



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

N0600710

21 September 2007, Melbourne

Ms L Ward, Member

SKILLED – INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) VISA – SUBCLASS 880 – CL.880.227 – PIC 4005 – WAIVER – OPINION OF MEDICAL OFFICER OF COMMONWEALTH – The visa applicant applied for a Skilled – Independent Overseas Student (Residence) (Class DD) visa. The application was refused by a delegate of the Minister for Immigration and Citizenship on the basis that the applicant did not satisfy cl.880.227 of Schedule 2 of the *Migration Regulations 1994* (the Regulations), because his son did not meet the health criteria in Public Interest Criterion (PIC) 4005 of Schedule 4 to the Regulations. The delegate based this decision on an opinion from a Medical Officer of the Commonwealth (MOC), who concluded that the health concerns of the applicant's son would result in significant cost to the Australian community in terms of health care and community services. The applicant claimed that the delegate's decision and the MOC's conclusions were incorrect, as the costs associated with the care of his son were not significant and his condition was likely to improve. The applicant also received a medical assessment review from the Review Medical Officer of the Commonwealth (RMOC). The RMOC found that the applicant's son did not satisfy PIC 4005.

Held: Decision under review affirmed

The Tribunal found that there was no evidence that the RMOC applied the wrong test in the assessment and that it was bound to accept this assessment as correct. The Tribunal also found that the applicant did not satisfy PIC 4005. The Tribunal noted that pursuant to cl.880.227, the applicant and his family members were required to satisfy PIC 4005, regardless of whether they were included in the visa application or not. The Tribunal acknowledged that there is provision for a waiver of this requirement if a family member is not included as a dependent as part of the application and where it would be unreasonable to require the person to undergo assessment. The Tribunal found that the applicant's son was a member of the applicant's family unit. Applying *MIMA v Sharon Ma* (1998) FCR 455, the Tribunal found that as the applicant had already been assessed by the MOC, there was no basis to exempt the son from the health assessment. Furthermore, the Tribunal could not identify any basis to suggest that it would be unreasonable for the applicant's son to undergo assessment for the purposes of PIC 4005. The Tribunal concluded that the applicant did not satisfy cl.880.227.

071203510

25 September 2007, Sydney

Mr R Derewlany, Member

SKILLED – INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) VISA – SUBCLASS 880 – CL.880.230 – REGISTERED COURSE – R.I.03 – FINALLY DETERMINED – The applicant applied for a Skilled – Independent Overseas Student (Residence)(Class DD) visa in September 2005 which was refused by a delegate of the Minister for Immigration and Citizenship in February 2007. The delegate found that the applicant did not satisfy time of decision criterion cl.880.230 as he did not have a skills assessment made on the basis of qualifications obtained in Australia following full time study in a registered course. Although the applicant obtained a favourable skills assessment from Trades Recognition Australia (TRA), the applicant's qualifications which formed the basis of TRA's assessment were not from a 'registered course' as defined in r.1.03 of the *Migration Regulations 1994* (the Regulations). The applicant claimed that the law in force at the time of his application did not require qualifications from a 'registered course', and argued that subsequent amendments to the Regulations in respect of cl.880.230 should not adversely affect his accrued rights unless there was express statutory provisions to the contrary. As the additional requirement in cl.880.230(2) for full time study in a registered course only applied to visa applications lodged before 1 July 2006 and not finally determined as of 1 July 2006, the applicant claimed that he fell outside of the scope of the relevant provisions. The applicant claimed the Tribunal should follow the *Acts Interpretation Act 1901* (Cth), as it was not clear that the Regulations specified that the amendments applied in the present case, and therefore it should apply the more favourable regime. The applicant also claimed that as the Department had refused the application in December 2005, the application was finally determined at that date. It was argued that an applicant exercising his review rights after the Department's refusal should not mean that a final determination had not taken place. .

Held: Decision under review affirmed

The Tribunal found that the provisions of cl.880.230 (as amended) applied in the present case as it was satisfied that the relevant amendments to the Regulations did have express provisions relating to how those amendments applied to both new applications and applications which had been lodged and not finally determined as of 1 July 2006. The Tribunal rejected the applicant's claim that his visa application was finally determined when the Department first refused the visa in December 2005, finding that the definition of "finally determined" in s.5(9) of the *Migration Act 1958* (Cth) did not apply where a decision was currently the subject of review. The Tribunal was satisfied that TRA had issued the applicant with a favourable skills assessment in respect of his nominated occupation, but because the qualifications on which TRA had based its assessment had not been awarded from a "registered provider" within the meaning of r.1.03, the applicant did not satisfy the criterion of cl.880.230.

