



The MRT-RRT Monthly Bulletin

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This issue of Précis includes a range of interesting MRT and RRT decisions, dealing with the genuineness of the relationship subject of a spouse visa, verifying documents from Afghanistan for a Remaining Relative visa, as well as protection visa cases relating to Jehovah's Witnesses in the Lebanon, Tamils in Malaysia, and family violence in Vanuatu.

A pleasing development is that further country-of-origin information has been added to the MRT-RRT website, including 314 country advice requests from 2009, and Basic Information Packages for 72 countries. Basic Information Packages contain hyperlinks to reliable sources of background information on the human rights and political situation of countries, and are a good starting point for research on these issues. Basic Information Packages are updated four times a year in January, March, May and October.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

0806919

25 February 2010, Melbourne

Mr G Robinson, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 – EMPLOYER NOMINATION SCHEME – CL.856.213(C) – EXCEPTIONAL CIRCUMSTANCES – A delegate of the Minister refused to grant Subclass 856 visas to the applicants on the basis that the first-named applicant (the applicant) did not have vocational English. The delegate also found that there were no exceptional circumstances such that the language requirement should be waived. The applicant gave evidence at the Tribunal hearing and noted that he had obtained qualifications and experience in Turkey before he and his family came to Australia in 2002. He gave evidence that he had worked for his present employers in Australia as a pastry cook since 2004 and that he speaks only English at his workplace. In 2008 he achieved an overall band score of 3.0 in an IELTS test. He also advised the Tribunal that he had completed an English course at TAFE in 2009, and that he practiced English at home with his teenage daughter. The applicant's employers gave evidence that the applicant is a good worker and a very talented pastry cook who supervises other employees and whose English language ability had never presented a problem. The employers noted that they had recently opened a second patisserie which would probably need to close if the applicant were to leave, as they had found it very difficult to find qualified staff from within Australia. They submitted that the applicant had already trained one apprentice and that the business intended to take on another apprentice to work under him this year. The representative noted that there was a critical shortage of pastry cooks in Victoria and that the applicant was a qualified trainer without whom the business would not be able to make sufficient products for both shops. He stated that if the second shop were to close, this would deprive a number of Australians of their jobs.

Held: Decision under review set aside.

At the hearing, the Tribunal found the applicant to be an articulate and intelligent interlocutor and it had no difficulties communicating with him in English. The Tribunal accepted that the applicant had made consistent efforts since arriving in Australia to improve his English and that he had made substantial progress in this endeavour. The Tribunal also noted that at the hearing, when the applicant was asked to read certain excerpts from a document, he was able to demonstrate a sound level of comprehension at a relatively sophisticated level. The Tribunal took into account relevant Departmental policy advice, as well as the evidence provided at hearing when considering whether exceptional circumstances existed. It found that overall the first-named applicant was able to work effectively and safely in the workplace. The Tribunal accepted that the applicant worked exclusively in the English language and that he had no difficulty communicating with his employer, his fellow employees and outside suppliers. The Tribunal also accepted the employers' evidence that they had tried to recruit other pastry cooks, however, there was a shortage of them in Victoria. The Tribunal found that the applicant had made, and will continue to make, a valuable contribution to training Australian citizens in pastry cooking and that he is an integral employee in a small family business which would be severely disadvantaged were he to leave Australia. Having taken all of the evidence into account, the Tribunal found that the first-named applicant and his employers had demonstrated that exceptional circumstances existed in this case and that the language requirement should be waived. Accordingly, the Tribunal found that the applicants satisfied the requirements of cl.856.213(c)(ii), and therefore satisfied cl.856.213(c) of the Regulations.

0808209

25 February 2010, Melbourne

Mr A Gregory, Member

SKILLED – INDEPENDENT (RESIDENCE) (CLASS VB) – SUBCLASS 885 – CL.885.221 – POINTS TEST – A delegate of the Minister refused the applicant's Subclass 885 visa application as the applicant did not satisfy cl.885.221 of the Regulations because she did not have sufficient points for this type of visa for which the pool and pass mark was 120 points. The delegate, in assessing the visa applicant, allocated 110

points which did not meet the pass mark. The visa applicant claimed she was entitled to 15 points and not 5 points in view of her Honours Bachelor's degree. The delegate stated that the Bachelor of Animal Science with Honours degree from La Trobe University was not eligible for 15 points, as the applicant had been awarded Second Class B honours, when the requirement was a Second Class Division 1 level or above. The applicant's representative submitted that there was ambiguity in the definition of "Second Class (Division 1) or above", and pointed out the varying standard of grades of the honours degrees by different Australian universities. The representative also pointed out that the applicant had endeavoured to seek clarification with the university and the Department before she made her application in relation to her situation and was led to believe that she would meet the 15 points criteria for her Honours degree. The applicant claimed that there was confusion regarding the university's grading system, both on their website and in their reference guide, and that before she completed her degree she obtained a booklet from the Department which indicated that she needed an "upper second class level". The applicant stated that a "Division 1" was required and that this was not indicated in the booklet. She claimed that she asked for an answer as to what was an "upper second class level" and was told it was 55% and that she would get 20 points. Under the circumstances the applicant claimed that she was not given the correct information.

Held: Decision under review affirmed.

The Tribunal found that the applicant had been given misleading advice by both the Department and the university and therefore she had been placed in a difficult situation. The Tribunal accepted that the visa applicant acted in good faith and endeavoured to meet the points test and that she felt she had attained what was required in regard to her degree. The Tribunal took "the simple view" that an H2B Honours grading, given that there were H1 and H2A grades, was not a Second Class Honour (Division 1), but equated to a Second Class Honour (Division 2). The Tribunal also referred to the Australian Government's Australian Education International Gradings, which equated Second Class Honours (Lower Division), to Second Class Division 2 or B. The Tribunal noted that La Trobe University listed as its honours grades: H1, H2, H2A, H2B and H3. Given this, the Tribunal found that the applicant had not met the requirements of an honours degree at the Second Class Division 1 level by an Australian educational institution and so was therefore entitled to 5 points and not 15 points. Hence, the Tribunal found that the applicant did not meet the requirements for the grant of the visa.

0901251

12 February 2010, Sydney

Mr A Mullin, Member

SKILLED (PROVISIONAL) (CLASS VC) – SUBCLASS 485 – CL.485.215(c) – EVIDENCE OF IELTS LANGUAGE TEST – A delegate of the Minister refused to grant the applicant a Skilled (Provisional) visa on the basis that the applicant did not satisfy the requirements of cl.485.215(c) of the Regulations. The applicant's results from an IELTS test held in September 2008 showed he did not achieve the required score. He submitted results of another IELTS test taken in March 2009 where he had achieved the required score, however, the applicant's migration agent was unable to show that this IELTS test had been booked at the time of the visa application due to the fact that the applicant had used a different migration agent, and there was no evidence that the applicant had notified the details of a further IELTS test to the Department. The applicant submitted the original IELTS test for March 2009 along with a letter from Macquarie University stating that in October 2008 he had booked an IELTS test which he attended in January 2009. The applicant admitted that he understood his English language ability at the time of application was neither at the "Competent" nor the "Vocational" level. He claimed that before he submitted his visa application, he had booked an IELTS test and obtained a receipt from the test centre confirming this but that he did not know where this document was now. He claimed he had attempted to scan the booking receipt and forward it electronically to the Department but that the result was not very clear. He claimed he then sent the receipt to the Department by mail 'some days later' and that he did not know why there was nothing on his file to indicate the Department had received the receipt by mail. The applicant's brother claimed at the hearing that he and the applicant realised the visa application form had not asked for the date of the next test, and confirmed their claimed attempts to notify the Department electronically and by mail. The migration agent claimed that the applicant was genuinely working as a cook, and that he and his brother planned to open a restaurant together in Australia.

Held: Decision under review affirmed.

The Tribunal found that there was no evidence that the applicant had achieved, in an IELTS test, a score as required by the Regulations. The Tribunal found, on this basis and as conceded by the applicant, that he did not have vocational English at the time of application. The Tribunal therefore found that the applicant did not have competent English at the time of application and further found, as conceded by the applicant, that his visa application was not accompanied by evidence that he had made arrangements to undergo a specified language test as required under cl.485.215(c). The Tribunal noted and accepted that in October 2008 the applicant made arrangements for and sat an IELTS test in January 2009. The Tribunal also noted the applicant's submission that there was no indication in the online visa application form that he would be required to submit evidence of arrangements for a subsequent IELTS test at that time and there was no facility to attach such evidence to the application form. The Tribunal was satisfied, however, that these circumstances did not alter the fact that the applicant did not provide the requisite evidence with the visa application. The Tribunal found the applicant's visa application was not accompanied by evidence that he had made arrangements to undergo a language test specified for the purposes of cl.485.215(c). The Tribunal accepted that the applicant had made arrangements for an IELTS test to be undertaken after the date of application and noted that it was unfortunate he did not submit the evidence of this with his visa application. The Tribunal indicated that although the decision appeared to be a harsh one in these circumstances, given the findings above, the Tribunal must affirm the decision.

1000944

8 March 2010, Sydney

Ms K Raif, Member

SKILLED INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) – SUBCLASS 880 – CANCELLATION – S.109(1) – A delegate of the Minister cancelled the applicant's Subclass 880 visa under s.109 because the delegate found that the applicant had provided a bogus document for the purpose of a skills assessment application. The applicant was a citizen of China who travelled to Australia on a Student visa in 2005 and completed a Diploma of Hairdressing Salon Management the following year. In 2007 the applicant applied for a Skilled visa, stating on the application form that he had obtained a skills assessment for the nominated occupation of a Hairdresser from Trades Recognition Australia (TRA). In the application, the applicant stated that he had been employed as a trainee hairdresser from April 2004 and he provided a signed employment reference which stated that he performed hair washing, hair treatment, drying and cutting, applying serum, scalp treatment and maintaining relevant health and safety procedures. The applicant also provided to the TRA a training book outlining his duties and responsibilities and was also granted a pre-migration skills assessment in 2006 which indicated that it was based on the completion of an Australian Qualification Framework Certificate (AQF) and 900 hours of work experience. The applicant was subsequently granted the visa. At a later date, officers from the Department conducted an investigation into the applicant's claimed employment where they spoke to the signatory of the employment reference who stated that the visa applicant was not employed but only helped in the salon, which was not the salon to which the employment reference referred. She stated that the applicant cleaned and washed hair but did not do any hairdressing as outlined in the reference, nor was he paid. The signatory stated that she recognised the signature on the employment reference but she did not write the reference and did not recognise the content of the document. Departmental officers concluded that the references were manufactured and that they were written by a person who had no authority to do so, and subsequently the applicant received a Notice of Intention to Consider Cancellation (NOICC) under s. 109 of the Act.

Held: Decision under review set aside.

In reaching its decision, the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the visa applicant based on the material before it. The Tribunal found that the notice under s.107 given to the applicant referred to the employment reference given by the applicant to TRA. Thus, the question that arose was whether those documents were given to an "officer" for the purposes of s.103. The Tribunal found that the documents given to TRA were not given to a person or body specified in s.103 and that there was no breach of s.103 in respect of the document that the applicant gave to the TRA.

A breach may also be established if a 'bogus document' was provided by the applicant to the Department. 'Bogus document' is defined to include "a document that the Minister reasonably suspects is a document that ... (b) is counterfeit or has been altered by a person who does not have authority to do so"; or (c) "was obtained because of a false or misleading statement, whether or not made knowingly". The delegate found that the TRA assessment was obtained on the basis of a false or misleading employment reference from Hair

Force 1 and that the TRA assessment was obtained because of a false or misleading statement and the assessment itself was a bogus document. This document was then given to DIAC, which suggested non-compliance with s.103. However, the Tribunal formed the view that the s.107 Notice did not sufficiently particularise the non-compliance or sufficiently state the basis on which the non-compliance was alleged, thereby not allowing the recipient an opportunity to understand and attempt to answer the allegation. As a visa cannot be cancelled under s.109 on a ground not sufficiently particularised in the s.107 notice, the Tribunal did not consider that the applicant was given a real opportunity to understand and answer the allegation. Accordingly, the Tribunal found that although the s. 107 Notice did not offer sufficient particulars, because the bogus documents given to TRA were not given to an "Officer", it was not possible to decide that there was non-compliance by the applicant "in the way described in the notice". It followed that the power to cancel the visa did not arise. Accordingly, the Tribunal found that the notice issued under s.107 of the Act was not a valid notice in that it did not sufficiently particularise the non-compliance and therefore, there was no power to cancel the visa. It followed that the delegate's decision to cancel the visa was set aside.

