RRT Bulletin

The Refugee Review Tribunal decisions digest

Issue No. 7/2007

25 June 2007

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.

Editor:
Laraine Roberts

Contributors:

Sean Baker
Kate Buring
Victoria Coleman
David Corrigan
Jacquelin Plummer
Preeti Prasad
Laraine Roberts
Loga Roshan
Pallavi Sinha
Stephen Tully
Michelle Wei
Rachel White

Please note that any enquiries regarding this Bulletin may be directed to the Editor on (02) 9276 5427 or at **legal@mrt-rrt.gov.au**

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

Contents

Refugee Review Tribunal Decisions 2
- Afghanistan 2
- Bangladesh 2
- China 3
- India 4
- Indonesia 5
- Lebanon 6
- Sri Lanka 6

High Court 7
- *SZBYR & Anor v MIAC & Anor* 7

Federal Court 9
- *SZEOP v MIAC* 9
- *SZGXV v MIAC* 9
- *MZXFQ v MIAC* 10
- *Applicant S1983 of 2003 v MIAC* 11

Federal Magistrates Court 12
- *SZILP v MIAC & Anor* 12
- *SZIZY & Anor v MIAC & Anor* 13
- *SZILQ v MIAC & Anor* 13
- *SZHQO v MIAC & Anor* 15
- *MZXLT & Anor v MIAC & Anor* 15

Legislation Update 17
Caseload Overview 19
Accessing Tribunal Decisions 20
Index 21

REFUGEE REVIEW TRIBUNAL DECISIONS

Afghanistan

071329032
23 April 2007, Sydney
Mr S Norman, Member

AFGHANISTAN - RACE - HAZARA - RELIGION - SHIA MUSLIM - POLITICAL OPINION - FURTHER PROTECTION VISA - The Shia Hazara applicant was previously recognised as a refugee on the basis that he had a well-founded fear of persecution from the Taliban who would take crops and livestock from Shia families and abduct or kill the young men. He now claimed that his family had left the country and that the Taliban and "Al-Qaeida" were still operating in his area. The applicant also feared Hezb-e-Wahdat, whose two factions were always fighting and would forcibly enlist him. He claimed that if he refused to fight he would be injured, tortured or even killed. The applicant also claimed that having been overseas he would be targeted by the Taliban and Hezb-e-Wahdat as a person perceived to have money.

Held: Decision under review set aside.

The Tribunal was satisfied there was evidence that recent returnees may have a greater chance of being targeted for harm given the likelihood they may be perceived as wealthy. It was satisfied that the primary reason for such harm would be the endemic criminality. However, the Tribunal noted that even if perceived wealth was the primary reason, it did not mean that a Convention reason could not also constitute a reason for the targeting. Whilst it was satisfied that much of the violence in Afghanistan may have been undertaken in order to acquire scarce resources, the Tribunal noted that such violence was commonly instigated on ethnic/political/religious lines. It was satisfied that the violence would continue and that the persecution feared by the applicant was for at least one Convention reason. Accordingly, the Tribunal was satisfied that the applicant's fear of persecution was well-founded.

Bangladesh

060908139
9 May 2007, Sydney
Ms C Long, Member

BANGLADESH - RELIGION - CHRISTIAN ACTIVIST - POLITICAL OPINION - AWAMI LEAGUE - The applicant feared persecution because of her religion and political opinion. She came from a devoted Christian family and was a leading activist. The applicant claimed that she worked with the poor and in slums and helped people convert from Islam to Christianity. She also claimed that she commenced political activities with the Awami league when she was a student, participated in the 2001 election campaign and did volunteer work until she came to Australia. The applicant claimed that because of her activities, fundamental Muslim groups and Jamat-e activists abused her, attacked her and threatened that if she continued to spread Christianity and engage in politics she would be killed. She claimed that she reported particular incidents to police but no action was taken.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was an active Christian and had talked about Christianity to others. It also accepted her claims in relation to her political activities with the Awami League. The Tribunal accepted that the applicant was generally harassed and was concerned about her safety because of her religious and political activities. Having regard to independent evidence the Tribunal found that it could not exclude the real possibility that the applicant could be harmed because of her political opinion and religion if she returned. It

accepted that effective protection would not be available to her from the harm feared. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution.

China

060418331
7 March 2007, Melbourne
Ms R Hearn-Mackinnon, Senior Member

CHINA - RELIGION - LOCAL CHURCH - The applicant feared persecution as a practising member of the Local Church, which was banned. She claimed she was actively involved in church activities, including the distribution of propaganda material. The applicant claimed she was detained for several days following a raid on a Local Church activity and was harassed, threatened, assaulted and tortured while in detention. She claimed she was a team leader of the Local Church and following her release from detention a number of summonses were issued requiring her to report to the local Public Security Bureau (PSB). She claimed that the PSB asked her to provide a list of names of other church leaders and she was questioned about her daily activities. She claimed her application for a passport was refused and she obtained a false passport. The applicant claimed that summonses had continued to arrive for her since her departure from China.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a Christian and a member of the Local Church with a high level of involvement in church activities. It accepted that she was detained for several days after Chinese authorities raided a Local Church activity; that she was beaten whilst in detention and was subject to ongoing monitoring. The Tribunal accepted that the authorities may have regarded the applicant as a leader within her village due to her capacity to speak Mandarin and her organisational role. The Tribunal found no reason to disbelieve her evidence that she was refused a passport because of her church involvement. It accepted that if the applicant returned to China she would continue to be an active member of the Local Church. The Tribunal accepted that continued involvement by the applicant in church activities would expose her to a real chance of serious harm. Accordingly, it was satisfied that her fear of persecution was well-founded.

