

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

Refugee Review Tribunal Decisions	2
Afghanistan	2
China	2
India	4
Israel	5
Latvia	5
Malaysia	6
Nepal	6
Slovenia	7
Thailand	8
Federal Court	9
<i>NBKT v MIMA</i>	9
<i>SZGLK v MIMIA</i>	10
<i>SZGLT v MIMA</i>	11
<i>Applicants S1266 of 2003 v MIMA</i>	12
<i>NAZH v MIMA</i>	13
<i>SZCBT v MIMA</i>	13
<i>SZESF v MIMA</i>	14
Federal Magistrates Court	16
<i>SZGGN & Anor v MIMA</i>	16
<i>MZXAR v MIMA & Anor</i>	16
<i>MZXJI v MIMA & Anor</i>	17
<i>SBLC v MIMA & Anor</i>	18
<i>SZBZN v MIMIA & Anor</i>	19
Legislation Update	20
Caseload Overview	21
Accessing Tribunal Decisions	22
Index	23

Issue No. 2/2007

5 February 2007

Editor:
Laraine Roberts

Contributors:

Kate Buring
Victoria Coleman
David Corrigan
Rey Hyland
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@rtt.gov.au

Published Tribunal decisions can be found at www.austlii.edu.au

REFUGEE REVIEW TRIBUNAL DECISIONS

Afghanistan

060906453

8 December 2006, Sydney

Ms P McIntosh, Member

AFGHANISTAN - RACE - HAZARA - RELIGION - SHIA - POLITICAL OPINION - FURTHER PROTECTION VISA - The applicant feared persecution as a Hazara Shia from Jaghourai who had spent time in a western country. He now claimed that he feared returning to Afghanistan as remnants of the Taliban were still there. The applicant claimed they were still free and capable of killing people like himself and that they had killed a number of Hazaras. He claimed that the Taliban had been targeting civilians associated with foreigners and had also killed aid workers. The applicant claimed that hundreds of Taliban captured in northern Afghanistan and involved in the massacre of Hazaras were going to be released from prison. He claimed that he would be persecuted because he had spent years in Australia and would be accused of conversion to Christianity.

Held: Decision under review set aside.

The Tribunal accepted that there had been periodic atrocities committed by Pashtuns, including the Taliban, against the Hazaras and that the Taliban were “anti-Shia”. It noted that the Taliban were reportedly operating at an increasingly effective level in the Pashtun-populated districts which neighboured Jaghourai. The Tribunal accepted that the area in which the applicant’s village was located was effectively encircled by Taliban forces. It accepted that the applicant had been “secularised” after spending his formative years in the west and that he would be assumed to hold views antithetical to those of the Taliban. The Tribunal found there was a real chance that the applicant, whose behaviour and appearance were those of a person with opinions at odds with those of the Taliban, may be assaulted. Given the Taliban’s propensity to violence it found that any assault may involve significant physical ill-treatment and was accordingly satisfied that the applicant’s fear of persecution was well-founded.

China

060848136

10 November 2006, Sydney

Ms K Raif, Member

CHINA - RELIGION - PARTICULAR SOCIAL GROUP - POLITICAL OPINION - FALUN GONG - The applicant feared persecution arising from his involvement with Falun Gong. He claimed that he was often hospitalised with a medical condition he had suffered for years and that a former high school classmate visited when he was at home sick. The applicant started to learn the Falun Gong exercises from his friend and he also read the book Zhuan Fa Lun. He claimed that he felt an improvement after three months and was able to engage in business. The applicant claimed that the police came to his home and searched it, saying that he had been reported as practising at home. They found no evidence and left. The applicant claimed that he continued to practise and several months later was taken to the police station after the book was found at his home. He claimed that he was questioned and beaten and then released after a bribe was paid. The applicant claimed that he regularly attended Falun Gong study classes in Australia and practised Falun Gong with a group. He claimed there was strong evidence that Falun Gong practitioners were persecuted in China.

Held: Decision under review set aside.

The Tribunal noted that the applicant did not explain to its satisfaction a number of issues relating to his claims of persecution in China. It was not satisfied that some of the events described by the applicant in fact took

place. However, the Tribunal found that he displayed an extensive knowledge of the history and philosophy of Falun Gong and gave coherent and ready responses to questions as well as detailed evidence. The Tribunal was of the view that the applicant was familiar with the philosophy and practice of Falun Gong and that he did undertake study of the Zhuan Fa Lun book. It also accepted that he was familiar with the exercises. The Tribunal found that the applicant was engaged in the practise of Falun Gong in Australia, that he attended study groups and was involved in other Falun Gong activities. It found that he was a genuine and committed Falun Gong practitioner and that if he returned to China, he would wish to continue to practise. The Tribunal found that practitioners were subjected to persecution and repression in China by the government and accordingly, the applicant had a well-founded fear of persecution.

060766337

23 November 2006, Melbourne

Mr A Gregory, Member

CHINA - RELIGION - CHRISTIAN - UNDERGROUND CHURCH - The applicant feared persecution because of his involvement in establishing underground Christian groups. He claimed that he was dissatisfied with the Chinese Christian Church which was loyal to the Communist Party. He claimed that as a result of his activities with the first of these groups, he was detained by the Public Security Bureau, tortured and forced to sign a confession that he had engaged in anti-government activities. The applicant claimed that as a result of his involvement with another group he was detained for a short period and then forced to undertake manual labour without pay. He further claimed that he was continually subjected to questioning and that he was forced to change his name and acquire a false passport.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a consistent and credible witness who had a strong Christian faith and that he had changed his name and acquired a false passport. It accepted that he was threatened and denounced by local officials because he had set up his own house church and that he was detained and ill-treated by officials. The Tribunal also accepted that the applicant was detained and forced to undertake punitive work as a result of his establishment of another house church. It found that the applicant's account of his mistreatment was consistent with independent information that persons in the applicant's situation were subject to detention and even torture. The Tribunal found that the applicant would continue to practise his Christian faith and as a result he faced a real chance of persecution. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

060768904

4 December 2006, Melbourne

Ms K Kirmos, Member

CHINA - RELIGION - LOCAL CHURCH - SHOUTERS - ARREST WARRANT - The applicant feared persecution arising from her involvement with the Local Church (Shouters). She claimed that her father was an elder of the church and had been subjected to persecution for a long time because the Shouters were classified as anti-government. The applicant claimed that her father encouraged her to spread the gospel to her friends at school. She claimed the teacher insisted that she be suspended or there would be problems for the school. The applicant claimed that when she commenced university her father assisted her to establish a bible study group on campus which distributed propaganda materials to students. She claimed that she had witnessed police questioning and beating her father who was regarded as a "black hand" and she as his key assistant. The applicant claimed that her father was still being detained and police were looking for her with an arrest warrant. She claimed that she could not return because she would not be safe anywhere in China.

Held: Decision under review set aside.

