

RRT Bulletin

The Refugee Review Tribunal decisions digest

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

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

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Burma

060425408

11 September 2006, Melbourne

Ms I Tsiakas, Member

BURMA - RACE - MON - RELIGION - CHRISTIAN - PARTICULAR SOCIAL GROUP - CHRISTIAN MON WOMEN - The applicant feared persecution as a Christian of Mon ethnicity who became involved with Baptist church activities in Burma. The applicant claimed she took leave each Christmas to undertake volunteer duties in Karen state. She claimed she taught the people that they should donate ten per cent of their produce to support the pastor and pay for the upkeep of the church. Prior to that the local military unit took the prime produce for themselves. The applicant claimed she was told by a high ranking officer that teaching people to give produce to the church would lead her into trouble. She claimed that the officer was later injured when he tried to grab her whilst apparently drunk. The applicant claimed she pushed him away and he fell over backwards. She claimed she was summoned to the military camp and told that the officer suffered an injury and was admitted to hospital. She claimed she was held overnight and mistreated. The applicant had to sign an undertaking not to teach villagers about Christian tithes and to pay all of the officer's hospital and medical costs otherwise she would be killed. However, she paid part of the amount only before departing. The applicant claimed that local authorities asked her family where she had gone because they had received enquiries from certain military officers.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness and accepted that Christian groups continued to experience difficulties in Burma. It accepted that the applicant was a Christian who travelled to another area for several years to teach religious studies. The Tribunal accepted that she spoke to the village people about donating tithes and providing their best produce to the church. It accepted that this angered the military and that the applicant would have been lectured about the dangers of her actions. The Tribunal also accepted that the applicant was grabbed by the drunk officer, which resulted in her pushing him away. It accepted that he then fell over and she was asked for money to pay the costs associated with his injuries. The Tribunal found that Christian Mon women were a particular social group. It found that the applicant was a target of unwanted attention from the military officer and continued to fear for herself if she should return. The Tribunal noted independent information indicating that sexual harassment and rape of ethnic minorities was not responded to or punished. It found that with the military officer's position and power, state protection would not be available to the applicant. The Tribunal was satisfied that the applicant had a well-founded fear of persecution for reason of her membership of a particular social group.

China

060391816

9 August 2006, Sydney

Mr P Wakim, Senior Member

CHINA - RELIGION - LOCAL CHURCH - SHOUTERS - The applicant feared persecution arising from his involvement in the Local Church or Shouters religion. He claimed he had joined the Shouters after being provided by them with financial assistance to establish a small business. The applicant claimed that he became a devout Christian and was baptised. He claimed he moved to another town and was instructed to establish a new group of the Local Church which met at his business premises for worship and his home for Bible study. The applicant claimed that his business was raided and he was arrested and detained by the Public Security Bureau for a month. He claimed that he was then under surveillance and received many visits from the police. The applicant claimed that members of his Local Church were arrested and confessed their involvement with the Shouters. He claimed that after they identified him as a group leader and key member of the Local Church he obtained a false passport and fled. The applicant claimed he would be arrested on return.

Held: Decision under review set aside.

The Tribunal found the applicant to be honest and forthcoming and found that he had displayed knowledge of, and commitment to, the basic tenets of the Christian faith. It noted that he had a detailed knowledge of the Shouters church and its practices and beliefs. The Tribunal was satisfied that the applicant had much more than a passing association with the church in China. It found that he was a follower of Christian beliefs and that he was associated with the Shouters church in China. The Tribunal accepted that independent evidence demonstrated the antipathy of the Chinese authorities towards any religious group which it did not control, such as the Shouters, which it regarded as "evil cults". The Tribunal found that it was not only leaders of the Shouters who were at risk, but ordinary members were liable to legal action, arrest, periods of detention and unfavourable treatment by work units. The Tribunal was satisfied that if the applicant returned, he would seek to expand the membership of the church for which he would be at risk of being punished and imprisoned. Accordingly, it found that the applicant had a well-founded fear of persecution for reason of religion.

060452335

1 September 2006, Sydney

Ms A O'Toole, Member

CHINA - POLITICAL OPINION - FALUN GONG - The applicant feared persecution arising from her association with her parents who were Falun Gong practitioners. She claimed that due to medical problems her father had not worked for several years and had developed an interest in Falun Gong for his wellbeing. The applicant claimed that her parents were warned by the authorities and later when Falun Gong was banned their house was raided and Falun Gong literature was taken away. The applicant claimed that her parents suffered ongoing harassment and interrogation and she was demoted at work due to rumours about her likely involvement with Falun Gong. She claimed that her father became leader of a Falun Gong group and was detained and tortured. The applicant claimed as a result he needed her assistance to perform the exercises at home and she was caught doing so by the authorities who visited the house frequently. She claimed that she would be suspected of being a Falun Gong practitioner and would be detained and subjected to re-education on return.

Held: Decision under review set aside.

The Tribunal accepted that the applicant's parents practised Falun Gong in China and that her father had suffered harm for this reason. It was satisfied that family members from a Falun Gong practitioner's household were at times targeted by the authorities in an effort to put pressure on the practitioner. The Tribunal was satisfied that such harassment could lead to problems for the family member leading to demotion, salary cuts and even termination of their employment. It was satisfied that the applicant was singled out by the authorities and suffered the harm as claimed. Accordingly, the Tribunal was satisfied that the applicant's fear of persecution for reasons of her imputed political opinion was well-founded.

060575968

Mr R Derewlany, Member

11 September 2006, Sydney

CHINA - RELIGION - SHOUTERS' CHURCH - ORGANISER - The applicant feared persecution as an important member of the Shouters' church. She claimed that she received religious education from a man who was one of the most famous and influential leaders of the Shouters' church in her home town. The applicant claimed that after she left school she collected and edited "propaganda material" on his instruction and transcribed his speeches as well as organising his itinerary and maintaining contact with Bible study groups. She claimed that she actively assisted the elder to spread the Gospel, develop the Shouters' church and give sermons in underground churches. The applicant claimed that the elder was subjected to persecution and was sentenced to a term of "Reform through Labour" and she had been investigated and mistreated by the police. She claimed that shortly after she left, the police came to her family home with an arrest warrant and indicated she was wanted for organising illegal religious activities.

Held: Decision under review set aside.

The Tribunal found that the applicant had given detailed, consistent and credible evidence regarding her activities as a member of the Shouters' church who was involved in assisting one of the elders in her church. It noted she was able to discuss in detail the principles on which the church was founded and functioned and was aware of important aspects of its history. The Tribunal found that the applicant was able to explain in detail the

place of open and vocal praise of God in worship. It was satisfied that she had been a member of the Shouters' church in China and was questioned as part of the investigation into the activities of the elder. The Tribunal was satisfied there was a real possibility that the authorities considered the applicant to have been involved in illegal religious activities. It noted that the authorities had declared the Shouters' church to be a cult and that abuses against adherents of unregistered churches had continued. The Tribunal was satisfied there was a real chance that the applicant would suffer serious harm and accordingly found that she had a well-founded fear of persecution for reasons of her religion.

060679184

25 September 2006, Sydney

Mr A Jacovides, Member

CHINA - RELIGION - SHOUTERS - The applicant feared persecution arising from his involvement with the Christian Shouter group. He claimed that prior to his departure he had been attending a Shouter meeting with his parents and brother when police surrounded the house and arrested everyone present. The applicant claimed he was able to hide and escape but his parents and brother were detained for attending an illegal gathering. He stated that his parents had been involved with the Shouters throughout his life and his mother had been arrested before he was born for organising gatherings. The applicant claimed that he would be an active Shouter in the future as any hardship endured would be rewarded in the "second coming".

