



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

060587666

18 July 2007, Melbourne

Ms M Hodgkinson, Member

INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) VISA – SUBCLASS 880 — EMPLOYMENT – REMUNERATION – The applicant applied for an Independent Overseas Student (Residence) (Class DD) visa which was refused by a delegate of the Minister for Immigration and Citizenship. The delegate awarded the applicant 115 points and refused the application on the basis that the applicant failed to obtain a pass mark in his ‘qualifying score’ for his nominated skilled occupation. The applicant claimed he was entitled to an additional five points under the ‘bonus points qualification’ by reason of his employment in Australia in a skilled occupation for a period totalling six months or more in the 48 months immediately before the day on which his application was made pursuant to item 6A82 of Schedule 6A to the *Migration Regulations* 1994 (the Regulations). The delegate relied upon advice from the Australian Taxation Office (ATO) that no group certificate was held in relation to the applicant’s claimed employment during the relevant period in concluding that the work undertaken by the applicant must not have attracted remuneration and, therefore, did not satisfy the definition of ‘employment’ as required by the Regulations. The applicant supplied the Tribunal with further information regarding the nature of his employment as a sales representative dealing in telecommunication products. The employer provided a description of the duties of the position and the ATO advised the Tribunal that their inability to provide a copy of the applicant’s tax summary was due to internal practices associated with electronic taxation returns and their inability to produce a copy of the tax summary did not reflect adversely upon the applicant.

Held: Decision under review set aside.

Based on the information provided by the ATO the Tribunal decided not to draw any adverse inferences against the applicant in respect of his employment during the relevant period. The Tribunal further accepted that the Australian Business Number (ABN) on the applicant’s tax file number declaration was the same as that of his employer. Balancing the evidence and the Australian Standard Classification of Occupations (ASCO) definition, the Tribunal was satisfied that the duties of the applicant closely matched those of Sales Representative (Information and Communication Products) (ASCO code 2222-13) and this position appeared on the relevant Skilled Occupations List. Therefore, the Tribunal found that the applicant was employed in a skilled occupation for remuneration for the relevant period, and was entitled to five points under item 6A82. The Tribunal awarded the applicant 120 points and found that the applicant achieved the qualifying score.

V05/05509

23 July 2007, Melbourne

Ms L Spieler, Member

STANDARD BUSINESS SPONSORSHIP APPROVAL REFUSAL – R.1.20D – UNINCORPORATED SOLE TRADER – The applicant applied for approval as a standard business sponsor which was refused by a delegate of the Minister for Immigration and Citizenship on the basis that applicant did not satisfy r.1.20D(2)(c) of the *Migration Regulations* 1994 (the Regulations) in that there was insufficient evidence of a record, or a demonstrated commitment towards, the business training Australians. The applicant applied for approval on the basis of his landscape gardening business which he operated as a sole trader. On the basis of sponsorship by his business he applied for a Subclass 457 temporary business visa for himself. In relation to his application for approval as a business sponsor the applicant claimed that as the workload of the business had increased, together with his intention to grow the business, it was necessary for him to take on additional staff to meet the increasing needs of the business. The applicant claimed to have hired a part time employee who would undertake further training either directly through the business or through a horticultural institute. and that a minimum of 4% (which could increase to 7%) of payroll costs would be spent on training.

Held: Decision under review affirmed.

The Tribunal accepted that, although the applicant’s commitment to training his new part-time employee was somewhat modest, it was reasonable given the nature and scope of the business at the time and found the applicant satisfied r.1.20D(2)(c). However, the Tribunal found the applicant did not satisfy the requirement in r.1.20D(2)(b) that the applicant for approval proposes to be the direct employer in Australia of the visa applicant as the holder of the visa. The Tribunal found it was not open for the applicant to sponsor himself in a business conducted by himself as a

sole trader operating an unincorporated business. The Tribunal applied the reasoning of Smith FM in *Moller v MIAC* [2007] FMCA 168, upheld on appeal by Cowdroy J in *Moller v MIAC* [2007] FCA 839 in finding the employer must be a separate legal entity to the visa applicant in order to be legally capable of incurring the separate obligations, responsibilities and benefits of sponsoring employer. Although noting that the Department of Immigration and Citizenship Procedures Advice Manual (PAM3) did not clearly distinguish between sponsorship by a sole person proprietary company and unincorporated sole trader which was inconsistent with r.1.20D(2)(b), the Tribunal was required to apply the law and found the applicant did not meet the requirements for approval as a standard business sponsor.

060738359

17 August 2007, Melbourne

Ms S Borg, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 - Clause 856.213(c)(i) – OVER THE AGE OF 45 YEARS –“EXCEPTIONAL CIRCUMSTANCES”

The applicant applied for a Subclass 856 Employer Nomination Scheme visa on the basis that he was employed by U L Auto Care as an auto mechanic since 2000. At the time of application the applicant was 60 years old. The applicant's employer requested an assessment of an 'exceptional' appointment on the basis that the applicant's age was not relevant because he was "highly experienced in the field of motor mechanics and has got 24 years of hands on experience as a motor mechanic in both diesel and petrol". Further, the applicant's employer claimed that several attempts to find a replacement in Australia and overseas have been unsuccessful. The delegate of the Minister for Immigration and Citizenship refused the visa on the basis that the applicant did not satisfy cl.856.213(c)(i) of Schedule 2 to the *Migration Regulations 1994* (the Regulations) because he was over the age 45 years and his appointment at U L Auto Care was not deemed to be 'exceptional'.

Held: Decision under review set aside.

The Tribunal considered the Department of Immigration and Citizenship's Procedures Advice Manual (PAM) which contained guidelines in relation to exceptional appointments on age grounds and noted that applicants who are over 60 years old do not generally have exceptional circumstances considered. It decided not to apply the policy because to do so in this particular case would produce an unjust decision. The Tribunal considered the following gave rise to exceptional circumstances for this appointment: the applicant's very good health; his 7 year employment with UL Auto Care; the submissions by UL Auto Care in relation to the applicant's high level of expertise, its inability to find a replacement in Australia and overseas, its attempts to train apprentices in the specific skills held by the applicant only to have them leave the employer upon completion of the apprenticeship; and also substantial financial loss if UL Auto Care was to lose the service of the applicant. Therefore, despite the applicant's occupation not being listed on the Migration Occupations in Demand List or being an Australian Standard Classification of Occupations 1-2 occupation, the Tribunal found that exceptional circumstances applied in regard to the applicant's appointment and was satisfied that the applicant met the requirements of cl.856.213(c)(i).

Partner and Family Visas

071194285

18 July 2007, Sydney

Mr T Delofski, Member

OTHER FAMILY (MIGRANT) (CLASS BO) VISA - SUBCLASS 115 - CL 115.211 – REMAINING RELATIVE - The applicant applied for an Other Family (Migrant) (Class BO) Visa in October 2006, which was refused by the delegate of the Minister for Immigration and Citizenship on the basis that the visa applicant failed to satisfy the requirements in cl.115.211 of the *Migration Regulations 1994* (the Regulations) that the visa applicant must be a 'remaining relative' of an Australian relative at time of application. The application included the visa applicant's son as the secondary applicant. The secondary applicant had not turned 18. The visa applicant had two near relatives, his mother and father, both of whom were Australian permanent residents usually resident in Australia. The delegate found the visa applicant's son was also a near relative as he was not "dependent", as defined in r.1.05A, on the visa applicant at the time of application. The visa applicant, his mother, and his ex-wife all gave written declarations that the secondary applicant lived with and was wholly or substantially in the daily care and control of the visa applicant.

Held: Decision under review set aside.

The Tribunal found that the visa applicant was the remaining relative of the review applicant as defined in r.1.15 of the Regulations. It found the visa applicant was sponsored by his sister, the review applicant, who was a settled Australian citizen who had turned 18 and was usually resident in Australia: r.1.15(1)(a) and (b). The Tribunal noted that the definition of “near relative” in r.1.15(2) referred only to a child of the visa applicant who had not turned 18 who was not wholly or substantially in the daily care and control of the visa applicant. It accepted the evidence that the son was wholly or substantially in the visa applicant’s daily care and control and, therefore, found the secondary applicant was not a near relative of his father and the visa applicant’s only near relatives were his parents and the review applicant. Having found that the visa applicant satisfied the definition of “remaining relative”, the Tribunal found the applicants met the criterion in cl.115.211.

071200908

1 August 2007, Sydney

Ms K Raif, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 116 (CARER) – CL.116.221 – CLOSE RELATIVE – The primary and secondary visa applicants applied for Other Family (Migrant) (Class BO) – Subclass 116 (Carer) visas which were refused by the delegate of the Minister for Immigration and Citizenship on the basis that the primary visa applicant did not satisfy cl.116.221 of the *Migration Regulations* 1994 (the Regulations) that the primary visa applicant is the carer of an Australian relative (the sponsor). The primary visa applicant claimed to be the carer of his father, the sponsor, who suffered from physical and emotional health problems including dementia and hearing loss. The primary visa applicant claimed that other family members were not able to care for the sponsor due to their own personal commitments, such as full time employment and education. The primary visa applicant, together with his spouse (a secondary visa applicant), claimed that they were willing and able to provide the necessary care to the sponsor.

Held: Decision under review affirmed.

The Tribunal found that the primary visa applicant was not a ‘carer’ as defined by r.1.15AA of the Regulations. The Tribunal relied upon the applicants’ evidence that upon arrival in Australia the primary visa applicant would look for employment while his spouse would remain at home and provide care to the sponsor. Whilst the Tribunal accepted that obtaining employment was a part of the normal integration process, it found that it was incompatible with the primary visa applicant’s own evidence as to the extensive assistance required by the sponsor with most aspects of his daily life. The Tribunal was not satisfied that the primary visa applicant was able to provide the substantial and continuing assistance required. As the primary criteria only needed to be satisfied by any one member of the family unit, the Tribunal also considered whether the secondary visa applicant spouse met the primary criteria. Based on the definition of “relative” in r.1.03 of the Regulations, the Tribunal found no evidence that the secondary visa applicant spouse had the requisite degree of relationship with the sponsor and was not satisfied that she was a “relative” of the person requiring care as required by r.1.15AA(1)(a).