071140112
27 March 2007, Sydney
Ms A MacDonald, Member

CHINA - RELIGION - FALUN GONG - DETENTION - WARNING - The applicant feared persecution because she was a Falun Gong practitioner. She found that it improved her health and practised privately after the Government banned it in 1999. The applicant claimed her child told classmates she was practising Falun Gong at home with others and that her neighbourhood committee had been told. She claimed the committee informed the Public Security Bureau and she was detained at the police station, refused to sign a statement and was released with a warning. She claimed she was visited by a police officer every few days to check whether she was still practising Falun Gong. The applicant claimed that in Australia she practised Falun Gong daily at two practice sites. She also provided supporting documentation from the Falun Dafa association.

Held: Decision under review set aside

The Tribunal found that the applicant's evidence was consistent, that she demonstrated knowledge of, and commitment to the theory and practice of Falun Gong and accepted that she was a genuine practitioner. It accepted that she had continued to study and practise Falun Gong in Australia. The Tribunal was of the view that the applicant faced ongoing monitoring and the possibility of being detained again for her involvement with Falun Gong. The Tribunal accepted that the applicant would continue to practise Falun Gong if she returned to China and that there was a real chance she would be detected by the authorities and detained and tortured for reasons of her beliefs. The Tribunal was satisfied that the persecution which the applicant feared was for reason of her religion. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

061031975
17 April 2007, Melbourne
Mr D Lennon, Member

CHINA - POLITICAL OPINION - PRO-DEMOCRACY ACTIVIST - FALUN GONG - The applicant feared persecution arising from her participation in the pro-democracy movement and involvement in Falun Gong, as well as the targeting of her family during the Cultural Revolution. She claimed that her parents were intellectuals and at that time her father was sent to the countryside to work. The applicant also claimed that she spent some years in another country where she became a fervent believer in democracy and attended commemorations for those who had lost their lives in the Tiananmen Square massacre. The applicant claimed that upon her return to China she was told to stop her involvement in pro-democracy activism and Falun Gong. She claimed that upon arrival in Australia she had joined a Chinese organisation and attended rallies protesting against the Chinese government. The applicant feared arrest and interrogation on return.

Held: Decision under review set aside.

The Tribunal noted that the Cultural Revolution occurred between 1966 and 1976 and was not satisfied on the evidence that the applicant would be persecuted as a result of her connection to parents who were targeted at that time. It noted that she was permitted to return to China despite many years of pro-democracy activity in the other country and was not satisfied that she faced a real chance of persecution solely on the basis of that activity. Nor was the Tribunal satisfied that the applicant faced a real chance of persecution solely on the basis of pro-democracy activism in Australia. In view of the applicant's lack of knowledge of Falun Gong it was not satisfied that she was a genuine practitioner. However, the Tribunal was satisfied that the chance of persecution occurring was not remote or insubstantial or a far-fetched possibility. Accordingly, it was satisfied that features of the applicant's history may have lifted her profile to the extent that she had a well-founded fear of persecution based on political belief.

India

061053906
12 April 2007, Sydney
Ms P Pope, Member

INDIA - POLITICAL OPINION - OPPOSING POLITICAL PARTIES - LOVE MARRIAGE - THREATS - HARASSMENT - The applicant and his wife feared persecution because they had entered into a "love marriage". This was opposed by the wife's parents because the applicant worked for a particular party and distributed election material. After the marriage his father-in-law sent a group of supporters of another party to threaten and harass him. The applicant claimed he made a report to police but they took no action. He stated that although his parents were not happy about the marriage, they took no action against him or his wife. Their families were only informed of their travel plans after they arrived in Australia. The applicant claimed that he and his wife were still afraid of the actions of her father and people from the other party.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant and his wife carried on a clandestine relationship for some time before they married and that they feared to tell their families. It accepted that this was due to the differing political affiliations of the families. The Tribunal accepted that the applicant attended meetings and distributed material for a particular party at election time. It accepted that after learning of the marriage his father-in-law arranged for supporters of another political party to threaten the applicant. The Tribunal noted that the threats were verbal only and did not accept that they constituted serious harm. It found that the applicant's political opinion was not the reason for the harm suffered but that his support fot the particular party made him an unacceptable marriage prospect to his wife's parents. Accordingly, the Tribunal found that the applicant did not face a real chance of persecution.

071211156
13 April 2007, Sydney
Mr A Jacovides, Member

INDIA - RELIGION - CHRISTIAN - PROSELYTISING - The applicant feared persecution as a member of a Roman Catholic family. She claimed that her late father was dedicated to spreading the word of God and rendering social service to the weaker sections of society and that she followed him into preaching and social service. The applicant claimed that she and all the members of her immediate family had been attacked or harassed by local Muslims for distributing religious literature and for their proselytizing activities. The applicant also claimed that police protection had not been forthcoming. Her house had been ransacked while she was in Australia where she voluntarily taught religious instruction in local schools. She claimed that her life would be in danger if she returned.

Held: Decision under review set aside.

The Tribunal found that to prevent the applicant from engaging in religious activities amounted to persecution. It accepted that she would persist with what she considered her religious duty and that being female and unattached to any particular organisation increased the risk of serious harm. The Tribunal accepted that the authorities would be unable to protect her and may take action to prevent her from proselytizing. It found that as her work would attract the attention of religious activists, the applicant faced a real chance of persecution wherever she settled. Accordingly, her fear of persecution was well-founded.

