

# 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>
Afghanistan	2
Bangladesh	2
China	2
India	6
Nigeria	7
<b>High Court</b>	<b>8</b>
<i>NBGM v MIMA &amp; Anor</i>	8
<i>MIMIA v QAAH oF 2004 &amp; Anor</i>	9
<b>Federal Court</b>	<b>12</b>
<i>SZGLQ v MIMA</i>	12
<i>SZDDS v MIMA</i>	12
<i>SZGLL v MIMA</i>	13
<i>SZEES v MIMA</i>	14
<i>MIMA v MZXGJ</i>	15
<b>Federal Magistrates Court</b>	<b>16</b>
<i>MZXEE v MIMA &amp; Anor</i>	16
<i>SZIQD v MIMA &amp; Anor</i>	16
<b>Legislation Update</b>	<b>18</b>
<b>Caseload Overview</b>	<b>20</b>
<b>Accessing Tribunal Decisions</b>	<b>21</b>
<b>Index</b>	<b>22</b>

Issue No. 13/2006

11 December 2006

Editor:  
Laraine Roberts

Contributors:

Sean Baker  
Kate Buring  
Sue Burton  
Victoria Coleman  
David Corrigan  
Sobert Haddad  
Rey Hyland  
Kerry Ko  
Cameron McDonald  
Jacquelin Plummer  
Laraine Roberts  
Wan Shum  
Pallavi Sinha  
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)

# REFUGEE REVIEW TRIBUNAL DECISIONS

## Afghanistan

**060711410**  
**17 October 2006, Sydney**  
**Ms J Morris, Member**

**AFGHANISTAN - RACE - HAZARA - RELIGION - SHIA MUSLIM - POLITICAL OPINION - HEZBE WAHDAT (AKBARI) - FURTHER PROTECTION VISA** - The applicant feared persecution as a Hazara Shia who left his country in fear of being killed by the Taliban, who had taken his father away several years ago. He claimed that the Taliban came regularly to search the houses for weapons and they would take the man or the oldest boy away. The applicant also claimed that because his father had supported the Akbari faction of Hezbe Wahdat he feared the rival Khalili faction which still controlled his area. He claimed that the Khalili faction had attacked and looted the houses of many Akbari supporters and had targeted his own family. The applicant also claimed that in Australia he lived a completely different lifestyle involving education and exposure to alcohol. He mixed with women and did not attend the mosque regularly, nor did he pray. The applicant stated that people in Afghanistan were illiterate and as he had been to school he wanted to talk to them about religious freedom, because he now understood it.

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

The Tribunal noted that there was an intolerant attitude to secularisation in Afghanistan and that non-Islamic/secular conduct was not acceptable. It found that no steps had been taken towards the secularisation of Afghan society, that Islamic groups were in power and in specific areas people could be targeted if they transcended strongly the norms of society. The Tribunal was satisfied that should the applicant return he would face harm amounting to persecution for reason of his religion, namely that he had abandoned Islam and practised a secular lifestyle. It found that the police were not very effective in protecting people of the applicant's type and that relocation was not an option as the applicant's family had left the country and there was no evidence that he had any links or connections elsewhere in Afghanistan. Accordingly, the Tribunal was satisfied that the applicant's fear of persecution was well-founded.

## Bangladesh

**060684367**  
**17 October 2006, Sydney**  
**Ms P Leehy, Member**

**BANGLADESH - RELIGION - AHMADIYYA - VIOLENCE - THREATS** - The applicant feared persecution arising from his conversion to Ahmadiyya from the Sunni Muslim faith. He claimed that his family disowned him, his wife left him and he resigned from employment. He claimed to have regularly attended a local mosque where departing individuals received police protection from attacks by Sunnis. He also claimed that Sunni Muslims threatened him with death unless he reconverted, that he was attacked by Sunni extremists, released from hospital several days later and reported the incident to local police. He occasionally travelled outside Bangladesh for business and tourist purposes before arriving in Australia where he claimed to have attended a local mosque.

**Held:** Decision under review affirmed.

The Tribunal found the applicant's claim of serious harm by Sunnis to be confused, contradictory and unconvincing. The claim was rejected partly because the medical documents did not identify the circumstances

of the injury. The Tribunal found that his wife's separation and the harassment associated with attending mosques were insufficiently serious to amount to persecution. It was also implausible that the applicant would return to Bangladesh whilst fearing for his life. The Tribunal found the applicant had a superficial knowledge of Ahmadiyya, but was unaware of a visit by its worldwide spiritual leader and unable to evidence attendance at local mosques. It found that if the applicant was not a committed Ahmadi then he would not seek to practise. If he was committed, there was no indication that the lack of serious harm to date would change and the independent evidence suggested the availability of government protection. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

## **China**

**060564069**

**26 September 2006, Melbourne**

**Ms W Boddison, Member**

**CHINA - RACE - UIGHUR - POLITICAL OPINION - UIGHUR SEPARATIST** - The applicant feared persecution for reasons of his Uighur ethnicity and his imputed political opinion as a Uighur separatist. He claimed he had been discriminated against in obtaining employment and was dismissed from his job as a result of one of his siblings being imprisoned for participating in demonstrations. The applicant could only obtain employment in a very low position and, as a designated worker, he was not allowed to worship in the mosque. He claimed that the authorities wanted him to support the Chinese Communist Party and its ideology and forced him to participate in activities for eradicating religious ideas and beliefs. The applicant also claimed that another sibling who came to Australia was recognised as a refugee and became politically active. He claimed that since arriving in Australia he had been involved in standing up for a separate Uighur state. The applicant claimed the Chinese authorities were aware of his and his sibling's activities in Australia and he would face serious harm if he were to return to China.

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

The Tribunal accepted that the applicant had one sibling who was arrested for demonstrating and another sibling who was politically active in Australia. It also accepted that he would have been dismissed from his employment as a result of his sibling's activities and that as a designated worker he was prohibited from attending the mosque or participating in Uighur cultural activities. It found that the applicant had been politically active in Uighur cultural activities in Australia and found that the applicant's family's activities gave them an adverse profile in China. The Tribunal was satisfied there were significant ongoing human rights abuses against Uighurs in East Turkistan. It found there was a real chance that Chinese authorities knew of the involvement in Australia of the applicant and his sibling in cultural and political activities on behalf of the Uighur community. The Tribunal accepted that the applicant would be regarded as a separatist or even a terrorist and as a result would be subject to serious harm including arrest and detention accompanied by serious mistreatment and torture. As such it found that the applicant had a well-founded fear of persecution for a Convention reason.

