



The MRT-RRT Monthly Decisions Bulletin

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This bulletin covers recently published decisions of the Migration Review Tribunal and the Refugee Review Tribunal. The decisions summarised represent a cross-section of published decisions of the Tribunals. Selected summaries of Court judgments, of interest to the Tribunals, are also included.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

060739664

21 May 2007, Sydney

Mr R Derewlany, Member

SKILLED - AUSTRALIAN SPONSORED (MIGRANT) (CLASS BQ) VISA - SUBCLASS 139 - CL 139.217 - EMPLOYMENT IN A SKILLED OCCUPATION - The applicant had been employed as an "Admin Manager" and nominated the occupation of Office Manager in his application for a Subclass 139 visa. A delegate of the Minister for Immigration and Citizenship refused the visa application because the visa applicant was not employed in a "skilled occupation" for at least 12 months in the 18 month period immediately before the application was made. The applicant claimed to spend half his time performing duties associated with his employer company's activities as a paper importer and the remainder managing the office operations of the company.

Held: Decision under review set aside.

The Tribunal found that the applicant's duties were commensurate with those as set out in the ASCO occupation instrument for both Import-Export Clerk and Office Manager. It also found it was possible that a person could be contemporaneously employed in more than one occupation and that it was open to the Tribunal to determine whether any of those occupations satisfied the definition of "skilled occupation" under r.1.03 of the *Migration Regulations* 1994. The Tribunal was satisfied that the applicant was performing the duties associated with the occupation of Office Manager for at least half of his time, thereby satisfying the definition of having been employed in a skilled occupation for the relevant period.

060493235

31 May 2007, Perth

Ms L Ward, Member

BUSINESS SKILLS - ESTABLISHED BUSINESS (RESIDENCE) (CLASS BH) VISA - SUBCLASS 845 - MAIN BUSINESS - R.1.11 - INVOLVEMENT IN DECISION-MAKING - The applicant applied for a Class BH visa as the owner of an established business in Australia. The business, Mediplus Management Pty Ltd (the company), was involved in the provision of services to a number of medical centres. The applicant claimed she was the administration manager and had owned 15 per cent of the company since 2002. She claimed she met with the person who was the majority owner and director several times a week. A delegate of the Minister for Immigration and Citizenship (the delegate) found that in relation to the applicant the company was not a "main" business as her role was largely routine and administrative in nature. The delegate found that r.1.11(1)(b) of the *Migration Regulations* 1994 (the Regulations) was not satisfied and clause 845.213 was not met. The applicant claimed that she had direct and continuous decision-making involvement in the company which was designed to make her a profit.

Held: Decision under review set aside.

The Tribunal accepted that the applicant had acquired a 15 per cent interest in the company in 2002 and met the ownership requirement of cl.845.213. It noted that she was not a majority shareholder nor a director, but had provided evidence of her involvement in making decisions. The Tribunal accepted the applicant's evidence in its entirety and found that she was very involved in the management of the company from day to day, and in making decisions affecting the overall direction and performance of the business. Accordingly, it was satisfied that for the purpose of r.1.11(1)(b) and cl.845.213 the company was a "main" business in respect of the applicant. The Tribunal noted that the company managed medical centres as a business and the purpose of the venture was to profit from the provision of administrative services. Accordingly, it was satisfied that the company was a "qualifying business" under r.1.11(1)(d) and that the applicant satisfied clause 845.213 of Schedule 2 to the Regulations.

060896374

31 May 2007, Perth

Ms L Ward, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) VISA - SUBCLASS 457 - CL 457.223(7A) - BENEFIT TO AUSTRALIA - NET ASSETS - The applicants applied for Temporary Business Entry (Class UC) visas in April 2004 relying on a business involved in publishing, promotions and design work. The business was owned and operated by the first and

second applicants. A delegate of the Minister for Immigration and Citizenship refused to grant the visas on the basis that the first applicant was prohibited from applying by item 1223A of Schedule 1 of the *Migration Regulations 1994* (the Regulations), the second applicant did not establish that she was a principal in the business and did not satisfy cl.457.223(7A)(a)(i) and they did not establish that their business was “of benefit to Australia” as defined in cl.457.111(2) and also did not satisfy cl.457.223(7A)(c)(ii).

Held: Decision under review set aside.

The Tribunal was satisfied as to the Schedule 1 requirements and cl.457.223(7A)(a), cl.457.223(7A)(b) and 457.223(7A)(c)(ii),(iii)&(v). It was satisfied that the travel and food books published by the business were based on Western Australian locations and produce and promoted local destinations and products to overseas groups. The Tribunal found that those books would lead to an expansion of Australian trade in goods or services and an improvement of Australian business links with international markets within the meaning of “benefit to Australia” as defined in cl.457.111(2)(a)(ii). It also found that the applicants utilised improved business skills in their publications within the meaning of cl.457.111(2)(b)(i). The Tribunal found the applicants thereby satisfied the definition of benefit to Australia and met cl.457.223(7A)(c)(i). It accepted that the equity in the applicants’ family home was more than \$250,000 and that the applicants were willing to borrow against their home in order to conduct the business if necessary. The Tribunal was therefore satisfied that the equity in the family home should be included in the net assets to conduct the business and accordingly found that they met cl.457.223(7A)(c)(iv). Accordingly, it was satisfied that the first applicant met cl.457.223(7A).

Partner and Family Visas

060570616

22 May 2007, Sydney

Ms P Leehy, Member

OTHER FAMILY (MIGRANT)(CLASS BO) VISA - SUBCLASS 115 - REMAINING RELATIVE - USUALLY RESIDENT IN AUSTRALIA - The applicant applied for an Other Family (Migrant) (Class BO) visa in March 2006 as a “remaining relative”. The applicant was sponsored by her sister who was an Australian citizen. She claimed that she was the adopted child of her stepfather, who was married to her mother. Her mother and her stepfather were permanent residents of Australia. She claimed that she had had no contact with her natural father who was living in China since her parents divorced in 1982, except in 2005 when she met with him for the signing of her adoption papers. A delegate of the Minister for Immigration and Citizenship refused the visa on the basis that the applicant did not meet the definition of remaining relative in r.1.15(1)(c) of the *Migration Regulations 1994* (the Regulations) because her natural father resided in the same country as herself.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant’s mother and stepfather were her near relatives as defined in r.1.15(2) and were Australian permanent residents satisfying the requirement in r.1.15(1)(c)(ii). However, the Tribunal noted that the applicant’s mother had several short visits and her stepfather one short visit to Australia only and they did not own any property in Australia. It found that her mother and stepfather were not usually resident in Australia at the time of application and time of decision, but that their home was in Shanghai and therefore the requirement of r.1.15(1)(c)(i) of the Regulations was not met. Accordingly the Tribunal found that the applicant was not the remaining relative of her sponsoring sister as defined in r.1.15.

060823647

22 May 2007, Brisbane

Ms S Kerr, Member

OTHER FAMILY (MIGRANT) (CLASS BO) VISA - SUBCLASS 115 - CL 115.211 - REMAINING RELATIVE - STEP-RELATIONSHIPS - The applicant applied for an Other Family (Migrant) (Class BO) subclass 115 (Remaining Relative) visa which was refused by the delegate on the basis that the visa applicant did not satisfy cl.115.211. The visa applicant and the review applicant were sisters. The visa applicant also had a half-brother who was an Australian citizen. The delegate found the applicant had two step sisters and therefore had two near relatives usually resident in Vietnam. The issue for the Tribunal was whether the applicant had two step sisters as near relatives.