061058039

8 August 2007, Sydney

Ms G Cullen, Member

PARTNER (TEMPORARY) (CLASS UK) VISA – SUBCLASS 820 – SUBCLAUSE 820.211 - SCHEDULE 3 - COMPELLING REASONS - The applicant applied for a Partner (Temporary) (Class UK) visa which was refused by the delegate of the Minister for Immigration and Citizenship on the basis that, as the applicant did not hold a substantive visa at the date of application she failed to satisfy the requirement in cl.820.211 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations) which required the applicant to satisfy Schedule 3 criteria 3001, 3003 and 3004 unless the Minister was satisfied there were compelling reasons for not applying the criteria. The applicant claimed her father’s illness, her genuine spousal relationship with her sponsor and her support of the sponsor during his campaign in state elections as compelling reasons. In addition, the applicant claimed that the parties did not have much money and had a mortgage, therefore, it would cause them great financial disadvantage if they had to leave their jobs to travel overseas to apply for a visa.

Held: Decision under review set aside.

The Tribunal was satisfied on the evidence that the applicant was the spouse of the sponsor within the meaning of r.1.15A of the Regulations. However, the Tribunal found that the applicant did not satisfy item 3001 of Schedule 3 as the visa application was not made within 28 days of the relevant day, being the last day that the applicant held a substantive visa. In considering whether there were compelling reasons for not applying the Schedule 3 criteria, the Tribunal accepted the applicant’s evidence that, but for her father’s heart attack she would have commenced her studies at university and would therefore have been on a student visa at the time of application for the spouse visa. The Tribunal accepted that the applicant withdrew from her studies to take care of her father. In addition, the

Tribunal accepted that the parties were in a genuine spousal relationship and that because of the nature of their relationship they both would return overseas if the applicant had to apply for another visa offshore. The Tribunal accepted that the parties were employed, that to return overseas to apply for a visa would result in them losing their jobs and that this would impose an undue financial hardship. On the basis of these circumstances, the Tribunal was satisfied that there were compelling reasons for waiving the Schedule 3 criteria. Accordingly, the Tribunal was satisfied that the applicant met cl.820.211.

071127336

13 August 2007, Sydney

Ms K Raif, Member

CHILD (MIGRANT) (CLASS AH) VISA – SUBCLASS 102 - ADOPTION – SPONSOR DID NOT RESIDE OVESEAS MORE THAN 12 MONTHS AT TIME OF APPLICATION – The visa applicant applied for a Child (Migrant) (Class AH) visa, subclass 102 on 27 October 2006. A delegate of the Minister for Immigration and Citizenship refused to grant the visa as the sponsor had not resided overseas for more than 12 months at the time of application, as required by cl.102.211(2) of the *Migration Regulations* 1994 (the Regulations). In addition, there was no evidence the visa applicant's adoption was approved by a competent authority or that it was made in accordance with the Adoption Convention. The review applicant claimed that her parents raised the visa applicant, a citizen of China, who was abandoned at birth. She stated that she adopted the visa applicant in February 2006 in accordance with Chinese law. The review applicant submitted that it was in the visa applicant's best interest for her to reside in Australia and requested the Tribunal to waive the 12 month requirement.

Held: Decision under review affirmed.

The Tribunal found that the review applicant had not been residing overseas for more than 12 months at the time of application and that it had no power to waive this requirement, therefore, the visa applicant did not meet cl.102.211(2). It noted that there was no evidence before it that a competent Australian authority had approved the review applicant as a suitable adoptive parent and, therefore, found that the visa applicant could not satisfy cl.102.211(3) or (4). In relation to cl.102.211(5), the Tribunal found the visa applicant's adoption had taken place in accordance with Chinese laws but that there was no evidence the adoption was made in accordance with the Adoption Convention. The Tribunal accepted the review applicant's claims in relation to the best interests of the child but found it had no discretion to waive the statutory requirements.

Student visas

060717246

11 July 2007, Sydney

Mr J Cipolla, Member

STUDENT (TEMPORARY) (CLASS TU) VISA - SUBCLASS 572 – VISA REFUSAL - CL.572.224 – PUBLIC INTEREST CRITERION 4013 The applicant applied for a Student (Temporary) (Class TU) Subclass 572 visa to undertake further studies in Australia. A delegate of the Minister for Immigration and Citizenship refused to grant the visa on the basis that the applicant did not meet cl.572.224 of the *Migration Regulations* 1994 (the Regulations) because his last held Subclass 573 visa was automatically cancelled under s.137J of the *Migration Act* 1958 (the Act), and that he was precluded under public interest criterion 4013 from lodging a further student visa application within 3 years unless there were compelling circumstances affecting Australia's interests or the interests of Australian citizens, permanent residents or eligible New Zealand citizens.

Held: Decision under review set aside.

The Tribunal found that the automatic cancellation under s.137J of the Act was reversed by the Minister because the s.20 notice issued under the *Education Services for Overseas Students Act* 2000 was defective. The effect was that the applicant had not been the subject of a previous visa cancellation and thus the exclusion period envisaged by public interest criterion 4013 was not applicable in this case. The Tribunal accordingly found that the applicant met cl.572.224 of the Regulations.

060948049
17 July 2007, Sydney
Mr R Derewlany, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 573 – VISA REFUSAL –CL.573.235 – COMPLY SUBSTANTIALLY WITH CONDITIONS – ACADEMIC PERFORMANCE – The applicant applied for a further Student (Temporary) (Class TU) subclass 573 visa onshore to undertake further studies in Australia. A delegate of the Minister for Immigration and Citizenship refused to grant the visa on the basis that the applicant did not meet cl.573.235 of the *Migration Regulations 1994* (the Regulations). That clause requires applicants who apply in Australia to comply substantially with the conditions that apply or applied to the last substantive visas held by the applicant and any subsequent bridging visa. Item 8202(3)(b) of Schedule 8 to the Regulations was a condition on the applicant's last substantive visa. It requires that the applicant achieved an academic result certified by the education provider to be at least satisfactory. The delegate relied on advice from the education provider that the applicant had not achieved satisfactory results in term 2, 2005 and term 1, 2006. Certification from the education provider that the applicant had achieved satisfactory academic results was provided to the Tribunal. In addition, the Tribunal received a letter from the Dean of Students of the education provider explaining that the initial certification was made with inadequate knowledge of the university's policies and processes regarding academic standing, progression and exclusion and that the university had not made a judgment about the student's academic results at the time of the original certification.

Held: Decision under review set aside.

The Tribunal found that the applicant had complied substantially with condition 8202(3)(b) of his Subclass 573 visa. The Tribunal considered the new evidence from the education provider which indicated that the original certification was incorrect and was satisfied that the education provider had certified that the applicant had achieved satisfactory academic results in the relevant terms. Therefore, the Tribunal found that the applicant had complied with the academic results requirements of condition 8202 and that there was no evidence before it that the applicant had not complied with the other requirements of condition 8202 or any other condition of his last held student visa or subsequent bridging visa. The Tribunal was satisfied that the applicant met cl.573.235 for the grant of the visa.

060663213
25 July 2007, Sydney
Mr L Hardy, Member

STUDENT (CLASS TU) VISA – SUBCLASS 572 – VISA REFUSAL – ENGLISH LANGUAGE PROFICIENCY – The applicant applied for a Student (Class TU) subclass 572 visa. A delegate of the Minister for Immigration and Citizenship refused to grant the visa on the basis that the applicant did not have the requisite English language proficiency as specified in cl.5A404 of Schedule 5A to the *Migration Regulations 1994* (the Regulations) and therefore did not meet cl.572.223(2)(a)(i)(A) of the Regulations. The education provider certified that the applicant completed the requirements for a Senior Secondary Certificate of Education in Year 11 and 12 in Australia and in English. The applicant did not present any evidence of an overall certificate of achievement issued by the NSW Board of Studies. Course Reports indicated that she achieved below the minimum standard expected in three of the subjects in which she sat examinations including English. According to the internal assessment of the education provider the applicant failed most of her subjects including English. The applicant argued that she met the English language proficiency requirements because she was certified as a person who successfully completed years 11 and 12 in Australia and in English, as recorded by the education provider in a "Senior Secondary School Certificate" (SSCE). The education provider was accredited to the Board of Studies NSW.

Held: Decision under review set aside

The Tribunal found that the applicant met the requirements of cl.5A404 of the Regulations. The question for the Tribunal was whether the applicant successfully completed the requirements for a SSCE in a course that was conducted in Australia and in English. The requirement is not that she must have been awarded an SSCE, but that she must have successfully completed the requirements for one. The SSCE is not defined in law. In NSW the senior secondary certificate of education is the Higher School Certificate (HSC) which has eligibility requirements as set by the NSW Board of Studies. The Tribunal accepted that the applicant gained the School Certificate or such other qualification as the Board of Studies considered satisfactory for her to proceed to senior secondary studies with the education provider. The Tribunal found that the provider's HSC stated the applicant successfully completed an HSC pattern of study in Australia and in English. The Course Reports satisfied the Tribunal that she sat for and made a serious attempt at the HSC external examinations thereby becoming eligible for an HSC, separate from being awarded an HSC. The Tribunal found no legal basis for assuming that only the awarding of an HSC or the eligibility to sit for the HSC satisfies cl.5A404(d)(i). Therefore, in the absence of a narrower legal definition, it considered the certificate issued by the education provider is evidence the applicant successfully completed the requirements for an SSCE in a

course that was conducted in Australia and in English. The Tribunal found that the applicant met the requirements of cl.5A404 of Schedule 5A to the regulations and as such satisfied cl.572.223(2)(a)(i)(A).

REFUGEE REVIEW TRIBUNAL DECISIONS

Afghanistan

071246761

9 July 2007, Melbourne

Mr D Mitchell, Member

AFGHANISTAN – FURTHER PROTECTION VISA – RACE – HAZARA – RELIGION – APOSTATE – POLITICAL OPINION – The applicant, a Shia Muslim of Hazara ethnicity, was previously recognised as a refugee on the basis of a well-founded fear of persecution for reasons of his race and religion. In his application for a further protection visa the applicant claimed to fear persecution on the grounds that he was a Hazara and due to a resurgent Taliban and other Pashtuns. He claimed he no longer believed in religion and would be killed in his village as an apostate. He also claimed he was a member of an opposing political party to that currently controlling his hometown. The applicant claimed as a Western returnee people in Afghanistan would harm him because they would think he must be wealthy.

