

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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REFUGEE REVIEW TRIBUNAL DECISIONS

Afghanistan

060627969

30 October 2006, Sydney

Ms K Hartman, Member

AFGHANISTAN - RACE - HAZARA - RELIGION - SHIA MUSLIM - FURTHER PROTECTION VISA - The applicant had previously been recognised as a refugee in Australia on the basis of circumstances then prevailing. He now claimed that one relative who had been an employee of the communist government was branded by locals as a communist sympathiser and his relatives had all fled to another country. The applicant claimed he did not feel safe from the hostile Pashtuns and Tajiks who were aware of his relative's former employment. He also claimed that although the Taliban had been officially removed from power, they were still operating in parts of the country. The applicant claimed that if he returned to any part of Afghanistan people would find him and he would be killed because of his family connection.

Held: Decision under review set aside.

The Tribunal noted that there had been no improvement in the security situation for Hazaras, who were under-represented in the armed forces and the police. It further noted that Hazaras would be very vulnerable in Kabul. The Tribunal found that although the Taliban were no longer in power, the deterioration in the security situation as a result of the recent upsurge in violence meant that there had not been a substantial and durable change in relation to the ways Hazaras were treated. The Tribunal found that there remained an absence of effective protection for Hazaras and was therefore satisfied that the applicant continued to have a well-founded fear of persecution for reason of his ethnicity.

China

060656066

31 October 2006, Sydney

Ms D Barnetson, Member

CHINA - POLITICAL OPINION - CHINESE DEMOCRATIC PARTY - ACTIVIST - The applicant feared persecution arising from his involvement with the Chinese Democratic Party (CDP). He claimed that he participated in anti-government protests in support of the protests in Tiannamen Square in the late 1980s then fled his home and lived in a remote village for several years to avoid being arrested by the authorities. The applicant claimed that he became a member of the CDP in the 1990s and had actively promoted the party's ideas and recruited several members. He also claimed that he was active in arranging local activities in support of a memorial in Hong Kong to commemorate the events in Tiannamen Square. The applicant claimed that the authorities accused him of being a leader of the party, searched his home and arrested his friends.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was forced to flee his home in the late 1980s because of his involvement in the CDP and the support it gave to the protests in Tiannamen Square. It also accepted that he lived in a remote village for several years in order to escape apprehension by the authorities. The Tribunal found that the applicant was active in arranging support for the Hong Kong commemoration and that the authorities were pursuing him as a result. Relying on independent information that members of the CDP who came to the attention of the authorities could face serious harm amounting to persecution, it found that should the applicant return to China in the foreseeable future, there was a real chance that he would suffer incarceration and other punishment because of his involvement in the CDP. Accordingly, it found that the applicant's fear of persecution was well-founded.

060661382
31 October 2006, Sydney
Ms L Symons, Member

CHINA - RELIGION - FALUN GONG - DETENTION - The applicant feared persecution because he was a Falun Gong practitioner. He claimed that he was introduced to Falun Gong by a friend and continued practising in secret after it was banned by the government in 1999. The applicant claimed he organised a group of several friends to practise at his home. He claimed to have attended a protest in a large city and to have been forced to attend "brain wash" classes as a consequence. The applicant claimed that leaflets about the suppression of Falun Gong were found in the building where he lived and he was arrested and detained for many days. At the detention centre he was kept awake for questioning and forced to write a "remorseful letter". The applicant claimed he was kept under surveillance by the neighbourhood committee and Public Security Bureau and that he had continued his Falun Gong practice since arriving in Australia.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness and accepted that his claims were consistent with the independent evidence available to the Tribunal. It found that the applicant was a genuine Falun Gong practitioner and that his conduct in practising Falun Gong in Australia had been otherwise than for the purpose of strengthening his claim to be a refugee. The Tribunal found that the persecution which the applicant feared involved serious harm and systematic and discriminatory conduct. It further found that the applicant's religion was the reason for the persecution which he feared. The Tribunal accepted that if he returned he would wish to continue practising Falun Gong. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution for reason of his religion if he returned to China now or in the reasonably foreseeable future.

060425045
15 November 2006, Sydney
Mr S Roushan, Member

CHINA - RELIGION - CHRISTIAN - TEACHER - UNDERGROUND CHURCH - The applicant, who was a teacher, feared persecution arising from her involvement with the underground church. She claimed that when a student terminated her school studies, she visited her at home and found that the mother had been detained for her involvement in an underground church. The applicant claimed that she learnt the student was taking care of her grandmother and decided to teach her at home. She claimed that she became a Christian and helped the underground church to set up a school for children from Christian families who were barred from normal schools. The applicant claimed that as a result she was warned twice and then detained for a month for "brain-washing". She claimed that the church helped her to obtain a false passport to leave the country.

Held: Decision under review set aside.

The Tribunal accepted that the applicant took the initiative to privately tutor a Christian and that the student's mother had been detained for her involvement with underground church activities. It accepted that the applicant was introduced to Christianity and began teaching other children from Christian families. The Tribunal accepted that the authorities discovered she had provided private lessons to Christian children and after being warned, she was detained for one month and mistreated. It accepted that this amounted to serious harm for the reason of her religion. The Tribunal found that the applicant's departure on a fraudulent passport and her acceptance of the risks of illegal departure was indicative of her fear of harm. It accepted that the applicant would continue to be involved with Christianity if she returned. The Tribunal found that members of some unregistered groups were subjected to intimidation, harassment and detention. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

India

060465909

21 November 2006, Sydney

Ms S Pinto, Member

INDIA - THREATS - FRAUD - MAFIA GROUP - The applicant feared persecution from a mafia group with which his relative was associated. He claimed that after the relative lost money in his own business due to his gambling and drinking, he joined the applicant's business. The applicant claimed that after a year he realised that his business was having problems due to his relative's gambling. He claimed that he had no money to pay his workers and asked his relative to leave the business. The relative refused and his friends, who were part of the mafia group, went to the business premises every day to drink and gamble. The applicant claimed he was told by the mafia group he would have to repay the business bank loan with the sale of his house. He claimed he was threatened and hit when he went to the premises. The applicant claimed he lost everything and that when he made a report to the police they did nothing to help.

Held: Decision under review affirmed.

The Tribunal accepted the applicant's claims but found the evidence did not establish that the relative and his friends were seeking to harm the applicant for any Convention reasons. Rather, the evidence established that they were motivated by financial gain and, in his relative's case, as a result of financial losses he incurred due to gambling, drinking and failed business ventures. The Tribunal accepted that the applicant was physically harmed and sustained injuries. However, it was not satisfied that the harm suffered was anything other than part of the dispute between himself and his relative and friends and their desire to continue occupying the business premises for their personal use and financial gain. The Tribunal was not satisfied that the applicant had suffered serious harm for a Convention reason nor that he would suffer such harm in the future. It found that inefficiency and corruption were the reasons for the police not making any attempt to resolve the situation and was not satisfied that the failure was motivated by a Convention reason. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