**060341569**

**5 October 2006, Sydney**

**Ms P McIntosh, Member**

**CHINA - RELIGION - CHRISTIAN - ONE CHILD POLICY - THIRD PREGNANCY - ENFORCED STERILISATION** - The applicant feared persecution for having a third pregnancy and for her Christian beliefs. She claimed that she had been involved in underground church activities since the early 1990s. The applicant claimed that she was forced to have an abortion when a number of officers came to her home during her third pregnancy, which was in breach of the one child policy. She claimed that family planning authorities also mentioned her participation in an underground church. The applicant also claimed that she was informed by letters that she was to pay a fine and to have a sterilisation. She left China to avoid paying the fine. The applicant feared that if she returned she could be arrested for her failure to undergo sterilisation and for her underground church activities.

**Held:** Decision under review affirmed.

The Tribunal accepted the applicant's claims that she attended a local house church "now and then". It was satisfied that she did so because her siblings attended and not because she had any particular allegiance to that church or its teachings, or to the Christian religion generally. The Tribunal could not find the chance remote that the applicant would still face sterilisation and/or a considerable fine. However, it was not satisfied that the motivation could be found in a Convention ground. The Tribunal was satisfied that the authorities were applying a law of general application in forcing her to have her pregnancy terminated and in ordering her to undergo sterilisation. It found that the authorities were aware of the limited extent of the applicant's religious activities and had no adverse interest in her because of them. Accordingly, the Tribunal found that the applicant did not have a well-founded fear of persecution for a Convention reason.

**060673497**  
**12 October 2006, Sydney**  
**Mr S Roushan, Member**

**CHINA - RELIGION - PARTICULAR SOCIAL GROUP - POLITICAL OPINION - FALUN GONG - INTERROGATION - THREATS** - The applicant feared persecution as a result of her practice of Falun Gong. She claimed a friend introduced her to Falun Gong in 1999. The applicant claimed that she was confronted by police at a practice site and was taken in for questioning. She was interrogated about her practise of Falun Gong and was threatened there would be serious consequences for her and her family if she continued to practise. The applicant stated that she was released after several hours. She claimed she returned to the practice site once more but the police told her to leave. The applicant stated she continued to practise at home. Upon arriving in Australia, the applicant continued to practise in private, later attending a practice site and study classes. The applicant claimed if she returned to China, she would have no job and would be put into prison.

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

The Tribunal accepted the applicant's claims to have practised Falun Gong in China. It accepted she stopped practising in public after she was questioned and threatened by the authorities but continued to practise in private. The Tribunal was satisfied that her understanding of Falun Gong was the product of continued interest and commitment over a long period of time. It was satisfied that she continued to practise and study Falun Gong in Australia. The Tribunal accepted that the applicant would continue to practise Falun Gong discreetly if she returned to China and that she would modify her conduct out of fear of persecution. It was satisfied if she did not modify her conduct she faced a real chance of arrest, imprisonment and torture for her political opinion, religion or membership of a particular social group. Accordingly, the Tribunal found that the applicant's fear of persecution was well-founded.

**060658227**  
**14 October 2006, Sydney**  
**Mr G Short, Senior Member**

**CHINA - RELIGION - FALUN GONG** - The applicant feared persecution because he was a Falun Gong practitioner. He claimed he had begun practising Falun Gong in 1998 for health reasons and he read books, listened to audio tapes, and practised in a small park and at home. After Falun Gong was banned, he practised privately at home. The applicant claimed he was discriminated against at work as he was denied promotions and pay rises and was laid off because he was a practitioner. He found it difficult to get another job because employers were told not to employ him. The applicant claimed he was asked to write anti-Falun Gong articles, had his home searched, his property confiscated, was gaoled for six months and threatened that he would be gaoled for three years if he practised again. The applicant claimed he continued practising undetected until he left China and had practised privately and publicly in Australia.

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

The Tribunal found the applicant to be a credible witness and his claims were typical of accounts given by genuine Falun Gong practitioners. It found that the applicant was a genuine practitioner and that his conduct in practising Falun Gong in Australia has been otherwise than for the purpose of strengthening his claims to be a refugee. The Tribunal accepted the applicant's claim of what happened to him in China. It found that if the applicant returned to China now or in the reasonably foreseeable future he would wish to continue practising

Falun Gong. The Tribunal found there was a real chance that his continued practise would be detected and he would be detained and tortured for reasons of his beliefs. The persecution involved serious harm and the applicant's religion was the reason for the persecution he feared. Accordingly, the Tribunal found that he had a well-founded fear of persecution for reasons of his religion.

**060605964**  
**19 October 2006, Sydney**  
**Mr J Cipolla, Member**

**CHINA - RELIGION - CHRISTIAN** - The applicant feared persecution as a Christian who had organised Bible study classes. She claimed that initially she conducted the classes, which the government had threatened to ban, at her own home and later at the home of another member of the congregation. The applicant claimed that at one meeting she read the Gospel according to Matthew and interpreted the passage to mean the right of freedom of expression and freedom to elect government representatives. She claimed this interpretation was reported to the Government and when she was visited by the Public Security Bureau (PSB) she refused to withdraw her statement and was detained for a number of days. The applicant claimed that she continued her religious practice on release, that the discussions of the Bible study group were again reported to the authorities and she was again detained, questioned, beaten and humiliated. The applicant claimed she resolved to flee China due to concerns about her safety and departed illegally on a fraudulent passport.

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

The Tribunal found the applicant to be truthful and credible and accepted that she was a devout and practising Christian. It accepted that the applicant's interpretation of the gospel of Matthew brought her to the attention of the PSB, that this led to her detention in consecutive months and to her having to flee China on a falsely obtained travel document. The Tribunal found that because the applicant was targeted by the PSB, there was a real chance she would come to the adverse attention of the authorities due to her religious beliefs. The Tribunal found that the disparate and often harsh treatment measured out to adherents of unregistered religious groups in China amounted to persecution and was satisfied that the applicant was at risk of persecution due to her religious beliefs. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution for reasons of religion.

**060701642**  
**24 October 2006, Sydney**  
**Mr J Duignan, Member**

**CHINA - RELIGION - PARTICULAR SOCIAL GROUP - POLITICAL OPINION - FALUN GONG** - The applicant feared persecution arising from her family's association with Falun Gong. She claimed she began practising in the mid 1990s to help her health and marriage and this led to other family members taking an interest in Falun Gong. The applicant claimed she was detained for short periods in three different years and that two of her children were sentenced to much longer periods. She further claimed that one of her daughters was released from detention shortly before she and the applicant left China, but the other daughter remained in detention. The applicant admitted to having travelled outside China on two other occasions, but said she did not seek protection because her children were in prison in China and she thought she should return to support them. The applicant claimed she was able to obtain a passport before her daughters were detained so at that time she was not of interest to the authorities.

