

# RRT Bulletin

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## 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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## Bahrain

060883850

25 January 2007, Melbourne

Ms W Boddison, Member

**BAHRAIN - POLITICAL OPINION - SHIA MUSLIM - DISCRIMINATION - PROTESTS** - The applicant, a Shia Muslim, feared persecution on the basis of his involvement in protests against the oppression of the Shia people by the Sunni government. The applicant claimed he and his family participated in many peaceful demonstrations against the government and that in the mid 1990s he was detained for several months. He claimed that he was later detained again for a short time. The applicant claimed his sibling was also arrested and detained. He claimed to have participated in a planned peaceful protest in which many people were harmed by the police and accused of damaging the area in a shopping precinct. The applicant claimed the authorities videotaped the demonstration in order to identify the participants and that officials came to his home looking for him. He claimed that he feared persecution on the basis of his political opinion if he returned.

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

The Tribunal accepted the applicant was a Shia Muslim and that the Shia were discriminated against in Bahrain. It accepted that the applicant and his sibling were detained as claimed, noting that in evidence to the Tribunal he demonstrated extensive knowledge about the political movements and relevant groups in Bahrain which was consistent with independent information. Further, the Tribunal accepted that the applicant was involved in the shopping precinct demonstration as claimed and that the authorities sought him after this event. It accepted that the applicant's family were involved in protesting against the government and found that if he returned to Bahrain he would continue to be politically active. The Tribunal noted that those detained for their political activities were tortured and that ill-treatment of detainees continued. It found that the applicant would not be able to relocate to avoid the risk of persecution as the repression of the Shia and the political power of the ruling regime extended throughout Bahrain. Accordingly, the Tribunal found that his fear of persecution was well-founded for a Convention reason.

## China

060986747

30 January 2007, Sydney

Ms S Durvasula, Member

**CHINA - RELIGION - FALUN GONG - ACTIVIST** - The applicant feared persecution as a Falun Gong practitioner. He claimed that a sibling had introduced the practice to the family for health reasons and this helped other family members. The applicant claimed that he quit the Chinese Communist Party although his work unit did not know. When he started refusing to attend party branch meetings, he was criticised by the chairman of the party branch. The applicant claimed that he continued to pay fees to the Communist Party against his will. He claimed that another family member was imprisoned for Falun Gong activity. The applicant gave up drinking and studied and practised Falun Gong exercises every day with his family. He claimed this could only be done covertly every morning. The applicant claimed that he prepared posters about persecution of Falun Gong practitioners and put them up in public places and into mailboxes. He claimed that it was important for him to communicate the truth about Falun Gong and he feared arrest and persecution if he returned.

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

The Tribunal found the applicant to be a credible witness and accepted that he was introduced to Falun Gong by his sibling. It accepted that he renounced his membership of the Communist Party and stopped attending meetings at his work. The Tribunal accepted that the applicant also distributed posters about Falun Gong to private mail boxes. It accepted he was not prepared to renounce his beliefs and had continued to actively participate in Falun Gong protests and activities in Australia. The Tribunal was satisfied there was a possibility that the Chinese authorities would find out about his Falun Gong beliefs and practice, given the strength of his convictions, his continued refusal to attend Communist Party meetings and his relative's history of being detained for Falun Gong activities. It accepted that the applicant would not change his beliefs and was satisfied there was a real chance that he would come to the adverse attention of the authorities if he returned. Accordingly, the Tribunal found that his fear of persecution was well-founded.

**061016061**

**6 February 2007, Sydney**

**Mr T Delofski, Member**

**CHINA - RELIGION - UNDERGROUND CHURCH - PREACHER** - The applicant feared persecution as a preacher at an underground church. He claimed that he detested the Communist Party's dishonesty and dictatorship of the Chinese people. The applicant claimed he attended the Three-self Church and took an active part in church activities but found that it was only an extension of the government. He claimed he started attending an underground church until it was closed by the government and then attended another which was also closed down. The applicant claimed that he opened his own house as a place of worship and that although the police came several times he "covered it up". He claimed he was later told by the police to confess his guilt and hand over a list of names and warned that he would be sent to undergo reform through labour. The applicant also claimed that police warned his boss about his Christian activities and he was sacked. He claimed that if he had persisted he would have been imprisoned.

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

The Tribunal accepted the applicant as a credible witness. It noted that he gave a detailed and credible account of his involvement in house church activities and of his systematic harassment by the police. The Tribunal found that the applicant's claims were consistent with independent evidence and that his Christian beliefs were genuine. It accepted that if the applicant returned to China now or in the reasonably foreseeable future there was a real chance that his continued practise of his beliefs, even if conducted in secret, would be detected and he would be detained and persecuted for reasons of his beliefs. The Tribunal found that the persecution feared involved serious harm and that his religion would be the reason for the harm. Accordingly, it found that the applicant had a well-founded fear of persecution for reasons of his religion.