Indonesia

071169424
13 April 2007, Sydney
Mr S Roushan, Member

INDONESIA - RACE - CHINESE - RELIGION - CHRISTIAN - The applicant, an ethnic Chinese Christian, feared persecution on the grounds of his race and religion. He claimed to have been attacked in a demonstration against ethnic Chinese and Christians in the 1990s. During this attack, the applicant pushed into his shop which was set on fire, destroying the business and causing him to be badly burned. He further feared the rise in Islamic fundamentalism as he would not be able to practise his religion. The applicant claimed that the Indonesian government favoured Muslims and that the authorities usually required bribes to protect minority groups.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was attacked, assaulted and his business set on fire. It accepted that this harm amounted to persecution. However, the Tribunal noted the applicant did not claim to have suffered harm in the years following the incident. It acknowledged Indonesia's history of state sponsored discrimination against ethnic Chinese but noted that such discrimination had decreased and the current Government promoted racial and ethnic tolerance. The Tribunal noted there had been an increase in vandalism of Christian places of worship, but found the rights of Christians were constitutionally protected, the influence of Islamic extremists had decreased, and the Government was committed to religious tolerance. The Tribunal found no persuasive evidence to indicate the alleged practice of accepting bribes was so pervasive that it rendered state protection inadequate. Accordingly, it was not satisfied that the applicant's fear of persecution was well-founded.

Lebanon

071201197
2 May 2007, Sydney
Dr R Witton, Member

LEBANON - PARTICULAR SOCIAL GROUP - HOMOSEXUALS - The applicant feared persecution from a senior member of his family and homophobic elements in Lebanese society because of his homosexuality. He claimed that he tried to conceal his sexual orientation for fear of retribution by his family and other people as those accused of being homosexuals were persecuted and considered outcasts. The applicant claimed that during his military service other conscripts abused him but he feared complaining to his superiors. He claimed that on several occasions he suffered physical violence by people who suspected that he was homosexual. The applicant claimed that he could not rely on the authorities for protection as homosexuality was not accepted and police rounded up suspected homosexuals. He claimed that he feared physical harm, even death from the family member who was religiously conservative. Due to close family networks in Lebanon this family member would find him wherever he might locate.

Held: Decision under review set aside.

The Tribunal found that the applicant was credible and accepted his evidence. It found that he was a homosexual. Based on independent information in relation to homophobic attitudes prevalent in the police and reflected in the law, the Tribunal accepted that the applicant could not expect protection from the authorities. It noted that homosexuals may form a particular social group and found that there was an identifiable homosexual community in Lebanon. The Tribunal noted independent information which suggested that homosexual men had very little public acceptance or support and that they were forced to live in a situation of extreme vulnerability. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

Sri Lanka

071125953
30 April 2007, Melbourne
Mr D Thomas, Member

SRI LANKA - RACE - TAMIL - POLITICAL OPINION - PARTICULAR SOCIAL GROUP - RETURNEES - The applicant feared persecution as a Tamil woman who was suspected of involvement with or sympathy for the Liberation Tigers of Tamil Eelam (LTTE). She also feared that having spent a considerable period in a Western country she would be of interest to the security forces and militant Tamil groups on return as a target of extortion. The applicant claimed that valuables had been taken from her house by persons with official police credentials on the pretext of searching for LTTE cadres. She feared for her personal safety on return and did not believe she would receive any justice.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant felt unsafe in Sri Lanka due to civil and criminal unrest and that she had been subject to incidents of robbery with threats. However, it noted that she had passed numerous security checks and was able to satisfy the authorities that she was legitimately resident in Colombo. It found that the applicant had availed herself of freedom of movement to travel overseas and was not satisfied she was of any adverse interest to the authorities on the basis of ethnicity or imputed political opinion arising from it. The Tribunal did not accept that the applicant would be at risk of detention on return as she had travelled previously without being subject to extortion or theft attempts on return. Accordingly, it was not satisfied that her fear of persecution was well-founded.

HIGH COURT JUDGMENTS

SZBYR & Anor v MIAC & Anor
[2007] HCA 26
High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon, Crennan JJ, S3/2007, 13 June 2007

This judgment concerned an appeal from a judgment of Madgwick J sitting in the Federal Court's appellate jurisdiction that dismissed an appeal from a judgment of Raphael FM upholding a decision of the Refugee Review Tribunal (the Tribunal) that the appellants were not persons to whom Australia had protection obligations.

The appellants, nationals of India, claimed to fear persecution for reasons of religion. The male appellant was previously married to "S" whose family were Muslims of a different sect. The male appellant claimed to have suffered various forms of harm at the instigation of S's family and was eventually pressured to divorce her. The male appellant married the female appellant and sometime thereafter heard that S had committed suicide. The appellants claimed to have been falsely charged with S's murder as revenge for her death and after a period of imprisonment were released on bail. The appellants claimed to fear further hostility from S's family and police acting at the family's instigation, as well as being imprisoned as a result of the outstanding charges, should they return to India.

The Tribunal found that the appellants were involved in a personal dispute and there was no relevant Convention nexus. The Tribunal did not consider the male appellant to be a reliable witness and referred amongst other things to "modifications and refinements" between his written claims and oral evidence. The Tribunal also considered it implausible that the appellants were able to leave India on passports in their own names given the existence of the alleged outstanding murder charges.

The Federal Magistrate found no breach of s.424A of the *Migration Act* 1958 (the Act) as the essential reason for the Tribunal's decision was that the appellants' claims had no Convention nexus. The Federal Court similarly found that the decision was unaffected by any information to which s.424A might have applied.