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

The Tribunal found the applicant had provided a consistent account of her practice of Falun Gong in China and Australia. It accepted as credible her explanation regarding her passport and found her account explained why she had not sought protection in other countries. The Tribunal accepted that the applicant was a Falun Gong practitioner and that she and her daughters were detained. It found her Falun Gong involvement in Australia was motivated by a genuine commitment to that philosophy. The Tribunal considered that the applicant's Falun Gong activities in Australia may have come to the attention of the Chinese authorities. It found that her departure from China with her daughter shortly after her release from detention and the fact that she still had one daughter in detention would make the applicant readily identifiable. It was satisfied the resulting harm would constitute persecution. The Tribunal found the Falun Gong movement was perceived as having religious qualities as the Chinese government had labelled it a cult. It also found it formed a particular social group and

that the anti-government view ascribed to the group by the authorities formed a political opinion imputed to the applicant. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution for a Convention reason.

## India

**060686032**

**26 September 2006, Sydney**

**Mr H Wyndham, Member**

**INDIA - PARTICULAR SOCIAL GROUP - MEMBERS OF BACKWARD CASTE - POLITICAL OPINION - TAMIL LIBERATION MOVEMENT - WITNESS TO MURDER** - The applicant claimed he was a member of a backward caste in Tamil Nadu who feared persecution from the Thevar community as the only witness to a murder. He had identified Thevar rebels to the police as the perpetrators of the murder and had been threatened and attacked by Thevar rebels who were seeking revenge. The applicant claimed that he had to move to various parts of India to avoid these people. He also claimed that he feared persecution because of his membership of the Tamil Liberation Movement. The applicant claimed that he had been detained and beaten by the police for this reason.

**Held:** Decision under review affirmed.

The Tribunal found that the applicant's claims and evidence had been contradictory and unconvincing. It noted that he had witnessed the murder in the early 1990s but did not leave India until many years later, during which he had been able to move around to different parts of India. The Tribunal was willing to accept that the applicant may have suffered one or more assaults over the years but was not satisfied that such assaults were for a Convention reason. It found the applicant's new claim that he suffered harm because of his membership of the Tamil Liberation Movement lacked credibility and did not accept it. The Tribunal accepted that caste problems occurred all over India but as the applicant failed to give evidence of suffering harm amounting to persecution, it gave no weight to this claim. Accordingly, it was satisfied that the applicant did not have a well-founded fear of persecution for a Convention reason.

**060731536**

**9 October 2006, Sydney**

**Ms K Raif, Member**

**INDIA - POLITICAL OPINION - COMMUNIST PARTY OF INDIA MARXIST** - The applicant feared persecution for reasons of his political opinion and his activities for the Communist Party of India Marxist (CPIM). The applicant claimed that he was involved in party operations and campaigns, that his opinion was sought when selecting candidates and that he had a good standing in the CPIM which led to him being a target for its opponents. The applicant later amended his claims and stated he was not a party member but had decorated halls and participated in campaigning and rallies when asked by party leaders. He also claimed that after the elections when the party gained power he had witnessed the murder of a friend who was a party leader. The applicant claimed he knew the identity of the murderers and would be persecuted by the Muslim League for that reason.

**Held:** Decision under review affirmed.

The Tribunal accepted that the applicant had participated in campaigns and rallies, but found he did this along with thousands of others. It accepted that he may have performed work for the CPIM but found that it would have been insignificant. The Tribunal found that such minor involvement would not render the applicant a target and there was no real chance he would be persecuted for a political opinion arising from such involvement or from membership of the CPIM. The Tribunal was not satisfied that if the applicant maintained the same level of activity with the party this would give rise to a real chance of persecution. It found the claim that the applicant had witnessed the murder of a party leader was not credible and did not accept that he would be targeted for that reason. Accordingly, the Tribunal found that the applicant did not have a well-founded fear of persecution for a Convention reason.

060480403  
13 October 2006, Melbourne  
Ms K Boland, Senior Member

**INDIA - RELIGION - SIKH - POLITICAL OPINION - ALL INDIA SIKH STUDENTS FEDERATION** - The applicant feared persecution as a Sikh from the Punjab who was a member of the All India Sikh Students Federation (AISSF). He claimed he had been a provincial president of the AISSF and was active in campaigning for Sikh rights in the early 1990s. The applicant also claimed he was a member of Akali Dal and that he had been attacked and injured by extremist members of the Congress Party. He claimed that when he lodged a complaint with police, the Congress Party members took revenge by smashing his windows and threatening family members. The applicant claimed that after a political assassination he, along with relatives, was taken into custody and tortured. The applicant claimed that when he returned to India after the Congress Party lost political power, members of the party dragged him from his house and beat him. He claimed that he feared members of the Congress Party, who were everywhere.

**Held:** Decision under review affirmed.

The Tribunal accepted the applicant's evidence about the nature and level of his involvement with the Khalistan movement. It accepted that he had been a member of Akali Dal and had been injured during attacks by extremist Congress Party workers. The Tribunal accepted that the applicant had been arrested along with his relatives who were active members and local office bearers of Akali Dal. It found that the applicant was released after several weeks due to lack of evidence but accepted that he was tortured during his detention. The Tribunal noted that there was a period of widespread violence in the Punjab which began in 1984, during which serious human rights violations occurred and Sikhs were persecuted. However, it did not accept that the applicant's activities during the period of the separatist movement resulted in him being suspected of terrorist activities and noted that he had not been involved in political activity since his departure ten years ago. The Tribunal found that he did not have a well-founded fear of persecution at that time. Accordingly, it was satisfied that the applicant would not face a real chance of serious harm if he returned.

## Nigeria

060668535  
25 October 2006, Sydney  
Ms S Zelinka, Member

**NIGERIA - RELIGION - CHRISTIAN CONVERT - JIHADISTS** - The applicant feared persecution as a result of Jihadists pursuing him at a relative's behest. He claimed that the relative, who was a Muslim, was angry that he had converted to Christianity and that he could no longer stay at this relative's house. He claimed that the Jihadists were capable of finding anyone in Nigeria no matter where one relocated. The applicant claimed that there were substantial communal riots between Muslims and Christians in his city during a specific year and that he had been targeted by Jihadists on a number of occasions. He stated that the Jihadists had not been able to locate him after he left his city as he had kept a low profile.