Held: Decision under review set aside.

The Tribunal accepted that the applicant had a genuine fear of authorities in China. It noted that the government of China restricted religious activities and had targeted individuals who were actively involved in religious groups classified as cults. The Tribunal also noted that local authorities had been implicated in human rights violations against individuals who participated in activities for the Shouters. It found that the authorities had detained, beaten, tortured and sent to reform-through-labour camps those who refused to abide by regulations governing religious activities. The Tribunal was satisfied that the applicant would attract the adverse interest of the authorities because of his involvement with the Shouters. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution for reasons of religion.

India

060428544

16 August 2006, Sydney

Ms A O'Toole, Member

INDIA - PARTICULAR SOCIAL GROUP - HOMOSEXUALS - HARASSMENT - The applicant feared persecution arising from his homosexuality. He claimed that after he and his partner began a sexual relationship, family members came to know of it and harassed them. The applicant claimed that local people also harassed them and he decided to study in another country where he accepted an offer of marriage. He claimed this was because of mental pressure about life without his partner and also financial difficulties. The applicant claimed that his partner later arrived in the other country and they resumed their relationship. He claimed his wife discovered that they were homosexual and exposed the relationship to Indian people who became very angry, threatened them and told them to leave. When the applicant's partner found out that his father had suffered a heart attack he returned to India but his family did not allow him to stay with them and his father refused to see him. The applicant claimed his partner was advised by a relative to leave India otherwise the local people would kill him. The applicant claimed that homosexual relationships were completely banned in India socially, religiously and according to law.

Held: Decision under review set aside.

The Tribunal was not satisfied that all homosexuals who were nationals of India had a real chance of persecution for that reason. However, it understood that in an appropriate case, an applicant may have sufficiently strong convictions, the suppression of which in order to escape harm may constitute persecution. The Tribunal noted that the applicant and his partner had lived together openly for several years in an overseas country and in Australia. It found the independent information showed that having experienced the ability to live openly as a homosexual in a western country may make it more difficult for the individual to

return to a lifestyle where sexual preference needed to be hidden to the extent required in India. The Tribunal was satisfied that the applicant's family and wider community were cognisant of his homosexuality and that he and his partner had lived openly as homosexuals for a number of years. It was satisfied that the persecution feared by the applicant was well-founded.

060451856

30 August 2006, Melbourne

Ms K Boland, Senior Member

INDIA - RACE - RELIGION - SIKH - POLITICAL OPINION - KHALISTAN MOVEMENT - The applicant feared persecution as a Sikh from the Punjab. He claimed he had joined the Khalistan Commando Force in the mid 1990s and was later detained by police and tortured. The applicant claimed that a number of party workers were picked up and killed by the police in the same year, that his brother also joined and his whereabouts were unknown. He claimed that over the years when he travelled overseas to raise funds he used bribes to avoid being arrested as he travelled in and out of India. The applicant believed that his name was registered as a worker for the party and this would be known to police. He claimed that he would be killed by the Punjabi police if he returned.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant joined the Khalistan movement in the mid-1990s and a year later was detained by police. It accepted that he was detained on other occasions during that period and that a number of party workers were picked up and killed by police in the same year. The Tribunal accepted that the applicant's brother joined the party and that his whereabouts were unknown. It accepted that there was a period of widespread violence in Punjab which began in 1984, during which serious human rights violations occurred and Sikhs were persecuted. However, all reports indicated that "normalcy" had returned to the state by 1998. The Tribunal noted that the applicant had made regular visits to his parents in the Punjab and concluded that he was not of interest to the Indian authorities during this period. It was satisfied that on return the applicant would be of no interest to the authorities or anyone else because of his past support for the Khalistan movement.

060608209

30 August 2006, Sydney

Ms K Raif, Member

INDIA - RELIGION - MUSLIM - POLITICAL OPINION - MAJLIS-E-ITTEHADUL MUSLIMEEN - The applicant feared persecution as a Muslim and an active member of the Muslim party Majlis-e-Ittehadul Muslimeen (MIM) in Hyderabad. He claimed that he had particular responsibilities within MIM and that he was approached by workers of the Bharatiya Janata Party (BJP) who questioned his actions in collecting funds for the people of a particular location. The applicant replied that he had a duty of care towards his country and he was also given the responsibility by the MIM. He claimed that on a later date as he drove home at night his car was obstructed by men from the BJP who attacked him, resulting in his hospitalisation. The applicant made a written complaint to police naming his attackers but claimed that no action was taken. He claimed that on several occasions he received threatening and abusive telephone calls and was told to leave the area or he would be killed. The applicant was feeling mentally depressed and harassed so decided to travel to Australia.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was a member of the MIM party and was involved in the collection of funds on behalf of the party. It accepted there was ongoing tension between Muslims and Hindus which had frequently triggered outbreaks of violence between the two communities. The Tribunal accepted that the applicant experienced difficulties and threats and this may have been from members of the BJP. It accepted that on one occasion he was assaulted by BJP members and was hospitalised as a result. The Tribunal noted that the applicant admitted he was never visited at home by BJP members attempting to threaten him although they were aware of his residential address. It found that the applicant did not suffer further harm despite threats being made and that the threats did not themselves constitute serious harm. The Tribunal was not satisfied that there was a real chance of the applicant being attacked or seriously harmed. It found that any harm he may face was localised and he would be unlikely to face these threats if he lived in a state other than his own. Accordingly, the Tribunal found it would be reasonable for the applicant to relocate to another part of India.

060604521

15 September 2006, Sydney

Ms P Pope, Member

INDIA - PARTICULAR SOCIAL GROUP - MEMBERS OF SCHEDULED CASTE - POLITICAL OPINION - DALIT - The applicant and his wife feared persecution because they were lower caste Dalits who constituted a scheduled caste and because the applicant actively promoted the Dalit cause. He also claimed that he and his wife had been born into Christian families and that he saw his role as that of a missionary whose task was to try to convert Dalits. The applicant claimed that Dalits were often treated like animals and were shown no respect. He assisted them in seeking solutions to their problems and organising demonstrations on occasion. His wife had been attacked and beaten by high caste people who said that her husband was well known for instigating the Dalits against them. The applicant claimed that his life would be threatened on return because of caste inspired extremists and religious intolerance at the hands of politicians as well as police who did the bidding of politicians. He claimed that the Hindus would not let him live.

Held: Decision under review set aside.

The Tribunal accepted that the applicant and his wife were Christians and members of the Dalit caste. It accepted their evidence as truthful accounts of their experiences and accepted that the applicant had attracted the active opposition of social and political elites threatened by his actions. The Tribunal accepted that they had caused harm to be done against him and his wife for reason of his activities in support of the Dalit people, particularly the Dalit women. It noted that the applicant was committed to the Dalit cause and the spread of his Christian faith with missionary zeal and fervour and was satisfied that he would continue to pursue those causes in India. Accordingly, the Tribunal was satisfied there was a real chance that the applicant would suffer serious harm for reason of his imputed political opinion and membership of a particular social group being a scheduled caste. The Tribunal found there was a real chance that the applicant's wife would suffer serious harm for reason of her membership of a particular social group being a scheduled caste, and for reason of her membership of the applicant's family.

