

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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▶ China

060966448
7 March 2007, Sydney
Ms W Machin, Member

CHINA - PARTICULAR SOCIAL GROUP - TRADE UNION ACTIVIST - HARASSMENT - THREATS - DETENTION - The applicant feared persecution because of her involvement with an illegal trade union. She claimed that after her factory was privatised the workers formed an illegal union and she was instrumental in organising a strike. The applicant claimed that they protested in front of the district government building and that they did not get any response. They went to the city government but were referred back to the district government. The applicant claimed that the management of the factory began to trouble them and that she was harassed by “gangsters” with threatening telephone calls and rocks thrown at her home. She contacted the police but they always came late or not at all. The applicant claimed that the police had detained her and abused her. She claimed that she could not seek protection in China as she was arrested everywhere she went.

Held: Decision under review set aside.

The Tribunal found the applicant to be an articulate and credible witness. It accepted that she was involved in establishing an illegal union and that the union took strike action. The Tribunal accepted that the applicant was threatened and harassed by certain individuals and groups. It also accepted that she was arrested and detained. The Tribunal accepted that the applicant took certain steps to bring the concerns of workers at her workplace to the attention of the appropriate authorities, but they did not get any response. It found that the applicant's claims and the responses of the local authorities were supported by independent information. The Tribunal found that she was at risk of serious harm, including physical harassment and possible incarceration if she returned to China. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

071152034
7 March 2007, Sydney
Mr S Roushan, Member

CHINA - RELIGION - FALUN GONG - PARTICULAR SOCIAL GROUP - CHILDREN OF FALUN GONG PRACTITIONERS - POLITICAL OPINION - The applicant feared persecution because of his and his family's involvement with Falun Gong. The applicant claimed that his parents were Falun Gong practitioners and that he encountered problems while looking for a job as he was also perceived or suspected of being a member of Falun Gong. He claimed that he was forced to resign his job after a year because of constant police harassment at work. The applicant claimed to have become a Falun Gong practitioner after arriving in Australia. He claimed that there were many informants in Australia and it was likely that his involvement with Falun Gong in Australia was known to the Chinese authorities. The applicant feared persecution for that reason if he were to return to China.

Held: Decision under review set aside.

The Tribunal found that the applicant was a credible witness and accepted that his parents were Falun Gong practitioners in China. It accepted that the applicant was subject to some harassment for reason of his parents' association with Falun Gong. The Tribunal accepted that he was genuinely committed to Falun Gong in Australia and that his activities were a genuine reflection of his beliefs. The Tribunal noted the applicant's family background, his reasons for adopting the practice of Falun Gong in Australia, the level of knowledge he displayed at the hearing and his overall credibility. It was satisfied that his conduct in Australia had been otherwise than for the purpose of strengthening his claim to be a refugee. The Tribunal found there was a real chance that the applicant would be at risk of arrest, imprisonment and torture if he returned to China. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

071099032
14 March 2007, Sydney
Ms P Wearne, Member

CHINA - RELIGION - LOCAL CHURCH - The applicant feared persecution for reasons of her religion. She claimed that she and her family were practising members of the Local Church, which was unregistered and banned. The applicant claimed she regularly attended gatherings at the home of the local church leader who was later arrested. She claimed she was interrogated by the Public Security Bureau (PSB) about the leader and the activities of the local church and was questioned several times about petitions asking the government to release the leader. The applicant and her husband subsequently held Local Church gatherings at their grocery store and following her departure from China the PSB was informed about the gatherings. The PSB interrogated her husband several times and closed and sealed the store. The applicant claimed that her husband and son were in hiding and the PSB were searching for them.

Held: Decision under review set aside.

The Tribunal accepted that the applicant belonged to a Local Church group and that she and her husband participated in church gatherings. It accepted that they allowed their grocery store to be used for Local Church gatherings; that the PSB was informed about these gatherings after the applicant's departure; and that the PSB closed and sealed the store. The Tribunal accepted that her husband and son were in hiding and the PSB was searching for them. It was satisfied that the applicant would continue to be involved with the Local Church if she returned. The Tribunal found that unregistered religious groups experienced varying degrees of official interference and harassment. It accepted that if the applicant returned to China she would come to the attention of the authorities because of her involvement with the Local Church and there was a real chance that she would be detained and tortured for reasons of her religious beliefs. Accordingly, the Tribunal was satisfied that the applicant's fear of persecution was well-founded.

