

# RRT Bulletin

Issue No. 10/2006

18 September 2006

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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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## Bangladesh

N06/53431

3 July 2006

Mr G Short, A/g Deputy Principal Member

**BANGLADESH – POLITICAL OPINION – BANGLADESH NATIONALIST PARTY (BNP) – PARTICULAR SOCIAL GROUP – ARTIST** – The applicant claimed to fear persecution for reasons of his political opinion as a member of the Bangladesh Nationalist Party (BNP). He claimed that he would be killed or detained without trial by the Awami League. He also claimed a false case had been filed against him and he had been convicted on charges involving illegal arms, torturing women, looting shops and ‘this type of case’. He said that Bangladeshi police could make up any case they liked. The applicant said he had been threatened by Muslim terrorists because he was an artist involved in a cultural group and fundamentalist Muslims did not like cultural activities. He referred to an attack on a cultural group and one on an open air concert.

**Held:** Decision under review affirmed.

The Tribunal noted that the BNP was in government in Bangladesh and did not accept that there was a real chance that the applicant would be persecuted by the authorities or by his political opponents in the Awami League for reasons of his involvement in the BNP. It did not accept that false charges were filed against him, given his evidence that he continued his cultural activities around the country without being arrested. It did not accept there was a real chance the applicant would be persecuted as an artist whether this claim was based on his membership of a particular social group or on his real or imputed political opinion or religious beliefs as a result of his involvement in cultural activities whether as a member of the BNP or otherwise.

## China

060343356

30 June 2006, Sydney

Mr R Wilson, Member

**CHINA – RELIGION – CHRISTIAN** – The applicant claimed to fear persecution as a Christian. He claimed his family were Protestants and that he was baptised soon after birth. The applicant claimed he attended the official government church but did not believe they were genuinely independent and eventually he stopped attending. He claimed he became involved in an underground Christian church where he gradually became an activist, spreading the Gospel among friends and relatives. The applicant claimed he came to the attention of the authorities; he was detained for about a week and was forced to work at a farm for several months. He was later dismissed from his job and he opened his own business which was used as a propaganda centre for the underground church to print, copy and disseminate religious material. The applicant claimed that he prepared to go overseas after being questioned by the Public Security Bureau (PSB). The authorities discovered he was in charge of this business and his business was closed by the PSB since his departure from China. His family had been questioned about his whereabouts. He feared he would be detained if he returned to China.

**Held:** Decision under review set aside.

The Tribunal found that the applicant was a Christian. It accepted that he attended Church regularly and was learning the Bible. The Tribunal was satisfied there was a real chance of persecution occurring to the applicant in the reasonably foreseeable future if he were to return to China. The Tribunal found that it was not reasonable for the applicant to relocate because he would continue to proselytise and find fault with the government-approved church wherever he was in China. Accordingly, the Tribunal was satisfied that he had a well founded fear of persecution.

060507812  
25 July 2006, Sydney  
Mr B MacCarthy, Senior Member

**CHINA – POLITICAL OPINION – ANTI-GOVERNMENT** – The applicant feared persecution in China because the authorities regarded him as a dissident. He claimed that the local military had confiscated farmland without paying compensation as promised. The applicant claimed that a group of farmers organised public protests. However, the protests were suppressed and the applicant's father and several other organisers were detained for several months by the Public Security Bureau (PSB). The applicant claimed that he went to the PSB on a number of occasions to ask them to release his father. On one occasion, he asked to see the police officer in charge of his father's case. He claimed that he was beaten unconscious by many policemen and that he was detained with a number of criminal suspects. On release he organised another protest which was also suppressed, but he escaped. He said he had been informed that the authorities were looking for him everywhere.

**Held:** Decision under review set aside.

The Tribunal was satisfied that the applicant had presented a true account of his circumstances. The Tribunal found that the Chinese authorities confiscated land farmed by the applicant's father without paying compensation. It found that his father organised protests and was arrested and sentenced to labour reform as a result. It further found that the applicant was assaulted by police when he attempted to intercede on his father's behalf. The Tribunal accepted claims that the applicant was being sought by local police after he had organised a protest. The Tribunal found that, were the applicant to return to China, he would be at risk of arrest and further detention and possible physical mistreatment. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

060390903  
18 July 2006, Melbourne  
Mr J Mahoney, Member

**CHINA – RELIGION – CHRISTIAN – SHOUTERS CHURCH** – The applicant feared persecution in China because of her religion. She claimed that she was born into a Christian family. She claimed to have served in a Shouters church by spreading the gospel and assisting with training of other members. The applicant claimed that on one occasion the Public Security Bureau came to a bible study gathering and arrested, questioned and detained some dozens of young persons, including her. She also claimed that she was abused both physically and mentally whilst detained. The applicant claimed to have continued to go to church in Australia and feared that she would be arrested and sent to prison if she were to return to China.

**Held:** Decision under review set aside.

The Tribunal found the applicant wife to be a witness of the truth and accepted her statement that she was detained and physically abused for her religious beliefs. It also accepted that she would suffer further persecution if she returned to China. Having regard to the "real chance" test set out in *Chan v MIEA* (1989) 169 CLR 379, the Tribunal found that the applicant had a well founded fear of persecution for a Convention reason.

## Colombia

N06/53069  
19 May 2006, Sydney  
Ms P McIntosh, Member

**COLOMBIA – PARTICULAR SOCIAL GROUP – POLICE INFORMANTS – POLITICAL OPINION – ANTI-CORRUPTION** – The applicant children and their grandmother claimed to fear persecution as a result of their association with the applicant husband, who claimed he had been targeted by local mafia leaders as a result of their belief that he was a police informant. He claimed that he received intimidating telephone calls and that he

was prompted to leave Colombia after being assaulted by armed men. The applicant husband claimed that he was viewed as someone with political views which meant he acted against criminals and their political allies. He said he had witnessed politicians and officials engage in illegal activities. The applicant husband claimed that a relative was killed because the assailants mistook her for his wife.

**Held:** Decision under review affirmed.

The Tribunal was satisfied that the applicant husband was employed successively in two nightclubs with close links to the Colombian mafia. It accepted that his relative was raped and killed but it was not satisfied that that tragic event was prompted by the applicant's actions. The Tribunal was not satisfied that the applicant husband was at risk of being harmed by members of the Colombian mafia as a result of a perception that he was a police informant. Nor was it satisfied that he had been imputed with a political opinion which might give rise to persecution. Accordingly, the Tribunal was not satisfied that the applicants had a well-founded fear of persecution because of their membership of a particular social group, a political opinion imputed to them, or any other Convention reason.