**Held:** Decision under review affirmed.

The Tribunal accepted that the applicant was a Christian convert and that his relative, in whose house he was living, was very upset when he discovered the fact of this conversion. The Tribunal found that the applicant left the city he lived in at a time of his own choosing and not because he was fleeing for his life. It noted that the applicant had continued living in Nigeria after leaving his city, except for short periods spent in two other countries, and had not been harmed by his relative or Jihadists at the behest of this relative. The Tribunal therefore found that there was only a remote chance of serious harm to the applicant from these parties in the reasonably foreseeable future. It was satisfied that it was reasonable for the applicant to return to Nigeria and relocate to another city or State. Accordingly, the Tribunal was not satisfied that the applicant's fear of persecution was well-founded.

## HIGH COURT JUDGMENTS

**NBGM v MIMA & Anor**

**[2006] HCA 54**

High Court of Australia, Gummow ACJ, Kirby, Callinan, Heydon, Crennan JJ, S145/2006, 15 November 2006

Immigration - Protection Visa application - where Statute requiring Minister to be satisfied Australia owes protection obligations to the applicant under Refugees Convention - applicant previously granted temporary protection visa for specified period - whether previous grant of temporary protection visa entitles applicant on application for a new visa to presumption of being owed protection obligations under Refugees Convention - construction of *Migration Act 1958* - construction of Refugees Convention.

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

The appellant, a national of Afghanistan and a Shi'a Muslim of Hazara ethnicity, had been granted a temporary protection visa as a refugee in March 2000. In affirming the decision to refuse to grant a further protection visa, the Tribunal did not accept there was a real chance that the appellant would be persecuted by remnants of the Taliban by reason of his being a Hazara and therefore found that Article 1C(5) of the Convention Relating to the Status of Refugees (the Convention) applied, as the circumstances in connection with which he had been recognised in Australia as a refugee had ceased to exist. The Tribunal made an alternate finding that s.36(3) of the *Migration Act 1958* (the Act) applied in relation to those circumstances. The Tribunal also found that the appellant did not have a well-founded fear of being persecuted by reason of additional matters raised for the first time at the hearing before it.

At first instance, Emmett J held that Articles 1A(2) and 1C(5) had some symmetry in their effect, and that it was open to the Tribunal, on the material before it, to conclude that the appellant, at the time of its decision, did not have a well-founded fear of persecution.

The appeal from the judgment of Emmett J was heard before a 5 member Full Court and dismissed by a 3-2 majority, although for differing reasons. Chief Justice Black & Mansfield J held that the Tribunal's correct application of s.36(3) of the Act provided an independent foundation for its decision and Stone J held that the Tribunal correctly applied Article 1C(5) of the Convention; however three of the five judges held that the Tribunal erred in its application of Article 1C(5).

The application for special leave was heard at the same time as the appeal in *MIMA v QAAH of 2004 & Anor* [2006] HCA 53 (*QAAH*) and raised similar questions for determination. The principal question before the High Court was whether an applicant for a further protection visa who has previously been recognised by Australia as a refugee is entitled, notwithstanding benign changes in the conditions of the country from which he has fled, to assert that he continues to be a person to whom Australia owes protection obligations. Other questions arose as to the proper construction of the Convention as received into Australian law in the Act and the nature and onus of proof in proceedings concerning refugees.

**Held:** per Gummow ACJ, Callinan, Heydon & Crennan JJ (Kirby J dissenting) appeal dismissed.

*per curiam:*

- (i) The outcome in *QAAH* controls the outcome in *NBGM*.

***On the interpretation of the Convention as received into Australian law***

*per Callinan, Heydon & Crennan JJ:*

- (ii) The first step is to ascertain, with precision, what the Australian law is, that is to say what and how much of an international instrument Australian law requires to be implemented, a process which will involve the ascertainment of the extent to which Australian law by constitutionally valid enactment adopts, qualifies or modifies the instrument. The subsequent step is the construction of so much only of the instrument, and any qualifications or modifications of it, as Australian law requires.

- (iii) The Convention does not provide any of the framework for the operation of the Act. The contrary is the case. That does not mean that the Convention, in and to the extent of its application to Australia, should be narrowly construed. It simply means that Australian law is determinative, and it is that which should be clearly ascertained before attention is turned to the Convention.

*per Kirby J (dissenting):*

- (iv) In the context of the Refugees Convention, through s.36 the Migration Act has transposed the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law. Obviously, the Act did not incorporate the Convention in its totality. But it did so for the purpose of giving meaning to the status of a person (a “refugee”), in respect of whom Australia has protection obligations. To that extent, the Act is the vehicle for fulfilling Australia’s obligations as a State party to the Convention and giving its provisions effect in this nation’s domestic law. That is why countless Australian courts faced with the interpretation of s.36 of the Act have proceeded directly to the Convention provisions concerning refugee status and interpreted them in accordance with the rules contained in the Vienna Convention on the Law of Treaties. This approach does not bypass Australian municipal law which has uncontested primacy in Australian courts. On the contrary, those courts have done what Australian law itself requires in defining the persons relevantly entitled (and not entitled) to protection as “refugees” under Australian law.

### ***Section 36 of the Act***

*per Gummow ACJ:*

- (v) There are various issues of construction of sub-ss. (3), (4) and (5) of s.36, some of which are referred to in *MIMIA v Al Khafaji* (2004) 219 CLR 664. These matters do not require determination for an outcome in the present appeal.

*per Callinan, Heydon & Crennan JJ:*

- (vi) Section 36 of the Act must be considered in context. The context is provided by other provisions of it. Some of those provisions, particularly the ones emphasised in *QAAH*, make it clear that the grant of a protection visa offers no promise or obligation to continue to afford protection or grant residence, whether permanent or otherwise, in the event that circumstances change.

### ***The Tribunal decision***

*per Kirby J (dissenting):*

- (vii) The Tribunal mistook its jurisdiction for the reasons given by Allsop J in his dissent in the Full Court.
- (viii) The Tribunal needs to be very sure before deciding that a “change of circumstances” has been established, warranting withdrawal of refugee status and the return of the appellant to his country of nationality. The correct standard for cessation of refugee status in accordance with Article 1C(5) obliges a clear conviction on the part of the Tribunal that a suggested change of circumstances has occurred that is “substantive, effective and durable”.

