to its adverse findings in relation to the facsimile received by the Tribunal on 28 August 2002 ("the facsimile") and had not made any or any adequate attempts to inquire into the material contained in the facsimile. The applicant further claimed that this and other information should have been put to him prior to the hearing and the failure to do so resulted in a breach of s.424A of the *Migration Act 1958* (the Act).

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal did not put adverse information contained in the protection visa application, namely the "earlier problems information", the "on the run information" and the "vacancy information" to the applicant as required by s.424A of the Act. The Tribunal thereby made a jurisdictional error by failing to comply with s.424A.
- (ii) The s.424A(3)(b) exception did not apply as the applicant had not referred to his claims to the Department in a manner which constituted incorporation of all such material in his review application. There was no critical examination of the delegate's reasons, no express reference to a Departmental file, no request that the Tribunal refer to a specific file and its contents, nor any claim that all the material facts on the record had not been considered.
- (iii) Even if, despite s.422B of the Act, there was still room for the operation of aspects of the rules of natural justice, no lack of natural justice was established. The Tribunal had no duty to make inquiries to make out the applicant's case. Whilst the applicant asked the Tribunal to see if it could trace the origin of the facsimile, the Tribunal did not represent that it would make inquiries. Nor was anything said which would 'have reasonably created an expectation that it would do so'.
- (iv) The Tribunal was not obliged to invite comment on its mental processes and provisional views in relation to the post hearing submissions. The findings in issue could not be said to have constituted an adverse conclusion which had been arrived at which would not obviously be open on the known material.
- (v) Section 424A does not require notice to be given before a Tribunal hearing.
- (vi) Whilst the Tribunal did not go so far as to state that the facsimile information had played no part in its reasoning, reading the decision as a whole and in context, it's findings that it did not know who sent the documents or why they did so and that the documents did not alter it's conclusion was a clear indication that the material played no part in its reason(s) for affirming the decision. Thus, s.424A did not apply in relation to the facsimile information.
- (vii) There was not a separate 'sur place' claim from the joint submission of the applicant in response to the facsimile. The submission did not suggest, nor did the material raise, that there had been a post-departure change of circumstances in Ghana or even intensification for existing conditions in Ghana or that his activities in Australia provided a basis for his claim. Hence the Tribunal did not have to deal with a separate 'sur place' claim.

**SZFAS v MIMA & Anor
[2006] FMCA 1029**

Federal Magistrates Court of Australia, Smith FM, SYG3287 of 2004, 12 July 2006

Immigration – Protection Visa – Re-constitution of Tribunal between hearing and decision without informing applicant – Reference by Tribunal to date of obtaining Australian visa in China – Whether information given to Tribunal by applicant – whether part of reasons for affirming decision – breach of s.424A of *Migration Act 1958*

The applicant, a national of China, 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. He claimed to fear persecution arising from his actions, working with two other people, in organising a large demonstration in support of their ideals.

The Tribunal, constituted by one member, held a hearing with the applicant. When the applicant received the Tribunal's decision, the decision was made by a different member. The Tribunal held that the applicant was not of interest to the authorities prior to his departure from China and did not accept that the applicant was or would be perceived to be a sufficiently prominent member of the relevant group in China. The Tribunal also found the applicant's claims to have fled China two days before police went to his home to arrest him and a that team was investigating his group were recent inventions. In making its decision the Tribunal referred to the delay in the applicant's departure, waiting two weeks after members of his group had been arrested, even though he had a valid passport and visa to Australia from mid-January 2004.

The applicant contended to the Court that he had never been notified of the change in constitution of the Tribunal, that the new member did not take into account all he had said at the hearing before the former member or understand his written claims. He also contended there was a breach of s.424A of the *Migration Act 1958* (the Act) in relation to the information about when he obtained his visa.

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

- (i) The Tribunal committed a jurisdictional error in failing to put the information that the applicant had a valid visa to Australia since mid January 2004 in writing in accordance with s.424A of the Act.
- (ii) The applicant did not give the information about when he obtained his visa to the Tribunal for the purposes of the review when responding to the Tribunal's questions at the hearing. There was only one source for that information which was put to the applicant at the hearing and it was found on the Department's file.
- (iii) The Tribunal's reasoning in relation to the position of the applicant if he returned to China did not provide a separate line of reasoning unaffected by its previous finding about the applicant's history in China before his departure.

Obiter

- (iv) The Court in *Liu & Anor v MIMA* (2001) 113 FCR 541, although finding no right to attend a further hearing where a case was reconstituted, noted that the Tribunal as reconstituted had a discretion to appoint a rescheduled hearing. The Tribunal also has a discretion to invite the applicant to consider whether he wished to request this opportunity. It may be consistent with *Liu* that a Tribunal might have a duty, as well as a power, to consider one of these procedures.
- (v) The fact that the Tribunal's reasons for decision contained a summary of the applicant's statutory declaration which contained clear errors was a further concern.

