

# RRT Bulletin

## The Refugee Review Tribunal decisions digest

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

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

### Contents

|  |           |
|--|-----------|
| <b>Refugee Review Tribunal Decisions</b> | <b>2</b>  |
| Bahrain                                  | 2         |
| Bangladesh                               | 2         |
| China                                    | 3         |
| India                                    | 6         |
| Indonesia                                | 6         |
| Iran                                     | 7         |
| Pakistan                                 | 7         |
| <b>High Court</b>                        | <b>9</b>  |
| <i>SZAYW v MIMIA</i>                     | 9         |
| <b>Federal Court</b>                     | <b>11</b> |
| <i>Applicant S296 of 2003 v MIMA</i>     | 11        |
| <i>MIMA v SZGMF</i>                      | 12        |
| <i>SZEOQ v MIMA</i>                      | 13        |
| <b>Federal Magistrates Court</b>         | <b>15</b> |
| <i>SZIME v MIMA &amp; Anor</i>           | 15        |
| <i>NBMF v MIMIA &amp; Anor</i>           | 15        |
| <i>SZFKC v MIMA &amp; Anor</i>           | 16        |
| <i>SZFWJ v MIMA &amp; Anor</i>           | 17        |
| <i>S1583 of 2003 v MIMA &amp; Anor</i>   | 18        |
| <i>SZFZN v MIMA &amp; Anor</i>           | 18        |
| <i>SZIML v MIMA &amp; Anor</i>           | 19        |
| <b>Legislation Update</b>                | <b>21</b> |
| <b>Caseload Overview</b>                 | <b>23</b> |
| <b>Accessing Tribunal Decisions</b>      | <b>24</b> |
| <b>Index</b>                             | <b>25</b> |

Issue No. 11/2006

16 October 2006

Editor:  
Laraine Roberts

Contributors:

Nicole Antonopoulos  
Kate Buring  
Sue Burton  
David Corrigan  
Rey Hyland  
Kerry Ko  
Cameron McDonald  
Jacquelin Plummer  
Preeti Prasad  
Laraine Roberts  
Stephen Tully  
Stephen Webb  
Rachel White

Please note that any enquiries regarding this Bulletin may be directed to the Editor on (02) 9276 5427 or at [legala@rrt.gov.au](mailto:legala@rrt.gov.au)

Published Tribunal decisions can be found at [www.austlii.edu.au](http://www.austlii.edu.au)

## Bahrain

060524895

17 August 2006, Melbourne

Ms W Boddison, Member

**BAHRAIN - RELIGION - CHRISTIAN CONVERT** - The applicant, a citizen of Bahrain, feared persecution for reasons of his religion. He claimed he converted from Islam to Christianity and as a result of this conversion he was dismissed from his employment and was detained, tortured and his life threatened. He claimed that although the persecution had been carried out by religious fundamentalists, the state had offered no protection. The applicant claimed that after this experience he was afraid to practise his religion and modified his behaviour by ceasing his openly Christian activities. He claimed that he did not leave Bahrain for several years as he expected things to improve but it did not and he was discriminated against and his business ventures suffered.

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

The Tribunal accepted the applicant was a Christian convert who had converted prior to coming to Australia. It referred to independent information that there was a real chance Christian converts would be persecuted by fundamentalist groups and found that although the applicant resided in Bahrain without incident for several years after he was tortured and threatened, this was because he did not outwardly manifest his religion. The Tribunal found that although during this period the applicant travelled extensively between Bahrain and its neighbouring countries, this did not undermine his claims as he had not practised his religion and consequently the authorities would not have known he was a Christian. The Tribunal accepted that the reason for the applicant's modified behaviour was his fear and found he had a well-founded fear of persecution for reasons of his religion. In addition, it found that the applicant had no present right to enter and reside in a third country and it would not be reasonable to relocate to another part of Bahrain as those he feared were throughout Bahrain and no state protection was available.

## Bangladesh

060487502

21 August 2006, Sydney

Mr S Norman, Member

**BANGLADESH - POLITICAL OPINION - AWAMI LEAGUE - THREATS - VIOLENCE** - The applicant feared persecution arising from his active involvement in politics for many years. He claimed he had always been a member and supporter of the Awami League and had held various positions in that organisation as well as in other political organisations. The applicant claimed that he had been subjected to threats and actual violence, false criminal charges and pressure to desist his political involvement. He also claimed he had been gaoled several times and feared for his safety now that the BNP was in power. The applicant claimed he had attempted to hide without success and would not be able to seek shelter from his political enemies anywhere in Bangladesh.

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

The Tribunal noted that the applicant had been elected to a position within the Awami League in his local area and was perceived to have allegiance to the organisation. It was satisfied that the applicant had been politically active and was subjected to threats and actual violence as well as false criminal charges. The Tribunal was satisfied that he had remained in hiding in Bangladesh until his departure. It was satisfied that the applicant's political convictions were sufficiently strong that the suppression of them in order to avoid persecution would constitute persecution for him. The Tribunal found there was a real chance he could give voice to those convictions on return and come to the adverse attention of his political opponents. It was also satisfied there

was a real chance the applicant may none-the-less come to the adverse attention of his political opponents and was accordingly satisfied that his fear of persecution was well-founded.

## China

**N0653368**  
**13 June 2006, Sydney**  
**Mr R Wilson, Member**

**CHINA - POLITICAL OPINION - ANTI-GOVERNMENT ACTIVIST** - The applicant feared persecution arising from her efforts to obtain information about her father's death. She claimed that he had been the Chairman of the Workers' Union at a large state-owned factory and when the government started to reform such enterprises there was heavy unemployment and tremendous social impact on the city. The applicant claimed that her father had hosted Workers' Union meetings at his home and at least five large demonstrations were organised. She claimed that he was detained and denounced as the "black hand" behind the demonstrations. The applicant claimed that after he died in custody she and her mother visited the Public Security Bureau (PSB) to ascertain how he had died. She claimed that the PSB refused to let anyone see the body, nor would they conduct an investigation. The applicant claimed she learnt from a contact that her father had been tortured to death. She claimed that a doctor who had undertaken to obtain her father's medical report was arrested by the PSB, which was commencing an investigation against her. The applicant claimed that she was also detained and forced to sign an undertaking to stop her investigation.

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

The Tribunal accepted the applicant's claims as truthful but noted that she had not provided truthful information in her application for a business visa to enter Australia. However, it accepted that persons who were being persecuted may use means to leave which were not always lawful or honest. The Tribunal accepted that there were workers' demonstrations, labour leaders were detained and thousands of workers protested against loss of benefits, inadequate severance pay and non-payment of back wages. It found that if the applicant had been able to obtain the reports that her father had been tortured, this would have led to a further outpouring of anger against the authorities with further strikes and demonstrations. As a result the Tribunal found that the applicant was detained and mistreated mentally and physically because of her imputed profile as an anti-government activist. It accepted that if she returned she would continue her search for the truth regarding her father's death and there was a real chance that would be detained. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution for reasons of political opinion.