Held: Decision under review set aside.

The Tribunal found that a step-relationship between siblings was derived from the step-relationship between the parent and child and that the step relationship with the second husband of the visa applicant's mother's husband ended with her mother's death. It was satisfied that the step-sisters were removed from a step-relationship with the visa applicant at the date of the mother's death. Accordingly, the Tribunal found that the visa applicant had no near relatives and was the remaining relative of the review applicant in accordance with cl.115.211.

Visitor visas

071128592

29 May 2007, Sydney

Ms C Carney, Member

SPONSORED (VISITOR) (CLASS UL) VISA - SUBCLASS 679 - PURPOSE OF VISIT - The visa applicant applied for a Sponsored (Visitor) (Class UL) visa in November 2006 to visit his wife who was the review applicant. He had visited Australia in 2004 and formed a relationship with the review applicant, who visited China in March 2006. They then entered a de facto relationship. They later married and, as he was running a successful business in China and did not want to settle in Australia, the visa applicant wanted to visit his wife for three months. A delegate of the Minister for Immigration and Citizenship found that he did not satisfy cl.679.224 of the *Migration Regulations* 1994 (the Regulations) and refused to grant the visa, not being satisfied that the review applicant was the spouse of the visa applicant or that his intention to visit Australia was genuine. The visa applicant gave evidence to the Tribunal about the relationship and stated that they would visit each other across the two countries as the review applicant had a child dependent on her.

Held: Decision under review affirmed.

The Tribunal found that the applicants were married to one another. However, it noted that since 2004 the review applicant had visited China for less than a month on each of two occasions and did not consider this was indicative of a genuine relationship. The Tribunal noted that the review applicant's son was an adult and did not accept this as the reason for her not spending longer periods in China with her spouse. It found that the evidence did not point to a genuine commitment to a continuing spousal relationship or that the parties had a mutual commitment to a continuing spousal relationship. Accordingly, the Tribunal was not satisfied that the review applicant was the spouse of the visa applicant within the meaning of r.1.15A of the Regulations and found that as the purpose of his visit was not to visit a spouse he did not satisfy cl.679.211. Accordingly it concluded that he did not meet the criteria for the Sponsored (Visitor) (Class UL) visa.

060837450

31 May 2007, Adelaide

Ms D Morgan, Member

TOURIST (CLASS TR) VISA - SUBCLASS 676 - VISA REFUSAL - PURPOSE OF VISIT - GENUINE VISIT - The applicant applied for a Tourist (Class TR) subclass 676 visa in August 2006 for a stay to August 2007. A delegate of the then Minister for Immigration and Multicultural Affairs refused to grant the visa on the basis that the applicant did not meet cl.676.211 of the *Migration Regulations* 1994 as she failed to satisfy the delegate that her expressed intention to only visit Australia was genuine. The delegate based the decision on information that the applicant wanted to stay on a Tourist visa for the purpose of securing a sponsor for a subclass 457 visa. She found the applicant had expressed an intention to seek employment and therefore cl.676.211 was not met. The applicant claimed she sought to stay only for the purpose of seeking a possible sponsor for her spouse. She further submitted that as the Regulations were silent in relation to seeking a sponsor, this was not a prohibited activity.

Held: Decision under review set aside.

The Tribunal found that the applicant's main purpose in applying for the subclass 676 visa was related to achieving a particular migration status for her husband and to a far lesser extent to finding an employer for herself. The Tribunal was satisfied that the applicant had not sought further stay in order to work or to carry on business and accepted her evidence that if required to depart Australia she would do so. It was not to the point that the applicant intended to use the attainment of a Tourist visa as a stepping stone to an application for a subclass 457 visa and the term "purpose" referred to what the applicant proposed to do during the period sought. The Tribunal found that the applicant's intention to stay in Australia as a visitor was genuine and she therefore met cl.676.211. The Tribunal considered that the applicant's intentions did not equate to "stay for a purpose related to business". It was satisfied that it was her intention to work or carry on business only if she was legally entitled to do so and that she was not

entitled to do so as the holder of a subclass 676 visa. The Tribunal was therefore satisfied she met cl.676.212 of the Regulations.

Other visas

061041404

31 May 2007, Melbourne

Ms M Hodgkinson, Member

EDUCATIONAL (TEMPORARY) (CLASS TH) VISA - SUBCLASS 419 - CL.419.228 - SUBSTANTIAL COMPLIANCE WITH CONDITION 8501 - The applicant held a subclass 419 (Visiting Academic) visa valid until 25 August 2006. When she applied for a further subclass 419 visa to continue her visiting academic appointment, she answered “no” to the question “Do you hold health insurance for your stay in Australia?”. The applicant later advised that she had taken out health insurance from October 2006 although she was not convinced that it was a requirement for this visa. The delegate was not satisfied that the applicant had complied with condition 8501 - Health Cover, in relation to the last substantive visa and subsequent bridging visa and refused the visa. The applicant claimed that in the application form for a subclass 419 visa, health insurance was recommended but not compulsory. She also claimed that the requirement was not mentioned during the process of the visa application assessment. The applicant claimed she had gone to great lengths to obey all visa conditions.

Held: Decision under review set aside.

The Tribunal noted that the applicant did not hold health insurance until she was alerted to the fact that she may be required to be covered. However, it found that condition 8501 did not require the applicant to hold health insurance. The requirement was to have maintained “adequate arrangements” for health insurance”. In addition, the website for the Department of Immigration and Citizenship stated that whilst it was recommended, health insurance was not a requirement of the visa. The Tribunal noted that the applicant understood that she had to pay medical expenses herself and advised that, had the need arisen, she and her husband had access to ample resources to cover them. The Tribunal noted that the applicant needed to substantially comply with condition 8501 and found that in the circumstances she had done so. There was no evidence she had not complied with other conditions of her visas, therefore the Tribunal found that the applicant met cl.419.228.

REFUGEE REVIEW TRIBUNAL DECISIONS

China

071239990

3 May 2007

Dr R Witton, Member

CHINA - RELIGION - PARTICULAR SOCIAL GROUP - POLITICAL OPINION - FALUN GONG - The applicant feared persecution for reasons of his practice of Falun Gong. He was introduced to Falun Gong by a colleague to help a medical condition that seriously impacted his work. Practising Falun Gong magically worked on his condition and it became his belief. The applicant claimed that when it was banned he went to Beijing to express support for Falun Gong, but this was not accepted by the government and he was sent to brain washing classes. He pretended to give up Falun Gong, but practised in secret. The applicant claimed that eventually he was arrested and tortured at a police station for several days. He claimed he was cut by sadistic police in an attempt to cripple him and had scars all over his body. The applicant claimed that his wife paid a large bribe to get him out of the police station. He claimed he then paid a lot of money and the company he worked for helped get him a passport.

Held: Decision under review set aside.