The Tribunal accepted that the applicant's father had been detained on several occasions and the applicant had been persecuted for her religious beliefs. It accepted that she was committed to her faith, had continued to be involved in the church in Australia and was a member of the Local Church. The Tribunal found that the applicant had been persecuted in the past for reasons of her religion and was not permitted to continue with her education. It accepted that she was informed against for organising bible study groups and it was likely that a warrant for her arrest would have been issued. The Tribunal accepted that the authorities had labelled the Shouters and Local church "cults" and declared them illegal. It also accepted that the law specified prison

terms for “cult” members who disrupted public order or distributed publications. The Tribunal found that, given her father’s position as elder, the applicant would be seen as a recruiter or leader and there was a real chance that she may face serious abuse and detention. Accordingly, it found that she had a well-founded fear of persecution for reason of her religion.

060766436

8 December 2006, Melbourne

Mr P Fisher, Member

CHINA - RELIGION - LOCAL CHURCH - DETENTION - HARSH TREATMENT - The applicant feared persecution arising from her involvement with the Local Church. She claimed she became involved after her father’s accidental death left the family with little income. The applicant claimed that she agitated publicly for compensation for his death when her mother needed expensive medical treatment. She claimed that as a result she was helped by Christians in the Local church who provided financial and spiritual support. The applicant claimed she attended religious gatherings and was later baptised. She claimed that she had been detained with others attending a gathering of the Local Church and was interrogated and lost her job as a result. The applicant claimed that later when she was distributing copies of religious works she was detained in the street, handcuffed and taken to the police station. The applicant claimed she was detained for several weeks and subjected to harsh treatment. She claimed that when she refused to answer questions about the church she was beaten, handcuffed and deprived of food and medication. The applicant claimed that as a Christian she felt compelled to continue to practise within the framework of the Local church.

Held: Decision under review set aside.

The Tribunal found that the claims were consistent with independent information and noted that the Chinese authorities viewed the Local Church as an illegal cult whose members were liable to detention and punishment. The Tribunal found the applicant’s account to be credible and accepted that she became involved with the Local Church as claimed and was detained and mistreated by the authorities as a result of her religious activities. It accepted that the authorities maintained an adverse interest in the applicant as a member of a cult who had re-offended. The Tribunal was satisfied that if the applicant returned to China she would be likely to continue to participate in the Local Church. Accordingly, given her past mistreatment, it found there was a real chance that she would face persecution for reason of her religion.



India

060668202

29 November 2006, Sydney

Prof S Blay, Member

INDIA - RELIGION - HINDU - VISHWA HINDU PARISHAD - THREATS - The Hindu applicant feared persecution from Muslim extremists. He claimed that he was an active participant in religious activities in his community in Gujarat and was an active member of a community organisation called Vishwa Hindu Parishad. The applicant claimed that following communal violence between Hindus and Muslims, his business was burnt and he and his partner were subject to threatening telephone calls by “unknown Muslim fundamentalists”. The applicant claimed that a caller said the burning was revenge for the burning property and lives of Muslims. The applicant claimed that he opened a new business, but received threats daily for several months. He claimed he was attacked and beaten by Muslim extremists with a warning that he should leave Gujarat. The applicant claimed the police could not protect him and that he had also tried to relocate to other parts of India without success.

Held: Decision under review affirmed.

The Tribunal accepted that several businesses belonging to Hindus and Muslims alike were burnt in communal riots in Gujarat. It found it to be more probable than not that the applicant owned a business that was burnt in the communal strife in Gujarat. The Tribunal found it was highly plausible that as a businessman engaged in the business, the applicant could have been associated with a community organisation such as the VHP. It therefore accepted that the applicant was a member of the VHP. The Tribunal found that while his business may have been attacked, there was no credible evidence that the applicant was targeted for reason of his

membership of a particular social group, his religion or his political opinion. The Tribunal noted that the attack occurred in the midst of community strife and there was no credible evidence that the applicant had been subject to further persecution. In the absence of supporting information it did not accept that he was beaten by a group of Muslim assailants and found that he was capable of relocating within India. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

Israel

0060720861

23 November 2006, Sydney

Mr S Roushan Member

ISRAEL - RACE - ARAB - DISCRIMINATION - HARASSMENT - VIOLENCE - FALSE ACCUSATIONS - The applicant feared persecution as a Christian Arab who was a national of Israel. He claimed that as a juvenile he had been subject to discrimination and significant harassment. The applicant claimed that after being falsely accused of breaking into cars he was gaoled with serious offenders. He claimed that he was harassed, threatened and attacked by other inmates and had confessed to unknown crimes in order to save himself. The applicant claimed that on many occasions he had been questioned by police and security forces with regard to whether he was involved in terrorist activities or Palestinian organisations or whether he was making bombs. He claimed that on several occasions his home was raided by police without warrants who damaged his possessions. The applicant claimed that members of the security forces had threatened more than once to kill him and that discrimination against Arabs was directed from the top levels of government. He claimed that the authorities acted with disproportionate force when dealing with Arab Israelis.

Held: Decision under review affirmed.

The Tribunal accepted the applicant's account of being falsely accused, forced to confess and wrongfully convicted of a crime he had not committed. It noted there was a disproportional representation of Arabs in the Israeli Juvenile system, discriminatory treatment of Arab suspects and much harsher sentences for Arab defendants. The Tribunal accepted that the applicant's detention and the treatment which followed amounted to serious harm for reason of his race. However, the Tribunal was not satisfied that the chance of similar events occurring was anything more than remote. It was not satisfied that regular and petty acts of discrimination described by the applicant, while most unpleasant and undesirable, amounted to persecution. The Tribunal accepted that the applicant's house was raided several times by police, causing much stress and inconvenience, but was not satisfied that this amounted to serious harm. It was not satisfied that the authorities had a continuing interest in the applicant for a Convention reason or that there was a real chance they would seriously harm him for a Convention reason if he returned. Accordingly, the Tribunal was not satisfied that the applicant's fear of persecution was well-founded.

Latvia

060619793

4 December 2006, Sydney

Mr G Short, Senior Member

LATVIA - RACE - POLITICAL OPINION - RUSSIAN - THREATS - VIOLENCE - The applicant feared persecution arising from her Russian ethnicity. She claimed that she and her mother had received an eviction notice because they had been unable to make certain property payments to the government. The applicant claimed they had no choice but to sell the apartment but she disagreed with this government policy and after she went to the Human Rights Committee, the story was published in newspapers and a newsletter. The applicant claimed that after they started to receive threatening notes her mother had gone to the police, who soon advised that they had dropped the case due to lack of evidence. The applicant also claimed that she and her mother were severely beaten by a group of Latvians, but the police response was that as they had been refused an ambulance, they had not been injured. A few days later a person with a Latvian accent had telephoned and said they "would be finished off soon". The applicant was told that the "nationalists" had put

them on a black list and they should be very careful. She claimed that she had been persecuted because she fought against the policy of the government to push Russians from Latvia at all costs.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a credible witness and that she had told the truth with regard to her experiences. It accepted that she and her mother had been attacked by Latvian nationalists because they were fighting for their rights following their eviction from the apartment which the mother had purchased. The Tribunal accepted that the police did not conduct an investigation into the attack and noted that the independent evidence suggested widespread hostility against Russians in Latvia. It also referred to a widely held view that the objective of the Latvian legislation on citizenship and language was to force members of the Russian community out of Latvia. The Tribunal noted that the government appeared to be ineffectual in controlling the activities of fascist organisations and it failed to meet standards of protection required by international standards. It accepted there was a real chance that if the applicant returned, she would again be attacked by Latvian nationalists for reason of her political opinion. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution.