Held: Decision under review set aside

Although the Tribunal accepted that the applicant was of the Hazara ethnic group, it did not consider that being a Hazara from Afghanistan was sufficient of itself to give rise to well-founded fear of persecution. The Tribunal did accept, however, that the applicant would have a well-founded fear for the combined reasons of race, religion (or lack of it), and imputed political opinion if he were to return to his home area. Accepting that the applicant's home village was effectively encircled by Taliban forces, the Tribunal considered the chance far from remote that he might come to their attention and suffer significant physical ill-treatment. In addition, the Tribunal considered there was a real chance that, given the applicant was a Hazara who had clearly been living in a Western country, he would be assumed to continue to hold views antithetical to those of the fundamentalist Taliban. The Tribunal considered that internal relocation was unavailable to the applicant given his limited family and support network outside of his home area, and found that there was no part of Afghanistan to which he could reasonably be expected to relocate where he would be safe from the persecution that he feared. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

China

071372583

31 July 2007, Sydney

Mr R Derewlany, Member

CHINA – RELIGION – CHRISTIAN – The applicant feared persecution for reasons of her religion. She claimed that she was introduced to Christianity by a friend after her divorce and she attended gatherings regularly. She claimed she was baptised at the home church, which belonged to the "Gospel" church. The applicant claimed that she was detained and questioned by the Public Security Bureau (PSB) and some members of the church were sent to a labour camp. She also claimed that she could not practise in one of the official churches because she believed that the official churches did not serve God but served the Government. The applicant claimed that she let the group use her business premises for religious service and when discovered by the PSB her business was sealed and some members were arrested. She claimed that she then fled and came to Australia on a false passport.

Held: Decision under review set aside

The Tribunal found that the applicant's claims were consistent with independent evidence that unregistered religious groups experienced varying degrees of official interference and harassment in China. It found that she was a credible witness who displayed a good understanding of Christianity. It also accepted that she entered Australia on a false passport. The Tribunal accepted that the applicant attended Christian services in China as a member of an unregistered house or underground church and she attended Christian services regularly in Australia. It further accepted that she was detained and interrogated in China and subjected to mistreatment for her practice of Christianity. The Tribunal also accepted that the applicant would continue to attend house churches on her return to China because she believed that the registered churches did not truly serve God. As a result it found the applicant would face a real chance of persecution. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

071348694
23 July 2007, Sydney
Ms B Forsyth, Member

CHINA – RELIGION – CHRISTIAN – The applicant claimed to fear persecution for reasons of his Christian religion. He claimed to belong to a church that was not part of the official church. He said the authorities considered this underground church a criminal organisation. The applicant claimed he had been interrogated, arrested and detained and stated the authorities stamped on his slippers and caused his toes to bleed. The applicant also claimed he made 5,000 copies of a petition which he delivered to government agencies and shopping centres thereby knowingly placing himself in danger. He claimed the authorities placed a “black spot” against his name and he was interrogated three times. The applicant entered Australia using a false name and passport.

Held: Decision under review set aside

The Tribunal accepted that the applicant was a Christian and a member of an underground church. It found he had been baptised, and attended religious gatherings in China and church in Australia. It further found the applicant attended church in Australia otherwise than for the purpose of strengthening his claim to be a refugee. It noted the applicant answered its questions about Christianity with confidence and certainty and did not believe the applicant could have delivered his responses in this manner unless they were something he genuinely had given some thought to and accepted. While the Tribunal did not accept the applicant’s claims about the petition, interrogation or detention, it did accept authorities had stamped on his slippers because it was not the type of detail it would have expected unless he had been speaking from personal knowledge. It, therefore, took into account the possibility that the applicant had come to the adverse attention of and been questioned by police, even if not in the manner or to the extent claimed. Accepting the independent information that Christians who attend underground churches are subject to persecution the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

071323178
25 June 2007, Sydney
Ms S Durvasula, Member

CHINA – POLITICAL OPINION – FALUN GONG – The applicant feared persecution as a Falun Gong practitioner. She informed the Tribunal that her protection visa application was incorrect and provided the correct information at the hearing. The applicant claimed to have been detained on two occasions, harassed and monitored by the authorities. She further claimed she was required to write letters of repentance, compelled to regularly attend police stations, and dismissed from her employment. She also claimed to have obtained a passport through bribery. The applicant said she had continued to practise Falun Gong after arriving in Australia. She described and demonstrated the exercises and explained Falun Gong’s philosophies and principles.

Held: Decision under review set aside

The Tribunal accepted that the applicant had relied upon her agent to complete her protection visa application, did not speak English and noted she had volunteered an explanation without prompting. It also drew no adverse conclusion from her ability to obtain a passport and one year later depart China without difficulty. The Tribunal accepted that the applicant was a genuine and committed Falun Gong practitioner and would not change her beliefs. It found she could not reasonably relocate within China and had presented a credible account of her experiences. The Tribunal concluded that the applicant’s Falun Gong activities within Australia, her previous history and independent country information established a real chance of persecution. As such the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

India

071204626
13 August 2007, Sydney
Ms A Cranston, Member

INDIA – PARTICULAR SOCIAL GROUP – HOMOSEXUALITY – The applicant husband and wife claimed to fear persecution on the basis of the applicant husband’s homosexuality. He claimed to have been socially harassed, abused by the authorities and ostracised from his family because of homosexual behaviour in India. The applicant wife claimed she was forced to marry the applicant husband, which made her the subject of bullying, sexual assaults and

harassment. The applicant husband claimed to have advertised as a sex worker and to have read men's magazines after arriving in Australia. He submitted the advertisement and photographs of homosexual activity.

Held: Decision under review affirmed

The Tribunal did not find the applicants' evidence to be credible. The Tribunal found the applicant wife gave inconsistent evidence about the sexual assault and where she was living after the birth of the applicants' child. It also found the applicant husband gave inconsistent evidence about when his parents and wife found out about his sexuality. The Tribunal further found that the applicants' marriage, birth of their child, arrival in Australia as husband and wife, joint protection application and continued residency together as husband and wife were inconsistent with the applicant husband's claimed homosexuality. It noted the photographs were taken in the same room and with the same party as photos in other cases before the Tribunal and found the photos and the advertisement were orchestrated for the purposes of the protection application. As such, the Tribunal, in accordance with s.91R(3), disregarded that conduct. The Tribunal concluded that the applicant husband was not a homosexual, had not engaged in homosexual activity in India and that neither applicant if returned would face a real chance of harm. As such the Tribunal was not satisfied the applicants had a well-founded fear of persecution for a Convention reason.

Indonesia

071372632

29 June 2007, Sydney

Ms P Pope, Member

INDONESIA – ETHNICITY – CHINESE – RELIGION – CHRISTIAN – The applicant claimed to fear persecution for reasons of his Chinese ethnicity and because he was a Christian. He claimed that as an ethnic Chinese he would face discrimination and as a Christian he would face violence. He said he was not present during the 1998 riots and his wife and child were not harmed. Also while his mother faced injury during the riots she was not actually harmed. However, the applicant claimed his parents' business was no longer prosperous and when he returned to Indonesia he had had difficulty finding work. He claimed the area had changed since the riots and business opportunities declined. The applicant claimed he had professed his Christian faith publicly. Although he had never been involved in or witnessed any attacks, the applicant claimed he and Christian congregations in generally were fearful when there were threats or rumours of bombs and attacks on churches.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was of Chinese ethnicity and a Christian. The Tribunal also accepted the applicant's unease and fear about the future. However, the Tribunal found it was not possible for it to make a decision on the basis that a person fears that something might happen to him in the future. It had to assess whether there was a real chance that harm might befall the applicant in the reasonably foreseeable future. The Tribunal noted improvements in Sino-Indonesian relations and the absence of any major anti-Chinese activity since the riots. It found this indicated that that situation would not arise in the same way again and there was a public and demonstrated willingness by the government to protect its citizens. While it appreciated that life was difficult for the applicant because of the limited employment opportunities, based on the evidence before it the Tribunal was not satisfied the applicant had a well-founded fear of persecution for a Convention reason.

Israel

071316825

29 June 2007, Sydney

Ms A Younes, Member

ISRAEL – PARTICULAR SOCIAL GROUP – PACIFIST – DESERTER – LAW OF GENERAL APPLICATION – The applicant claimed to fear persecution for reasons of his membership of the pacifists' movement. He claimed that, although he had participated in compulsory military service, he was a deserter in the eyes of the Israeli authorities due to his failure to present for compulsory reservist service together with his pro-peace beliefs. He claimed to have participated in many pro-peace demonstrations and, as a result, to have been routinely questioned by the authorities, arrested and detained on one occasion. He also claimed he was fired by his employer.

Held: Decision under review affirmed

The Tribunal accepted as plausible that the applicant had participated in a specific demonstration and that he had been detained and questioned as a result. The Tribunal found, however, that on the applicant's own evidence the police had "targeted everybody" at the demonstration and that he had not been singled out for a Convention reason. The Tribunal also accepted that he had been dismissed from his job after the demonstration, but again on the applicant's own evidence found that his dismissal was attributable, correctly or incorrectly, to his productivity whilst employed. The Tribunal accepted that while the applicant may have been visited by the police and talked to on occasion, it did not accept that they were "checking" on him because he was of adverse interest to them. The Tribunal was further satisfied that the compulsory conscription feared by the applicant was a non-discriminatory law of general application. While accepting that he may be penalised as a deserter if he refused to participate the Tribunal was not satisfied that he would receive disproportionate ill-treatment amounting to persecution. As such the Tribunal was not satisfied the applicant had a well-founded fear of persecution for a Convention reason.