**060315846**  
**21 July 2006, Sydney**  
**Mr S Roushan, Member**

**CHINA - PARTICULAR SOCIAL GROUP - FALUN GONG PRACTITIONERS** - The applicant feared persecution arising from his practise of Falun Gong following his cousin's recovery from a serious illness. He claimed he had been a Falun Gong practitioner in China since 1997 and that he had staged a number of sit-in protests in 1999. The applicant claimed that as a result he was harassed and interrogated by police for a number of years. He also claimed that he continued to practise Falun Gong after arriving in Australia and that he feared harm by the authorities if he were to return to China.

**Held:** Decision under review affirmed.

The Tribunal accepted that Falun Gong practitioners constituted a particular social group in China for the purposes of the Refugees Convention. However, the applicant's evidence led the Tribunal to find that he was not a Falun Gong practitioner in China and that his interest in Falun Gong was a recent invention designed to strengthen his claims for a protection visa. The Tribunal found that the applicant lacked the level of knowledge that it reasonably expected from someone who had practised Falun Gong since 1997. The applicant's claims regarding his protest activity and the reaction of the authorities were found to be inconsistent with the independent evidence. The Tribunal did not accept that the applicant was engaged in any form of protest or that he had suffered any harm amounting to persecution in China for the reason of his Falun Gong activities.

Accordingly, the Tribunal was satisfied that the applicant did not have a well-founded fear of persecution for a Convention reason.

**V06/18447**  
**27 July 2006, Melbourne**  
**Ms G Hamilton, Member**

**CHINA - POLITICAL OPINION - PROPERTY DISPUTE** - The applicant feared persecution for supporting the Beijing student movement in the late 1980s. He claimed that he was detained and subsequently sacked from a senior school position before he fled to Australia, where he participated in further political protests. The applicant returned to China in the early 1990s to secure his wife's release from detention, believing that the authorities had forgiven his pro-democracy activities. He claimed he suffered a further period of detention and forced retrenchment. He also claimed that his family-owned property had been illegally occupied by the authorities because of his political views. The applicant claimed that he was detained for several days after arguing with a Registrar when seeking to enforce his family's property rights through the local courts.

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

The Tribunal did not accept that any harm the applicant experienced since his return to China was due to participation in the 1989 pro-democracy movement. It found that he did not face a real chance of future harm in connection with the 1989 protests. The Tribunal was not satisfied that the applicant had actively participated in political protests in Australia or that he was removed from his position in China. However, his long-running dispute with local authorities had a political character given ideological uncertainty over private property rights and local authoritarianism and corruption. The Tribunal accepted that the applicant was detained due to an altercation with judicial officials and that this could re-occur. It also accepted that he could be harmed in connection with this property dispute given independent information about the physical mistreatment of detainees. The Tribunal was satisfied that the applicant had a well-founded fear of persecution on account of his political opinion.

**060382823**  
**27 July 2006, Sydney**  
**Mr S Roushan, Member**

**CHINA - RELIGION - POLITICAL OPINION - CHRISTIAN** - The applicant feared persecution for converting to Christianity. She claimed she had been introduced to an "underground church", attended Bible study meetings, distributed religious material and was baptised. The applicant claimed that her husband, who was a government employee, obtained information about impending government action and foiled a raid on church members. She claimed that the authorities became suspicious and she was questioned and beaten. The applicant claimed she had been in the mountains when her husband was imprisoned and, after an arrest warrant was issued for her, obtained a false passport to enable her illegal departure.

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

The Tribunal found that the applicant provided persuasive answers concerning her Christian beliefs and was satisfied that she practised Christianity. It accepted as plausible the applicant's explanation of her husband's ability to pass on government information and his subsequent imprisonment. The Tribunal accepted that upon investigation the authorities became aware of the applicant's religious identity and possible collaboration with her husband. In the Tribunal's view, the applicant's illegal departure indicated her fear of harm and it was satisfied that she would continue to practise her faith upon return. The Tribunal found that the applicant had a well-founded fear of persecution as independent information indicated that unregistered religious groups experienced official interference within China. The risk of persecution was exacerbated by an imputed political opinion due to her husband's efforts against the authorities in rendering assistance to the church.

**060447414**  
**31 July 2006, Sydney**  
**Mr M Northcott, Member**

**CHINA - FALUN GONG** - The applicant feared persecution as a Falun Gong practitioner. She claimed that for health reasons her neighbour introduced her to Falun Gong after the birth of her child and she attended public Falun Gong exercise groups before they became illegal. The applicant claimed that the authorities had "cracked down" on Falun Gong practitioners in July 1999 and she continued to practise in private. She claimed she was detained and subject to re-education techniques after protesting when members of her practice group were taken away by police. The applicant claimed that after detention she was dismissed from her government employment and her movements were monitored. Prior to her arrival in Australia she was summonsed on more than one occasion to the local police station. She also claimed her child was questioned about her activities. She claimed that her new employer, who was unaware she was Falun Gong, obtained her passport and visa when it sent staff with clients on a trip to Australia. The applicant claimed that she attended Falun Gong study on a weekly basis in Australia and that she continued to practise the exercises.

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

The Tribunal found the applicant to be a witness of credit. It considered her evidence to be detailed and consistent and found it was clear from her demonstration of the exercises that she was able to perform them confidently. The Tribunal accepted her explanation for not knowing the names of the exercises. As such it accepted that the applicant was a Falun Gong practitioner. The Tribunal accepted that if the applicant returned to China she would feel compelled to continue to practise Falun Gong. It was satisfied that if she modified her behaviour and did not practise in public, this would be due to her fear of persecution. The Tribunal accepted that the Chinese authorities knew about the applicant's adherence to Falun Gong and found that even if she practised in private there was every chance that she would draw adverse attention to herself. It found that this could be the case regardless of whether or not she was involved in Falun Gong in a leadership capacity. The Tribunal found that Falun Gong practitioners faced persecution for reasons of political opinion. It followed that it was satisfied that the applicant had a well-founded fear of persecution for reasons of political opinion.

**060593272**  
**12 September 2006, Sydney**  
**Ms A O'Toole, Member**

**CHINA - POLITICAL OPINION - PRO-DEMOCRACY GROUP - CHINA DEMOCRACY PARTY** - The applicant feared persecution arising from his political opinion as an anti-government activist. He claimed that he and several others organised an "information pro-democracy group" which held regular meetings and distributed propaganda. The applicant claimed that he met a member of the China Democracy Party (CDP) who wanted to establish a branch in the area. He claimed that his group was later renamed as a branch of the CDP and he led a small group which mainly distributed pro-democracy propaganda material. The applicant claimed that after a number of group members were arrested in his absence he moved to another province and eventually left China. He claimed that his wife was questioned frequently on his whereabouts. The applicant feared being immediately arrested and gaoled for a long time if he returned as his political activities were not tolerated and he was wanted by the authorities for joining the CDP and distributing its propaganda.