Malaysia

060744446

16 November 2006, Melbourne

Ms I Tsiakas, Member

MALAYSIA - RELIGION - HINDU - RELATIONSHIP WITH MUSLIM MAN - SHARIA LAW - The Hindu applicant feared persecution on the basis of her religion. She claimed she was in a relationship with a Muslim man and that their families did not approve of the relationship. The applicant claimed she and her boyfriend began living together secretly in 2005 and hoped to marry. However, upon discovering their relationship his parents and two Islamic men came to their home and threatened that if she did not leave her boyfriend or convert to Islam, they would report her to the police. Following this incident, her boyfriend's parents, accompanied by two Sharia police and a government police officer visited her mother at home and threatened her. The applicant claimed a police report was lodged about their relationship. She claimed that she and her boyfriend could not marry under Sharia Law. The applicant feared that if returned to Malaysia, she would be subjected to punishment under Sharia law and imprisoned.

Held: Decision under review affirmed.

The Tribunal accepted the applicant's claims to be a Hindu in a relationship with a Muslim man. It accepted as plausible that her boyfriend's parents asked her to convert to Islam or to leave their son, that they may have threatened to report her to the police and may have made threats to her mother. The Tribunal accepted that the applicant probably could not marry her boyfriend unless she converted to Islam. However, relying on independent information, it found that as she was not a Muslim, Sharia Law did not apply to her in Malaysia, rather she would be subject to civil secular law. It found that even if her boyfriend's parents had reported their relationship to police, the applicant had not broken any Malaysian law. The Tribunal did not accept that she had suffered serious harm and found that effective state protection was available to her. It found that the applicant did not face a real chance of persecution and accordingly, her fear of persecution for a Convention reason was not well-founded.

Nepal

060779039

21 November 2006, Sydney

Dr R Witton, Member

NEPAL - PARTICULAR SOCIAL GROUP - UNMARRIED WOMEN - HARASSMENT - EXPLOITATION - The applicant feared persecution as a member of the particular social group of unmarried mothers. She claimed that on return as a single mother who had adopted a western lifestyle she would be harassed,

ostracised and treated as an outcaste by her family. The applicant claimed that she would be vulnerable to being perceived as having made money overseas, her family would not protect her and women had no access to education or economic resources. She claimed she would be vulnerable to gender-related violence, trafficking or sexual exploitation. The applicant claimed that she would be unable to relocate elsewhere within Nepal or to India because she would be denied effective protection by the authorities in both countries.

Held: Decision under review set aside.

The Tribunal found that unmarried women constituted a particular social group in Nepal where family ties and caste remained important. It accepted that, given the patriarchal nature of Nepalese society, the applicant would be vulnerable to harm from men for reason of extortion or sexual slavery through trafficking. The Tribunal found that the authorities were less than adequately responsive to protecting women such as the applicant from violence and exploitation. It found there was a real chance that protective assistance would be denied to her on a selective and discriminatory basis and that this harm could not be avoided through relocation. The Tribunal accepted that although the applicant had a right to enter and reside in India, independent information indicated that protective assistance would also be denied to her by the Indian authorities for similar reasons. Accordingly, it found that the applicant had a well-founded fear of persecution.



Slovenia

060414744

18 December 2006, Melbourne

Ms G Hamilton, Member

SLOVENIA - RACE - SERB-CROAT - THREATS - VIOLENCE - DISCRIMINATION - The applicant feared persecution arising from her Serb-Croat ethnicity and her husband's Serbian ethnicity. She claimed that she and her child had been threatened and that her rights were significantly affected. The applicant claimed that her child's teacher asked her to attend a meeting because a Bosnian Muslim child was tormenting her child, who was the only Serb in his class. She claimed that the child's father had also been coming to the school and threatening the applicant's child. The applicant claimed that when the school reported a further incident to police, they did nothing and did not contact the applicants or the school. She claimed that the family endured verbal abuse, property damage, physical attacks and threats. The applicant claimed that she had to take on a Slovenian identity in order to obtain a job and an apartment. She claimed that she and her husband and child had been victims of systematic racial violence and threats, accompanied by systematic and discriminatory failure of the Slovenian police to protect them.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant and her husband became involved in a dispute with the father of a student at their child's school. It accepted that this man was violent towards their child and abusive and threatening towards the applicant and her husband. However, the Tribunal did not accept that the motive for this treatment was their ethnicity. Animosity had developed between the children and the father could have been acting out of a sense of paternal loyalty and the Tribunal did not accept that the police were alerted to the events. It did not accept the applicant's other claims of assault, threats or property damage, as the failure to report those incidents was not consistent with the fear for their safety that they claimed. The Tribunal noted that the applicant and her husband were members of ethnic minorities in a xenophobic country. Hate speech was common socially and racist attitudes were perpetrated by the media. The Tribunal found that the police were insensitive to racist crime and may even be unsympathetic to victims for racial reasons. However, it found that there were many people with the applicant's ethnicity in Slovenia and did not accept that as Serb-Croats or Serbs she or her husband had a well-founded fear of persecution.



Thailand

060860015

29 November 2006, Sydney

Ms K Raif, Member

THAILAND - RELIGION - MUSLIM - PARTICULAR SOCIAL GROUP - WOMEN - DOMESTIC VIOLENCE -

The applicant feared persecution for reasons of religion. She claimed that once she started living with her boyfriend he asked her to convert from Buddhism to Islam. The applicant claimed that after she converted to Islam she and her boyfriend had arguments during which he would hit her, kick her and slap her face. The applicant claimed that one day she refused to go to a religious ceremony and her boyfriend hit her saying he would kill her if he saw her face again. The applicant reported the incident to the police, but they said it was a family matter. She left her boyfriend and converted back to Buddhism and claimed that if she met him he would kill her. The applicant also claimed she would face harm from her boyfriend's family.

Held: Decision under review affirmed.

The Tribunal found the applicant to be a credible witness and accepted that she had converted to Islam and suffered physical harm on several occasions. The Tribunal held that the feared harm was Convention-related in two respects, religion and membership of a particular social group. It accepted that although she reported the harm to the police no action was taken. The Tribunal found there was inadequate state protection offered to victims of domestic violence. It found the reason such protection would be withheld from the applicant was because she was a woman. However, the Tribunal found that the harm the applicant feared was localised and there was little chance that her boyfriend would locate her if she resided outside Bangkok and away from her parents' home. It further found that it was reasonable for her to relocate. Accordingly, the Tribunal found that the applicant did not have a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

NBKT v MIMA

[2006] FCAFC 195

Federal Court of Australia, Gyles, Stone, Young JJ, NSD 344 of 2006, 20 December 2006

Immigration - Protection Visa application - whether failure to comply with s.424A of *Migration Act 1958* in respect of provision of information to appellant - whether Tribunal asked wrong question or applied wrong test in considering claim of fear of persecution on religious grounds - whether Tribunal denied appellant procedural fairness having regard to manner of examination of independent country information - lapse of time between entry into Australia and bringing of application for protection visa - consideration of s.91R(3)(b) of *Migration Act 1958* - where appellant converted to Christianity while in Australia.