Lebanon

071410995

9 July 2007, Melbourne

Ms K Raif, Member

LEBANON – RELIGION – JEHOVAH'S WITNESS –The applicant feared persecution for reasons of his religion. He claimed that he was born in a Christian Orthodox faith but was baptised into Jehovah's Witness. He also claimed he held a position as a Senior Officer. The applicant claimed that he and his family were threatened, harassed and discriminated against by their neighbours who were mainly hardline Orthodox Christians and Muslims. He claimed that Jehovah's Witness was not recognised as a religion under Lebanese law and that his children had to go overseas to get married as they were unable to get legally married in Lebanon. The applicant also claimed that they were forbidden to convene for religious activities and his family cemetery which was registered as Jehovah's Witness was closed down by the government. The applicant referred to a number of other Tribunal decisions where Jehovah's Witnesses were found to be in a vulnerable position in Lebanon.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was a Jehovah's Witness and acted as a Senior Officer in his congregation in Lebanon and Australia. It also accepted that he would continue to practise if he returned to Lebanon. In light of independent information, the Tribunal accepted that Jehovah's Witnesses were not recognised under the Constitution of Lebanon and the applicant had experienced certain restrictions with respect to his religious practices. It also accepted that the applicant's cemetery had been closed down. However, the Tribunal found that, although there were reports of occasional local instances of opposition, the independent information provided no evidence of serious harm befalling Jehovah's Witnesses. It also provided no evidence they had been prevented from practising their faith. It acknowledged that other Tribunal decisions had set aside primary decisions relating to Jehovah's Witnesses in Lebanon but noted that the Tribunal must consider each case on its merits and did not consider itself bound by such decisions. Accordingly, the Tribunal was not satisfied that the applicant's fear of persecution was well-founded.

Nepal

071296105

29 June 2007, Sydney

Ms S Durvasula, Member

NEPAL– POLITICAL OPINION – ANTI MAOIST - The applicant claimed that he became involved in politics due to his relative's influence, joined a political party while studying, was pro-royalist and spoke out against the Maoists. He claimed he was kidnapped by the Maoists and tortured before being released. He claimed he supported Christian friends with their programs and soon after Maoists broke into his home, robbed him, forced his family to leave the house and destroyed it completely. He then moved to Kathmandu and was supported by his relatives and the Maoists did not know where he was living. He claimed his family had been long affiliated with the political party and was targeted for donations and threatened by the Maoists. He claimed that if he returned to Kathmandu he would have to live secretly and he could not hide there forever. He claimed the peace agreement in Nepal was not enforced in practice and he could not relocate to India as there were Maoists there and it would be difficult for him to find food, shelter and work there as Nepalese were discriminated against in India. The applicant's evidence was supported by

two witnesses and by various documents which were confirmed by the Department of Foreign Affairs and Trade to be authentic.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness. The Tribunal accepted the applicant was adversely targeted by Maoists because of his active involvement with the political party and because of his relative's long standing involvement in politics. The Tribunal accepted he was detained by the Maoists and his house was destroyed by the Maoists. The Tribunal also accepted the applicant had a prominent anti-Maoist profile and, as a result, the Maoists continued to threaten him while he remained in his home city. The Tribunal concluded that the applicant could not relocate within Nepal and live safely within another part of the country. The Tribunal did not accept that there was a reasonable level of state protection available to the applicant against the risk of future harm from Maoists. The Tribunal was satisfied that there was a real chance the applicant would experience persecution from the Maoists if he returned to Nepal and the applicant's political opinion was the essential and significant reason for the persecution he feared. The Tribunal was unable to be satisfied the applicant had an existing legally enforceable right to enter and reside in India either temporarily or permanently. The Tribunal was satisfied that the applicant had a well-founded fear of persecution in Nepal for reason of political opinion and that subsection 36(3) of the *Migration Act* 1958 did not apply to him with respect to India.

Pakistan

071413088

18 July 2007, Sydney

Ms K Raif, Member

PAKISTAN – RELIGION – AHMADI – THIRD COUNTRY PROTECTION – The applicants claimed to fear persecution in Pakistan for reasons of their Ahmadi religion. The applicants claimed that their family received threats of harm and threats that they may be reported for preaching their religion. They also claimed that a relative of the primary applicant was killed. The applicants claimed that they were threatened when people realised that the family was well-settled and had a good business. The primary applicant's husband had remained in Pakistan and was afraid for his life. The applicants had valid visitor visas for another country which permitted a stay of up to 180 days.

Held: Decision under review set aside

The Tribunal accepted that the applicants were of Ahmadi faith. It also accepted their claims of past harm on the basis that they were consistent with independent information and accepted that their problems were exacerbated by events in a certain year. Therefore, the Tribunal found that there was a real chance that the applicants would face persecution for reason of their religion if they were to return to Pakistan now or in the reasonably foreseeable future. The Tribunal was not satisfied that the State would provide adequate and effective protection from the harm claimed. Accordingly, the Tribunal was satisfied that the applicants had a well-founded fear of persecution for a Convention reason. Further, the Tribunal found that the visitor visas held by the applicants did not constitute a right to enter and reside in another country and s.36(3) of the *Migration Act* 1958 did not apply. The Tribunal concluded the applicants were, therefore, persons to whom Australia had protection obligations.

HIGH COURT JUDGMENTS

SZATV v MIAC [2007] HCA 40

High Court of Australia, Gummow, Kirby, Hayne, Callinan and Crennan JJ, S62/2007, 30 August 2007

This was an appeal against an order of Tamberlin J, sitting in the Federal Court's appellate jurisdiction, dismissing an appeal from a judgment of Nicholls FM, which dismissed an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia owed protection obligations.

The appellant, a Ukrainian national, claimed that as a political journalist he had criticised governor and government corruption in the Chernovtsy region and that he had been subjected to a systematic campaign of harassment and mistreatment as a result. The appellant had published several articles critical of the governor and linking him to corruption in July 2000 which had drawn objections and threats, and these were followed by searches, an assault, and in May 2001 the appellant was summoned to the local police station. He departed for Australia in June 2001.

The Tribunal accepted the appellant's claims, found he was generally a credible witness, and went on to find that the appellant had suffered persecution in the past for the Convention reason of his political opinions. It went on to find, however, that because the persecution he had suffered was localised in the Chernovtsy region, it would be reasonable for the appellant to relocate elsewhere in Ukraine. While, the Tribunal found, he may not be able to work as a journalist elsewhere in Ukraine, he might be able to find work in the construction industry as he has done in Australia. The Tribunal was therefore not satisfied that his fears of persecution upon his return were well founded.

Before the High Court, the appellant advanced two grounds of appeal, the first being that the 'internal relocation' principle is unsupported by the text of the Refugees Convention and is incorrect. The second ground was that the Tribunal failed to make findings about, and consider, whether requiring the appellant to avoid the expression of political opinions in relocating in the Ukraine would require the appellant to sacrifice one of the fundamental attributes which the Refugees Convention is intended to protect and uphold. The appeal was heard together with *SZFDV v MIAC* [2007] HCA 41 and judgments delivered on the same day.

Held: *per curiam* Appeal allowed

Internal relocation

per Gummow, Hayne & Crennan JJ (Callinan J agreeing)

- (i) Depending on the circumstances of the case, it may be reasonable, in the sense of practicable, for the appellant to relocate to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. However, what is 'reasonable' must depend on the particular circumstances of the applicant and the impact upon that person of relocation of the place of residence within the country of nationality.
- (ii) Because the Refugees Convention is concerned with persecution in the defined sense, not with living conditions in a broader sense, whether relocation is reasonable or practicable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights.

per Kirby J

- (iii) A propounded 'fear' of persecution might not be classified as 'well-founded' if, instead of seeking protection from Australia, it would be reasonable for the applicant to rely on his or her country of nationality to afford the protection at home by the simple expedient of moving to another part of the country, free of the risk of persecution. Relocation would be unreasonable where it amounts to an affront to any of the specified Refugees Convention-based grounds of persecution which it is the object of the Convention to prevent, discourage and redress.

Application of the relocation principle

per Gummow Hayne & Crennan JJ (Callinan J agreeing)

- (iv) The Tribunal considered that the applicant could move elsewhere in Ukraine and live 'discreetly', not working as a journalist, so as not to attract the adverse interest of the authorities in his new location, lest he be further persecuted by reason of his political opinions. By this reasoning the Tribunal sidestepped consideration of what might reasonably be expected of the appellant with respect to his 'relocation' in Ukraine.

per Callinan J

- (v) Whilst in this case the Tribunal fell into error, it is too categorical to hold that discretion with respect to membership, or an attribute of a social group, properly defined is a necessarily unreasonable requirement or expectation, or, if it has to be exercised to avoid persecution, will mean in all circumstances that the member is a persecuted person.

per Kirby J

- (vi) The Tribunal made an error of the type identified in *Appellant S395/2002 v MIMA* [2003] HCA 71. To consider what is reasonable for the refugee applicant to do by way of internal relocation is not to hypothesise supposedly reasonable conduct such as 'living discreetly'. The Tribunal must consider how in fact the refugee applicant will act if returned to the country of nationality. Necessarily this must be considered in cases where the internal relocation postulate is raised, bearing in mind that the applicant will be expected to act reasonably. The Tribunal displayed a clear error in its understanding of the purpose of the Refugees Convention, which includes that of safeguarding the appellant's right to have, and to express, his 'political opinion' in Ukraine and not to be persecuted for it.

SZFDV v MIAC

[2007] HCA 41

High Court of Australia, Gummow, Kirby, Hayne, Callinan and Crennan JJ, S61/2007, 30 August 2007

This was an appeal against an order of Madgwick J, sitting in the Federal Court's appellate jurisdiction, dismissing an appeal from a judgment of Barnes FM, which dismissed an application for judicial review of decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia owed protection obligations.

The appellant, an Indian national, claimed that he and his family sympathised with the Communist Party in Tamil Nadu and that his brother had been killed by "rowdies" from the Dravida Munnetra Kazhagam (the DMK) and another major Tamil party. The appellant claimed that he had been elected as a trade union leader at the mill where he was employed and disputed some payments to the workers by their employer. He claimed that the mill owners held him responsible for the subsequent closure of the mill and had used their influence as DMK members to procure the laying of false charges against the appellant for the murder of a DMK leader. The appellant claimed to have been assaulted by DMK "rowdies" and that his family was threatened.

The Tribunal did not think it plausible that the mill owners or the DMK would have the capacity to cause the appellant difficulties in the adjoining state of Kerala or that his parents would continue to be questioned as to his whereabouts if he relocated there. Having regard to the appellant's education, health and employment background, as well as country information showing that Kerala had a relatively large Tamil speaking community and Communist Party presence, the Tribunal was satisfied that the appellant could reasonably be expected to relocate within India and by doing so would avoid any well-founded fear of persecution for a Convention reason.