## India

**060402544**  
**7 July 2006, Melbourne**  
**Ms G Hamilton, Member**

**INDIA – RELIGION – MUSLIM – PARTICULAR SOCIAL GROUP – MUSLIM GIRLS/WOMEN** – An Australian born applicant claimed to fear persecution in India because of her religion, relying on claims put forward by her father, and because she is a Muslim girl. Her father had claimed that, as a very successful businessman in Gujarat, he was subjected to extortion from the World Council of Hindus (VHP), a political party which was against Muslim interests. He claimed that VHP members killed a person in his shop. The father claimed that over two weeks later they beat him badly. The applicant also claimed that she was at risk of persecution due to being a member of the following particular social groups: women/girls in India, young girls in India, Muslim children in India, or her family who have a well-founded fear of persecution. She claimed that she was at risk of rape, kidnapping, torture and death, and being exposed to discriminatory treatment, in particular police inaction to protect Muslim women/girls.

**Held:** Decision under review affirmed.

The Tribunal was not satisfied that much of the applicant's father's account of events was true. It therefore did not accept that he was persecuted due to his religion. It noted that evidence presented about the disadvantaged social status of women in India and discriminatory treatment against Muslim women by the law did not indicate that women or girls in particular, or Muslim women or girls in particular, or Muslim children, were persecuted in India. The Tribunal stated that there was no evidence about any particular attribute of the applicant that marked her out from this impression. Accordingly, the Tribunal was not satisfied that she had a well-founded fear of persecution.

**060553947**  
**12 July 2006, Melbourne**  
**Ms S Muling, Member**

**INDIA – PARTICULAR SOCIAL GROUP – FAMILY** – The applicant claimed protection from the life threatening situation he faced in India due to family problems. He claimed that there were problems between his family and his cousins over division of his grandfather's inheritance. The applicant believed he and his brother were entitled to 50% of the wealth, while his cousins wanted the assets to be divided into more shares among the several grandsons. He further claimed that over several years he received life threatening ultimatums, he was attacked and his cousins wanted to kill him. He stated his cousins would not leave him alone and so he decided to come to Australia after another attack on his life. The applicant consented to a decision being made on the papers without a hearing as his appeal was being brought solely for the purpose of accessing the Minister's discretion under s.417 of the *Migration Act 1958*.

**Held:** Decision under review affirmed.

The Tribunal accepted that the applicant was threatened and attacked on a number of occasions and he went into hiding. The Tribunal was not satisfied that the reason his cousins were targeting him was because he belonged to his particular family. Rather their motivation was their desire for a larger portion of their grandfather's assets. The Tribunal was satisfied the matter was purely a personal dispute in which the applicant's cousins were motivated by pecuniary interests. Accordingly, it could not be satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## Iraq

**060284338**  
**29 June 2006, Melbourne**  
**Mr P Harris, Member**

**IRAQ – RELIGION – SUNNI MUSLIM – RACE – PALESTINIAN – FURTHER PROTECTION VISA** – The applicant claimed to fear persecution as a Sunni Muslim and a Palestinian. He claimed that the situation of Palestinians in Iraq was very bad. The applicant claimed that his parents were given a flat to live in during the period of Saddam Hussein and so were later perceived as helping the resistance forces. His parents left Iraq after they were warned by Badr troops and given 10 days to leave. He claimed that if he returned to Iraq he would be imprisoned. The applicant further claimed that he had been detained on two occasions by government officials when attending religious meetings at the mosque. He claimed that, whilst in custody, he was accused of being a member of the Muslim Brotherhood.

**Held:** Decision under review set aside.

The Tribunal did not accept that the applicant was ever detained by any state agency or persons representing any non-state actor. In light of independent country information, the Tribunal was satisfied there had been a deterioration in the protection of Palestinians from attacks by insurgents, security forces and members of the public, exposing them to arbitrary arrest, detention and house raids. This was motivated by the identification of Palestinians as a group who enjoyed privileges under the Saddam Hussein regime. The Tribunal found that the applicant was a Sunni Muslim and noted evidence of detention, torture and extrajudicial killings against the Sunnis, raids on Sunni mosques by the Shia majority, assassinations of Sunni clerics by the Badr organisation and general discrimination against Sunnis. Accordingly, the Tribunal found there was a real chance the applicant, as a Sunni and a Palestinian, would be exposed to serious harm if he returned to Iraq.

## Kyrgyzstan

**V05/18357**  
**9 June 2006, Melbourne**  
**Mr A Gentile, Member**

**KYRGYZSTAN – POLITICAL OPINION – AKAYEV SUPPORTER** – The applicant claimed to fear persecution on the basis of his political opinion. He claimed that he strongly supported the former President Akayev and voted for him in elections. The applicant claimed he was threatened not to associate with people of other ethnic origins, just Kyrgyz. He participated in a protest about the rights of people of any ethnic origin and was arrested, detained for several hours and subjected to beatings. The applicant claimed the police made threats against him saying that he should leave the country or be put in gaol for stirring people up against the new government. He claimed that they continued to seek his whereabouts.

**Held:** Decision under review affirmed.

The Tribunal accepted that the applicant was a supporter of the ousted President Akayev and that he found himself leading a demonstration. However, it found that the applicant's support for Akayev was not the reason for the march. The Tribunal accepted that the applicant was detained but did not accept that his detention for several hours constituted harm of the kind and severity to be considered persecution. It noted that he was not charged with an offence or convicted of a crime and that he was able to leave the country legally. The Tribunal therefore did not accept he was of interest to the authorities or that he would be sought by the authorities on his return. The Tribunal did not accept that the applicant was threatened and asked to associate only with people of Kyrgyz ethnicity. The Tribunal found that the applicant did not have a real chance of persecution now or in the reasonably foreseeable future should he return to Kyrgyzstan.

## Lebanon

**060331167**  
**27 June 2006, Melbourne**  
**Mr S Roushan, Member**

**LEBANON – RELIGION – CHRISTIAN** – The Druze applicant feared persecution from his extended family because of his religious beliefs. He claimed to have become interested in Christianity from a very young age and that his interest grew as a result of his relationship with an Australian Catholic. The applicant claimed to be in the process of conversion to Christianity and that he would be baptised soon. He claimed that the Druze faith did not allow conversion to, or from, another religion or allow inter-religious marriages. The applicant claimed that his family and the elders in his village were aware of his intention to convert and that if he were to return to Lebanon, he would be at risk of honour killing or some other kind of serious harm. Further, he claimed that the authorities would not offer protection as they regard it as a religious matter over which they have no control.