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 claimed to fear persecution in China on the basis of her conversion to Christianity. In its reasons for its decision, the Tribunal relied on the fact that she had applied for a protection visa five and a half years after arriving in Australia on a business visa. The Tribunal accepted that Christianity was rapidly growing within China and concluded that there was no real chance that the appellant would be persecuted. Furthermore, the Tribunal found her claims of practising Christianity in Australia were vague and unsubstantiated and disregarded them under s.91R(3)(b) of the *Migration Act 1958* (the Act). The Federal Magistrate found the Tribunal did not err in considering the applicant's claims and made findings open to it on the evidence.

The appellant alleged that the Tribunal failed to comply with s.424A of the Act in relation to information in her protection visa application, failed to apply the correct test in considering whether her fear of persecution was well-founded and failed to provide procedural fairness concerning the way in which independent information was put to her.

Held: Appeal dismissed.

per Young J (Gyles & Stone JJ agreeing):

- (i) Following *SZEEU v MIMIA* (2006 150 FCR 214 (*SZEEU*), the dates of the appellant's arrival in Australia and her protection visa application constituted "information" to which s.424A(1) of the Act applied.
- (ii) However, as the appellant "gave" this information for the purposes of the application, these dates fell within the exemption in s.424A(3)(b). This was uncontentious factual material forming an essential element of the decision under review. The appellant expressly provided or affirmed the relevant dates in response to basic propositions put by the Tribunal at hearing. The Tribunal's questions arose naturally from the appellant's application. The appellant's written submissions also expressly referred to and incorporated the information contained in her protection visa application, thereby inviting the Tribunal to refer to it.
- (iii) The authorities highlight the importance of giving careful consideration to the nature of the information said to fall within s.424A(3)(b) and the circumstances in which it is communicated to, or elicited by, the Tribunal. Both *SZEEU* and *NAZY v MIMIA* (2005) 87 ALD 357 suggest that the exception may not apply where the appellant does no more than affirm the accuracy of a statement which contains many diverse pieces of information. At the same time, artificial distinctions should not be drawn between information provided by way of "evidence in chief" and answers to questions posed.
- (iv) *Obiter*: It seems somewhat odd, and hardly consistent with the statutory purpose of s.424A of the Act, to extend it to information that is basic to the whole review process such as the dates the applicant arrived in Australia and applied for a protection visa.

- (v) Given the general nature of the appellant's claims concerning Christianity, the Tribunal was not obliged to speculate whether she might join an official or unregistered church in China, particularly where she was indifferent in choosing between them. It was open to the Tribunal to conclude on the basis of the limited evidence available that there was no real risk of persecution if the appellant were to continue to practise Christianity in the manner she had chosen.
- (vi) *Obiter*: In cases where the fact or genuineness of religious conversion is not in dispute, there is considerable doubt whether s.91R(3) of the Act would authorise the Tribunal to disregard the fact of religious conversion as distinct from conduct that might thereafter be engaged in by the convert in Australia. Conversion is a matter of conscientious belief rather than conduct.

SZGLK v MIMIA
[2006] FCA 1744

Federal Court of Australia, Rares J, NSD 1102 of 2006, 8 November 2006

Immigration - Protection Visa application - where Federal Magistrate found jurisdictional error on part of Tribunal but refused relief on basis of significant delay - where applicant pursued alternative relief through two class actions - whether acquiescence with Tribunal decision.

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations. The appellant, a national of Malaysia, claimed to fear persecution for reasons of his homosexuality.

The Tribunal had found that the appellant was a homosexual and that homosexuals constituted a particular social group in Malaysia. It noted that "discretion seems by now to be germane to him" and found that the appellant could be expected to relocate away from his home state to areas such as Kuala Lumpur where there appeared to be a degree of tolerance.

Within a month of the Tribunal's decision the appellant commenced to participate in a class action: *Macabenta v MIMA* which proceeded to a decision of the Full Court of the Federal Court. There was a subsequent application for special leave to appeal to the High Court of Australia which was refused on 18 June 1998. He later joined the *Muin* and *Lie* class action which was dismissed on 20 February 2004. An application was made in a letter dated 23 March 2004, for consideration of a more favourable exercise of the Minister's discretion under s.417 of the *Migration Act 1958* (the Act). Notification was received on 5 April 2005 that the application was unsuccessful and a little under two months later the appellant commenced proceedings in the Federal Magistrates Court to challenge the decision of the Tribunal.

His Honour the Federal Magistrate held that the appellant had proved that the Tribunal had committed a significant jurisdictional error by acting on an erroneous view of the law exposed much later by the High Court's decision in *Appellant S395/2002 v MIMA* (2003) CLR 473. The Federal Magistrate accepted the appellant's submission that the Tribunal erred by assuming that he would act discreetly upon return to Malaysia, without considering the reasons why he would act discreetly. However, his Honour found that part of the appellant's attempts to secure refugee protection status "occurred on acceptance that the Tribunal's decision was in fact correct" and refused on the basis of "significant unexplained delays" to exercise his discretion and grant relief.

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

- (i) The Federal Magistrate erred by withholding relief. The remedies which the appellant sought in those other proceedings were perfectly legitimate for him to pursue and did not involve any unwarrantable delay or acquiescence by him.
- (ii) The Federal Magistrate erred by concluding that the letter under s.417 of the *Migration Act 1958* amounted to or could be read as an acceptance of the correctness of the Tribunal's decision.
- (iii) It was erroneous for his Honour to take the view that the appellant's participation in the class actions was a matter in which he should be taken as having accepted the correctness of the Tribunal's decision. There are a number of reasons why people take other proceedings or do not challenge on all possible

grounds in one proceeding. Furthermore, the class actions which had been joined by the appellant could have resulted in his matter being reconsidered and the point he now wished to take could have been reventilated before the Tribunal afresh. It is possible to see that a more convenient and satisfactory remedy was achievable for the appellant in pursuing the substantive class actions.

SZGLT v MIMA
[2006] FCA 1749

Federal Court of Australia, Dowsett J, NSD 1210 of 2006, 20 December 2006

Immigration - Protection Visa application - economic hardship - where extortion by Moro Islamic Liberation Front - where threats made to kill appellant's family - where Tribunal found that appellant could relocate - whether Tribunal considered full ambit of claims - whether economic persecution.

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 that the appellant was not a person to whom Australia had protection obligations.