The Tribunal was impressed by the applicant's extensive knowledge of Falun Gong practice and accepted that the scars on the applicant's body were consistent with the treatment claimed. It also accepted that Falun Gong practitioners had been arrested and imprisoned and if they did not recant their beliefs, subjected to harsh treatment including prison, labour camps and extra-judicial "legal education" centres. Therefore, it found the applicant's past treatment by the Chinese authorities amounted to persecution. The Tribunal was satisfied that since coming to Australia the applicant had continued to practice and that he was genuinely committed to Falun Gong. It also found that he would continue to practise if he returned to China where he would face arrest, imprisonment and torture for reason of his political opinion, religion, and membership of a particular social group. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

071223698

10 May 2007, Sydney

Ms P McIntosh, Member

CHINA - POLITICAL OPINION - FALUN GONG - PARTICULAR SOCIAL GROUP - FALUN GONG PRACTITIONERS - The applicant feared persecution arising from his practice of Falun Gong. He claimed that he had publicly practised Falun Gong with other practitioners for a number of years until it was officially banned by the government. Since then, the applicant practised Falun Gong in private without the music and continued to promote it by spreading brochures about "the truth". He claimed that he was dismissed from a senior position in a company because the management was aware that he practised Falun Gong. The applicant was detained by local Public Security Bureau (PSB) officers and was only released when someone connected with the Falun Gong network paid a bribe. He further claimed that he had previously been investigated by the police and also had to make an undertaking that he would not do anything relating to Falun Gong. The applicant claimed that he would be arrested and treated severely if he returned.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a Falun Gong practitioner in China and that he still considered himself as such, albeit preferring to practise in a private manner. It accepted that he had been dismissed from his senior position in the company because his employer was aware of his Falun Gong practice. The Tribunal also accepted that the applicant was detained on more than one occasion and that Falun Gong practitioners continued to be targeted for arbitrary detention and in some cases serious ill treatment and torture. The Tribunal accepted that the applicant remained on police records as a past Falun Gong practitioner who continued to practise after Falun Gong was banned. The Tribunal found the chance was not remote that if questioned, he may face treatment amounting to persecution for reason of his membership of the particular social group, "Falun Gong practitioners" or an imputed political opinion. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

East Timor

071204406

27 April 2007, Melbourne

Mr A Gentile, Member

EAST TIMOR - RACE - LOROSAE - LOROMONU - ETHNIC CONFLICT - The applicant feared persecution on the grounds of her Larosae ethnicity. She claimed she would be harmed as a result of the conflict between the Larosae of the east and the Loromonu of the west. The applicant claimed that during the riots which were sparked by tension between the two groups she was afraid for her life. She claimed that the gangs (of Loromonu) had roamed the area in which she resided, acting in a threatening and aggressive manner towards her. She claimed she was later threatened over the telephone as a person of Lorosae ethnicity and that her family had been targeted and her sibling attacked as a result of the ethnic tension. The applicant also claimed that her home had been looted in her absence.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was Lorosae and was threatened as claimed. It had regard to independent information as to the development of ethnic differences between the Lorosae and the Loromonu. The Tribunal noted that these differences had been exacerbated by the political circumstances in existence since the early 2000s. It considered that independent information showed that the tension between these groups led to attacks and other violence against the Lorosae. It found that the particular characteristics of the applicant, including her level of education and her full-time employment increased her risk of harm. The Tribunal noted that the intervention of the UN and other troops had restored some semblance of order, but was not satisfied the applicant would obtain adequate state protection. The Tribunal therefore found there was a real chance that the applicant would face serious harm on return. Accordingly, it found that she had a well-founded fear of persecution.

India

071202048

17 April 2007, Sydney

Mr T Delofski, Member

INDIA - RELIGION - CHRISTIAN - POLITICAL OPINION - The applicant claimed she feared harm both from Hindu fundamentalists and Muslim extremists who threatened her to stop her work with elderly and poor people in a small village. The applicant converted to Christianity and became an active member of her community church. She claimed her extensive work with the poor in her region led many of them to convert to Christianity and resulted in Muslims and Hindus becoming angry with her, assaulting her and throwing stones at her house. The applicant claimed that after receiving threats to stop her activities she tried to obtain help from local authorities but did not receive help because she was a member of a particular political party. She claimed that being a minority Christian, she could not expect protection from the Indian police and Government authorities who were all from the Hindu community.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant's Christian beliefs were genuine but was not satisfied of her claim regarding her political beliefs. It accepted that the applicant may have been threatened and otherwise persecuted by extremist representatives of other religions and/or political organisations because of her religious and/or political beliefs. However, the Tribunal did not accept that the applicant had availed herself fully of the state protections from such persecution that were available within India. Based on independent information, the Tribunal found that Indian citizens could generally avail themselves of police and other state and legal protection when they were victims of persecution for their religious and/or political beliefs. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution within the meaning of the Convention.

Iran

071183981

30 April 2007, Sydney

Prof S Blay, Member

IRAN - RELIGION - CHRISTIAN CONVERT - MUSLIM FAMILY - The applicant feared persecution as a former Muslim who had converted to Christianity since arriving in Australia. Although she was born into an Islamic family, she claimed she was dissatisfied with that religion. The applicant claimed that she had developed an interest in Christianity at university but had kept this secret. She claimed that it was a great sin to convert to other religions and the punishment was death. The applicant's husband had assisted her to attend a religious organisation in Australia where she attended services and she now attended a particular church twice weekly. She claimed that even though there were several churches in Iran, Christians nevertheless faced persecution.

Held: Decision under review set aside.

The Tribunal noted the applicant's familiarity with Christian beliefs and her willingness to call on her local priest as a witness. It noted that her husband had attended the hearing as a support person and found the unusual situation of his Islamic beliefs supported her claim to have converted with his support. The Tribunal found that the applicant was a Christian, that there were several Christian organisations in Iran and that the religion was accepted under the constitution. However, the Tribunal noted reports of Christian converts being killed and found no indication that the government had done anything to stop such persecution. It found that the authorities either condoned or were not willing to stop the persecution of Christians, particularly where they had converted from Islam. The Tribunal found it was more likely than not that the applicant faced persecution at the hands of her own family and in-laws. It found that this would not be stopped by the authorities and accordingly, her fear of persecution was well-founded.

Nepal

071244193

14 May 2007, Sydney

Ms P Leehy, Member

NEPAL - RACE - LOWER CASTE - PARTICULAR SOCIAL GROUP - WOMEN WHO FAIL TO HONOUR ARRANGED MARRIAGE - SINGLE MOTHER - DOMESTIC VIOLENCE - The applicant, a single mother of lower caste, claimed to fear persecution from her former partner and from society. She claimed she left an arranged marriage and lived with another man to whom she became pregnant. Following her pregnancy he assaulted her and forced her into prostitution. She left the relationship and returned to her village but he continued to abuse her. The applicant claimed to have experienced the social stigma of being a single mother and claimed generally to have suffered discrimination because she was of a lower caste. The applicant feared she would be attacked by her former boyfriend and by society in general if she returned to Nepal. She claimed to be a member of the particular social group of women who failed to honour an arranged marriage.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant left an arranged marriage and moved in with another man. It accepted she became pregnant, was abused by him and forced to work as a prostitute. The Tribunal accepted that she left him prior to the birth of their child. However, it did not accept that this man continued to abuse her after the birth of their child. The Tribunal noted independent information did not support the applicant's claim to face serious harm as a result of her lower caste status. It noted that whilst domestic violence was widespread, steps were being taken to address these issues. The Tribunal noted the applicant had lived in her village for a number of years without suffering serious harm. It was therefore not satisfied that the applicant faced a real chance of persecution if she returned to Nepal now or in the reasonably foreseeable future. Accordingly, she did not have a well-founded fear of persecution.