**Held:** Decision under review set aside.

Having regard to the evidence from the applicant, his fiancée and a senior of the church, the Tribunal accepted that he had genuinely embarked on the process of converting to Christianity. It accepted that the applicant's family and elders in his community had been informed of his intention to convert and that he had been threatened with serious consequences, including death. The Tribunal could not rule out as remote and insubstantial the chance that if he were to return to Lebanon now or in the reasonably foreseeable future he would face persecution at the hands of members of his extended family and/or religious zealots in the community. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

## Morocco

**060349772**  
**27 June 2006, Sydney**  
**Mr S Roushan Member**

**MOROCCO – PARTICULAR SOCIAL GROUP – HOMOSEXUALS IN MOROCCO** – The applicant claimed to fear persecution as a homosexual. In particular, he claimed to fear harm from the authorities, his father, Muslim extremists and the general population. He claimed that, in Morocco, homosexuality is a crime and that he was unable to practise or declare his sexuality without fear of being harmed, abused or imprisoned. He claimed that upon learning of his sexuality his father said he was 'sick' and had notified the authorities that he was homosexual. He believed a warrant for his arrest would be issued if he were to return to Morocco and that he could be imprisoned or otherwise harmed.

**Held:** Decision under review set aside.

The Tribunal accepted the applicant had been a practising homosexual for several years. It accepted that he lived a clandestine life as a homosexual and was unable to practise or express his sexuality due to his fear of

his family, the authorities and the general population. The Tribunal accepted that his father believed him to be 'sick' and had made arrangements for a warrant of arrest to be issued against him. Referring to independent evidence, it accepted that homosexuals in Morocco constitute a particular social group within the meaning of the Convention. The Tribunal was satisfied that if the applicant did not modify the open conduct in which he had been engaged in Australia there was a real chance he would face serious physical harm or imprisonment in Morocco. Accordingly, the applicant had a well founded fear of persecution for a Convention reason.

## Russia

**N06/53356**

**20 June 2006, Sydney**

**Mr G Short, A/g Deputy Principal Member**

**RUSSIAN FEDERATION – PARTICULAR SOCIAL GROUP – FAMILY – SECTION 91S – FATHER'S POLITICAL OPINION** – The applicant claimed he feared persecution because of his membership of a 'particular social group' constituted by his immediate family. The applicant's father was involved in several businesses and was a member and financial supporter of a political party. The applicant claimed that his father had been threatened and assaulted, that the militia and taxation militia had raided his businesses and that some of his goods had been confiscated. His father had told him that the confiscation was in retaliation for his political activities. The applicant claimed that his father told him to do his best to remain in Australia because the authorities had made threats that they would make sure the applicant would be conscripted to serve in Chechnya where anything might happen to him.

**Held:** Decision under review set aside.

The Tribunal accepted that the applicant's father had a role in a number of businesses, that he financially supported a named political party and that he had problems with the Russian authorities. The Tribunal accepted that the applicant's family constituted a group distinguished from society at large and was a 'particular social group' for the purposes of the Convention. The Tribunal considered the effect of s.91S of the *Migration Act 1958*. The Tribunal found that the applicant's father had been persecuted for reasons of his real or imputed political opinion. This bore the necessary connection with one of the five Convention reasons. The Tribunal found that the applicant had a well-founded fear of persecution for reasons of his membership of the particular social group constituted by his family if he were to return to Russia.

# FEDERAL COURT JUDGMENTS

MZWPD v MIMIA

[2006] FCA 1095

Federal Court of Australia, Weinberg J, VID98 of 2006, 18 August 2006

**Immigration – Protection Visa – Whether failure by Tribunal to consider reason for incidents cumulatively as well as individually – Whether failure to consider claim in its entirety a constructive failure to exercise jurisdiction, giving rise to jurisdictional error – “Serious harm” for the purposes of s.91R(1)(b) of the Migration Act 1958**

The applicants, a husband, wife and the wife’s daughter, were citizens or former residents of Latvia. They sought judicial review of decision of the Refugee Review Tribunal (the Tribunal) that the husband was not a person to whom Australia owed protection obligations. The husband claimed to fear persecution on the basis of a long history of anti-semitic discrimination which the Latvian authorities had failed to protect him against and indeed had actively condoned.

Whilst the Tribunal accepted the many incidents that the applicant made reference to had occurred, after setting out each incident, it went on to conclude that each event was not brought about by discrimination on the basis of anti-semitism, and concluded that these events were simply misfortunes, had happened long in the past and that in any event Latvia now took appropriate action against those who engaged in anti-semitic activities.

The applicant applied to the Federal Magistrates Court for judicial review of that decision and was unsuccessful. The applicant then appealed to the Federal Court. The central issue before the Court was whether the Tribunal had properly understood the nature of the appellant’s claims, and had addressed those claims. The Court noted that there was no explanation made for the considerable delay between the application being made to the Tribunal and it being decided.

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

- (i) The Tribunal was bound to consider the applicant’s claim that he suffered long standing and insidious anti-semitism, which was still prevalent in Latvia. It had to consider each incident of alleged discrimination, not merely in isolation, but also in conjunction with the others. Following Katz J in *Khan v MIMA* [2000] FCA 1478, it had to consider the “totality of the case put forward”. The Tribunal did not ask itself whether the events recounted were misfortune or whether there was a common cause for their occurrence – namely anti-semitism.
- (ii) This was a failure on the part of the Tribunal to consider a claim advanced and supported by material before the Tribunal and amounted to a constructive failure to exercise jurisdiction and therefore to jurisdictional error.
- (iii) It is by no means certain that a well-founded fear of racial or religious discrimination in relation to matters such as education, employment and housing cannot amount to “serious harm” within the meaning of that expression in s.91R(2). It is possible that individual incidents of discrimination will not themselves amount to “serious harm”, but when considered cumulatively satisfy the requirements of s.91R. The Tribunal did not consider whether the husband’s claims considered cumulatively could amount to “serious harm”.

**SBWC v MIMIA**  
**[2006] FCA 1104**  
**Federal Court of Australia, Finn J, SAD266 of 2005, 22 August 2006**

**Immigration – Protection Visa – Applicant a convicted child sex offender – Resident visa cancelled under s.501 of *Migration Act* 1958 - Applicant claimed well-founded fear of persecution for reason of membership of a particular social group being “persons who had been convicted of sexual offences on children”**

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 owed protection obligations. The applicant claimed to fear persecution for reason of his membership of a particular social group being “persons who have been convicted of sexual offences on children”. The Tribunal found that this was not a particular social group, stating:

[A]lthough being convicted of a sexual offence on children may be considered an attribute or characteristic, such characteristic does not lead to and is not the matter which makes the group identifiable. ... The groups envisaged require some concrete manifestation of their existence, discussed variously as being identifiable. Furthermore, the characteristic is not one which distinguishes the group from society at large. It may be a characteristic which distinguishes an individual from other individuals but not one which characterises a group. This distinction applies notwithstanding the cultural, religious and other factors relevant to India. The Tribunal finds that this element is absent.

It also found that even if the applicant’s criminal history were publicised and he were to be harmed, the reason would not be because of his membership of any group but because of his actual crimes.

It was contended the Tribunal had failed to ask and/or answer the correct question, in that it answered the first criterion from the High Court authority *Applicant S v MIMA* (2004) 217 CLR 387 (*Applicant S*) (directed at whether there is a group identified by a characteristic or common attribute) by resort to considerations relevant to the third question (directed at whether the group is distinguished from society at large) and vice versa, and that the third question was answered without consideration of cultural and other factors relevant in India.