India

060926579
28 February 2007, Sydney
Prof S Blay, Member

INDIA - RELIGION - POLITICAL OPINION - MUSLIM - The Muslim applicant feared persecution because of his involvement in a committee against "Anti-Muslim activities" and his subsequent involvement in a Tamil organisation. The applicant claimed he participated in the operations of the committee and their influence spread throughout Tamil Nadu. He claimed there were several clashes between the committee and its opponents which led to the death of several members. Fearing for his safety, the applicant left India for another country where he joined a Tamil organisation and became a branch leader. The activities of the group provoked radical Hindus who targeted this organisation. He later left the group, joining a splinter organisation which assisted with the Tsunami recovery, further provoking Hindu opponents to attack members of the new organisation. The applicant claimed that Members of the first Tamil organisation tried to assassinate him and claimed he would be murdered if he returned to India.

Held: Decision under review affirmed.

The Tribunal noted the absence of corroborative evidence to support the claims and did not accept that the applicant was a member of any Muslim social and political organisations. Having so found, it did not accept the applicant's claims to have fled India because he was of adverse interest to Hindu extremist groups. The Tribunal considered that its findings on these points were strengthened by inconsistencies in evidence provided by the applicant. It found that even if it were to accept his claims to fear persecution in Tamil Nadu or the Madras area, the applicant could relocate to other regions of India where Muslims formed the majority of the population. Accordingly, the Tribunal found that the applicant did not have a well-founded fear of persecution for a Convention reason.

Lebanon

060840806
4 January 2007, Sydney
Ms C Long, Member

LEBANON - RELIGION - MARONITE CHRISTIAN - POLITICAL OPINION - FREE NATIONAL MOVEMENT - The applicant, who was a Maronite Christian, feared persecution from members of Hezbollah, Syrian intelligence and Lebanese authorities because of his political opinion and religion. He claimed that he was a member of the Free National Movement under the leadership of General Aoun and was a leader of a local network of the movement. The applicant claimed that he was kidnapped by Lebanese authorities, held for several days and questioned about his involvement in the movement. He further claimed that unknown people came to his house looking for him and that he slept at a friend's house and took precautions. He claimed that he paid money to get his passport. The applicant also claimed that he would be harmed by Shiite Muslims because he was a Maronite Christian.

Held: Decision under review affirmed.

Although the Tribunal accepted that the applicant was a member of the political movement led by General Aoun and that he supported that party, it did not accept that he was a leader of a local network or a high profile member. The Tribunal noted the applicant's evidence that he supported himself working as a tradesman in Beirut for years prior to his departure and found this was not consistent with his claims of staying away from his home to avoid harm. It did not accept that he paid a bribe to obtain a passport as it was obtained before he claimed to have been detained. Whilst the Tribunal accepted that there was conflict between Shiite Muslims and Christians it did not accept that the applicant would be targeted by Muslims. It noted his evidence that most of the families in his area were Christians and that he lived in this area and worked for many years. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

071105908
19 March 2007, Sydney
Ms J Morris, Member

LEBANON - RELIGION - SUNNI MUSLIM - POLITICAL OPINION - HEZBOLLAH FORCED RECRUITMENT - MILITARY CONSCRIPTION - The applicant feared persecution in the form of forced recruitment by Hezbollah and military conscription by the Lebanese Armed Forces upon return. He was a Sunni Muslim and claimed that Hezbollah wanted to force him to join and fight Israel. The applicant claimed that Hezbollah had visited his house to search for him and had harassed his family. He claimed that he escaped Lebanon and he did not undertake his military service. The applicant claimed that the military had also been visiting his home looking for him. He feared that he would be sent to the war zone in South Lebanon to fight. The applicant claimed that he feared the war and he feared for his safety and that of his wife.

Held: Decision under review affirmed.

The Tribunal noted that Hezbollah was a radical Shia Muslim organisation and did not accept the applicant's claims that it would forcibly recruit a person of a different faith. In addition, it found no reports of forced recruitment by Hezbollah and was not satisfied that any objection to being recruited by Hezbollah would give rise to a fear of harm. The Tribunal found that the applicant was no longer under any obligation to perform military service as conscription had recently been abolished. Further, the Tribunal was not satisfied that the applicant was a refugee arising from his refusal to undergo military conscription even if he still faced a residual military service obligation. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

Malaysia

071129159
28 March 2007, Sydney
Mr J Duignan, Member

MALAYSIA - RACE - TAMIL - RELIGION - HINDU - HARASSMENT - The applicant feared persecution as a Tamil Hindu woman. She claimed that after she separated from her husband a number of Muslim men who worked with her gave her trouble by trying to force her to convert to the Muslim religion. She claimed that after she was divorced from her husband, the men gave her more problems and on one occasion they stopped her on her way back home and asked her for sex. The applicant claimed they threatened to kill her if she reported them to the police. She claimed she then ceased working and went to live with her sister in another area. The applicant claimed that the police were Muslims and as the government was run by Muslims there was no protection from the authorities. She claimed that there would be further troubles with Muslims if she returned.

Held: Decision under review affirmed.