**060858423**

**26 February 2007, Sydney**

**Ms C Carney, Member**

**CHINA - RELIGION - CHRISTIAN - SHOUTER - PROSELYTISING** - The applicant feared persecution as a result of her relationship with a leader of an underground Christian Shouter group and her own participation in the group. The applicant claimed that she and the leader had to hide from the authorities to continue their activities. The police then arrested the leader and other members of the group. The applicant claimed that she was able to hide in a local shop to avoid detention and that with the help of members of the group she was able to obtain a false passport to leave China. She further claimed that she continued to participate in Shouter activities in Australia.

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

The Tribunal found that the applicant gave clear and detailed evidence and accepted that she was a member of the Shouters and had practised in both China and Australia. It accepted that the applicant was a committed member of the church. The Tribunal further accepted that she would continue to proselytise and to participate in the Shouters if she were to return to China. It accepted, given the independent information and the oral and documentary evidence, that the applicant would come to the attention of the authorities for being an associate of the Shouters' leader. The Tribunal found there was a real chance due to her beliefs and her relationship with members of the Shouters group that she would be persecuted upon return. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

## Fiji

060978937

26 February 2007, Sydney

Ms P Leehy, Member

**FIJI - RACE - INDIAN - RELIGION - HINDU - THREATS - HARASSMENT** - The applicant feared persecution as an Indian Hindu Fijian who had been harassed, robbed and threatened over a long period by ethnic Fijians. He claimed that if he retaliated or sought legal help he was beaten. The applicant claimed that during social gatherings drunken ethnic Fijians would interrupt religious programs and threaten the wives and children. He claimed that living on native leased land was not easy because whenever ethnic Fijians ran out of money they would threaten him and his community, taking livestock and demanding money. The applicant claimed that they also stoned his house. He stated that it seemed things got worse for him when he complained to the police. The applicant claimed that there was no religious freedom because ethnic Fijians destroyed Hindu places of worship. He claimed that he did not have money to buy a house elsewhere and the situation was bad in other places as well.

**Held:** Decision under review affirmed.

The Tribunal accepted that the applicant had been harassed in the past for reason of his ethnicity and that this generally consisted of theft and verbal abuse by indigenous Fijians. It accepted that on more than one occasion he had been physically attacked and this had been distressing, but did not accept that such incidents were sufficiently serious to amount to persecution. The Tribunal found that Hindus were free to practise their religion, even if temples were sometimes attacked. It was not satisfied that the applicant would be persecuted for reason of his religion in Fiji in the foreseeable future. The Tribunal was of the view that the situation for Indian Fijians had not deteriorated and in fact had somewhat improved. It found that while isolated instances of harassment were likely to occur they would not be such as to cause sufficiently serious harm to amount to persecution. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

## India

060895391

7 March 2007, Sydney

Ms D Barnetson, Member

**INDIA - RELIGION - POLITICAL OPINION - MUSLIM - RASHTRIYA SWAYEMSEVAK SANGH** - The applicant feared persecution as a Muslim who had a business which employed Hindu workers. He noticed discrepancies in the number of goods produced and gave photographs of his workers stealing to police. He claimed the workers discovered this, there was a scuffle and he was hit on the head. The applicant also claimed he had caused Hindu families in the village to convert to Islam by giving them books to read. He claimed that he had been threatened by the Rashtriya Swayemsevak Sangh (RSS) and the Bharatiya Janata Party. The applicant claimed that he and a group of associates from the Communist Party spoke to his workers, who had RSS members with them. A scuffle broke out and an RSS member badly injured a Communist Party member. The applicant claimed he received threats from RSS members not to name the person responsible. He claimed he would be harmed because he had converted Hindus, had reported the thefts to police and had participated in Communist Party meetings where he spoke against the RSS.

**Held:** Decision under review affirmed.

The Tribunal accepted the applicant's claims and found that he feared persecution by the RSS, due to his religious and political affiliations and activities. It noted that threats received by the applicant to date had been verbal and were vague and unspecific. However, the Tribunal found, given the incident at the business and the applicant's role in converting Hindu families, as well as the antagonism by the RSS to Muslims generally that the harm he may face on return would amount to serious harm. It found there was a real chance that the RSS

would seek to inflict such harm upon the applicant. The Tribunal nevertheless found that the national and state governments actively protected minority groups from persecution and that it would be reasonable for the applicant to relocate to another area in India.

## Lebanon

060964967

26 February 2007, Melbourne

Mr A Gentile, Member

**LEBANON - RELIGION - JEHOVAH'S WITNESS - POLITICAL OPINION - ZIONIST** - The applicant feared persecution as a Jehovah's Witness and for reasons of an imputed political opinion arising from accusations of being a Zionist. She claimed she was unable to practise as a Jehovah's Witness as she could not proselytise or attend religious meetings on a regular basis. In addition the applicant claimed that Jehovah's Witnesses in Lebanon were regarded as pro-Israeli and as enemies because of their neutral war stance. She claimed that she had been proselytising in neighbouring villages regularly and that on one occasion when she was part of a group the people used unemployed youths to "kick them out" of the village. The applicant claimed that on another occasion a relative who was visiting stated that he could finish their lives if he wanted. She claimed she changed her name to avoid Zionist overtones and she denied her faith at work in order to avoid being dismissed.