**SZGMI v MIMIA & Anor
[2006] FMCA 284**

Federal Magistrates Court of Australia, Driver FM, SYG1483 of 2005, 30 June 2006

Immigration – Protection Visa – Whether the RRT breached s.424A of the *Migration Act 1958*– Whether information implicitly adopted in chief in support of review application – s.424A(3)(b) exception

The applicant, a national of Nepal, 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 membership of the revolutionary Maoist political movement in Nepal.

The applicant's migration agent provided a submission to the Tribunal which referred briefly to the applicant's protection visa application ('PVA') claims, and later provided a statutory declaration which expanded upon the claims made in the PVA. The Tribunal did not accept the applicant's claims as it did not find him to be a credible witness. In doing so, the Tribunal relied on information in the applicant's PVA as well as material submitted at review and the applicant's evidence at the hearing.

Before the Court the applicant contended, that in making its decision the Tribunal did not observe [s.424A] procedures which it was required to do so by law. Counsel for the Minister submitted that the information in the applicant's PVA fell within the exception in s.424A(3)(b) of the *Migration Act 1958* (the Act) as a result of the applicant providing the submission and statutory declaration to the Tribunal.

Held: RRT decision quashed and remitted for reconsideration.

- (i) The Tribunal fell in jurisdictional error when it failed to comply with s.424A(1) of the Act. As the Tribunal had relied on the inconsistencies between claims made in the PVA and claims made to the Tribunal to find that the applicant was not a credible witness, the Tribunal was obliged to provide this information to the applicant in writing for his comment pursuant to s.424A(1) of the Act.
- (ii) The Tribunal was not relieved by s.424A(3)(b) of the Act from disclosing to the applicant the adverse information as it was information that came from the applicant's protection visa claims which were not specifically adopted in chief by the applicant in his review application and could not be said to have been implicitly adopted in chief in support of that review application.
- (iii) If additional material submitted by an applicant to the Tribunal simply assumes knowledge of the PVA claims and moves on from them, then it cannot be said that the PVA claims have been adopted in chief. If it is not clear that in the additional material the applicant continues to rely upon the protection visa claims in the same terms as they were put, then it cannot be said that the protection visa claims have been implicitly adopted.
- (iv) In this case, the statutory declaration had served the purpose of augmenting, clarifying and possibly correcting the PVA claims, and consequently, the PVA claims could not have been seen to have been adopted.

SZGVQ v MIMA & Anor

[2006] FMCA 1005

Federal Magistrates Court, Smith FM, SYG1978 of 2005, 27 July 2006

Immigration – Protection Visa – Tribunal accepted past incident of persecution – Found that police were no longer interested in applicant – Failed to address risk of future similar incidents – 'Real Chance' test

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

The Tribunal accepted that the applicant had in April 2004 been detained by the Chinese Public Security Bureau (PSB), interrogated, mistreated, and released upon reporting conditions, as a result of his public activities seeking to organise an unofficial farmers' association. However the Tribunal found the chance remote that the police would again ill treat him to the extent that that treatment would amount to persecution. It also found that such problems as he may have with the police were confined to his local area and that he could reasonably move away from that area to another town or village.

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal's decision was affected by jurisdictional error.
- (ii) The Tribunal asked itself whether the applicant might suffer further mistreatment arising from the 2004 events which caused him to flee China, but failed to address the real issue. This was whether, in the light of those events, there was a real chance that the applicant might in the future suffer further persecution anywhere in China as a result of his continuing to demonstrate political opinions inimical to the current government of China. The Tribunal failed to appreciate that its findings as to the applicant's history were only evidentiary, and not conclusive in relation to this question.
- (iii) The "real question" in every case is whether the applicant has a well-founded fear of persecution in the future for a Convention reason, and not whether he has a well-founded fear of the continuation of past persecution.
- (iv) The Tribunal's finding that the applicant was not on a countrywide police "blacklist" did not address the question of whether the applicant, wherever he lived in China, would continue to have and demonstrate the political opinions he had shown in the past, and whether as a result he would be at risk of again suffering persecution by reason of those opinions.

Obiter:

- (v) The Tribunal gave no consideration, as it was obliged to do, whether the alternative inference of continuing interest in the applicant by the PSB in relation to the 2004 events was, at least, a "real chance" although less than probable. While the Tribunal's finding is expressed in firm language, it is difficult to understand how, as a matter of law, it was open to the Tribunal to draw an inference with certainty that the applicant had ceased to be a person suspected by the PSB to be an anti government activist, in the face of its earlier findings. The Tribunal must have failed to apply the "real chance test" according to law. Alternatively, its conclusion based on this key finding was "unreasonable" in the sense of lacking evidentiary foundation, or was based on a finding of fact which was "not open" to it as a matter of law.