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

The Tribunal noted that China was still an authoritarian state with the Chinese Communist Party as the paramount source of power. It found that citizens lacked the freedom to express opposition to the party-led political system and that the Government interfered frequently in the judicial process. The Tribunal accepted the applicant's claim that he came to the adverse attention of the Chinese authorities because of his ongoing involvement in a pro-democracy movement and that his wife was constantly questioned about him. The Tribunal was satisfied that the applicant's fear of persecution was well-founded as he could be detained and interrogated because of his perceived anti-government activities. It was satisfied there was more than a remote possibility that the applicant may come to the adverse attention of the authorities for reason of his actual or imputed political opinion and be seriously harmed.

## India

060428619  
16 August 2006, Sydney  
Ms A O'Toole, Member

**INDIA - PARTICULAR SOCIAL GROUP - HOMOSEXUALS - HARASSMENT - HUMILIATION - THREATS -**  
The applicant feared persecution arising from his homosexuality. He claimed that after he and his partner met and began a relationship, local people came to know of it and as a result they started to harass them including family members who banned them from meeting. The applicant claimed that he and his partner left India and moved to another country to study. He claimed that the Indian community started to harass them and a Hindu priest came to the house to tell them that homosexuality was completely banned by the religion. The applicant claimed that they were insulted and threatened that they should leave the area. He claimed that he returned to India when his father became ill but his family did not allow him to stay with them and told him to leave the country or the local people would kill him. The applicant claimed that if he returned to India he would go to gaol and his life would be in danger.

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

The Tribunal accepted that the applicant was a homosexual and that he feared persecution for reason of his membership of the particular social group of homosexuals. It was not satisfied that all Indian homosexuals had a real chance of persecution for that reason. The Tribunal noted it appeared that in New Delhi homosexuals experienced a degree of freedom not found in many other locations within India. However, it found that an applicant may have sufficiently strong convictions, the suppression of which in order to avoid harm might constitute persecution. The Tribunal also noted that the convictions of some were sufficiently strong that there may be a real chance they could come to the attention of the authorities. It noted that the applicant and his partner had lived openly in another country for several years and openly in Australia as homosexuals. The Tribunal was not satisfied that all homosexuals could live in publicly acknowledged relationships without invoking a real chance of persecution in India and noted that the applicant's family and community were cognisant of his homosexuality. Accordingly, it was satisfied the persecution feared was well-founded for a Convention reason.

## Indonesia

060470739  
15 September, Sydney  
Mr H Wyndham, Member

**INDONESIA - RACE - CHINESE - RELIGION - CHRISTIAN -** The applicant feared persecution as a Chinese woman who was also a Christian. She claimed that during the anti-Chinese rioting in 1998 she was terrified as the family barricaded their home. The applicant claimed that she regarded herself as lucky she was not attacked as were the many Chinese women who were murdered. She claimed that her family considered it too dangerous for her to travel to high school, so she not only had to disavow her religion and ethnicity, but lost the opportunity to continue her studies. The applicant claimed she was assaulted at knifepoint on a bus in Jakarta and that the non-Chinese passengers did not intervene or help. She also claimed that when the family home was ransacked, it was reported to police who were clearly not interested, due to ethnicity. The applicant claimed that she had been stopped by police and criticised for wearing short sleeved clothing in public.

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

The Tribunal noted that, despite the fact that the situation for ethnic Chinese had improved for ethnic Chinese in recent years, there was still legal and societal discrimination against them. It found this was demonstrated by the applicant's account of daily systematic and discriminatory - sometimes threatening - conduct towards her in Jakarta and the limitations her fear of danger placed on her life. However, the Tribunal found that the independent information did not show that the present level of discrimination indicated a real chance of the

applicant suffering persecution for reason only of her ethnicity. It found that the applicant was dedicated to her Christian faith and there was a rising tide of Islamist fundamentalism which the Government was unable to control. The Tribunal found that Christians were targeted by fringe groups and that adequate protection was not always available. It found there was a real chance of the applicant suffering persecution for reason of her race and/or religion and accordingly, her fear was well-founded.

## Iran

**060320788**  
**18 July 2006, Sydney**  
**Mr G Short, a/g Deputy Principal Member**

**IRAN - RELIGION - PARTICULAR RELIGIOUS MINORITY - ARBITRARY ARREST - IMPRISONMENT** - The applicant feared persecution arising from his religion. He claimed that his parents for many years had lived in another country where his father managed a business. The applicant claimed he was born in the other country and that after the Iranian revolution it became impossible for his parents to return due to the treatment of the particular religious minority to which they belonged. He claimed that one relative had been murdered because of their religion and other family members had many problems because one of his parents had converted from Islam to the particular religious minority in order to marry. The applicant claimed that he had no right of residence in the other country and every year had been required to renew his residence permit for which his father had sponsored him. He claimed that although he was an Iranian citizen he had never been to Iran and would be unable to avoid persecution there as a member of the particular religious minority.

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

The Tribunal accepted that the applicant was a national of Iran. However, it found that whilst the applicant's father had been able to sponsor him for residence in the other country while he remained a student, this would not be possible if he wished to work. The Tribunal did not consider it was a foregone conclusion that the applicant's residence permit would be reinstated on return to the other country. It noted that the right to enter and reside in a country must be a presently existing legal right, not merely a potential right or an opportunity to seek the favourable exercise of discretion. The Tribunal did not consider that the applicant had such a right in any other country apart from Iran. It accepted that the applicant was a member of the particular religious minority which faced persecution in Iran involving arbitrary arrest and imprisonment. Accordingly, the Tribunal found that he had a well-founded fear of persecution in Iran for reasons of his religion.

## Pakistan

**N06/53084**  
**24 July 2006, Sydney**  
**Ms L Mojsin, Member**

**PAKISTAN - RELIGION - MINORITY RELIGIOUS GROUP - VIOLENCE - INTIMIDATION** - The applicant feared persecution arising from his religious activities. He claimed that he held an official position in a minority religious group. The applicant claimed that he became involved in a public disagreement with a Muslim preacher and when he disagreed with the Muslim, he was assaulted. He claimed he was later approached by a group of Muslims and told that he should convert to Islam, but he refused and was threatened. The applicant claimed it was his job to carry out religious activities in all different places. He believed that he was now considered to have spoken out against Mohamed and against Islam and would therefore be sentenced to death under the Blasphemy laws. He also claimed that he was still being sought by particular Muslims who would attempt to convert him and then kill him when he refused.

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

The Tribunal accepted that the applicant was a member of a minority religious group, but was not satisfied that he had been threatened by Muslims or that he had suffered Convention-related harm in Pakistan. However, it

noted that the government of Pakistan was unwilling to take action against societal forces hostile to those who practised a different faith and that there had been instances in which the government had failed to intervene in cases of violence directed at religious groups. The Tribunal noted that the lack of an adequate government response had contributed to an atmosphere of impunity for acts of violence and intimidation against religious minorities. It was not satisfied that Pakistan was able to meet its obligation to those like the applicant who faced the threat of adverse treatment for reasons of their religious activities as a member of a minority religious movement. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution for reasons of his religion.