Before the High Court, three grounds of appeal were pressed, being that the Tribunal erred by: (a) having asked whether the appellant might reasonably be expected to relocate within India to avoid persecutory harm; (b) treating the reasonable availability of protection within India as determinative of his refugee status; and (c) failing to make findings about, and consider, whether requiring the appellant to relocate would involve the abnegation of the attribute for which the appellant was selected for persecution. The appeal was heard together with *SZATV v MIAC* [2007] HCA 40 and judgment delivered on the same day.

Held: per Gummow Hayne & Crennan JJ (Callinan J agreeing) Appeal dismissed

Internal relocation

per Gummow Hayne & Crennan JJ (Callinan J agreeing)

- (vii) As indicated in *SZATV*, and as a general proposition to be applied to the circumstances of the particular case, it may be reasonable for the applicant for a protection visa to relocate in the country of nationality to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution.

per Kirby J

- (viii) If, reviewing all the facts, it is concluded that the particular applicant, acting reasonably, will relocate if returned to that country, it will be open to the decision-maker to conclude, where the source of the fear of Convention-related persecution is localised in the country of nationality, that the propounded fear of persecution is not "well-founded".

Application of the internal relocation principle

per Gummow Hayne & Crennan JJ (Callinan J agreeing)

- (ix) The Tribunal did consider and make findings about whether relocation to Kerala would involve abnegation of the attribute for which the appellant had come into conflict with the mill owners and members of the DMK. For the reasons given, the Tribunal concluded, as it was open to do, that the appellant could safely relocate to Kerala and that it would not be unreasonable to expect him to do so.

per Callinan J

- (x) The Tribunal did not assume or expect, on relocation or otherwise, the silencing of the appellant's political views. The Tribunal's reasons focussed upon, and correctly identified, the activities in which he was involved and the controversy to which they gave rise as effectively exclusively local.

per Kirby J (dissenting)

- (xi) The Tribunal offended against the principles laid down in *Appellant S395/2002 v MIMA* [2003] HCA 71 in three ways. First, it failed to ask whether the particular applicant would, as a matter of fact, relocate from Tamil Nadu if he were returned to India. Instead it asked whether the Tribunal could itself impose such an obligation. Second, it failed to examine the "well-foundedness" of the appellant's current fear of persecution based on the reality of what in fact he would reasonably do if he were returned to India. Third, it failed to consider whether it would be inconsistent with the purpose of the Refugees Convention to require the appellant to relocate within India, given that his asserted fear of persecution is claimed as being on the basis of his expressions of his political opinion. The Tribunal contemplated the appellant's abandonment of his political opinions in India in the only place where it was relevant and important to the appellant, namely in the State of Tamil Nadu. In effect the Tribunal's approach amounted to a demand to "live discreetly".

FEDERAL COURT JUDGMENTS

SZHBX v MIAC

[2007] FCA 1169

Federal Court of Australia, Edmonds J, NSD716 of 2007, 7 August 2007

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

The appellant, a citizen of Bangladesh, claimed he had a well-founded fear of persecution by reason of his Buddhist religion. While accepting that the appellant was a Buddhist, the Tribunal did not accept that he had a high profile, or that he faced serious harm. The Tribunal was not satisfied that his business was targeted by Muslim businessmen because he was a Buddhist. The Tribunal found that he had embellished his claims and was not a credible witness. Further, it was reasonable for him to relocate within Bangladesh. The Federal Magistrates Court concluded that there was no error by the Tribunal.

The appellant contended that the Federal Magistrate erred in failing to hold that the Tribunal erred by failing to deal with the appellant on the basis that he belonged to a particular social group such as Buddhist businessmen. It was claimed that the Minister's delegate dealt with the claim on that basis and it was not obvious on the known material having regard to the issues arising, that the Tribunal would not deal with the claim on the same basis.

Held: Appeal dismissed

- (i) Whether the appellant was persecuted as a member of a particular social group was not squarely raised as an issue before the Tribunal. There was no necessity for the Tribunal to pursue it further or deal with it in its reasons. It was sufficient for the Tribunal to ask the first appellant to expand upon his account and explain the nature of the Convention ground on which he relied. The way the Tribunal identified the relevant issue was consistent with observations made by the High Court in *SZBEL v MIMA* [2006] HCA 63.
- (ii) The Tribunal is not bound to treat the applicant's case as identical to the case the applicant presented to the delegate or as confined to the issues which were identified by the delegate. The Tribunal does not have a duty to inform an applicant that because the evidence on which he or she now relies is different from the evidence before the delegate, the Tribunal may make different factual findings. Nor does the Tribunal have a duty under s.425 of the *Migration Act 1958* to inform an applicant that because the claims are now framed on the basis of a different Convention ground it will be required to consider whether the evidence supports the new claim.
- (iii) Even if the ground of appeal were established the Tribunal's decision would stand on the basis of its finding that it was reasonable for the first appellant to relocate.

M175 of 2002 v MIAC

[2007] FCA 1212

Federal Court of Australia, Gray J, VID 1137 of 2004, 10 August 2007

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

The appellant claimed to fear persecution in Sri Lanka for reasons of his imputed political opinion; being sympathetic to and assisting the Liberation Tigers of Tamil Eelam (LTTE). The Tribunal invited the appellant to a hearing before it and arranged for an interpreter to be present. The interpreter did not have either National Accreditation Authority for Translators and Interpreters (NAATI) level 3 or level 2 accreditation. He had "NAATI recognition". At the hearing the interpreter advised the Tribunal he had "NAATI recognition" but it was not at "level 3". The Tribunal embarked on the hearing with the interpreter interpreting without further discussion as to the interpreter's qualifications. Based on country information and the appellant's inconsistent evidence to it, the Tribunal did not accept that the appellant had been involved with the LTTE.

The Federal Magistrates Court dismissed the application and before the Federal Court the appellant contended that the Tribunal breached s.425 of the *Migration Act 1958* (the Act) by not providing him with adequate interpreting services and failing to afford him an effective opportunity to give evidence and present arguments.

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

- (i) As the appellant was not afforded a real opportunity to give evidence, the Tribunal failed to comply with its obligation under s.425(1) of the Act. To the extent to which the appellant was not able to put before the Tribunal the evidence he wanted to, because elements of his answers were omitted from the interpreter's translation of them, he was deprived of the opportunity to give evidence to the Tribunal.
- (ii) It is apparent from an analysis of the flaws in the interpreting at the Tribunal hearing that the appellant was not able to give the evidence that he wanted to give in its entirety. Some of the interpreter's errors can be traced directly to findings in the Tribunal's reasons for decision. The appellant failed to satisfy the Tribunal that he had a well-founded fear of persecution because the Tribunal did not believe his claims. There was plenty in the content of the appellant's evidence, as it was presented to the Tribunal through the interpreter, which must have caused the Tribunal to doubt that the appellant was being truthful. In all of these ways, the interpreter's errors were of significance, or at least of potential significance, to the outcome of the case. The errors deprived the appellant of a fair opportunity to succeed. They therefore amounted to a denial of procedural fairness.

SZHBP v MIAC

[2007] FCA 1226

Federal Court of Australia, Rares J, NSD792 of 2007, 15 August 2007

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations. The appellant, a citizen of the People's Republic of China (PRC), claimed that he was detained and tortured after organising protest activities.

The Tribunal found that, although accepting of these claims, there was only a remote chance that the PRC authorities or anyone else would seek to harm him in the reasonably foreseeable future for political reasons. This was based on the Tribunal finding that he had not engaged in political activity since his arrest and that he had not expressed interest in pursuing further political activities in the reasonably foreseeable future. The Federal Magistrate at first instance found that the Tribunal had made a factual assessment, as it was open to do, that the appellant had engaged in a brief episode of political activism but that he had no interest in pursuing further political activities in the reasonably foreseeable future.

On appeal, the appellant argued that the Tribunal had committed jurisdictional error on two counts. Firstly, that the Tribunal had failed to ask whether the ceasing of his political activities, and his failure to express interest in further involvement in them, was a consequence of his accepted persecutory treatment. Secondly, that the Tribunal had failed to consider whether he had a well founded fear of persecution, having regard to his individual circumstances, characteristics and history, because it was necessary for him to be politically inactive in the PRC in order to avoid persecution.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Federal Magistrate erred in failing to find that the Tribunal made a jurisdictional error.
- (ii) The Tribunal did not address whether the applicant had been effectively silenced by the threat of further harm were he again to express any political opinion. The Tribunal should have considered whether the applicant had changed or modified his interest in protesting against the government's conduct because of the persecutory consequences the Tribunal accepted that he had suffered. This was relevant to whether the threat of further persecution gave rise to a well-founded fear in the applicant that he would be persecuted for reasons of political opinion.
- (iii) The facts which the appellant claimed had occurred to him required the Tribunal to consider what would occur in the future if he were to return to China. The Tribunal failed to ask itself whether its finding as to what had happened to the applicant in China indicated that his lack of political activity was because he feared that expressing his opinions would subject him to further persecution.

- (iv) The Tribunal needed to address whether the applicant would have feared in the future to express his political opinions, or if he would abstain from doing so, were he returned to China because in that way he would hope to avoid persecution.

SZGCK v MIAC
[2007] FCA 1247

Federal Court of Australia, Marshall J, NSD2382 of 2006, 17 August 2007

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 that the appellant was not a person to whom Australia had protection obligations.

The appellant had applied for release to him of Department of Immigration and Citizenship and Tribunal file contents under the *Freedom of Information Act* 1982 (Cth) (FOI Act). Certain documents were exempt from disclosure under the FOI Act and were not released. Prior to his hearing, the appellant raised with the Tribunal his concern that the exempt information might be taken into account by the Tribunal in considering his “good faith”. The Tribunal stated in its decision that the documents were not considered by it to be relevant to his protection visa application and that they had been put aside and not used as any basis for its decision. Federal Magistrate Smith dismissed the appellant’s judicial review application. His Honour accepted that some of the material in the exempt documents was potentially derogatory of the appellant’s character and the credibility of his refugee claims, but found that the Tribunal treated the exempt documents as not credible, relevant and significant to the decision to be made and that it decided on the review without relying on them.