Argument before the High Court centred on the proper construction of s.424A and the application of the correct principles regarding the discretionary grant of relief. The appellants contended that information in a statutory declaration submitted with the appellants' protection visa application, from which inconsistencies were said to arise, was "information" falling within s.424A(1)(a) of the Act and should have been put to them for comment in writing.

Held: ***per curiam*** **appeal dismissed.**

per Gleeson CJ, Gummow, Callinan, Heydon & Crennan JJ:

(i) On the facts of this case, s.424A was not engaged at all. The relevant parts of the statutory declaration were not "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review".

per Kirby & Hayne JJ (Gleeson CJ, Gummow, Callinan, Heydon & Crennan JJ agreeing in obiter):

(ii) The discretion to grant relief should be exercised against the appellants as no useful result could ensue. Even if the appellants were correct as to the proper operation of s.424A they cannot overcome the Tribunal's finding that their claims lacked the requisite Convention nexus.

per Kirby J:

(iii) *In* light of the Tribunal's oral identification of the "information" derived from the appellants themselves, any infraction of s.424A was effectively reduced to a complaint of a failure to provide the "information" concerned to the appellants in written form with an invitation to comment on it. Allowing for the Parliament's provision for such a requirement, the fact remains that any comment by the appellants on these particular matters could not possibly have altered the Tribunal's characterisation of the "reasons" for the appellants' propounded fear of persecution. Any breach of

s.424A might be relevant to the general credibility of the male appellant. However the Tribunal's "reason" for affirming the decision was that the source of any "fear" was private.

"…would be the reason, or a part of the reason"

per Gleeson CJ, Gummow, Callinan, Heydon & Crennan JJ:

(iv) Section 424A of the Act does not turn on "the reasoning process of the Tribunal", or "the Tribunal's published reasons". The reason for affirming the decision depends on the criteria for the making of that decision in the first place. The use of the future conditional tense ("would be") rather than the indicative, strongly suggests that the operation of s.424A(1)(a) is to be determined in advance – and independently – of the Tribunal's reasoning on the facts of the case. Here the appropriate criterion was found in s.36(1) of the Act, therefore the "reason, or a part of the reason, for affirming the decision" was that the appellants were not persons to whom Australia owed protection obligations.

(v) It is difficult to see how the relevant parts of the statutory declaration were a "reason, or a part of the reason". They did not contain in their terms a rejection, denial or undermining of the appellants' claims. If their contents were to be believed, they would have been a relevant step towards rejecting, not affirming the decision under review.

per Kirby J (obiter):

(vi) Not everything that is said in the course of the reasons of a tribunal constitutes "the reason, or a part of the reason" for the resulting decision. Finding what would be "the reason" or "a part of the reason" for a "decision" of a tribunal requires identification of the links in the chain that sustain the eventual disposition. In many cases a reference to evidence relevant to the applicant's credit would be "the reason, or "a part of the reason" for the decision. However, that is not this case.

(vii) While the phrase should not be narrowly read so as to diminish the obligations of s.424A, the search is not simply for a passage in the Tribunal's discussion. It is for the identification of something more substantive. Just as the elucidation of the *ratio decidendi* of a decision for legal purposes requires analysis, the "reason or a part of the reason" also requires discernment and correct analysis.

"information…"

per Gleeson CJ, Gummow, Callinan, Heydon & Crennan JJ:

(viii) If the reason for affirming the decision under review was the Tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as "information". However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence.

SZEOP v MIAC
[2007] FCA 807
Federal Court of Australia, Rares J, NSD 2531 of 2006, 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 was not a person to whom Australia had protection obligations.

The appellant, a citizen of Bangladesh, claimed to fear persecution primarily on the basis of his membership of a particular social group of homosexual men in Bangladesh. He arrived in Australia on a Student visa in January 2001, became unlawful and, after being detained, lodged a protection visa application in August 2004. The application was rejected by a delegate of the Minister and the Tribunal affirmed that decision. The decision was appealed and the matter was remitted to the Tribunal to be redetermined according to law. Following the hearing the Tribunal sent a letter to the appellant pursuant to s.424A of the *Migration Act* 1958 (the Act), which stated among other things that his delay in applying for Australia's protection cast doubt on his claimed fear of being persecuted if he returned to Bangladesh. When arriving at its decision to affirm the delegate's decision, the Tribunal concluded that the delay cast doubts on the appellant's claim to be homosexual.

The Court considered a question of construction arising out of the provisions of s.424A of the Act.

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

(i) The Tribunal committed jurisdictional error by failing to properly explain the relevance of information in the s.424A letter.

(ii) The letter addressed only the relevance of delay in relation to the appellant's fear of being persecuted. The s.424A letter was silent about the appellant's claim to be homosexual. By relying upon the delay of the appellant in making his protection visa application as a basis for concluding that he had fabricated all his claims, including his claim to be homosexual, the Tribunal used that information in a way which went beyond what it had identified in its letter under s.424A of the Act.

(iii) It may be retorted that saying that the delay cast doubt on the genuineness of the claimed fear of being persecuted comprehended every basis upon which the fear was sought to be established. However, in the context of the letter that the Tribunal wrote that would not be a fair reading.

(iv) A finding that someone has fabricated a claim is quite different in quality to a finding that the claim is not established. To conclude that someone has fabricated a claim, the Tribunal must use information, as it did here, so as to justify the conclusion. The way in which the Tribunal reasoned was expressly to say that the identified delay in seeking a protection visa, first, cast doubt on the appellant's claim and, secondly, showed that he had fabricated the claim itself. That was a leap to the conclusion.