SZHCI v MIMA & Anor

[2006] FMCA 1016

Federal Magistrates Court of Australia, Smith FM, SYG 2544 of 2005, 26 July 2006

Immigration – Protection Visa – Indian claiming persecution as Congress party worker – Tribunal disbelieved claims by testing knowledge of party history – Conduct of hearing – Reasonable apprehension of bias

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 that he had a well-founded fear of persecution for reasons of his involvement in the Congress Party (the Party).

The applicant claimed to be a known youth member of the Party and an active Party worker in recent local elections. The Tribunal hearing commenced with the applicant giving evidence of attacks he claimed to have suffered. The Tribunal then proceeded to test the applicant's knowledge of the Congress Party by reference to a two page general history of the Party downloaded on the day of the hearing from an internet encyclopaedia. The applicant could not answer the Tribunal's questions about the party's history but insisted that this was because he was merely a young local member who had assisted in recent local elections; he never claimed to have knowledge of the party's history or initial objectives. The applicant was then given an opportunity to describe his claimed involvement in the party and local elections. When the Tribunal asked the applicant and his adviser if they had anything else to say at the conclusion of the hearing, they responded in the negative.

In its written reasons for affirming the decision under review, the Tribunal found that the entirety of the applicant's claims lacked credibility due the applicant's evidence as a whole and in particular, his "extreme lack of knowledge" of "factual matters relating to the Party".

On appeal, the applicant contended, among other things, that the Tribunal's conduct gave rise to apprehended bias.

Held: RRT decision quashed and matter remitted for reconsideration.

- (i) The Tribunal's conduct gave rise to apprehended bias amounting to jurisdictional error. A reading of the transcript of hearing as a whole might cause a fair-minded lay observer to reasonably apprehend that the member constituting the Tribunal might not have brought an impartial mind to deciding whether the applicant was a refugee.
- (ii) An informed lay observer may have reached the opinion that the Tribunal had decided the case early in the hearing, upon expressing its opinion that the applicant possessed an "*extreme lack of knowledge*" of the Party's history. Without hearing the applicant's relevant recent history, the Tribunal had set him an unwarned, *viva voce* history examination, which lacked a reasonable foundation for the assumption that the applicant should be expected to have the knowledge demanded.
- (iii) The Tribunal's comments throughout the course of the questioning were belittling of the applicant's responses, which admitted a lack of knowledge. The Tribunal's conduct appeared to have intimidated the applicant into giving incomplete evidence. In addition, by the Tribunal effectively stating that it would dismiss all his evidence due to his extreme lack of knowledge, it created the impression in the mind of the applicant and his adviser that it had decided against the applicant and that there was nothing further they could say to change these adverse opinions.
- (iv) The likelihood that the Tribunal had closed its mind prematurely was confirmed by the Tribunal's subsequently published reasons, whose foundation was its opinion that the applicant demonstrated a lack of knowledge of the party.

SZHVX & Anor v MIMA & Anor
[2006] FMCA 519

Federal Magistrates Court, Scarlett FM, SYG3701 of 2005, 5 April 2006

Immigration – Protection Visa – Where applicants did not attend Tribunal hearing – s.424A of the *Migration Act 1958* – Whether information is not specifically about the applicant or another person – s.424A(3)(a) exception

The applicant husband and wife, citizens of India, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations.

The applicant husband ("the applicant") applied for the protection visa as the primary applicant and the applicant wife applied as a family member with no claims of her own. The applicant, a former BJP activist, claimed to fear persecution from BJP thugs for making contact with the Congress Party in the interests of his business. He also claimed to have been threatened by Muslim fundamentalists because of his Hindu religious beliefs.

The Tribunal invited the applicants to a hearing but the applicants did not attend.

In its decision, the Tribunal noted that a number of relevant questions were left unanswered including, why the applicant needed to contact the Congress Party "given that the Gujarat State was a BJP stronghold and the member of the National Parliament for Ahmedabad (the applicant's last residence in India) was from BJP as was Chief Minister of the State " and why he feared attacks from Muslim when "Gujarat was an overwhelmingly Hindu State (indeed it has been notorious in the past as the scene of ugly attacks by Hindus on Muslims rather than the other way round)". It also stated that it would have also needed to ask the applicant why he could not relocate elsewhere in India "given that country is large and movement within India was easy." The source of the information relied on by the Tribunal was not disclosed in the decision.

The applicants contended that the Tribunal committed jurisdictional error by failing to comply with s.424A of the *Migration Act 1958* (the Act).