On appeal from the Federal Magistrates Court, the appellant claimed that the Tribunal was affected by apprehended bias, that it denied him procedural fairness by not providing him with an opportunity to comment on allegations made about him.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal, to accord procedural fairness to the appellant, should have informed him of the substance of the allegations made in the exempt documents and asked him to respond to them, or at the very least informed him of the substance of those parts of the exempt documents which bore on the credibility of his claims to have a well-founded fear of persecution, and asked him to respond. In failing to do so, the Tribunal failed to accord the appellant procedural fairness.
- (ii) No reasonable tribunal could consider that the documents were not “credible, relevant and significant”. Some of the material in the exempt documents was supported by other parts of it. That impacts on its potential credibility. The exempt documents could not be divorced from an assessment of the appellant’s claim to have a well-founded fear of persecution. At the very least, they could not, by their nature, be reasonably dismissed as not bearing on the credibility of the appellant’s refugee claims in a real and substantial way such that the material in them could be put to one side and out of the decision-maker’s mind.
- (iii) The Tribunal’s view on the credibility, relevance and significance of material could be reviewed by a Court in circumstances where the material is, of its nature, so obviously credible, relevant and significant that a reasonable tribunal could not regard it as otherwise.

MIAC v Le & Ors
[2007] FCA 1318

Federal Court of Australia, Kenny J, VID 317 of 2007, 27 August 2007

This was an appeal from a judgment of the Federal Magistrates Court allowing an application for judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister’s delegate that they were not entitled to the grant of a Partner (Temporary) (Class UK) visa.

During the hearing, the Tribunal referred the sponsor to evidence on the Department of Immigration and Citizenship (DIAC) file which indicated that during his interview with the delegate he had stated he was no longer in a relationship or living with the primary visa applicant, had signed a statement withdrawing his sponsorship and had then subsequently withdrawn that statement following demands by the primary visa applicant. The sponsor denied telling the delegate that he had not been living with his wife and that the marriage was not genuine. He stated that he had been placed under significant pressure during the five hour interview and had become confused.

Following the interpreter's departure, the Tribunal advised the applicants' agent that he could either request a further hearing before he left that day or following receipt of the detailed s.359A letter that it would be sending to him under s.359A of the *Migration Act* 1958 (the Act). The agent responded that he didn't feel a further hearing would be necessary. The Tribunal acknowledged the agent's view but reinforced that he should contact the Tribunal if, following receipt of the s.359A letter, the applicants wished to be invited to a further hearing. During its conversation with the agent, the Tribunal noted it was not ideal to be discussing these matters in the absence of an interpreter and asked that he arrange for the Vietnamese staff in his office to relay their discussion to the applicants. No request for a further hearing was made

On appeal, McInnis FM, held that the Tribunal erred by failing to discharge its obligations under s.360 of the Act and by unreasonably failing to make enquiries of the delegate.

Held: Appeal dismissed

- (i) The failure of the Tribunal to make a straightforward enquiry for information that was apparently readily available and relevant to critical issues was unreasonable in the sense used in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. This was one of the rare or exceptional cases where a decision maker acting reasonably would have made some further enquiry.
- (ii) At the least, a decision-maker, acting reasonably in the *Wednesbury Corporation* sense, would have sought to verify whether the primary decision-maker's statements regarding the sponsor's supposed admissions derived from what the primary decision-maker mistakenly understood to be the effect of his written statement. Additionally, a decision-maker would have enquired whether the interviewing officer, acting under the misapprehension that the sponsor said that his marriage relationship had ended, had advised the sponsor to withdraw his sponsorship. In the circumstances of this case especially the mistranslation, a decision-maker acting reasonably might also have made some enquiry as to whether the interpreter at the Departmental interview was adequately qualified.
- (iii) There was no breach of s.360(1) and no proper basis for the Federal Magistrate to conclude that the Tribunal's repeated offers to conduct a hearing were not genuine because the offers were made to the applicant's advisor and were not contemporaneously translated to the applicant.
- (iv) It was not open to the Federal Magistrate to proceed on the basis that the applicant's agent did not convey the offer of hearing to the applicant, or had acted negligently.

SZIED v MIAC
[2007] FCA 1347
Federal Court of Australia, Moore J, NSD 2121 of 2006, 30 August 2007

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

The appellants were husband and wife. The husband appellant (the appellant), a coffee farmer, claimed that he joined the Liberal Party in 1990 and supported a local politician. He claimed that a group called Ejercito Popular de Liberacion (EPL) approached him in 1996, threatened him and demanded money. The appellant claimed that he feared persecution from the EPL because he refused to pay the illegal 'war tax' they demanded from him and because they feared he would report them to the authorities. He also claimed that if he were to return to Colombia, he would feel compelled to return to the family owned farm and be a coffee grower.

Referring to independent country information indicating that a small EPL group continued to operate in Colombia, albeit lacking in resources to track a person down throughout Colombia, the Tribunal found that the EPL could target the appellant if he were to return to the farm and that that he could face serious harm amounting to persecution. It then proceeded to consider whether it may be reasonable for the appellant to access internal protection by relocating within Colombia. The Tribunal rejected the appellant's claim that he would be compelled to return to the farm because if the appellant was prepared to live in Australia for some eight years where he was unable to have contact with the farm, he could also live in Colombia without choosing to live or work on the farm. It considered the appellant's employment in Australia in construction and cleaning and his wife's qualification as a beauty therapist and found that they would be able to pursue work in a city in Colombia. Accordingly, the Tribunal was satisfied that it was reasonable for the appellants to access internal protection by relocating within Colombia.

On appeal from the Federal Magistrates Court, the appellant contended that the Federal Magistrate erred in his finding that the Tribunal correctly applied the test in *Randhawa v MILGEA* (1994) 52 FCR 437, in that it had failed to have regard, or failed to have appropriate regard, to the appellants' personal circumstances and the practical realities in the event of such relocation.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal fell into jurisdictional error by misunderstanding the content of the principle propounded in *Randhawa*.
- (ii) The test propounded by Black CJ in *Randhawa* requires that the evaluation be proper, realistic and fair and all the circumstances be taken into account. Proper consideration must be given to the issue of relocation as a practical matter, by considering whether it would be reasonable to expect a person to relocate in view of all the 'practical realities' facing that person.
- (iii) It was not open to the Tribunal to reject the appellant's claim that he would feel compelled to return to the family if he were to return to Colombia, by pointing to the fact that he abandoned the farm by fleeing to Australia. His fleeing to Australia was to escape persecution. The Tribunal did not give real consideration to the specific impediment raised by the appellant, namely that he would feel compelled to return to work on the family farm.

FEDERAL MAGISTRATES COURT JUDGMENTS

SBWD v MIAC & Anor

[2007] FMCA 1156

Federal Magistrates Court, Lindsay FM, ADG 144 of 2006, 20 July 2007

The applicant, a national of Nigeria, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution as a Christian and because he was a member of the Yoruba-based political group, O’Odua People’s Congress.

The applicant claimed that religious violence in Jos led to the death of his family members. The Tribunal did not deal with the applicant’s specific situation but discussed the concept of religious violence more generally. It found that the religious violence in Nigeria was “random and sporadic” and that “therefore” there was not a “systematic” attempt by Nigerian Muslims to eliminate Christians. The Tribunal found that as s.91R of the *Migration Act* 1958 (the Act) required that the persecution be systematic, the religious violence claimed by the applicant could not amount to Convention-related persecution.

The applicant contended, among other things, that the Tribunal fell into jurisdictional error by failing to properly understand its obligations pursuant to s.91R of the Act.

Held: Tribunal decision quashed and remitted for reconsideration

- (i) The Tribunal misapprehended the effect of the requirement in s.91R of the Act that conduct be “systematic” and in applying its understanding of s.91R made a jurisdictional error.
- (ii) Justice McHugh in *MIMA v Haji Ibrahim* (2000) 204 CLR 1 eschewed the use of the expression “systematic conduct” except if it is made clear that the reference is to “non-random” acts. But it is clear that His Honour was referring to ‘non-random’ acts in the sense of non-selective acts: an act would be random if it was not deliberate or premeditated or intended. The reasoning of the Tribunal indicates that that the Tribunal used the word “random” as a synonym for the word “sporadic”. This connotes an understanding of the word “systematic” very close to the regular or methodical sense of the word identified in *Ibrahim*, as erroneous.
- (iii) Further, the Tribunal appeared to think that its categorisation of the religious violence as “random and sporadic”, entailed a finding that religious violence “that erupts from time to time” was not “systematic” and therefore did not meet the definition of persecution. This was erroneous because religious violence which erupts from time to time could be “systematic”.

Cao v MIAC & Anor

[2007] FMCA 1239

Federal Magistrates Court of Australia, McInnis FM, MLG 1195 of 2005, 31 July 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 she was not entitled to the grant of a Partner (Migrant) (Class BC) subclass 100 visa.

The applicant sought to rely on the domestic violence exception after her marital relationship had ceased. In support of her application the applicant relied on three statutory declarations. One of them was from Ms Hart, a “Co-ordinator of WAYSS Ltd. Emergency Accommodation”. The Tribunal found that Ms Hart was not a competent person as defined in regulation 1.21(2) of Division 1.5 of the *Migration Regulations* 1994 (the Regulations), on the basis there was “no evidence” before the Tribunal to suggest that Ms Hart was a coordinator or manager of a women’s refuge, or a crisis and counselling service that specialises in domestic violence. The Tribunal did accept that WAYSS emergency accommodation was affiliated or connected with the WAYSS domestic violence service.

The applicant contended that: 1) the Tribunal erred in that it imposed a test for “specialises” in regulation 1.21(2) of the Regulations to mean a sole specialty, which was too restrictive and not warranted by the Regulations; and 2) the Tribunal was wrong in concluding there was no evidence and it failed to deal with the applicant’s claim that Ms Hart was a competent person.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal failed to deal with the case before it and to that extent asked itself the wrong question or misconstrued the essential statutory criteria which resulted in jurisdictional error.
- (ii) The Tribunal erred in that it imposed a test for “specialises” which was too restrictive and not warranted by the definition in regulation 1.21(2) of Division 1.5 of the Regulations. There is nothing in the regulation which provides that the position should require the person to specialise in only one area or the organisation to which the person is attached that specialises in domestic violence cannot provide other services.
- (iii) The Tribunal erred when it made the finding there was no evidence before the Tribunal to suggest that Ms Hart was a coordinator or manager of a women’s refuge, or a crisis and counselling service that specialises in domestic violence. There was evidence which should have been dealt with by the Tribunal rather than it simply found that there was no evidence in relation to the issue.