The appellant, a national of the Philippines, claimed that the Moro Islamic Liberation Front (MILF) was active in her province and had demanded money from her family. The family had paid some money, but the MILF started demanding larger amounts including a part of the appellant's salary which was unaffordable. The MILF threatened to kill the family and take over their properties. The appellant claimed the government was unable to control the situation. The appellant further claimed that she and her family had been singled out by the MILF rebels because of their financial means, derived from her husband's fish-mongering business and her salary as a teacher.

The Tribunal accepted that the appellant was opposed to the aims and extortionary taxes of the Islamic rebels, that the family had been paying the tax imposed by the rebels and that the appellant had counselled her family against doing so. The Tribunal was not satisfied that the appellant had ever come to the adverse attention of the rebels as a result of her disapproval of the tax. The Tribunal also considered whether the appellant could relocate to elsewhere in the Philippines to specifically avoid the rebels in question and concluded that relocation was a reasonable possibility.

The substantive matter in the appeal was whether the Tribunal had properly understood and considered the full ambit of the appellant's claims, in particular that she claimed to fear economic persecution as well as physical violence, and that such fear was of persecution for political belief (her opposition to extortion) and, arguably, for membership of a particular social group (those who could pay and/or had spoken out against extortion).

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

- (i) The Tribunal failed to appreciate the full range of the appellant's claims to refugee status, particularly those aspects which related to financial persecution. The Tribunal could be reasonably expected to question the appellant in more detail about the financial difficulties of extortion had it understood the nature of the claim. The Tribunal should have identified the appropriate questions in relation to economic persecution, including whether the relevant extortion was likely to threaten the capacity of the appellant and her family to subsist.
- (ii) The Tribunal's reasons for affirming the delegate's decision, including not being satisfied that the appellant had come to the attention of MILF rebels, the appellant not telling anybody about her claims and the appellant returning from the United Arab Emirates to the Philippines, were not relevant to the question of economic persecution.
- (iii) Further, had the Tribunal appreciated the appellant's concerns about economic persecution, it would have given more attention to the financial implications of relocation. The Tribunal's finding that the appellant had sufficient resources to enable her to live in Manilla, namely her family's resources and her husband's income, does not take into account the reasonable expectation that if the appellant were to relocate to Manilla she would do so with her family and in that case her husband would be deprived of the income from his business.

**Applicants S1266 of 2003 v MIMA
[2006] FCA 1771**

Federal Court of Australia, Bennett J, NSD 582 of 2006, 21 December 2006

Immigration - Protection Visa application - logical difficulty with Tribunal's conclusion that harm suffered by appellant not racially motivated in circumstances where Tribunal satisfied that ethnic Chinese in Indonesia suffered persecution - no jurisdictional error in Tribunal's reasoning process - allegation that Tribunal denied appellant common law procedural fairness - issue as to whether some ethnic Chinese were not targeted because of their race should have been put to appellant.

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 Indonesia, claimed to fear persecution for reasons of his Chinese ethnicity.

The Tribunal accepted that the appellant's business had been looted and destroyed during the May 1998 riots but was not satisfied that this was because the business was owned by a Chinese family. Rather it occurred in the context of a general breakdown of law and order. Furthermore, the Tribunal was not satisfied that the appellant's fear of harm on return to Indonesia was well-founded. This conclusion was based, first of all on the Tribunal's finding that only a small percentage of ethnic Chinese were actually harmed during the riots, the appellant and his family were unharmed during the riots and there was no evidence that his siblings who continued to reside in Indonesia had been harmed. Secondly, there had been significant changes in Indonesia since the appellant left in August 1998 and even if there were a further riot, the chance was remote that the appellant would face serious harm. Finally, the new political leadership was determined to promote racial tolerance and this appeared to have the support of a substantial proportion of the population.

Before the Federal Magistrate the appellant contended that the Tribunal had denied him natural justice by failing to put to him for comment 15 country information reports referred to by the Tribunal in its decision. The Federal Magistrate considered that the Tribunal had complied with its obligations to provide natural justice.

On appeal, the appellant again contended that he had been denied natural justice and that the Tribunal's conclusion was not supported by evidence or was otherwise illogical.

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

- (i) The Tribunal denied the appellant natural justice and thereby made a jurisdictional error.
- (ii) The member did not suggest to the appellant that it doubted that the destruction of the family's business was due to it being owned by a Chinese family or suggest that ethnic Chinese were not targeted during the riots because of their race. To the extent that the Tribunal relied upon evidence that some ethnic Chinese were not targeted because of their race but instead suffered harm in the context of a breakdown of law and order, that evidence was adverse information that was "credible, relevant and significant" in the sense directed in *Applicant VEAL of 2002 v MIMIA* (2005) 222 ALR 411 and the Tribunal was obliged to give the appellant the opportunity to deal with it.
- (iii) The observations in *SZBEL v MIMIA* [2006] HCA 63 are also relevant. Had the appellant been given an opportunity to respond to the issue of the cause of the destruction of his business, the Tribunal may have concluded that the looting of businesses did have a racial nexus and that if this were to reoccur, the appellant could suffer harm serious enough to amount to persecution.
- (iv) The Tribunal's finding that there was no link between the harm and the appellant's race impacted on its characterisation of subsequent events in Indonesia in September 1999 and its conclusion that the chance was remote that the appellant would face harm in the future from any riots as an ethnic Chinese. The denial of natural justice therefore affected the ultimate conclusion.

NAZH v MIMA
[2007] FCA 5
Federal Court of Australia, Madgwick J, NSD 1313 of 2005, 11 January 2007

Immigration - Protection Visa application - *sur place* claim - whether constructive failure to exercise jurisdiction - whether failure to consider integer of claim - 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 that the appellant was not a person to whom Australia had protection obligations.

The appellant is a small child, born in Australia in 2002 to Sri Lankan parents who were ultimately unsuccessful in their applications for protection after several appeals to the courts. A separate application was lodged for the appellant after his birth. Before the Tribunal, the appellant's parents lodged submissions on his behalf which repeated their own claims for protection. They also claimed that a further risk to the appellant had been generated by the publication on the internet of Hely J's Federal Court judgment in relation to the parent's protection claims which exposed the identities of the appellant's parents and the father's name. The Federal Magistrate had dismissed the appeal on the grounds that it was clear that the applicant's *sur place* claim was considered and dealt with by the presiding member by reference to that information and there was no jurisdictional error in the decision.

The appellant submitted that although a separate finding was made by the Tribunal to the effect that the appellant would not face a risk of persecution based solely upon his and his parents' status as failed asylum seekers, the Tribunal had not addressed the claim that the combination of his parents' experiences and the effect of the internet publication of information concerning those experiences would expose the appellant (and his family) to persecution for a Convention reason should he travel to Sri Lanka.

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

- (i) The Tribunal failed to consider an integer of the applicant's claims which amounted to a constructive failure to exercise jurisdiction. The Tribunal relied on country information dealing entirely with unsuccessful claims for refugee status by returning Tamils in general and there was no consideration of the particular claims made by the appellant's father on his behalf.
- (ii) The Tribunal missed the potential force of what the father was saying, and the separate and distinct way he was putting the *sur place* claim. The appellant's father sufficiently clearly asserted a claim that the appellant would suffer harm at the hands of members of the community in Sri Lanka (through harm the parents would suffer); and by reason of his father acquiring a reputation as a traitor from what had appeared on the internet. This was materially different from a mere possibility that the fact of their unsuccessful application for refugee status here would alone cause the parents difficulties.