Family visas

0804423

3 March 2010, Melbourne

Ms S Muling, Member

OTHER FAMILY (MIGRANT) – (CLASS BO) – SUBCLASS 115 – REMAINING RELATIVE – R.1.15(2) – AUTHENTICITY OF DOCUMENTS – A delegate of the Minister refused to grant the applicant a Subclass 155 visa on the basis that the delegate could not be satisfied that certain family members were in fact deceased. The visa applicant applied for a Remaining Relative visa in 2006. He indicated on the application form that he was born in 1981 in Ghazni Province in Afghanistan. He claimed his parents and two brothers were deceased and he had one brother, the review applicant, residing in Australia. In 2008, the Department wrote to the visa applicant advising that the Embassy of the Islamic Republic of Afghanistan in Islamabad had advised that the death attestations issued by the Ministry of Foreign Affairs in Kabul were not genuine. The review applicant's migration agent wrote to the Department outlining the process which the visa applicant went through in obtaining the death attestations and registering them with the Afghanistan Consulate in Quetta. It was submitted that the review applicant believed the officer who stamped and signed the documents failed to enter them on the Consulate register and this was why they were considered to be fakes. The agent contended that the visa applicant and review applicant were innocent victims of the inefficiency and/or fraud practised by officials in the Afghanistan Consulate in Quetta. Along with the review application, the review applicant provided certified copies of new death certificates issued by the new Consul at the Afghanistan Consulate in Quetta dated in May 2008. The new certificates were purportedly based on the certificates previously obtained from within Afghanistan and countersigned by the Ministry of Foreign Affairs in November 2007 and which were provided to the Department. Also attached to the DFAT response was a letter from the Embassy of the Islamic Republic of Afghanistan, Islamabad, to the Australian High Commission, Islamabad, dated 7 January 2010 which confirmed that the Consulate General of Islamic Republic of Afghanistan in Quetta had informed the Embassy that the death certificates were confirmed as genuine and were attested on the basis of documents from a court of Afghanistan provided by the applicants.

Held: Decision under review set aside.

The Tribunal assessed all the evidence that was provided by the visa and review applicants in relation to their claim that the visa applicant's parents and two brothers were deceased and therefore the visa applicant does not have any near relatives residing outside Australia. The Tribunal noted the concerns of the delegate regarding the visa applicant's evidence as to when his mother and brothers died. The Tribunal also considered the advice received from Afghan officials regarding the veracity of some of the documentary evidence provided to substantiate the claims that the visa applicant's parents and two brothers were deceased. However, based on the most recent advice received from the Embassy of Islamic Republic of Afghanistan in Islamabad, which confirms that the death certificates presented to the Consulate General in Quetta were verified as genuine and were attested on the basis of court documents from a court of Afghanistan, the Tribunal found that the death attestations dated 20 May 2008 are, in fact, authentic and that the visa applicant's parents and brothers are deceased. On the basis of these findings, the Tribunal found that the applicant has no 'near relatives' as defined in r.1.15(2) other than those that are usually

resident in Australia and are Australian citizens, Australian permanent residents or eligible New Zealand citizens and thus meet the requirements of r.1.15(1)(c). Accordingly, the Tribunal found that the applicant met the requirements of cl.155.211 and 155.221 of the Regulations.

0807821

31 March 2010, Sydney

Ms C Carney, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 114 – AGED DEPENDENT RELATIVE – R.1.05(1)(a)(i) – DEFINITION OF AGED DEPENDENT RELATIVE

A delegate of the Minister refused to grant the applicant an Aged Dependent Relative visa on the basis that the delegate found that the visa applicant was not dependent upon the sponsor, her son (the review applicant). The review applicant claimed that the visa applicant travelled to Australia in 2004 after his father passed away and that he supported her during this stay. She stayed for a year before returning to Egypt but when the visa applicant visited Australia again, she was unable to fly back due to her blood pressure and the review applicant decided it would be better for her to stay permanently in Australia so he applied for her to stay. However, this application was rejected so the visa applicant returned to Egypt. The review applicant claimed that the visa applicant receives 450LE (*Livre Egyptienne*) a month pension from the Egyptian government and that food costs around 30-40LE per day. He stated that her other costs were clothing, medication, transport, phone and utilities. The review applicant stated that he has been sending funds regularly to the visa applicant since 2002. Evidence of funds transferred in 2002 and 2003 were provided. The review applicant claimed that the delegate had refused the application as he mistakenly thought the visa applicant was receiving a pension of 800LE per month but since his father had passed away his mother only received 450LE and this was not enough for her to live on. The review applicant also advised that the visa applicant has two shops. Since her husband's death, the store they owned had been closed as she was not able to run it by herself. They pay 85LE a month to rent it out and they paid rent upfront and are obligated to continue to pay rent. In order to utilise these assets, his siblings would have to go back to Egypt to organise things and this would take time. He stated that they were waiting for their mother to come to Australia and they would then go back and sell everything. He stated that the shop was only worth about 15,000 to 20,000 Egyptian dollars. The review applicant advised that the visa applicant lives in a rent controlled unit in Alexandria. The visa applicant advised she was now getting a pension of around 600LE per month from which she pays for rent, water, electricity but it is not enough for her medical treatment as she has no health insurance.

Held: Decision under review affirmed.

The Tribunal considered whether the visa applicant was dependent upon the review applicant for her basic needs for food, clothing and shelter for a reasonable period of time prior to the date of her application. The Tribunal accepted the evidence of both the review and visa applicants that the visa applicant lived in a rent controlled apartment in Alexandria for which she pays a small amount of rent from her pension and she has a further apartment, which she resides in when she is in Cairo. Accordingly, the Tribunal found that the visa applicant was not dependent on the review applicant for her shelter. In relation to her expenses, the Tribunal accepted that the visa applicant was in receipt of a pension and also that she received funds from her two sons. Based on independent country information, the Tribunal did not accept the estimation provided of the visa applicant's basic needs as a true representation of what she actually spends on her basic needs. The Tribunal accepted that the money the applicant received from her sons was used for medication and expenses such as helping with her shopping and to make her life more comfortable. However, the Tribunal came to the conclusion that money sent in 2002 and 2003 was for the review applicant's father's medical expenses as no further money was sent to the visa applicant following her husband's death in 2004 until August 2007. The Tribunal advised the review applicant during the hearing that only his contributions could be assessed as he was the sponsor. The Tribunal was not satisfied that the review applicant had provided financial support to the visa applicant for food and clothing or for her other rental costs for a reasonable period prior to the date of application. The Tribunal found that the visa applicant did not meet the definition of 'aged dependent relative' and that the visa applicant was not the 'aged dependent relative' of the review applicant. Accordingly, the Tribunal found that the visa applicant did not meet cl.114.211 of the Regulations and the decision to refuse the grant of the visa was affirmed.

Partner visas

0806415

26 February 2010, Sydney

Ms L Nicholls, Member

PROSPECTIVE MARRIAGE (TEMPORARY) (CLASS TO) – SUBCLASS 300 – CL.300.216 – GENUINE INTENTION TO LIVE TOGETHER AS SPOUSES – A delegate of the Minister refused the visa application on the basis that the visa applicant did not satisfy cl.300.216 of the Regulations. The delegate was not satisfied that the parties had a genuine intention to live together as spouses. At a hearing before the Tribunal the applicants gave evidence and described the development of their relationship. The review applicant explained that he met the visa applicant in August 2004 when he accidentally bumped into her and knocked her bag out of her hands. He said that he then picked up her bag and started talking to her which led to him asking her out to dinner. At that time she was 57 years of age and although he was over 80, he told her he was 67 because he did not want her to think he was too old. The parties claimed that they went out to dinner two weeks later and continued going out together for six to eight months. The visa applicant gave evidence that they decided to get married in November 2004 but waited, as the review applicant wanted to arrange a house suitable for a married couple. In 2005, however, the visa applicant was found to be working illegally and was detained. The review applicant claimed that he tried to obtain the visa applicant's release from detention but was unable to do so. He told the Tribunal that he visited her in detention every day for 41 days and that he had been prepared to provide a bond for security. He claimed that after she returned to Thailand in 2005 they kept in daily contact by telephone and also by mail. The applicants provided statements detailing the history of their relationship, telephone records and other documents in support of the application.

Held: Decision under review set aside.

The Tribunal found the review applicant articulate and considered that he gave detailed and frank evidence at hearing. The Tribunal also found that the visa applicant's evidence was generally consistent. The Tribunal found that the review applicant demonstrated a strong commitment to the visa applicant and that the couple provided each other with emotional support and comfort. The Tribunal accepted that the parties went out to dinner together in Australia and that the review applicant had visited the visa applicant every day whilst she was in detention. It also accepted that the parties had spoken on the telephone every day for the last four and a half years and the Tribunal found that this showed considerable commitment to the relationship. The Tribunal noted that they are familiar with each other's personal circumstances and appeared to have a deep affection for each other. It also noted that whilst the circumstances could have raised suspicions about the parties' genuine intention to marry, the applicants demonstrated a very realistic and sensible appreciation of the nature of their relationship and an awareness of the respective benefits of the relationship. The Tribunal found that the review applicant sought companionship and care; the visa applicant sought affection and a home in Australia, and that both were prepared to provide each other with that mutual support. Accordingly, the Tribunal found that, at the time of application, the parties did have a genuine intention to live together as spouses, and therefore met cl.300.216 of the Regulations.

0902567

26 February 2010, Adelaide

Ms D Morgan, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – CL.309.211 – GENUINE DEFACTO RELATIONSHIP – A delegate of the Minister refused to grant the primary applicant and her infant son Partner visas on the basis that the review applicant did not declare his relationship with the visa applicant when he applied to migrate in 2005. The delegate found that the review applicant knew the visa applicant was pregnant in March 2005 but he proceeded with his plans to migrate and he did not return to Zimbabwe for the birth of his claimed son or for his traditional marriage ceremony to the visa applicant in December 2005. The delegate also found that when the review applicant visited the visa applicants in January 2007, he stayed for only one month. The review applicant claimed that they committed to a long term spouse relationship in December 2003, and began a de facto relationship in January 2004. He claimed he came to Australia to study and to be with his father in June 2005. His son was born in 2005 but his birth was not registered until 2007 when the applicant returned to Zimbabwe to confirm paternity. He claimed not to have

the finances to travel for his customary marriage and his father opposed the relationship and refused to help him. He claimed he only stayed in Zimbabwe for a month because he had to return to Australia to work. He claimed he traveled to China in 2008 to find work but his mother died suddenly in 2008 so he made an unplanned visit to Zimbabwe. He provided evidence that his sister supported him financially. The review applicant provided evidence of money transfers and phone calls to his partner in 2008 and a summary of emails to her between 2005 and 2009. He claimed he and his partner married customarily before their son was born and they did not register the marriage. He claimed he did not declare his relationship because he thought it would end when he came to Australia. He claimed they cohabited in December 2007 when he was in Zimbabwe and the next time was in 2008 when his mother died. He did not deny they had not yet conducted a household together. He claimed he was committed to a long term relationship when he was in Australia and he learned of his partner's pregnancy. He claimed he had no money to visit the visa applicants prior to January 2007 and he had not considered borrowing money. The applicant claimed they would marry in Australia but they had not made specific plans. He claimed he would undergo a DNA test to prove his paternity if required. He claimed his son was a compassionate and compelling circumstance for the grant of the visa and it would be better for the applicants to be together with him as a family.

Held: Decision under review affirmed.

The Tribunal found that the Zimbabwean Marriage Act required the presence of the parties at the solemnization of their marriage and prohibited contracting a valid marriage through another person. Accordingly, the Tribunal was not satisfied the visa applicant was the spouse of the review applicant or that the applicants were validly married under Zimbabwean law. However, the Tribunal found that the applicants did satisfy the requirements of a de facto relationship at the time of application and they were assessed accordingly. The Tribunal considered the financial aspects of the relationship and found the applicants had mostly been financially independent of each other. The Tribunal further found that, as the review applicant had spent at most 8 weeks physically with his son, he had negligible responsibility for the care of his son. The Tribunal was not satisfied by the meager evidence before it regarding the social aspects of the relationship or that the applicants were recognized by their respective communities as being in a defacto spouse relationship. The Tribunal accepted the parties were customarily married by proxy in Zimbabwe while the review applicant was in Australia. The Tribunal further accepted that when the review applicant learned his partner was pregnant to him he decided he would commit to a long term relationship with her. The Tribunal was gravely concerned about the very brief time the parties had spent physically together or that the parties had ever formed a household. The Tribunal accepted the review applicant traveled to Zimbabwe in 2007 and spent one month with the visa applicants and this was his first meeting with his claimed son who was aged 1 year 3 months. The Tribunal found that in 2007 and 2008 the review applicant resided in China and his visit to Zimbabwe in late 2008 was not planned but was a consequence of his mother's death. The Tribunal found that since 2005 he had spent only 8 weeks physically with his partner and his son. The Tribunal considered the applicant's claimed financial inability to travel was not indicative of a person in a genuine spouse relationship and that he could have borrowed money to be present for his son's birth and to give support at that very significant time in their lives. The Tribunal was satisfied the review applicant was able to afford three trips to China since late 2007 and this supported the finding that he was not committed to a defacto spouse relationship. The Tribunal acknowledged the contact made between the parties but this did not persuade the Tribunal that the review applicant was committed to a genuine and continuing defacto relationship. If the Tribunal accepted that the child is a child of the relationship, it would usually follow that a child was a compelling and compassionate circumstance. However, the Tribunal found that, as there was no mutual commitment to the relationship, there was no need to consider whether there was a defacto relationship or whether compelling and compassionate circumstances affected this case. Therefore, the Tribunal found that the applicant did not satisfy cl.309.211(2) of the Regulations.