**Held: RRT decision set aside and remitted for reconsideration.**

- (i) The Tribunal failed to address the principal issue before it which was whether, in India, the claimed group was a particular social group.
- (ii) While the Tribunal posed for itself the correct question, it did not answer that question. It forsook applying the *Applicant S* criteria in favour of a process which conflated both the first and third criteria in a way that defeated its answering properly the question it posed for itself. By discountenancing that there was such a “group” in the manner in which it did, the Tribunal never reached the third *Applicant S* criterion, let alone a consideration of whether that group was a “particular social group in India” having regard either to societal perceptions in India or to “cultural [etc] factors relevant to India”. The differentiating characteristic advanced by the applicant was capable of application to isolate what could be considered to be a distinct group.
- (iii) From the manner in which it disregarded “the cultural, religious and other factors relevant to India”, the Tribunal misapprehended as well what the third *Applicant S* criterion would have required of it.
- (iv) The Tribunal’s later finding was founded upon and reflected the earlier finding that there was not a group as claimed. In any event, the distinction between persecution of a person because of what he or she does as distinct from his or her membership of a group whose attributed is the doing of the same thing can be illusory.

**SZEWL v MIMIA**  
**[2006] FCA 968**  
**Federal Court of Australia, Allsop J, NSD 1719 of 2005, 25 July 2006**

**Immigration – Protection Visa – s.424A of the *Migration Act* 1958– Information which was part of the reason for affirming the decision – Whether alternative ground was an independent basis for the decision**

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

The appellant did not appear for a hearing before the Tribunal. In its decision the Tribunal made reference to information gleaned from the Departmental file indicating that the appellant had withdrawn his original application for refugee status; lodged the present application six and a half years after his arrival in Australia and had renewed his Bangladeshi passport whilst in Australia. The Tribunal found that this and other behaviour was inconsistent with a person who has a genuine fear of persecution. The Tribunal also found that the appellant had provided only general details in support of his claims and having regard to country information was not satisfied that he faced a real chance of persecution on return to Bangladesh.

On appeal, the appellant claimed amongst other things that s.424A of the *Migration Act* 1958 (the Act) was not complied with.

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

- (i) Information which was part of the reason for affirming the decision required a letter in conformity with the prescription of s.424A and failure to provide that letter in accordance with the Act and regulations vitiated the decision by reason of a failure to comply with a mandatory statutory requirement.
- (ii) Information that the applicant gave to the Department and not to the Tribunal, though passed on by the Department to the Tribunal, was not information excluded from the operation of the Act and the operation of s.424A by s.424A(3)(b). That information - material from the applicant's passport and supporting documentation - was taken into account and for the purposes of s.424A might be seen as part of the reason for affirming the decision.
- (iii) The claimed alternative ground of the decision was not an independent basis for the decision. Reading the whole of the decision it is not possible to conclude that the relevant material was not part of the reason for the decision. In this case, no clear-cut distinction between the true reason for the decision and a matter of preliminary comment only could be seen. There was bound up in the whole decision-making process the totality of what appears in the relevant parts of the Tribunal's statement of reasons.

**SZGGD v MIMA**  
**[2006] FCA 1138**  
**Federal Court of Australia, Jessup J, NSD914 of 2006, 28 August 2006**

**Immigration – Protection Visa – s. 424A of the *Migration Act* 1958– Information which was part of the reason for affirming the decision - Whether alternative basis providing support for the decision was entirely independent of the Tribunal's failure to follow s.424A**

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

The appellant, a national of India, claimed that he had a well-founded fear of persecution as he was being targeted by the Thevar community. He claimed that his fears were based on the treatment of his family by his

in-laws and the fact that he had not been able to move the police to investigate and prosecute the wrongdoers. The Tribunal had real concerns as to the appellant's credibility and expressed those concerns in its decision.

The appellant sought to rely on two new grounds which had not previously been taken in the Federal Magistrates Court. Both grounds related to an alleged failure on the part of the Tribunal to comply with s.424A of the Act. The first related to a claim made in the appellant's protection visa application regarding his mother's death. The Tribunal stated "And while claiming in his protection visa application ... at the hearing the Applicant did not make this claim but rather attributed [the death of his mother to a different reason]".

The second ground was in relation to the Tribunal's comments regarding the appellant's request for more time to provide more documentation to support his cause. The Tribunal indicated that it was worried that the appellant had not previously obtained these documents and suggested that the matter went to his credibility.

**Held: RRT decision set aside and remitted for reconsideration.**

- (i) The Tribunal failed to comply with s.424A and thereby made a jurisdictional error.
- (ii) The Tribunal did not put the issue of differing explanations for the death of the appellant's mother to him as required by s.424A. Although the Tribunal had not stated that this was an issue which went to the appellant's credibility, the use of the word 'while' conveyed the sense of contrast and indicated that the Tribunal had identified an inconsistency. Considering the passage in the context of the overall paragraph in which it appears, it could not be said that the Tribunal had merely noted the differing explanations provided and had not subsequently acted upon it. The essence and purpose of the Tribunal's observations was to collect together a number of aspects in which the appellant's claims were regarded as 'unsupported conjecture'. As this was a powerful and significant finding against the appellant, it could not be relegated to the status of mere commentary. The inconsistency was at least part of the reason why the Tribunal affirmed the decision under review and there was a failure to comply with s.424A.
- (iii) The Tribunal's comments on the appellant's failure to provide supporting documents previously was not a reference to information within the terms of s.424A. The context in which the Tribunal warned the appellant should be seen as the identification of gaps, defects, or lack of detail or specificity in the evidence in relation to the appellant's case before the Tribunal. In any case, the very existence of those documents was something which lay in the appellant's own assertion to the Tribunal. To the extent that this involved any "information" it would be covered by the exception in s.424A(3)(b).
- (iv) There was no independent basis on which to refuse relief arising from the Tribunal's findings that the appellant could relocate to another part of India if he returned as the appellant had made submissions regarding his inability to relocate which were dismissed by the Tribunal on credibility grounds.

## FEDERAL MAGISTRATES COURT JUDGMENTS

**MZXAE v MIMA**  
**[2006] FMCA 1087**

**Federal Magistrates Court of Australia, O'Dwyer FM, MLG 599 of 2005, 4 August 2006**

**Immigration – Protection Visa – Ground squarely raised on the evidence although not expressly argued – Membership of a particular social group – Failure to consider ground squarely raised**

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 was a dancer in the Sri Lankan Army Band who had deserted the military. He had objected to performing such dances at political functions and was subjected to military punishment. The Tribunal found that the applicant was punished because of his failure to carry out orders without questioning and like any other officer who did not carry out their duties rather than because of his political opinions. It accepted that he may have faced prosecution for his act of desertion but was not satisfied that the punishment would be exacted for a Convention reason.