SZGXV v MIAC
[2007] FCA 800
Federal Court of Australia, Branson J, NSD 161 of 2007, 29 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 India, claimed to fear persecution because of his involvement with the Sikh separatist Khalistan Liberation Movement (KLF) and his association with the group Babbar Khalsa (BK). The Tribunal was not satisfied that the appellant was a member of BK. However, it was prepared to accept that BK hid some ammunition at his home during the violent separatist campaign in the Punjab in the 1980s and early 1990s, that he gave food to BK persons but found that he did nothing else in relation to BK or any other militant group.

The Tribunal accepted as plausible that the appellant may have suffered persecution in the past as a Sikh, however, it was not satisfied that the appellant's fear of persecution was now well-founded. It found that Sikh militancy was no longer active in Punjab and did not accept that he was of adverse interest to the authorities before he left India or presently.

The appellant contended that the Tribunal had failed to comply with s.424A(1) of the *Migration Act* 1958 (the Act).

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

(i) The Federal Magistrate erred in concluding that no obligation arose for the Tribunal to comply with s.424A of the Act. The information contained in the appellant's visa application was information that the Tribunal considered would be part of the reason for affirming the decision and the Tribunal made a jurisdictional error by failing to put it to the appellant for comment in writing.

(ii) The Tribunal did not have in contemplation the appellant's claim to have been a member of BK when it concluded it was not satisfied that his fear of persecution was well-founded because it had rejected that claim. At least a part of the reason for rejecting that claim was the Tribunal's adverse view of the appellant's credibility generally and his failure to present the claim consistently. In forming an adverse view of the appellant's credibility the Tribunal compared the information provided in the visa application with the oral evidence given by him and took into account its view that the two were inconsistent. This leads to the inference that the Tribunal placed weight on the information in the protection visa application.

MZXFQ v MIAC
[2007] FCA 826
Federal Court of Australia, Kenny J, VID 1270 of 2006, 30 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 owed protection obligations.

The Tribunal found that the appellant, a national of Sri Lanka, had provided inconsistent evidence at the hearing and in earlier statements, and was not a credible witness. The appellant had submitted a letter from Ms Meehan, an "advocate/counsellor", which provided her opinion that the appellant was suffering a range of psychological symptoms, which the Tribunal had dismissed because Ms Meehan had not provided her qualifications. In the Federal Magistrates Court the appellant contended that the Tribunal had contravened s.424A of the *Migration Act* 1958 (the Act) by not putting information contained in the letter from Ms Meehan to the appellant for comment. The Federal Magistrate found that the Tribunal had rejected the appellant's claims on a separate ground, that it did not believe he had been a member of the political parties as claimed, and the Magistrate found that the Tribunal had put no weight on Ms Meehan's letter.

Before the Federal Court, the appellant claimed that the Tribunal had relied on the letter from Ms Meehan and her failure to state her qualifications in that letter, and also information in the appellant's protection visa application, and had not given the appellant an opportunity to comment on this information.

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

(i) The Tribunal made a jurisdictional error by failing to put Ms Meehan's letter, particularly in the form it took, and information from the protection visa application to the applicant pursuant to s.424A of the Act.

(ii) The fact that the Tribunal mentioned the letter in its reasons and then determined to give it no weight, thereby bolstering a conclusion about the appellant's credibility, meant that the letter played a part in its reasons for affirming the delegate's decision.

(iii) The appellant did not, in this case, adopt the whole of his statement in his protection visa application. His references to his initial statement being correct and true, and his use of the words "further statement" did not republish the protection visa application before the Tribunal.

Applicant S1983 of 2003 v MIAC
[2007] FCA 854
Federal Court of Australia, Branson J, NSD 144 of 2007, 8 June 2007

This was an appeal from a decision 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.

In his application for a protection visa, the appellant, a citizen of India and a Hindu, claimed to fear persecution on the basis of being a member of the Sindhi community in Maharashtra because he belonged to a low caste. When questioned by the Tribunal as to whether he was claiming he was a Dalit, the applicant responded: "*Yes, Sindhi, low caste Dalit*".. In recounting the appellant's claims, the Tribunal referred to the appellant having made a contention at the hearing that being Sindhi and Dalit is essentially the same as both groups are low caste. The Tribunal was not satisfied that "*being low caste (Sindhi and Dalit)*" gave rise to a real chance of persecution.

The issue before the courts was whether the Tribunal misunderstood and failed properly to deal with the claim advanced by the appellant by proceeding on the basis that being Sindhi and being Dalit are essentially the same.

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

(i) The Tribunal committed jurisdictional error by failing to address the claim advanced by the appellant.

(ii) The social group of which the appellant had claimed membership was constituted by Dalits (low caste people) only and it did not include all Sindhis. Dalits and Sindhis are not the same. Because the Tribunal proceeded on the basis that it was essentially the same to be a Sindhi and a Dalit, it took into account material concerning the treatment in India of Sindhis when determining whether the appellant had a well-founded fear of persecution for reason of his membership of a particular social group. In doing so the Tribunal misunderstood and failed properly to deal with the claim advanced by the appellant.

SZILP v MIAC & Anor
[2007] FMCA 592
Federal Magistrates Court of Australia, Driver FM, SYG668 of 2006, 11 May 2007

The applicant, a citizen 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. He claimed he had joined the Maoists as a volunteer teacher, but had come to oppose their methods of murder, kidnapping, destruction of infrastructure and collecting financial contributions by force. After the local airport was bombed he quit the party but stayed in the village working at a health clinic with overseas funding. The applicant claimed that after the King began to rule by proclamation the army was given increased power, many of his Maoist friends were killed or arrested, and the army was seeking him out. He claimed he also feared the Maoists, as they do not accept people leaving the party. The applicant tendered a letter, which he claimed was from the Maoists, demanding that he return to face his punishment.