Student visas

0905992

26 February 2010, Sydney

Dr Irene O'Connell, Senior Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – HIGHER EDUCATION SECTOR – CANCELLATION – S.116(1)(b) – CONDITION 8202(1)(b) – EXCEPTIONAL CIRCUMSTANCES – A delegate of the Minister cancelled the applicant's Subclass 573 visa under s.116(1)(b) on the basis that the

applicant had breached Condition 8202 of his student visa. The applicant's education provider certified the applicant had not achieved satisfactory course progress and, therefore, he had failed to meet the requirements of condition 8202(3). The education provider also provided the Department with intervention strategies adopted, copies of a warning letter and the intention to report letter addressed to the applicant. The applicant informed the Department that he achieved average marks and had difficulty keeping up with the course which resulted in unsatisfactory results. He claimed he did not have the competency for the course and he decided to study another course. The applicant later claimed his mother had a heart condition. He claimed he often spoke with her at night and he was unable to sleep or concentrate on his studies due to his concern for her. He provided a medical report which described his mother as unfit for work. He claimed he accepted that he failed to make satisfactory course progress and breached condition 8202 due to the exceptional circumstances of his mother's ill health. The applicant claimed his mother had difficulty walking and a doctor had indicated it could be a coronary condition which may result in paralysis. He claimed his mother was better now but still not fit. The applicant claimed he did not mention his mother's ill health to the Department as a cause of his failure to study because he did not know whether the Department would accept that as a reason. The applicant provided a further medical certificate which stated his mother was hospitalized for coronary artery disease. The applicant's adviser submitted that the applicant was a guardian for his brother and to cancel the applicant's visa would also jeopardize his brother's position in Australia.

Held: Decision under review affirmed.

The Tribunal found the education provider certified the applicant had not achieved satisfactory course progress, therefore not complying with condition 8202(3)(a) of his visa, and a ground for cancellation existed. The Tribunal accepted, on the basis of the medical certificates provided that the applicant's mother may not have been in good health and may have undergone a period of hospitalization at the time of the applicant's non compliance. The Tribunal did not accept this was an exceptional circumstance leading to his non compliance. The Tribunal did not find that the applicant's mother had a sudden, dramatic or devastating loss of health which required his sudden return home. The Tribunal did not find that a parent's ill health set the applicant apart from other persons. The Tribunal noted the applicant informed the Department about his failure to make satisfactory course progress and his desire to take up alternative studies but did not mention his mother's poor health as a reason for his failure in his studies. The Tribunal was unconvinced by his explanation that he did not raise his mother's ill health to the Department because he did not think the Department would accept this reason. The Tribunal considered that if the applicant's mother's ill health was exceptional and of such concern that it caused the applicant's non-compliance then he would have raised it at the Departmental level. Accordingly, the Tribunal was satisfied that the non-compliance was not due to exceptional circumstances beyond the applicant's control and such circumstances were prescribed circumstances in which the visa must be cancelled in accordance with s116(1)(b) of the Regulations.

0908311

16 March 2010, Sydney

Ms P Summers, Member

STUDENT (TEMPORARY) (CLASS TU)) – SUBCLASS 572 – VOCATIONAL EDUCATION AND TRAINING SECTOR – CANCELLATION – S.137J – NON-REVOCATION – INEFFECTIVE NOTIFICATION – A delegate of the Minister refused to revoke the automatic cancellation of the applicant's Subclass 572 visa because the delegate was satisfied that the non-compliance with the satisfactory course progress condition was not due to exceptional circumstances beyond the visa holder's control. On 29 July 2009, The Sydney Business & Travel Academy issued to the applicant a written notice under s.20 of the *Education Services for Overseas Students (ESOS) Act* which stated that the applicant did not achieve satisfactory course progress in the Advanced Diploma of Hospitality Management. It stated that the applicant's student visa would be automatically cancelled at the end of the 28th day after the date of the notice unless the applicant took one of two options outlined for attendance at a DIAC office to discuss her situation with a Departmental officer. The applicant did not comply with the notice or otherwise attend within 28 days of the date of the notice. The applicant's visa was therefore automatically cancelled under s.137J on 27 August 2009. On 28 August 2009 the applicant wrote to the Minister seeking revocation of the automatic cancellation of her Subclass 572 visa as she claimed that two months after starting the Advanced Diploma course she heard that her aunt, to whom she was close, was sick in Germany with no-one to look after her. The applicant claimed that she was stressed and had headaches worrying about her aunt, and she sometimes stayed home instead of attending the course. In April 2009, the applicant said she was asked by

the education provider to make an appointment to discuss her situation. She made an appointment for 28 May 2009 but she claimed that the education provider's representative forgot the appointment and she did not hear from the education provider after that. When she engaged a migration agent to contact the education provider on 27 August 2009, she was told that she had already been reported to the Department. She says that she did not receive an email from the education provider about this. With the submission, the applicant provided copies of medical certificates with English translations concerning the hospital treatment of a woman in Germany in December 2008

Held: Decision under review set aside.

The applicant sought review of a decision made under s.137L of the Act not to revoke the automatic cancellation of her Student visa. The provisions of s.137J were purportedly engaged by a notice that The Sydney Business & Travel Academy sent to the applicant with the intention of complying with s.20 of the ESOS Act because the applicant had breached a prescribed condition of the visa. The notice was dated 29 July 2009. The Tribunal noted that the legislative regime at that time was relevantly indistinguishable from that considered by the Court in *Hossain and Mo*. On the authority of those decisions, the Tribunal found that in this case, the notice sent to the applicant was ineffective for s.20 of the ESOS Act and s.137J of the Act because there was, at the time, no prescribed condition for the purposes of s.20. Therefore, the Tribunal found that the applicant's visa was not cancelled and that there was nothing to revoke. Accordingly, the Tribunal set aside the decision under review to refuse to revoke the automatic cancellation of the applicant's Subclass 572 Vocational Education and Training Sector visa and substituted a decision that the visa was not cancelled.

Other visas

0907811

26 February 2010, Melbourne

Ms G Hamilton, Member

RETURN (RESIDENCE) (CLASS BB) – SUBCLASS 155 – (FIVE YEAR RESIDENT RETURN) – CL.155.212 – SUBSTANTIAL TIES TO AUSTRALIA – COMPELLING REASONS FOR ABSENCE – A delegate of the Minister refused to grant the applicant a Subclass 155 visa on the basis that the applicant did not meet the criterion in cl.155.212. The applicant was granted permanent residence in Australia on 8 August 2002, arrived on 16 August 2002. He left Australia on 25 August 2002, without returning. Thus, he had been absent from Australia for a continuous period of 5 years immediately before making the application for the visa. He claimed, however, to have substantial personal ties to Australia, in that his mother lived in Perth, and to have compelling and compassionate reasons for his absence from Australia. In outlining the reasons for his absence from Australia, he referred to sustaining an injury which it had taken several months to recover from, to his son's education and army commitments, as well as to business and financial considerations. He gave evidence at the Tribunal hearing that, until two years ago, he had regularly paid for his mother and her husband to travel to see him and his family in Israel but that now they are unable to travel because of their age. He claimed that if allowed to return to Australia, he would probably establish a tourism business. He provided details about the highly successful tourism business he had run in Israel and explained that he had been unable to get away from it or to wind it up, as he had a number of employees for whom he felt responsible. A letter from the applicant's Federal MP and other supporting documentation was provided in support of the application.

Held: Decision under review set aside.

The Tribunal found that there were compelling reasons for the applicant's absence from Australia since August 2007. The Tribunal accepted his evidence that during the period in question his business was rapidly expanding and that as he had all the expertise on which it depended, he had been unable to leave Israel for leisure. The Tribunal noted that for this reason he had paid for his mother and stepfather to visit Israel for extended periods. The Tribunal also accepted that twenty employees had been dependent on the applicant for their livelihood and that he needed to sell the business as a going concern in order to move to Australia. The Tribunal acknowledged that, to do this, he had to keep the business running profitably until a buyer was found. The Tribunal also found the applicant had strong family ties in Australia and intended to reside here permanently. It accepted that he was very likely to become a participating member of the Australian

community and economy in the future, and that his presence would certainly enrich the lives of individual Australian residents and citizens – namely his mother and stepfather. The Tribunal, therefore, found that the applicant had substantial personal ties with Australia which were of benefit to Australia and accordingly, that he met the criterion in cl.155.212 of the Regulations.

0909458

3 March 2010, Sydney

Ms D Barnetson, Member

TOURIST (CLASS TR) – SUBCLASS 676 – S.66 – DEFECTIVE NOTIFICATION – The review applicant was an eleven year old girl at the time the review application was made and, therefore, the application was signed by her grandmother. The review applicant's grandmother claimed that the applicant's father lived in Australia and that he had remarried and lived with his wife and her child. She claimed that the review applicant's mother was the visa applicant, who lived overseas, and that the review applicant lived with her (the grandmother) and had done so since her arrival in Australia. The grandmother argued that neither of the review applicant's parents had the responsibility for the review applicant, however she, as the child's guardian, had responsibility for the rights and welfare of the child. The Tribunal noted that the question that arose in this case was whether the Tribunal had jurisdiction, which depended on whether the review applicant lodged an application properly made under s.347 of the Act for review of the delegate's decision.

Held: The Tribunal did not have jurisdiction in this matter.

The Tribunal accepted that the review applicant lived with and was cared for by her grandmother who provided care and support for her on a daily basis. It also accepted that her grandmother had performed this role on a long-term basis. However, the Tribunal found that there was insufficient evidence for it to be satisfied that she had the legal capacity to make this review application on behalf of the review applicant. It also found that there was insufficient evidence that the review applicant's parents, one of whom was resident in Australia, no longer had legal responsibility for the review applicant. The Tribunal was not satisfied that the arrangement with the grandmother was anything other than an informal one for the day to day care of the child. Consequently, the Tribunal found that the grandmother was not the guardian of the review applicant. The Tribunal noted that as a minor, the review applicant did not have the legal capacity to make an application in her own right and that her guardian, as defined under the legislation, must do so on her behalf. The Tribunal found that as the review application was made on the review applicant's behalf by her grandmother and that there was no information to suggest that she was the review applicant's guardian as defined in the legislation, the application for review was not an application which was properly made under s.347 for review of an MRT-reviewable decision. The Tribunal further noted, however, that in the Department's letter to the visa applicant advising of the decision that it was stated there were no review rights available to the applicant, and that under the provisions of the Act which set out the various decisions that are MRT-reviewable, a decision to refuse to grant a Tourist (Class TR) visa under s.65 of the Act was covered by s.338(7). Therefore, the Tribunal found that the Department gave incorrect information in its letter to the visa applicant, and that the decision was indeed an MRT-reviewable decision. The Tribunal noted that s.66(2) provided that notification of a decision to refuse a visa must contain certain information about why the visa was refused and, if there was a right of review, how to apply for review of the decision. It found that, in this case, it appeared that the notice issued by the Department under s.66 was defective meaning that there was not a valid notification of the primary decision, and that a further application could therefore be made by the review applicant's parent or legal guardian. Accordingly, the Tribunal found it did not have jurisdiction in this matter.

REFUGEE REVIEW TRIBUNAL DECISIONS

China

0910146

12 March 2010, Melbourne

Mr D Lennon, Member

CHINA – RELIGION – FALUN GONG – EFFECTIVE PROTECTION IN A THIRD COUNTRY – The applicant claimed that she had problems in China due to the fact that she was a Falun Gong practitioner and that because of this she fled to Japan, however, the Chinese authorities continued to chase her there. She claimed that a number of generations in her family had been persecuted by the Chinese Communist Party for being Catholic, and that her grandparents were tortured to death during the Cultural Revolution due to their religion. She claimed that she started practising Falun Gong in 1997 after being introduced to it by friends and that some time later she realised that there was no future for her in China because of her family background, so she went to live in Japan. She claimed that her family in China were regularly visited by the local police after she had left for Japan and that she received constant threatening phone calls. The applicant claimed that this was when she decided to come to Australia. The delegate noted that the applicant had the right to enter and reside in Japan as she had been married there and, that in light of the effective protection that was available to the applicant, Australia did not owe protection obligations to her. The applicant was invited to attend a hearing at the Tribunal but she advised that she wished for the Tribunal to proceed to a decision on the information already before it.