Nepal

060576110

31 August 2006, Sydney

Ms P McIntosh, Member

NEPAL - POLITICAL OPINION - HUMAN RIGHTS ACTIVIST - MAOISTS - THIRD COUNTRY PROTECTION - The applicant feared persecution as a member of the Nepali Congress party and a human rights defender. He claimed that because of his political opinions he had attracted the adverse interests of the Maoists when the "people's war" began in 1996. The applicant claimed that the Maoists initially harassed him for money and later demanded that he send his son to fight with them but he did not comply. He claimed that a close friend on the village committee was murdered and when police arrested Maoists for the death he was suspected of being an informer. The applicant received death threats and police informed him he was on a Maoist hit list. He claimed he moved to Kathmandu and was again identified and threatened by Maoists who demanded money. He claimed that his son had now been told that as the applicant was making money in a safe place, the son must give money to the Maoists. The applicant claimed that the present government was disabled, the Maoists now operated with impunity and they would harm him if he returned.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness and accepted that he was targeted in his home area and later in Kathmandu by Maoists who threatened to kill him if he did not co-operate with them. It was also satisfied that they had threatened and killed members of various groups of which the applicant was a member. The Tribunal was satisfied that the Maoists had imputed a political opinion to the applicant and it was for that reason they had threatened him. It accepted that the Maoists had a continuing interest in the applicant's whereabouts and they had continued violating a cease-fire despite their claims to the contrary. The Tribunal was unable to be satisfied that the applicant had a legally enforceable right to enter and reside in India. It noted that the Treaty of Peace and Friendship did not impose an obligation on India to allow free entry by all nationals of Nepal. The Tribunal could not be satisfied that even if the applicant were able to enter India, he

would not be returned to Nepal by the Indian authorities. Accordingly, it found that the applicant had a well-founded fear of persecution for reasons of political opinion.

Sri Lanka

060656946

29 September 2006, Sydney

Mr A Jacovides, Member

SRI LANKA - POLITICAL OPINION - TAMIL MUSLIM - MUSLIM MILITIA GROUP - FORCIBLE RECRUITMENT - LIBERATION TIGERS OF TAMIL EELAM - The applicant feared persecution as a Tamil Muslim at the hands of the Muslim militia, or home guard, as well as the Liberation Tigers of Tamil Eelam (LTTE). He claimed that he lived with his family in refugee camps until he was taken by a Muslim militia group which intended to train him as a fighter. The applicant claimed that he escaped and the group subsequently tried to locate him. He claimed that while in this area he was taken by the LTTE and held in a camp on suspicion of being a spy. The applicant fled the camp after it was hit by a bomb and went into hiding until he left the country. He claimed he was unable to seek assistance from the authorities because the army was associated with the militia group and would have handed him over. The applicant claimed that both groups considered him an enemy and he would be punished or killed on return. He claimed that the army would not be interested in assisting him because he was a Tamil and had refused to join the militia.

Held: Decision under review set aside.

The Tribunal was satisfied that the applicant gave a truthful account of his circumstances and noted that independent evidence indicated that Muslim militias and the LTTE had targeted such Muslim Tamil males. It noted that these groups sought to either recruit these young people or punish them for not co-operating. The Tribunal was satisfied that the applicant was particularly vulnerable to exploitation by these groups because he was poor and displaced. It found that neither group had regard for the applicant's well-being and sought to exploit him for their own purposes. The Tribunal found that the harm suffered by him amounted to persecution. It found that on return the applicant would again be at risk of serious harm from the Muslim militia and the LTTE and would not have access to protection by the State. Accordingly, the Tribunal found that the applicant would be subjected to persecution for reasons of political opinion.

Turkey

060543625

19 September 2006, Sydney

Ms J Morris, Member

TURKEY - PARTICULAR SOCIAL GROUP - MARRIED WOMEN - ABUSE - DEATH THREATS - The applicant feared persecution as a woman whose husband had gravely abused her and threatened to kill her. She claimed that she could not move to another part of the country because she had always been a housewife and had no financial or family support elsewhere. The applicant claimed that her husband believed they were still husband and wife and that they should live together. She claimed that her husband was fixated on harming her and would follow her wherever she went in Turkey. The applicant claimed that there was inadequate state protection against the violence she would experience.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness who had made genuine efforts to explain why she feared return to Turkey. It noted that her claims were consistent with the independent evidence. The Tribunal found that "married women in Turkey" constituted a particular social group for the purposes of the Convention and the applicant was a member of this group. It noted that spousal abuse was considered an extremely private matter involving notions of family honour and few women went to the police. The Tribunal found that the authorities rarely carried out thorough investigations into women's complaints about violent attacks or murders or apparent suicides of women. It was therefore satisfied there was a real chance that the

applicant would face persecution and that the government was unwilling and unable to protect her for reason of her membership of a particular social group consisting of married women.

MIMA v SZFDE

[2006] FCAFC 142

Federal Court of Australia, French, Allsop, Graham JJ, NSD 139 of 2006, 3 October 2006

Immigration - Protection Visa application - procedural fairness - fraud - invitation to attend oral hearing - where fraudulent advice from migration agent that Tribunal would refuse application - advice that applicant should not attend hearing - where applicant dissuaded by fraud from attending - whether procedural unfairness - whether apparent consent to non-appearance vitiated by fraud - whether Tribunal decision induced or affected by fraud.

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 first respondent and her family were not persons to whom Australia had protection obligations.

The first respondent and her family lodged an application for review with the Tribunal which nominated a person as her authorised recipient. In the course of the review, it came to the Tribunal's attention that the respondents' authorised recipient was no longer registered as a migration agent. The Tribunal wrote to the respondents at the residential address provided on their application for review form asking whether they wished to change their authorised recipient. That letter was returned unopened. The Tribunal continued to send correspondence to the authorised recipient including an invitation to attend a hearing and a copy was sent to the respondents' residential address which was again returned. The authorised recipient faxed a response to the hearing invitation indicating that the respondents did not wish to attend. The Tribunal proceeded to make its decision, finding that the first respondent's claims lacked sufficient detail for it to be satisfied that she had a well-founded fear of Convention-related persecution.

The respondents gave evidence to the Federal Magistrates Court that their authorised recipient had fraudulently represented to them that he was a solicitor and registered migration agent. He had persuaded them that it would be against their interests to attend the Tribunal hearing. The applicants contended that the Tribunal decision should be quashed because the Tribunal procedure had been tainted by the fraudulent conduct of their authorised recipient. At first instance the Federal Magistrate found: the family had been dissuaded from appearing by the fraud of the agent; the agent's actions deprived the invitation to hearing of the quality of a meaningful invitation under s.425 of the *Migration Act* 1958 (the Act); as the victim of such fraud she had been denied natural justice; and the Tribunal committed jurisdictional error by sending correspondence to an authorised recipient under s.441G of the Act when it was aware that his registration as a migration agent had been cancelled.

The Minister on appeal contended that the Federal Magistrate erred and that the finding of jurisdictional error was not open on the basis of the statutory provisions. The first respondent contended that the Tribunal failed to comply with s.425 of the Act, also there was denial of procedural fairness applying general law principles and the decision of the Tribunal was affected by fraud.

Held: *per Allsop & Graham JJ (French J dissenting), appeal allowed.*

Per curiam

- (i) There was no breach of procedural fairness in the circumstances of the case. The content of procedural fairness depends upon the statutory framework and the Tribunal complied with the legislative provisions which related to the hearing rule.

Per Allsop & Graham JJ

- (ii) The decision of the Tribunal was not induced or affected by fraud. The respondents did not attend a hearing to which they were invited and of which they were aware because of the dishonest advice of their own agent. The Tribunal decision itself was made without the participation of the respondents, but unaffected, and not induced, by fraud.
- (iii) The Tribunal was empowered to make its decision by the legislative provisions. An invitation under s.425(1) of the Act was issued to the respondents and was received by their appointed agent. The respondents did not attend. That being so, the Tribunal was authorised to make a decision by

s.426A(1) of the Act. There was no breach of s.425.

- (iv) Section 422B of the Act makes Division 4 an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with. The respondents had no rights to natural justice inconsistent with the provisions of the Act, in particular sections 425, 425A, 426 and 426A.