SZIQN v MIAC & Anor

[2007] FMCA 1376

Federal Magistrates Court of Australia, Scarlett FM, SYG 1043 of 2006, 3 August 2007

SZIQM v MIAC & Anor

[2007] FMCA 1372

Federal Magistrates Court of Australia, Scarlett FM, SYG 1042 of 2006, 3 August 2007

The applicants, citizens of the Philippines, sought judicial review of decisions of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations. SZIQN claimed a fear of persecution after her husband, a local councillor, was murdered by rebels. SZIQM, the niece of SZIQN, also claimed a fear of persecution as an eyewitness to the murder of her uncle. They also provided evidence of the murder of SZIQN’s brother-in-law who was a policeman and that they had received a series of threats from the New People’s Army (NPA) in letters and threatening conduct.

The Tribunal accepted the reason for the murder of SZIQN’s husband was his political opinion but did not accept that he was also murdered for reasons of his membership of the particular social group of his family and did not accept that subsequent events showed that the applicants faced a real chance of persecution for reason of family membership, political opinion or any other reason. The Tribunal accepted SZIQN’s brother-in-law was murdered by the same people, for the same reasons, by reason of his office and the political values that represented, but did not accept that it gave rise to a well-founded fear of persecution for reasons of membership of the family. The Tribunal accepted SZIQN suffered psychological harm as a result of her husband’s murder. The Tribunal was not satisfied the applicants had suffered any subsequent persecution following this incident, or that such harm as occurred was for the same or related reasons as her husband’s murder. The Tribunal found that the threatening letters to SZIQN were in the nature of extortion demands as a result of public knowledge that SZIQN had control over her late husband’s assets. The Tribunal found that SZIQM did not have a subjective or well-founded fear of persecution arising from the killing itself as the attackers made threats to SZIQM at the time of the killing to intimidate her into not talking to the police, but took no further steps to contact her or track her down although she remained in the area, enrolling in further study.

The applicants set out a series of contentions, including, that the Tribunal erred by failing to consider whether fear of harm as a consequence of a Convention-related murder could amount to a well-founded fear of execution even if the perpetrators of the threats were not themselves acting from political motivation.

Held: Tribunal decision quashed and remitted for reconsideration according to law

- (i) The Tribunal committed jurisdictional error in relation to SZIQN in failing to consider whether the original political reason for the husband’s murder was the essential and significant reason for the persecution. This jurisdictional error also established jurisdictional error in relation to SZIQM based on her claim as a member of the family of SZIQN.
- (ii) Once the Tribunal had accepted that threats were made to SZIQN as a consequence of the murder of her husband which the Tribunal had accepted occurred for a Convention reason, the Tribunal was bound to consider whether the Convention reason was the essential and significant reason for those threats.

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

REGULATIONS

Migration Amendment Regulations 2007 (No.7) (SLI2007, No.257) (Legislative Instrument – F2007L02644)

The *Migration Amendment Regulations 2007(No.7) (SLI2007, No 257)*, commenced on 1 September 2007, amend the *Migration Regulations 1994* (the Principal Regulations) and make significant changes to the General Skilled Migration (GSM) programme by restricting the relevant classes and subclasses of visas. In particular, these amending regulations amend the Principal Regulations to:

- increase the level of English language requirements to be satisfied by applicants for GSM visas;
- allocate additional points to applicants with strong English language skills under the GSM points test;
- place greater emphasis on skilled work experience in the requirements for grant of GSM visas;
- clarify the requirements to be met by students who must have studied in Australia for two years before being eligible for grant of a GSM visa;
- introduce a new temporary visa for graduates from recognised overseas universities with skills in demand in Australia, to allow them to work and study in Australia and apply for a permanent GSM or employer-sponsored visa at any time;
- introduce a new temporary visa for graduates who have recently completed studies in Australia, to provide them with additional time to gain skilled work experience in Australia or improve their English skills to allow them to apply for a permanent GSM or employer-sponsored visa at any time;
- restructure the visas in the GSM programme by collapsing the current visa structure of 10 classes and 14 subclasses into one with four classes and nine subclasses;
- close the existing classes to future applicants from 1 September 2007;
- fold the current New Zealand citizen specific visa class into the wider General Skilled Migration program;
- create clear pathways for holders of temporary GSM visas to permanent GSM and employer nominated visas, and to the temporary Subclass 457 (Business (long stay)) visa;
- provide for electronic lodgement of GSM visa applications made on or after 1 September 2007;
- remove from the criteria for all GSM visas the discretion to require an Assurance of Support to be provided to Centrelink, as the very low number of cases where Assurances of Support are appropriate for these visas and the administrative expense of requiring them outweighs their effectiveness; and
- make a number of amendments that are consequential to the restructuring of the General Skilled Migration visas;

Migration Amendment Regulations 2007 (No.8) (SLI 2007, No.272) (Legislative Instrument – F2007L03559)

The *Migration Amendment Regulations 2007(No.8) (SLI2007, No.272)*, commenced on 10 September 2007, amend the Principal Regulations to repeal the Subclass 471 (Trade Skills Training) visa and associated trade skills training sponsorships so that from that day these amendments commence;

- persons will no longer be able to apply for or be granted a Subclass 471 (Trade Skills Training) visa; and
- persons will no longer be able to apply to become or be approved as an approved trade skills training sponsor.

Note that Subclass 471 (Trade Skills Training) visas granted and approved trade skills training sponsorships approved before the day these amendments commence will continue in effect.

Migration Amendment Regulations 2007 (No.9), (SLI2007, No.273) (Legislative Instrument – F2007L03557)

The *Migration Amendment Regulations 2007 (No.9) (SLI2007, No.273)*, commenced on 10 September 2007, amend the Principal Regulations to clarify the operation of certain provisions relating to nomination of positions and the grant

of Subclass 457 (Business (Long Stay)) visas. In particular, these amending regulations amend the Principal Regulations to:

- clarify that nomination by a standard business sponsor of a position in which a subclass 457 visa holder is proposed to be employed in Australia may not be approved unless at the time the nomination is decided the occupation continues to be specified in the Gazette Notice listing occupations in respect of which nominations may be made;
- clarify that a nomination by a standard business sponsor that cannot be approved because the occupation has ceased to be specified in the relevant Gazette Notice may still be approved if the nominator has become a party to a labour agreement with either the Minister for Immigration and Citizenship or the Minister for Employment and Workplace Relations which covers the nominated position and under which the nominator is authorised to recruit and employ persons and equivalent clarification in relation to an application for a Subclass 457 visa sought on the basis of such a nominated position by a standard business sponsor;
- provide that an application for a Subclass 457 visa on the basis of sponsorship by a standard business sponsor for an approved nomination may not be approved if, at the time of decision, the occupation to which the approved nomination relates is no longer specified in the relevant Gazette Notice;
- clarify a Subclass 457 visa that cannot be granted on the basis of sponsorship for an approved nomination because the occupation relevant to the nomination is no longer specified in the relevant Gazette Notice, may still be granted on the basis of there being an approved nomination if the sponsor has become a party to a labour agreement that covers the nominated position;
- provides for refunds of the nomination fee and visa application charge in certain circumstances where approval of a nomination or visa grant is prevented due to a change in the relevant Gazette Notice; and
- inserts Notes in the Principal Regulations, as relevant, to clarify by way of an example circumstances under which the Minister for Immigration and Citizenship may consider it reasonably appropriate to approve an application for approval as a sponsor or a nomination, although adverse information may be known about the applicant or sponsor, or the applicant or sponsor may be under investigation in relation to an alleged breach of an undertaking or a law of the Commonwealth or a State or Territory.

Migration Amendment Regulations 2007 (No.10) (SLI2007, No. 274)
(Legislative Instrument – F2007L03560)

The *Migration Amendment Regulations 2007 (No.10) (SLI2007, No.274)*, commenced on 10 September 2007, amend the Principal Regulations to provide that certain applicants for Contributory Parent (Migrant) (Class CA) and Contributory Aged Parent (Residence)(Class DG) visas who:

- have held a temporary contributory parent visa at any time in the 28 days immediately before applying; or
- have held a temporary contributory parent visa and for whom compassionate and compelling circumstances exist;

are to be considered as the holder of a temporary contributory parent visa at the time of application to allow them to benefit from lower visa application charges and less stringent criteria for the grant of a permanent contributory parent visa.

These amending regulations also allow applicants who have held a temporary contributory parent visa at any time since last entering Australia to be able to apply for a wider range of visas if they are outside Australia.

Immigration (Education) Amendment Regulations 2007 (No.2) (SLI2007, No.256)
(Legislation Instrument – F2007L026645)

The *Immigration (Education) Amendment Regulations 2007 (No.2) (SLI2007, No.256)*, commenced on 1 September 2007, amend the *Immigration (Education) Regulations 1992* to waive the prescribed English course fee for holders of new Subclass 475 (Skilled – Regional Sponsored) or Subclass 487 (Skilled – Regional Sponsored) General Skilled Migration (GSM) provisional visas, which continues the existing arrangements for holders of current provisional GSM visas.

INSTRUMENTS

Immigration (Education) Act 1971 – Specification under subparagraphs 4(b)(ii) and 4(c)(ii) – English Courses and Citizenship Courses Held for Holders of Certain Temporary Visas – August 2007
(Legislative Instrument – F2007L02653)

This instrument, commenced on 1 September 2007, specifies classes of temporary visas, the holders of which will be able to access English courses and citizenship courses. It operates to provide access to English language tuition for holders of the Skilled (Provisional) Classes VF (subclass 475) and VC (subclass 487) visas, in addition to those visa

classes already listed in the current instrument. Dependants of the primary visa holder who do not have functional English will have access to 510 hours of English language tuition.

Migration Act 1958 – Specification under subsection 96(1) and 96(2) – Pass Marks and Pool Marks in Relation to Applications for GSM Skilled Visas (Classes VE, VC, VF and VB) – August 2007
(Legislative Instrument – F2007L02689)

This instrument, commenced on 1 September 2007, operates to set the pass and pool marks for the points-tested General Skilled Migration (GSM) visa categories. In addition to meeting other requirements set out in the *Migration Act 1958* and the *Migration Regulations 1994* to be granted a points-tested visa, applicants need to have been awarded sufficient points to reach the pass mark specified by the Minister of Immigration and Citizenship in this instrument.