The central issue in this case was whether the Tribunal failed to consider a claim (membership of a particular social group) not expressly argued by the applicant before the Tribunal, but which was one the Tribunal should have considered as having been squarely raised by the evidence presented to it.

**Held: RRT decision set aside and remitted for reconsideration**

- (i) The Tribunal failed to ask itself the right by question; namely, is there another Convention reason, apart from his political belief as to why the applicant was subjected to punishment? The Tribunal's focus was restricted to a consideration of whether the applicant qualified under the Convention because of political opinion to the exclusion of giving consideration to other Convention grounds, namely as to whether he was a member of a particular social group.
- (ii) The peculiar background of the applicant in respect of his training and skills as a Kandian dancer, the special place such dancers have in the esteem of the Sri Lankan community and the fact that his standing and skills are what secured in the first place his employment with the Sri Lankan army band clearly placed the applicant into a category that be best described under the Convention as a particular social group which is set apart and readily identifiable from the community at large.
- (iii) Although the applicant did not specifically argue this particular group at the hearing, the issue was raised squarely before the Tribunal on the facts presented to it.

**MZXHM v MIMIA**  
**[2006] FMCA 1151**

**Federal Magistrates Court, McInnis FM, MLG 270 of 2006, 11 August 2006**

**Immigration – Protection Visa – Failure to deal with claim of imputed political opinion/religion – Failure to deal with integer of claim**

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

The applicant claimed to fear persecution from the Lebanese militia because in 1989 he had witnessed a murder of a man, which he suspected was committed by a group of militiamen. He claimed that the group subsequently detained, interrogated and tortured him because, not only did he witness the murder, but he was able to identify the deceased. Further, the applicant claimed that he had remained 'on the run' in Lebanon for the following 16 years and feared he would be killed if he were to return to Lebanon.

The Tribunal found that the serious harm suffered by the applicant in 1989 was not for any Convention reason, but arose out of a desire by the group to determine what the applicant knew about the killing he had witnessed and to ensure that he did not seek revenge for the killing.

The applicant contended that the Tribunal failed to deal with claim of an imputed political opinion which could have been attributed to the applicant when he witnessed the murder in 1989. Further, the applicant contended that the Tribunal failed to deal with an integer of his claim that he had been 'on the run' in its finding that the applicant suffered no subsequent harm in Lebanon for 16 years.

**Held: RRT decision quashed and remitted for reconsideration**

- (i) The Tribunal committed a jurisdictional error by failing to properly consider an integer of the applicant's claims, namely his imputed political opinion, which could properly be attributed to the applicant when witnessing the killing of a person by unidentified militia/group.
- (ii) The Tribunal failed to properly question the applicant as to the political nature of the group and or further details concerning the identity of the group responsible for the killing and interrogation of the applicant shortly after the killing. Had the Tribunal considered these issues, in particular, whether the applicant could be imputed to have a political opinion as a result of him witnessing the murder, it may well have come to a different conclusion.
- (iii) The Tribunal failed to deal with the applicant's claim that he had been 'on the run' for 16 years before concluding that the applicant had not suffered harm for an extended period.

**SI607 of 2003 v MIMA & Anor**

**[2006] FMCA 1178**

**Federal Magistrates Court of Australia, Smith FM, SYG 737 of 2004, 24 August 2006**

**Immigration – Protection Visa – Fear of persecution by Indian Sikh – Claimed history of torture and harassment – Tribunal found him not to be a high profile activist – Failed to address factual claims presented by applicant and his wife**

The applicant, a national of India, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal), that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of his involvement in the Sikh Student Federation and other pro-Khalistan activities.

The applicant's evidence included a statutory declaration from his wife. The applicant indicated to the Tribunal that he wished it to take oral evidence from her, but she was unable to attend on the scheduled day, and the Tribunal proceeded to make its decision without a further hearing. In its statement of reasons, the Tribunal summarised parts of the wife's statutory declaration concerning events in India before the applicant's departure. In relation to subsequent events, the Tribunal wrote only one sentence setting out her claim that the police detained and questioned her about her own activities and about her husband.

The applicant contended that the Tribunal denied him procedural fairness by failing to take oral evidence from his wife, and by making a decision based on only partial evidence.

**Held: RRT decision set aside and remitted for reconsideration**

- (i) The Tribunal's conclusions were based on a substantial misunderstanding of the factual claims which were presented to it by the evidence of the applicant and his wife, within principles discussed in *NABE v MIMIA (No 2) (2004)* 144 FCR 1. As a consequence, the Tribunal constructively failed to exercise its jurisdiction to review the delegate's decision by reference to all the relevant material before it.

- (ii) The Tribunal failed to appreciate and give consideration to important elements in the wife's history which, properly understood, were of crucial relevance to the consideration of the applicant's refugee claims. In particular, it failed to appreciate that, through the wife's history, the applicant claimed that the Indian authorities had continued to pursue him and his family after he had left India. It therefore assessed his status as a refugee upon a material misunderstanding of his claims.
- (iii) The Tribunal's summary of the wife's statutory declaration failed to recognise her significant claim that the police were still seeking the applicant after his departure from India and, implicitly, that this provided a substantial element in their motivation for her own harassment. This omission, together with the Tribunal's decision not to question the applicant's wife about her evidence, suggested strongly that the Tribunal overlooked or put out of its consideration a significant element in the applicant's claims which was provided by his wife's evidence.

*Obiter*

- (iv) There was probably a denial of procedural fairness comparable with that found by the High Court in *Applicant NAFF of 2002 v MIMIA (2004) 221 CLR 1*. The applicant and his wife were probably led to believe, on reasonable grounds, that she would be invited to give oral evidence which would allow her to corroborate the applicant's claims. They were never warned that the Tribunal had subsequently decided not to schedule a hearing for this purpose.

**SZDAD v MIMA & Anor**

**[2006] FMCA 1091**

**Federal Magistrates Court of Australia, Nicholls FM, SYG692 of 2004, 9 August 2006**

**Immigration – Protection visa – Tribunal did not properly assess the applicant's claims based on her membership of social group – “Indian women” – Tribunal failed to deal with an aspect of the applicant's claim**

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

The applicant feared harassment and rape by indigenous Fijians and claimed that Indo-Fijian women were committing suicide because of their fear of persecution. The Tribunal recognised the applicant's claims to be that Indo-Fijian women were vulnerable to crimes by indigenous Fijians but found that there was nothing in the material to support the applicant's suggestion that “Indo Fijians” or “Indo-Fijian women” were committing suicide due to a fear of persecution. It found that the applicant made no claims to have suffered persecution in the past and that, in any event, Indo-Fijians did not face a real chance of persecution by the government or other authorities. The Tribunal was also satisfied that the authorities provided effective protection to “Indo-Fijians”.