Per Graham J

- (v) The Federal Magistrate's findings in relation to s.441G were misconceived. Whether an "authorised recipient" within the meaning of s.441G of the Act is a registered migration agent, a de-registered migration agent, an unregistered migration agent or any other person who may or may not be a migration agent, has no bearing upon the statutory obligation imposed upon the Tribunal to "give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant".
- (vi) To the extent that the Full Federal Court decision in *MIMIA v SCAR* (2003) 128 FCR 553 (*SCAR*) may have found that s.425(1) of the Act required more of an invitation than compliance with the terms of the Act it is plainly wrong and should not be followed. The statute does not impose any additional obligation requiring an invitation to be "real and meaningful" or "meaningful". The sufficiency of an invitation under s.425 can be addressed the moment the invitation has been given.

Per French (dissenting)

- (vii) The process leading to the Tribunal's decision was compromised by the fraud of the family's agent. The apparent consent by the first respondent to have her decision decided without a hearing was not a genuine consent, it had been obtained by fraud. The Tribunal acted upon that apparent consent. There is nothing in the Act to displace the common law proposition that fraud unravels everything. In this case the proposition applies to the consent upon which the decision-maker acted as well as the decision which resulted.
- (viii) While there may be room for debate about the reasoning in *SCAR* it is not "plainly wrong".

MIMIA v SZFML & Anor

[2006] FCAFC 152

Federal Court of Australia, Spender, French and Cowdroy JJ, NSD 141 of 2006, 27 October 2006

Immigration - Protection Visa application - invitation to attend hearing - acceptance of invitation - rescheduled hearing - fresh notice of rescheduled hearing - response by migration agent that applicant did not wish to attend hearing - no authority for response - whether consent to Tribunal proceeding without hearing - no effective consent - Tribunal decision beyond power - period of notice - whether minimum prescribed period between notice and hearing applies to rescheduled or adjourned hearing - prescribed period not applicable.

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 a person to whom Australia had protection obligations. The respondent claimed to fear persecution in Mongolia because of her sexuality.

The Tribunal invited the respondent to attend a hearing on 9 November 2004 which the respondent through her migration agent advised she would attend. On 8 November 2004, the Tribunal rescheduled the hearing to 25 November 2004 because of difficulties engaging a Mongolian interpreter. On 24 November 2004, the migration agent informed the Tribunal both orally and in writing that the respondent did not want to attend the rescheduled hearing. The Tribunal proceeded to decide the review without enabling the respondent to appear before it.

Federal Magistrate Scarlett held that the Tribunal had breached its obligations under s.425A of the *Migration Act 1958* (the Act) and r.4.35D of the Migration Regulations 1994 by failing to give the prescribed period for the hearing rescheduled at the Tribunal's behest. Federal Magistrate Scarlett distinguished *SZDQO v MIMIA* [2005] FCA 1026 on the basis that the variation of the hearing date was sought by the respondent and not the Tribunal.

In addition, Scarlett FM accepted the respondent's evidence, as compared to her migration agent's often vague evidence, that she had not given her express authority to her migration agent to inform the Tribunal that she did not wish to attend the rescheduled hearing. Accordingly, his Honour held that s.425(2)(b) of the Act did not apply.

On appeal, the Minister contended that the general authority given to the migration agent under Section C of the review application and s.441G of the Act entitled the agent to complete the response to hearing invitation and thereby give effect to s.425(2)(b) and s.425(3). That specific authority to respond to the hearing invitation was not given was not challenged on appeal.

Held: Appeal dismissed.

- (i) The Tribunal was not entitled to treat the respondent as disentitled from the hearing under s.425A(2)(b) of the Act as a condition of the Tribunal's power to determine an application without a hearing, either effective consent or non-attendance, was not satisfied.
- (ii) The authorisation contained in Section C of the review application and s.441G of the Act authorises the authorised recipient to do certain things on behalf of the respondent however nothing in the section has the effect of allowing the agent to act for a respondent beyond the scope of the actual authority conferred.

Obiter:

- (iii) As a prudential measure the Tribunal might be well advised, where an applicant apparently consents through an agent to a decision being made without a hearing, to require that the applicant's signature appear on any such written advice together with a verifying statement that the applicant has read the invitation and the proposed response or had it interpreted to the applicant's own language. In this case there is room for the argument that the Tribunal should have been put upon inquiry by the sudden apparent reversal of the respondent's attitude to participation in a hearing between the hearing as originally scheduled and the rescheduled hearing.
- (iv) Notification of a rescheduled hearing does not involve a fresh invitation for the purposes of s.425(1) of the Act but where a hearing is rescheduled then it is implicit in the obligation imposed on the Tribunal under s.425A(1) that the Tribunal give the applicant notice of the amended day on which, and time and place at which, the applicant is scheduled to appear.
- (v) The Tribunal is entitled to adjourn a hearing from time to time under s.427 of the Act and its implied incidental power to give practical effect to its obligation to provide a hearing. The power of the Tribunal to reschedule a hearing of which notice has been given is of the same character. Provided the notice of the rescheduling is reasonable there is no requirement, applicable to that procedure, for the application of the minimum period prescribed applicable to the notice required by s.425A of the Act. *SZDQO v MIMIA* (2005) 144 FCR 251 cannot be distinguished on the basis that the rescheduling, in that case, was instigated by the applicant.

SZFBS v MIMIA & Anor

[2006] FCA 1296

Federal Court of Australia, Tamberlin J, NSD 275 of 2006, 29 September 2006

Immigration - Protection Visa application - further protection visa - whether Tribunal correctly formulated and applied test for Article 1C(5) of Convention relating to the Status of Refugees - whether Tribunal erred in its application of s.36(3)-(5) of *Migration Act* 1958.

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, an Afghan national, had previously applied for and been granted a temporary protection visa. In considering his application for a further protection visa, the Tribunal found that Article 1C(5) of the Convention relating to the Status of Refugees (the Convention) applied and it was not satisfied that at the time of its decision the appellant had a well-founded fear of persecution for a Convention reason.

The appellant claimed that rather than applying Art. 1C(5) of the Convention the Tribunal simply applied Art. 1A(2) of the Convention by effectively equating "... the circumstances in connexion with which [a person] was recognised as a refugee" with a test for the reasons for recognition as a refugee. He also claimed the Tribunal erred in having regard to s.36(3)-(5) of the *Migration Act 1958* (the Act).

Held: Appeal dismissed.

- (i) The Tribunal correctly formulated and applied the test for Art. 1C(5) and did not err in its application of s.36(3)-(5) of the Act.
- (ii) The Tribunal sought to apply and formulate the correct approach to Art. 1C(5) of the Convention, while at the same time bearing in mind the importance of giving primacy to the language of the Convention. For the purposes of the present case the correct test was whether the circumstances have so changed that the well-founded fear which previously existed can no longer be a basis for refusing the protection of the applicant's country of nationality. However, a lack of demonstrable clarity in the reality and durability of the change will lead to the grounds for cessation not being established.
- (iii) It is important to return to the language of the Convention and there was no reason to doubt that the Tribunal had done that. The Tribunal's observation that the expressions of commentators do not constitute "legal tests" does not signify that the Tribunal has adopted a different or inconsistent approach, but rather that it was conscious of the need to apply the language in the Convention.
- (iv) The determination of the question of whether the conditions in the country had changed is one of fact within the jurisdiction of the Tribunal. The fact that the Tribunal considered that the substantial change in conditions which it found to exist will last into the foreseeable future cannot be described as an error of law on the basis that it was not reasonably open to the Tribunal on the material before it or embodied the incorrect approach. The Tribunal is not bound to accept any of the information before it and its reasons made clear there was a finding that the conditions which had previously prevailed had ceased to exist to a sufficient degree of durability and reliability to comply with Art. 1C(5).
- (v) Section 36(2) of the Act requires that whenever there is an application for a protection visa of any kind, the Minister must be satisfied that Australia has protection obligations to the applicant. Subsections (3)-(5) expressly exclude the operation of such obligations unless the person has a well-founded fear on Convention grounds. The wording of the section is calculated to enliven a requirement that there must exist a well-founded fear where a new application is made and the requirement is not displaced by generalised overtones which are said to emerge inferentially from the terms of Art. 1C(5) of the Convention which did not contemplate legislative modifications of the type found in s.36 of the Act.