Held: Decision under review affirmed.

The Tribunal found that, in the absence of more detailed information, it could not be satisfied that the applicant was a Catholic or a follower of Falun Gong, that she had been targeted by the Chinese authorities, or that her safety or freedom was at risk in China as she claimed. The Tribunal noted that even if it had been satisfied of the merits of the applicant's claim to face a real chance of persecution in China, an issue would have arisen as to whether section 36(3) of the Migration Act applied to abrogate Australia's responsibility to the applicant on the basis that she had a right to reside in Japan. The Tribunal noted however that it was not necessary to determine that issue given that the Tribunal was not satisfied that the applicant had been targeted by the authorities in China. Accordingly, the Tribunal was not satisfied that the applicant faced a real chance of persecution in the reasonably foreseeable future in China for a Convention reason, or that the applicant's claimed fear of persecution was well-founded within the meaning of the Convention.

0910215

25 February 2010, Sydney

Ms B Connolly, Member

CHINA – RELIGION – CHRISTIANITY – NO CONVENTION REASON – UNEMPLOYMENT – In his protection visa application, the applicant claimed that he was from a poor family and that he had been an oyster farmer and a fisherman prior to his departure from China. He claimed that his oyster farm had twice been destroyed in typhoons and that this had forced him to take up fishing. He claimed that on one occasion he and other villagers had almost drowned whilst out at sea when a rogue wave hit their boat. After this event, he claimed he became a faithful Christian and that he, along with the other Christian fishermen, did not wish to attend the state sanctioned church because they did not want the government to control their religion. He claimed that he participated in protests against the government in relation to providing for the families of fishermen who were lost at sea and that this had caused tension. He also claimed that in 2005, the local government became aware of their underground bible study and from then on they could not continue their practice. The applicant claimed that he had left China most recently to go fishing near Indonesia territories but unfortunately the ship got stuck on a reef and they had to be rescued by the Australian government. When the applicant appeared at a Tribunal hearing, he confirmed his personal details and explained that after being rescued from the fishing vessel he had been taken to an Australian city where he was supposed to board a flight for China but he had failed to do so. He explained that he did not wish to return to China because the boat on which he had worked had sunk and, therefore, he would be

unemployed. He confirmed to the Tribunal that this was the only reason he did not wish to return to China. He acknowledged that he was not familiar with the claims contained in his visa application and that he did not complete the application or provide any information to the agent. He also claimed that he was a Christian and that he had attended church occasionally since he was 13 but said that was an official church.

Held: Decision under review affirmed.

The Tribunal found the applicant to be a credible witness and found that the applicant had not made the claims which were contained in his visa application. It accepted the applicant's evidence that his involvement with the completion of the application form was limited to having signed it, providing his personal details, and telling his agent about the shipwreck and how he arrived in Australia. The Tribunal found that the applicant had never owned or operated an oyster farm nor had he complained to the local government about their treatment of local fishermen. The Tribunal found that the applicant had never been in a severe storm at sea prior to his boat hitting a reef and that he did not convert to Christianity after his life was in peril. The Tribunal found that the Chinese government had never taken any action against the applicant because he was a Christian or that he had ever been stopped from studying the Bible by the Chinese government and that he was never denied religious freedom in China. The Tribunal accepted the applicant's evidence at hearing that he did not want to return to China because the fishing boat on which he had worked had sunk and he would, therefore, now be unemployed. The Tribunal found, as acknowledged by the applicant at hearing, that this was the only reason he did not want to return to China. Based on this information, the Tribunal found that the applicant had not made any claims that he feared persecution on the basis of a convention reason. Accordingly, the Tribunal was not satisfied on the evidence before it that the applicant had a well founded fear of persecution for a Convention reason.

1000209

19 March 2010, Brisbane

Mr G Cranwell, Member

CHINA – RELIGION – FALUN GONG – The applicant claimed that she began practising Falun Gong in 2004 after being given materials and a CD by a friend, as she was hoping to heal her back pain. She claimed that after one month her father forbade her from continuing to practise and made her destroy all of her Falun Gong materials as he was concerned that she would be sent to jail if the authorities found out. The applicant arrived in Australia at the end of 2006. She had previously applied for a business visa and a student visa, and had appealed the rejection of the student visa without success. She claimed that she started practising Falun Gong again in 2008 by downloading a book and other materials from the internet, and that the reason why she did not do this sooner was that she had spent a significant period living in a remote area that did not have access to the internet. The applicant also claimed that she was busy studying for her IELTS test during this period. The applicant confirmed that she visited China for one month in 2008 and that her father was having difficulties with his back and blood pressure, so she recommended he practise Falun Gong. The applicant claimed she provided him with written materials and a CD that she had taken to China in her laptop. The applicant claimed that she found out a short time later from her uncle that her father had been arrested and detained for six months after being found with this material. She claimed that she had talked to her father two or three times after his release and he had told her to be careful. The applicant claimed that she had been practising Falun Gong with groups in Australia since 2008 and stated that she was a genuine Falun Gong practitioner. Oral evidence was provided to the Tribunal by two witnesses who both gave evidence that they had known the applicant since 2009 and had seen her involved in various Falun Gong activities. The applicant also provided an "Education through Labor Notification" from a Labor Camp in Liaoning Province dated in 2008, which indicated that the applicant's father was sentenced to "6 months of education through labor for illegal practice of Falun Gong".

Held: Decision under review affirmed.

The Tribunal considered that the delay in the applicant applying for a protection visa of more than ten months from the time the applicant claimed that she was informed of her father's arrest, indicated that she was not in fear of being persecuted as she claimed. The Tribunal noted that the applicant had previously applied for a business skills visa and a student visa, and had appealed the rejection of the former to the Migration Review Tribunal and, therefore, considered that the applicant was well informed of the various visa options available to her and it did not accept that she was unaware of her eligibility to lodge a protection visa application as claimed. The Tribunal did not accept as credible the applicant's claims that she

took Falun Gong materials with her on her laptop when she returned to China in 2008. It noted that on the applicant's own evidence she was aware that Falun Gong had been banned in China, and that her father had previously forced her to destroy her Falun Gong materials in China in order to avoid being sent to jail. In those circumstances, the Tribunal was of the view that she would not have taken Falun Gong materials with her to China. The Tribunal found that the "Education through Labor Notification" certificate provided by the applicant was not genuine, having regard to independent information outlining the high incidence of document fraud in China, and further noted that the certificate did not have provision for the offender's signature, nor for the signature of a family member. The Tribunal found that the independent information indicated that such certificates should be signed by the offender. Based on this evidence, the Tribunal found that the applicant was not a credible witness and that she had fabricated claims in making her application for a protection visa. The Tribunal accepted that the applicant may have engaged in Falun Gong conduct in Australia given the supporting evidence of the two witnesses at hearing, however, it was not satisfied that she had engaged in the conduct otherwise than for the purpose of strengthening her claim to be a refugee. The Tribunal did not accept that there was a real chance that she would be persecuted for reasons of practise of, or involvement in, Falun Gong if she were to return to China. Accordingly, the Tribunal affirmed the decision under review finding that the applicant did not have a well-founded fear of persecution for a Convention reason.

Colombia

0909643 & 0909647

18 February 2010, Sydney

Mr L Hardy, Member

COLOMBIA – POLITICAL OPINION– TARGETED BY REVOLUTIONARY ARMED FORCES OF COLOMBIA – NO CONVENTION REASON – CRIMINAL GANGS – This matter involved two separate applications lodged by members and dependents of the same Colombian family, and were thus heard together by the Tribunal. The primary applicant claimed that his sister had been abducted and held for ransom by the insurgent Revolutionary Armed Forces of Colombia (FARC). The applicant claimed that the ransom sum was negotiated down, however, negotiations faltered before it could be paid and his sister was never returned. He claimed that investigations pointed to the involvement of a local criminal gang and in particular to one of its members, who was eventually arrested and charged but he was acquitted for a lack of evidence. The applicant claimed that the family had received threats over a period of years and that these intensified after the suspect's release. He claimed that in 2006 he was approached on the street and shot twice in the leg, and that this was revenge by or on behalf of the suspect for the trouble caused to him and perhaps for the failure to pay the ransom originally demanded. The applicant claimed, at this point, it was agreed that he should go abroad as he was the most immediate target, so it was arranged for him to study in Australia. The applicant's mother claimed that she did not dare leave Colombia until now as she had clung to the hope that her daughter might still be alive and might be freed. The applicants claimed Colombian authorities could not protect them from FARC as the authorities were already stretched by inadequate resources and that there were too many cases like theirs, meaning that the police could not protect everyone who was targeted by FARC. A number of documents had been submitted to the Department in support of the application, including certification from the Secretaria Común attesting to the kidnapping of the primary applicant's sister; two notarial declarations witnessing the impact on the family of the kidnapping; and a clinical report relating to the gunshot wounds sustained by the applicant.

Held: Decision under review affirmed.

The Tribunal accepted that the primary applicant's sister was kidnapped in circumstances where a ransom was demanded, negotiated and ultimately not paid, and it further accepted that his sister was never released after the failure to resolve the ransom issue. The Tribunal was prepared to accept that it was quite likely that her kidnappers were affiliated with FARC, and that independent information indicated that the use of a local criminal gang to carry out the kidnapping did not necessarily preclude FARC's involvement. The Tribunal accepted that the named suspect was arrested in connection with the kidnapping and that his "cronies" had harassed the family over the years in response to his arrest. It found that the chances were greater than remote that this harm and harassment would continue, and it accepted that the authorities would have difficulty protecting them from this harm, although it noted that there was no suggestion that the police were selective or discriminatory about which kind of people they would or would not protect. The

Tribunal found that the applicants' characterisation of themselves as persons who feared harm from FARC and/or criminal gangs for reasons of being "victims of FARC and/or criminal gangs" was a circular one, and it could not correctly be regarded as a particular social group. The Tribunal found that the independent country information argued convincingly that the Colombian state genuinely tried to protect its citizens from harm by both FARC and criminal gangs, and that it was not satisfied that any failure of the Colombian state to protect the applicants' family would involve any systematic or discriminatory conduct for any Convention-related reason. The Tribunal found that personal criminal interests were the only motivation for the harm they continued to face in Colombia. The Tribunal was, therefore, not satisfied that the applicants faced a real chance of *Convention-related* persecution in Colombia. However, it noted the request that their cases be referred to the Department for further consideration by the Minister. Given that, in the Tribunal's view, the particular circumstances and personal characteristics of the applicants provided a basis for believing that there was a significant threat to their personal security and human rights should they return to Colombia, and that they had been and may be individually subjected to mistreatment which could amount to persecution but which had not occurred or was not likely to occur for a reason provided in the Refugees Convention, the Tribunal affirmed the decision and referred the matter for the Minister's consideration.

India

0905785

7 March 2010, Sydney

Dr S Crosdale, Member

INDIA –PARTICULAR SOCIAL GROUP – HOMOSEXUALS – The applicant claimed to fear persecution for reasons of his homosexuality because he came from a strict and conservative Muslim family. He claimed he worked in the garment industry and that he and a work supervisor commenced a homosexual relationship and became partners. The applicant claimed he later established his own business where his partner assisted him and they commenced living together at the applicant's business premises. The applicant claimed one of his employees learned of the relationship and they mentioned it in the community and the applicant's family found out. The applicant claimed his father was offended by this and considered the relationship to be disgraceful. The applicant claimed this impacted on the respect of his family and his father was questioned by religious and social leaders. The applicant claimed his father told him to end the relationship and to get married but the applicant claimed he did not wish to marry. He claimed his partner was told to leave the area and that, on one occasion, his father and brother came to his factory and assaulted his partner and he was beaten mercilessly. His mother tried to protect him but she was hurt and the applicant was severely injured and required medical treatment. The applicant claimed he could not go outside as he was branded as gay and singled out in society. He claimed he was disowned by family members and hated by the community and it was difficult to lead life with dignity as he was a victim of harassment, discrimination and persecution. He claimed to be very frustrated, that he suffered with mental issues, and that his partner had disappeared as he feared the applicant's family. The applicant claimed he had to discontinue his business as it was not possible to live in this area and that his relationship would not be accepted anywhere in India or that he would be protected by the authorities. He claimed to be in shock from being separated from his partner and that he genuinely feared returning to India. The applicant claimed he had heard of an Indian High Court decision which attempted to bring changes to homosexual relationships, but claimed society would not accept this because their mind was set.

Held: Decision under review set aside.