The Tribunal found that the previous harassment and difficulties experienced by the applicant had all arisen in the context of her employment. It noted her evidence that the men never went to her home and that with one exception the harassment only occurred in her workplace. The Tribunal also noted that since the applicant ceased employment there were no attempts to locate her at home or through contact with her family. The Tribunal found that the threat to the applicant did not extend beyond her employment at the factory. Noting her evidence that she was safe from the threatened harm in her sister's location the Tribunal found that she would obtain protection by relocating to her sister's area. Accordingly, it found that the applicant was not a person to whom Australia owed protection obligations.

Nepal

060868092
5 January 2007, Sydney
Ms P McIntosh, Member

NEPAL - RELIGION - CHRISTIAN - POLITICAL OPINION - FOREIGN PROPAGANDA - PROSELYTISING - The applicant feared persecution as a person who grew up in a Hindu family and then became a Christian. She claimed that she had studied overseas and when she returned home and her family realised she was a Christian, her mother had beaten her and her family had thrown her out of the house and no longer accepted her as a member. The applicant claimed she had been attending church in Australia and that she would be viewed by the state and Hindu fundamentalists as spreading foreign propaganda because of her duty to proselytise. The applicant claimed that members of her caste may attack her to make her revert to Hinduism. The applicant also claimed that the Maoists in Nepal harassed and killed Christians.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant had attended church since her arrival and was perceived by the pastor to be a genuine convert. It was satisfied that Nepal's Constitution prohibited activities of people who engaged in religious conversion of others, an activity punishable by fines or imprisonment. The Tribunal noted that personal conversion was allowed and converts generally did not fear to admit their affiliations. It was satisfied there were evangelical Christian communities in Kathmandu whose members were predominantly Nepalese. The Tribunal was satisfied that most had converted from other religions, including Hinduism. It inferred that the applicant would be made welcome in such communities and her personal conversion would attract no penalty. The Tribunal noted the applicant's evidence that she would evangelise by telling people about her beliefs if she thought they would be interested. It found this was not the type of activity which attracted harm by Maoists or extremist Hindus, or prosecution by the authorities. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.

071179670
3 April 2007, Sydney
Ms P Leehy, Member

NEPAL - POLITICAL OPINION - UNITED MARXIST-LENINIST PARTY - MAOISTS - INTERCASTE MARRIAGE - DISCRIMINATION - The applicant feared persecution in the form of extortion and harassment by the Maoists because of his support for the United Marxist-Leninist party (UML), his family background (being wealthy landowners and businessmen) and as a person returning from overseas with money. He also feared persecution in the form of discrimination by his family and society because of his intercaste marriage to a woman from a lower caste. The applicant claimed that the Maoists took away his family land, businesses and money by way of forced donations. The applicant claimed that if he returned to Nepal, he would be attacked by the Maoists and also by his family.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant and his family were supporters of the UML and that the Maoists had seized assets and extorted money from them. However, it found that the relevant incidents occurred several years ago and neither the applicant nor his family had suffered harm serious enough to amount to persecution. The Tribunal accepted that the applicant may be approached by the Maoists for money if he returned but did not accept his claim that his inability to donate would result in physical harm. The Tribunal found that the political situation in Nepal was becoming more stable and the mechanisms of civil protection were becoming stronger. It had also considered the applicant's claim to fear persecution because of his intercaste marriage and accepted that he would suffer some forms of discrimination. However, the Tribunal was satisfied that any discrimination faced by the applicant would not cause him significant economic hardship or denial of capacity to earn a livelihood. Accordingly, it was not satisfied that he had a well-founded fear of persecution.

Sri Lanka

060929663
26 March 2007, Melbourne
Ms L Spieler, Member

SRI LANKA - RACE - TAMIL - LIBERATION TIGERS OF TAMIL EELAM - The Tamil applicant feared persecution from the Liberation Tigers of Tamil Eelam (LTTE) as well as the Sri Lankan security forces. She had supported the groups who were fighting for freedom and in the 1990s a relative was "brainwashed" into joining the LTTE. The applicant claimed that the relative was killed after being taken to the LTTE camp and that she was angry and organised a protest. The LTTE warned her to stop those activities and she was later told to report to their camp. Instead she moved to Colombo where she allowed certain persons to rent a room in her home. The applicant claimed she became suspicious that they were LTTE members when police visited her. She claimed she was taken to the police station and questioned. On several occasions she was taken by police to identify people and when she was unable to do so was accused of supporting the LTTE. The applicant feared both the authorities and the LTTE.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant's relative became involved with the LTTE in the 1990s and was killed. It accepted that she was distressed and that following the death she expressed her opposition to the LTTE and was warned to desist. The Tribunal accepted that the applicant moved to Colombo to escape the attention of the LTTE. However, it noted that she lived undisturbed for several years until the police arrived looking for her lodgers and she was taken in for questioning. The Tribunal was not satisfied, in view of the lack of interest by the police for some years, that the authorities had any ongoing interest in the applicant. Nor did it accept that the applicant was of any ongoing interest to the LTTE. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution.