**Held:** Decision under review affirmed.

The Tribunal accepted that a requirement of the Jehovah's Witness religion was the need to proselytise, that it was not a registered religion in Lebanon and as a result there were consequences such as legal restrictions on gatherings and negative community attitudes. However, it was not satisfied that adherents could not practice their religion or that they were persecuted for doing so. The Tribunal found that the harm reported by the applicant did not constitute Convention persecution. It accepted that on occasion Jehovah's Witnesses may be accused as supporters of Zionism but did not accept that such attitudes were so widespread as to lead to a real chance of persecution. It found there was no indication that the applicant had been subjected to harm for this reason and that her name change was not for reasons related to religion. The Tribunal noted there was no independent evidence to support claims that recognition as a Jehovah's Witness would lead to dismissal from work. Accordingly, it was not satisfied that the applicant had a well-founded fear of persecution for reasons of her religion or imputed political opinion.

## Philippines

061000497

15 February 2007, Sydney

Mr R Inder, Member

**PHILIPPINES - PARTICULAR SOCIAL GROUP - HOMOSEXUALS** - The applicant feared persecution as a homosexual who had suffered discrimination, beatings by his brothers and refusal of employment. He claimed that he was obliged to live a lifestyle of a high level of conformity and could not share a same-sex relationship. He claimed that someone had thrown stones at him for no reason and laughed and shouted that he was gay. The applicant claimed that on one occasion his car was going through a checkpoint with other cars, when the police stopped him and asked him to disrobe as they were looking for a tattoo. He felt they were preying on him. The applicant claimed that his family were not willing to include him in social events and he could not do what he wanted as his brothers and friends could kill him. He claimed he had not actively participated in the gay scene as he was afraid he could be recognised. The applicant claimed that his brothers had said it would be better if he remained in Australia than to "spread the infection in the Philippines".

**Held:** Decision under review affirmed.

The Tribunal accepted that the applicant was gay and had been aware of this since he was at high school. It accepted that he belonged to a particular social group under the Convention. However, the Tribunal noted

that the applicant had no difficulty in being admitted to university and that he was employed after graduating. It noted that he had also been a successful businessman employing a number of agents. The Tribunal was satisfied he would be able to find employment or set up a new business without experiencing difficulties because he was gay. It accepted that the applicant had experienced stones being thrown at him and that he was asked by police to disrobe. However, the Tribunal was not satisfied that this was systematic or frequent discrimination or that it was condoned by the State. It accepted there had been some discrimination but noted that significant efforts were being made to address this. The Tribunal accepted that the applicant's siblings did not want to be associated with him, but did not accept there was a real chance that he would be subject to harm from any source including his family. Accordingly, it did not accept that the applicant had a well-founded fear of persecution.

## Sri Lanka

**061020230**  
**19 February 2007, Sydney**  
**Mr R Wilson, Member**

**SRI LANKA - RACE - TAMIL - POLITICAL OPINION - LIBERATION TIGERS OF TAMIL EELAM - EELAM PEOPLE'S DEMOCRATIC PARTY** - The applicant feared persecution by the Liberation Tigers of Tamil Eelam (LTTE), the Eelam People's Democratic Party (EPDP) and Sinhalese thugs for reason of her ethnicity and imputed political opinion. The applicant, a Tamil from Jaffna, claimed that she was perceived to be an LTTE sympathiser because she had relatives in the LTTE and had joined a Villipu Kulu following requests by the LTTE. She claimed the LTTE forced her to cook for them and extorted significant amounts of money and valuables from her. The applicant claimed that she had also been subject to extortion by the EPDP and Sinhalese thugs who threatened to expose her association with the LTTE if she did not pay them. The applicant claimed that the authorities would not protect her.

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

The Tribunal accepted that the applicant had suffered extortion of significant amounts of money and valuables by the LTTE, EPDP and Sinhalese thugs for reason of her imputed political opinion. Referring to independent information, it accepted that if she had not paid her extortionists she may have been seriously harmed. The Tribunal accepted that the EPDP was a pro-government force and that the authorities were unwilling to protect her. Referring to the worsening situation in Sri Lanka, the Tribunal found that the applicant would face increased adverse attention from the Sri Lankan authorities, including the EPDP if she were to return and there was a real chance that she would suffer persecution for reason of her political profile as an LTTE supporter. It accepted that she would be unable to avail herself of state protection due to her political profile and because the police had often been the agents of persecution. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

**061032202**  
**8 March 2007, Sydney**  
**Ms A Younes, Member**

**SRI LANKA - RACE - POLITICAL OPINION - LIBERATION TIGERS OF TAMIL EELAM - FORCED LABOUR** - The applicant feared persecution as a Tamil with an imputed political opinion arising from his sibling's involvement in the Liberation Tigers of Tamil Eelam (LTTE). He claimed his sibling was forcibly recruited by the LTTE and died in battle and on this basis his family were declared to be martyrs. The applicant was also forced at various times to provide labour, food and money to the LTTE. He claimed that the Sri Lankan army asked him about his involvement with the LTTE and on each occasion he gave them money. The applicant also claimed to fear harm from the People's Liberation Organization of Tamil Eelam (PLOTE) because they had demanded money from him, arrested him and held him in a camp until payment. He claimed his wife had been harassed by the Sri Lankan army and planned to escape to India. The applicant had travelled internationally several times on business, but claimed his last departure was in fear of his life.