## HIGH COURT JUDGMENTS

**SZAYW v MIMIA**

**[2006] HCA 49**

High Court of Australia, Gleeson CJ, Gummow, Hayne, Callinan, Crennan JJ, S57/2006, 5 October 2006

**Immigration - Protection Visa application - hearing of an application for review by the Tribunal to be "in private" - appellant making common cause with other visa applicants - application for review conducted with other applicants present - whether hearing of application conducted "in private".**

This was an appeal against an order of the Full Federal Court which reversed a finding of Driver FM that a decision of the Refugee Review Tribunal (the Tribunal) involved jurisdictional error because there was non-compliance with s.429 of the *Migration Act* 1958 (the Act) which provides that the hearing of an application for review by the Tribunal must be in private.

The appellant and three of his friends, who were also applicants before the Tribunal, were stateless Palestinians who had been living in Lebanon. Their claims were based on shared experiences; each was a witness in support of the others; they had the same migration agents; they had asked to have their cases heard by the same member; there was no suggestion that their interests, or their cases, conflicted; and they had argued that their individual claims should be regarded as more credible because of the consistency of their accounts. The same date was fixed for the hearings and the Tribunal member began by taking evidence from one of the applicants in the absence of the others but then decided to question the appellant and the other two applicants together, as it had become apparent that the claims were all based on shared experiences. She allowed the migration advisers to be present during all four hearings, and said that the girlfriend of one of the applicants could be present while he gave evidence but not while the other applicants were being questioned. No complaints or objections were raised about the procedure. The Tribunal disbelieved a substantial part of their evidence and rejected their claims that they had a well-founded fear of persecution.

The appellant argued before the High Court that the hearing of his application was not in private because while he was giving his evidence the other applicants were present and were able to hear what he said.

**Held:** *per curiam* appeal dismissed.

- (i) The procedure adopted by the Tribunal member did not infringe the privacy to which the appellant was entitled under the Act. It was consistent with the purpose of s.429 of the Act. The proceedings were not open to the public. The other applicants were witnesses upon whose evidence the appellant intended to rely. Their presence at the hearing of his application was necessary at least for the purpose of enabling them to give evidence in his support. He knew that his evidence was intended to be used in support of their claims. In the circumstances, the presence of the other applicants while the appellant was giving his evidence did not mean that the hearing of his application was not in private.
- (ii) The concept of privacy is imprecise, and is not to be equated either with secrecy or isolation. Obviously, in order for a hearing to be in private it is necessary that it not be in public. However, that of itself is not sufficient. "Public" and "private" are words that are used in contrast, but they do not cover the entire range of possibilities.
- (iii) Since the requirement of privacy is for the benefit of an applicant, it is not open to the Tribunal member to allow anyone to be present at the hearing so long as it is not open to the general public. On the other hand, persons whose presence is reasonably required for purposes of, or in connection with, the performance of the Tribunal's functions, such as interpreters, security officers, necessary administrative staff, migration advisers and witnesses, are clearly within the contemplation of the statute as persons who may be present at the hearing, although privacy may require the exclusion of witnesses when they are not giving evidence.
- (iv) Subject to the Tribunal's implied powers to regulate its proceedings, it is consistent with the statutory purpose, and with common use of language, to treat the concept of privacy as embracing, not only

agents of an applicant, but also persons whom an applicant desires to be present and thus to be made privy to what occurs at a hearing.

- (v) Section 429 of the Act does not necessarily prevent hearings which are wholly or partly concurrent, if that course is dictated by the objectives stated in s.420 and is consistent with procedural fairness.

*Obiter:*

- (vi) Having regard to the nature of the cases that the four applicants were presenting, and the support they hoped to gain from the consistency of their stories, fairness would probably have obliged the Tribunal member to follow some procedure, in compliance with the Act, which would have enabled each applicant to know what the others had said. To the extent to which there were material inconsistencies, they were all entitled to deal with those inconsistencies. Since they were all relying on consistency, they were entitled to know of the extent of the consistency.

## FEDERAL COURT JUDGMENTS

**Applicant S296 of 2003 v MIMA**

**[2006] FCA 1166**

**Federal Court of Australia, Gyles J, NSD 2450 of 2003, 28 August 2006**

**Immigration - Protection Visa application - obligation to invite applicant to appear before Tribunal - refusal to grant further adjournment for applicant suffering fluctuating psychiatric illness despite substantial delay before offer of hearing dates - breach of natural justice.**

The applicant, a national of Pakistan, 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 lodged an application for review to the Tribunal on 1 May 1998. He was invited to a hearing on 10 December 1999 and then a rescheduled hearing on 21 March 2000. The applicant's adviser requested that the rescheduled hearing be stood over for a further three months, in order that the applicant's psychiatric position could be better assessed. The Tribunal advised that it was not minded to agree to the request subject to any submissions the applicant's adviser may make. The adviser responded that the applicant's medical condition would be assessed following an appointment with a doctor in approximately one month's time. He stated "[i]f there is a reasonable prospect of improvement in [the applicant's] condition within the next few months then it would be consistent with the legislation that [the applicant] be given an opportunity to appear at a hearing within such reasonable time". The adviser also stated that evidence of the applicant's mental state and symptoms might explain apparent inconsistencies and would corroborate, to some extent, the fact that he had suffered some major torture/trauma.

The Tribunal proceeded to make a decision under s.426A of the Act. In its Findings and Reasons, the Tribunal accepted the applicant had suffered some trauma in the past, consistently with the diagnoses offered by both a psychologist and a psychiatrist. However, the Tribunal found that it was not obliged to keep postponing a hearing where there was clear evidence that the applicant was mentally unfit to give evidence and where the expert evidence indicated that there was no certainty when, if ever, he would be able to attend.

In the Federal Court the applicant contended, among other things, that the Tribunal breached its procedural fairness obligations by denying him the opportunity to attend a hearing and present his case.

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

- (i) The Tribunal breached the rules of procedural fairness by unreasonably refusing the applicant an opportunity to present his case.
- (ii) The Tribunal did not consider the fact that the review application had been on foot since 1 May 1999. This, together with the Tribunal member's acceptance that there were genuine psychiatric problems, led to a situation which required there be at least another opportunity given to put forward or to seek to put forward material from the applicant in person.
- (iii) The Tribunal made it clear that it could not find in the applicant's favour on the basis of the written material. Thus, the appearance of the applicant was essential to change the mind of the Member. There were indications in the evidence of fluctuations in the applicant's psychiatric condition. Given it was accepted that there had been trauma earlier in the applicant's life, there was also a lively issue as to the cause of that trauma and the effect of that cause upon a claim for a protection visa.

*Obiter:*

While the Tribunal is under a duty to deal with a review in a "fair, just, economical, informal and quick" manner (s.420 of the *Migration Act 1958*), there will be circumstances where the incapacity of an applicant is such that the review by the Tribunal simply must take place without the benefit of oral evidence from the applicant.

## MIMA v SZGMF

[2006] FCAFC 138

Federal Court of Australia, Branson, Finn and Bennett JJ, NSD 593 of 2006, 7 September 2006

Immigration - Protection Visa application - whether Tribunal had closed mind against further probative material at time of sending letter pursuant to s.424A of *Migration Act* 1958 - test for apprehended bias - whether obligation to maintain neutral state of mind during review - whether s.424A letter ensured that respondent understood why certain information relevant to review - where no reference made in letter to fact that Tribunal may disbelieve contents of respondent's documents - critical that Tribunal not close mind against further probative material.