Sri Lanka

071196773

22 May 2007, Melbourne

Ms J Ellis, Member

SRI LANKA - POLITICAL OPINION - UNITED NATIONAL PARTY - The applicant feared persecution based on his political opinion. He claimed to have been a member of the United National Party (the UNP) since the 1990s and that in early 2000, supporters of the United People's Freedom Alliance (the UPFA) requested his support for their candidate. The applicant claimed he refused and was subjected to threatening telephone calls and harassment at work. He claimed he was abducted at gunpoint and that he was threatened and bashed. On another occasion, unidentified people came to his house falsely claiming to be police, he claimed they took him away in a vehicle and he was again bashed. The applicant claimed that after he came to Australia his family received threatening calls and that other UNP members, including his associate, were murdered. He feared that he would be killed if he returned to Sri Lanka.

Held: Decision under review set aside.

The Tribunal accepted that the applicant had been involved in the UNP since the late 1990s and that he began to be threatened in the early 2000s after he took on a more prominent role in the party. It accepted that he was threatened, attacked and abducted on several occasions in the early 2000s by his political opponents or thugs associated with them. The Tribunal accepted that the applicant's parents received threatening telephone calls after he left Sri Lanka. It further accepted that his friend, a member of the UNP with a similar political profile, was murdered as was another member of the UNP and that their deaths appeared to have been politically motivated. The Tribunal noted that political violence, often committed by thugs associated with particular politicians, was common and that the operation of the police force was often politicised. Consequently, it accepted that the applicant was unable to obtain adequate protection from the authorities and that it would not be reasonable for him to relocate within Sri Lanka. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution.

Vietnam

071267518

15 May 2007, Sydney

Ms A Younes, Member

VIETNAM - POLITICAL OPINION - ANTI REGIME FAMILY - RE-EDUCATION CAMPS - The two applicants, members of a family, feared persecution because their family was known and classified by the Public Security Office as "reactionary element who have consistently been against the revolution outcome in April 1975". They claimed that the first applicant's father and various family members who held professions were tortured in re-education camps for years and some died there because they were involved with the former regime. The first applicant claimed that he was arrested, gaoled and mistreated in a re-education camp in the early 1990s because of his family and his profession. He claimed he was then assigned to stay in a particular city where he remained under surveillance. The second applicant claimed that he had to finish schooling early and could not pursue further studies or find jobs because of his family history.

Held: Decision under review set aside.

The Tribunal accepted that the first applicant had relatives who were involved in the previous regime and held senior professions. It was satisfied they were sent to re-education camps where some died. The Tribunal accepted that the first applicant was arrested and sent to re-education camps in the early 1990s and was also subjected to house arrest and monitoring by the authorities. It was satisfied that the first applicant and his family had been perceived by the current regime as having anti-regime opinions by virtue of their employment and/or association with the previous regime. Although it was not satisfied with the second applicant's claim that he could not pursue further studies or get a job because of his family history, the Tribunal was satisfied that because of this history he would be imputed with anti regime political views. It was satisfied there was a real chance that both applicants would suffer serious harm if they returned and their fear of persecution was well-founded.

FEDERAL COURT JUDGMENTS

Chey v MIAC

[2007] FCA 871

Federal Court of Australia, Kenny J, VID 1066 of 2006, 8 June 2007

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) that the appellant was not entitled to the grant of a Partner (Migrant) (Class BC) (Subclass 100) visa.

The issue before the Tribunal was whether the appellant, at the time of application, was “the spouse of the sponsoring spouse”. The appellant after marrying the sponsor in Cambodia arrived in Australia in October 2002 on Subclass 309 visa. In July 2003 the sponsor advised the Department that their spousal relationship had been in question since November 2002, they were separated in March 2003 when the appellant moved to Melbourne and that she was threatened by the appellant not to report him to the Department. In November 2003 the sponsor advised the Department that she was going to Melbourne as the appellant wanted her to “sign papers” and that she was scared about what he might do to her or her family. Later the appellant and sponsor claimed that they resumed their spousal relationship and that they had a child. The Tribunal was not satisfied that the resumption of cohabitation was entered into voluntarily by the sponsor and reflected a genuine relationship.

The essential contention in the appeal was that the Tribunal breached s.360 of the *Migration Act 1958* (the Act) because it did not identify the critical issue, whether there was a genuine spousal relationship at the time of decision between the appellant and the sponsor.

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

- (i) The Tribunal breached s.360(1) of the Act and thereby made a jurisdictional error.
- (ii) Almost the entire focus of the hearing was on the communications by the sponsor to the Department in July and November 2003, and the events around this time. This was not the only issue arising in relation to the decision under review. The Tribunal did not identify that it had any issue with the appellant’s or the sponsor’s account of their life together in 2004 and 2005, including their financial, household or social arrangements, such that the Tribunal would reject their “date of decision” evidence, as it did. The appellant and the sponsor might have been misled to believe that, so far as the Tribunal was concerned, almost the only obstacle in their path was the information given by the sponsor to the Department in 2003. The Tribunal did not identify for the appellant those other issues arising on the review, in order that he might address them by evidence or argument.
- (iii) This defect was not cured by the Tribunal’s addressing a general invitation to the appellant at the conclusion of the hearing to add anything further that might occur to him. Unless the Tribunal had identified what it saw as the issues arising, there was nothing that the appellant might usefully add, either at or after the hearing.

Hao Jiang v MIAC

[2007] FCA 907

Federal Court of Australia, Bennett J, NSD 471 of 2007, 15 June 2007

This was an appeal from a judgment of Lucev FM dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister’s delegate to refuse to grant the appellant a further (temporary) student visa.

The Tribunal had affirmed the decision on the basis that the appellant did not satisfy cl.572.212 of Schedule 2 to the Migration Regulations 1994 (the Regulations), which required him to have “complied substantially” with the conditions to which his last visa was subject. Relevantly, condition 8202(3)(b) of the regulations required him to achieve an academic result that was “certified by the education provider to be at least satisfactory”. There was no such certification. However the Tribunal had applied a “substantial compliance” test to the condition. In reaching its conclusion that the appellant had failed to meet cl.572.212, it referred to the fact that he was excluded from his course because he had failed 22 out of 27 subjects, and that he had exhausted the university’s appeal mechanisms without success.

Pursuant to s.359A of the *Migration Act 1958* (the Act), the Tribunal had invited the appellant to comment on information that he was excluded from studying at Sydney University because he had failed to achieve academic results that were considered “at least satisfactory” by his education provider in 2003. The letter explained that this information was relevant because he needed to demonstrate that he had complied substantially with Condition 8202 and that as the University had found that he did not achieve academic results that it considered to be at least satisfactory, the Tribunal “may find you were in breach of condition 8202”.

Held: Appeal dismissed.

- (i) The Tribunal failed to apply the correct test and failed to comply with s.359A of the Act, thereby committing jurisdictional error. However, to remit the matter to the Tribunal for further hearing would be an exercise in futility.
- (ii) The Tribunal applied the wrong test to the question of substantial compliance with Condition 8202 in circumstances where there was no compliance with Condition 8202(3)(b). There is no scope for operation of the distinction between strict compliance and substantial compliance in determining whether Condition 8202(3)(b) is satisfied. Either the condition is satisfied or it is not; either there is a certificate of an “at least satisfactory” academic result or there is not.
- (iii) The s.359A letter did not direct the appellant to the information that formed the basis for the Tribunal decision. It made no reference to the number of subjects that he had failed or the fact that he had exhausted appeal mechanisms.
- (iv) Relief may be refused if, irrespective of any question of procedural fairness or individual merits, the decision-maker was bound by the governing statute to refuse the application. In those circumstances, the grant of relief would lack utility. In the present case, the Tribunal was so bound and it was not possible that the Tribunal would reach a different result. The inevitable result of a rehearing is a finding of lack of compliance with Condition 8202 in respect of the visa and a consequent refusal of the application for a further student visa.