### **MIMIA v QAAH of 2004**

**[2006] HCA 53**

**High Court of Australia, Gummow ACJ, Kirby, Callinan, Heydon, Crennan JJ, B2/2006, 15 November 2006**

**Immigration - Protection Visa application - application for permanent protection visa - Statute requiring Minister to be satisfied Australia owes protection obligations to applicant under Refugees Convention - where applicant previously granted temporary protection visa for specified period - whether previous grant of temporary protection visa entitles applicant on application for a new visa to a presumption of being owed protection obligations under the Convention.**

This was an appeal from orders of the Full Federal Court that allowed an appeal from Dowsett J who had upheld a decision of the Refugee Review Tribunal (the Tribunal) that the respondent, a national of Afghanistan and a Shi’a Muslim of Hazara ethnicity, was no longer a person to whom Australia has protection obligations under the Refugees Convention (the Convention) for the purposes of s.36(2) of the *Migration Act* 1958 (the Act).

The respondent was granted a temporary protection visa in 2000 on the basis that he fell within the definition of “refugee” in Article 1A(2) of the Convention because he had “a real chance of being captured by the Taliban

and forced to fight or be killed by them". He subsequently applied for and was refused a further protection visa. In affirming the delegate's decision, the Tribunal found that the Taliban had been effectively dislodged from power and had ceased to be a coherent political movement, and that Article 1C(5) of the Convention applied. Article 1C(5) provides that the Convention shall cease to apply to any person falling under the terms of section A if "[h]e can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality". The Tribunal found further that the respondent did not have a real chance of being persecuted by other sources because of his ethnicity and religion and concluded that he did not have any well-founded fear of persecution.

The Full Court held that the appellant bore an onus of proving that the respondent was no longer a "refugee" for the purposes of the Act and that, in order to attract the operation of Article 1C(5) of the Convention, the appellant had to advance evidence demonstrating changes in circumstances which were substantial, effective and durable, or profound and durable and incompatible with a real chance of future persecution.

The principal question in the appeal was whether a person who has been granted a temporary protection visa is, on its expiry, and notwithstanding benign changes in the conditions of the country from which he fled, entitled under Australian law to assert that he continues to be a person to whom Australia has protection obligations. The Minister argued that there is a precise symmetry between the tests imposed by Articles 1A(2) and 1C(5) and that the test for both is whether the visa applicant has a well-founded fear of being persecuted for a Convention reason and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his or her country.

**Held: per Gummow ACJ, Callinan, Heydon & Crennan JJ (Kirby J dissenting) appeal allowed**

*per Gummow ACJ, Callinan, Heydon & Crennan JJ:*

- (ix) When the holder of a protection visa that has expired makes a fresh application for another protection visa, the relevant criterion for the grant of that visa at that time is that the applicant is a person to whom Australia *has* (not had) protection obligations under the Convention.
- (x) Whether under s.36(2) of the Act Australia has protection obligations depends upon whether a person satisfies the definition of a refugee in Article 1A of the Convention, in the context of other relevant articles.
- (xi) The Act does not pose the question whether, at the time of an application for a further protection visa, there have occurred in the applicant's country changes of a substantial, effective and durable kind. True it may be that if the non-citizen did, before entering Australia, suffer persecution or had a well-founded fear of it in that other country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will in all probability continue to be one to whom Australia owes protection obligations, but to hold that there was, in effect, an onus upon the appellant to establish the occurrence of substantial, effective and durable change, was to fail to give effect to the rule of Australian law that the proceedings under the Act in the Tribunal are not adversarial.
- (xii) The words of Article 1C(5) - "He can *no longer*", and "the circumstances ... *have ceased to exist*" - make it clear that the circumstances from time to time and not merely as a matter of history are the relevant circumstances, that is, that the "status" of a person permitted to reside in an asylum country may change as circumstances in the country which he has left change.
- (xiii) The cessation provision operates automatically according to its terms, and need not for its application be triggered by a request for a visa, although in practice such a request will ordinarily be the occasion for consideration of a person's right or otherwise to continuing protection. This is the operation that Article 1C(5) has, and is the work that it has to do and for which Article 1A does not make provision.
- (xiv) The Tribunal did not fail to make the inquiries which the Full Court said that it was bound, in the proper exercise of its jurisdiction, to make. The Tribunal did make findings with respect to Taliban activity generally in Afghanistan, what the future held in that regard, for example, sporadic but containable threats to security, and the applicant's susceptibility, if any, to threats from the Taliban and other sources.

*per Kirby J (dissenting):*

- (xv) The approach to the grant of “refugee” status under Article 1A(2) cannot “mirror” or be “symmetrical to” the approach to cessation of refugee status under Article 1C(5). Articles 1A(2) and 1C(5) contemplate two separate inquiries. The first involves a determination of an applicant’s “refugee” status. The question at that stage is whether or not the applicant is to be recognised as a refugee. Article 1C(5) adds an additional, distinct and subsequent process which presupposes that “recognition” as a refugee has already happened. At the time when cessation proceedings are commenced, a person who has previously been recognised as a “refugee” is still recognised as a refugee under the Convention. This is so whether or not he or she still has an Australian protection visa. Therefore, the answer to the question under Article 1A(2) of the Convention will necessarily be in the affirmative. Under the Convention, this fact can be displaced once an available ground of cessation is made out.
- (xvi) When the test in Article 1C(5) is applied, the decision-maker is obliged to consider whether any purported change in circumstances of the country of nationality is fundamental, stable and durable. Before cessation can be said to have occurred, conditions in the country of nationality must have changed in a significant and enduring way.

*per curiam:*

- (xvii) The Minister does not bear a legal burden of proving a requisite change in circumstances to attract Article 1C(5).

*per Gummow ACJ, Callinan, Heydon & Crennan JJ:*

The proceedings of the Tribunal are administrative in nature, or inquisitorial and there is an onus upon neither an applicant nor the Minister. It may be that the Minister will sometimes, perhaps often, have a greater capacity to ascertain and speak to conditions existing in another country, but that does not mean that the Minister is to bear a legal onus, just as, in those cases in which an applicant is the better informed, that applicant is not to be so burdened.

*per Kirby J:*

The Minister does not bear a legal burden of proving a requisite change in circumstances to attract Article 1C(5). However, as a matter of forensic practicalities, the Minister's officials will usually be obliged to furnish affirmative evidence of a propounded change.

*per Kirby J:*

- (xviii) The UNHCR Guidelines and Handbook constitute a useful source of expertise that can aid the interpretation of provisions in the Convention that are ambiguous or unclear. The Handbook, having been prepared by experts to “assist member States to carry out their obligations” under the Convention and Protocol, is available for use by any decision-maker considering whether a person is a “refugee”; or whether a person who has previously been recognised as a “refugee” has ceased to be one.