060813394

21 November 2006, Sydney

Mr S Roushan, Member

INDIA - PARTICULAR SOCIAL GROUP - HOMOSEXUALS - VIOLENCE - STATE PROTECTION - The applicant feared persecution as a practising homosexual who feared persecution by the authorities as well as the general population. He claimed that at school he became friendly with another male student and that they commenced a sexual relationship. The applicant claimed that this was discovered and he was detained for several days by the police. He claimed that he commenced college and discovered that the same student had also been sent there. He claimed that they resumed their relationship which was again discovered and he was expelled and falsely accused of theft. The applicant claimed he was again arrested and severely beaten. He also claimed that when he returned home he was stabbed in the street by a group of boys for reason of his sexuality.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a practising homosexual and that homosexuals in India formed a particular social group. It was satisfied that after his relationship with the other student was discovered, the applicant was subjected to harassment and verbal abuse by people in his area. However, the Tribunal was not satisfied that this constituted persecution. Nor was it satisfied that his expulsion from college amounted to persecution. The Tribunal was not satisfied that the stabbing was for reason of his membership of a particular social group. It accepted that the applicant was arrested on two separate occasions at the instigation of the parents of the other student and was seriously mistreated. The Tribunal noted that homosexuals in India faced harassment, violence, extortion and physical and sexual abuse. It found that if the applicant sought to express his sexuality, there was a real chance he would face persecution for reason of his membership of the particular social group of homosexuals. Accordingly, the Tribunal was satisfied that the applicant's fear of persecution was well-founded.

 **Iraq**

060662741

8 November 2006, Melbourne

Mr P Fisher, Member

IRAQ - RELIGION - CHALDEAN CHRISTIAN - PROPERTY DISPUTE - STATE PROTECTION - The applicant feared persecution as a Chaldean Christian. He stated that he initially travelled to Australia for a reason unrelated to any problems in Iraq. He claimed that subsequently his sibling and child in Iraq had accompanied a person to whom he had previously sold land, to survey the boundaries of the property. The neighbour to the land, who was an influential member of the Kurdistan Democratic Party (KDP), confronted the group and a dispute arose resulting in the neighbour's relative being killed. The applicant was fearful that he would be killed in retribution by the neighbour or by members of the same tribe. The applicant also claimed that he was unwilling to seek the protection of the authorities as they would not be able to protect him, partly because he was in dispute with a person who was a KDP militant, and partly because of his own Christianity.

Held: Decision under review set aside.

The Tribunal accepted that the applicant and his family were Chaldean Christians. It found they were targeted because the applicant was held responsible for the property dispute which led to the death of his former neighbour's relative. However, The Tribunal found that the reason for the harm the applicant feared from his neighbour was not a Convention ground. Nevertheless, it found that the applicant's unwillingness to seek the protection of the authorities was justifiable because he was in dispute with a Kurdish militant who was a part of the government apparatus in the Kurdish controlled region. The Tribunal noted that the independent information indicated the authorities discriminated against Christians. It found that the authorities would be unwilling to provide protection to the applicant for reason of his Christianity and/or his imputed anti-KDP political opinion. Accordingly, the Tribunal found that he faced a real chance of persecution for those reasons.

 **Nepal**

060539231

18 September 2006, Sydney

Prof S Blay, Member

NEPAL - POLITICAL OPINION - MAOISTS - RELIGION - CHRISTIAN - The applicant feared persecution as a Christian who had been accused of preaching Christianity in the area under the command of Maoist rebels. He claimed that he was accused by Maoist rebels of preaching Christianity in the area under their command without authority. The applicant was beaten and made to join the Maoists but he managed to escape in the night to his hometown. He claimed that he sought refuge in a city, where he later received information from his mother that Maoists had come to her house to demand that he should join their ranks. The applicant feared that on his return to Nepal, the Maoist forces would attack him and punish him for deserting their ranks.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a Christian and that it was probable he may have engaged in Christian activities and incurred the displeasure of Maoist commanders in the area. However, it rejected his claims that the Maoists were looking for him and were likely to punish him unless he joined their ranks, and was not satisfied that he was of adverse interest to the Maoist rebels. The Tribunal accepted that the applicant may have been attacked while preaching. It noted that while the Nepalese Constitution's prohibition on proselytising had an element of a law of general application, it was unduly geared against Christians and any other religion that engaged in proselytising, whilst exempting the dominant Hindu religion, in which the concept of proselytising was unknown. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

Occupied Palestinian Territory

060793720

21 November 2006, Sydney

Mr A Jacovides, Member

OCCUPIED PALESTINIAN TERRITORY - POLITICAL OPINION - ISRAELI COLLABORATOR - The applicant feared persecution as a Palestinian who had lived and worked illegally in Israel for a number of years. He claimed he fled the Occupied Territories after his best friend was killed for being a collaborator. The applicant claimed that he and his friend had spent considerable time together and that after his murder he was also accused of collaborating with the Israeli authorities. He claimed that after he received a summons to attend a police station he fled to Israel where he lived discreetly. The applicant claimed that more notices were received and if he had responded he would have been killed by Hamas or other extremists who considered him a traitor. He claimed that political extremists had killed Palestinians because of mere suspicion or gossip that they were collaborators. The applicant also claimed that he would not have access to protection by the state.

Held: Decision under review set aside.

The Tribunal found that there were widespread human rights abuses in the Occupied Territories and accepted that persons suspected of being collaborators or informers for Israel were at risk of serious harm by Hamas and other similar groups which had considerable power. The Tribunal also accepted the applicant's claim that the authorities were either unable or unwilling to provide meaningful protection to Palestinians suspected of being collaborators or informers. It accepted the applicant's claim that he would be at risk of serious harm in the Occupied Territories from Hamas and other groups because he was suspected of collaborating with the Israeli authorities. The Tribunal found that the applicant would not have access to meaningful protection by the state and would not be given an opportunity to defend himself. The Tribunal was satisfied that the applicant did not have the right to return to or live in Israel and found that he had a well-founded fear of persecution in Israel and the Occupied Territories for reasons of imputed political opinion.

Sri Lanka

060613994

4 October 2006, Sydney

Ms A Younes, Member

SRI LANKA - RACE - TAMIL - POLITICAL OPINION - ANTI-LIBERATION TIGERS OF TAMIL EELAM - The applicant feared persecution on the basis of her Tamil ethnicity and an imputed political opinion. She claimed that her brother was affiliated with the Eelam People's Revolutionary Liberation Front (EPRLF), the Indian Peace-Keeping Forces (IPKF) and the Tamil United Liberation Front (TULF) and that he and his wife were killed by the Liberation Tigers of Tamil Eelam (LTTE). The applicant claimed that following her brother's death the LTTE attempted to extort money from her in compensation for his active campaigns against them and threatened to kill her. She claimed that after her husband's death she paid the LTTE but they continued to approach her for money and accused her of supporting the EPRLF. The applicant further claimed the EPRLF persecuted her and approached her to join their party. She feared that if she returned, the LTTE would be angry with her for failing to pay a large sum of money they had asked for. The applicant claimed she would be particularly vulnerable as an elderly woman without relatives in Sri Lanka.

Held: Decision under review set aside.