The Tribunal did not accept the applicant's claims regarding problems with the Maoists and the government. The Tribunal did not accept that he would have left the party yet stayed in the village for a further year and only when he left became targeted as an enemy of the Maoists; it found that his activity with a western funded NGO would have been unacceptable to the Maoists, particularly after he left the party; it found that he had fabricated his claims and produced a fraudulent document; and had the government been pursuing him it would have detained him at the airport.

The applicant contended that the decision was capricious, arbitrary and made according to humour or private opinion rather than reason and justice.

Held: Tribunal decision quashed and remitted for reconsideration.

(i) Apprehended bias has been established. A fair minded observer would apprehend that the presiding member did not bring an independent mind to bear on the issue to be decided because he so lightly dismissed the applicant's critical explanation as to the reason why he was not harmed while he remained in his home village, based on nothing but an assumption by the presiding member as to the political motives and likely actions of the Maoists. This finding is reinforced by the manner in which the presiding member dealt with the letter which on its face was a threat from the Maoists. The Tribunal assumed that it was fraudulent because it had found the applicant had fabricated the claim which the letter supported and engaged in no analysis of the appearance or contents of the letter.

(ii) In dealing with the applicant's explanation that he was protected from the Maoists' vengeance while he worked with a western funded NGO because they were happy with the work being done for poor people, the Tribunal found that this would have been unacceptable to the Maoists. However, there was nothing in the country information to suggest any general objection by the Maoists to the operations of western funded NGOs. The Tribunal seems to have made its finding on the basis of the opinion of the presiding member.

(iii) The presiding member's assumption that the applicant would have been unable to depart using his own passport if the authorities had been pursuing him was not supported by the available country information.

(iv) A decision-maker may use their own knowledge if that use is fully disclosed to the applicant such that the applicant can comment upon it, and only where the conclusion reached on the basis of that knowledge is of probative value and not an issue about which expert evidence should be sought.

SZIZY & Anor v MIAC & Anor
[2007] FMCA 264
Federal Magistrates Court of Australia, Driver FM, SYG1852 of 2006, 11 May 2007

The applicant, a national of Sri Lanka, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution because of his perceived affiliation with the Liberation Tigers of Tamil Eelam (LTTE), such perception being held by the Karuna group and the Sri Lankan army.

The Tribunal did not accept the applicant's claim regarding his political profile. It did not accept that the applicant was a "wanted" person as a result of his previous activities, including social and administrative work, for the LTTE; that he was pursued by the Karuna group or that he was sought by the Sri Lankan army. Although the Tribunal accepted the applicant's claims that he was held and tortured in relation to a 1993 bus incident, it found the incident of little relevance 13 years later to his subsequent claim that he was a "wanted" person.

The applicant contended that the Tribunal erred in failing to consider an integer of his claim. He contended that his claim properly understood was a claim of imputed political opinion based upon ethnicity as well as upon his association with particular persons and events.

Held: Tribunal decision quashed and matter remitted for reconsideration.

(i) The Tribunal fell into jurisdictional error when it failed to consider the applicant's generalised claim in relation to his ethnicity.

(ii) Central to the applicant's claims was a claim that he feared harm because of a political opinion imputed to him by the Karuna group and by the Sri Lankan army, but underlying that, was a more generalised fear of harm as a member of the Tamil community. The following issues squarely arose from the applicant's written claims: he was a Sri Lankan of Tamil ethnicity; ethnic Tamils had suffered grievously in the past at the hands of the Sri Lankan armed forces; he had personally suffered in the 1993 bus incident where he was detained and tortured; one of the Sri Lankan army personnel who was responsible for harming him had said to him that "all Tamils are LTTE supporters"; and he was afraid to return to Sri Lanka.

(iii) Although the claim was generalised, there was sufficient material to call for an inquiry by the Tribunal as to whether the applicant had a well-founded fear of harm as an ethnic Tamil in Sri Lanka, independently of his claims of a fear of harm by reason of imputed political opinion. The applicant's claims of the harm suffered by the Tamil community extended beyond a simple claim of harm to those who are politically active or believed to be so. It extended to a generalised fear of harm as a member of the minority group in an ethnic civil war.

SZILQ v MIAC & Anor
[2007] FMCA 483
Federal Magistrates Court of Australia, Smith FM, SYG3769 of 2006, 16 April 2007

The applicant 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 be a refugee on the basis of his conversion to Christianity.

A decision was made by the Tribunal on 17 February 2006. This was appealed to the court and remitted to the Tribunal to be redetermined according to law. On 3 October 2006, the second Tribunal sent via facsimile to the applicant via his agent, an invitation pursuant to s.424A(1) of the *Migration Act* 1958 (the Act) to comment on adverse information. The letter also informed him that the Tribunal would listen to the tape of the previous hearing and might not invite him to another hearing. His agent responded, requesting a further hearing including a claim that the applicant needed a Fuzhou interpreter rather than the Mandarin interpreter provided previously. The Tribunal decided not to hold another hearing and proceeded to affirm the decision, in part finding pursuant to s.91R(3) of the Act, that it was not satisfied his attendance at church services and subsequent baptism whilst in detention was for a purpose other than strengthening his claims to be a refugee.