SZHWI v MIMA

[2007] FCA 900

Federal Court of Australia, Allsop J, NSD 31 of 2007, 15 June 2007

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations.

The appellant, a Nepalese national, claimed to fear harm from Maoists who had kidnapped his children and demanded money. Although he promised he would, he had been unable to pay the money. He claimed he had been targeted because of his perceived wealth.

In affirming the delegate’s decision the Tribunal found the appellant’s fear was not for a Convention reason. The essential and significant reason for the feared harm was extortion or monetary gain. It also found that the appellant had a right to enter and reside in India where he would not face a well-founded fear of persecution for a Convention reason.

The appellant contended, amongst other things, that the Tribunal failed to consider whether the harm he feared was for reasons of his membership of the particular social group, Nepalese people of perceived wealth, or his imputed political opposition to Maoists.

The Federal Magistrates Court held that the appellant’s claims were based on his personal or perceived wealth, not on membership of a social group. Having found the extortion was indiscriminate it was unnecessary for the Tribunal to address his imputed political opinion.

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

- (i) The Tribunal made a jurisdictional error by failing to direct itself to aspects of the appellant’s claims. The Tribunal also failed to deal with an element of s.36(3) of the *Migration Act 1958* in its independent reasons for affirming the decision.

- (ii) The facts were sufficiently clear to require the Tribunal to consider whether the attempted extortion of someone with money and, having failed to pay, the fear of return, was a criminal act against an individual or conduct directed at him because he fell into some particular social group. The nature and extent of that particular social group is a question of fact for the Tribunal.
 - (iii) The Tribunal failed to deal with an element of s.36(3) - that the appellant had not taken all possible steps to avail himself of a right to enter India. It could not be concluded that if the Tribunal had directed enquiry to this issue the answer would be that he had not taken all possible steps to go to India. It cannot be concluded that failure by the Tribunal to address this element can be excused because it was effectively conceded or not in issue.
- Obiter:*
- (iv) If the Tribunal has not directed itself to the possible imputed political opinion of the appellant arising from his refusal to comply with the extortion demand, that failure is not cured by reaching a conclusion that he was targeted for his personal wealth. The point that was open to be made was that failure to pay, irrespective of the original reasons for targeting him, would lead to an imputed political opinion, although it is unclear whether this claim was in fact raised by the facts.

**SZCQA v MIAC
[2007] FCA 827
Federal Court of Australia, Cowdroy J, NSD645 of 2006, 29 June 2007**

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations.

The appellant, a citizen of India, made claims of political persecution in his protection visa application and a supporting statutory declaration. At the Tribunal hearing, the appellant was able to provide an understanding of what a statutory declaration is when asked and confirmed that all the information contained in his statutory declaration was true and correct. The appellant was questioned extensively in relation to the contents of his statutory declaration by the Tribunal. The Tribunal found that there was a lack of corroborative evidence and noted numerous inconsistencies between the appellant's oral evidence and the statements contained in his application to the Department for a protection visa.

The Federal Magistrates Court concluded that there was no error by the Tribunal. Before the Federal Court the appellant contended that the Tribunal breached s.424A(1) of the *Migration Act* 1958 (the Act) in that the information provided by the appellant in his statutory declaration in support of his protection visa application was not republished to the Tribunal and accordingly that information did not fall within the exception in s.424A(3) of the Act. The appellant submitted that *NBKT v MIMA* [2006] 156 FCR 419 established that if the information relied upon by the Tribunal was communicated by an applicant by way of responses to questions asked by the Tribunal concerning the protection visa application, the exception in s.424A(3)(b) will apply if the nature of the information is uncontentious, foundational or basic but not if it is contentious, complex and diverse.

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

- (i) The Tribunal breached s.424A(1) of the Act as the appellant was entitled to receive notice from the Tribunal that it would be relying on the statutory declaration for the purposes of determining his application for review. Where the Tribunal intends to rely upon information which is more than historical fact or other basic detail, the appellant is entitled to be given notice that the Tribunal will rely upon such information.
- (ii) The information contained in the statutory declaration formed part of the reasons for the Tribunal's decision. It was not uncontentious, foundational or basic, nor was it information which was given to the Tribunal by the appellant to enliven the exception under s.424A(3)(b) of the Act. The fact that the appellant was asked to supplement the information in his statutory declaration orally in answer to the Tribunal's questions and the fact that the appellant referred to the statutory declaration in the course of these answers is not sufficient to constitute "giving" the document to the Tribunal.
- (iii) The mere fact that the appellant understood the significance of a statutory declaration and answered the Tribunal's questions is not relevant to the question of republication envisaged by s.424A(3)(b) of the Act. The fact that the appellant did not have his statutory declaration with him at the hearing supports the inference that the appellant did not intend to adopt or republish the claims made therein.

FEDERAL MAGISTRATES COURT JUDGMENTS

Ashraf v MIAC & Anor

[2007] FMCA 448

Federal Magistrates Court of Australia, Riethmuller FM, MLG 1414 of 2006, 4 June 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to cancel his Student (Temporary) (Class TU) subclass 573 visa.

The applicant had his Student visa cancelled by a delegate of the Department pursuant to s.116 of the *Migration Act* 1958 (the Act). In accordance with r.2.43(2)(b)(ii) of the *Migration Regulations* 1994 (the Regulations), the Minister must cancel a visa under s.116 if satisfied that the visa holder has not complied with condition 8202 *and* the non-compliance is "not due to exceptional circumstances beyond the visa holder's control". In affirming the delegate's decision the Tribunal stated the onus of establishing acts which may lead to cancellation was on the decision maker not the visa holder. However, the Tribunal also referred to Ministerial Guidelines (MSI 382) which discussed the meaning of "exceptional circumstances" in the context of the automatic cancellations regime pursuant to s.137L of the Act. This stated that the onus of establishing exceptional circumstances was on the applicant. The Tribunal found that none of the circumstances put forward by the applicant were exceptional, but then concluded by saying it was not satisfied that the applicant's breach of condition 8202 "was due to exceptional circumstances beyond his control".

The applicant contended, among other things, that the Tribunal misapplied the test in r.2.43(2)(b)(ii)(B) of the Regulations by not asking itself whether the applicant's non-compliance "was not due to exceptional circumstances beyond his control".

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal made an error of law amounting to jurisdictional error in that it failed to consider the matter in accordance with s.116 of the Act and r.2.43 of the Regulations. It considered whether or not it was satisfied that the applicant's breach of condition "was due to exceptional circumstances beyond his control" whereas the Act requires the Tribunal to consider whether or not it could be satisfied that the non-compliance "was not due to exceptional circumstances beyond the visa holder's control".
- (ii) The difference in the two forms of consideration becomes apparent in cases where the Tribunal is unable to be satisfied that there were exceptional circumstances, but is similarly unable to be satisfied that there were not special circumstances. In these cases, the applicant would be successful under s.116 and r.2.43, as the relevant consideration would not leave the decision-maker satisfied that there was not a special circumstance.
- (iii) Notwithstanding the earlier comments and findings in the decision referring to the correct test, in light of the way that the formal finding was expressed together with the reference to MSI 382, the error was not simply infelicitous language, nor was the applicant bound to fail in any event.

Herft v MIAC & Anor

[2007] FMCA 756

Federal Magistrates Court of Australia, Smith FM, SYG1709 of 2006, 6 June 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate that he was not entitled to the grant of a Partner (Migrant) (Class BC) Subclass 100 visa.