S2012 of 2003 v MIMA

[2006] FCA 1294

Federal Court of Australia, Lander J, NSD 726 OF 2006, NSD 726 of 2006, 3 October 2006

Immigration - Protection Visa application - whether jurisdictional error - failure to consider integers of claim - consideration of state protection - appeal allowed.

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 appellants were not persons to whom Australia had protection obligations.

The Federal Magistrates Court had held that even though the Tribunal decision had been tainted by three jurisdictional errors it had made an independent relocation finding that was not infected with jurisdictional error. The three jurisdictional errors were:

- failure to address an independent claim that the appellant husband was at risk of harm because of his Hindu religion;
- denial of procedural fairness to the appellants in failing to allow an opportunity to comment on adverse country information re state protection that was credible, relevant and significant to the making of the decision; and

- misconstruction or failing to apply the law correctly by holding that for discrimination to be considered persecution, the discrimination must be motivated by an intent to harm.

On appeal, counsel for the appellants contended that the material which was not supplied to the appellants impacted on the question of state protection and was therefore a relevant consideration in considering relocation. Counsel for the respondents submitted that the Federal Magistrates Court erred in concluding that the failure to consider the religious claim was an error as it was part of the race claim and dealt with in that context.

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) The question of relocation cannot be considered in a vacuum if, in fact, there is no adequate state protection available to the appellants. The question of relocation must always depend upon there being available adequate state protection. As the Federal Magistrates Court had correctly found that the Tribunal had fallen into error in relation to the question of state protection, the Tribunal decision could not stand.
- (ii) The appellants, on the evidence, did raise a claim of persecution based on religion independent of race. The finding of relocation therefore was made in the absence of the Tribunal first considering one of the integers of the appellants' claims, namely a fear of persecution by reasons of religion. The finding of relocation could not stand because the appellants' claim had not been appropriately addressed because the Tribunal did not address the question as to whether, if the appellants were to relocate, they would be subject to persecution for reasons of their religion.

FEDERAL MAGISTRATES COURT JUDGMENTS

MZWZB v MIMA & Anor

[2006] FMCA 421

Federal Magistrates Court of Australia, McInnis FM, MLG 387 of 2005, 30 March 2006

Immigration - Protection Visa application - whether failure to consider relevant material - whether finding not open on evidence - relevance of adverse finding relating to past persecution - whether Tribunal required to speculate about future persecution when finding made that past persecution has not occurred - whether jurisdictional error.

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 claimed to have suffered “chronic” discrimination and specific instances of injustice in Romania due to being a Gypsy.

The applicant submitted to the Tribunal a psychiatrist report which indicated that his mental state had been brought about, and perpetuated by, the victimization he had suffered in Romania. In affirming the delegate’s decision, the Tribunal accepted the applicant may have been discriminated against, being called offensive names and perhaps being refused service in shops and restaurants but it did not accept this amounted to Convention-related persecution. In relation to the psychiatrist report, the Tribunal accepted the diagnosis made by the psychiatrist as to the nature of the applicant’s mental state but did not accept parts of the applicant’s history which he had provided to the psychiatrist. Further, the Tribunal found that “there may be many causes” for the applicant’s symptoms, apart from persecution.

The applicant contended, among other things, that the Tribunal was obliged to consider whether the discrimination which the Tribunal accepted the applicant would face upon return to Romania, taken with the diagnosis of the psychiatrist which the Tribunal also accepted, might give rise to such psychological harm that would amount to persecution.

Held: Application dismissed.

- (i) The Tribunal’s decision was free of jurisdictional error.
- (ii) A proper reading of the Tribunal’s decision indicated that it made a very clear finding, addressing the claim before it, that the applicant had not been the victim of persecution for a Convention reason in the past. Once having made that substantive adverse finding there is no error arising from the Tribunal’s perceived failure to consider in some further detail whether the applicant may suffer harm in the future.
- (iii) There was adequate material before the Tribunal disclosed and relied upon by the applicant which provided a proper basis upon which the conclusion drawn by the Tribunal that there may be “many causes for these symptoms” could be reached.
- (iv) The history taken by the psychiatrist is simply an assertion of the history of the applicant. The Tribunal is not bound to accept that history, rather it is a matter for the Tribunal to assess the history carefully and reach its own conclusions and not then be bound by what a psychiatrist concludes as perhaps being a reason for the symptoms. The Tribunal is not in the position of a treating doctor, but rather is required to make an appropriate assessment of a claim put by an applicant.

SZGUM v MIMA & Anor
[2006] FMCA 1419

Federal Magistrates Court of Australia, Emmett FM, SYG1910 of 2005, 7 September 2006

Immigration - Protection Visa application - where start time for hearing changed by Tribunal - whether change fell within s.427(1)(b) of *Migration Act* 1958 as an adjournment - whether failure to comply with s.424A regarding inconsistent evidence by applicant - where adverse information given by applicant to Tribunal at hearing.

This was an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the applicant was not a person to whom Australia had protection obligations. The applicant, a national of the People's Republic of China, claimed that she had a well-founded fear of persecution because of her Christianity.

The Tribunal found the applicant's evidence to it to be vague and internally consistent. In particular the Tribunal had concerns as to the claim that the applicant had been detained whilst handing out Christian literature where she had also claimed to have been released as there was no substantive evidence to prove that she had been doing this.

The applicant sought to rely on a breach of s.424A of the *Migration Act* 1958 (the Act).

The Minister's solicitors drew the Court's attention to a letter dated 9 May 2005 to the applicant which stated "Please be advised that your original hearing time of 9.30 on 13 May 2005 has now been changed to a later starting time of 1.30pm".

Held: Appeal dismissed.

(i) The terms of the letter made it quite clear that the Tribunal was intending to change the start time of the hearing and was not intending to nominate a time for a new hearing. This fell within the circumstances of s.427(1)(b) of the Act as an adjournment of the hearing. As there is no prescribed time for notification of an adjourned hearing date, there was no jurisdictional error.

Obiter:

(ii) However, even if the letter of 9 May 2005 was an invitation pursuant to ss.425 and 425A of the Act, it would not be appropriate to grant relief for the following reasons: the hearing was deferred for four hours; the applicant attended the hearing; there was no complaint by the applicant about the change of time; there is no evidence of any prejudice to the applicant arising out of the conduct of the Tribunal in deferring a hearing time.

(iii) The Tribunal had not failed to comply with s.424A of the Act as the adverse information relied upon was information that had been given by the applicant to the Tribunal at the hearing. Therefore, the information relied upon by the Tribunal as part of the reason for affirming the decision under review was information provided by the applicant to the Tribunal and was therefore excluded from the obligations of s.424A(1) by operation of s.424A(3)(b) of the Act.

SZGRA v MIMA & Anor
[2006] FMCA 1097

Federal Magistrates Court of Australia, Lloyd-Jones FM, SYG 1754 of 2005, 15 September 2006

Immigration - Protection Visa application - Nepalese applicant - where finding made of right of applicant to enter and reside in India - whether failure to consider whether right legally enforceable - whether misapplication of s.36(3) of the *Migration Act* 1958.