The applicant contended the second Tribunal was bound to invite him to a new hearing pursuant to s.425(1) of the Act. He also submitted that the Tribunal failed to comply with s.424A(1) as the invitation sent on 3 October 2006 was not served in a manner required by s.424A(2) as his agent did not consent to facsimile communication with the Tribunal. The applicant contended the Tribunal committed a further jurisdictional error, making a finding under s.91R(3) without having evidence or without putting the allegation to the applicant as required by *SZBEL v MIMIA* [2006] HCA 63 (*SZBEL).* Finally, the applicant submitted that the first Tribunal failed to arrange for proper interpretation of the applicant's evidence at the hearing held by the first Tribunal and therefore, breached its obligations under s.425(1) of the Act.

Held: application dismissed.

Whether duty to hold another hearing:

(i) The Tribunal performed its duty to send an invitation under s.425(1) in relation to the review application when the first Tribunal invited the applicant to the hearing. The mandatory procedural duties of "the Tribunal", which, on their proper construction arise only once in a review proceeding, may be satisfied at any point of time during the review proceeding, regardless of whether this occurs before or after the Tribunal is reconstituted after the quashing of an invalid decision.

(ii) Section 414A of the Act cannot be read as raising a new obligation on the Secretary under s.418(2) in cases where the Secretary has already performed that obligation prior to a remittal by a Court, nor an implication that any other procedural step in the proceedings on a review which occurred prior to the remission of a matter must be repeated after the remission. The only intention of s.414A(1)(b) is that a 90 day target is to continue to run in such a case.

(iii) The terms of the court's order for remission in the present case did not give rise to any duty to perform duties which had previously been validly performed in the review proceeding.

Whether breach of s.424A:

(iv) Section 441AA gave the Tribunal power to choose any appropriate method of communicating to the agent, including by facsimile to the number shown on her letterhead, if it thought that this was "appropriate". In circumstances where this had become the usual and apparently reliable mode of communication, it was clearly open to the Tribunal to adopt that opinion.

(v) In any event, the repeated tendering to the Tribunal by the agent of her facsimile number, and her failure to voice any objection to its communicating with her at that number, amounted to that number being "provided to the Tribunal by the recipient in connection with the review". The words "provided … in connection with the review" are broad, and do not carry the implication of an agreed or designated address for receiving documents.

(vi) Even if consent were required, this was implicit in the conduct of the agent. The fact that her original notification of her address for service to the Department did not provide an agreed facsimile number and requested that "all decisions" should be "forwarded by registered post", does not require a different conclusion.

Procedural fairness and SZBEL:

(vii) An assessment of the applicant's motives for engaging in Christian activities while in detention was a necessary part of its assessment of his evidence to decide whether it supported his fear of being persecuted. This should have been apparent to the applicant and his advisor. The applicant should be taken to have been fully aware that this assessment would be addressed by reference to the definition of refugee as adopted and modified by ss.36 and 91R of the Act. Procedural fairness does not require any specific warning as to how the assessment of his new evidence might be approached in terms of those legislative provisions.

Whether error in use of Mandarin Interpreter:

(viii) Considering the whole of the transcript of the hearing and the evidence tendered for the applicant, neither the one error in the interpretation identified or any other aspects of the interpretation at the Tribunal's hearing, necessitated a finding that the applicant was generally denied the opportunity required by s.425 of the Act in relation to the provision of a sufficient level of interpreting services, nor did it materially affect the second Tribunal's decision.

SZHQO v MIAC & Anor
[2007] FMCA 746
Federal Magistrates Court, Scarlett FM, SYG 3920 of 2006, 8 May 2007

The applicants, nationals of Jordan, 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 applicants feared persecution on the basis of their Christian religion from members of the Muslim Brotherhood. The applicant's daughter provided evidence of possible harm arising from her relationship with a particular member of the Muslim Brotherhood named Ashraf. In its reasons for decision, the Tribunal accepted that the applicant father had been imprisoned and tortured for having bibles and was threatened that he should convert to Islam. The Tribunal also accepted that the applicant wife, daughter and son had been threatened, harassed or abused. However, the Tribunal did not accept that these experiences amounted to persecution for a Convention reason. Furthermore, the Tribunal indicated that it had "considered the claims forwarded in relation to" Ashraf and concluded that any possible retaliation was not for a Convention-related reason.

The applicant alleged jurisdictional error on several grounds, including that the Tribunal failed to take relevant material into account.

Held: Tribunal decision set aside and remitted for reconsideration.

(i) The Tribunal failed to take relevant material into account and thereby made a jurisdictional error.

(ii) The hearing transcript indicates an intention and an undertaking in some form given by the Tribunal to consider the reasons in another Tribunal decision relating to the applicants' daughter. The Tribunal had asked the applicants' daughter whether she had the Tribunal decision reference to her case and the daughter was able to provide it. This clearly indicates some sort of an intention to consult that decision.

(iii) Whether or not that would have affected the Tribunal decision in relation to the applicants, that material was put to and prima facie accepted by the Tribunal as being relevant. The Tribunal's decision record does not show that the Tribunal in fact considered the material which it appears to have said that it would.

MZXLT & Anor v MIAC & Anor
[2007] FMCA 799
Federal Magistrates Court of Australia, McInnis FM, MLG 1064 of 2006, 29 May 2007

The applicant 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 in Russia on the basis of her Jewish ethnicity and as a woman.

The Tribunal found that the applicant had a legally enforceable right to enter and reside in Israel for the purposes of s.36(3) of the *Migration Act* 1958 (the Act) and had not taken all possible steps to avail herself of that right and was therefore excluded from protection. The Tribunal based its decision upon the Israeli Law of Return that provides that: 1. "Every Jew has the right to come to this country as an Oleh"; and 2. "Aliyah" is by "Oleh's visa", which "shall be granted to every Jew who expresses his desire to settle in Israel". This is made subject to certain narrow exceptions.