The Tribunal found the applicant to be a truthful and credible witness and his evidence was consistent with material submitted to the Department and at the Tribunal hearing. The Tribunal accepted the applicant's account regarding his homosexual relationship and his departure from India and that the applicant was a homosexual as claimed. The Tribunal also accepted that the Delhi High Court ruling in July 2009 was unlikely to have any immediate impact now or in the foreseeable future as to how Indians generally, and Muslims in particular, regard homosexuality. The Tribunal had regard to independent country information and to the applicant's evidence, and was satisfied that prejudice against homosexuals was entrenched within the Muslim and the local community generally and any identifiable change to these attitudes was unlikely to occur in the foreseeable future. The Tribunal accepted the applicant had departed India for the reasons given and that he was persecuted and harmed because of his homosexuality. The Tribunal was satisfied that there was no part of India where the applicant would be safe and that the applicant's homosexuality was

likely to bring him to the attention of persons or groups opposed to homosexuality in India. The Tribunal accepted that since his arrival in Australia, the applicant had not had a homosexual relationship and accepted his explanations as to why this was the case. The Tribunal considered the independent country information and was satisfied the applicant would be unable to have public acknowledgement of his homosexuality or any relationship without exposure to harm and persecution. Accordingly, the Tribunal was satisfied that the applicant faced a real chance of serious harm amounting to persecution from for reasons of his homosexuality and that he had a well founded fear of persecution for a Convention reason.

Indonesia

0908450

3 March 2010, Sydney

Dr I O'Connell, Senior Member

INDONESIA – NO CONVENTION REASON – DOMESTIC VIOLENCE – CREDIBILITY – The applicant claimed that she was forced into an arranged marriage by her father and that her husband beat her at least once a week, he frequently physically assaulted her and he forced her into sex with other men. The applicant claimed that her husband entered into a second marriage and his second wife lived with them for a short time before she suddenly went missing. She also claimed her husband was a pimp and he would often bring prostitutes to the house, including at times when she was pregnant. She claimed that on one occasion she ran away to her parents' home and then to the home of another relative who took her to see a religious leader both of whom sent her back to her husband. She claimed that after this, she was savagely beaten and locked in her room for a week. The applicant claimed that her sister secretly reported the situation to the police but they said the applicant's husband was the boss and that she should listen to him. She claimed she subsequently saw a police officer talking to her husband and when she asked her husband about the policeman he became angry and hit her. She claimed that when she threatened to call the police her husband left with the children and that shortly afterwards the policeman came into the house and sexually molested her. She claimed that following this event her husband let a man into her room who raped her at knife-point and he returned the next day and raped her again. She became pregnant with her third child and told her husband that, if the policeman was the father, he and her husband would be in trouble. Eventually her husband agreed to let her leave with her children because he was afraid she would cause a problem with DNA testing. She claimed that she fled to Australia to get away from this abuse and that if she returned to Indonesia she would suffer further abuse from her husband. She claimed that she could not avail herself of protection from the authorities of Indonesia.

Held: Decision under review affirmed

The Tribunal found that in her written statement, the applicant had detailed a level of abuse which she did not make out at the hearing. The Tribunal also found that the applicant's general state of well-being did not seem to be in keeping with what one might expect from a person claiming to have undergone sustained and extensive physical and sexual abuse over a period of many years. The Tribunal referred to the applicant's own evidence that in Australia she had enjoyed good health and had not sought or required any medical or other care over and above that relating to the birth of her third child. The Tribunal also noted that the birth certificate of the applicant's third child indicated that her husband was the father and as such, the Tribunal did not accept that the paternity of her third child was a point of dispute. The Tribunal had additional concerns about the fact that she had not, by her own account, taken any steps to avail herself of state protection, and noted that although she claimed to have used the threat of police to get her husband to let her come to Australia with the children, she did not seem to have initiated any other measures to gain protection from her husband over many years. The Tribunal also rejected the applicant's claim that she was in a violent marriage in Indonesia and that she fled to Australia to escape this marriage. Further, the Tribunal referred to independent country information which indicated that the Indonesian authorities do provide protection to victims of domestic violence and that women are able to divorce husbands who are violent towards them. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason on her return to Indonesia.

Korea, Republic of

0907840

28 February 2010, Sydney

Mr R Wilson, Member

KOREA –PARTICULAR SOCIAL GROUP – HEROIN ADDICTS IN SOUTH KOREA – LOAN SHARKS –

The applicant was born overseas where his father ran a business. He claimed that his father had borrowed heavily to start the business, and despite his family being forced to sell their home in South Korea, they had been unable to repay all of the debt. He claimed that his father borrowed more funds from the same people to service his existing debt and invest further in the business, and that these funds had also not been repaid. The applicant claimed that the people who were owed the debt had threatened the applicant's grandparents and ransacked their factory in South Korea. He claimed that the creditors had threatened the applicant's grandparents many times that they would abduct the applicant and kill him if his father did not pay the debt. The applicant also claimed that he had a drug addiction and that his health would deteriorate as there was inadequate medical treatment available to people with drug addictions in South Korea. He feared that he would be arrested and imprisoned because of his addiction as he would be forced to undertake compulsory military training on his return, and on completing a medical they would discover the marks on his arms. The applicant claimed that he was getting treatment in Australia and that this was unavailable to him in Korea as heroin did not exist there. He claimed that methadone was not available and that his doctor in Australia had recommended to him that he undergo at least one and a half to two years treatment. The applicant provided a letter to the Tribunal from his treating doctor to this effect, along with various documents outlining the nature and anticipated duration of his treatment from the clinic he was attending.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant's father had defaulted on his loans in South Korea and that other family members were subjected to threats. However, regarding the claim that those who default on loans and were victims of violence were a particular social group, the Tribunal found that the shared fear of persecution, by definition, could not be a characteristic of a particular social group. Therefore, the Tribunal found that the applicant's father's fear relating to his default on his loans was not Convention related and that the applicant, who was pursued because he was a member of the family of his father who was targeted for a non-Convention reason, did not fall within the grounds for persecution covered in the Convention definition. In relation to his military service, the Tribunal found that independent advice indicated that the applicant would be graded after his medical, and depending on the results of his examination, he may be able to get an exemption or be able to work in the public service or second militia service. The Tribunal also noted that the applicant did not claim that he had any conscientious objection to military service and found that in Korea, military service was a law of general application and that the law would not be enforced selectively against the applicant for a Convention reason. The Tribunal accepted that the applicant had a substance abuse problem with heroin and that he was under the care of a doctor who had been treating him with methadone and buprenorphine, and it further accepted that there were few heroin addicts in Korea and that methadone and similar drugs used for treatment were not available. Whilst the Tribunal accepted that this would have a deleterious effect on the applicant's health if he were to return to Korea, it noted independent information which suggested that the applicant could seek permission to import methadone into Korea for his use as a methadone patient. The Tribunal found that the law relating to individuals who had been using drugs, including heroin, were laws of general application, and that the law would not be enforced selectively against the applicant for a Convention reason. As a result of the findings above, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for any Convention related reason.

Lebanon

0909520

10 March 2010, Melbourne

Mr A Gentile, Member

LEBANON – RELIGION – JEHOVAH'S WITNESS – The applicant claimed she was born a Sunni Muslim but she converted to being a Jehovah's Witness and was baptised in the early 1980's. She claimed she started proselytising when she was around 10 years old. She was married without a ceremony by a Maronite priest who was paid money to register the marriage as Jehovah's Witnesses cannot register marriages in Lebanon. The applicant claimed that she is at particular risk from Islamic fundamentalists because she was a Muslim who had converted and as she had no male protection since her husband's death, it was dangerous for her to practice her faith. She claimed that when they were out spreading the word, two incidents had happened: in 2004 six people followed them down a street and started throwing stones; in 2008 she received threats to leave the village and not come back. She did not report these incidents to the police saying they were of a different religion and the government did not protect Jehovah's Witnesses and they were not popular with the army. If she were to return, she claimed she would live in fear as before and that because she had converted from Islam, they could kill her. The applicant feared she would be harmed by fundamentalist Muslims and the Lebanese authorities. She stated that in Lebanon she was always in fear. When they spread the word, the children lived in fear but in Australia they can practise their religion in freedom. The applicant's daughter was also included in the application. She claimed her daughter recently distributed some magazines and she enjoys doing this in Australia.

Held: Decision under review set aside.

The Tribunal did not accept that the applicant was at risk because she was a convert from Islam. The applicant indicated that she was baptised in the early 1980's and that her father had been a Jehovah's Witness since 1960. The Tribunal noted that the applicant claimed she was 10 years old when she started accompanying people to 'spread the word' but she had not reported any adverse incident during her life in Lebanon which could be attributed to her 'conversion' from Islam. Under these circumstances, the Tribunal found that the applicant was not, and was not seen as, a convert from Islam. However, the Tribunal found the applicants and their witnesses to be credible and that they displayed a thorough knowledge about the principles of their faith. On this basis, the Tribunal accepted that the applicants were Jehovah's Witnesses and that they had commitment to their faith. The Tribunal accepted that the applicants had engaged in religious activities intrinsic to their faith while residing in Lebanon and in Australia and it also accepted that if the applicants were to return to Lebanon, they would continue to engage in these activities, including spreading the word, praying and attending gatherings for religious worship. The Tribunal accepted that the adverse events which they described had actually occurred and that these are only examples of numerous and similar incidents to which they had been subjected in the past. In light of this evidence, the Tribunal found that there was a real chance that the applicants may experience physical harassment, intimidation and other forms of abuse if they were to continue to overtly practise their religion in Lebanon and it found that this constituted serious harm. The Tribunal also accepted the applicants' evidence that their level of religious involvement in Lebanon was accompanied by fear of harm. The Tribunal found that the harm feared by the applicants amounted to serious harm and that the applicants' religion was an essential and significant reason for the persecution which they fear. The Tribunal also found that the persecution which the applicants feared involved systematic and discriminatory conduct in that it was deliberate or intentional and involved selective harassment for a Convention reason (religion). There was no evidence before the Tribunal that the applicants may be able to avoid persecution by relocating within Lebanon. Given the continuing harassment of the applicants in the past, the restrictions on their religious practice and the lack of protection available to them from the Lebanese authorities, the Tribunal found that there was a real chance that they would be persecuted for the Convention reason of religion, now or in the reasonably foreseeable future, should they return to Lebanon. The Tribunal thus found that the applicant's fear of persecution was well-founded. Accordingly, the Tribunal remitted the matter for reconsideration with the direction that the applicants were persons to whom Australia had protection obligations under the Refugees Convention.

Malaysia

0905690

17 March 2010, Melbourne

Ms M Hodgkinson, Member

MALAYSIA – RELIGION – HINDU – ETHNICITY – TAMIL – The applicant was a ten year old boy whose mother gave evidence on his behalf. It was claimed that the applicant would face persecution at the hands of religious extremists, members of the Malay Muslim community and the authorities due to his Hindu religion and his Tamil ethnicity. The applicant's mother claimed that in Malaysia, ethnic Indians, Tamils and Hindus were treated as second class citizens, and that preferential treatment was given to ethnic Malays. She claimed that Islam was regarded in law and practice as superior to other religions and that Hindus were discriminated against and their temples destroyed. The applicant's mother claimed that she had left the applicant's father due to domestic violence, and that she had been unable to obtain police protection as a Tamil. She claimed that on one occasion her husband had come looking for her with a machete and demanded his son, but he was unable to get into the house and that, instead of investigating the matter further, the police contacted him and said something like "don't disturb your wife." She claimed that her ex-husband had subsequently re-married and that his new wife did not want the applicant around, so she started abusing him and treating him badly. She claimed that his father requested that the applicant come to Australia to live with his mother. The applicant's mother claimed that the Malaysian government wanted to eliminate Tamil schools and that they did not provide them with any assistance. She claimed that Tamil children were not permitted to speak Tamil at school and that text books and food coupons were provided free to Malay and Chinese students, but not to Tamils. She also claimed that Tamil Hindus were immediately sent to the lowest class where they were not taught properly and that on one occasion, the applicant was poked in the neck by a Malay boy with a pencil and when she complained the teacher did nothing. The applicant's mother claimed that she feared her son would grow up without being able to freely express himself within his culture, nor express his beliefs, and that he would face discrimination on account of his religion for the rest of his life. She claimed that the applicant would never be able to obtain employment due to his ethnicity and religion. The Tribunal was provided with a number of documents, including psychological reports in relation to the applicant; a police report in relation to the applicant's mother's case against her ex-husband; and letters relating to the applicant's mother's mental state.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was mistreated by his step-mother whilst living with his father, however, it noted that his father had sent him to live with his mother in Australia and had not made any attempts to gain custody since that time. The Tribunal accepted that the bullying at school may have occurred and that the teacher might not have taken action against the perpetrators. The Tribunal also accepted that the applicant feared being harassed on his return due to his Tamil race and Hindu religion, however, it did not consider the claimed instances of low level harassment to be sufficiently severe to constitute serious harm amounting to persecution. The Tribunal found that the independent information demonstrated that there was not a real chance that the applicant would be prevented from practicing his Hindu religion in Malaysia if he were to return in the reasonably foreseeable future, and that although the Tribunal accepted that Tamil schools were not as well funded as national schools, the applicant was able to attend a national school, even if he was required to purchase text books whereas Malay children were not. The Tribunal was not satisfied that the discrimination described by the applicant's mother in relation to education was sufficiently severe to constitute serious harm amounting to persecution for a Convention reason. The Tribunal also considered the applicant's claims cumulatively but found that they did not constitute serious harm amounting to persecution.