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

The Tribunal found the applicant's evidence was consistent and plausible and supported by independent information. It accepted the evidence regarding his sibling's profile and death and the characterisation of the family as martyrs. It also accepted the applicant's encounters with the LTTE, the Sri Lankan army and PLOTE. The Tribunal found the harm suffered amounted to persecution and happened for reasons of the applicant's race and imputed political opinion. It accepted there was a real chance that the Sri Lankan authorities and PLOTE would regard him and his family as sympathetic to the LTTE and would therefore target them. Similarly, it found that if the applicant were to return there was a real chance he would be targeted by the LTTE for financial support and/or recruitment. The persecution feared involved serious harm and his race and imputed political opinion were the reasons. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution.

## FEDERAL COURT JUDGMENTS

**SZGKX v MIAC**

**[2007] FCA 461**

**Federal Court of Australia, Conti J, NSD 1015 of 2006, 29 March 2007**

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

The appellants were husband and wife. No specific claims were made by or on behalf of the appellant wife. The appellant husband (the appellant) claimed to be a United National Party supporter, drama producer and later media Secretary to the former Foreign Minister. He claimed to have been assaulted in 1997 by a gang alleged to be supporters of the People's Alliance (PA) party. During the 1999 elections, he was assaulted by another gang alleged to be supporters of the PA when he was videotaping them assaulting the opposing party supporters. In support of this claim, the appellant provided a newspaper article which featured a story that was consistent with his claim. The appellant claimed to have been assaulted again by an unidentified gang in 2004 and to have received anonymous death threats.

During the Tribunal hearing, the appellant claimed that the real death threats took place after the former Foreign Minister changed political parties and after he was seen with the former Foreign Minister on national television in 2004. In a post hearing submission, the appellant reiterated that the alleged death threat he received was "not a criminal act", because he had only received threats since he changed his political opinion and political parties.

The Tribunal affirmed the delegate's decision to refuse the protection visa to the appellant on the basis that there was no credible evidence to support the appellant's claim that either the assault on him in 1997, or the assault in 1999, or the alleged assault in 2004, was politically (rather than criminally) motivated. The Tribunal's decision made mention of the fact that the appellant had submitted documents to the delegate including "various media reports from Sri Lanka".

Before the Federal Court, the appellant contended, among other things, that the Tribunal breached s.430 of the *Migration Act 1958* (the Act) by failing to take into account relevant material corroborating his claims. He further contended that the Tribunal failed to consider an integer of his claims that he feared persecution by reasons of his affiliation and association with the former Foreign Minister.

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

- (i) The Tribunal erred by failing to take into account relevant material corroborating the appellant's claims of politically motivated attacks and the omission reflected an extent of confinement in the requisite width of approach required in the light of those facts and circumstances.
- (ii) The Tribunal was not entitled in the circumstances to withhold from closer consideration and evaluation material which may well have given rise to conclusions favourable to the appellant's claim.
- (iii) The appellant husband's unfortunate experience of serious physical assaults upon his person the subject of media publicity, which occurred in the temporal context of his public profile, and the implications of the then prevailing political climate to which was subjected, albeit not as an elected politician, provided a potentially viable basis for his case of causation relevant to his political profile.

**SZGZH v MIAC**  
**[2007] FCA 486**  
**Federal Court of Australia, Graham J, NSD 2455 of 2006, 4 April 2007**

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 Bangladeshi national, claimed several times during the hearing that he was unwell. He stated he had pain which affected his ability to recall matters and give evidence. He produced a prescription and referral to Redfern X-ray from Dr. Deva whom he had seen earlier. The Tribunal adjourned the hearing and called Dr. Deva requesting information on the appellant's condition. Dr. Deva told the Tribunal that he was not convinced the pain was genuine and even if he had pain it would not affect his thinking. The Tribunal resumed the hearing and informed the appellant of the content of the conversation with Dr Deva.

In affirming the delegate's decision the Tribunal found the appellant lacked credibility and at three points in its Findings and Reasons found the appellant's inconsistencies could not be explained by some physical or mental condition.

The Federal Magistrates Court held the Tribunal's Findings and Reasons showed a separation in its mind between the need to focus on whether it was fair to continue the hearing, and the separate issue, once it had settled that question, of the appellant's credibility.

The appellant contended that the Tribunal failed to give him particulars of information in writing in accordance with s.424A(1)(a) of the *Migration Act* 1958 (the Act).