Migration Regulations 1994 – Specification under item 6701 of Schedule 6 – Designated Areas – August 2007
(Legislative Instrument – F2007L02654)

This instrument, commenced on 1 September 2007, specifies what areas are designated areas for the Skilled – Designated Area – Sponsored and the Skilled – Regional Sponsored visa subclasses. These visa categories provide that an applicant can be sponsored by an Australian relative living in a ‘designated area’. Applicants granted provisional visas on this basis are subject to a condition that they live, work and study only in a designated area.

Migration Regulations 1994 – Specification under regulation 1.03, subregulation 2.26B(1), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(6)(b)(iii), 1229(7)(b)(ii), items 6A11, 6A12, 6A13, 6B11, 6B12, and 6B13 – Skilled Occupations, Relevant Assessing Authorities and Points for General Skilled Migration – August 2007
(Legislative Instrument – F2007L02690)

This instrument, commenced on 1 September 2007, specifies skilled occupations, the number of points awarded for each occupation and the bodies that are the relevant assessing authorities for each occupation for the residents of one or more countries. All principal applicants for a General Skilled Migration visa must nominate a skilled occupation and have their skills assessed as satisfactory for that occupation by the relevant assessing authority. The purpose of this instrument is to specify the list of skilled occupation, the bodies responsible for assessing the applicant's suitability for working in those skilled occupations in Australia and the points available for each skilled occupation under the Schedule 6B points test.

Migration Regulations 1994 – Specification under regulation 1.15C, 1.15D and clauses 485.215 and 487.215 – English Language Tests and Level of English Ability for General Skilled Migration – August 2007
(Legislative Instrument – F2007L02688)

This instrument, commenced from 1 September 2007, provides what score in an Occupational English Language test will be accepted as being equivalent to that set out in the regulations as an International English Language Testing System score required to be attained for an applicant to be assessed as having either “competent English” or “proficient English”. Applicants for a Subclass 485 or 487 visa can, for the purposes of paragraph 485.215(c) or paragraph 487.215(e), submit evidence that they are scheduled to sit one of the tests that are specified in this Instrument if they have not already sat one of these tests before lodging their application.

Migration Regulations 1994 – Specification under regulation 476.212 – Institutions and Disciplines - August 2007
(Legislative Instrument – F2007L02657)

This instrument, commenced on 1 September 2007, specifies a discipline of study and the overseas educational institution where that course of study must have been undertaken and completed for an applicant to be eligible for the grant of a Skilled - Recognised Graduate, subclass 476 visa.

Migration Regulations 1994 – Specification under sub-regulations 134.222C(2)(a), 139.226(b), 475.214(b)(i), 475.214(c)(i), 487.215(b)(i), 487.215(c)(i), 487.224(b)(i), 487.224(c)(i), 496.226(b), 863.226(b), 882.225(b), 6B34(a), 6B34(b) and 6B101(f) – States and Territories with English Language Training Arrangements – August 2007
(Legislative Instrument – F2007L02670)

This instrument, commenced on 1 September 2007, provides for the States and Territories in which arrangements are established for suitable English-language training for certain General Skilled Migration visa applicants.

Migration Regulations 1994 – Specification under various provisions of Schedule 1 and Schedule 2 – Post Office Box and Courier Addresses – August 2007
(Legislative instrument – F2007L02691)

This instrument, commenced on 1 September 2007, provides postal and courier delivery addresses for lodging a General Skilled Migration skilled visa application and, when required, Sponsorship Forms

Migration (United Nations Security Council Resolutions) Regulations 2007 – Specification Of United Nations Security Council Resolutions under regulation 4(1) –August 2007.

(Legislative Instrument – F2007L03520)

This instrument, commenced on 1 September 2007, specifies UNSC resolutions for the purposes of identifying UNSC-designated persons who are prevented from entering or transiting through Australian Territory

Migration Regulations 1994 – Specification under regulations 1224A and 462.221 - Arrangements For Work And Holiday Visa Applicants From Thailand, Iran, Chile And Turkey – August 2007.

(Legislative Instrument – F2007L02650)

This instrument, commencing on 1 October 2007, operates to list the foreign countries in which Australia has a reciprocal Work and Holiday (Subclass 462) Visa arrangement and to specify the required educational qualifications and the addresses for lodgement of applications for those applicants.

Migration Act 1958 – Determination under section 175A – Eligible Passports – August 2007

(Legislative Instrument – F2007L02702)

This Instrument, commenced on 27 August 2007, operates to determine that Australian ePassports and New Zealand ePassports are eligible passports for the purposes of section 165 of the Act and holders of these passports may use through an authorised system for immigration clearance.

Migration Regulations 1994 – Specifications under paragraph 457.223(6)(a) and subclause 457.223(11) of Schedule 2 – Exemptions to the English Language Requirement for the Temporary Business (Long Stay) visa – September 2007

(Legislative Instrument – F2007L03570)

This instrument, commenced on 10 September 2007, creates an additional exempted category, for the purposes of subclass 457.223(11), that acts as a transitional provision in circumstances where the Subclass 457 visa applicant held a Subclass 457 visa on 1 July 2007 and seeks a further visa not extending beyond the length of stay approved in relation to the first visa; and to clarify the methodology for calculating the level of salary for the purpose of paragraph 457.223(6)(a)(i).

Migration Regulations 1994 – Specification under regulations 1.20B, 1.20G(2) and 1.20GA(1)(a)(i) – Minimum Salary Levels and Occupations for the Temporary Business Long Stay visa – September 2007

(Legislative Instrument – F2007L03586)

This instrument, commenced on 10 September 2007, aims to

- remove occupations covered by an industry labour agreement from being nominated under Subclass 457 Standard Business Sponsorship arrangements;
- redefine certain other occupations that may be nominated under Subclass 457 Standard Business Sponsorship arrangements;
- clarify the methodology for calculating the level of salary for the purposes of defining the minimum salary level;
- specify a new minimum salary level with respect to applicants who met the subclause 457.223(6) exemption to the English language requirement; and
- provide illustrative examples to assist employers and visa holders in verifying whether or not the level of salary paid to the visa holder is at least the minimum salary level.

Legislation Pending

Migration Legislation Amendment (Restoration of Rights and Procedural Fairness) Bill 2007

(Bill – C2007B00165)

The *Migration Legislation Amendment (Restoration of Rights and Procedural Fairness) Bill 2007* was introduced as a private member's bill to the Parliament by Senator Bartlett on 8 August 2007.

The Bill seeks to store rights and procedural fairness to persons affected by decisions taken under the *Migration Act 1958*, and for related purposes.

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. On the same day, the Selection of Bills Committee referred the Bill to the Senate and Constitutional Legislation Committee (SCLC) for public inquiry and a report by 30 July 2007. The completed report is now available on the Australian Parliament House website.
(http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_sponsorship/index.htm)

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 a person for a visa. The new regime aims to apply to prescribed kinds of visas and where the obligations apply these will replace the current undertakings arrangements. Importantly, the new regime also incorporates enforcement provisions by way of civil penalties if an approved sponsor breaches an obligation.

The bill also includes provisions for inspectors to monitor an employer's compliance with their sponsorship obligations which is an important element of the enforcement regime. In addition there are enhanced information exchange powers between the Department and other prescribed Commonwealth, State and Territory Agencies.

Migration (Climate Refugees) Amendment Bill 2007
(Bill – C2007B00149)

The *Migration (Climate Refugees) Amendment Bill 2007* was introduced as a private member's bill to the Parliament by Senator Kerry Nettle on 20 June 2007.

The Bill seeks to create a new visa category to recognise refugees of climate change induced environmental disasters, and for related purposes.

CASELOAD OVERVIEW

MRT Decisions – August 2007

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	0	13	1	1	15
Visitor refusal	6	9	0	2	17
Student refusal	11	16	3	2	32
Temporary business refusal	8	8	2	5	23
Permanent business refusal	8	4	0	1	13
Skill linked refusal	20	18	2	3	43
Partner refusal	80	43	4	4	131
Family refusal	24	33	4	1	62
Student cancellation	36	42	2	6	86
Sponsor approval refusal	2	2	1	0	5
Other	6	11	3	4	24

RRT Decisions – August 2007

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	7	0	1	9
Burma (Myanmar)	0	3	0	0	3
China (PRC)	16	56	0	6	78
Egypt	0	1	0	0	1
Fiji	0	2	0	0	2
India	0	22	0	1	23
Indonesia	0	11	0	0	11
Iran	1	1	0	0	2
Iraq	1	1	0	0	2
Israel	0	2	0	0	2
Korea, Dem Peoples Rep of	0	1	0	0	1
Korea, Republic Of	0	1	0	0	1
Lebanon	1	3	0	0	4
Malaysia	0	5	0	0	5
Morocco	0	1	0	0	1
Nepal	0	4	0	0	4
Netherlands	0	1	0	0	1
Pakistan	2	1	1	0	4
Palestinian Terr. (W.Bank/Gaza)	0	1	0	0	1
Papua New Guinea	0	1	0	0	1
Philippines	0	2	0	0	2
Russian Federation	0	2	0	0	2
South Africa	0	2	0	0	2
Spain	0	1	0	0	1
Sri Lanka	3	0	0	0	3
Stateless	0	1	0	0	1
Syria	0	3	0	0	3
Thailand	0	2	0	0	2
Turkey	0	4	0	0	4
Uganda	1	0	0	0	1
Uzbekistan	0	1	0	0	1
Vietnam	0	3	0	0	3
Zimbabwe	2	3	0	0	5

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 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 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.

The Tribunal's Email address is: enquiries@mrt-rrt.gov.au

Editor: Rey Hyland

Contributors:

Sean Baker

Kate Buring

Sue Burton

Victoria Coleman

David Corrigan

Rey Hyland

Kerry Ko

Jacquelin Plummer

Preeti Prasad

Wan Shum

Pallavi Sinha

Stephen Tully

Andrew Verduci

Stephen Webb

Michelle Wei

Rachel White

Please note that any enquiries regarding this publication may be directed to the Editor on (02) 9276 5309 or at enquiries@mrt-rrt.gov.au

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