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

The respondent, a Bangladeshi national, claimed to fear persecution by reason of his political opinion and membership of the Awami League (AL). In support of his claims, the respondent submitted letters of support signed by senior office holders of the AL.

During the review, the Tribunal obtained information from the Australian High Commission in Dhaka provided by a reliable senior AL member that the letters of support submitted by the respondent were genuine but the contents were false. It stated that the "contents of these documents were worded in such a way to offer this applicant support to obtain economic refugee status abroad, rather than to verify any particular status within the Awami League". The Tribunal sent a letter pursuant to s.424A of the *Migration Act* 1958 to the respondent with the following particulars of information and invited him to comment on it:

"Many members of the Awami League are prepared to offer *such documents* on request in a humanitarian way to help former supporters. They are worded in a way to offer support to obtain economic refugee status, rather than to verify any particular status within the Awami League... This information is relevant because it may undermine the general credibility of [the respondent] and may cause the documents to be disregarded."

The respondent failed to reply to this letter. The Tribunal placed no weight on the letters of support and stated in its decision "because of the advice received by the Australian High Commission in Dhaka from a senior source within the AL, I am unable to give any weight to the [respondent's letters of support]".

On appeal to the Full Federal Court, the Minister contended that the Federal Magistrate erred in concluding that the Tribunal's decision was affected by jurisdictional error because there was a reasonable apprehension of bias.

**Held:** *per curium*, appeal dismissed.

- (i) The Federal Magistrate erred in concluding that a hypothetical fair-minded lay person properly informed as to the nature of the proceedings before the Tribunal, matters in issue and the conduct identified by his Honour might reasonably apprehend that the Tribunal member, at the time that the s.424A letter was sent to the respondent, might have reached a firm decision from which he could not be persuaded to affirm the decision of the delegate.
- (ii) There is no obligation on a Tribunal member to maintain a neutral state of mind during the course of the review process. What is critical is that the member not close his or her mind to any additional material that might possibly prove probative.
- (iii) The Tribunal breached its statutory obligation under s.424A(1)(a). The purported particulars of the information provided to the respondent by the s.424A letter made no reference to the advice that *his* documents were worded in such a way as to offer him support to obtain economic refugee status abroad rather than to verify any particular status within the AL. The information which specifically related to the respondent's letters of support was information which the Tribunal considered would be (at the least) part of the reason for affirming the decision under review.

- (iv) The Tribunal also failed to comply with its statutory obligation under s.424A(1)(b). The s.424A letter did not ensure, so far as reasonably practicable, that the respondent understood why the information received by the Tribunal concerning his letters of support from AL members was relevant to the Tribunal's review. The Tribunal's failure to state explicitly the relevance to the review of the information concerning the letters was of importance because of the opaque way the information was particularised; the use that the Tribunal could make of the information was not self-evident. The respondent may not have understood that the relevance of the information was that it caused the Tribunal to disbelieve or doubt the content of his letters of support.

**SZEOQ v MIMA  
[2006] FCA 1171**

**Federal Court of Australia, Cowdroy J, NSD 491 of 2006, 8 September 2006**

**Immigration - Protection Visa application - where Tribunal member expressed profound disbelief in appellant's claims - where Tribunal member's responses to appellant's answers frequently dismissive - whether actual bias - whether reasonable apprehension of bias.**

This was an appeal from a decision of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations. The appellant, a citizen of Lithuania, claimed that he faced persecution on account of his Roma ethnicity; that he had faced discrimination all his life; that police in Lithuania were known to beat and arbitrarily arrest Roma citizens; and some of his relatives had been imprisoned on fabricated charges.

The Tribunal conducted a hearing in which it challenged, among other things, the appellant's claims to be Roma and to be perceived as Roma; that the police mistreated Roma; that he faced persecution when he had spent so much time outside Lithuania in recent times; and the claim that it would be useless to approach the police in relation to the problems he claimed to have experienced. At the end of the hearing there was an acrimonious exchange between the Tribunal and the appellant's advisor.

In making its decision that the appellant did not have a well-founded fear of Convention persecution, the Tribunal accepted the appellant was ethnic Roma/Russian, that lack of educational opportunity impacted negatively on Roma communities and unemployment was higher for Roma, but did not accept that these difficulties amounted to serious harm. The Tribunal also found the appellant had not suffered any significant physical harassment or ill-treatment, nor that there was a failure of state protection in circumstances where the appellant had not reported the police behaviour.

At first instance, Nicholls FM held that the transcript of the hearing was not sufficient to make out a claim of bad faith or bias; that the Tribunal's initial questioning of the appellant in relation to his appearance was immaterial because the Tribunal accepted the appellant's ethnicity and dealt with the claims in that context; and the fact that the Tribunal indicated at the hearing that it had not been able to find independent evidence that Lithuanian police targeted Roma, when it referred to such information in its decision, was not sufficient to establish bad faith or bias. The appellant contended on appeal that the Federal Magistrate erred and the Tribunal decision was affected by bias.

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

- (i) The Tribunal member's conduct at the hearing was such that it would give rise to a reasonable apprehension of bias.
- (ii) The conduct of the Tribunal member at hearing went well beyond simply putting adverse views to the appellant and beyond a mere "vigorous exchange". From the very beginning the Tribunal member expressed profound disbelief in the appellant's claims, expressed her opinions about the merits of the claims vehemently, asked questions in an aggressive manner and the Tribunal member's responses to the appellant's answers were frequently dismissive. The statements evincing the Tribunal's disbelief of the claims continued throughout the hearing and the hearing descended into "almost a slanging match" between the Tribunal and the appellant's migration adviser.

- (iii) Considering the reasons ultimately given for the decision, the conduct of the Tribunal member did not establish actual bias.

## FEDERAL MAGISTRATES COURT JUDGMENTS

**SZIME v MIMA & Anor**

**[2006] FMCA 1195**

**Federal Magistrates Court, Emmett FM, SYG716 of 2006, 22 August 2006**

**Immigration - Protection Visa application - where applicant alleged breach of s.429 *Migration Act* 1958 (the Act) - where alleged failure by Tribunal to give applicant meaningful hearing under s.425 of the Act - whether deficiency of interpretation amounting to jurisdictional error.**

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 has protection obligations.

The applicant claimed that he was a Maoist and had to leave Nepal because of his association with the Maoists. The Tribunal found that the applicant fabricated the importance of politics in his life, gave no weight to some of his supporting documents and did not accept that the applicant faced Convention related persecution. During the Tribunal hearing, the first interpreter asked to be released. The Tribunal engaged a second interpreter but requested the first interpreter to remain as an observer.

The applicant claimed the Tribunal breached s.429 of the *Migration Act* 1958 (the Act) by requiring the interpreter to remain in the hearing room after her professional services had been terminated and breached s.425 of the Act because its use of evidence before it and its acceptance of substandard interpretation meant that it failed to give the applicant a meaningful hearing.