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

- (i) Information obtained from Dr Deva was information that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review. Dr Deva's opinion concerning the appellant's ability to think clearly as a result of his alleged pain and Dr Deva's doubt as to whether the alleged pain was genuine was specifically about the appellant. It was not given by the appellant to the Tribunal for the purpose of the application, but rather, was obtained by the Tribunal. The conclusion was inescapable that the Tribunal was bound to give particulars of the information gleaned from Dr Deva to the appellant in writing inviting his comment in accordance with s.424A(1) of the Act.
- (ii) What is important is that the Tribunal's decision was plainly affected by Dr Deva's response "that he was not convinced about the applicant's pain" and that "he was not convinced the pain was genuine" and further Dr Deva's opinion that even if the appellant had back pain it would not affect his thinking. It could not be said that it was obtained purely and simply to enable the Tribunal to determine whether or not it was reasonable to adjourn the hearing. On three separate occasions the Tribunal made findings that the inconsistencies in the appellant's account could not be explained by some physical or mental condition which impaired his ability to give evidence. Such a finding materially affected the Tribunal's assessment of the appellant and his claims in respect of his alleged fear of persecution and the foundation for it.

## FEDERAL MAGISTRATES COURT JUDGMENTS

**SZIYR v MIAC & Anor**

**[2007] FMCA 357**

**Federal Magistrates Court of Australia, Smith FM, SYG1764 of 2006, 16 March 2007**

The applicant, an infant born in Australia to parents of Colombian nationality, 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 member of his family as a particular social group due to his parents' involvement with trade union groups in Colombia. His refugee claims were addressed by a differently constituted Tribunal from that of his parents. (The Tribunal's decision in relation to the applicant's father was subsequently set aside due to jurisdictional error.) The Tribunal wrote to the applicant inviting comment on information derived from the parents' applications for review. No substantive response was received and the applicant did not appear at the scheduled hearing. The Tribunal found that as it was unable to explore or test the accuracy of the parents' claims it was unable to establish the relevant facts. The Tribunal also indicated that it had considered the additional material set out in the Tribunals' decision records in relation to the applicant's parents' application but was unable to be satisfied on the basis of that material that the applicant had a real chance of harm for reason of membership of his family.

The applicant alleged jurisdictional error on several grounds, including that the Tribunal failed to comply with s.424A of the *Migration Act 1958* (the Act).

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

- (i) The Tribunal failed to comply with s.424A of the Act. The Tribunal's reference to the "additional material" in the parents' decision records must include a reference to the information contained in the Tribunal's s.424A invitation. The invitation's unparticularised references to "the evidence given by [the applicant's] parents" and "a number of inconsistencies" did not provide particulars of any information as required by s.424A(1)(a) of the Act.
- (ii) Even if the Tribunal's reference to "the additional material set out in the Tribunal's decision records in relation to [the applicant's] parents' applications" is not read as referring to adverse material which the Tribunal purported to put to the applicant in its s.424A invitation, it must be read as an unparticularised reference to information found in the parents' decision records which contributed to its inability to be satisfied as to the applicant's refugee status.
- (ii) It is plain from its narrative of the claims and the brevity of its reasoning that the Tribunal substantially relied upon the content and outcome of other Tribunal decisions in relation to the applicant's parents. The surrounding circumstances also point to the conclusion that when assessing the applicant's refugee claims the Tribunal probably relied upon the adverse findings of these earlier Tribunal decisions. The lack of analysis of the evidence from the parents' files when assessing the child's situation confirms that the Tribunal must have considered those facts to have been sufficiently explored in previous Tribunal decisions, notwithstanding that one had been infected with jurisdictional error.

**SZDJZ v MIAC & Anor**

**[2007] FMCA 310**

**Federal Magistrates Court of Australia, Scarlett FM, SYG 1208 of 2004, 21 March 2007**

The applicant, a citizen of Afghanistan, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. He was recognised as a refugee in January 2000 and granted a Temporary Protection visa in circumstances where he faced persecution by the Taliban authorities as a Hazara Sayed and Shia Muslim.

The Tribunal found that the Taliban were removed from power in 2001 and that the circumstances in connection with which the applicant was recognised as a refugee had ceased to exist. It found that he could no

longer refuse to avail himself of the protection of Afghanistan. The Tribunal found that on return the applicant might be perceived to have money and could experience extortion. However, it found that local commanders who did prey upon or abuse those perceived to have money did so for reasons of opportunistic self-aggrandisement rather than Convention-based persecution.

The applicant contended that the Tribunal had erred by failing to address the issue of whether he could return to his home district in safety and by failing to consider whether any extortion practised upon him could be for reason of his membership of a particular social group of Afghans returning from overseas.

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

- (i) The Tribunal fell into jurisdictional error by failing to consider whether, if the applicant did face extortion, there was any other reason that might constitute the essential and significant motivation for the extortion and, if there was, whether that reason could be characterised as a Convention reason.
- (ii) On the issue of the applicant's means of return to his home district, there was no evidence that the Tribunal failed to consider any claim. It was not satisfied that the applicant had a well-founded fear of persecution in Afghanistan or "on return to his own district". The Tribunal considered whether there was evidence of attacks by the Taliban on Hazara communities in the applicant's district, but found there were not, even though there were reports of sporadic attacks against foreign aid workers and their Afghan assistants, government officials and government and international forces.