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

The Tribunal found that the applicant could avoid the harm he feared in Nepal by moving to India where he could enter and reside with rights and privileges commonly available to Indian nationals without fear of being forced to return to Nepal. The Tribunal stated that:

Where an applicant does not have a legally enforceable right to enter and reside in a third country, Australia will nonetheless not have protection obligations to that person if he or she is likely to be given effective protection in that country...

The Tribunal then found that the effective protection principles summarised in the above paragraph applied and that the applicant had a right to enter and reside in India and had not taken all possible steps to avail himself of that right. The Tribunal, in support of its findings, referred to a Treaty of Peace and Friendship between India and Nepal granting rights equal to those of its own citizens to the nationals of the other residing in its territory as well as other country information.

The applicant's counsel submitted that the Tribunal asked itself the wrong question and took into account an irrelevant consideration, namely whether the applicant had effective protection in India. It was also submitted that the Tribunal failed to address a relevant consideration, that being whether the applicant had a legally enforceable right to enter and reside in India, as opposed to a permission which may be granted pursuant to a bilateral "Treaty of Peace and Friendship".

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) The Tribunal reached the conclusion that the applicant had a legally enforceable right to enter and reside in India but it did not in any way identify whether this alleged right stems from the erroneous application of the effective protection principle in *MIMA v Thiyagarajah* (1998) 80 FCR 543 (*Thiyagarajah*) or s.36(3) of the *Migration Act* 1958. The Tribunal's reasoning was not clear and appears to have applied the effective protection principle and the divisions of s.36(3) as an amalgam. The finding that "the "effective protection" principles summarised above apply to the applicant" is a jurisdictional error.
- (ii) On the material that the Tribunal referred to it was not open to find that the applicant had a right to enter and reside in India as an existing legally enforceable right. The Tribunal decision's application of s.36(3) appears to have been influenced by the effective protection principle found in *Thiyagarajah* and is therefore vitiated by jurisdictional error.

SZFTP v MIMA

[2006] FMCA 1026

Federal Magistrates Court of Australia, Driver FM, SYG 478 of 2005, 29 September 2006

Immigration - Protection Visa application - temporary protection visa - fear of Taliban - whether failure to address issue of cessation of protection - whether Tribunal misinterpreted claim as fear of Taliban in government - whether failure to consider cumulative impact of claims - jurisdictional error.

The applicant, a national of Afghanistan, 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 was a Shia Hazara and had previously applied for and been granted a temporary protection visa on the basis that he feared persecution from the Taliban. In his application for a further protection visa, the applicant claimed that he continued to fear persecution from the Taliban and also from other Hazara families because his father assisted the Taliban after he departed Afghanistan. Further, the applicant claimed to have spent three years in Australia, had drunk alcohol and had forgotten how to pray.

The Tribunal did not accept that there was a real chance of the Taliban re-emerging as a governing authority in Afghanistan in the reasonably foreseeable future and therefore found that Article 1C(5) of the Refugees Convention applied. Alternatively, it found that s.36(3) of the *Migration Act* 1958 applied in relation to those circumstances. The Tribunal also found that the animus directed at the applicant's father and which may affect the applicant himself by extension, would not be for reason of political opinion. Further, it was not satisfied that the applicant's beliefs and practices now were such that he would be persecuted for that reason on return "nor was it claimed that any beliefs or innate characteristic compel the applicant to drink alcohol on return".

The applicant contended amongst other things that the Tribunal misunderstood the meaning and effect of Article 1C(5) and failed to properly consider the claim in relation to his secularisation.

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) On the basis of the reasoning of the majority in *QAAH v MIMA* [2005] FCAFC 136, the Tribunal failed to properly address the cessation issue, constituting a jurisdictional error.
- (ii) The Tribunal committed jurisdictional error by failing to properly consider the applicant's claim. The applicant claimed that he feared persecution "at the hands of the Taliban", which the Tribunal misinterpreted as a "fear of the Taliban in government".
- (iii) The Tribunal misdirected its consideration to the limited basis upon which temporary protection visa had been granted rather than the more general basis upon which protection had been sought. The right question for the Tribunal to ask was, "what did the applicant claim to fear and did there remain a well-founded basis for fear?", and not, "on what basis had temporary protection been granted and had circumstances changed?"
- (iv) The Tribunal failed to properly consider the cumulative impact of the various elements of the applicant's claim of secularisation. The Tribunal needed to consider the cumulative impact of the various elements of this claim in order to determine whether the applicant would face a serious risk of harm in a conservative and deeply religious society as one who had become an outsider by abandoning his religious beliefs and cultural attitudes.
- (v) The Tribunal committed *S395 (Appellant S395/2002 v MIMA (2003) 26 CLR 163)* type error by assuming that the applicant, who had become "westernised" whilst in Australia, could be expected to modify his behaviour if he returned to Afghanistan

**SZGNE & Anor v MIMA & Anor
[2006] FMCA 1179**

Federal Magistrates Court of Australia, Driver FM, SYG1529 of 2005, 29 September 2006

Immigration - Protection Visa application - where applicant invited to comment on adverse information pursuant to s.424A of Migration Act 1958 - whether Tribunal failed to ensure that applicant understood significance of the information - whether Tribunal failed to ensure applicant understood that discrepancies might be relied on to support adverse credibility conclusion.

The applicants, nationals of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations.

The main applicant claimed that she feared persecution as a Kadiany Muslim. The Tribunal found that the main applicant was not a Kadiany Muslim and had not been, or would not be, persecuted for that reason. The Tribunal found it was unable to accept most of her evidence as there were too many discrepancies and too many matters in which her evidence was simply wrong or where she demonstrated ignorance about things of which she should be knowledgeable if she were what she claimed to be.

The Tribunal sent the applicant a letter pursuant to s.424A of the *Migration Act 1958* (the Act) after the hearing outlining inconsistent information given in the protection visa application and a previous visitor visa application. The Tribunal explained in the letter that the information was relevant to the review because the inconsistent information might lead the Tribunal to conclude that it could not rely on other information provided with the application for protection.

The applicants claimed the Tribunal failed to comply with s.424A(1)(b) of the Act by failing to ensure that they understood why the particulars of information provided were relevant to the review.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal made a jurisdictional error because it used information in the protection visa application to affirm the decision but did not explain that possibility in the s.424A letter and hence, did not comply with its obligation to explain the significance of the information.

- (ii) The s.424A letter did not put the applicants on notice that the Tribunal might rely on information in the protection visa application for the purpose of supporting an adverse credibility conclusion. It was only sufficient to put the applicant on notice that, because of the inconsistency between claims in the protection visa application and the visitor visa application, the Tribunal might place no reliance on any information in the protection visa application. The letter informed the applicants that the information in the protection visa might not be reliable but did not inform the applicants that it might be relied on to affirm the decision under review.
- (iii) The Tribunal's reference to "discrepancies" is a reference to the perceived discrepancies between her protection and visitor visa application which formed part of the factual matrix leading to the Tribunal's conclusion that the main applicant was not "what she claims to be".

MZXFJ v MIMA & Anor
[2006] FMCA 1465

Federal Magistrates Court of Australia, McInnis FM, MLG 1630 of 2005, 10 October 2006

Immigration - Protection Visa application - claim by woman of severe abuse in Uganda - forced marriage upon return - persecution as a lesbian in Uganda - whether failure to consider relevant issue of reason for failure of applicant to lodge complaint in Uganda - whether failure to take into account departmental guidelines - video link hearing undesirable where credibility of applicant in issue.