The Tribunal accepted the applicant's claims as being plausible. It was satisfied the harassment by the EPRLF and the LTTE, as well as the extortion, amounted to serious harm. The Tribunal was not satisfied that being Tamil alone was sufficient to constitute a real chance of persecution but found that in consideration of the evidence as a whole, including independent information, the applicant had suffered serious harm. The Tribunal was satisfied that, as a result of her brother's affiliations, the applicant was perceived to have pro-TULF, IPKF and EPRLF political opinions as well as an imputed anti-LTTE political opinion. It found the serious harm was

related to her ethnicity and her imputed political opinion. It further found that her age meant there was a real chance that any form of harm by the LTTE and/or any other group would result in her suffering serious harm. Further, it found there was a real chance of such harm occurring in the reasonably foreseeable future. The Tribunal found that the applicant would not receive adequate state protection and that relocation was not reasonable in the circumstances. Accordingly, the Tribunal was satisfied that she had a well-founded fear of persecution.

060409776

31 October 2006, Sydney
Mr R Derewlany, Member

SRI LANKA - RACE - TAMIL - POLITICAL OPINION - LIBERATION TIGERS OF TAMIL EELAM - The applicant feared persecution as a Tamil regarded by the police and the Eelam People's Democratic Party (EPDP) as a supporter of the Liberation Tigers of Tamil Eelam (LTTE). He claimed that he had been approached by the LTTE in the 1990s to join the movement and provide assistance and was told that if he did not assist he would be considered a traitor. The applicant claimed that when he was later approached by the LTTE to provide accommodation in the shop he worked in he tried to refuse as the EPDP had warned him against such involvement. He claimed he was threatened by the LTTE and several people arrived the following day and stayed in his shop. The applicant claimed that he was questioned regarding these people by the police who had suspicions that he was involved with the LTTE. He claimed that following these incidents he was questioned and detained by the EPDP but managed to escape. The applicant stated that as a result of what had occurred prior to leaving Sri Lanka, he felt his life was in danger.

Held: Decision under review set aside.

The Tribunal was satisfied that the applicant had presented a true account of his circumstances. It was satisfied that if the applicant returned to Sri Lanka, there was a real chance he would face serious harm by the EPDP and/or the police and that the reasons would be his Tamil race and an imputed political opinion of being an LTTE supporter. The Tribunal was further satisfied on the basis of independent information that the State had not been willing or able to adequately protect Tamils against such abuses. The Tribunal also found there was a real chance that the applicant would be subject to continuing and increased pressure to provide assistance to the LTTE. It was satisfied that if the applicant refused to comply with these demands, he would be regarded as being anti-LTTE and would suffer serious harm as a result. Accordingly, the Tribunal was satisfied that his fear of persecution was well-founded.



Taiwan

060585246

30 October 2006, Sydney
Mr L Hardy, Member

TAIWAN - POLITICAL OPINION - CONSCIENTIOUS OBJECTOR - ALTERNATIVE MILITARY SERVICE - The applicant feared persecution on the basis of a conscientious objection to performing national military service. He claimed that as a result he would be imputed as having a dissident political opinion. The applicant claimed a lack of fluency in Mandarin and unfamiliarity with Taiwan having lived in an English speaking environment for many years. He claimed that he would feel compelled to evade the alternative civilian service for conscientious objectors and argued that this option was discriminatory as it was for a longer term. The applicant claimed that this was intended to punish conscientious objectors. He also claimed that he would be ridiculed by other recruits as a foreigner.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant's reintegration would be difficult and that he may suffer marginalisation or discrimination. However, it found that laws providing for compulsory military service did not amount to persecution because they were generally applicable and achieved a legitimate national objective. The applicant's claim that he would be bullied in the armed services as a "returning overseas Chinese" was purely speculative. Furthermore, the Tribunal found there was no evidence that the applicant would have a political profile in Taiwan. Although evidence of a genuine conscientious objection was very thin, the Tribunal

was satisfied that conscientious objectors in Taiwan were all treated substantially the same. It also found that the longer period of alternative service for conscientious objectors, although discriminatory, was not intended as a form of punishment and would not entail any harm to the applicant. Accordingly, his fear of persecution was not well-founded.

HIGH COURT JUDGMENTS

STCB v MIMIA & Anor

[2006] HCA 61

High Court of Australia, Gleeson CJ, Gummow, Kirby, Callinan, Heydon JJ, A5/2006, 14 December 2006

Immigration - Protection Visa application - where fear of persecution for reason of membership of particular social group - family - fear of persecution because of family involvement in blood feud - whether decisionmaker required by s.91S of *Migration Act 1958* to disregard fear of persecution - Albanian citizens subject to customary law - whether a "particular social group".

This was an appeal from a decision of the Full Federal Court that dismissed an appeal from a judgment of Finn J who 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 Tribunal accepted that the appellant, a citizen of Albania, was a member of a family involved in a blood feud because the appellant's grandfather killed a member of another family. The Tribunal considered that s.91S of the *Migration Act 1958* (the Act) required it to disregard the appellant's fear of persecution because of membership of the family because it arose from his being a relative of a person targeted for a non-Convention reason. The Tribunal found that the potential social group of "Albanian citizens who are subject to the *Kanun* includes men, women and children who live in urban areas and those who live in rural areas, people who are wealthy and people who are poor, those who are well-educated and have good jobs and those who have neither" and that "such a heterogeneous group of people could [not] sensibly be said to be united, cognisable or distinguished from the rest of Albanian society".

The appellant made the same contentions before the High Court as were made to the Full Federal Court. He contended that the Tribunal erred by failing to consider and make findings in relation to each aspect of s.91S of the Act and also in applying an incorrect test for identifying a particular social group, in that it failed to consider the subjective perceptions held by the Albanian community in relation to the particular social group of "Albanian citizens subject to the *Kanun*". The appellant contended the Full Federal Court had attempted to remedy defects in the Tribunal's decision as to s.91S by constructing its own findings of fact to fill the vacuum.

Held: per Gleeson CJ, Gummow, Callinan & Heydon JJ (Kirby J dissenting) appeal dismissed

Analysis of s.91S of the Act

per Gleeson CJ, Gummow, Callinan & Heydon JJ, Kirby J agreeing

- (i) Section 91S of the Act required the Tribunal to consider each of the questions posed by s.91S(a) and (b) before determining that it could disregard the appellant's fear of persecution in this case. The Tribunal did this to the extent necessary.
- (ii) The relevant finding was that the reason for the persecution was not just "revenge" but "revenge for a criminal act". While some types of revenge may be motivated by Convention reasons, the Tribunal did not deflect itself from inquiring whether revenge for the grandfather's criminal act was within Art IA(2) of the Refugees Convention: it explicitly and correctly found that it was not.
- (iii) Revenge was sought because of the appellant's family relationship with the grandfather, whose crime triggered the other family's desire for revenge. *MIMA v Sarrazola (No.2)* (2001) 107 FCR 184 held that a family was capable of constituting a particular social group, and s.91S of the Act preserves that possibility. However, s.91S reverses another aspect of that case so far as it permitted claims of persecution by one family member deriving from persecution of another family member for non-Convention reasons.
- (iv) The Tribunal's conclusions about s.91S(a) meant that the answers to the s.91S(b) issues were inevitably adverse to the appellant. The want of express consideration of s.91S(b) was therefore not a sign of any jurisdictional error.