The applicant contended that the Tribunal failed to consider the totality of her claims that she faced a real chance of persecution as an “Indo-Fijian woman”. Among other things, the applicant also contended that the Tribunal erred by failing to disclose adverse country information on which it relied in the making of its decision.

**Held: RRT decision set aside and remitted for reconsideration.**

- (i) The Tribunal made a jurisdictional error by inadequately dealing with the applicant's claim to fear harassment and rape as an “Indo-Fijian woman”.
- (ii) It was not open to the Tribunal to seek to characterise the fear of harassment and rape as only being seen in the context of leading to suicide. By dealing only with the issue of suicide, the Tribunal failed to consider whether the applicant would be harassed and raped by indigenous Fijians merely for being an “Indo-Fijian woman”. The Tribunal did not deal with what itself saw as the perceived vulnerability of Indo-Fijian women to crime by indigenous Fijians.
- (iii) While the Tribunal considered the issue of crime and lack of security in the context of the applicant being “Indo-Fijian”, it did not adequately deal with that aspect of crime and security as it impacted on the separate group of “Indo-Fijian women” and rape and harassment by indigenous Fijians.

- (iv) The Tribunal did not breach its obligations under s.424A of the *Migration Act* 1958 as the general country information fell within s.424A(3)(a) of the Act. Following *Lay Lat v MIMIA* [2006] FCAFC 61, the Tribunal's exhaustive obligations in this regard are contained in s.424A.

**SZEVJ v MIMA & Anor**

**[2006] FMCA 69**

**Federal Magistrates Court of Australia, Nicholls FM, SYG2085 of 2004, 21 July 2006**

**Immigration – Protection Visa – Fear of persecution based on threats by a “loan shark” and membership of an “underground church” –Convention nexus – Inconsistencies between claims made in the original application and to the Tribunal – Whether applicant republished claims before the Tribunal – Bias**

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 claimed that he was at risk of persecution from a loan shark to whom he owed money for his failed business and because of his religion. The Tribunal accepted that in an attempt to keep his business afloat the applicant borrowed money from a loan shark. However, it was not satisfied that any claims related to the loan shark were for a Convention reason and found that the applicant would not be refused state protection for a Convention reason. Further the Tribunal accepted that the applicant had attended some church meetings since arriving in Australia but did not accept that he was identified, or practised, as a Christian in China and was detained. It was not satisfied that the applicant had a well founded fear of persecution for reasons of his religion.

The applicant contended, amongst other things, that the Tribunal was biased against him for including encouraging him to put forward any new claims that had not been put in his initial application and then misleading him because when he put in such new claims, this was used as the basis for refusing his application. He also contended that he belonged to a particular social group and therefore it was not open to the Tribunal to make a finding that the fear of the loan shark was not for a Convention reason and there was no evidence to support the Tribunal's findings. In addition the applicant contended that the Tribunal's reference in its decision record to the applicant's protection visa application gave rise to obligations under s.424A(1) of the *Migration Act* 1958 (the Act).

**Held: Appeal dismissed.**

- (i) There was no jurisdictional error in the Tribunal's decision.
- (ii) The Tribunal's findings in relation to the applicant's claims concerning Christianity were open to it on the material before it. There was no bias deriving from its actions in this regard.
- (iii) The applicant was unable to show how the Tribunal “encouraged” applicants to put forward any claims that had not been “handed in with the initial application”. While the references in the Tribunal's correspondence indicated an opportunity to submit additional information, evidence or documents, they could not be read as an enticement to put forward completely new claims, which the applicant did in this case.
- (iv) The applicant was not misled in any way or entrapped by the Tribunal. The Tribunal gave clear reasons for its acceptance of some of the applicant's explanation as to why new claims concerning the loan shark emerged at the hearing for the first time but also, equally, gave reasons for not accepting this explanation in regard to the applicant's claims on religion. All of this was open to the Tribunal on the material before it. There was no error in how the Tribunal went about its task in that regard nor that it showed bias on the part of the Tribunal.
- (v) The applicant could not succeed in his assertion that his fear relating to the loan shark was Convention related. In the material before the Tribunal, the applicant simply made no claim that his

fear of the loan shark was, even in part, originating from his membership of any social group. Nor did the circumstances put forward by the applicant suggest this.

- (vi) There was no breach of s.424A of the Act. Whilst part of the reason for the Tribunal's decision in relation to religion was that the applicant had omitted to raise this issue in his protection visa application, the applicant's statement in his application for review to the Tribunal clearly referred the Tribunal to the statement of his claims made in the protection visa application. The applicant thereby republished his "statement", and the information contained in that statement fell within the exception provided in s.424A(3)(b).

**SZFXV v MIMA**

**[2006] FMCA 1204**

**Federal Magistrates Court, Raphael FM, SYG 590 of 2005, 23 August 2006**

**Immigration – Protection Visa – Where applicant claimed persecution on basis of religion (Ahmadia) – Whether Tribunal's information that the Australian Ahmadi Association provides confirmation about a person's adherence to Ahmadia is 'information' for the purposes of s. 424A of the *Migration Act 1958***

The applicant, a national of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of his religious affiliation to the Ahmadi branch of the Islamic religion.

The Tribunal was not satisfied of the veracity of the applicant's claimed adherence to the Ahmadi sect. In its reasoning process, the Tribunal relied, among other things, on the failure of the applicant to produce documented confirmation from the Ahmadi community in Australia that they recognise his adherence, finding that this failure was inconsistent with his claimed Ahmadi adherence.

The applicant argued that the Tribunal failed to comply with the requirements of s.424A of the *Migration Act 1958* (the Act) by failing to give the applicant information that the Ahmadi community in Australia provided confirmatory information about a person's adherence to their religion and that its non provision would be an indicator that he was not a member of that sect. Counsel for the Minister submitted that the non production of the documentation was not 'information' for the purposes of s.424A, but rather an expression of its reasoning process; it was simply the Tribunal's response to the applicant's promise to provide that documentation.

**Held: RRT decision set aside and remitted for reconsideration.**

- (i) Even though the Tribunal provided the applicant with procedural fairness at the time of the hearing, it did not comply with the provisions of s.424A(1) of the Act and for the reasons given by the High Court in *SAAP v MIMIA* (2005) 215 ALR 162, it fell in jurisdictional error.
- (ii) The Tribunal's reasons indicate that it had posited as a litmus test, that if the applicant was able to produce the written documentation from the Ahmadi sect in Australia then his claims to be an Ahmadi would be much more likely to be met. In such circumstances, the failure to provide that documentation was part of the reason for affirming the decision.
- (iii) The knowledge that the Tribunal had about the activities of the Ahmadi community in Australia, in particular its ability to identify and confirm the applicant's religious affiliation, was 'information' that came within s.424A(1). This information did not fall within s.424A(3)(a) because it was information directly about the applicant.
- (iv) The information that Tribunal relied on and the information the applicant promised to provide were not one and the same. The applicant was referring not to evidence from the Ahmadi community in Australia but to a person who knew the applicant as an Ahmadi in Bangladesh. As a result the exception in s.424A(3)(b) was irrelevant.