**SZFKV v MIAC & Anor**

**[2007] FMCA 349**

**Federal Magistrates Court of Australia, Scarlett FM, SYG 568 of 2005, 23 March 2007**

The applicant, a national of Afghanistan, 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 of his Hazara ethnicity and Shia religion and claimed persecution by the Taliban.

The applicant, who was granted a Temporary Protection Visa on 30 April 2001 but was then refused a Further Protection Visa on 11 May 2004, sought review before the Tribunal. He argued that he was a Hazara who would face persecution by the Taliban if he was returned to Afghanistan. The Tribunal was not satisfied that the applicant was a national of Afghanistan. The Tribunal questioned the applicant closely on his alleged flight from Afghanistan and found his extreme vagueness did not allow the Tribunal to be satisfied that the applicant was in fact from Afghanistan.

The applicant pressed two grounds before the Court. The first was that the Tribunal had not taken into account a relevant consideration, being a language analysis report obtained by the Department of Immigration extracted in the first Tribunal decision, which supported the applicant's contention that he was from Afghanistan. The second ground was that the Tribunal had not afforded the applicant procedural fairness by alerting him that it intended to revisit and revise an earlier finding of the first Tribunal that he was a national of Afghanistan.

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

- (i) The Tribunal committed a jurisdictional error because it failed to consider a relevant factor and thereby fell into jurisdictional error.
- (ii) The Tribunal had the evidence of the language analysis report before it as it had cited the earlier Tribunal decision. The report was directly relevant to the conclusion of the second Tribunal and therefore should have been considered. The evidence leads to an inference that the Tribunal simply did not consider it.
- (iii) Sub-sections 416(c) and (d) of the *Migration Act* 1958 (the Act) must be read together. The Tribunal cannot logically ignore information upon which a finding has been made in an earlier application and at the same time make a contrary finding.

*Obiter:*

- (iv) There is no scope for the application of common law natural justice, as s.422B of the Act covers the field, and therefore the second ground fails.

**SZJOZ v MIAC  
[2007] FMCA 335**

**Federal Magistrates Court of Australia, Emmett FM, SYG3146 of 2006, 26 March 2007**

The applicant, a citizen of China, sought extension of time to apply for judicial review of a decision of a delegate of the Minister for Immigration that he was prevented by s.48A of the *Migration Act 1958* (the Act) from lodging a second protection visa application as a previous application, where the grant of a visa had been refused, was considered to be a valid application.

The applicant had lodged a protection visa application in 1996 but had at no time provided details of his reasons for claiming to be a refugee to the Department in relation to that application. In 1997 a delegate of the Minister decided to refuse to grant a protection visa and the applicant sought Tribunal review of that decision, providing detailed claims and submissions in support of his application. The Tribunal affirmed the delegate's decision in April 1998. After seeking ministerial intervention under s.417 of the Act, the applicant made no further contact with the Department until 2006, when he lodged a further protection visa application detailing his claims to be a refugee. At the relevant time, the legislation required a visa application to be made in the way prescribed by regulations for the making of an application, including completion of the form in accordance with any directions on it, and the application to be made at an office of Immigration.

The applicant contended that the delegate had erred in refusing to consider his second application on the basis of s.48A of the Act, contending that the application made in 1996 was not a valid application. Counsel for the Minister contended that the first application was valid because the applicant had made claims before the Tribunal which were considered and determined by it in the conduct of its review. In support of that proposition, the Minister referred to *Yilmaz v MIMA* (2000) 100 FCR 495 and *SZECD v MIMIA* (2006) 150 FCR 53, which held that consideration by the Tribunal of claims made to the Tribunal cured any invalidity of the first protection visa application.

**Held: Extension of time refused.**

- (i) The delegate's refusal to consider the applicant's protection visa application lodged in 2006, on the basis that s.48A of the Act prevented the delegate from doing so because there had been another application and decision, was wrong.
- (ii) The relevant legislation, having been interpreted and applied in *MIMA v Li* (2000) 103 FCR 486 (Li), makes clear that, in circumstances where there has been a failure by an applicant to comply with the regulations in the making of his application, the result is that no valid application has been made. The failure to comply with the prescribed regulation requiring an application to be lodged at an office of Immigration in accordance with r.2.10(1)(b) of the Migration Regulations 1994 (the Regulations), is not, according to the Full Court in *Li*, a failure capable of being cured by the subsequent Tribunal decision.
- (iii) The application lodged in 1996 was not completed in accordance with the relevant regulations. In particular r.2.10(1)(b) of the Regulations required the applicant to make his application at an office of Immigration.
- (iv) Even though relief was available, in balancing the interests of justice in the exercise of the Court's discretion, the relief sought should be refused. The applicant's conduct was shrouded by perpetuated dishonesty and an absence of any attempt to seek to inform himself about his rights or status in Australia. Moreover, he had a merits hearing by the Tribunal of the same claims he was now making.