Particular Social Group

per Gleeson CJ, Gummow, Callinan & Heydon JJ, Kirby J dissenting

- (v) So far as the Kanun is a source of customary law binding on all Albanian citizens in a particular area, the appellant failed to demonstrate that the third element of the test stated by Gleeson CJ, Gummow and Kirby JJ in *Applicant S v MIMA* (2004) 217 CLR 387 at [36], that the characteristic distinguishes the group from society at large, was satisfied. The failure of the group relied on by the appellant to comply with this third requirement is not one which could have been overcome by inquiry into the subjective perceptions of Albanian society. The nature of the appellant's claims in these proceedings made the inquiry irrelevant. Criticism of the Tribunal was misplaced in view of the fact that no request was made to it to consider the subjective perceptions of Albanian society and in view of the apparent absence of materials which might have been used as an aid in doing so.

Per Kirby J (dissenting)

- (vi) The Tribunal misdirected itself by its reference to irrelevant considerations. It is not a requirement of a particular social group that the group must: be of modest numbers; be of non-heterogeneous composition; be united; and be clearly cognisable or distinguished as such from the rest of society.
- (vii) The reasoning in *MIMA v Khawar* (2002) 210 CLR 1 (*Khawar*) is directly relevant in this case. There are important factual similarities between the categories of women accepted in *Khawar* as potentially constituting a particular social group and the persons in the sub-class of the Albanian population to which the appellant belonged. Each was a member of a large and disparate group in society. Each, by reason of cultural norms, was commonly confined to the home. Each was oppressed by behavioural features of the society which constituted an affront to fundamental human dignity and human rights. Each was at risk of losing life itself and each was unable to look to the authorities for effective and reasonable protection from non-state agents.
- (viii) It would not be futile to return the matter to the Tribunal. On the basis of the country information there is evidence to support common characteristics or attributes of the posited group. It would also be open to the Tribunal to conclude that the appellant had established persecution. The level of protection that can be expected of a putative refugee's country of nationality is that which affords a "practical standard, which takes proper account of the duty which the state owes to all its own nationals": *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 500. As in *Khawar* the authorities are unwilling, or at least unable, to intervene.

VBAO v MIMIA & Anor

[2006] HCA 60

High Court of Australia, Gleeson CJ, Gummow, Kirby, Callinan, Heydon JJ, M81/2006, 14 December 2006

Immigration - Protection Visa application - well-founded fear of persecution - s.91R(1) of *Migration Act* 1958 required that persecution involve "serious harm to the person" - serious harm defined to include "threats to person's life or liberty" - whether threat referred to likelihood of death or deprivation of liberty - whether threat referred to communication of intention to kill or deprive of liberty - whether expression of intention to harm sufficient to constitute "serious harm".

This judgment concerned an appeal from a judgment of the Federal Court (appellate jurisdiction) that allowed an appeal from a judgment of Walters FM setting aside a decision of the Refugee Review Tribunal that the appellant was not a person to whom Australia had protection obligations.

The appellant, a national of Sri Lanka, claimed to fear persecution for reasons of his political opinion. In particular, he claimed that he was a member of a political party and had attended and performed at rallies and that he had subsequently been harassed and received threatening telephone calls and letters from members of a rival political party. The Tribunal was prepared to accept that the appellant might have received intimidating and threatening telephone calls and letters but did not accept that this involved serious harm amounting to persecution. The Tribunal also did not accept that the appellant had any active involvement in politics outside election campaigns or that he had any practical involvement with organisational aspects of the political party to which he claimed to belong.

The Federal Magistrate found that the Tribunal had accepted that the appellant "had received threats to his life" and that "prima facie" such threats must comprise instances of serious harm having regard to s.91R(2)(a) and s.91R(1)(b) of the *Migration Act* 1958 (the Act). The Federal Magistrate held that the Tribunal had failed to properly assess the appellant's claims and correctly apply s.91R and thereby fell into jurisdictional error.

On appeal to the Federal Court, Marshall J held that the Tribunal had correctly applied s.91R of the Act and that the Federal Magistrate erred. Justice Marshall held that the correct interpretation of the word “threat” in s.91R(2)(a), applying principles of statutory interpretation, must connote “risk” in the sense of danger or hazard, in line with the submissions made on behalf of the Minister.

Argument before the High Court again centred on the proper construction of the phrase “threat to ... life or liberty” in s.91R(2)(a) of the Act.

Held: *per curiam* appeal dismissed.

per Callinan and Heydon JJ (Gleeson CJ, Kirby & Gummow JJ agreeing):

(i) The Federal Magistrate proceeded upon a misconception. The Tribunal did not make findings of fact favourable to the appellant calling for the application of s.91R(2)(a) of the Act. The Tribunal used only provisional language – language of assumption or hypothesis, not belief – about the facts to which s.91R(2)(a) might be applicable had the appellant’s assertions been believed. As there was no factual foundation for a claim of persecution for a Convention reason, there was no occasion for consideration of the meaning of s.91R(2)(a) by the Federal Magistrate.

Obiter:

Gleeson CJ & Kirby J:

(ii) The immediate and wider context of s.91R(2)(a) of the Act make it plain that “threat” is used to mean a likelihood of harm rather than a communication of an intention to harm. A past communication of an intention to harm a person may, or may not, be some evidence that there is a likelihood of future harm to the person’s life or liberty, but the question for the decision-maker is whether there is such a likelihood. The decision-maker is required to decide the risk of future harm not the risk of future communications.

Gummow J:

(iii) The six pars (a)-(f) of s.91R(2) of the Act should be considered together; they take their colour from the specification of “serious harm” in the opening words of the sub-section. The term “significant” qualifies the physical harassment, physical ill-treatment and economic hardship spoken of in pars (b), (c) & (d). The consequence of an action or state of affairs spoken of in pars (d),(e) & (f) must be one which “threatens the person’s capacity to subsist”. This reading of the whole of the text of s.91R(2) suggests that no less an element of comparable gravity is involved in the stipulation of a threat to the life or liberty of the person in question. More is required than a possibility which is capable of instilling a fear of danger to life and liberty.

per Callinan and Heydon JJ:

(iv) Neither the Convention nor s.91R can be read as if a threat of sufficient gravity which has passed, has not been renewed or revived, and is unlikely to be renewed or revived for a Convention reason, will suffice to give rise to the requisite well-founded fear. The Federal Magistrate erred in holding that a threat to life or liberty, made in the past, but neither current nor prospective, satisfied the requirements of s.91R of the Act.

SZBEL v MIMIA & Anor

[2006] HCA 63

High Court of Australia, Gleeson CJ, Kirby, Hayne, Callinan, Heydon JJ, S274/2006, 15 December 2006

Immigration - Protection Visa application - appellant claimed to fear persecution on basis of conversion to Christianity if returned to Iran - delegate refused to grant appellant protection visa because not satisfied of genuineness of appellant’s conversion - appellant invited by Tribunal to give evidence relating to issues arising in relation to decision under review - appellant gave evidence addressed to delegate’s concern regarding genuineness of conversion to Christianity - Tribunal affirmed delegate’s decision not to grant protection visa on basis claims not credible - whether Tribunal failed to notify appellant adequately of issues to which its reasoning processes were directed - whether failure of Tribunal to ask appellant to address issues it considered important amounted to denial of procedural fairness.

This judgment concerned an appeal from a judgment of the Federal Court (appellate jurisdiction), that dismissed an appeal from the judgment of Raphael FM 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.