The applicant claimed to have been the victim of domestic violence committed by the sponsoring spouse and therefore to satisfy cl.100.221(4) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations) for the grant of the visa.

Relevantly, the Tribunal found that the applicant was not the spouse, as defined in r.1.15A of the Regulations, of the sponsor, and therefore did not satisfy this threshold issue. The Tribunal therefore did not need to consider whether the domestic violence had occurred.

The applicant contended, among other things, that the Tribunal had not properly invited the applicant to a hearing. The applicant's agent had ticked the box on the Tribunal's response to hearing invitation form indicating that the applicant did not wish to appear but also noting that if the Tribunal could make a positive finding on the papers then there would be no need for an appearance. It was contended that the applicant did not consent to not attend a hearing where a positive decision could not be made. It was also contended that the Tribunal had not informed the

applicant of the issue on which the case turned, being whether the spousal relationship had existed prior to the domestic violence, and therefore had not given the applicant an opportunity to respond.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal committed a jurisdictional error by failing to comply with s.360 of the *Migration Act* 1958 (the Act).
- (ii) The applicant's consent to the Tribunal not holding a hearing was qualified and the conditions upon which it was intended to be acted upon were clearly indicated to the Tribunal. The consent was premised on a reasonable misapprehension of the issue that the Tribunal would decide the matter on.
- (iii) The Tribunal's invitation, in the absence of any warning otherwise, implied that the "issues arising in relation to the decision under review" were the issues addressed by the delegate and not the r.1.15A issues upon which the Tribunal decided the case. The Tribunal had no power to proceed to make that decision without having put the applicant on notice of the new issues and then affording him an opportunity to address them at a hearing.
- (iv) It is consistent with the High Court's judgment in *SZBEL v MIMIA* [2006] HCA 63 to construe s.360 as requiring that the Tribunal must be satisfied that the applicant is aware of any new issues on the review at the time when he responds to the hearing invitation, either prior to the hearing, or at least in the course of a hearing which he attends.
- (v) The Tribunal did not proceed under s.362B of the Act and it is hypothetical how it might have contemplated the exercise of that power.
- (vi) The Tribunal correctly instructed itself that it could address r.1.15A criteria at a time prior to the alleged termination of the relationship. However, applicants for a subclass 100 visa are entitled to assume that they have already presented evidence, and to have satisfied the Minister as to the existence of a prior relationship satisfying r.1.15A of the Regulations when obtaining their temporary "spouse" visa, at least in the absence of some special circumstance or communication alerting them to the contrary.

Obiter:

- (vii) The Tribunal denied the applicant procedural fairness and committed a jurisdictional error by not making the applicant aware of the issue on which the case would be decided. The applicant was entitled to assume that the issues identified by the delegate were the issues in dispute.

SZGYT v MIAC & Anor

[2007] FMCA 883

Federal Magistrates Court of Australia, Driver FM, SYG475 of 2007, 6 June 2007

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

The applicant feared persecution in China based on his practice of Falun Gong. He submitted as further evidence nine statutory declarations in which witnesses attested to the applicant's practice and study of Falun Gong in Australia and supporting his claim to be a genuine practitioner. In its reasons for decision, the Tribunal did not accept that the applicant had given a truthful account. The "highly inconsistent and problematic" oral evidence led the Tribunal to conclude that the applicant was not a Falun Gong practitioner in China as claimed. Although the Tribunal accepted that the applicant practised Falun Gong in some form in Australia, it was not satisfied for the purposes of s.91R(3) of the *Migration Act* 1958 (the Act) that the applicant had engaged in conduct in Australia, in relation to his practice of Falun Gong and the demonstration against the Chinese government, otherwise than for the sole purpose of strengthening his claim to be a refugee. In reaching this conclusion, the Tribunal did not accept that there was any credible evidence before it as to why the applicant, having never practised Falun Gong in China, "would commence that practice" in Australia.

The applicant alleged jurisdictional error on the basis that the Tribunal failed to take relevant material into account.

Held: Tribunal decision set aside and remitted for reconsideration.

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

- (ii) The words “engaged in” under s.91R(3) of the Act mean “carried on” rather than “commenced”. A person may commence a course of conduct in Australia for the purpose of enhancing their protection visa claims but nevertheless carry on that conduct for other reasons.
- (iii) By concentrating on the commencement of the applicant’s conduct in Australia rather than considering the entire period of that conduct, the Tribunal overlooked the significance of the statutory declarations attesting to the genuineness of the applicant’s belief and practice of Falun Gong at the time of the declarations. The Tribunal needed to consider whether, taken as a whole, the applicant’s conduct in Australia was merely to support his protection visa claims or whether he had become a genuine practitioner whose risk of harm in China needed to be considered. The statutory declarations supported the proposition that, whatever the applicant’s original motives may have been, he was, at the time of the declarations, a genuine practitioner. There was no real consideration by the Tribunal of that issue.

Dostanov v MIMIA & Anor

[2007] FMCA 792

Federal Magistrates Court of Australia, Nicholls FM, SYG 2483 of 2005, 13 June 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming the decision of a delegate of the respondent Minister to cancel the applicant’s Subclass 573 (Higher Education Sector) visa pursuant to s.116 of the *Migration Act* 1958 (the Act).

The applicant’s visa was subject to Condition 8202 [Schedule 8 to the *Migration Regulations* 1994 (the Regulations)], which relevantly required the applicant to attend for at least 80% of the contact hours scheduled for each term or semester of his course. The Tribunal invited the applicant to a hearing. The applicant’s migration agent wrote asking the Tribunal to reschedule the hearing as the applicant’s treating psychiatrist was out of the country for six weeks and his report would be important to the applicant’s case and it would allow the applicant to be prepared for the hearing. A Tribunal officer contacted the migration agent and informed that the hearing would go ahead as scheduled. The applicant attended the hearing. Subsequently the Tribunal found that for Semester 2 of 2004 the applicant’s attendance was 76.36%, the medical evidence from the applicant’s psychiatrist did not establish that the applicant was unable to attend classes due to depression in that semester and therefore the applicant breached Condition 8202 for that period and the Tribunal was required to cancel the visa.

The applicant contended that the Tribunal denied him procedural fairness by its refusal to delay the hearing given the applicant’s known psychiatric condition.

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) The Tribunal’s failure to consider the issue of the treating psychiatrist’s absence and its impact on the applicant’s capacity to give evidence at the hearing was a failure to accord procedural fairness within the context of its obligation under s.360 of the Act resulting in jurisdictional error. The Tribunal committed a further jurisdictional error by not properly considering the request for it to obtain evidence from the psychiatrist pursuant to s.361 of the Act.
- (ii) There was no evidence before the Court to indicate that the agent’s adjournment request was referred to the Tribunal Member for consideration, or that the Tribunal officer was acting on direction from the presiding member, nor was there anything in the Tribunal’s decision to reflect this. The presiding member’s failure to consider the request for adjournment or how the absence of the treating psychiatrist would impact on the applicant’s capacity to present his evidence and arguments at hearing was a denial of the opportunity for a meaningful hearing pursuant to s.360 of the Act.
- (iii) The agent’s letter constituted a request from the applicant for the Tribunal to obtain evidence from the psychiatrist, it was provided in writing and within the period specified in s.361(2). The omission of this request from the “Request for Hearing” form did not detract from the request in the agent’s letter. The use of the form was optional for this purpose.
- (iv) Even though the Tribunal is not required to comply with the request made under s.361, it is required to have regard to the applicant’s notice: s.361(3) of the Act. There was no evidence of such consideration either in the decision record or otherwise.