Nepal

1000979

14 April 2010, Sydney

Mr A Jacovides, Member

NEPAL – IMPUTED POLITICAL OPINION – TARGETED BY MAOISTS – The applicant claimed that he was targeted by Maoists in Nepal and that the authorities were unable to protect him. He claimed that he

and his father were members of the Communist Party in Nepal and that the Communist party opposed the Maoists. He stated that the Maoists asked him and his father to join the party and subjected them to physical and mental torture when they refused to do so. He stated that they suffered ongoing harassment from the Maoists and persistent demands for donations and that, although he relocated to avoid the Maoists, they followed him to another village and continued to demand money from him. He claimed that in July 2009 his house was burnt down because he could not meet their demands and that his wife and child were injured in the attack. The applicant claimed that he and members of his family were threatened after their house was burnt down and they found it necessary to flee and go into hiding. The applicant claimed that an adverse political opinion was attributed to him by the Maoists because of his family background and the ongoing conflict that his family had with the Maoists. The applicant claimed that members of his family were targeted as opponents of the Maoists. He also claimed that he would face life threatening harm by Maoists in Nepal, including the youth wing, for reasons of political opinion. The applicant also claimed that he would not have access to meaningful protection by the state as the Maoists pursue their opponents with impunity.

Held: Decision under review set aside.

The Tribunal accepted the applicant's claim that he was subjected to persecution by the Maoists when his house was attacked and burnt to the ground. The Tribunal formed the view that although the applicant was targeted for money and revenge, the essential and significant reason for the targeting was his political opinion and the political opinion that had been attributed to him by the Maoists. The Tribunal found that the Maoists, particularly the youth wing, targeted opponents with impunity and that the applicant faced the risk of serious harm by the Maoists because of his real or imagined political opinion. The Tribunal considered information from external sources regarding the Nepalese government's ability to protect persons who were targeted by Maoists and it formed the view that the government had not been able to provide adequate protection to these individuals or organisations. Therefore, the Tribunal accepted the applicant's claim that the government would not be able to provide him with a reasonable level of protection if he were targeted by Maoists. The Tribunal found that the applicant could not currently, or in the reasonably foreseeable future, safely return to Nepal or express his views regarding the Maoists without attracting the adverse interest of the Maoists. Accordingly, the Tribunal was satisfied that the applicant faced a real chance of serious harm amounting to persecution from Maoists for reasons of his real or imputed political opinion and that he had a well founded fear of persecution for a Convention reason.

Pakistan

0908316

26 February 2010, Melbourne

Ms M Holmes, Member

PAKISTAN – RELIGION – REJECTION OF ISLAM – The applicant claimed that he came to Australia on a student visa, but also to escape his uncle and other extremists in Pakistan because he had a different opinion to them in relation to Islam. He claimed that he would be beaten and tortured by his uncle and possibly killed and physically harmed by members of the Muthida Majlise-Ammal (MMA) as he had denounced and was no longer practising Islam. The applicant stated that he had never strictly followed Islam and that he was forced to pray 5 times a day and to observe Ramadan when he attended a prestigious boy's school. He claimed that he no longer followed a religion and that he thought religion led to conflict and extremism. The applicant claimed that his father died before he was born and that his mother was quite liberal and had not made him practise, but when his uncle was at their home he would ask everyone to pray at the mosque and the applicant felt forced to comply. He claimed that his uncle believed in Sharia law and was close to an MMA member of parliament, and that his uncle's role in the party was to get votes for the MMA in elections by using violence and torture to frighten people who opposed them. He claimed that his uncle exercised control over the applicant's family by depriving them of money, and that he made the applicant's mother strictly observe Islam and that he beat her when she complained. The applicant stated that when he was nine, his uncle hit him across the face for not observing Ramadan and that at other times he would abuse the applicant. He had also pushed him hard once when the applicant was about thirteen because he had worn jeans instead of a traditional outfit. The applicant claimed that he had shared his views whilst in Australia and that these had reached his uncle who had telephoned him, called him an infidel and threatened that if he returned to Pakistan he would physically hurt him. The applicant further claimed that his mother had been threatened by his uncle and other religious extremists about the applicant's safety should he return home. The applicant's representative submitted that the applicant may be

targeted for recruitment by the Taliban if he were to relocate to a rural area, and that his uncle may facilitate this as revenge for the applicant's lack of interest in Islam.

Held: Decision under review affirmed.

The Tribunal accepted the applicant's account of his family background, that he was born into a Muslim family and that he had abandoned Islam and was very critical of many of its tenets. The Tribunal also accepted that the applicant had grown into adulthood in Australia and that he had developed a western lifestyle and ideas during that time. The Tribunal noted the applicant's claims that his uncle was abusive and had slapped him when he was nine and pushed him when he was thirteen and found that, while this might have been frightening at the time, these were isolated incidents not amounting to significant physical harassment or ill-treatment of a kind to constitute persecution. The Tribunal accepted that the applicant's uncle was a devout Muslim, but found that the applicant had either exaggerated or constructed his uncle's political profile given his lack of knowledge of what he actually did. The Tribunal also accepted that the applicant's uncle might be a tyrannical patriarch in the family who bossed others, but found the applicant's evidence about what he did to the applicant's mother unconvincing. It found that if his mother was so controlled and her activities were as limited as the applicant claimed, it was difficult to accept that she would have been able to allow the applicant to live as he did, dressing in western ways and not going to mosque. The Tribunal also noted that despite the applicant's claims about the control his uncle had over his family's money, sufficient money was provided to enable the applicant to study in Australia. The Tribunal considered the applicant's claims in relation to the phone call he received from his uncle and found it relevant to look at this threat in the context of what his uncle had done to him when the applicant was in Pakistan. It noted that there had been no physical mistreatment since the applicant was pushed when he was thirteen. Accordingly, the Tribunal did not accept that there was a real chance that the applicant's uncle would inflict serious harm on him due to his non-compliance with Islam and his views on religion. The Tribunal also found that there was no reason why the applicant would relocate to an area where the Taliban may be seeking recruits. Therefore, the Tribunal concluded that there was not a real chance that the applicant would face harm amounting to persecution for a Convention reason and that his fear of what might happen to him upon his return was not well-founded.

Vanuatu

0907337

15 March 2010, Adelaide

Ms D Morgan, Member

VANUATU –PARTICULAR SOCIAL GROUP – WOMEN IN VANUATU – DOMESTIC VIOLENCE – The applicant claimed to fear persecution because her husband was physically violent towards her and she claimed she had been told that in order to obtain a divorce in Vanuatu she needed to stay away from her husband for three years. The applicant claimed that in Vanuatu, each village had its own chief who had a very important role in society. A woman could not be a chief as the role of women in Vanuatu is to stay at home and have children. The applicant claimed that women could not voice their opinions in Vanuatu and that if she returned to her home to sort out problems, the chief would call the parties together and try to sort out their problems by working out who is in the wrong. He would then order penalties to be paid, for example, provide three pigs to the other party. The applicant stated that many husbands in Vanuatu committed violence towards their wives and the reason was the bride price. She claimed that the culture of payment of a bride price means that women didn't have any rights. Her husband paid approximately AUD\$3,500 to her parents as a bride price before they married. The applicant claimed she had provided details of incidents of domestic violence to the chief but she did not feel as though she was helped. She stated that the police use chiefs for these types of matters and that in Vanuatu village chiefs are more like police than the police themselves. The applicant claims that village chiefs think their laws are better than police laws and people listen to chiefs. Vanuatu chiefs and church leaders want couples to reconcile but violent husbands repeat their violence. The representative's summary claimed that when the applicant was married to her husband, he believed that she was his property and he did not treat her as a human being or as his wife. When she tried to get help from the church or the village chiefs, she was spurned. When her family tried to help her, they were threatened. The applicant's ex-husband was a church leader and if she had gone to the police for help they would not have helped. Vanuatu is a male dominated society where women have few rights. The applicant stated that if forced to return to Vanuatu her ex-husband would find

her and she would likely be seriously injured or killed. Relocation by the applicant would not prevent this harm. A letter of support confirming the applicant was “a victim of prolonged and sustained abuse” was also provided.

Held: Decision under review set aside.

The Tribunal found the applicant’s oral evidence at the hearing to be credible and consistent and that, because she had been out of Vanuatu for 6 years, she did not know what level of protection the police might afford her. The Tribunal was satisfied that the applicant’s claims in relation to conditions for women in Vanuatu, specifically the conditions affecting victims of domestic violence, were consistent with country information about the treatment of women in Vanuatu. The Tribunal accepted that some of the physical acts of violence such as those that had been inflicted on the applicant by her husband over the years, were vicious and extreme and that the applicant had suffered serious harm from her husband in the past. It further accepted that the applicant faced a real chance of serious harm from him in the reasonably foreseeable future if she were to return to Vanuatu. The applicant also gave evidence to the Tribunal that Vanuatu chiefs and church leaders push for reconciliation in domestic violence cases and that domestic violence in Vanuatu did not cease after a chief had intervened. The Tribunal accepted, in light of country information, the applicant’s claim that because her husband was an elder of his church, she faced very significant hurdles in approaching other elders for assistance in relation to his violent conduct. The Tribunal was satisfied on the evidence that cultural norms and practices with respect to domestic violence in Vanuatu had not in the past, and does not presently, afford a system of adequate protection for female victims of that violence. In consequence of country information and accepting the applicant’s claims as to the inadequate standard of protection for domestic violence victims through common law assault prosecutions, the Tribunal was satisfied that the Vanuatu authorities were unable to provide a level of protection to women who were victims of domestic violence that was in accordance with international standards. The Tribunal accepted the applicant’s claim that soon after her arrival at Port Vila airport, her husband would be aware of her arrival because it is a small town where everyone knows each other. The Tribunal further accepted that it was more than likely that her husband would search for her because she is his property, in accordance with the bride price culture, and that if the applicant were to return to Vanuatu, she would naturally want to see her children and that would soon filter through to her husband. The Tribunal was satisfied that it would be unreasonable for the applicant to establish herself in another part of Vanuatu where she would more than likely be located by her husband and be without adequate protection from the law of Vanuatu or from local customs and practices. For these reasons, the Tribunal was satisfied that Vanuatu failed to protect members of the particular social group “women in Vanuatu” from serious harm. The Tribunal further found that the applicant’s fear was well founded for a Convention reason and that she was, therefore, a refugee within the meaning of the Convention.

COUNTRY ADVICE

Cameroon

Cameroon – Cameroon Ecological Movement/*Mouvement des Ecologistes du Cameroun* – CMR35532 – 7 October 2009

Provides information on the *Mouvement des Ecologistes du Cameroun* and their recent election participation.

China

China – Domestic Violence – Legal Protection – Access to Justice – Access to Services – CHN35378 – 15 September 2009

Provides information on the legal status of domestic violence in China in 2009, the justice process and the quality and access of services available to victims of domestic violence.

China – Underground Christians in Fujian & Jiangxi – Chinese Christian Funeral and Burial Practices – CHN35544 – 20 October 2009

Provides information on house churches and the treatment of underground Christians in Fujian and Jiangxi as well as information on Christian burial and funeral practices in China.

China – Charter 08 – Signing Online – Treatment of Signatories & their families – Internet Monitoring – CHN35725 – 12 November 2009

Provides information on Charter 08, how Charter 08 spread online and treatment of signatories of Charter 08. Also provides information on internet monitoring in China.

Colombia

Colombia – FARC-EP – ELN – Bogotá – Medellín – Extortion – Urban militias – COL35627 – 16 November 2009

Provides information on extortion by leftist groups such as FARC in Bogota in 2003 and whether leftist groups still make demands for money in urban areas such as Bogota. Also provides information on the FARC-EP urban militias and whether leftist groups are still active in Medellin, Bogota and Colombia more generally.

Ghana

Ghana – Dagbon Chieftaincy Dispute: Andani and Abudu – December 2008 Elections: Results & Violence – Treatment of NPP – Internal Relocation – GHA35085 – 30 July 2009

Provides current information on the Dagbon Chieftaincy Dispute; results and violence during the December 2008 elections, particularly in Tamale and the Northern Region; current treatment of NPP supporters in Ghana; violence between NPP and NDC in Tamale during February 2009; and information on internal relocation.

India

India – Gay Men – Delhi High Court Decision – IND35367 – 31 August 2009

Provides information on the 2009 Delhi High Court ruling that Indian laws against homosexuality contravene anti-discrimination protections in the Indian Constitution, as well as information on the reactions of political parties, religious groups and the Indian public and a brief update on incidents involving gay men in New Delhi.