Turkey

071195831
26 April 2007, Sydney
Mr L Hardy, Member

TURKEY - RACE - KURD - POLITICAL OPINION - The applicant feared persecution as an ethnic Kurd and supporter of Kurdish organisations. He claimed that he was frequently bullied, harassed and detained by authorities because of his race and imputations regarding his potential as a Kurd to be involved in activities against the State. He was intimidated during his national service and was also threatened and asked to spy on fellow Kurds. The applicant claimed that his family organised for him to leave Turkey after an assault because it was no longer safe for him to stay there.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a Turkish national of Kurdish ethnicity and that ethnic Kurds in Turkey faced discrimination for reasons of race. It found that the applicant was bullied in the army because of his ethnicity and that it was conceivable he was asked to police other Kurds. The Tribunal accepted that the applicant was frequently bullied and harassed by authorities because of his ethnicity and imputations regarding his potential as a Kurd to be involved in activities against the State. It also accepted that the situation was chronic enough for the applicant's family to engineer his departure. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

FEDERAL COURT JUDGMENTS

SZHWHY v MIAC
[2007] FCAFC 64

Federal Court of Australia, Lander, Graham , Rares JJ, NSD2013 of 2006, 9 May 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, a national of Egypt, was not a person to whom Australia had protection obligations.

The appellant had claimed that he had a well-founded fear of persecution because of his homosexuality and his conversion from Islam to Christianity. The Tribunal did not accept that the appellant had converted from Islam to Christianity, or that he was a homosexual. During the hearing, the appellant had volunteered that he had seen a solicitor but was too afraid to speak to the solicitor, who was a Muslim, about his Christianity or his homosexuality. The Tribunal then proceeded to ask the appellant some questions about his discussion with his solicitor, including “What did you talk to him about”; “So you told him that you didn’t want to go back for political reasons”; and “And what did he advise you to do?”.

The issue before the Court was whether the Tribunal was authorised by the *Migration Act 1958* (the Act) to ask the appellant questions about the communications he had had with his solicitor.

Held: per Lander & Rares JJ (Graham J dissenting) appeal allowed; Tribunal’s decision quashed; matter remitted to the Tribunal to be decided according to law.

per Lander & Rares JJ (Graham J dissenting):

- (i) The Tribunal’s decision involved jurisdictional error.

per Lander J:

The Tribunal was under an obligation to advise the appellant that he was entitled to refuse the questions which the Tribunal asked of him if they were to disclose the contents of a confidential communication with his lawyer. It failed to do so.

per Rares J:

There was an inviolable limitation or restraint on the Tribunal’s power to ask questions. By exceeding its powers in asking and pursuing questions to elicit the content of the appellant’s conversation with his solicitor which was the subject of legal professional privilege, the Tribunal failed to give the appellant a hearing according to law.

per Lander J:

- (ii) Legal professional privilege has survived the enactment of s.422B of the Act in relation to a review by the Tribunal of a decision of a delegate refusing to grant a protection visa. Legal professional privilege is not part of the natural justice hearing rule but a common law right quite separate from the obligation to accord a party natural justice.
- (iii) The appellant did not waive the privilege. However, in the absence of a claim for privilege, the evidence which he gave was admissible and receivable by the Tribunal.

per Rares J:

- (iv) The Tribunal’s powers under the Act to ask questions and take evidence did not authorise it to override the common law immunity of legal professional privilege or the common law right to refuse to answer questions that might tend to incriminate the person giving the answers.
- (v) Alternatively, the Tribunal did not proceed in a reasonable fashion in its questioning, because it did not take any step to advise the appellant to the effect that s.433(1A) of the Act entitled him to refuse to answer or to otherwise maintain his privilege.

per Graham J (dissenting):

- (vi) The asking of the questions was not in any way improper. It was always open to a person who was asked a question by a Tribunal Member to decline to answer it on the ground that the answer would require the disclosure of a privileged communication. Section 433(1A) of the Act makes it clear that a privilege such as legal professional privilege would provide a reasonable excuse for a refusal or failure to answer a question that an applicant was required to answer by a Tribunal Member.
- (vii) Nevertheless, a Tribunal Member, who is obliged to provide a fair hearing, should refrain from calling on an applicant for review, who is likely to be unfamiliar with the law in relation to legal professional privilege, to disclose what are *ex facie* privileged communications, without contemporaneously advising that applicant of his or her right to decline to do so.
- (viii) The right to procedural fairness has been circumscribed by s.422B of the Act in such a way as to deprive the appellant of an entitlement to have advice concerning the availability of legal professional privilege tendered by the Tribunal Member to him before being asked to respond to questions such as those identified.