The applicant, a national of Uganda, 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 claimed to fear persecution based on her membership of a particular social group. In particular, she feared persecution on the basis of being a lesbian in Uganda. In addition, she claimed that she had been subject to severe sexual and physical abuse as a child and that she would be subject to female genital mutilation on her return to Uganda.

The Tribunal did not find the applicant to be a credible witness and rejected her claims finding that "the applicant's manner, style and presentation of her claims belie the genuineness of her claims". A significant factor taken into account by the Tribunal in rejecting the applicant's claims was her failure to report the abuse which had occurred while she was in Uganda.

The applicant contended that the Tribunal failed to take into account the ministerial guidelines on dealing with gender related claims and the reasons why a victim of sexual abuse would not seek assistance from authorities in the country of origin. The applicant submitted that the gender guidelines were a relevant consideration that the Tribunal was bound to take into account.

Held: Tribunal decision quashed and matter remitted for reconsideration.

- (iii) On a proper reading of the Tribunal decision, both in its reasoning and in the method by which it conducted its hearing, the Tribunal ignored gender guidelines released by the Minister to deal with gender-related claims by asylum seekers. The departmental gender guidelines ought to have been properly regarded as relevant to the application under review.
- (iv) Where a Tribunal elects to conduct a hearing by video link and then seeks to make significant adverse credibility findings not simply confined to findings in relation to facts or inconsistencies but rather findings that the genuineness of the claims are adversely affected by a finding in relation to the applicant's "manner, style and presentation of her claims", then it is incumbent upon the Tribunal to ensure, if proper regard was being given to the gender guidelines, that the hearing be conducted in a manner which at least provides the opportunity for the Tribunal to comply with those guidelines. If the mode of hearing precludes a Tribunal from making a proper assessment of the manner, style and presentation of an applicant's claims, then the Tribunal would not have any adequate opportunity to establish a rapport with the applicant in a manner consistent with the gender guidelines.
- (v) The Tribunal's findings that the applicant failed to seek help or redress in Uganda demonstrates that the Tribunal had focused on those matters without regard and/or allowance for those matters as set out in the gender guidelines.

MZXGK V MIMA & ANOR
[2006] FMCA 1469

Federal Magistrates Court of Australia, McInnis FM, MLG 46 of 2006, 10 October 2006

Immigration - Protection Visa application - whether Tribunal took into account irrelevant and outdated material - whether failure to take into account relevant country report - whether failure to accord procedural fairness - whether jurisdictional error.

The applicant, a national of Burma, sought judicial review of a Refugee Review Tribunal decision that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the ground of political opinion.

The applicant provided post-hearing submissions to the Tribunal which specifically made reference, amongst other things, to a previous decision of the Tribunal which included a reference to a country report entitled “the treatment of political dissidents in Burma” published in July 2002. The Tribunal’s decision in the present case, referred to a country report published on 28 January 2000, but did not specifically refer to the July 2002 country report, which was more beneficial to the applicant’s case. The Tribunal referred in general terms to “other RRT cases where Burmese applicants were granted protection” and noted “that they all turn on their own individual facts and merits”. The Tribunal’s reasons also stated that “the Tribunal assumes that the applicant might be questioned and cautioned in the event of return to Burma. However, the Tribunal does not accept on the evidence before it that he would face such attention or treatment as would amount (even cumulatively) to persecution”.

The applicant claimed that the Tribunal: failed to have regard to relevant material, being the July 2002 country report and assessed the applicant’s claim by reference to the earlier country information which was irrelevant and outdated material; failed to accord procedural fairness by ignoring highly probative material relating to the country situation in Burma; failed to make a finding in relation to the applicant’s claim of having been a repetitive demonstrator in Australia; and made an assumption but did not make a finding that the applicant would be questioned and cautioned in the event of return to Burma which would necessarily involve detention and did not make a finding about the reasons, nature, duration or consequences of the detention or whether there was a real chance that such detention would amount to persecution.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal failed to take into account relevant material, namely the country report of July 2002. It was incumbent on the Tribunal to at least refer to the second country report and to attempt to reconcile that report with the earlier report. Further, the Tribunal, having found that the applicant faces a likelihood of questioning and cautioning, should have explored the prospect, clearly and directly raised in the second report, that there was a risk of interrogation and detention with the possibility of punishment for returnees with a low profile.
- (ii) The failure to refer to the second report while taking into account the earlier report was sufficient to constitute a denial of procedural fairness. The Tribunal was bound to take the later report into account in the *Peko-Wallsend* sense.
- (iii) The later report raised different and less onerous categories of Burmese nationals who would be of concern to the Burmese government upon return to Burma. By directing its attention to categories which are raised from the first report, the Tribunal erred by effectively asking itself the wrong question. By failing to refer to the later report, the Tribunal denied itself the opportunity of properly considering what might occur in the future in relation to the applicant.
- (iv) The reference in the Tribunal’s decision to the “various submissions” of the applicant which cite “independent reports of mistreatment of certain expatriate dissidents” could only amount to a cursory reference to that material and was insufficient. The mere fact that the Tribunal has referred to “post-hearing submissions” does not of itself provide any sufficient basis upon which the court can conclude that the Tribunal properly took into account a specific and later country report, which was clearly relevant to the determination of the issue before the Tribunal.

SZIBR v MIMA & Anor
[2006] FMCA 1490
Federal Magistrates Court, Scarlett FM, SYG 87 of 2006, 11 October 2006

Immigration - Protection Visa application - applicant citizen of Nepal - whether no evidence for Tribunal's finding - whether Tribunal's decision irrational or illogical or not based upon findings of fact supported by logical grounds - credibility.

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. He claimed he had left Nepal because he was assaulted by Maoists believing he had informed the authorities about their leader, who was later arrested. The applicant also feared that the police would interrogate him about this man and would suspect him of supporting the Maoists.

The Tribunal found that if the applicant were truly at risk of being harmed by the Maoists he would not have remained in his village but would have fled immediately. It also disbelieved the applicant's claim to have been assaulted by Maoists and was not satisfied that had the Maoists suspected the applicant of the claimed behaviour, he would have lived to tell the tale. The Tribunal found that the Maoists were brutal in their treatment of any person believed to be an enemy. Nor did it accept that the applicant was under suspicion by the authorities for assisting the Maoists. Accordingly, it found that he did not have a well-founded fear of persecution for reason of his actual or imputed political opinion or for any other Convention reason if he returned to Nepal.

The applicant contended that the Tribunal committed a jurisdictional error in that there was no evidence to support certain factual findings made by the Tribunal and that its findings were irrational or illogical.

Held: Tribunal decision quashed and remitted for reconsideration.

- (v) The statement by the Tribunal that;

"The applicant claims that he was the victim of an assault by two Maoists at his factory because they suspected that he was involved in his tenant's arrest. I am not satisfied that had the Maoists suspected the Applicant of such behaviour, he would have lived to tell the tale. As already stated above, the Maoists are brutal in their treatment of any person perceived to be an enemy.

was a critical step in the Tribunal's ultimate conclusion and there was no evidence to support the finding. This constitutes jurisdictional error.

- (vi) There was evidence available that the Maoists kill some but not all of those they suspect to be opposed to them and there was evidence to show that the Maoists could have killed the applicant at some stage but did not. That evidence came from the country evidence referred to by the Tribunal.

MZXIV v MIMA & Anor (No 2)
[2006] FMCA 1454
Federal Magistrates Court, Riley FM, MLG436 of 2006, 13 October 2006

Immigration - Protection Visa application - exercise of jurisdiction - whether Tribunal failed to consider a discrete element of applicant's claim - meaning of term "to consider" - jurisdictional error.

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 had protection obligations.