In his protection visa application, the appellant, an Iranian seaman, who jumped ship in Port Kembla in April 2001, claimed he was invited by a fellow seaman on his ship to attend a Christian service in Dubai in 1996. Thereafter, he attended Christian services as often as possible in various countries. In December 2000 fellow crew members spotted him departing a church in Argentina and took him to the ship where an officer warned him that displaying interest in Christianity would lead to the termination of his employment. He claimed to have returned home for medical treatment where he told friends about his Christianity, they urged him to renounce his heresy and to embrace Islam. He received threatening telephone calls accusing him of apostasy. The captain heard the rumours circulating in his home town and of the ostracism he experienced there. He denied he was Christian but the captain did not believe him, rather he was informed he would be dealt with when the ship returned to Iran and that he would be closely supervised. The appellant became afraid of the crew who considered him to be a criminal. On 6 April 2001 he was allowed to visit a doctor in Port Kembla as he was ill. He subsequently jumped ship. The delegate was not satisfied the appellant had a genuine commitment to Christianity but did not consider the appellant's claims to have informed his friends of his interest in Christianity, nor to have been called before the captain to explain his interest in Christianity.

The Tribunal informed the appellant it was unable to make a decision in his favour on the information before it and pursuant to s.425(1) of the *Migration Act* 1958 (the Act) found several aspects of the applicant's claim to be lacking in credibility. First, there was the basis upon which the captain came to believe the appellant was involved in Christianity. Secondly, that the captain would accuse him of apostasy/involvement in Christianity on the basis of comments from a crew member was said to be implausible. Finally, that the appellant would have had freedom of movement when the ship was in dock was said to belie the claim that the captain was intending to hand him over to authorities. However, during the hearing, the Tribunal did not appear to challenge the appellant's evidence, express any reaction, or invite him to amplify any of these aspects of his claims which it later deemed to be implausible.

The Federal Magistrates Court dismissed the application for relief. The Federal Court of Australia dismissed an appeal, finding that while the Tribunal was obliged to advise a person such as the appellant of any adverse conclusion which would not obviously be open on the known material, the decision maker would not be otherwise obliged to expose his or her mental processes or provisional views to comment before making the decision. The principal issue before the High Court was whether the appellant was adequately notified of the issues arising in the review in accordance with the requirements of procedural fairness.

Held: per curiam, appeal allowed.

- (i) The Tribunal did not accord the appellant procedural fairness as it did not give him a sufficient opportunity to give evidence or make submissions about what turned out to be two of the three determinative issues arising in relation to the decision under review.
- (ii) The applicant was not on notice that his account of how the ship's captain came to know of his interest in Christianity and the captain's reaction to that knowledge were issues arising in relation to the decision under review. The delegate had not based his decision on either of these aspects of the matter and nothing in the delegate's reasons indicated that these aspects of his account were in issue. The Tribunal did not identify these aspects of his account as important issues and did not challenge what the appellant said or say anything to him that would have revealed to him these were live issues. Based on what the delegate had decided, the appellant would, and should have understood the central and determinative question on review to be in the nature and extent of his Christian commitment. Nothing the Tribunal said or did added to the issues that arose on the review.

Procedural fairness

- (iii) The Migration Act defines the nature of the opportunity to be heard that is to be given to an applicant for review. The reference to "the issues arising in relation to the decision under review" in s.425(1) of the Act is important. The issues arising in relation to a review are to be identified having regard not only to the fact that the Tribunal may exercise all the powers and discretions conferred by the act on the original decision-maker, but also to the fact that the Tribunal is to review that *particular* decision, for which reasons will have been given.

- (iv) The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the review are to be identified by the Tribunal. But unless the Tribunal tells the applicant something different, the applicant would be entitled to assume that the reasons given by the delegate for refusing to grant the application will identify the issues that arise in relation to that decision.
- (v) If, for example, the delegate had concluded that the applicant for a protection visa was a national of a particular country, then absent any warning to the contrary from the Tribunal, there would be no issue in the Tribunal about nationality that could be described as an issue arising in relation to the decision under review. If the Tribunal invited the applicant to appear, said nothing about any possible doubt about the applicant's nationality and then decided the review on the basis that the applicant was not a national of the country claimed, there would not have been compliance with s.425(1) of the Act; the applicant would not have been accorded procedural fairness.
- (vi) The Tribunal is not, and is not to adopt the position of contradictor, but where there are specific aspects of an applicant's account that the Tribunal considers *may* be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.
- (vii) Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given, rather to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgement.

FEDERAL COURT JUDGMENTS

MIMIA v MZWLH
[2006] FCAFC 173

Federal Court of Australia, Tamberlin, Weinberg & Allsop JJ, VID 1240 of 2005, 30 November 2006

Immigration - Protection Visa application - where Afghani national claimed to fear Taliban - where Tribunal found that Taliban no longer in position to pose threat - whether Article 1C(5) of Refugees Convention applied - whether Tribunal properly addressed "durability" question - whether correct approach to apply Article 1A(2) of Refugees Convention.

This was an appeal by the Minister for Immigration and Multicultural and Indigenous Affairs from a judgment of the Federal Magistrates Court setting aside a decision of the Refugee Review Tribunal (the Tribunal) that the respondent was not a person to whom Australia had protection obligations. The respondent had been granted a temporary protection visa valid for three years and later made a further application for a protection visa. He claimed he faced persecution in Afghanistan at the hands of the Taliban due to his ethnicity and his support for the former communist regime. He also claimed that as he had lived overseas he may be seen as anti-Muslim.

The Tribunal addressed the question of whether, in accordance with Article 1C(5) of the Refugees Convention, the respondent could not continue to refuse to avail himself of the protection of his country of nationality because the circumstances in connection with which he had been recognised as a refugee had ceased to exist. It found that the Taliban were no longer in a position to pose a threat to the respondent, that his circumstances had relevantly changed and that Article 1C(5) applied. The Tribunal then embarked on an alternative course of reasoning and posed itself the question whether the respondent had a well-founded fear of persecution under Article 1A(2) of the Refugees Convention.

Relying on the majority judgments in the Full Federal Court in *QAAH v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363, the Federal Magistrate found that in considering whether the respondent had ceased to be a refugee, the Tribunal did not properly address the "durability" question, nor did it properly address the full circumstances in connexion with which the applicant was previously recognised as a refugee.

On appeal to the Full Federal Court the respondent sought to uphold the decision of the Federal Magistrate in an argument to the effect that the decision in *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522 (*NBGM*) in the Full Federal Court did not contain a relevant *ratio*.

Held: *per curiam*, appeal allowed.

- (i) The durability approach has been overtaken by the decision of the Full Federal Court in *NBGM* in which the majority stated that *the decision-maker must be satisfied that, at the time the decision is made, the applicant for a permanent protection visa then has a well-founded fear of persecution for a Convention reason*
- (ii) Furthermore, the High Court has now delivered judgment in the appeals in *Minister for Immigration and Multicultural Affairs v QAAH* and *NBGM v Minister for Immigration and Multicultural Affairs* in which a majority of the High Court made clear the correct approach was to apply Article 1A(2) of the Refugees Convention.
- (iii) The two recent High Court decisions made the respondent's arguments regarding a relevant *ratio* in the Full Federal Court decision of *NBGM* irrelevant.

Immigration - Protection Visa application - operation of Articles 1A(2) or 1C(5) of the Convention Relating to the Status of Refugees 1951 - s.424A of the *Migration Act* 1958 - information that should have been subject of the provision of particulars.