**Held: Application dismissed.**

- (i) In the circumstances, the presence of the interpreter did not have the effect that the hearing was not conducted in private. The interpreter was not in the same position as a witness who has given evidence, been excused and chosen to remain after the giving of their evidence. The Tribunal had required her to remain after she was replaced and she was still bound by her oath of confidentiality. As such it could not be said that the first interpreter was not "*concerned in the case*" (*MIMIA v SZAYW* [2005] FCAFC 154 per Kiefel J).
- (ii) The hearing offered and conducted was in accordance with s.425 of the Act. There was no interpretation inaccuracy which resulted in any unfairness to the applicant that he did not have an opportunity to address. The applicant's representative had no hesitation in making clear any concerns he had about misinterpretation, the Tribunal gave the representative every opportunity to express any concerns and acknowledged the right to do so, the Tribunal re-put questions to the applicant where the representative had raised concerns and noted that the representative made no complaint about the interpretation of the questions when re-put, the Tribunal noted that no request was made for anything interpreted by the first interpreter needing to be revisited once the second interpreter started and the Tribunal noted that the representative made no post hearing submission regarding the interpretation.

**NBMF v MIMIA & Anor**

**[2006] FMCA 1265**

**Federal Magistrates Court, Scarlett FM, SYG3241 of 2005, 23 August 2006**

**Immigration - Protection Visa application - where Tribunal relied on evidence from witness called by applicant over and above that which was in witness's proof of evidence - whether failure to take account of relevant consideration.**

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 account of his sexual orientation. He was accompanied at hearing by two named witnesses. The applicant led evidence that his father and an uncle threatened to kill him and referred to a homosexual cousin who had been killed by another uncle. One witness, a flatmate, provided a

statutory declaration. He also gave oral evidence that he did not know that the applicant was homosexual until told by him and that the applicant's uncle appeared to be "very nasty" during a telephone conversation between them. In its reasons for decision, the Tribunal concluded that the evidence did not suggest that the applicant would be harmed by family members, that the likelihood of the uncle harming the applicant was remote and that a threat "to kill" could be a figure of speech. Furthermore, as there was nothing in the applicant's appearance, manner or behaviour to suggest his homosexuality, there was no real risk of persecution in India if the applicant behaved discreetly as he had chosen to in Australia and if necessary could relocate to another city.

The applicant alleged there was a breach of s.424A of the *Migration Act 1958* (the Act), in that the Tribunal had failed to give the applicant an opportunity to comment on the witness's evidence that the applicant would not be identified as a homosexual by his behaviour upon his return to India. The applicant also contended that the Tribunal decision was affected by Wednesbury unreasonableness.

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

- (i) There was failure to comply with s.424A of the Act, giving rise to a jurisdictional error.
- (ii) The oral evidence of the witness given at hearing was given over and above what was provided in his statutory declaration and what the applicant expected the witness to provide. Following *SZCNG v MIMIA & Anor* [2006] FMCA 505, such additional evidence requires disclosure to the applicant and an opportunity to comment.
- (iii) The undisputed evidence that one family member has been murdered for homosexual behaviour by another family member is relevant to the applicant's fear that he may also be murdered or suffer physical harm for the same reason from another (albeit different) family member and cannot be disregarded.
- (iv) By making the finding that the likelihood of the uncle harming the applicant was remote, the Tribunal ignored the significance of the claim relating to the death of the applicant's cousin. This did not involve Wednesbury unreasonableness but qualified as jurisdictional error. Following *MIMIA v VOAQ & VOAP* [2005] FCAFC 50, the Tribunal should have undertaken an evaluation of the available evidence and its significance, in which case its conclusion would have constituted a finding of fact and probably been invulnerable to judicial review.

**SZFKC v MIMA & Anor**  
**[2006] FMCA 1227**

**Federal Magistrates Court of Australia, Driver FM, SYG27 of 2005, 23 August 2006**

**Immigration - Protection Visa application - where sexual assault found by Tribunal to not be "serious harm" - Tribunal failed to take into account that applicant was a child when assaulted - whether jurisdictional error.**

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 owed protection obligations. As an Indo-Fijian, the applicant claimed to fear persecution as a result of her race, social group and political opinion.

The applicant claimed that she was cornered by two indigenous Fijian boys who touched her sexually and wanted to rape her on her way home from school, before she ran away. The Tribunal found that this incident did not involve serious harm to her. It found in this regard that the incident was not the motivation for her travelling to Australia; rather, it was to visit her relatives.

The applicant contended that the Tribunal failed to consider her claim that she was a student whose education was interrupted. She attacked the Tribunal's finding on serious harm and claimed that it failed to make a proper assessment and that its conclusion was unfounded.

**Held: Tribunal decision quashed and remitted for reconsideration.**

- (iv) The Tribunal failed to give meaningful consideration to the issue of serious harm to a child who was allegedly traumatised and failed to deal with relevant material identified at the hearing before the

Tribunal, both of which constituted jurisdictional errors.

- (v) The question of what conduct amounts to persecution is a matter of fact and degree for the Tribunal alone. That, however, is only part of the issue. In reaching its conclusion on that fundamental issue, the Tribunal must consider all elements or integers of the applicant's claims and must give meaningful consideration to them.
- (vi) The applicant asserted that she was traumatised by various events which included the attempted rape identified as "the incident". It was also manifest on the face of the protection visa application that the applicant was a child of 15 at the time of the incident. There was no consideration by the presiding member of the impact that such an incident would have on a child. That was a serious omission.
- (vii) The discussion at hearing concerning a student visa application made by the applicant should have alerted the presiding member to the possibility that there was another reason for the applicant coming to Australia, namely, to study. There was no discussion of that possibility. If that had been explored by the presiding member he would have noted that the delegate who dealt with that application found compelling reasons for the grant of the student visa. The applicant asserted in her oral submissions that the reasons she advanced as compelling reasons included the incident. The failure by the presiding member to pursue the issue of the student visa application renders unsafe his finding as to the reason why the applicant left Fiji and came to Australia. The presiding member overlooked relevant material that was identified by the applicant at the hearing and which should have been referred to.

**SZFWJ v MIMA & Anor**

**[2006] FMCA 1231**

**Federal Magistrates Court, Raphael FM, SYG609 of 2005, 25 August 2006**

**Immigration - Protection Visa application - where applicant provided evidence in form of a newspaper article - where Tribunal drew adverse conclusion from article - whether adverse conclusion open to be drawn from context of article - whether Tribunal failed to put adverse conclusion to applicant - whether failure was breach of procedural fairness - whether Tribunal made findings of fact, essential to its decision, which were unsupported by evidence.**

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 that he was an anti-Maoist campaigner and had received a threatening letter from Maoists that he would be killed if he did not resign from his position of vice president of a village development committee. The Tribunal did not accept that the applicant was an anti-Maoist campaigner and referred to a newspaper interview produced by the applicant where he spoke about his political projects but did not mention the threat of the Maoists.