The applicant claimed to fear persecution after having been personally identified in an Australian newspaper as having assisted Falun Gong practitioners in China. He also feared that Chinese authorities knew from security agents operating in Australia that he had become a novice practitioner and attended demonstrations. The applicant claimed that the authorities had intercepted mail to his wife containing Falun Gong, government corruption and other information, that his apartment had been raided and his wife questioned.

In its reasons for decision, the Tribunal concluded that the applicant's inconsistent accounts suggested that his claims were concocted. The Tribunal found that the authorities would know that the claims personally attributed to him by the newspaper were untrue and that the applicant may only suffer short-term, administrative measures. The Tribunal also concluded that the applicant had not posted Falun Gong material to his wife because it did not accept that he was a practitioner.

The applicant alleged that the Tribunal decision was affected by jurisdictional error, including on the basis that the Tribunal failed to consider his *sur place* claims of attending Falun Gong demonstrations in Australia given his awareness that Chinese consulates monitored the overseas activities of practitioners, that he posted anti-Communist material and that his wife had been questioned.

Held: Tribunal decision set aside and remitted for reconsideration.

- (iv) There was a failure to consider the applicant's claims, giving rise to jurisdictional error.
- (ii) The wholesale reproduction of submissions or evidence did not indicate of itself that the Tribunal had considered material in the required sense. By considering whether the applicant was a Falun Gong practitioner, the Tribunal had not embarked on a process of actually fixing its mind upon his claim to have attended demonstrations as a Falun Gong sympathiser. The Tribunal's conclusions that he was not a practitioner, would not suffer persecution arising from the newspaper article and did not post Falun Gong materials to his wife did not constitute findings of greater generality containing consideration of his discrete claim that he feared persecution because the authorities knew that he had attended demonstrations in Australia.
- (iii) The Tribunal misunderstood and thereby failed to consider an aspect of the applicant's claims by characterising the information the applicant claimed to have posted as Falun Gong materials. The applicant's statutory declaration indicated that he had also posted articles concerning corruption and anti-communist information. His claims that his apartment had been raided and his wife questioned could clearly have given rise to a well-founded fear of persecution.

SZGWM v MIMA & Anor

[2006] FMCA 1161

Federal Magistrates Court, Lloyd-Jones FM, SYG2035 of 2005, 13 October 2006

Immigration - Protection Visa application - obligation to provide interpreter - use of interpreter - role of interpreter - standard of interpretation - dialect of interpreter.

The applicant, a national of the Peoples Republic of China, 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 claimed that she feared persecution because of her involvement with the "Shouter Group", a Christian religious organisation. She claimed she was under surveillance as a result of her involvement with this group and was detained by the authorities. The Tribunal did not accept that the applicant was a prominent member of the Shouter Group because she had no real knowledge of Christianity and her claims were unsupported by documentary evidence. At the hearing the Tribunal provided a Mandarin interpreter as requested by the applicant. The applicant wrote to the Tribunal following the hearing to advise that she had trouble understanding the Mandarin interpreter and requested another hearing with an interpreter who speaks her dialect, which she advised as Fujian. The Tribunal considered the applicant's submission but, in light of the steps it had taken during the hearing, declined to offer another hearing, and instead invited further written submissions.

During the Court proceedings it became apparent that the applicant's dialect was in fact Fuqing, not Fujian.

Held: Tribunal decision set aside and remitted for reconsideration.

- (v) Applying established law, the Tribunal is required under s.427 of the *Migration Act 1958* (the Act) to provide an interpreter where an applicant is unable to give evidence without one and the Tribunal has a statutory obligation under s.425 of the Act to ensure the invitation to a hearing is "real and

meaningful”, which includes providing an interpreter of sufficient skill such that the applicant is not denied his or her rights to a fair hearing (*VWFY v MIMIA* [2005] FCA 1723).

- (vi) Despite a number of factors suggesting the Tribunal did all it could to ensure the applicant had a fair hearing, a number of exchanges recorded in the decision record raised doubt about whether the applicant was given a fair hearing. These included discussions relating to whether the applicant used a false name to obtain a passport; the applicant’s knowledge of Christian faith; her spoken language and the choices provided to the applicant of languages she spoke; all of which caused doubts as to the fairness of what took place at the hearing.
- (vii) For these reasons, it was not established whether the non responsiveness of the applicant to key questions relating to her passport and religion was due to deliberate avoidance in answering the questions or lack of knowledge of the subject matter or because she was unable to answer the questions because of the difficulty with the interpreting service. In these circumstances the matter should be returned to the Tribunal.

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/Bills/.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/Bills/.nsf/0/0A84C9D68069185BCA2571CE00080865/\\$file/18080601b.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills/.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/Bills/.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/bills1.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 be found at:

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

Migration Legislation Amendment (Appropriate Review) Bill 2006

The *Migration Legislation Amendment (Appropriate Review) Bill 2006* was introduced as a private member's bill to the Parliament by Senator Bartlett on 19 October 2006.

The Bill seeks to remove unfair restrictions upon applications for review of refugee visa decisions, namely the imposition of a fee for review by the Refugee Review Tribunal.

A copy of the bill can be found at:

<http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bytitle/81DA5E9C7B61EA82CA25721000040C63?OpenDocument>

CASELOAD OVERVIEW

RRT Decisions – October 2006

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	3	0	0	0	3
Albania	2	0	0	0	2
Algeria	0	1	0	0	1
Bahrain	1	1	0	0	2
Bangladesh	1	19	0	14	34
Burma Myanmar)	5	1	0	0	6
Cameroon	1	0	0	0	1
Chile	0	3	0	0	3
China (PRC)	30	116	1	6	153
Colombia	0	0	1	0	1
Cote D'Ivoire	1	0	0	0	1
Egypt	1	0	0	0	1
Ethiopia	2	0	0	0	2
Fiji	0	3	1	2	6
Germany	0	2	0	0	2
Ghana	2	1	0	0	3
India	2	38	1	4	45
Indonesia	2	23	0	0	25
Jordan	0	1	0	0	1
Kenya	0	1	0	0	1
Korea, Republic of	0	8	0	0	8
Lebanon	0	3	0	0	3
Lithuania	0	1	0	0	1
Malaysia	1	8	0	0	9
Mongolia	2	0	0	0	2
Nepal	1	4	0	0	5
Nigeria	1	3	0	0	4
Pakistan	1	8	0	0	9
Peru	0	1	0	0	1
Philippines	0	0	1	1	2
Romania	0	1	0	0	1
Russian Federation	0	1	0	0	1
Somalia	1	0	0	0	1
Sri Lanka	9	12	0	0	21
Syria	0	1	0	0	1
Taiwan	0	1	0	0	1
Tanzania	0	1	0	0	1
Thailand	2	0	0	0	2
Tonga	0	3	0	0	3
Turkey	1	0	0	0	1
Ukraine	0	1	0	0	1
Vietnam	1	0	0	0	1

ACCESSING TRIBUNAL DECISIONS

Access on Tribunal Premises

Access to published decisions of the Refugee Review Tribunal can be obtained from the Sydney and Melbourne Registries of the Tribunal.

The Sydney Registry is located at: Level 11
83 Clarence St
Sydney NSW 2000

The Melbourne Registry is located at: Level 12
460 Lonsdale St
Melbourne VIC 3000

Access via the Internet

A selection of Tribunal decisions is also currently available on the Refugee Review Tribunal's World Wide Web site located at <http://www.rrt.gov.au>.

The web site also contains information about how to apply to the Tribunal, how the Tribunal is organised, the function of the Tribunal and what it aims to achieve, caseload statistics, as well as copies of this and previous RRT Bulletins.

The RRT web site is updated on a regular basis.

The Tribunal's Email address is: rrtinfo@rrt.gov.au

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