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 Iranian national, had been recognised, along with his wife and two children, as a refugee by the United Nations High Commissioner for Refugees in 1990. The appellant applied for and was granted an offshore subclass 202 visa by the Australian Government on 28 June 1991 and entered Australia with his family later that year.

The Tribunal expressed the view that it had to consider whether at the time of decision, the appellant had a well-founded fear of persecution for a Convention reason and accepted that Australia had previously recognised the appellant as a refugee. It therefore saw Article 1C(5) of the Refugees Convention as relevant but also considered that ss.36 (2) & (3) of the *Migration Act* 1958 (the Act) required it to consider whether the appellant had a well-founded fear of persecution in Iran at the time of its decision.

The Tribunal rejected the evidence of the appellant about his political activity in Iran. The Tribunal did recognise that upon return to Iran, the appellant would come to the attention of the Iranian authorities and that Iranians returning from abroad could be questioned and detained if there was any evidence of them having participated in anti-regime activities. The appellant's adviser submitted that material available publicly in an Administrative Appeals Tribunal decision about the appellant in 1999 and his political activity in Australia would become available to the Iranian authorities. However, the Tribunal in its findings and reasons rejected this submission indicating that the applicant's name "does not appear in any context when a general keyword search is done on the internet using Google and MSN search engines".

The Tribunal also agreed to pose questions to an expert doctor about the appellant's likely behaviour if he returned to Iran. A report was obtained about the mental state of the appellant and given to the appellant in its entirety. The Tribunal referred to the doctor's report and stated that whilst the appellant had claimed that if he were in a confrontational situation with the Iranian authorities he would be likely to express his views against the regime, the doctor's report "does not state that he might react in this way". Accordingly, the Tribunal was not satisfied that this would be the case.

The appellant argued on appeal that the primary judge erred in finding that there had been no breach of s.424A of the Act in relation to the web search and the doctor's report and that the Tribunal had directed itself to the correct question required by s.36(2).

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

Internet searches

Per curiam:

- (i) There was a breach of s.424A of the Act in relation to the Tribunal's internet searches resulting in jurisdictional error.

per Tamberlin J

- (ii) The information sought was specifically about the appellant. A specific enquiry was made and reliance placed on the results. A search of this type cannot be treated as simply having recourse to a legitimate source of judicial notice or a permissible source of information as might be found from a search of standard reference works such as reputable encyclopaedias or dictionaries. The information ought to have been disclosed to the appellant to provide an opportunity for the appellant to make submissions in response.

Doctor's report

per Allsop J, Weinberg J agreeing

- (iii) There was a breach of s.424A of the Act in relation to the Tribunal's reliance on the doctor's report resulting in jurisdictional error.

per Allsop J:

- (iv) The form of the doctor's report and its failure to say that the appellant would behave in a confrontational way was taken by the Tribunal as supportive of the conclusion that he would not behave in that way and thus implicitly a relevant proposition as to how the appellant would behave was being extracted from the form of the doctor's report. The absence of something in the report was not merely taken as a gap, but was implicitly probative that there was no such danger. If the form of the report (including what it did not say) did not have this significance for the Tribunal there would have been no point in mentioning it.
- (v) The information which should have been the subject of a letter in compliance with s.424A was that the doctor had reported and did not state that the appellant might react in a way to express his views against the regime. The letter should have pointed out why this was relevant to the review as it tended against the proposition that he might so behave.

per Weinberg J:

- (vi) There is no reason in principle why an omission (which the Tribunal views as important, and which is plainly adverse to the applicant's case) should be treated any differently when it comes to s.424A of the Act, than a positive statement. This is particularly so where the Tribunal treats the omission as though it provides support for a positive assertion that is detrimental to an applicant's case. It makes no difference whether the omission is to be found in a prior statement of the applicant or in a statement provided by a third party.
- (vii) Even if the Tribunal did comply with s.424A(1)(a), it did not comply with s.424A(1)(b) or (c).

per Tamberlin J (dissenting):

- (viii) In this case the appellant had access to the whole of the report of the expert doctor. The information, that there was no reference to any reaction by the appellant to a confrontational situation, was disclosed.
- (ix) It is unreasonable to impose a requirement that the Tribunal must go back to the appellant and point out that a report given to the appellant will or might be used in a particular way or be assigned significance in the Tribunal's reasoning process. Such a requirement would unduly impede the reasonable and proper exercise of the Tribunal's function.

Obiter:

per Allsop J, Weinberg and Tamberlin JJ agreeing

- (x) The majority of the High Court has unequivocally decided that the proper approach for the Tribunal to take was an analysis under Article 1A(2) of the Refugees Convention. Therefore, the approach taken was correct.

SZHNV v MIMA

[2006] FCA 1686

Federal Court of Australia, Stone J, NSD 1669 of 2006, 6 December 2006

Immigration - Protection Visa application - where appellant claimed membership of underground church in China - arrest - claims rejected due to inconsistency - whether Tribunal failed to comply with 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.

The appellant, a national of China, claimed to fear persecution as a member of an “underground” Christian church. In particular, he claimed that he, his parents and sister had been actively involved in the church’s activities and that in 2001 he was arrested at his home and detained for 40 days.

The Tribunal was not satisfied that the appellant was a committed Christian or, if he was, that he was a significant enough figure to attract the interest of the authorities. Although the Tribunal accepted that the appellant was detained and beaten, it did not accept that this was because of his religion. In reaching this conclusion the Tribunal referred to a number of inconsistencies between the appellant’s oral evidence at the Tribunal hearing and that contained in his protection visa application.

On appeal before the Federal Court, the appellant contended, for the first time, that the Tribunal had failed to meet its obligations under s.424A of the *Migration Act 1958*.

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

- (i) The Tribunal failed to comply with the requirements of s.424A of the *Migration Act 1958* and thereby made a jurisdictional error.
- (ii) In assessing the appellant’s claim to have been arrested, the Tribunal relied on an inconsistency between the appellant’s written account, which emphasised the important role his parents played in the underground church, and his oral evidence of his arrest (in particular that his parents were present but not arrested). The information in the written statement that gave rise to the discrepancy was relied on to support the crucial finding that the arrest was not on account of his Christianity, even though it was not the main reason for rejecting the claim that his commitment to Christianity would expose him to persecution.
- (iii) In its summary of the appellant’s oral evidence at the hearing, the Tribunal noted a further discrepancy between the appellant’s written statement and the oral evidence. Although not mentioned under the heading of “Findings and Reasons”, there is no reason to doubt that this was also a part of the reason for the Tribunal’s conclusion about the level of the appellant’s commitment to Christianity.

FEDERAL MAGISTRATES COURT JUDGMENTS

SZCXB v MIMA & Anor

[2006] FMCA 1139

Federal Magistrates Court of Australia, Lloyd-Jones FM, SYG 611 of 2004, 16 November 2006

Immigration - Protection Visa application - whether Tribunal failed to fully consider persecution of applicant - whether failure to consider fully what harm encompasses - extortion - whether failure to consider issue of membership of particular social group - whether jurisdictional error.