Iran

Iran – Ahwazi Arab Minority – Security – IRN35261 – 30 July 2009

Provides an update on the situation of Iran's Ahwazi Arab minority.

Iraq

Iraq – Kurdistan Regional Government Area – Sulaymaniyah – Security – Relocation – IRQ34994 – 9 July 2009

Provides information on the level of security in the Sulaymaniyah governorate of northern Iraq and the activities of Muslim fundamentalist groups in the area. Also provides information on the liberal attitudes of Sulaymaniyah city inhabitants relative to the rest of Iraq and the ability of someone to relocate to other Kurdish areas.

Lebanon

Lebanon – Elections – 2009 – Sunnis – March 14 – LBN35294 – 14 August 2009

Provides information on the two main rival political alliances that contested the 7 June 2009 parliamentary elections in Lebanon, the election results and the likelihood of sectarian violence in the aftermath of the elections.

Liberia

Liberia – State Protection – Traditional Practices – Poro – LBR35260 – 5 August 2009

Provides information on state protection against harmful traditional practices and the Poro.

Malaysia

Malaysia – Islamic Councils – Islamic Police – Sikhs – State Protection – Islamic Courts – Conversion – MYS35349 – 16 September 2009

Provides information on Islamic Councils, Islamic police and whether Islamic courts are involved in converting, including forcibly, non-Muslims in Malaysia. Also provides information on the treatment of Sikhs including the availability of state protection for Sikhs in Malaysia.

Morocco

Morocco – Fez – Criminal Gangs – Anizyin – Religious Freedom – Corruption – State Protection – MAR35417 – 22 September 2009

Provides information on freedom of religion in Morocco, including authorities' treatment of suspected Islamists and effectiveness of state protection.

Philippines

Philippines – New People's Army – PHL35333 – 7 October 2009

Provides updated information on the New People's Army (NPA).

Russia

Russia – Treatment and Protection of Disabled Persons – Treatment for Former Heroin Users – RUS35475 – 19 October 2009

Provides information on how disabled persons are treated in daily life, whether they face discrimination in employment, protection provided by the government against discrimination or harm against disabled people and the legality of methadone and alternative treatments available to heroin users in Russia.

Zimbabwe

Zimbabwe – British Army – Treatment of Family Members – ZWE35354 – 23 September 2009

Provides information on the treatment of family members of Zimbabweans enlisted in the British Army.

FEDERAL COURT JUDGMENTS

Hasan v MIAC

[2010] FCA 375

Federal Court of Australia, North J, NSA 1369 of 2009, 22 April 2010

The appellant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) that it did not have jurisdiction to conduct the review because the application was filed out of time.

Notice of the decision of the delegate of the respondent refusing to grant the visa applicant was sent to the appellant by email in October 2008. The decision notification letter advised that "the enclosed brochure... provides more information about the review processes and where applications for review can be lodged". The letter itself included the addresses of the New South Wales and Victorian registries of the Tribunal as places where applications for review could be lodged. The relevant brochure identified the New South Wales and Victorian registries of the Tribunal as well as registries of the Administrative Appeals Tribunal in Queensland, South Australia and Western Australia but was not in fact enclosed with the letter. The appellant lodged a review application in March 2009, some five months after receipt of the delegate's decision. In finding the review application was lodged outside the prescribed time period, the Tribunal was satisfied that the decision notification letter complied with the requirements of s.66 of the *Migration Act 1958* (the Act), including by stating where an application for review could be made.

The Federal Magistrates Court held that the Tribunal correctly declined to exercise jurisdiction and that s.66(2)(d)(iv) only requires that the notification letter indicate *a* place where an application can be received.

Held: Appeal allowed.

- (i) Section 66(2)(d)(iv) requires the Minister to include in the notification *every* place at which an application for review may be lodged.
- (ii) An application given before the start of the period does not comply with the requirement in s.347(1)(b) and r.4.10(1)(a) that the application be made *within* the prescribed period. The period for giving an application to the Tribunal will only commence to run when the Minister notifies the appellant in accordance with s.66(2)(d)(iv). The application filed by the appellant was given before prescribed period commenced and as such the Tribunal was not entitled to hear the application.

SZMSA v MIAC & Anor

[2010] FCA 345

Federal Court of Australia, Gilmour J, NSD 897 of 2009, 13 April 2010 (revised 15 April 2010)

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) affirming a decision not to grant the appellant, a citizen of Ukraine, a protection visa.

On 10 August 2007, the Tribunal invited the appellant to attend a Tribunal hearing on 17 September 2007. The appellant's migration agent advised the Tribunal that he would not be able to participate in the hearing on that date. According to the opinion of a consultant psychiatrist he had developed 'Post-Traumatic Stress Disorder and Major Depression' and was medically unfit to attend the Tribunal hearing at that point in time but may be ready to participate in about two months depending on his response to medication. The Tribunal arranged for another psychiatrist (Dr. Roberts) to assess the appellant's fitness to attend a hearing. Dr Roberts' report dated 15 October 2007 stated that the appellant was "currently unfit to participate in a Tribunal hearing" and that it was "premature to attempt to predict when [he] will become sufficiently well as to be considered fit to participate in a Hearing. A review will be necessary to reassess fitness after a further period of treatment."

The Tribunal invited the appellant to attend a hearing on 10 July 2008. The appellant responded indicating that he wished to attend the hearing. The hearing was conducted on 10 July 2008. In its decision record the Tribunal noted that it was satisfied that the appellant was able to participate effectively in the hearing and that he was not prevented by any psychological difficulties he may experience from articulating his claims. It

found that his answers to questions were responsive and detailed, and he was able to engage in extended discussion on a range of issues.

The appellant contended that he was unfit to attend the Tribunal hearing and that the Tribunal was required to obtain another report from Dr. Roberts. He also contended that the Tribunal did not study the details of his medical condition; and misunderstood Dr. Roberts' report.

Held: Appeal dismissed.

- (i) No appealable error was established. The appellant did not lack the capacity to give an account of his experiences, to present argument in support of his claims, to understand and answer the Tribunal's detailed questions, or to put his case to the Tribunal.
- (ii) The Tribunal did not misunderstand Dr. Roberts' report. Dr. Roberts' report did not establish that the appellant was unfit to attend the Tribunal hearing. No legal basis was identified for the suggestion that the Tribunal was obliged to obtain another report from Dr. Roberts.

SMKR v MIAC

[2010] FCA 340

Federal Court of Australia, Gray J, NSD 1046 of 2009, 9 April 2010

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a Refugee Review Tribunal (the Tribunal) decision affirming a decision not to grant the appellant, a citizen of Bangladesh, a protection visa.

The appellant claimed to have a well-founded fear of persecution for reason of his political opinion, specifically because he had been involved in the Freedom Party. Among the material on which he relied was a letter purporting to come from the President of the Freedom Party in a particular district. The Tribunal made inquiries of the Department of Foreign Affairs & Trade (DFAT) about the authenticity of the letter. In its response, DFAT advised, among other things, that its source could not identify anyone by that name and confirmed that no one by that name had ever held the position specified in the letter. Pursuant to s.424A of the *Migration Act 1958* (the Act), the Tribunal wrote to the appellant, providing him with copies of the DFAT reports, giving him particulars of information in those reports that it considered adverse to his case, explaining why that information was relevant, and inviting him to comment or respond. In affirming the delegate's decision, the Tribunal rejected all the appellant's claims, relying on, among other things, the failure of DFAT's informant to confirm the appellant's membership or office-holding in the Freedom Party as an implicit assertion that he was not such a member or office-holder.

The principal question in the appeal was whether the absence of evidence about a particular fact in a document was "information" for the purposes of s.424A(1)(a) of the Act. It was also alleged that the Tribunal failed to use its powers to inquire into material that was readily available and centrally relevant to the decision, in particular, the basis of the knowledge of DFAT's contact and the contact's credibility, and following up questions asked of DFAT that had not been answered.

Held: Appeal allowed.

- (i) The Tribunal's decision was tainted by jurisdictional error because it failed to perform its duties under s.424A(1)(a), (b) and (c). Its failure to do so was of importance in the outcome because of the reliance it placed on the fact that the DFAT reports did not confirm crucial elements of the appellant's case.
- (ii) Because the Tribunal relied on the failure of the informant in Bangladesh to confirm the appellant's membership or office-holding in the Freedom Party as an implicit assertion that the appellant was not a member or office-holder in that party, the Tribunal was obliged to comply with s.424A(1) in respect of that information. An implied assertion is no different from any other item of information in the way in which s.424A(1) impacts on it.
- (iii) This was not a case in which the Tribunal was obliged to make further inquiries in relation to the DFAT reports. Although it would have been relatively easy for the Tribunal to ask further questions of DFAT, it would have been far from simple for DFAT to pursue its inquiries any further.

SZNMV v MIAC
[2010] FCA 338

Federal Court of Australia, Gray J, NSD 990 of 2010, 9 April 2010

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) affirming a decision not to grant the appellant, a citizen of Bangladesh, a protection visa.

An interpreter was present throughout the Tribunal's hearing; however, for significant parts of the hearing, the appellant elected to rely on the Tribunal's English questions and to give his answers in English. On a number of occasions, the appellant departed from this practice and relied on the interpreter to translate the Tribunal's questions, and gave his answers through the interpreter. In addition, the interpreter intervened on occasions to assist when it seemed that the appellant did not understand properly what the Tribunal was asking him.

The appellant alleged, among other things, that the Tribunal denied him procedural fairness by restricting his use of an interpreter during the hearing. The appellant claimed that the Tribunal erred when it failed to insist, pursuant to s.427(7) of the *Migration Act 1958* (the Act), that he speak in his native language and use the interpreter, when it was clear that he was not coping using English. Section 427(7) provides that if a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter.

Held: Appeal dismissed.

- (i) No jurisdictional error was demonstrated in relation to the Tribunal's failure to give a direction pursuant to s.427(7) of the Act.
- (ii) The use of the word "may" in s.427(7) confers on the Tribunal a discretion, rather than an obligation. There was nothing to show that the Tribunal's failure to exercise the discretion was the result of any error. There was nothing to suggest that the Tribunal member ought to have taken the view that the appellant was struggling to understand questions expressed in English, or to give responsive and coherent answers to those questions in English.
- (iii) Section 427(7) gives to the Tribunal a power to assess an applicant's proficiency in English. The occasion for exercising the discretion to direct that communication with an applicant proceed through an interpreter arises only if that applicant is not proficient in English. The only person who can assess such proficiency is the member constituting the Tribunal.
- (iv) The Tribunal does not have an absolute obligation to ensure that an applicant whose first language is not English suffers no disadvantage at all for that reason. Some disadvantage is inevitable when an applicant has no English or a command of English that is less than fluent. The Tribunal's obligation is to afford procedural fairness, which includes the exercise of the discretion conferred in s.427(7) when it sees that there is confusion or misunderstanding in communication. The present case was not one in which such confusion or misunderstanding appeared to the Tribunal.

SZNVK v MIAC
[2010] FCA 297

Federal Court of Australia, Flick J, NSD 1222 of 2009, 30 March 2010

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a Refugee Review Tribunal (the Tribunal) decision affirming a decision not to grant a protection visa.

The Tribunal did not accept the appellant was a credible witness. One matter of concern was that a letter on which the appellant was relying was substantially the same as another letter, from a different organisation and signed by a different person that the Member had come across in an unrelated case. The Tribunal gave the appellant details of the other letter, but did not disclose the details of the person who wrote it, the organisation from whence it had come, or its date. The Tribunal raised with the appellant for his comment its concern about the identical wording of the other letter, explaining that it could suggest that the letters

were 'made to order' and not genuine, and that the appellant's account of his experiences was not truthful. It informed him that if he preferred not to comment on that day, he should let the Member know and they could talk about how he might comment in the future. The questions that arose were first, whether details of the person who wrote the other letter, his organisation, and the date of the letter, constituted 'information' for the purposes of ss.424A and 424AA, which required the Tribunal to give 'clear particulars' of adverse information; and secondly, if the 'information' was confined to the details in fact disclosed, whether the Tribunal had complied with s.424AA(b)(iii) and (iv), which required the Tribunal to advise the appellant that he may seek additional time in which to comment or respond to the information.

Held: Appeal allowed.

- (i) The matters not disclosed to the appellant formed part of the information relied upon and no clear particulars of that information were communicated to the appellant either in writing pursuant to s.424A or orally pursuant to s.424AA.
- (ii) 'Information' for the purposes of s.424A cannot in all cases be clinically divorced from the context in which it appears. How much of that surrounding context must also be disclosed must depend upon the facts and circumstances of each individual case. In some cases, the disclosure of the 'substance' of information may be sufficient. In other cases, 'clear particulars' may require more. In the present proceeding, where the information was contained within a comparatively short letter which was presumably readily available, details as to who wrote the other letter, the capacity of the person who wrote that letter and its date had to be disclosed for clear particulars to have been given. An opportunity to comment or respond would only be a meaningful opportunity if there had been disclosure of such particulars as enabled the appellant to put that other letter into context.