**MZXJA & Ors v MIAC & Anor**

**[2007] FMCA 375**

**Federal Magistrates Court of Australia, McInnis FM, MLG 463 of 2006, 27 March 2007**

The applicants, nationals of Burma, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia owed protection obligations. The first applicant (the applicant) claimed to fear persecution on the basis of her Chin ethnicity, Christian religion, membership or support for the National League for Democracy (NLD) and her pro-democracy political opinion generally.

The Tribunal did not accept the applicant's claim to be a member or supporter of the NLD due in part to vagueness and inconsistencies in her evidence. In rejecting a specific claim that her home was searched by authorities, the Tribunal "noted" that the incident was not mentioned in a psychiatrist's report which had been forwarded to the Tribunal in response to a letter pursuant to s.424A of the *Migration Act 1958* (the Act) attached to a submission by the applicant's adviser.

The applicant contended that the psychiatrist's report had been provided to the Tribunal in an attempt to overcome any adverse view as to the applicant's credibility owing to her inability to recall aspects of her claims and explain other inconsistencies. It was contended that by using the report for an unexpected purpose, namely to further undermine her credit, the Tribunal had failed to comply with its obligations under s.424A.

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

- (i) The Tribunal breached s.424A of the Act and thereby made a jurisdictional error.
- (ii) The Tribunal's finding concerning the failure to mention the relevant incident to the psychiatrist, whilst referred to as being a matter which the Tribunal "also notes" appears as part of a paragraph where the crucial finding was made by the Tribunal that it did not accept that the applicant's home was searched. Whilst that finding precedes the reference to the psychiatrist's report, and despite the fact that it was referred to as something the Tribunal "also notes", at the very least it strengthened the Tribunal's adverse conclusion about the incident. It was "a part of the reason" for the purpose of s.424A.
- (iii) Whilst attached to correspondence forwarded for and on behalf of the applicant, the information was not information the applicant gave for the purpose of the application. The source of the information was a person other than the applicant, being the psychiatrist, and accordingly the report should not be distinguished from evidence which may have been given by another person called on behalf of the applicant at a hearing.
- (iv) Where a Tribunal receives information from a third party, namely a psychiatrist as in the present case, which is clearly information of a kind directed towards the mental state of the applicant, it is incumbent upon the Tribunal to then comply with s.424A of the Act by notifying the applicant if it be the case that the content of the report may be used for another purpose.

**SZIYX v MIAC & Anor**

**[2007] FMCA 308**

**Federal Magistrates Court of Australia, Barnes FM, SYG1787 of 2006, 27 March 2007**

The applicant, a national of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that she was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of her Falun Gong practice. She claimed that she had practised publicly in China until she was arrested, detained and forced to sign a guarantee that she would renounce it.

The Tribunal did not accept that the applicant practised Falun Gong in China, noting that she had travelled in and out of China using her own passport. It gave no other reasons for this finding, but in the following paragraphs provided reasons for its view that she was not a genuine Falun Gong practitioner in considering her conduct in Australia.

The applicant took issue in a number of respects with the Tribunal's reasoning from a finding that the applicant was not of adverse interest to the authorities upon her departure from China to a conclusion that therefore she was not practising Falun Gong prior to her departure. She submitted that the Tribunal had failed to consider whether a person who had signed a guarantee document stating he or she would not practice Falun Gong in the future would be permitted to depart China. It was also said that the Tribunal failed to have regard to the evidence of the applicant's witnesses, having made no reference to it in the "Findings and Reasons" part of its decision.

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

- (i) The Tribunal fell into jurisdictional error in that it ignored relevant material in a way that affected the exercise of power.
- (ii) In making its critical finding that it did not accept that the applicant was practising Falun Gong prior to her departure from China, the Tribunal did not take into account the integers of the applicant's claims about the nature of her practice of Falun Gong, the implications of such practice, the fact that she signed a guarantee letter and thereafter did not practise in public or attend study at her coach's residence.
- (iii) Even if such material were not of itself to be regarded as a relevant consideration but only as an item of evidence, the Tribunal fell into jurisdictional error in circumstances where it also failed to take into account and give consideration to the corroborative evidence of the two witnesses called by the applicant at the Tribunal in the manner considered by the Full Court of the Federal Court in *WAJJ v MIMIA* (2004) 80 ALD 568.
- (iv) In all the circumstances the Tribunal's failure to have regard to the corroborative material before reaching a conclusion that it rejected the applicant's credibility, as it rejected her claims as untrue, was such that its determination was not carried out "*according to law*" (*WAJJ* at [27]) so that the decision was affected by jurisdictional error.

**SZHPG & Anor v MIAC & Anor**

**[2007] FMCA 527**

**Federal Magistrates Court of Australia, Cameron FM, SYD 3350 of 2005, 13 April 2007**

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

The applicant claimed to have been persecuted because of her ethnic background, in particular her European background. The applicant made one particular claim regarding an assault by police and submitted Amnesty International and Royal Commission reports on police corruption to support her claim. The Tribunal wrote in its decision that it had "considered the applicant's claims, the way those claims were presented, and information from external sources relevant to claims".