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

The applicant feared harassment, extortion and harm from government authorities and aligned Tamil organisations such as the Eelam People's Democratic Party (EPDP) due to prior association with the Liberation Tigers of Tamil Eelam (LTTE). She claimed to have given money and property to the EPDP after they threatened to inform Sri Lankan authorities and she continued to fear harm including disappearance. In its reasons for decision, the Tribunal accepted that the applicant had been extorted on two occasions. However, other information did not indicate that there was wide-spread harassment of Tamils who had previously assisted the LTTE. The Tribunal did not accept there was a real chance that anti-LTTE organisations would persecute the applicant or that she had been or would be targeted by the authorities.

The applicant contended that the Tribunal decision was affected by jurisdictional error, including on the grounds that the Tribunal did not apply the test for persecution cumulatively and by failing to consider her fears of disappearance or being handed to Sri Lankan authorities given her previous assistance to the LTTE.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) There was a failure to consider the applicant's claims, giving rise to jurisdictional error.
- (ii) The conclusion that anti-LTTE forces would not be interested in the applicant because they lacked inclination and resources did not address the specific claim that she feared kidnapping or harm from them. Harm includes threats to life, economic harm and denying access to property or possessions. Independent information indicated that government agencies collaborated with former government members in extra-judicial killings, torture and extortion. The Tribunal did not address whether her fear of disappearance by anti-LTTE groups was well-founded. The test of persecution must be applied in a real, objective, logical and probative way.
- (iii) The Tribunal's findings that the applicant would not be persecuted by the government or LTTE forces did not address the issue of whether the applicant would be extorted by the LTTE. Furthermore, the limited consideration given to extortion was not specific to the applicant. Independent information suggested that the LTTE extorted money from the Tamil population.
- (iv) In dismissing all Convention reasons for the extortion, the Tribunal failed to properly consider whether the extortion would be for reasons of the applicant's membership of a particular social group. The Tribunal insufficiently identified the particular social group that the applicant belonged to as individuals who had previously "helped the LTTE" and failed to consider the applicant's further claim of also having close relatives as leaders for the LTTE.

Immigration - Protection Visa application - whether failure to deal with part of express claim - whether Tribunal overlooked evidence put prior to hearing - whether Tribunal required to deal with all claims whether express or implied.

The applicant, a national of Sri Lanka, 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 appellant claimed to fear persecution on the basis of family members' suspected involvement in the Liberation Tigers of Tamil Elam (LTTE).

The Tribunal, which was reconsidering a decision remitted by the Federal Magistrates Court, found that the applicant's "most fundamental claims" were fear of persecution based on her brother's connection with the LTTE, that her son would be forced to join the LTTE, and that she would not be permitted to move about freely because she had been identified as a "victim of sexual harassment". While the Tribunal accepted as plausible some of the harm claimed to have been suffered, in "looking at the evidence as a whole", it was not satisfied that that harm amounted to persecution within the meaning of the Refugees Convention. It was specifically satisfied that the harm suffered was as a result of general insecurity prevailing in Sri Lanka during the relevant times.

The applicant contended that the Tribunal failed to make any finding on her claim that she feared the Sri Lankan authorities because police told her that her son was suspected of being involved with the LTTE and threatened to detain her on the ground that her son was an LTTE collaborator. This claim had been raised before the delegate, the first Tribunal, and the Federal Magistrates Court, but not at the second Tribunal hearing.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal failed to make any finding on the applicant's claim that she feared the Sri Lankan authorities because police told her that her son was suspected of being involved with the LTTE and threatened to detain her on the ground that her son was an LTTE collaborator. This was a failure to deal with part of an express claim made by the applicant such that the Tribunal failed in the discharge of its statutory duty to conduct a review of the delegate's decision and as such was jurisdictional error.
- (ii) The Tribunal focused on what was said at the hearing to such an extent that caused it, in its analysis, to overlook what may have been put before it previously.
- (iii) The applicant's claim about the perception of her son's involvement with the LTTE was not merely a piece of evidence; it was an integer of her claim. There was a consistent presentation throughout the history of the development of this case to indicate that the applicant contended as a separate, and distinct, part of her claim, that she herself would be imputed with a political opinion not necessarily because her son was involved with the LTTE, but that the police communicated to her what they said was the Sri Lankan army's belief, or perception, that her son was involved with the LTTE.
- (iv) In properly and fully exercising its jurisdiction, the Tribunal is not only required to deal with the applicant's "fundamental" claims, but indeed all of the applicant's claims whether made expressly, or as they are considered to impliedly arise from circumstances put forward by the applicant.

Immigration - power on review - where exercise of power by original decision maker unauthorised - whether applicants notified of decision - whether notification in accordance with s.66(2) of *Migration Act* 1958.

The applicant, a national of Burma, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that it did not have jurisdiction to review the delegate's decision that she was not a person to whom Australia had protection obligations.

The applicant's brother lodged a protection visa application identifying the applicant and her sister as members of his family unit. The applicant and her sister also lodged separate protection visa applications. A delegate of the Department of Immigration and Multicultural Affairs (the Department) found that the applicant and her sister were not members of their brother's family unit and proceeded to make three separate decisions refusing to grant protection visas to each of the visa applicants. Under cover of a letter dated 8 July 2005, sent to the applicants' authorised recipient and deemed to have been received on 19 July 2005, the applicants were purported to be notified of these decisions. The letter referred to the protection visa applications lodged by the adviser's three clients and stated:

"Your clients have been refused a protection visa.....If your client makes a valid review application within this 28 day period your clients bridging visas remain valid for 28 days after you receive a decision..." (emphasis added)

On 13 October 2005 the applicant and her sister lodged separate applications for review to the Tribunal. The Tribunal found that it did not have jurisdiction as the applicants had not lodged their applications for review within a 28 day period, as required by s.412(1)(b) of the *Migration Act* 1958 (the Act) and r.4.31(2)(b) of the *Migration Regulations* 1994 (the Regulations). The Tribunal was satisfied the letter dated 8 July 2005 was a valid notification of the decision relating to the applicant and her sister pursuant to s.66 and s.494D of the Act. The Tribunal also found that neither it nor the delegate had power to extend the time limit or take action to recommence the time period by renotifying the applicant's of the decision. It did not accept the applicant's submissions that she was not notified until receipt of the delegate's letter addressed to her individually and sent to her authorised recipient on 10 October 2005.

Held: Tribunal decision quashed and matter remitted for reconsideration.

- (i) The Tribunal erred by finding that it did not have jurisdiction as the letter dated 8 July 2005 did not constitute a valid notification under s.66(2) of the Act. The applicant and her sister were notified of the delegate's decision by the separate letters dated 10 October 2005 and their applications to the Tribunal were lodged within 28 days.
- (ii) The use of "client" in the letter dated 8 July 2005 was confusing given the earlier inclusion of the applicant and her sister as the dependants of their brother in his protection visa application. The reference to the adviser's "client" was not a clear indication as to the requirement that each of the three individuals referred to in the joint letter could and indeed were required to each individually lodge an application for review to the Tribunal (s.66(2)(d)(iii) of the Act).
- (iii) The Department did have the statutory power to send the 10 October 2005 notification (despite its contention that the letter dated 10 October 2005 was merely a renotification) as no previous notification had been correctly provided to each of the applicants.

Immigration - Protection Visa application - where Columbian fearing persecution for political activities - whether Tribunal drew unwarranted conclusions from country information - whether illogical and perverse conclusions from applicant's evidence - failure to assess evidence favouring applicant - whether decision made recklessly - not genuine attempt to exercise jurisdiction.