LEGISLATION UPDATE

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

Legislation Passed

ACTS

Migration Amendment (Statutory Agency) Act 2007 (No. 87, 2007)

The *Migration Amendment (Statutory) Agency Act 2007*, commenced on 22 June 2007, amends the *Migration Act 1958* (“the Migration Act”) by creating a new statutory agency for the purposes of the *Public Services Act 1999*, comprising the Refugee Review Tribunal (RRT) Principal Member and the staff of the RRT and the Migration Review Tribunal (MRT). The amendments implement changes to the legislative framework of MRT and RRT recommended in the *Uhrig Report, Review of the Corporate Governance of Statutory Authorities and Office Holders*, in 2003. The purpose of the recommended changes is to strengthen the governance of the two tribunals and give legal effect to the practical reality that the tribunals have progressively been administered as one agency since 2001.

Migration Amendment (Review Provisions) Act 2007 (No.100, 2007)

The *Migration Amendment (Review Provisions) Act 2007*, commenced on 29 June 2007, amends the Migration Act by inserting new ss.359AA and 424AA, amending ss.357A & 422B and ss.359A & 424A, as well as making other minor consequential amendments. Broadly speaking, the amendments:

- enable the MRT and RRT to give to an applicant clear particulars of information that would be the reason, or a part of the reason, for affirming the decision under review and to invite comment or response, orally while the applicant is appearing before the Tribunal;
- exclude from the obligation to give adverse information and invite comment or response, information already provided by the applicant to the Department of Immigration and Citizenship (“the Department”) as part of the process leading to the decision under review (other than information given orally to the Department)
- Provide that if adverse information is given, orally or in writing, the Tribunals must ensure that the applicant understands the consequences of the information being relied on in affirming the decision;
- Provide that if adverse information is given orally, the Tribunal must advise that the applicant that he or she may seek additional time to comment on or respond to the information;
- Provide that if the applicant seeks more time to comment on or respond to the adverse information and the Tribunals consider that the applicant reasonably needs more time, the Tribunal must adjourn the review and provide the applicant with that opportunity; and
- Provide that the Tribunals, in implementing the provisions of Part 5 Division 5 and Part 7 Division 4 of the Act, must do so in a way that is fair and just.

Migration (Sponsorship Fees) Act 2007 (No.110, 2007)

The *Migration (Sponsorship Fees) Act 2007*, commenced on 28 June 2007, validates the collection of sponsorship fees for certain temporary visas under regulation 5.38 from the period 1 May 1997 to 24 May 2007. It corrects a problem caused by an oversight in legislative drafting.

REGULATIONS

Migration Amendment Regulations 2007 (No.4) (SLI2007, No.166) (Legislative Instrument - F2007L01798)

The *Migration Amendment Regulations 2007*, commenced on 1 July 2007, amend the *Migration Regulations 1994* (the Principal Regulations) relating to Student visas, charge and fee increases, Tourist and Temporary Business Entry visas, and the obtaining of personal identifiers.

In particular, these amending regulations amend the Principal Regulations to:

- in relation to Student visas, ensure that:
 - certain applicants for a student visa must provide evidence at the time of their application that they either intend to reside in Australia with a parent or other suitable guardian or alternatively that their education provider has made appropriate arrangements for their accommodation, support and general welfare;
 - the education provider's confirmation of appropriate arrangements must be for at least the minimum period of enrolment plus seven days; and
 - a student will breach their visa conditions if they enter Australia before the day nominated by the education provider for those arrangements to commence.
- increase visa application charges and fees in line with increases to the Consumer Price Index;
- increase the second instalment of the visa application charge for a contributory parent visa in line with the Contributory Parent Visa Composite Index;
- prescribe a "Nil" visa application charge for certain Tourist and Temporary Business Entry visa applications;
- enable applicants for a Tourist visa to study in Australia in certain circumstances;
- require an applicant to provide a personal identifier as a requirement for the grant of a Protection, Refugee and Humanitarian or Temporary Safe Haven visa;
- allow personal identifiers obtained from a person in fisheries or environment detention to be used for the purpose of immigration detention if useable and of satisfactory integrity

Migration Amendment Regulations 2007 (No.5) (SLI 2007, No. 190)

(Legislative Instrument - F2007L01980)

The *Migration Amendment Regulations 2007*, commenced on 1 July 2007, amend the Principal Regulations in relation to: Bridging visas; automated border processing systems; the immigration clearance of New Zealand citizens; Student visa conditions; Work and Holiday visa agreements with foreign countries; and Subclass 457 (Business (Long Stay)) visas.

Of particular relevance to the Tribunals, it amends the Principal Regulations to:

- provide that applicants for certain permanent Skilled visas are granted an associated Bridging A or B visa with nil conditions;
- change Student visa condition 8202 to provide that:
 - an education provider, rather than the Minister, will be required to assess whether a student is meeting their attendance requirements; and
 - the student visa holders meets the requirement of the condition if the education provider has not certified that the student has not achieved satisfactory course progress or attendance;
- repeal condition 8206 which limits the ability of student visa holders to change education providers during their course of study and make various consequential amendments;
- clarify that sponsors and nominations for, and grant of a Subclass 457 (Business (Long stay)) visas will not be approved when:
 - adverse information is known about the business background of the sponsor; or
 - the sponsor is under investigation or subject to legal action in relation to an allegation of breach of a sponsorship undertaking or non-compliance with Australian law;
- unless the Minister considers it reasonably appropriate to approve the sponsorship, nomination or grant of the visa in the circumstances; and
- provide that applicants for a Subclass 457 (Business (Long Stay)) visa must have a specified level of English language proficiency (except in certain special circumstances) and allow the Minister to test the applicant's level of English language proficiency.

Migration Amendment Regulations 2007 (No.6) (SLI 2007, No. 191)

(Legislative Instrument - F2007L01896)

The *Migration Amendment Regulations 2007 (No.6) (SLI 2007, No.191)*, commenced on 1 July 2007, amend the Principal Regulations to create a new maritime crew visa (MCV). The MCV replaces special purpose visas which are currently granted by operation of law to members of the crew of non-military ships and the spouses and dependent children of such crew.

Migrations (United Nations Security Council Resolutions) Regulations 2007 (SLI 2007, No. 167)

(Legislative Instrument - F2007L01791)

These regulations, commenced on 1 July 2007, repeal the four existing sets of regulations dealing with travel sanctions imposed by various United Nations Security Council (UNSC) Resolutions, and replace them with a single set of regulations. The new regulations incorporate all the existing travel sanction resolutions, and enable new travel sanction resolutions to be incorporated as required by way of legislative instrument made by the Minister for Immigration and Citizenship. Grounds and circumstances under these regulations apply to cancellation of a visa under s.116 of the *Migration Act 1958* and consideration of visa applications made by a UNSC designated person.

INSTRUMENTS

Migration Act 1958 – Direction under s.499 – *Guidelines for considering cancellations of student visas for breach of Condition 8202* (Direction No.37 of 2007)

(Legislative Instrument - F2007L01860)

The *Direction No.37 of 2007* made under s.499 of the Migration Act, commenced on 1 July 2007, provides guidance to Department of Immigration and Citizenship decision-makers about what may be considered as exceptional circumstances when determining whether cancellation action should be pursued for breach of condition 8202. The Direction applies to the Student Visa (TU) visa, Subclass 570 (Independent ELICOS Sector), Subclass 571 (Schools Sector), Subclass 572 (Vocational Education and Training Sector), Subclass 573 (Higher Education Sector), Subclass 574 (Postgraduate Research Sector), Subclass 574 (Postgraduate Research Sector), Subclass 575 (Non-Award Sector) and Subclass 576 (AusAID or Defence Sector).