SZCBT v MIMA
[2007] FCA 9
Federal Court of Australia, Stone J, NSD 1682 of 2006, 12 January 2007

Immigration - Protection Visa application - relocation principle - whether Tribunal applied correct test in finding that applicant did not have well-founded fear of persecution for Convention reason - whether Tribunal considered possibility of future persecution - ambit of Tribunal's obligations to consider future persecution upon relocation.

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 Egypt, claimed to fear persecution because of his Coptic Christian religion, because he was a member of a particular social group (namely Christian lawyers) and because he was a member of the liberal political opposition.

The Tribunal accepted that the appellant may have embarked on a campaign of letter writing generally directed towards religious issues and that it was possible that this led to his unlawful detention. However, it considered that the police were acting as rogue individuals, and not in a manner sanctioned by the state. The Tribunal

accepted that the appellant was the victim of some police harassment in his place of residence, but found that, given that he was well educated, a lawyer, and a male with family support, and in the absence of any information put forward by him as to why he would be unable to relocate within Egypt, it would be reasonable for him to do so. The Federal Magistrates Court found that the Tribunal's conclusion as to relocation was open to it, and that in reaching this conclusion the Tribunal correctly applied the test for relocation.

The appellant contended that the Federal Magistrate erred in failing to find that the Tribunal misapplied the test for relocation, and in doing so made a jurisdictional error. By finding that the local police or authorities would not pursue him to another city, or inform the authorities there of his presence, the Tribunal was distracted from the central question, namely whether he had a well-founded fear of future persecution should he be returned.

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

- (i) The Federal Magistrate erred in failing to find that the Tribunal misapplied the test for relocation, and in doing so made a jurisdictional error.
- (ii) The Tribunal found that the appellant had a reputation as a troublemaker and that it was likely that this was at the root of his past treatment. That being so it was not sufficient to find that those responsible for that treatment would not seek him out in other parts of Egypt. It was necessary for the Tribunal to ask if the appellant is likely to continue with the conduct that marked him as a troublemaker in the past and, if so, whether that conduct would, in the future, evoke a similar response from others. The Tribunal is not entitled to base its prediction on an expectation that the appellant will modify his behaviour on his return to Egypt.
- (iii) The Tribunal's comment – that the applicant did not suggest that he would attract new harassment by continuing to engage in the same kinds of activity as he had in the past – must be considered in the context of the exchange that the Tribunal had with the applicant. The Tribunal's questions were specifically directed to the local problems and whether the applicant could escape those local problems by relocating. They were focused on the consequences of past conduct. As reported by the Tribunal there was nothing in the exchange that would have directed the applicant's mind to his future activities and their consequences. The general thrust of the Tribunal's comments suggest that the issue was overlooked.

SZESF v MIMA

[2007] FCA 6

Federal Court of Australia, Stone J, NSD 365 of 2006, 12 January 2007

Immigration - Protection Visa application - meaning of "information" in s.424A of *Migration Act 1958* - whether information contained in photographs was the reason or part of the reason for Tribunal's decision - whether information in photographs fell within the exceptions in s.424A(3) - where appellant produced photographs to both Minister for Immigration and Multicultural Affairs and the Tribunal and claimed they depicted different events - where Tribunal relied on fact that photographs depicted the same event to make adverse credibility finding.

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 Russia, claimed to fear persecution for reasons of political opinion because of his open opposition to Russia's war in Chechnya.

Included in the appellant's visa application were several photographs that the appellant claimed were of a demonstration he had attended. Five more photographs were produced at the Tribunal hearing which the appellant initially claimed were of a different demonstration. After questioning by the Tribunal, the appellant conceded that all of the photographs depicted the same demonstration in May 2000. The Tribunal ultimately accepted that the appellant had participated in some protests in Moscow but did not find credible his claims to have been exposed to arrest by the police, attack, threatened attack, or any other harm as a result.

The appellant contended both at the primary stage and on appeal that the Tribunal had failed to comply with its obligations under s.424A of the *Migration Act 1958* (the Act).

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

- (i) The Tribunal failed to comply with s.424A in relation to information contained in photographs given to the delegate but not produced to the Tribunal by the appellant, resulting in jurisdictional error.
- (ii) Having referred to it several times, the Tribunal's conclusion that the appellant tried to pass off the photographs given at hearing as being of a different demonstration from that depicted in the delegate's photographs, must have been relevant to the ultimate decision. The conclusion that the photographs produced to the Tribunal were not what the appellant originally represented them to be was based on the information contained in both the photographs before the delegate and the photographs produced to the Tribunal. It was only by comparing the information provided by each set that the Tribunal could make the deduction to which it referred.
- (iii) Three of the photographs in the materials before the Tribunal appear to be the same as the photographs before the delegate and were marked as having been provided by the appellant to the delegate. There is no evidence as to how the Tribunal obtained these photographs and it is reasonable to conclude that they were contained in the Department file given pursuant to s.418(3) of the Act. The information in these photographs does not come within the exception in s.424A(3)(b).
- (iv) Although the Tribunal commented that the appellant had produced "the originals of the documents which had been produced to the Department"; and in formal legal documents or statutes the word "document" may commonly be given a wide meaning encompassing photographs; the Tribunal's expression of its reasons does not have such formality. Given the context in which the comment appeared, the Tribunal was referring to documents in the more usual sense and was not referring to photographs.

FEDERAL MAGISTRATES COURT JUDGMENTS

SZGGN & Anor v MIMA

[2006] FMCA 1803

Federal Magistrates Court of Australia, Raphael FM, SYGI 199 of 2005, 8 December 2006

Immigration - Protection Visa application - Sri Lankan mother and illegitimate child - fear of persecution arising from unlawful marriage - fear that child would be ostracised and abused - where Tribunal found family could remain quiet about child's status - whether child and family could be expected to remain silent about illegitimacy - whether Tribunal committed jurisdictional error.

The applicants, a mother and child from Sri Lanka, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not people to whom Australia had protection obligations.

The applicant mother claimed to fear persecution from her former "husband". She claimed he was abusive. She further claimed to fear persecution, in the form of social, legal and economic suffering, as a woman in Sri Lanka who was married unlawfully. The applicant child claimed to fear persecution as an illegitimate child in Sri Lanka arising from the invalidity of her parent's "marriage". She claimed that she may be ostracised and persecuted by society, family members and relatives.

In affirming the decision of the delegate, the Tribunal found that the applicants were not members of a particular social group for the purposes of the Convention because the harm feared was the defining characteristic of the group. In respect of the applicant child, the Tribunal found that the family had the option of remaining quiet about her illegitimacy and that even if this did become known, social comment on the matter would not be so serious as to constitute persecution within the meaning of the Convention and s.91R of the *Migration Act Act 1958* (the Act).