# FEDERAL COURT JUDGMENTS

**SZGLQ v MIMA**  
**[2006] FCA 1506**

**Federal Court of Australia, Gyles J, NSD 1275 of 2006, 1 November 2006**

**Immigration - Protection Visa application - failure of decision-maker to give appellants opportunity to comment on change of circumstances indicated by information obtained between hearing and decision - whether denial of procedural fairness.**

This was an appeal from a judgment of the Federal Magistrates Court dismissing the appellants' application for judicial review of a decision of the Refugee Review Tribunal that they were not persons to whom Australia had protection obligations.

The appellants' adviser made a significant written submission to the Tribunal dated 13 December 1993 and attached documents and press clippings to support the arguments advanced. The Tribunal, in its written decision statement (dated 28 June 1995), made reference in the "Claims and Evidence" section at one point to the primary application but made no reference to the adviser's submission or any of the later material provided by the adviser. The Tribunal did, however, refer to various items of independent information dated from 1994 and 1995, including information relating to a change of position in the country of origin, in rejecting the appellants' claims.

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

- (i) The Tribunal's failure to advert to the adviser's coherent and detailed submission and supporting material was so striking in this case as to amount to a failure to carry out the obligation to have regard to all of the information provided and to properly consider the application.
- (ii) There was a denial of common law procedural fairness as a result of the Tribunal's failure to disclose to the appellants independent information sourced by the Tribunal after the hearing and relied upon to affirm the decision under review. The material was crucial to the decision. Whilst the concepts in the material may have already been traversed by the material submitted by the adviser, it did relate to a later period and amounted to the reason why the applications failed.

**SZDDS v MIMA**  
**[2006] FCA 1428**

**Federal Court of Australia, Jessup J, NSD963 of 2006, 3 November 2006**

**Immigration - Protection Visa application - where appellant claimed former migration agent forced her to make false claims in protection visa application - appellant changed previous claims to fear of persecution for reason of membership of particular social group - Tribunal did not accept explanation for change - where this information not put to appellant in writing - whether breach of s.424A 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.

Three weeks prior to the hearing, the appellant, a national of Bangladesh, submitted to the Tribunal that her former migration agent forced her to complete her protection visa application with false statements. In a new statement to the Tribunal, the appellant changed her previous claims to fear of persecution for reason of her membership of a particular social group, being: "middle class Muslim separated women with children in Bangladesh who are widely known to have an extra-marital affair".

The Tribunal did not accept the appellant's explanation as to why she changed her story and her failure to mention in her protection visa application that her former migration agent was acting for her was a factor in that conclusion. This information was not put to the appellant for comment in writing. The Tribunal also made a finding that it was reasonable for the appellant to relocate within Bangladesh.

The tapes of the Tribunal hearing suggested that the appellant's adviser may have handed the Tribunal a copy of the original application for a protection visa, however a copy of the document that was handed over was not on the file.

The Federal Magistrates Court held that the Tribunal did not breach s.424A of the Migration Act 1958 (the Act) and dismissed the application.

Before the Federal Court, the Minister conceded that the omission from the appellant's protection visa application of any reference to the fact that she was being assisted by her former migration agent was "information" within the terms of s.424A(1) and was part of the reason why the Tribunal affirmed the delegate's decision. However, the Minister contended that the "information" had been re-submitted to the Tribunal when the appellant handed the original protection visa application over at the hearing. The Minister further contended that even if there had been a failure to comply with s.424A, the Tribunal's findings on relocation provided an independent ground for its decision to affirm the decision of the delegate.

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

- (i) The Tribunal failed to comply with s.424A of the Act and committed jurisdictional error.
- (ii) The Tribunal failed to provide the appellant with written notice of the "information" constituted by the absence of any reference in her protection visa application to the fact that her former migration agent was acting for her at the time.
- (iii) In the absence of better evidence as to what was handed to the Tribunal, it would not be safe to find not only that the applicant (through her adviser) handed a copy of her protection visa application to the Tribunal during the hearing, but also that it was identical in all relevant aspects to the application as originally filed.
- (iv) Furthermore, the circumstance which worked to the appellant's disadvantage was her failure to mention, on the original occasion, a fact on which she later sought to rely as justification for the terms of that application. That the information would have been apparent to a reader of the application when resupplied to the Tribunal at the hearing, was irrelevant to the significance of the information against the appellant's case. The mere adoption of the earlier information during the review process did not result in the information being comprehended by s.424A(3)(b).
- (v) The possibility cannot be excluded that the Tribunal's adverse findings as to the appellant's credibility had such an impact on its reception of her written and oral statements generally as to have caused it to discount heavily, her apprehensions concerning the treatment she would receive if she were obliged to live anywhere in Bangladesh. It cannot be concluded that the relocation finding was independent of the s.424A error and therefore there was no independent basis for decision.

**SZGLL v MIMA**  
**[2006] FCA 1507**

**Federal Court, Gyles J, NSD 1025 of 2006, 3 November 2006**

**Immigration - Protection Visa application - where breach of s.424A of *Migration Act* 1958 - Federal Magistrate dismissed application - where Federal Magistrate satisfied at least two reasons for decision not affected by breach - whether jurisdictional error.**

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 Minister conceded that there was a breach of s.424A of the *Migration Act* 1958 (the Act) by the Tribunal. The breach of s.424A related to the Tribunal's reliance on information from the Department's movement database as to the appellants' various visits to Australia. The Tribunal concluded, based on the movement records, that the appellants would not have voluntarily returned to Fiji (let alone repeatedly done so) if they had a well-founded fear of serious harm amounting to persecution for a Convention reason.

The Federal Magistrate dismissed the application as he was satisfied that at least two reasons for the decision were not affected in any way by the breach of s.424A of the Act.

The substantive matter in the appeal was a contention that the breach of s.424A should have led to the setting aside of the Tribunal's decision. The appellants contended that the s.424A breach was relevant to the Tribunal's findings that the incidents suffered by the appellants were not Convention related and in relation to the question of state protection. The appellants thus claimed that there was no basis for the Tribunal's decision which remained unaffected by the s.424A breach.

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

- (i) It cannot be said that there is any "independent and unimpeachable" basis for the Tribunal's decision, uninfected by any jurisdictional error under s.424A of the Act.
- (ii) The conclusions drawn from the movement records directly affected the assessment on the claims for protection which were made by the appellants as well as affecting credibility generally.
- (iii) The conclusions drawn from the movement records would plainly be relevant to the question of whether or not the incidents suffered by the appellants were for a Convention reason and to the issue of State protection.