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal failed to comply with its s.424A obligations and committed jurisdictional error in relation to three categories of information. In each case, the volunteering of the information in a way that was contrary to the applicant's assertions established that information as information that formed

part of the reasons for affirming the decision not to grant protection visas. None of that information attracts the protection of the exception in s.424A(3)(a) of the Act and it is certainly not information that the applicant gave for the purposes of the application or “non-disclosable” information.

- (ii) The information volunteered by the Tribunal relating to the member of the Parliament for Ahmedabad and the Chief Minister for the State of Gujarat was specifically about two other persons even though it was not specifically about the applicant and it did not come within the protection given by s.424A(3)(a).
- (iii) The reference to the notoriety of Gujarat as a scene of ugly attacks by Hindus on Muslims was entirely unsourced information. The decision did not refer to any independent country information and there was no indication as to where it came from. This volunteered information by the Tribunal member was information which was the reason or part of the reason for affirming the delegate’s decision and as such should have been put to the applicant in writing for comment under s.424A(1)
- (iv) It is common knowledge India is a large country. However, it is not common knowledge that movement within India is easy and there was no source for this information.

LEGISLATION UPDATE

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

▶ Legislation Pending

Migration Legislation Amendment (Migration Zone Excision Repeal) Bill 2006

Migration Legislation Amendment (Migration Zone Excision Repeal) (Consequential Provisions) Bill 2006

The Migration Legislation Amendment (Migration Zone Excision Repeal) Bill 2006 and the Migration Legislation Amendment (Migration Zone Excision Repeal) (Consequential Provisions) Bill 2006 were introduced as a private member's bill to the Parliament by Senator Bartlett on 15 June 2006.

The Bills seek to amend the *Migration Act 1958 (the Act)* by repealing various provisions to return excised offshore places to Australia's migration zone and to make consequential provisions for returning excised offshore places to Australia's migration zone, and for related purposes.

A copy of the bills can be found at:

Migration Legislation Amendment (Migration Zone Excision Repeal) Bill 2006

<http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/all/search/3896467B6985AAABCA25718F0007C793?OpenDocument>

Migration Legislation Amendment (Temporary Protection Visas Repeal) Bill 2006

The Migration Legislation Amendment (Temporary Protection Visas Repeal) Bill 2006 was introduced as a private member's bill to the Parliament by Senator Bartlett on 22 June 2006

The Bill aims to introduce an Act to amend the Migration Regulations 1994 by removing the category of Temporary Protection Visas, and for related purposes.

A copy of the bill can be found at:

Migration Legislation Amendment (Temporary Protection Visas Repeal) Bill 2006

<http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/all/search/4798216D4F8BF732CA25719600179612?OpenDocument>

▶ Legislation Withdrawn

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

The Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 that was introduced to the House of Representatives on 11 May 2006 and passed with amendments on 10 August 2006 was withdrawn by the Government on 14 August 2006.

The amended Bill sought to amend the *Migration Act 1958* by expanding the offshore processing regime currently applying to offshore entry persons and transitory persons to include, in addition, all persons arriving at mainland Australia (meaning other than at an excised offshore place) unlawfully by sea on or after 13 April 2006. The concept of offshore entry person was to be replaced by the concept of designated unauthorised arrivals.

CASELOAD OVERVIEW

RRT Decisions – July 2006

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	1	2	0	0	3
Albania	1	1	0	0	2
Bangladesh	4	8	0	1	13
Bosnia and Herzegovina	0	1	0	0	1
Cameroon	1	0	0	0	1
China (PRC)	9	71	2	2	84
Ethiopia	0	2	0	0	2
Fiji	0	1	0	0	1
India	0	24	2	1	27
Indonesia	1	11	0	1	13
Iran	1	1	0	0	2
Iraq	1	0	0	0	1
Korea, Dem Peoples Rep of	0	1	0	0	1
Korea, Republic of	0	4	0	1	5
Kyrgyzstan	0	1	0	0	1
Lebanon	1	1	0	0	2
Malaysia	1	4	0	0	5
Morocco	1	0	0	0	1
Nepal	1	2	0	0	3
Nigeria	1	1	0	0	2
North Korea	1	0	0	0	1
Papua New Guinea	1	0	0	0	1
Philippines	0	3	0	0	3
Russian Federation	1	2	0	0	3
Serbia & Montenegro	0	1	0	0	1
Sri Lanka	0	5	0	0	5
Sudan	1	0	0	0	1
Thailand	0	2	0	0	2
Tonga	0	1	0	0	1
Turkey	0	2	0	0	2
Ukraine	0	1	0	0	1
Uzbekistan	1	1	0	0	2
Vietnam	0	2	0	0	2
Zimbabwe	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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