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal fell into jurisdictional error in that it failed to properly consider the applicant mother's claims to fear social, legal and economic suffering from restrictions and disadvantages by virtue of her unlawful marriage.
- (ii) In respect of the applicant child, the Tribunal committed an error of the type identified in *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 by finding that the family had the option of remaining quiet about her illegitimacy. An admonition of this type in respect of a young child would be so unlikely to be effective that it would not be a genuine reason for refusing the child Australia's protection. The applicant child and her relatives could not be expected to remain silent about the illegitimacy and the applicant mother could not be expected to be dishonest about the matter to educational authorities or the government.
- (iii) The evidence put forward by the applicant was that her child would be ostracised, subject to abuse, suffer socially, legally and economically and would be subject to ridicule and looked upon as an outcast. The Tribunal's assumption that even if the illegitimacy became known all that would happen would be "some social comment", was not a finding based on evidence contained in the independent country information or otherwise and the Tribunal thus committed a jurisdictional error.

MZXAR v MIMA & Anor

[2006] FMCA 1926

Federal Magistrates Court of Australia, McInnis FM, MLG 726 of 2005, 21 December 2006

Immigration - Protection Visa application - where issue concerning standard of interpretation - where no accredited interpreter available - where applicant unable to understand questions or address issues - jurisdictional error.

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

fear persecution on the basis that he would be persecuted by Georgian authorities for his political views arising from a dispute with the management of a dance company he was touring with in Australia.

A hearing was held with the assistance of a Georgian interpreter who was not accredited by the National Accreditation Agency for Translators and Interpreters (NAATI). During the hearing, the applicant's representative indicated that he would like the hearing to be rescheduled due to problems perceived with the standard of interpretation. The representative indicated that the previous day he had spoken to the applicant through a friend who had provided a different account to what had been provided to the Tribunal at hearing. The Tribunal indicated that it would not reschedule a further hearing as the Tribunal had gone to great lengths and been unable to locate a NAATI accredited Georgian interpreter. The Tribunal indicated that it would receive written submissions from the applicant instead. Written submissions were provided on 18 February 2005.

The Court also had difficulties with obtaining a Georgian interpreter for its proceedings. Before the Court were two transcripts of the Tribunal hearing. The second transcript contained some inaccuracies in recording what had been said in English at the hearing. However, it clearly revealed some differences in terms of the Georgian words.

The applicant contended that the Tribunal had failed to comply with its obligations under ss.420 and 425 of the Migration Act 1958 (the Act) which resulted in the applicant's inability to understand various questions, to address relevant issues and to make any further oral submissions because of the level of interpretation provided. The applicant contended that he was denied the opportunity to give evidence because the interpreter was not qualified.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal failed to give proper effect to s.425(1)(a) of the Act by failing to make a meaningful direction pursuant to s.427(7) and made a jurisdictional error.
- (ii) As there were numerous errors noted between the two transcripts, the complaint concerning the quality of the interpreter (who was not qualified) was well made out. The interpretation in the application was critical in order to permit the applicant to answer directly and effectively the questions raised by the Tribunal. The mere provision of written submissions could not be regarded as having placed the applicant as nearly as possible in the same position as an English speaker.
- (iii) The need for a qualified interpreter becomes paramount where issues of fact are agitated and need to be tested and assertions made by the applicant are ultimately rejected by the Tribunal. Failing to provide a competent interpreter constituted a failure to comply with the appropriate provisions of the Act. The failure was not a denial of procedural fairness of a kind which would be avoided by the operation of s.422B of the Act.

MZXJI v MIMA & Anor

[2006] FMCA 1921

Federal Magistrates Court, McInnis FM, MLG 474 of 2006, 21 December 2006

Immigration - Protection Visa application - whether failure to consider social group - whether integer of claim - whether lack of state protection - whether jurisdictional error.

The applicant, a national of Sri Lanka, 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 as a Tamil Muslim opposed to the Liberation Tigers of Tamil Eelam (LTTE).

The Tribunal found that the applicant did not have a real chance of persecution due to his religion and that the Sri Lankan authorities had the ability to control the harm the applicant feared.

The applicant contended, among other things, that the Tribunal failed to deal with integers of the applicant's claims, being that he had a well-founded fear of persecution based on his race, membership of a particular social group and actual or imputed political belief.

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) The Tribunal failed to consider essential claims of fear of persecution by the applicant arising out of his race (as a Tamil), membership of a particular social group (a Tamil Muslim) and his actual or imputed political beliefs (of opposition to the LTTE). Its failure to do so constituted jurisdictional error.
- (ii) All of the claims squarely raised by the applicant needed to be addressed by the Tribunal before it could make a proper and appropriate assessment of the availability of state protection for the applicant.
- (iii) The obligations of the Tribunal to properly consider the claims are not avoided by moving directly to the question of state protection.

SBLC v MIMIA & Anor

[2006] FMCA 1910

Federal Magistrates Court of Australia, Lindsay FM, ADG 192 of 2006, 22 December 2006

Immigration - Protection Visa application - s.424A notice includes information from Interpol alleging applicant wanted for fraud in country of origin - fear of persecution not well-founded - Tribunal makes finding that criminal conduct explains fear of persecution - illegality of decision - jurisdictional error.

The applicant, a national of Vietnam, 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 feared persecution arising from his former association with the Nationalist South Vietnamese government during the Vietnam War and assistance given to Buddhist monks. In particular, the applicant claimed to have been arrested and detained in 1980 and 1995 and to have been issued with a summons in May 2003 prior to his departure for Australia. Information from Interpol before the Tribunal indicated that the applicant was wanted for alleged fraud offences by the Vietnamese authorities.

In its reasons for decision, the Tribunal found that there was no real chance he would be persecuted in the reasonably foreseeable future for reasons of his religion or imputed political opinion. The Tribunal accepted that the applicant feared being apprehended but did not accept that the summons was issued for the reasons given by the applicant. The Tribunal found that any harm the applicant feared in relation to the alleged fraud “is for reasons of having been involved in criminal activity” and not for Convention-related reasons. The Tribunal also found that the applicant’s fear of being arrested or harmed by the police arose from his alleged involvement in criminal activity and not because of any imputed political opinion or religious belief.

The applicant alleged jurisdictional error on several grounds, including that the Tribunal’s use of the Interpol information was illogical or irrational, was based on information that had not been produced to the applicant and the allegations were unable to be tested by him.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal’s decision was affected by illogicality, irrationality or application of a test based upon an inappropriate or mistaken criterion, namely criminality, giving rise to jurisdictional error.
- (ii) The Tribunal’s finding that the applicant’s fear of persecution on account of political or religious opinion or membership of a particular social group was not well-founded, based on its evaluation of the country information, did not necessitate an alternate explanation for the applicant’s fears. The Tribunal’s finding that the applicant’s fear resulted from involvement in criminal activity went further than a suggestion that the applicant was a person against whom fraud allegations have been made. The Tribunal’s apparent apprehension that it was bound to find that it was the applicant’s involvement in criminal activity that gave rise to his fears in relation to the summons is disturbing. The applicant could have held fears that were not well-founded and yet be innocent of the criminal activity with which he is charged.
- (iii) The Interpol information was identified by the Tribunal as a part of the reason for affirming the delegate’s decision. There was no alternative basis in the material before the Tribunal to permit the

drawing of an inference that the applicant was a fugitive from the criminal justice system and that explained his attitude to the summons.