**SZEES v MIMA**

**[2006] FCA 1545**

**Federal Court of Australia, Spender J, NSD 546 of 2006, 17 November 2006**

**Immigration - Protection Visa application - where claim made after Tribunal hearing of involvement with anti-government newspaper - Tribunal found newspaper had been defunct for some time - information not put to applicant - whether breach of s.424A of *Migration Act 1958*.**

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

The appellant, a Bangladeshi national, claimed to fear persecution for reason of his political opinion. Among other things, he claimed he would be targeted because he had been the News Editor of an anti-government Bangladeshi newspaper published in Sydney. The appellant made this claim in a post-hearing letter asserting that there had been insufficient time to make the claim during the hearing.

Independent investigations by the Tribunal set out in two file notes indicated that the newspaper had had little support and was defunct which did not indicate its former journalists were of interest in Bangladesh. In finding the appellant's claim to work for the newspaper, or if he did work for the newspaper his claim of persecution, was fabricated, the Tribunal found the submission was made post-hearing because the appellant had realised it viewed his original claims as questionable.

The appellant claimed for the first time before the Federal Court that the Tribunal had breached s.424A of the *Migration Act 1958* (the Act).

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

- (i) The Tribunal fell into jurisdictional error as the information obtained by the Tribunal from its own inquiries was not communicated to the appellant as required by s.424A. There was no evidence that there was any oral discussion of the information revealed in the file notes, and it was beyond argument that the information was never communicated in writing.
- (ii) The Tribunal did not reject the claim relating to the newspaper because it was made post-hearing. It did not accept that the claim was not made at hearing because of a lack of time and so found the appellant either fabricated the claim he worked for the paper or, if he did, fabricated the claim of persecution. However, the crucial finding concerning the claim of facing persecution was expressed in the passage containing the information that the paper "*appears to have had little support*" and "*has*

*been defunct for some time*'. This information was part of the reasons for concluding the applicant would not face persecution for having worked for the paper. It follows that part of the reason for rejection of the claim was the information obtained by the Tribunal and not communicated to the appellant as required by s.424A of the Act.

**MIMA v MZXGJ**  
**[2006] FCA 1594**

**Federal Court of Australia, Sundberg J, VID 923 of 2006, 24 November 2006**

**Immigration - Protection Visa application - whether Tribunal took into account irrelevant considerations - whether Tribunal erred in taking into account applicant's failure to raise fear of persecution in application under s.351 of *Migration Act* 1958.**

This was an appeal by the Minister for Immigration and Multicultural Affairs (the Minister) from a judgment of the Federal Magistrates Court quashing 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 national of China, claimed to fear persecution by Chinese authorities because of his practise of Falun Gong. The Tribunal had reservations about the strength of the respondent's convictions with respect to his practise of Falun Gong and found that he was not a witness of truth. In 1997 or 1998, the respondent had applied for a Subclass 850 – Resolution of Status (Temporary) visa which was subsequently refused by the Department and the Migration Review Tribunal. At the end of 2000, the respondent with the assistance of a migration agent asked the Minister to exercise his discretion under s.351 of the *Migration Act* 1958 (the Act). In that request, the respondent did not make any reference to practising Falun Gong. In May 2004, the Minister informed the respondent that he would not exercise his discretion. In finding that the respondent was not a witness of truth and was not a sincere Falun Gong practitioner, the Tribunal took into account the respondent's failure to mention his Falun Gong practice in his request under s.351 of the Act.

The Federal Magistrates Court held that this was an irrelevant factor and in taking it into account, the Tribunal committed a jurisdictional error because grounds relevant to a refugee claim were not relevant to the s.351 discretion.

On appeal to the Federal Court, the Minister contended that the s.351 discretion cannot be limited to consideration of matters that might be determined by the Migration Review Tribunal and must include matters that relate to an application for refugee status.

**Held: Appeal allowed.**

- (i) The respondent's failure to mention his Falun Gong practice in his request under s.351 of the Act was a matter the Tribunal was entitled to take into account and view with suspicion and in doing so, the Tribunal did not take into account an irrelevant consideration.
- (ii) The applicant's fear that if he were to return to China he would be harmed because of his practice of Falun Gong was relevant to the Minister's consideration of the respondent's s.351 request. The purpose and object of ss.351 and 417 of the Act must be the same: to enable compassionate and humanitarian relief to be granted. The public interest referred to in each section is a broad concept and there is no reason to confine the exercise of the power to ameliorate an applicant's position consequent on the denial of a visa by reference to matters relevant only to the granting or refusal of that visa.
- (iii) Where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard. A consideration will be irrelevant only if the applicable statute expressly or impliedly prohibits a Tribunal from taking it into account.

## FEDERAL MAGISTRATES COURT JUDGMENTS

### **MZXEE v MIMA & Anor**

**[2006] FMCA 1513**

**Federal Magistrates Court of Australia, Burchardt FM, MLG 1424 of 2005, 30 October 2006**

**Immigration - Protection Visa application - whether failure to address integers or elements of applicant's claims - whether Tribunal failed to have regard to factual materials before it - jurisdictional error.**

The applicant, a national of Iraq, 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 Tribunal found that the applicant did not have a well-founded fear of persecution because of his family's involvement with the British forces.

Counsel for the applicant submitted that the Tribunal had failed to address integers or elements of the applicant's claims which were set out in detailed submissions to the Tribunal including a claim that he was a member of a particular social group of "returnees from the west".

Counsel for the Minister argued that a passage in the Tribunal's decision: "Neither is there evidence that having spent a number of years in a western country would of itself cause problems", was sufficient in demonstrating that the Tribunal had addressed this issue.

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

- (i) The Tribunal did not turn its mind to the issue raised by the applicant, namely whether it would not be safe for him to return simply because of his years in the west. The only Tribunal sentence on the matter was set in a context wholly concerned with instances of conservative religious prejudices in Basra. The Tribunal fell into jurisdictional error as it considered this issue as a subset of the applicant's asserted difficulties arising out of his family's relationships and other matters.
- (ii) The Tribunal also failed to have regard, as it should have done, to the materials before it that dealt with country information going to the question of prejudice faced by returnees from the west generally.