The applicant claimed that the Tribunal failed to address the correct question and take into account relevant considerations and that the decision was not based on probative material or logical grounds with respect to her police assault claim. The applicant also claimed that the Tribunal failed to make findings on all of her claims.

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

- (i) The Tribunal made a jurisdictional error in that it did not take account of relevant material.
- (ii) The inference that the Tribunal did not have regard to the particular country information in question was because the information was supplied, in 167 folios of material, to the Tribunal without the applicant identifying why the information was relevant and consequently may have been overlooked or its significance not appreciated. Furthermore, the relevant portions dealt in considerably more detail than did the country information cited by the Tribunal with discipline problems in the Malaysian police force and was pointedly more relevant to the issue than the generic information relied on.

- (iii) The content of the country information supplied to the Tribunal on the subject of police misconduct in Malaysia was so at variance with the Tribunal's findings that, had it been properly considered, it ought to have been discussed and reasons given for its rejection.
- (iv) Although the Tribunal may have read the written material, it did not give it adequate consideration because, if it had, it would have either concluded that the Malaysian police were sufficiently ill-disciplined that the applicant had a reasonable basis for fearing to make a complaint or it would have said why its conclusion was otherwise.

## LEGISLATION UPDATE

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

### ▶ Legislation Passed

#### **Migration Legislation Amendment (Information and Other Measures) Act 2007 No. 63**

The *Migration Legislation Amendment (Information and Other Measures) Act 2007* (the Act) was introduced to the House of Representatives on 1 March 2007 and passed by the House on 26 March 2007. The Act was introduced and passed in the Senate on 28 March 2007. The Act received Royal Assent on 15 April 2007.

The Act commenced on 15 April and amends the *Migration Act 1958* by:

Addressing limitations of certain provisions dealing with identifying information, for example by ensuring that no offence is committed under sections 336D or 336E if identifying information, collected from a non citizen, is accessed or disclosed after the person has become an Australian citizen (and no longer fits the description of “non-citizen”);

Broadening the ability of the Department of Immigration and Citizenship to disclose movement records for the benefits of the person to whom the record relates; and

Amending the definition of “fisheries detention offence”

A copy of the Act can be found at:

<http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bytitle/93AC0A085F0E885ACA2572960014B4C6?OpenDocument>

### ▶ 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 (SLCAC) 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 inquiry and the report by SLCAC were completed on 20 February 2007 and on 26 February 2007 the report by SLCAC was tabled in the Senate.

The Bill aims to amend the Act to:

Allow the Refugee Review Tribunal (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 Citizenship, 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\(Rewiew%20Provisions\)%20Bill%202006](http://parlinfoweb.aph.gov.au/piweb/browse.aspx?path=Legislation%20%3E%20Current%20Bills%20by%20Title%20%3E%20Migration%20Amendment%20(Rewiew%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](http://www.aph.gov.au/Senate/committee/legcon_ctte/mig_review_provisions/submissions/sublist.htm)

A copy of the report by the Senate Legal and Constitutional Affairs Committee can be found at:

[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/mig\\_review\\_provisions/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/mig_review_provisions/report/index.htm)

## CASELOAD OVERVIEW

### ▶ RRT Decisions – March 2007

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	0	1	0	0	1
Armenia	0	1	0	0	1
Bangladesh	2	7	1	11	21
Bosnia and Herzegovina	0	0	1	0	1
Burma (Myanmar)	0	1	0	0	1
Cambodia	1	2	0	0	3
China (PRC)	28	73	0	2	103
Colombia	0	1	0	0	1
East Timor	0	1	0	0	1
Egypt	1	3	0	0	4
Ethiopia	3	2	0	0	5
Fiji	0	3	0	1	4
Georgia	0	1	0	0	1
Ghana	0	1	0	0	1
India	0	17	2	0	19
Indonesia	1	16	0	1	18
Iran	2	0	0	0	2
Jordan	0	1	0	0	1
Kenya	1	0	0	0	1
Korea, Republic Of	0	5	0	0	5
Latvia	1	0	0	0	1
Lebanon	1	6	0	0	7
Lithuania	0	1	0	0	1
Malaysia	0	7	1	0	8
Mongolia	0	2	0	0	2
Nepal	0	2	0	1	3
Nigeria	1	2	0	0	3
Pakistan	1	2	0	0	3
Papua New Guinea	0	1	0	0	1
Philippines	0	7	1	0	8
Poland	0	1	0	0	1
Sierra Leone	0	1	0	0	1
Singapore	0	1	0	0	1
South Africa	1	0	0	0	1
Sri Lanka	7	3	0	0	10
Tanzania	0	1	0	0	1
Thailand	0	4	0	0	4
Tonga	0	1	0	0	1
Turkey	1	1	0	0	2
Ukraine	0	3	0	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](mailto:rrtinfo@rrt.gov.au)

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