Obiter:

- (iii) The statement that the appellant need not "comment on those things today", if he preferred not to, reversed the requirement imposed by s.424AA(b)(iii), that an applicant be positively advised that he may seek additional time in which to respond. How that advice may be effectively communicated will depend upon the facts and circumstances of the individual case. But compliance is not achieved by a statement which merely implicitly conveys to an applicant that he may seek and be given additional time. Nor can non-compliance necessarily be excused or cured by reason of additional time in fact being extended.

**Leung v MIAC
[2010] FCA 268**

Federal Court of Australia, Lander J, NSD 1346 of 2009, 25 March 2010

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision to cancel the appellant's Student visa under s.116 of the *Migration Act 1958* (the Act) on the basis of non-compliance with condition 8202.

The Tribunal found that the appellant had not complied with condition 8202 in that his education provider SIBT had certified him as not achieving satisfactory course attendance. The further question for the Tribunal under r.2.43(2)(b)(ii)(B) of the Migration Regulations 1994 was whether the non-compliance was not due to exceptional circumstances beyond the appellant's control. Before the Tribunal, the appellant claimed that his grandmother became ill and passed away and that as a result he felt depressed, homesick and was often late because he was unable to sleep which had affected his studies. The Tribunal accepted these claims as genuine. The Tribunal found, however, that the applicant did not seek any counselling or other assistance from SIBT regarding these problems and their possible effect on his attendance, nor did he seek professional medical advice about the problem. It considered that it was within his control to seek assistance from SIBT or a medical professional and also that it was in his control to raise the issue of the effect of his grandmother's illness on his attendance when he lodged his internal appeal with SIBT and when responding to the Department's notification of its intention to consider cancellation. Accordingly, the Tribunal concluded that the non-compliance was not due to exceptional circumstances beyond his control.

The appellant contended that the inquiries carried out by the Tribunal addressed matters not relevant to the issue before it and therefore that it had identified the wrong issue.

Held: MRT decision set aside and remitted for reconsideration.

- (i) The Tribunal failed to exercise its jurisdiction as it did not decide all three issues which needed to be addressed to determine whether r.2.43 was engaged, It did not determine whether the circumstances relied upon by the appellant were exceptional circumstances, or whether those circumstances were the cause of non-compliance with Condition 8202. It purported to inquire into whether the circumstances which it accepted were beyond the appellant's control, but did not complete the inquiry.
- (ii) The Tribunal made no finding that if the appellant had sought assistance from SIBT or a medical professional he would have received such treatment that would have enabled him to keep an attendance record that would have meant that he complied with Condition 8202. In the absence of such a finding, the Tribunal failed to address the question of control even if it assumed that the non-compliance was due to exceptional circumstances.
- (iii) A finding needs to be made whether the circumstances are exceptional. Next, whether the non-compliance with Condition 8202 was due to exceptional circumstances. Once those findings are made the Tribunal can address the question of control in light of its previous findings. It is necessary to proceed in that logical fashion because each finding informs the issues that follow.

FEDERAL MAGISTRATES COURT JUDGMENTS

Reddy v MIAC & Anor

[2009] FMCA 560

Federal Magistrates Court of Australia, Wilson FM, BRG 538 of 2008, 1 July 2009

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate refusing the grant of a Partner (Migrant) Class BC visa.

The Tribunal identified the issue in the case as whether the applicant was the spouse of the sponsoring spouse at the time of the decision within cl.100.221(2) or (2A) of Schedule 2 of the Migration Regulation 1994 (the Regulations). The Tribunal stated that there was no suggestion in the claims or evidence that the alternative provisions in cl.100.221(4) apply. Clause 100.221(4) provides that cl.100.221 may be met where the relationship has ceased and the applicant has suffered domestic violence committed by the sponsoring spouse, as provided for in rr.1.23 and 1.24 of the Regulations.

The applicant contended that the Tribunal erroneously restricted its enquiry as to whether the criteria were satisfied by looking only at two of the criteria and did not conduct a full de novo hearing; failed to detect errors in the delegate's decision; and failed to consider whether the applicant satisfied cl.100.221(4) where it was raised by the material, even though not articulated by the applicant.

Held: Application dismissed.

- (i) There was no jurisdictional error demonstrated in the manner the Tribunal went about its assessment of the applicant's claim.
- (ii) The applicant had not raised a case that he had been the victim of domestic violence, nor did the material before the Tribunal raise such a case in the manner required such that the Tribunal was obliged to consider the claim. No evidence was presented that came close to satisfying the regime for determining whether a person was taken to have suffered domestic violence in rr.1.23 and 1.24. For domestic violence to have been a relevant consideration, the Tribunal would have had to go through the file looking for evidence, view it in a way favourable to the applicant and then construct a case for him by asking further questions designed to elicit further information in support of that argument. This constructive or creative activity is not required of the Tribunal.
- (iii) The Tribunal did not confine itself to an enquiry as to whether the decision of the delegate was correct. To detect error in the delegate's decision is not the Tribunal's function.

**Pasula v MIAC
[2010] FMCA 219**

Federal Magistrates Court of Australia, Smith FM, SYG 2911 of 2009, 16 April 2010

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate refusing the grant of a Skilled – Independent Overseas Student (Residence) (Class DD) visa.

The applicant had sought to rely on an E-Business diploma which he argued was relevant to his nominated skilled occupation of Cook for cl.880.215 of Schedule 2 to the Migration Regulations 1994 (the Regulations), because it would enable him to manage an online restaurant. The Tribunal referred to the judgment in *Thongsuk v MIAC & Anor* [2007] FMCA 655, concluding that the relevance test applied to the nominated occupation and not to the occupation the applicant intends to engage in in the future. The Tribunal was not satisfied that the applicant satisfied cl.880.215. It declined the applicant's request to "apply consistency" by following an earlier Tribunal decision, stating that Tribunal decisions "have no precedential value to the Tribunal".

The applicant contended that the Tribunal did not take into account the Department's policy as set out in PAM3 concerning what qualification combinations may be regarded as acceptable; did not take into account the decision of a differently constituted Tribunal; and failed to give proper, genuine and realistic consideration to matters arising in the review.

Held: Application dismissed.

- (i) The Tribunal's decision was not affected by jurisdictional error. The relevance of a qualification for the purposes of cl.880.215 must relate to the nominated occupation itself, and not to some different occupational classification which might later be pursued by the visa applicant.
- (ii) The contents of PAM3 do not themselves provide relevant considerations which the Tribunal is bound to consider. Further, PAM3 could not have assisted the Tribunal to arrive at a different conclusion as to the relevance of the applicant's E-business diploma to his nominated occupation as a cook. If PAM3's advice was legally erroneous, then the Tribunal could not make a jurisdictional error by not considering whether to follow that advice. In any event, it could not be concluded from the absence of any express reference to a particular statement in PAM3 that the Tribunal did not give it appropriate consideration.
- (iii) The Tribunal was not bound as a matter of law to follow previous decisions of the Tribunal, whether in relation to matters of law or fact. While consistency of factual outcomes is desirable in an administrative agency, an administrative tribunal is not lawfully entitled to give greater weight, or even a substantial weight, to this objective, if this involves declining to give effect to its own opinions on fact and law in relation to the matter before it. Different obligations to consider the desirability of consistent outcomes might apply to the exercise of administrative discretion, but the Tribunal was not exercising a discretion when it applied cl.880.215. It was bound to apply the terms of that regulation to the facts before it, even if this produced an outcome which might appear inconsistent with an earlier Tribunal decision.

LEGISLATION UPDATE

Legislative developments of relevance to the work of the Migration Review Tribunal and the Refugee Review Tribunal are noted below. The following Acts, Regulations and Instruments are accessible via the Commonwealth Law of Australia (COMLAW) website – <http://www.comlaw.gov.au>

Legislation Passed

INSTRUMENTS

Migration (United Nations Security Council Resolutions) Regulations 2007 – Specification of United Nations Security Council Resolutions under Subregulation 4(1) – March 2010

This Specification revokes the Migration (United Nations Security Council Resolutions) Regulations 2007 – Specification of United Nations Security Council Resolutions under Subregulation 4(1) – February 2010 and specifies relevant United Nations Security Council Resolutions.

REGULATIONS

Migration Amendment Regulations 2010 (No. 3)

These Regulations amend the Migration Regulations 1994 to vary the requirements for some Business Skills visas.

Migration Amendment Regulations 2010 (No. 4)

These Regulations amend the Migration Regulations 1994 to rectify an administrative error which resulted in the removal of certain criteria from some student visa subclasses.

Legislation Pending

Immigration (Education) Amendment Bill 2010

This Bill proposes to amend the Immigration (Education) Act 1971 to implement a new Adult Migrant English Program (through which English language tuition is delivered). This bill was introduced in the House of Representatives on 17 March 2010.

CASELOAD OVERVIEW

MRT Decisions – March 2010

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	3	8	2	0	13
Visitor refusal	40	21	2	4	67
Student refusal	33	21	10	6	70
Temporary business refusal	14	15	9	9	47
Permanent business refusal	6	8	8	1	23
Skill linked refusal	70	51	18	13	152
Partner refusal	75	24	12	5	116
Family refusal	28	32	4	1	65
Student cancellation	58	37	1	9	105
Sponsor approval refusal	3	2	6	0	11
Other	16	22	8	6	52
Total	346	241	80	54	721

RRT Decisions – March 2010

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	0	2	0	0	2
Algeria	0	1	0	0	1
Bangladesh	1	2	0	1	4
Burma (Myanmar)	1	0	0	0	1
Cameroon	1	1	0	0	2
China (PRC)	25	50	0	7	82
Egypt	2	2	0	0	4
Ethiopia	1	0	0	0	1
Fiji	1	21	0	0	22
Ghana	0	1	0	0	1
India	2	22	0	0	24
Indonesia	1	14	0	1	16
Iran	0	1	0	0	1
Korea, Republic of	0	3	0	0	3
Lebanon	1	10	0	0	11
Malaysia	0	22	0	4	26

Mongolia	0	1	0	0	1
Nigeria	0	1	0	0	1
Pakistan	3	0	0	0	3
Palestinian Terr. (W.Bank/Gaza)	1	0	0	0	1
Papua New Guinea	0	0	0	1	1
Philippines	0	1	0	0	1
Sierra Leone	1	0	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	3	1	0	0	4
Syria	0	1	0	0	1
Taiwan	0	1	0	0	1
Tanzania	1	0	0	0	1
Thailand	0	1	0	0	1
Tonga	0	3	0	0	3
Uzbekistan	1	1	0	0	2
Vanuatu	1	0	0	0	1
Vietnam	0	3	1	0	4
Zimbabwe	0	1	0	0	1
Total	47	168	1	14	230

PUBLICATION OF TRIBUNAL DECISIONS

The Tribunals publish decisions on AustLii that are considered to be of 'particular interest'. If you would like published decisions of a particular kind, or a particular decision, please let us know by contacting enquiries@mrt-rrt.gov.au.

Decisions which are regarded by the Tribunals as of particular interest are decisions: identified as representing a broad cross-section of decisions having regard to factors such as the visa subclass and the outcome of the review; or where there is detailed consideration of legal arguments or policy issues; or where the factual circumstances are complex or unusual or where there is or is likely to be significant external interest; or where there is clear precedential value. The Tribunals aim to publish at least 40% of decisions made by each Tribunal.

Between 1 January 2010 and 31 March 2010, 46% of all substantive decisions made have been published (45.5% of MRT and 47.5% of RRT). This does not include 'Withdrawn' or 'No Jurisdiction' cases.

MRT decisions are selected and vetted for publication each day, with publication delayed by approximately seven days to allow for applicants to be notified of the Tribunal's decision. RRT decisions are also selected daily for editing. Once edited, the decisions are quality checked and sent to AustLII for publishing on their website.

The Refugee Review Tribunal has a statutory obligation to ensure that the published version of a decision statement must not contain any information which may identify the applicant or any relative or other dependent of the applicant. Decisions that require extensive editing to meet this obligation may not be published. The Migration Review Tribunal is not similarly restricted but may direct that certain information in a decision not be published in the public interest.

If a published decision of the MRT or RRT causes concern to a person with a close interest or involvement in the decision, a request for deletion of portions of the decision or its withdrawal from AustLii may be made by request to enquiries@mrt-rrt.gov.au.

A selection of Tribunal decisions are available on the Migration Review Tribunal and Refugee Review Tribunal's website located at <http://www.mrt-rrt.gov.au/>.

The website also contains information about how to apply to the Tribunals, how the Tribunals are organised, the function of the Tribunals, caseload statistics, as well as copies of this and previous Bulletins. The website is updated on a regular basis.

The Migration Review Tribunal and the Refugee Review Tribunal is not 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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