### **SZIQD v MIMA & Anor**

**[2006] FMCA 1467**

**Federal Magistrates Court of Australia, Driver FM, SYG1028 of 2006, 19 October 2006**

**Immigration - Protection Visa application - where applicant making *sur place* claim - application of s.91R(3) of *Migration Act 1958* considered - whether breach of s.424A of *Migration Act 1958***

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

The applicant claimed in his protection visa application that he had previously been a member of the Chinese Communist Party (CCP) in China, but on arriving in Australia for a visit, he had seen the literature relating to how the Chinese authorities treated Falun Gong and democratic activists and had publicly renounced his affiliation with the CCP in Sydney's Chinatown. He feared that if he returned to China he would possibly be persecuted by the Chinese Government because of this public renunciation.

The Tribunal asked the applicant to summarise his fears of returning to China, and the applicant summarised his claims of renouncing the CCP publicly in Sydney. It explained the effect of s.91R(3) of the *Migration Act 1958* to the applicant and invited him to provide further details of his experiences in Sydney. The Tribunal found that the applicant's act was for the express purpose of not simply "strengthening" but actually establishing a basis upon which to claim refugee status. The Tribunal therefore disregarded the renunciation (pursuant to s.91R(3) of the Act) in assessing whether the applicant had a well-founded fear of persecution if he returned to China.

It was argued by the applicant's Counsel that the Tribunal was obliged, in the circumstances, to provide to the applicant information concerning the operation of s.91R(3) in writing. Counsel for the Minister contended that the information in the protection visa application was repeated orally at the hearing and therefore came within the exception in s.424A(3)(b) of the Act.

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

- (iii) The Tribunal failed to meet its obligations under s.424A and in doing so made a jurisdictional error.
- (iv) It is apparent from the decision and reasons that the Tribunal relied upon both the protection visa statement and the applicant's oral evidence. The protection visa statement alerted the Tribunal that s.91R(3) of the Act presented a potential obstacle to the applicant's claim. The Tribunal relied upon the applicant's protection visa statement to identify his relevant conduct in Australia and relied upon his oral evidence to confirm that there was no other basis upon which he claimed to be a refugee.
- (v) Although the applicant provided a short summary of the information in response to a general question from the Tribunal, it was not so detailed as to amount to a complete restatement of that information. Neither could it be said to be information volunteered "in chief". The information was given in response to a question from the Tribunal which was seeking to explore whether there were any alternative bases for the applicant's fear.
- (vi) Not only was the Tribunal obliged to give the applicant an opportunity to comment on the information in his protection visa statement, it was also obliged to explain why that information was significant to the outcome of the review – in this instance by explaining in writing the impact of s.91R(3) of the Act so as to give an effective opportunity for the applicant to comment.

*Obiter:*

- (vii) It is not clear whether s.91R(3) has any application in a case where the relevant conduct forms the sole basis of a claim for protection rather than being engaged in for the purposes of strengthening a claim for protection.

## 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/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>

#### **Migration Legislation Amendment (Duration of Detention) Bill 2006**

The *Migration Legislation Amendment (Duration of Detention) Bill 2006* was introduced as a private member's bill to the Parliament by Senator Bartlett on 9 November 2006.

The Bill seeks to introduce an Act to amend the *Migration Act 1958* to allow the issue of interim orders for the release of detainees, and for related purposes.

A copy of the bill can be found at:

[http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/5FE38BA30AE95782CA257228007649EC/\\$file/06166b.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/5FE38BA30AE95782CA257228007649EC/$file/06166b.pdf)

#### **Migration Legislation Amendment (Restoration of Fair Process) Bill 2006**

The *Migration Legislation Amendment (Restoration of Fair Process) Bill 2006* was introduced as a private member's bill to the Parliament by Senator Bartlett on 30 November 2006.

The Bill seeks to introduce an Act to remove the privative clause in 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/CF70E185E88C07F6CA25723B001E7E67/\\$file/06183b.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/CF70E185E88C07F6CA25723B001E7E67/$file/06183b.pdf)

# CASELOAD OVERVIEW

## RRT Decisions – November 2006

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	2	0	1	0	3
Albania	0	1	0	0	1
Algeria	0	1	0	0	1
Bahrain	2	1	0	0	3
Bangladesh	2	22	1	4	29
Burma (Myanmar)	7	0	0	0	7
Cameroon	1	0	0	0	1
Chile	0	3	0	0	3
China (PRC)	27	104	0	4	135
Cote D'Ivoire	1	0	0	0	1
East Timor	0	1	0	0	1
Egypt	4	0	0	0	4
Ethiopia	2	0	0	0	2
Fiji	0	3	0	0	3
Germany	0	2	0	0	2
Ghana	0	1	0	0	1
India	3	38	1	1	43
Indonesia	4	28	0	0	32
Iran	0	1	0	0	1
Iraq	1	0	0	0	1
Korea, Republic Of	0	7	0	0	7
Lebanon	0	5	0	0	5
Malaysia	1	8	0	0	9
Mongolia	1	0	0	0	1
Nepal	2	3	0	0	5
Nigeria	0	1	0	0	1
Pakistan	2	10	0	0	12
Peru	0	1	0	0	1
Philippines	0	2	1	0	3
Russian Federation	0	1	0	0	1
SriLanka	9	12	0	0	21
Syria	0	1	0	0	1
Taiwan	0	1	0	0	1
Thailand	2	0	0	0	2
Togo	0	1	0	0	1
Tonga	0	3	0	1	4
Turkey	0	1	0	0	1
Ukraine	0	2	0	0	2
United Kingdom	0	1	0	0	1
Vietnam	1	1	0	1	3
Zimbabwe	1	0	0	0	1

# ACCESSING TRIBUNAL DECISIONS

## Access on Tribunal Premises

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

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

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

## Access via the Internet

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

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

The RRT web site is updated on a regular basis.

The Tribunal's Email address is: [rrtinfo@rrt.gov.au](mailto:rrtinfo@rrt.gov.au)

# INDEX

Ahmadiyya (Bangladesh).....	2
All India Sikh Students Federation (India).....	7
Christian (China).....	5
Christian convert (Nigeria).....	7
Communist Party of India Marxist (India).....	6
Enforced sterilisation (China).....	3
Falun Gong (China).....	4
Further Protection Visa (Afghanistan).....	2
Hazara (India).....	2
Hezbe Wahdat (Akbari) (Afghanistan).....	2
Interrogation (China).....	4
Jihadists (Nigeria).....	7
One child policy (China).....	3
Particular social group “Falun Gong” (China).....	4
Particular social group “Members of backward caste” (India).....	6
Sikh (India).....	7
Tamil Liberation Movement (India).....	6
Threats (Bangladesh).....	2
Threats (China).....	4
Uighur separatist (China).....	3
Violence (Bangladesh).....	2
Witness to murder (India).....	6