SZFOH v MIAC

[2007] FCAFC 63

Federal Court of Australia, Moore, Besanko, Buchanan JJ, NSD1250 of 2007, 11 May 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, a national of China, was not a person to whom Australia had protection obligations.

In his review application form the appellant set out his residential address in Section C and nominated his migration agent to act for him in relation to the review. In Section D of the form, the appellant also nominated his migration agent to act as his authorised recipient (AR) pursuant to s.441G of the *Migration Act 1958* (the Act) and elected to have correspondences sent to him.

The Tribunal sent the appellant a letter under s.425 of the Act and invited him to appear before it to give oral evidence and present arguments. The letter itself was addressed to the appellant at his residential address. At the end of the letter there was a note to the effect that it was also sent to the AR at a different address to that shown in the form and that a copy of the letter was sent to the appellant “as addressed”.

No response was received from the appellant and he failed to appear on the proposed hearing date. On this date, the appellant’s AR advised the Tribunal over the telephone “that a response about a hearing would be sent as soon as possible”. When no response was received from the AR, the Tribunal proceeded to make a decision on the review pursuant to s.426A of the Act and affirmed the delegate’s decision to refuse the appellant’s application for a protection visa.

Federal Magistrate Smith at first instance found no error in the Tribunal serving the letter to the appellant at his residential address, pursuant to s.441A(4) of the Act. Smith FM held that it was immaterial whether the letter was served on the appellant’s AR. There had been a compliance with s.441A(4) and pursuant to s.441C(4) the letter was deemed to have been received in time to provide the requisite period of notice required under reg.4.35D of the *Migration Regulations 1994*.

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

per curiam:

- (i) The Tribunal failed to comply with s.425A of the Act. The power in s.426A to make a decision on review without taking any further action to allow or enable the appellant to appear before it was not enlivened.
- (ii) The Magistrate was wrong to conclude that service on the AR was immaterial. Under s.425A, 426A, 441A and s.441G of the Act the AR must be given a document by one of the methods specified in s.441A. If the invitation to appear was not given to the appellant’s AR, the provisions of the Act were not complied with and there has been a jurisdictional error.

- (iii) On the present facts, the invitation was not given to the AR in accordance with s.441A.

per Besanko (Moore J agreeing)

- (iv) Even if the invitation was sent (and the envelope addressed) to the AR, the letter itself was addressed to the appellant at his residential address and not to the AR. On the authority of *VEAN v MIMIA* (2003) 133 FCR 570, it was not given to the AR.

Per Buchanan J

- (v) Whilst it may be accepted that under the general law, effective communication would be sufficient to satisfy procedural fairness requirements, the general law did not apply in the present proceedings. Directives in s.441G and the way in which they interact with the provisions of s.425A, 426A, 441A and 441C are an exhaustive statement with respect to natural justice and procedural fairness. Correspondingly, they must be complied with strictly – *SAAP v MIMIA* (2005) 79 ALJR 1009.

SZHVE v MIAC

[2007] FCA 685

Federal Court of Australia, Rares J, NSD 12 of 2007, 2 May 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 citizen of the People's Republic of China, claimed to fear persecution on the basis of his faith as a Christian. He claimed that he was a member of the Shouters sect from his childhood and that he had practised regularly until he left China. The Tribunal found that he was not genuinely involved with the Shouters Church in China. In its findings and reasons the Tribunal indicated that it had reached this conclusion for "a number of reasons among which" were those set out in the paragraphs that followed.

Held: Appeal allowed. FMC orders set aside. Tribunal decision quashed. Matter remitted for redetermination according to law.

- (i) The Tribunal failed to comply with s.424A of the *Migration Act* 1958 (the Act). One of the bases upon which the Tribunal explained that it had not been satisfied on issues of the appellant's credibility was that the claim that he went into hiding was advanced for the first time at the hearing. The only way that the Tribunal could have been aware that the appellant advanced this claim for the "first time" was by having regard to what had been put by the appellant both to the Tribunal and anywhere else which the Tribunal had available to it. The Tribunal recorded in its statement that it had the departmental file before it which included the protection visa application. No notice was given to the appellant under s.424A(1) of the Act of that fact.
- (ii) In relation to the appellant's second new claim that the authorities would know that he had falsified documents, the Tribunal said that that assertion was not mentioned anywhere in the submission to the Tribunal. The way in which the Tribunal reasoned was unimpeachable and did not engage an obligation under s.424A(1) to give the applicant notice of any information.
- (iii) There was no jurisdictional error in the way in which the Tribunal used the information in the appellant's passport in its reasoning. The appellant voluntarily provided the passport within the meaning of s.424A(3)(b) of the Act and the Tribunal was entitled to make such use of it as it did in its decision.