**SZGHZ v MIMA & Anor**

**[2006] FMCA 1170**

**Immigration – Protection Visa – Allegations of bias and bad faith – Tribunal’s doubts are part of the Tribunal’s thought processes – Whether applicant properly invited to a hearing before the Tribunal – Whether Tribunal relied on information not provided to it for the purposes of the review**

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

The Tribunal wrote to the applicant advising that, on the material before it, it was unable to make a favourable decision on that information alone and invited the applicant to give oral evidence and present arguments at a hearing. The applicant did not appear at hearing and the Tribunal proceeded to affirm the delegate’s decision without taking any further action to enable the applicant to appear before it. The Tribunal explained that it was unable to enlarge on or test the limited information in the application and unable to clarify a seeming inconsistency because the applicant did not attend the hearing.

The Tribunal also found that the applicant was of no interest to the Chinese security authorities based on information that he was able to leave China freely using a passport in his own name. The primary visa application contained boarding passes and a statement that the applicant left China legally although he had to pay money for his passport. There was no evidence that the applicant gave any information regarding his passport or boarding passes to the Tribunal.

The applicant claimed the Tribunal was biased against him, that he did not have the opportunity of explaining what he saw as the Tribunal’s misunderstanding of his application and that the Tribunal did not notify him that he might be rejected because of its misunderstanding and that departing China without difficulties did not mean he would not be persecuted upon return.

**Held: RRT decision set aside and remitted for reconsideration.**

- (i) The Tribunal did not comply with s.424A(1) because it relied on information regarding the applicant’s passport and departure from China that had not been put before it for the purposes of the review which formed part of its decision.
- (ii) The case does not fall within the exception articulated in *SZEEU* by Allsop J because the alternate basis for the Tribunal’s decision was not entirely independent of the failure to follow s.424A such as to warrant the withholding of relief. The applicant’s claims were rejected for two inter-related reasons. One being the lack of satisfaction based on the limited information and the other being that the applicant was of no interest to the Chinese authorities. The Tribunal relied in part on information which should have been dealt with in a s.424A letter.
- (iii) The claim of bias was not made out.
- (iv) The Tribunal’s doubts about the applicant’s claim, in so far as they were part of the Tribunal’s thought processes were not matters that it was required to put to the applicant.
- (v) In the circumstances of the Tribunal putting the applicant on notice as to its preliminary view and giving the applicant an opportunity to provide further material at hearing, the applicant cannot complain that the Tribunal was not able to be satisfied on what was before it.

**SZGXY v MIMIA**  
**[2006] FMCA 1081**

**Federal Magistrates Court of Australia, Nicholls FM, SYG 2131 of 2005, 4 August 2006**

**Immigration – Protection Visa – Claims to fear persecution based on Chinese ethnicity in Indonesia – Tribunal considered the applicant’s claims to be based on “Christian Chinese ethnicity” – Failure to properly consider the applicant’s claim – Jurisdictional error**

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

The applicant noted in her protection visa application that she was a Christian from Indonesia and claimed to fear persecution for reasons of her Chinese ethnicity. She also claimed a fear of harm for her ethnicity before the Tribunal. Tribunal found it was not satisfied the applicant would suffer persecution for reasons of her “Christian Chinese ethnicity”.

The applicant claimed the Tribunal failed to deal with her claim that she would be persecuted because of her “Chinese ethnicity”, and considered instead whether she would be persecuted because she was a “Christian” of “Chinese ethnicity”.

**Held: RRT Decision quashed and remitted for reconsideration**

- (i) The Tribunal failed to deal with the claim as put by the applicant. In finding it could not be satisfied as to the applicant’s fear of persecution, not solely on the basis of her Chinese ethnicity, but “on something different” which it described twice as “Christian Chinese ethnicity”, the Tribunal fell into jurisdictional error.
- (ii) The only material revealing that the applicant was a “Christian” was in the protection visa application. As a result, to the extent that the Tribunal’s perception that the applicant’s fears arose from her “Christianity” was adverse to the applicant, the information on which the perception was based was subject to s.424A of the *Migration Act* 1958 and had to be put to the applicant in writing.
- (iii) A decision based solely on the Tribunal’s inability to be satisfied on the material before it, where that material was inadequate and of insufficient detail, would (in the absence of anything else) reveals no error on the part of the Tribunal. But the lack of satisfaction must relate to a proper understanding of the applicant’s claims and the Tribunal needs to exhibit an understanding, through its decision record, of what exactly it could not be satisfied about.

*Obiter*

- (iv) The Tribunal was entitled to proceed to a decision without conducting a hearing. The applicant advised her adviser that she did not intend to appear, and despite the file note that the hearing was “cancelled”, there was no evidence to contradict the Tribunal’s statement that the applicant failed to appear at the scheduled hearing.

**SZIFP v MIMA & Anor**  
**[2006] FMCA 965**

**Federal Magistrates Court, Nicholls FM, SYG300 of 2006, 11 July 2006**

**Immigration – Protection Visa – Claims to Tribunal lacked detail – Failure to attend hearing before Tribunal – Jurisdictional error found in Tribunal’s decision pursuant to s.424A(1) of the *Migration Act* 1958 - Unwarrantable delay – Application filed outside the time limits set by s.477(1)**

The applicant, a national of the People’s Republic 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 claimed to fear persecution based upon his defence of Falun Gong practitioners in China and his practise of Falun Gong in Australia.

The Tribunal found the applicant's claims to be sketchy and lacking in detailed particulars. It did not accept that the applicant was a Falun Gong practitioner and it could not be satisfied that the applicant would suffer real harm upon his return to China.

The applicant received notification of the Tribunal's decision on 14 March 2003. The applicant filed the application in Court on 31 January 2006 which was outside of the time limit specified in s.477 of the *Migration Act 1958* (the Act).

Although not raised in the application to the Court by the applicant, the Court considered whether the Tribunal's decision relied on information which was not given to it by the applicant for the purposes of review, namely information that the applicant did not appear before a Departmental officer to explain his claims, and passport information. The Court considered whether the Tribunal should have put this information to the applicant in writing pursuant to s.424A. Counsel for the Minister submitted that even if jurisdictional error was revealed in the Tribunal's decision, as the applicant had delayed lodging his application by nearly three years, the Court should exercise its discretion not to grant the applicant an extension of time pursuant to s.477(2).