The applicant submitted that the Law of Return is premised on the desire of the person to invoke the right and the refusal of the Israeli authorities to consider an application that is not a genuinely voluntary expression of desire to invoke the law means that the right does not come into existence or is a conditional or contingent right. Absent that expression of desire, the applicant should not be taken not to have taken all possible steps to avail herself of a right to enter and reside in Israel.

Counsel for the Minister submitted that the question of whether the applicant had an existing legally enforceable right to enter and reside in Israel within the meaning of s.36(3) of the Act was a question of fact for the Tribunal. It was further argued that the expression of a desire to settle, in the form of making an

application to settle in Israel, was a "possible step" which the applicant could make to avail herself of a right to enter and reside in Israel under the Law of Return.

Held: Tribunal decision set aside and remitted for reconsideration.

(i) The Tribunal made an error of fact in interpreting the Law of Return and an error of law in interpreting s.36(3) of the Act and thereby made a jurisdictional error.

(ii) Section 36(3) did not apply to the applicant. Where a person such as the applicant, a Jew, clearly expresses the desire not to return and reside in Israel then the process which may permit that person to avail herself of the Law of Return has not been enlivened.

(iii) The Tribunal erred as a matter of law by imposing on the applicant an interpretation of s.36(3) which would otherwise seek to impose an automatic obligation upon all Jews to express a desire to live in Israel. In the absence of a genuinely voluntary expression of desire to invoke the Law of Return, the right cannot be regarded as an existing right but rather a conditional or contingent right.

(iv) It was an error of law for the Tribunal to infer that the expression of a desire to settle in Israel was one step which could properly form part of "all possible steps" required by s.36(3).

LEGISLATION UPDATE

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

Legislation Passed

Migration Amendment (Statutory) Agency Bill 2007

The Migration Amendment (Statutory) Agency Bill 2007 was introduced to the House of Representatives on 24 May 2007 and passed by the House on 12 June 2007. On 13 June 2007, the report by the Selection of Bills Committee was tabled and adopted in the Senate. On 14 June 2007, the Bill was passed in the Senate. It is currently awaiting assent.

Following government endorsement of the recommendations of the Review of the Corporate Governance of Statutory Authorities and Office Holders (the Uhrig Review), the Bill aims to amend the Migration Act 1958 to constitute the Refugee Review Tribunal and the Migration Review Tribunal as a single statutory agency under the Public Service Act 1999.

A copy of the Bill can be found at:

http://www.comlaw.gov.au/comlaw/Legislation/Bills1.nsf/bills/bytitle/F0ED61E112A13BCDCA2572E600099D78?OpenDocument

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. 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 and passed on 20 June 2007. It is currently awaiting assent.

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://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bytitle/491C04B0B184B2ECCA257244000EF60A?OpenDocument

CASELOAD OVERVIEW

RRT Decisions – May 2007

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	1	0	0	0	1
Angola	0	1	0	0	1
Bangladesh	2	3	0	5	10
Brazil	0	1	0	0	1
Burma (Myanmar)	3	1	0	0	4
Cambodia	0	1	0	0	1
Cameroon	1	0	0	0	1
China (PRC)	13	62	1	1	77
Colombia	2	0	2	0	4
Croatia	0	1	0	0	1
East Timor	2	1	0	0	3
Egypt	1	2	0	0	3
Fiji	1	6	0	0	7
India	2	30	0	2	34
Indonesia	1	14	0	0	15
Iran	1	0	0	0	1
Iraq	1	0	0	0	1
Israel	0	1	0	0	1
Japan	0	1	0	0	1
Korea, Republic Of	1	6	0	0	7
Kyrgyzstan	0	1	0	0	1
Lebanon	3	5	0	0	8
Malaysia	0	4	0	0	4
Mongolia	3	2	0	0	5
Morocco	1	2	0	0	3
Nepal	0	3	0	0	3
New Zealand	0	1	0	0	1
Nigeria	0	0	0	1	1
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	0	0	2
Russian Federation	0	1	0	0	1
Sri Lanka	4	6	0	0	10
Stateless	0	1	0	0	1
Taiwan	0	1	0	0	1
Thailand	0	3	0	0	3
Tonga	0	1	0	0	1
Turkey	3	0	0	0	3
United Kingdom	0	1	0	0	1
Vietnam	1	2	0	0	3

ACCESSING TRIBUNAL DECISIONS

Access on Tribunal Premises

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

The Sydney Registry is located at:	Level 11 83 Clarence St Sydney NSW 2000
The Melbourne Registry is located at:	Level 12 460 Lonsdale St Melbourne VIC 3000

Access via the Internet

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

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

The RRT web site is updated on a regular basis.

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

INDEX

Awami League (Bangladesh) 2
Chinese (Indonesia) 5
Christian (India) 5
Christian (Indonesia) 5
Christian activist (Bangladesh) 2
Detention (China) 3
Falun Gong (China) 3
Further Protection visa (Afghanistan) 2
Harassment (India) 4
Hazara (Afghanistan) 2
Local Church (China) 3
Love marriage (India) 4
Opposing political parties (India) 4
Particular social group "Homosexuals" (Lebanon) 6
Particular social group "Returnees" (Sri Lanka) 6
Pro-democracy activist (China) 4
Proselytising (India) 5
Shia Muslim (Afghanistan) 2
Tamil (Sri Lanka) 6
Threats (India) 4
Warning (China) 3