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

The applicant claimed to fear persecution on the basis of his own and his family's political opinions and activities, including involvement in MOIR (Independent Revolutionary Workers Movement). His initial claims were very general, but developed over time. The Tribunal discussed numerous "inconsistencies" and "implausibilities", and his explanations which it found "unconvincing" and "implausible", concluding that his claims were a fabrication.

It was contended that the Tribunal's decision was based on reasoning that was irrational and illogical, and unwarranted assumptions, and also that the Tribunal failed to give consideration to relevant and significant evidence supporting the applicant's claims.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal's decision was affected by jurisdictional error. The Tribunal significantly misstated the effect of important country information. In addition, it presented unsupported, unreasonable and capricious adverse conclusions to justify its decision, and failed to address significant evidence, which it did not reject, providing support for the applicant's claims. Cumulatively, the flaws in the Tribunal's reasoning reveal a decision-maker who has not made a genuine attempt to assess all the evidence, so as to make the determination required under ss.36 and 414 of the *Migration Act 1958* (the Act).
- (ii) The Tribunal did not consider the actual contents of the country information which it purported to compare with the applicant's evidence concerning his involvement with the Hope, Peace and Freedom movement (EPL). It could not rationally have made its adverse findings which purported to support its conclusions if it had done so. Its decision to "give no weight to his claims and evidence" was based wholly or very substantially upon reasons which the evidence it cited was incapable of supporting. Moreover, its reasoning and conclusion ignored the substantial support given to the applicant's claims by the country information. These errors establish the jurisdictional error of failing to take into account the actual contents of relevant material.
- (iii) The Tribunal's criticisms of the applicant's claims and evidence regarding his involvement in MOIR appeared to have dubious substance, and its conclusion from them that it should "give no weight to his claims and evidence" as to any involvement in MOIR appeared extravagant and disproportionate. The applicant's explanation for his statements about its political position appeared cogent and credible; his explanation for omitting from his original application his involvement in MOIR was by no means obviously incredible; and it was illogical and unreasonable to refuse to give any credence to this explanation merely by labelling it as "self-serving". This part of the Tribunal's reasoning did not, of itself, establish jurisdictional error. However, in the context of its other reasoning, it tended to point to a failure by the Tribunal genuinely to assess the evidence favourable to the applicant, and a propensity to adopt illogical or unbalanced reasons for rejecting his evidence.
- (iv) There was no rational basis for the Tribunal's conclusion that it should treat the applicant's misstatement of the date of his brother's murder as the "most significant of inconsistencies", and as a point which significantly explained its rejection of his explanation for delay in putting forward his political background as "far-fetched" and its rejection of that background as entirely untrue.
- (v) The Tribunal's characterisation of the applicant's explanation that he was afraid to disclose his and his family's political activities as "thoroughly implausible", "self-serving" and "fabricated" cloaked in extravagant language its failure to weigh up the possibility that his claims might be true, at least to the degree required under the "real chance" test. It provided no discussion showing any consideration of whether the combined evidence of violent attacks on the applicant's family, the country information,

and the applicant's psychiatric disorder, might support the possibility that his claimed political background might be true. A genuine consideration of the applicant's refugee claims required a careful assessment of these matters. In the context of the other deficiencies in its statement of reasons, it must be concluded that the Tribunal did not give them any consideration.

- (vi) The Tribunal's conclusion that its criticisms of other inconsistencies and implausibilities were "fatal" to believing the applicant's claims showed an approach to the assessment of evidence which can properly be described as manifestly unreasonable, amounting to "perverse" or "capricious".
- (vii) The Tribunal did not fail to carry out its statutory duties under s.424A(1) of the Act. Its general references to inconsistencies and implausibilities in its s.424A letter must have been intended to be read as references only to the instances which it specifically claimed to have identified. It should not be inferred that the Tribunal relied upon any unidentified information taken from the applicant's statements to the Department.

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

Legislation Pending

Migration Amendment (Review Provisions) Bill 2006

This Bill was introduced to the Senate on 7 December 2006 and aims to amend the Act to:

Allow the Tribunal to orally give clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review and invite the applicant to comment on or respond to the information;

Provide that the obligation to give an applicant information and invite comment on or a response to the information does not extend to information already provided by the applicant to the Department of Immigration and Multicultural Affairs (the Department), as part of the process leading to the decision under review, other than information that the applicant has given orally to the Department;

Provide that if the Tribunal gives, orally or in writing, clear particulars of the information that the Tribunal considers would be the reason or part of the reason for affirming the decision under review, then the Tribunal must ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review and the consequences of the information being relied on in affirming the decision;

Provide that if an applicant is given information at the hearing, the Tribunal must advise that he or she may seek additional time to comment on or respond to the information;

Provide that if an applicant seeks more time to comment on the information and the Tribunal considers that the applicant reasonably needs additional time, the Tribunal must adjourn the review and provide the applicant with that opportunity;

Include new provisions that ensure that in carrying out the procedures and requirements regarding the natural justice hearing rule set out in the Act (which continue to be an exhaustive statement of the natural justice hearing rule), the Tribunal must do so in a way which is fair and just.

Consideration of this Bill has now been adjourned and will not be progressed until the Senate sits again on the 6th February 2007.

A copy of the bill can be found at:

[http://www.comlaw.gov.au/ComLaw/Legislation/Bills/n.sf/0/66E48422C5B1D4A7CA2572440010498A/\\$file/06175b.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills/n.sf/0/66E48422C5B1D4A7CA2572440010498A/$file/06175b.pdf)

The following private member's bills introduced over the period October to November 2006 are still pending:

Migration Legislation Amendment (Enabling Permanent Protection) Bill 2006

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

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

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

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 – December 2006

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	1	0	1	0	2
Albania	1	0	0	0	1
Algeria	0	1	0	0	1
Bahrain	2	1	0	0	3
Bangladesh	5	7	0	3	15
Burma (Myanmar)	0	1	0	0	1
Cameroon	1	0	0	0	1
China (PRC)	14	59	0	3	76
Egypt	4	2	0	0	6
Fiji	0	4	0	0	4
Ghana	0	1	0	0	1
India	3	31	1	1	36
Indonesia	0	13	0	1	14
Iran	0	1	0	0	1
Iraq	2	0	0	0	2
Israel	0	2	0	0	2
Jordan	0	1	0	0	1
Korea, Dem Peoples Rep of	1	0	0	0	1
Korea, Republic of	0	3	1	0	4
Latvia	1	0	0	0	1
Lebanon	0	1	0	0	1
Malaysia	0	10	0	0	10
Morocco	0	1	0	0	1
Nepal	0	5	0	0	5
Nigeria	0	3	0	0	3
Other	0	1	0	0	1
Pakistan	0	7	0	0	7
Palestinian Terr. (W.Bank/Gaza)	2	0	0	0	2
Philippines	0	6	1	0	7
Romania	1	0	0	0	1
Russian Federation	0	1	0	0	1
Serbia & Montenegro	1	0	0	0	1
Slovenia	0	1	0	0	1
Sri Lanka	4	2	0	0	6
Sweden	0	1	0	0	1
Taiwan	0	1	0	0	1
Tanzania	0	1	0	0	1
Thailand	2	3	0	1	6
Turkey	0	3	0	0	3
Ukraine	0	1	2	0	3
Vietnam	0	1	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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