Counsel for the applicant submitted that procedural fairness had been denied because the Tribunal used the interview in a way that could not reasonably have been expected by the applicant and it had failed to disclose its intended use of the report of that interview to the applicant. It was also submitted that the Tribunal made a number of findings of fact that were unsupported by the evidence.

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

- (i) The context of the newspaper interview did not lead naturally to an opportunity to discuss the Maoist insurgency so the coming to an adverse conclusion about the applicant on these grounds without providing him an opportunity to comment was unfair. The context of this interview was rather pre-election boosterism.
- (ii) The Tribunal's findings concerning the applicant's well-founded fear was significantly influenced by its findings in regards to the letter and in relation to other threats from the Maoists which were unsupported by the evidence. There was no independent and entirely uninfected ground upon which the Tribunal relied.

**SI583 of 2003 v MIMA & Anor**

[2006] FMCA 1256

Federal Magistrates Court, Emmett FM, SYG715 of 2004, 31 August 2006

**Immigration - Protection Visa application - whether Tribunal erred in failing to consider medical evidence as part of practical realities in facing relocation - whether Tribunal denied applicant procedural fairness by failing to put to applicant adverse information upon which it relied.**

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, a Sikh from the Punjab, claimed to fear persecution by the Indian government due to his involvement in the All India Sikh Student Federation (AISSF).

The Tribunal accepted that the applicant was a witness of truth, however it relied on information in a Department of Foreign Affairs and Trade (DFAT) cable to find that the situation in the Punjab had settled down and that the applicant did not face a real chance of persecution if he were to return there. The Tribunal also gave no weight to a claim that the applicant would be detained at the airport if he were to return to India in reliance on information from a university professor indicating that he was not aware of Sikhs being detained on return unless they had outstanding criminal charges against them. The Tribunal made a further finding that if the applicant did not wish to return to the Punjab it would be reasonable for him to relocate within India having regard to the applicant's political profile, single status, language abilities and work experience.

The applicant contended that the Tribunal denied him procedural fairness by failing to put the substance of the information contained in the DFAT cable and given by the university professor to him for comment. It was also contended that the Tribunal erred by failing to take into account a relevant consideration, namely medical evidence indicating that the applicant suffered from Post-Traumatic Stress Disorder, when making its internal relocation finding.

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

- (i) The Tribunal relied on the DFAT cable and the professor's advice to make adverse findings in respect of the applicant's claims. The documents were not given to the applicant by the Tribunal at any time nor did the Tribunal put the substance of those documents to the applicant in any meaningful and fair way. The documents were credible, significant and relevant and in the circumstances should have been disclosed to the applicant. The failure to do so resulted in a denial of procedural fairness amounting to jurisdictional error.
- (ii) The Tribunal's finding that the applicant could relocate within India was affected by jurisdictional error in that the Tribunal failed to have regard to all of the practical realities facing the applicant, particularly the medical evidence provided by the applicant that he was suffering from post traumatic stress disorder.

**SZFZN v MIMA & Anor**

[2006] FMCA 1153

Federal Magistrates Court, Smith FM, SYG 789 of 2005, 31 August 2006

**Immigration - Protection Visa application - where applicant feared persecution as homosexual - where Tribunal accepted member of particular social group - where Tribunal nevertheless found persecution motivated by personal revenge and corruption - whether Tribunal misconceived what it was required to address under the causal test.**

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 his homosexual partner's father persecuted him and his family. The Tribunal accepted the applicant's history of persecution and accepted or assumed that this revealed that the applicant was publicly identified as a member of a "particular social group" of homosexuals within the term in the Convention definition. However, the Tribunal found that the partner's father was motivated by a desire for personal revenge against the applicant and also a desire to ensure the applicant left his home town. The Tribunal found that police beatings of and false accusations against the applicant were at the partner's father's

behest, their motivation was corruption and not Convention-related. The Tribunal also found that relocation to a major Indian city would be a reasonable option for the applicant.

The applicant claimed the Tribunal made a jurisdictional error either being a misconception of what it was required to address under the relevant causal test or as to the applicant's claims as to the reasons for certain events.

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

- (ii) The Tribunal misconceived the causal question raised by the Convention definition's reference to "for reasons of".
- (iii) Nothing in the Tribunal's reasoning suggested it characterised the underlying anti-homosexual element, which upon the evidence accepted by the Tribunal appears to explain the partner's father's conduct, as inessential or insignificant and accordingly, s.91R of the *Migration Act 1958* did not apply.
- (iv) The Tribunal's relocation findings did not amount to an entirely separate basis for the Tribunal's decision justifying withholding relief because it could not be said that the relocation findings might not have been influenced by the Tribunal's earlier finding that the persecution was not by reason of the applicant being identified as homosexual.
- (v) Taking into account the applicant's personal circumstances and the general uncertainty and confusion surrounding judicial review remedies over the relevant time, there is nothing in the applicant's conduct to justify denying relief in this case on the ground of the applicant's delay in commencing proceedings.

**SZIML v MIMA & Anor**

**[2006] FMCA 1296**

**Federal Magistrates Court of Australia, Smith FM, SYG 736 of 2006, 14 September 2006**

**Immigration - Protection Visa application - Indonesian woman of Chinese ethnicity - claimed sexual harassment by native Indonesians - clearly articulated claim not addressed by Tribunal - 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.

As part of her claims that there was no security for ethnic Chinese or Christians in Indonesia, the applicant claimed that her female relatives had been raped and she was often sexually harassed by the native Indonesians at work and in her neighbourhood. The applicant did not appear at the hearing and the Tribunal made its decision pursuant to s.426A(1) of the *Migration Act 1958* (the Act). It found that the applicant did not have a well-founded fear of persecution for reasons of her race or religion.

**Held: Tribunal decision quashed and remitted for reconsideration.**

- (i) The Tribunal failed to make a finding on a substantial, clearly articulated argument that relied upon established fact. It did not address the applicant's claim that her female relatives were raped and she was "*often sexually harassed by the native Indonesian at work and in the neighbourhood*". Implicitly, the applicant contended that her experiences amounted to "*persecution*" and that she had been given inadequate protection by the Indonesian state authorities. The Tribunal could have analysed this claim as a fear of persecution by reason of "*membership of a particular social group*" distinguished by gender and race or other features of non-native Indonesian women living in the applicant's town. Alternatively, it may have been a significant and separate element in the applicant's fear of persecution "*for reasons of race*".
- (ii) The structure of the decision clearly showed the Tribunal did not complete its required review function. Considering the Tribunal's statement of reasons as a whole, the absence of any pertinent findings and discussion about the claim implied that it was overlooked by the Tribunal. That the claim was overlooked was confirmed by its analysis of the particular components of the applicant's claims which emerged from the headings used. The description of the applicant's claims in the "*Findings and Reasons*" contained no

analysis of the applicant's statement and no particular passage which would confirm that the Tribunal appreciated that she made the claim. Independent information did not address the issues or where it did there was no indication in the reasons of an awareness that that information might be relevant to the consideration of an important element of the applicant's claims.