- (iv) Nor was there any independent and unimpeachable basis for the decision. The Tribunal's conclusion that the applicant fears arrest because he is guilty of criminal conduct appears to have been utilised as a means of cross-checking the earlier finding that the applicant's fear of persecution for a Convention reason was not well-founded. The focus on the question of the applicant's involvement in criminal activity distorted the decision-making process.

SZBZN v MIMIA & Anor

[2006] FMCA 27

Federal Magistrates Court of Australia, Raphael FM, SYG 2553 of 2003, 18 January 2006

Immigration - Protection Visa application - where applicant produced letters in support of claims - where Tribunal originally had doubts as to genuineness of letters - where Tribunal subsequently made its own investigations and found letters were genuine but did not contain honest expressions of opinion - whether failure of Tribunal to put that conclusion to applicant amounted to breach of procedural fairness.

The applicant, a citizen of Bangladesh, 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 being a leading activist in the Awami League (AL) political party. In support of his claims he provided three letters from the General Secretary of the Bangladesh AL, the Chittagong District AL and from Sheikh Hasina, former Prime Minister and leader of the AL respectively. The Tribunal expressed doubts at hearing that the letters were genuine, but made its own enquiries and subsequently made its decision on the basis that the letters were genuine but that the claims of persecution in the letters were not credible and that the applicant did not have a well-founded fear of persecution for reasons of political opinion. The Tribunal stated that "... the applicant has, through using political influence or by other means, obtained letters to suit his ends ...".

The applicant contended that, by not giving him an opportunity to comment on the conclusion reached about the letters the Tribunal had denied him procedural fairness. The application for review was made prior to the commencement of s.422B of the *Migration Act 1958*.

Held: Tribunal decision void and remitted for reconsideration according to law

- (i) The Tribunal did not provide the applicant with procedural fairness in the manner in which it dealt with the letters and fell into jurisdictional error.
- (ii) The Tribunal could have responded by finding that the concerns expressed in the letters, whilst genuine, were not well-founded. If it had done so it would have completed its mandated task. Instead, the Tribunal came to a conclusion based upon no evidence whatsoever that the applicant and very senior members of the Bangladesh opposition had connived to dishonestly influence the Minister. If a Tribunal is going to come to a conclusion of this seriousness where there has been no suggestion that such a conclusion was being considered, the Tribunal is bound, as it was in *WAGU v MIMA* [2003] FCA 912, to give the applicant an opportunity to comment upon its suspicions.

LEGISLATION UPDATE

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

▶ Legislation Pending

Migration Amendment (Review Provisions) Bill 2006

The *Migration Amendment (Review Provisions) Bill 2006* (the Act) was introduced to the Senate on 7 December 2006. On the same day, the Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 20 February 2007. Submissions were called for by 19 January 2007 and a public hearing was held in Sydney on 31 January 2007.

The Bill 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.

A copy of the bill can be found at:

[http://parlinfoweb.aph.gov.au/piweb/browse.aspx?path=Legislation%20%3E%20Current%20Bills%20by%20Title%20%3E%20Migration%20Amendment%20\(Review%20Provisions\)%20Bill%202006](http://parlinfoweb.aph.gov.au/piweb/browse.aspx?path=Legislation%20%3E%20Current%20Bills%20by%20Title%20%3E%20Migration%20Amendment%20(Review%20Provisions)%20Bill%202006)

A copy of the submissions received by the Senate Legal and Constitutional Affairs Committee as at 2 February 2007 can be found at:

http://www.aph.gov.au/Senate/committee/legcon_ctte/mig_review_provisions/submissions/sublist.htm

CASELOAD OVERVIEW

▶ RRT Decisions – January 2007

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	1	0	0	0	1
Albania	0	1	0	0	1
Algeria	1	0	0	0	1
Bahrain	0	1	0	0	1
Bangladesh	3	8	0	4	15
Belarus	1	0	0	0	1
Brazil	0	1	0	0	1
Bulgaria	0	1	0	0	1
Cambodia	0	1	0	0	1
Chile	0	2	0	0	2
China (PRC)	32	106	2	5	145
East Timor	0	1	0	0	1
Egypt	2	0	0	0	2
Ethiopia	4	0	0	0	4
Fiji	2	3	0	0	5
Ghana	0	1	0	0	1
India	1	20	0	3	24
Indonesia	1	15	1	0	17
Iran	2	1	0	0	3
Iraq	1	0	0	0	1
Israel	0	0	1	0	1
Korea Dem Peoples Rep of	0	2	0	0	2
Korea Republic Of	0	3	0	0	3
Kyrgyzstan	2	1	0	0	3
Latvia	2	0	0	0	2
Lebanon	1	5	0	0	6
Macedonia Fmr Yugo Rep of	0	1	0	0	1
Malaysia	0	10	0	1	11
Nepal	1	9	0	0	10
Nigeria	2	2	0	0	4
Pakistan	1	3	0	0	4
Papua New Guinea	1	0	0	0	1
Philippines	0	6	1	0	7
Russian Federation	1	0	0	0	1
Slovakia	0	1	0	0	1
Sri Lanka	4	6	0	0	10
Thailand	2	6	0	1	9
Tonga	0	2	0	0	2
Turkey	1	0	0	0	1
Ukraine	0	2	0	0	2
Uzbekistan	2	1	0	0	3
Vietnam	0	3	0	0	3

ACCESSING TRIBUNAL DECISIONS

Access on Tribunal Premises

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

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

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

Access via the Internet

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

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

The RRT web site is updated on a regular basis.

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

INDEX

Arab (Israel)	5
Arrest warrant (China).....	3
Christian (China).....	3
Detention (China).....	4
Discrimination (Israel).....	5
Discrimination (Slovenia)	7
Domestic violence (Thailand).....	8
Exploitation (Nepal)	6
False accusations (Israel)	5
Falun Gong (China).....	2
Further Protection Visa (Afghanistan).....	2
Hindu (India)	4
Hindu (Malaysia)	6
Harassment (Israel)	5
Harassment (Nepal)	6
Harsh treatment (China).....	4
Hazara (Afghanistan)	2
Local Church (China).....	3
Muslim (Thailand).....	8
Particular social group “Falun Gong” (China).....	2
Particular social group “Unmarried women” (Nepal).....	6
Particular social group “Women” (Thailand).....	8
Russian (Latvia).....	5
Serb-Croat (Slovenia)	7
Sharia law (Malaysia).....	6
Shia (Afghanistan)	2
Shouters (China).....	3
Threats (India)	4
Threats (Latvia)	5
Threats (Slovenia).....	7
Underground church (China).....	3
Violence (Israel)	5
Violence (Latvia).....	5
Violence (Slovenia)	7
Vishwa Hindu Parishad (India).....	4