**Held: Application dismissed.**

- (i) The Tribunal's inability to be satisfied that the protection visa could be granted was, at least in part, due to the applicant's ability to obtain a passport and to leave China without any hindrance and without difficulty from Chinese authorities. This information was not provided to the Tribunal for the purposes of review and in failing to put this information to the applicant in writing, the Tribunal breached s.424A of the Act and committed jurisdictional error.
- (ii) Notwithstanding the jurisdictional error in the Tribunal's decision, the applicant's unexplained and very lengthy delay in coming forward strongly outweighed the error found. As the applicant had been given fair opportunities to understand and address the relevant issues, and in the interests of the administration of justice, no purpose would be served in granting any extension to the applicant to file his application in Court.
- (iii) The Tribunal's reference to the applicant not appearing before the Departmental officer, both when read as part of the whole of the Tribunal's decision, and even when read as part of the decision record where it appears, was a contextual explanation for its decision, rather than a part of the reasons for the decision. The Tribunal did not affirm the decision because the applicant did not attend before the delegate.

**VXAB v MIMA**

**[2006] FMCA 857**

**Federal Magistrates Court of Australia, O'Dwyer FM, MLG753 of 2005, 30 June 2006**

**Immigration – Protection Visa – Convention ground not expressly argued but squarely raised on evidence – Membership of a particular social group – Religion – Law of general application enlivened for a Convention reason**

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

The applicant, a citizen of Sri Lanka from a family renowned for traditional drumming and drum making, deserted from the Army whilst in Australia as part of a traditional dancing troupe. He claimed to fear persecution in Sri Lanka from his military superiors as he was punished for expressing dissatisfaction with their expectations that he perform for leading political parties in Sri Lanka. He claimed he objected to performing his 'sacred dances' for politicians and people he perceived as criminals, rather believing those dances should be performed in sacred and important places. In affirming the delegate's decision, the Tribunal canvassed the

history and claims made by the applicant, finding that the applicant did not object to performing due to his political opinion or other Convention reason, rather it stemmed from “his feelings of being exploited and objection to traditional dancing and drumming being used for purposes other than what it was intended”.

The applicant contended that the Tribunal failed to consider a claim which was not expressly argued before it, but which the Tribunal should have considered as having been raised on the evidence presented to it. In particular the Tribunal failed to consider whether the applicant qualified as a refugee because of his membership of a particular social group or because of religion.

**Held: RRT decision set aside and remitted for reconsideration.**

- (i) The Tribunal committed a jurisdictional error in that it failed to give proper consideration to the claims arising under Convention grounds that were squarely raised on the material before it. The accepted facts as set out by the Tribunal in its decision clearly should have alerted an inquisitorial Tribunal to the potential claim under the Convention based upon the applicant’s membership of a particular social group and expressed religious belief.
- (ii) Indeed, it was incumbent upon the Tribunal, having regard to the history of the applicant, his particular and peculiar qualifications and the clear reference to the cultural and religious context in which he practiced his skills, for it to consider and explore whether or not he qualified as a member of a particular social group and suffered persecution because of that membership or because of a religious belief.
- (iii) It was incumbent upon the Tribunal to fully articulate its reasons in respect of the ‘other obvious Convention grounds’ and it was not sufficient to merely try to encompass them in a finding that there is ‘no other Convention reason’ for persecution.
- (iv) The particular social group of which the applicant was a member, and which can be distinguished from society at large is the group described as traditional drummers and traditional dancers. The material before the Tribunal clearly establishes that the applicant was a member of such a group whose membership is traced through heritage and cultural indoctrination.

## LEGISLATION UPDATE

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

### Legislation Pending

#### **Migration Legislation Amendment (Complementary Protection Visas) Bill 2006**

The Migration Legislation Amendment (Complementary Protection Visas) Bill 2006 was introduced as a private member's bill to the Parliament by Senator Bartlett on 13 September 2006.

The Bill seeks to introduce Complementary Protection visas into the Migration Act to provide an alternative system of protection for those who do not meet the definition of refugee in the Refugees Convention, but who may have compelling humanitarian reasons for not returning to their home country.

A copy of the bill will soon be available at

<http://www.comlaw.gov.au/ComLaw/legislation/bills1.nsf/sh/browse&CATEGORY=bill>

#### **Migration Legislation Amendment (Return to Procedural Fairness) Bill 2006**

The Migration Legislation Amendment (Return to Procedural Fairness) Bill 2006 was introduced as a private member's bill to the Parliament by Senator Bartlett on 17 August 2006.

The Bill aims to introduce an Act to restore the application of common law natural justice to the Migration Act 1958, and for related purposes.

A copy of the bill can be found at

[http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0A84C9D68069185BCA2571CE00080865/\\$file/18080601b.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0A84C9D68069185BCA2571CE00080865/$file/18080601b.pdf)

#### **Migration Legislation Amendment (End of Mandatory Detention) Bill**

Migration Legislation Amendment (End of Mandatory Detention) Bill 2006 was introduced as a private member's bill to the Parliament by Senator Bartlett on 7 September 2006

The Bill aims to introduce an Act to end the mandatory detention of visa applicants and asylum seekers, and for related purposes

A copy of the bill can be found at

<http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/all/search/33B96926135FDF3CCA2571E300153B89?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>

# CASELOAD OVERVIEW

## RRT Decisions – August 2006

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	0	1	0	0	1
Algeria	0	1	0	0	1
Azerbaijan	0	1	0	0	1
Bahrain	1	0	0	0	1
Bangladesh	5	15	0	3	23
Bhutan	0	1	0	0	1
China (PRC)	28	73	2	3	106
Colombia	2	0	0	0	2
Cote D'Ivoire	1	0	0	0	1
Egypt	0	3	0	0	3
Ethiopia	2	0	0	0	2
Fiji	0	3	0	0	3
Ghana	1	0	0	0	1
India	2	40	1	0	3
Indonesia	1	12	0	1	14
Iran	4	1	0	0	5
Jordan	1	0	0	0	1
Kenya	1	3	0	0	4
North Korea	2	1	0	0	3
Korea, Republic of	0	2	0	0	2
Latvia	2	0	0	0	2
Lebanon	1	4	0	0	5
Malaysia	0	9	0	0	9
Mongolia	0	1	0	0	1
Nepal	0	7	0	0	7
Nigeria	4	1	0	0	5
Pakistan	3	8	0	0	11
Papua New Guinea	3	0	0	0	3
Peru	0	1	0	0	1
Philippines	0	1	0	1	2
Russian Federation	1	0	0	0	1
Serbia & Montenegro	0	1	0	0	1
Sri Lanka	2	6	0	0	8
Sudan	0	1	0	0	1
Syria	1	1	0	0	2
Tanzania	1	0	0	0	1
Thailand	0	4	0	0	4
Tonga	0	0	1	1	2
Turkey	0	4	0	0	4
United States of America	0	1	0	0	1
Uruguay	0	1	0	0	1
Vietnam	0	3	0	0	3
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](mailto:rrtinfo@rrt.gov.au)

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