FEDERAL MAGISTRATES COURT JUDGMENTS

AI25 of 2003 v MIMA & Anor

[2007] FMCA 250

Federal Magistrates Court of Australia, Cameron FM, SYG 54 of 2006, 8 March 2007

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

The applicant claimed to fear further persecution from Maoists and others on the basis of his membership of the Nepalese National Democracy Party, membership of a particular social group, his imputed political opinion and his religion being a Christian evangelist. The Tribunal did not accept the applicant's claim, among others, that he moved to Kathmandu in August 2001 to escape the Maoists, on the basis that he had provided earlier contradictory evidence that he lived at the same home address from 1990 until September 2001 when he left for Australia. This information was first provided to the Department of Immigration in his protection visa application form. When questioned at the Tribunal hearing, the applicant confirmed that he did live at home until September 2001. However at the same hearing, he later claimed that he moved to Kathmandu in August 2001 to escape from the Maoists. Referring to the applicant's evidence at hearing that he first mentioned this claim to the Tribunal as previously constituted, the Tribunal found this claim to be an invention to assist his claims for protection.

The applicant contended that the Tribunal breached s.424A of the *Migration Act 1958* (the Act) by failing to put to him in writing the information contained in his protection visa application form and explaining to him the relevance to the review and therefore made a jurisdictional error.

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 reference to the applicant having "first mentioned" his move to Kathmandu at the first Tribunal hearing involved an unavoidable implication that the information was omitted from the initial application for a protection visa. The Tribunal relied on the omission to conclude that the applicant had not been truthful when claiming later that he left his home for Kathmandu prior to coming to Australia. The omission formed part of the reason for affirming the delegate's decision and was information which should have been dealt with in accordance with its obligation under s.424A(1) of the Act.
- (iii) The "information", that the applicant stayed at home until he left for Australia, was within the scope of s.424A(3)(b) of the Act and therefore there was no breach of s.424A(1) in respect of it. The applicant's oral evidence contained the same information as was in his protection visa application form.

SI42 of 2003 v MIAC & Anor

[2007] FMCA 582

Federal Magistrates Court of Australia, Smith FM, SYG 2294 of 2005, 30 March 2007

The applicant, a national 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 from the Awami League (AL) because of his and his father's involvement with the Bangladesh Freedom Party.

The Tribunal found that independent evidence did not support the applicant's claims to fear persecution from the AL. In its "findings and reasons", the Tribunal referred to a significant change of government in Bangladesh which did not occur until after the final date before which the applicant was told to submit any further comments or material. Though it accepted that the applicant had been attacked by AL thugs, it found that he could obtain protection from the authorities in Bangladesh. It was also not satisfied that the applicant would be subject to persecution because of his grandfather's support for Pakistan in Bangladesh's fight for independence from Pakistan.

The applicant contended, among other things, that Tribunal should have put to him the independent information which was adverse to his case, because it contained information that the government of Bangladesh had changed. The change of government was a critical issue upon which the case turned. In addition, the Tribunal failed to consider an integer of the applicant's case in failing to consider his claim that he was a first generation descendant of the losing side in the Bangladeshi independence war, and was at risk of harm by reason of that descentance by mistakenly referring to the applicant's grandfather instead of his father.

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) The applicant was not given a fair opportunity to deal with credible, relevant and significant information, and was denied procedural fairness. It would not have been open to the Tribunal to have arrived at a conclusion without considering the implications of the change of government. This was information which was undoubtedly "credible, relevant and significant to the decision to be made" by the Tribunal on the applicant's refugee claims.
- (ii) The factual mistake by the Tribunal in referring to his grandfather rather than his father caused it to fail to address a claim and was jurisdictional error. The Tribunal failed to appreciate that the applicant presented a history of persecution of a more immediate family member, when assessing the risk to the applicant by reason of family membership. Its reference to the applicant's grandfather and not to his father was not just a mere slip of the pen. The mistake was material to its assessment.

MIMA v SBRF & Ors

[2007] FMCA 438

Federal Magistrates Court of Australia, Brown FM, ADG 316 of 2006, 4 April 2007

The Minister sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the respondents, both nationals of Albania, were persons to whom Australia owed protection obligations.

The Tribunal accepted that the respondents were involved in a blood feud in which they were threatened with serious harm for reasons of their membership of a particular social group, their family, and that the Albanian authorities were unable to protect them from this harm.