- (iii) It was open to the Tribunal to address the claim specifically or globally with the applicant's other claims on the grounds that it was not presented with sufficient evidence.
- (iv) The fact that the claim was presented without details and supporting evidence did not mean it did not satisfy the requirement in *NABE (No 2) (2004) 144 FCR 1* that a claim requiring attention by a decision-maker should be "*substantial ... (and) relying on established fact*", as the Full Court did not intend to suggest that a clearly presented claim could be ignored. The Tribunal has a statutory duty under s.414(1) of the Act to "*review*" the merits of every claim. It is given no power to decide a case without addressing the merits of an applicant's claims and, in particular, is not given that power when authorised to proceed under s.426A(1).

*Obiter:*

- (v) There was a strong impression that most of the statement of reasons had been "*cut and pasted*". This impression extended beyond the Tribunal's discussion of legal principles and general country information to include discussions in the "*Findings and Reasons*". While this, of itself, does not provide grounds for setting aside the decision it was possible that this approach explained the error.

## LEGISLATION UPDATE

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

### ▶ Legislation Pending

#### **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>

#### **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**

*The 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 (Complementary Protection Visas) Bill 2006**

*The Migration Legislation Amendment (Complementary Protection Visas) Bill 2006* was introduced as 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 Refugee Convention, but who may have compelling humanitarian reasons for not returning to their home country.

A copy of the bill can now be found at:

<http://www.comlaw.gov.au/comlaw/legislation/bills/1.nsf/bills/bytitle/B6340E4DA932570CCA2571F10003BEF3?OpenDocument>

### **Migration Legislation Amendment (Enabling Permanent Protection) Bill 2006**

The *Migration Legislation Amendment (Enabling Permanent Protection) Bill 2006* was introduced as a private member's bill to the Parliament by Senator Bartlett on 12 October 2006.

The Bill seeks to remove the provisions in the *Migration Act 1958* which preclude Temporary Protection visa holders who have been convicted of certain legal offences from being eligible to acquire a Permanent Protection visa when their temporary protection visa expires.

A copy of the bill can found at:

<http://www.timebase.com.au/downloads/downloadLawOneFile.cfm?legislationDownloadID=33079>

# CASELOAD OVERVIEW

## RRT Decisions – September 2006

| Country                         | Primary decision set aside | Primary decision affirmed | No jurisdiction Withdrawn | No jurisdiction Other | Total |
|---------------------------------|----------------------------|---------------------------|---------------------------|-----------------------|-------|
| Afghanistan                     | 1                          | 0                         | 1                         | 0                     | 2     |
| Albania                         | 0                          | 2                         | 0                         | 0                     | 2     |
| Bangladesh                      | 1                          | 8                         | 1                         | 10                    | 20    |
| Belarus                         | 0                          | 1                         | 0                         | 0                     | 1     |
| Burma (Myanmar)                 | 1                          | 1                         | 0                         | 0                     | 2     |
| Cameroon                        | 4                          | 0                         | 0                         | 0                     | 4     |
| China (PRC)                     | 22                         | 74                        | 1                         | 7                     | 104   |
| Egypt                           | 2                          | 3                         | 0                         | 0                     | 5     |
| Fiji                            | 0                          | 4                         | 0                         | 1                     | 5     |
| Georgia                         | 0                          | 1                         | 0                         | 0                     | 1     |
| Ghana                           | 0                          | 1                         | 0                         | 0                     | 1     |
| Guinea                          | 0                          | 1                         | 0                         | 0                     | 1     |
| India                           | 4                          | 30                        | 1                         | 2                     | 37    |
| Indonesia                       | 1                          | 13                        | 0                         | 3                     | 17    |
| Iran                            | 0                          | 2                         | 0                         | 0                     | 2     |
| Ireland                         | 0                          | 1                         | 0                         | 0                     | 1     |
| Jordan                          | 0                          | 2                         | 0                         | 0                     | 2     |
| Korea, Republic Of              | 1                          | 1                         | 1                         | 2                     | 5     |
| Lebanon                         | 1                          | 2                         | 0                         | 0                     | 3     |
| Lithuania                       | 0                          | 1                         | 0                         | 0                     | 1     |
| Malaysia                        | 0                          | 5                         | 0                         | 5                     | 10    |
| Mauritius                       | 0                          | 0                         | 1                         | 0                     | 1     |
| Mongolia                        | 1                          | 1                         | 0                         | 0                     | 2     |
| Nepal                           | 1                          | 5                         | 0                         | 0                     | 6     |
| Nigeria                         | 1                          | 2                         | 0                         | 0                     | 3     |
| Pakistan                        | 0                          | 4                         | 0                         | 0                     | 4     |
| Palestinian Terr. (W.Bank/Gaza) | 0                          | 1                         | 0                         | 0                     | 1     |
| Philippines                     | 0                          | 2                         | 0                         | 0                     | 2     |
| Russian Federation              | 1                          | 1                         | 0                         | 0                     | 2     |
| South Africa                    | 0                          | 1                         | 0                         | 0                     | 1     |
| Sri Lanka                       | 3                          | 4                         | 0                         | 0                     | 7     |
| Sudan                           | 1                          | 0                         | 0                         | 0                     | 1     |
| Syria                           | 0                          | 2                         | 0                         | 0                     | 2     |
| Tanzania                        | 0                          | 1                         | 0                         | 0                     | 1     |
| Thailand                        | 0                          | 2                         | 0                         | 0                     | 2     |
| Tonga                           | 0                          | 1                         | 0                         | 0                     | 1     |
| Turkey                          | 0                          | 3                         | 0                         | 0                     | 3     |
| Ukraine                         | 1                          | 0                         | 0                         | 0                     | 1     |
| United States of America        | 0                          | 1                         | 0                         | 0                     | 1     |
| Uzbekistan                      | 0                          | 1                         | 0                         | 0                     | 1     |
| Vietnam                         | 0                          | 2                         | 0                         | 0                     | 2     |
| Zimbabwe                        | 3                          | 0                         | 0                         | 0                     | 3     |

# 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)

# INDEX

|   |   |
|---|---|
| Anti-Government activist (China).....                           | 3 |
| Arbitrary arrest (Iran).....                                    | 7 |
| Awami League (Bangladesh) .....                                 | 2 |
| China Democracy Party (China).....                              | 5 |
| Chinese (Indonesia).....  | 6 |
| Christian (China).....  | 4 |
| Christian (Indonesia).....                                      | 6 |
| Christian convert (Bahrain) .....                               | 2 |
| Falun Gong (China).....   | 4 |
| Harassment (India).....   | 6 |
| Humiliation (India) .....                                       | 6 |
| Imprisonment (Iran) .....                                       | 7 |
| Intimidation (Pakistan) .....                                   | 7 |
| Minority religious group (Pakistan).....                        | 7 |
| Particular religious minority (Iran) .....                      | 7 |
| Particular social group “Falun Gong practitioners” (China)..... | 3 |
| Particular social group “Homosexuals” (India).....              | 6 |
| Pro-democracy group (China) .....                               | 5 |
| Property dispute (China).....                                   | 4 |
| Threats (Bangladesh).....                                       | 2 |
| Violence (Bangladesh) .....                                     | 2 |
| Violence (Pakistan) .....                                       | 7 |