Migration Regulations 1994 – Specification under subparagraph 1224(3)(c)(iii) – Class of Persons

(Legislative Instrument - F2007L01929)

This Instrument, commenced on 1 July 2007, specifies a class of persons who can make a valid application for Subclass 462 (Work and Holiday) visas, subject to satisfying the requirements of subparagraph 1224A(3)(c)(i) and (ii). In particular, it specifies holders of passports issued by the Islamic Republic of Iran as a class of persons for the purposes of subparagraph 1224A(3)(c)(iii). The Iranian passport holders are therefore eligible to apply for up to three successive Subclass 462 (Work and Holiday) visas.

Migrations (United Nations Security Council Resolutions) Regulations 2007 – Specification of United Nations Security Council Resolutions under regulation 4

(Legislative Instrument - F2007L01877)

This instrument, commenced on 1 July 2007, specifies the United Nations Security Council Resolutions for the purposes of regulation 5 of the *Migration (United Nations Security Council Resolutions) Regulations 2007*.

Migration Regulations 1994 – Specification under clause 457.223 of Schedule 2 – Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa

(Legislative Instrument - F2007L02077)

This instrument, commenced on 1 July 2007, operates to indicate the minimum level of salary an applicant must be paid to be exempted from the English language requirement where it is in the interests of Australia. It also operates to exempt the following groups of persons from the English language requirement, where the nominated occupation does not require a level of English language competency for grant (however described) of registration, licence or membership. Applicants:

- whose nominated activity attracts a level of salary that is at least the level of salary worked out in a way specified by the Minister in an Instrument in writing;
- whose first language is English and are passport holders of Canada, New Zealand, the Republic of Ireland, the United Kingdom or the United States of America;
- who are nominated for a genuine position in ASCO Major Groups 1-3;
- who have completed at least a five consecutive years of full-time study in a secondary and/or tertiary education institution where at least 80 per cent of the instruction was delivered in English;
- who are nominated for an activity that will be undertaken within the confines of a diplomatic or consular mission of another country or an office of the authorities of Taiwan.

Migration Act 1958 – Specification under paras 82(2AA)(a) and (b) – Substantive Visa Classes

(Legislative Instrument - F2007L01939)

This instrument, commenced on 1 July 2007, operates to indicate that any class of substantive temporary visa may be held concurrently with the MCV except for a Special Purpose visa granted to a person on the grounds that they are a member of the crew on a non-military ship, or a spouse or dependent of a member of the crew. This information will be required by immigration officers for the purposes of determining circumstances where another visa may be granted to the holder of an MCV, or where the MCV may be granted to the holder of another visa.

Migration Regulations 1994 – Specification under paragraph 1218(2)(a)(i)(B) – Classes of Persons
(Legislative Instrument - F2007L01929)

This instrument, commenced on 1 July 2007, specifies two classes of persons who are entitled to a nil visa application charge for a Subclass 676 (Tourist) visa;

- Holders of a passport issued by a European Union (EU) member who electronically lodge an application from offshore for a Subclass 676 (Tourist) visa for a duration of three months or less; and
- Registered World Youth Day pilgrims.

Migration Regulations 1994 – Specification under paragraph 1223A(2)(a)(ix) – Classes of Persons
(Legislative Instrument - F2007L01933)

This instrument, commenced on 1 July 2007, specifies which class of persons is entitled to a nil visa application charge to apply for a Subclass 456 Temporary Business (Short Stay) (Class UC) visa. It lists certain passport holders for whom a nil visa application charge is prescribed, namely, holders of a passport issued by a European Union member country, as set out in the Schedule.

Legislation Pending

Migration Amendment (Sponsorship Obligations) Bill 2007
(Bill - C2007B00148)

The *Migration Amendment (Sponsorship Obligations) Bill 2007* was introduced into the House of Representatives on 21 of June 2007 and was referred to the Senate and Constitutional Legislation Committee for inquiry and report by 30 July 2007.

The Bill seeks to amend the *Migration Act 1958* by introducing a regime of obligations to be met by employers who are approved sponsors in relation to an applicant for certain visas. The new regime aims to apply to prescribed kinds of visas and where the obligations apply these will replace the current undertakings arrangements. The new regime also incorporates enforcement provisions by way of civil penalties if an approved sponsor breaches an obligation as well as provisions for inspectors to monitor an employer's compliance with their sponsorship obligations. In addition there are enhanced information exchange powers between the Department and other prescribed Commonwealth, State and Territory Agencies.

CASELOAD OVERVIEW

MRT Decisions – June 2007

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	3	11	0	2	16
Visitor refusal	24	15	0	4	43
Student refusal	26	24	3	3	56
Temporary business refusal	12	14	1	1	28
Permanent business refusal	6	3	0	1	10
Skill linked refusal	49	15	3	5	72
Partner refusal	152	61	6	7	226
Family refusal	27	26	3	2	58
Student cancellation	51	43	2	11	107
Sponsor approval refusal	5	5	1	1	12
Other	12	14	1	1	28

RRT Decisions – June 2007

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	2	0	0	0	2
Albania	1	0	0	0	1
Azerbaijan	0	1	0	0	1
Bangladesh	1	4	0	15	20
Cambodia	0	1	0	0	1
China (PRC)	14	62	1	0	77
Colombia	1	0	0	0	1
Ethiopia	0	1	0	0	1
Fiji	0	2	0	2	4
Former Yugoslavia	0	1	0	0	1
Ghana	1	1	0	0	2
India	0	13	0	7	20
Indonesia	1	12	0	0	13
Israel	1	1	0	0	2
Kenya	1	0	1	0	2
Korea, Dem Peoples Rep of	0	1	0	0	1
Korea, Republic Of	0	2	0	0	2
Lebanon	1	4	1	0	6
Macedonia, Fmr Yugo Rep of	0	1	0	0	1
Malaysia	0	3	0	2	5
Mongolia	2	2	0	0	4
Nepal	0	4	0	1	5
Nigeria	1	0	0	0	1
Pakistan	2	3	0	0	5
Philippines	0	3	0	1	4
Portugal	0	1	0	0	1
Russian Federation	0	1	0	0	1
Saudi Arabia	1	0	0	0	1
Singapore	0	1	0	0	1
Sri Lanka	3	5	0	0	8
Syria	0	1	0	0	1
Thailand	0	2	0	0	2
Tunisia	1	0	0	0	1
Turkey	1	0	0	0	1
Uganda	1	0	0	0	1
Ukraine	1	0	0	0	1
United Kingdom	0	1	0	0	1
Uzbekistan	1	0	0	0	1
Vietnam	1	0	0	0	1
Zimbabwe	2	0	0	0	2

PUBLICATION OF TRIBUNAL DECISIONS

The Migration Review Tribunal and Refugee Review Tribunal are required to publish decisions that are considered to be of 'particular interest'.

Decisions which are regarded 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 up to 20% of decisions made.

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.

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

The websites also contain 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 websites are updated on a regular basis.

The Migration Review Tribunal and the Refugee Review Tribunal shall not be liable for any reliance by any person on the summaries contained in this Bulletin. Each summary provides a guide only to each decision and should not, under any circumstance, be used as a substitute for the full text of a decision.

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