Counsel for the Minister submitted that the Tribunal had failed to ask itself any question consistent with s.91S of the *Migration Act* (the Act) as to whether to disregard the fears of a cousin and a brother who had a fear of persecution for a murder committed by the cousin, in determining whether the first respondent had a well-founded fear of persecution because of his family membership.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal failed to identify the proper questions it was required to address in applying s.91S of the Act to the circumstances of the case. It did not consider whether it was required to disregard the fears of persecution held by other members of the first respondent's family. Acting on the assumption that these fears were shared by the first respondent with both his cousin and brother constituted a jurisdictional error.

SZHDO v MIAC & Anor

[2007] FMCA 632

Federal Magistrates Court of Australia, Smith FM, SYG2635 of 2005, 12 April 2007

The applicant, a national of Nepal, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia owed protection obligations. The applicant claimed that he had been targeted by Maoists in his village for reprisals and forced recruitment.

Before the Tribunal, the applicant claimed that his village had been attacked by Maoists, who subsequently had sought him out in order to recruit him, and had threatened "consequences". He also claimed that the Nepali Security forces could not protect people in his situation and that they punished villagers who were perceived to have assisted the Maoists. The Tribunal was not satisfied that the Maoists were specifically seeking the applicant, or that he had a well-founded fear of persecution on return to Nepal.

The Court considered the claims made by the applicant in his protection visa application and compared this with the decision of the Tribunal.

Held: Tribunal decision set aside and remitted for reconsideration.

- (ii) The Tribunal committed a jurisdictional error because it failed to fully address the claims which were before it.
- (iii) Whilst it decided that the Maoists were not personally targeting him, the Tribunal did not consider the separate claim of whether he was a member of a particular social group which might be at risk. The applicant, through his statements, raised a claim as a member of a particular social group of young people, and the Tribunal was under an obligation to make findings defining the group and then assessing the risk that its members face.

MZXLY & Ors v MIAC & Anor

[2007] FMCA 418

Federal Magistrates Court of Australia, Burchardt FM, MLG1136 of 2006, 19 April 2007

The applicants, nationals of India, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations. The applicant husband claimed to have suffered serious harm in the past from members of Shiv Sena, a Hindu nationalist political party, on the basis of his Muslim religion.

In its reasons for decisions, the Tribunal accepted that the harm was for a Convention-related reason and accepted that if he returned to India now or in the reasonably foreseeable future there was a real chance of similar harm occurring. However, the Tribunal concluded that if the applicant returned to India he would be able to access effective state protection and that accordingly there was not a real chance of Convention-related persecution. There was evidence that following the first report made by the applicant to the police about harassment and extortion, there was more harassment and he thereafter withdrew his complaint. There was then further harassment. Following a shooting incident where a customer of the applicant was shot, the police arrested the alleged perpetrators and their case was before the Court when the applicant fled the country.

The applicant alleged jurisdictional error on several grounds, including that the Tribunal failed to apply the correct test for effective state protection.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal committed a jurisdictional error by asking itself the wrong question and reaching a mistaken and logically inconsistent conclusion. Once it had found that the applicant faced a real chance of harm upon returning to India, it was no longer appropriate for the Tribunal to consider whether he was likely to be protected by the authorities. The evidence accepted by the Tribunal showed that the applicant faced a real chance of harm notwithstanding the appropriate involvement of the Indian authorities.

SZJSD v MIAC & Anor

[2007] FMCA 604

Federal Magistrates Court of Australia, Driver FM, SYG3377 of 2006, 20 April 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 owed protection obligations. The applicant claimed to hold a well-founded fear of persecution for reason of her Christian religion.

The Tribunal had doubts about the applicant's claims that she had practised Christianity in China and rejected her claims to have attended an underground church given her very limited knowledge of the Christian religion. On the basis of her limited knowledge, and information it obtained from the Pastor of the church the applicant had been attending in Australia, the Tribunal found that the applicant's knowledge of Christianity had been obtained by regularly attending church services in Australia. The Tribunal was not satisfied the applicant became involved with the Church in Australia otherwise than for the purpose of strengthening her claims to be a refugee and disregarded those activities under s.91R(3) of the *Migration Act 1958* (the Act). On this basis,

the Tribunal found that the applicant would not continue her association with the Christian church upon return to China and accordingly would not attract the adverse attention of the Chinese authorities.

Held: Tribunal decision quashed and matter remitted for reconsideration.

- (i) The Tribunal erred by failing to ask “what if I am wrong” and consider whether the applicant faced a real chance of persecution if she maintained her faith as a committed Christian.
- (ii) The Tribunal did not reach such an unequivocal finding about the applicant’s claims to avoid the need to consider the claims as if they were true. While finding that it had doubts about the applicant’s claims to have been a Christian in China, it could not have been certain on the information before it that the applicant was not a committed Christian. That information was unequivocal; the applicant knew some things and not others. Accordingly, the Tribunal needed to consider what the applicant’s position would be if she maintained her faith.

Obiter:

- (iii) In the event of any conflict between s.91R(3) and s.424 of the Act, the latter must prevail. If the Tribunal requests information about an applicant’s conduct in Australia it is obliged to take that information into account. Accordingly, the Tribunal was entitled (and probably obliged) to take into account the information obtained from the Pastor, notwithstanding that the Tribunal was required to disregard the applicant’s conduct in Australia, when forming its opinion that the applicant’s knowledge of Christianity was only recently obtained in Australia.
- (iv) The Tribunal’s finding that the applicant would not be associated with the Christian church was, at least in part, made in reliance on the applicant’s conduct in Australia that the Tribunal disregarded under s.91R(3) of the Act. A serious difficulty arises out of this reasoning because if a Tribunal is required to disregard an applicant’s conduct in Australia it must disregard it for all purposes. It is arguable that while s.91R(3) prevents a Tribunal from relying upon an applicant’s conduct in Australia which has been disregarded, the Tribunal is not thereby prevented from taking into account its own reasoning and findings in relation to that conduct, however the distinction is conceptually difficult and may be elusive.

SZJNU v MIAC & Anor

[2007] FMCA 586

Federal Magistrates Court of Australia, Lloyd-Jones FM, SYG3014 of 2006, 20 April 2007

The applicant, a national of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia owed protection obligations. The applicant claimed to have entered Australia on a false Japanese passport. On the Department of Immigration file it was noted that the applicant was unable to produce any identification document (other than the false passport) upon arrival in Australia.

During the hearing, the applicant provided a photocopy of a Chinese identity card allegedly bearing his own name. He was questioned about the original identity card which he claimed he provided to an officer of the Department of Immigration and Citizenship at Villawood Detention Centre.

The Tribunal, in its decision, stated that “There were a number of issues which detracted significantly from the applicant’s claims...” and later “The Tribunal accepts that the applicant was a resident of Fuqing City in Fujian Province, that he lived with his parents and wife and two children. It was noted in the DIMIA File at Folio 46 that upon arrival in Australia, the applicant was unable to provide any ID documentations. Yet he claimed before the Tribunal that it was taken by a Departmental officer upon arrival. Subsequently he produced a Photostat copy of a Chinese ID card in his name which contained details of his home address etc, but was unable to produce the original.”

The applicant contended that the Tribunal had failed to disclose particulars of information that was part of the reason for affirming the decision under review as required by 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 by failing to put information that was a reason or part of the reason for the refusal to the applicant.

- (ii) The information was the inconsistency of the applicant's claim to have provided the original identity card to an immigration officer and the Department file note that the applicant was unable to produce any identification document. The Tribunal had identified this as an issue which detracted from the applicant's claim and was a part of the reason for affirming the decision.

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 (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. On 29 March 2007, the Bill was passed in the Senate. The Bill was introduced into the House of Representatives on 8 May 2007. The second reading of the Bill is listed for the next Parliamentary sitting.

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\(Review%20Provisions\)%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

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

CASELOAD OVERVIEW

RRT Decisions – April 2007

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	0	1	0	0	1
Argentina	0	1	0	0	1
Bahrain	0	1	0	0	1
Bangladesh	0	3	1	10	14
Belgium	0	1	0	0	1
Bhutan	0	1	0	0	1
Bulgaria	0	1	0	0	1
Cambodia	0	1	0	0	1
China (PRC)	16	55	0	1	72
Colombia	0	1	0	0	1
East Timor	4	1	0	0	5
Egypt	2	1	0	0	3
Fiji	0	1	0	0	1
India	1	13	0	1	15
Indonesia	2	5	0	0	7
Iran	3	1	0	0	4
Iraq	1	0	0	0	1
Israel	0	1	0	0	1
Kenya	0	1	0	0	1
Korea, Republic Of	0	4	0	0	4
Lebanon	0	4	0	0	4
Macedonia, Fmr Yugo Rep of	0	1	0	0	1
Malaysia	0	7	0	0	7
Mongolia	0	1	0	0	1
Nepal	2	6	0	0	8
Nigeria	0	2	0	0	2
Pakistan	1	1	0	0	2
Palestinian Terr. (W.Bank/Gaza)	1	0	0	0	1
Papua New Guinea	1	0	0	0	1
Philippines	0	2	2	0	4
Singapore	0	1	0	0	1
Solomon Islands	1	0	0	0	1
Sri Lanka	4	3	0	0	7
Syria	0	1	0	0	1
Thailand	0	5	0	0	5
Tonga	0	1	0	0	1
Vietnam	0	1	0	0	1
Zimbabwe	2	0	0	0	2

ACCESSING TRIBUNAL DECISIONS

Access on Tribunal Premises

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

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

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

Access via the Internet

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

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

The RRT web site is updated on a regular basis.

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

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