060802284

4 October 2007, Sydney

Ms J Marquard, Member

NOMINATED POSITION – R.5.19(2)(e) – ADEQUATE PROVISION FOR TRAINING EXISTING EMPLOYEES – ADEQUATE PROVISION FOR FUTURE TRAINING OF EMPLOYEES – The applicant applied to the Department of Immigration and Citizenship for approval of a nominated position under r.5.19(1B) of the *Migration Regulations 1994* (the Regulations). The Department requested the applicant provide further documentary evidence that the business had adequate provision for training existing employees or evidence of a past training record with a commitment to future training. The Department of Employment and Work Relations advised that the applicant had not yet demonstrated that the training requirements were met and gave advice regarding further information the applicant should provide. Although the applicant responded, a delegate of the Minister refused the nomination on the basis that she was not satisfied that r.5.19(2)(e) was met. On review, the applicant provided further information to the Tribunal, including information explaining the growth of the company and considerable material relating to training consultancy and administrative staff.

Held: Decision under review set aside

The Tribunal had regard to the characteristics of the applicant business in considering the meaning of 'adequate provision' of training. The Tribunal found that its training needs required practical on-the-job training in which people with experience pass on their knowledge to junior consultants. The Tribunal accepted that the applicant provided on-the-job training, including a 12 month on-the-job training program based on the applicant's training manual and practical experience and some class room training was also involved. The Tribunal also found that the applicant had employed a Trainee Business Administrator whose contract provided for a 12 month trainee program towards a qualification accredited by the NSW Vocational Education & Training Accreditation Board. The Tribunal accepted evidence that the applicant intended to continue to expand this training program and that the applicant was committed to progressing administrative staff to consultancy roles if requested. Having found that the applicant has made and continues to make adequate provision for training existing employees in work relevant to the business, the Tribunal found that the applicant satisfied r.5.19(2)(d). The Tribunal considered and made findings on the remaining r.5.19(2) criteria to set aside the decision under review and substituting a decision approving the appointment under the Employer Nomination Scheme.

Partner and Family Visas

W0506207

10 September 2007, Melbourne

Mr G Haddad, Member

CONTRIBUTORY AGED PARENT (RESIDENCE) (CLASS DG) – SUBCLASS 864 – CL.864.212 – DEFINITION OF SETTLED – R.1.03 – RESIDENT IN AUSTRALIA – ELIGIBILITY PERIOD – The visa applicants applied for a Contributory Aged Parent (Residence) (Class DG) visa, which was refused by a delegate of the Minister for Immigration and Citizenship on the basis that the applicants did not satisfy cl.864.212 of Schedule 2 to the *Migration Regulations 1994*. The delegate concluded that the sponsor was not settled in Australia at the time of the visa application, having been resident in Australia for approximately 6-7 months. In support of the application for review, the applicants provided evidence concerning the sponsor's ongoing full-time employment, her purchase of a home for the applicants, her recent citizenship status and that of her immediate family, and the sponsor's claim that when she travelled to Australia with her parents their intention was to settle permanently.

Held: Decision under review set aside

The Tribunal noted that r.1.03 defines the term 'settled' as meaning 'lawfully resident in Australia for a reasonable period', but noted that the legislation does not define the expression 'reasonable period'. The Tribunal considered departmental policy which indicates that in normal circumstances two years is to be considered a reasonable period, but that exceptions may apply in certain circumstances. Additional policy references indicated that the eligibility period for Australian citizens may be regarded as at least three months. The Tribunal noted that since the initial visa application, the sponsor and her family had become citizens. The Tribunal also observed that *Naiker v MIMA* [2002] FCA 888 (18 July 2002) stated that factors other than length of stay in Australia can be relevant to the question whether a person has been resident in Australia for a reasonable time. Having regard to the sponsor's circumstances and the additional evidence provided, the Tribunal found that the applicants were aged parents of a person who was a settled Australian permanent resident and therefore satisfied cl.864.212.

060754504
21 September 2007
Ms S Borg, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 115 – CL.115.211 – REMAINING RELATIVE – OVERSEAS NEAR RELATIVE - R.1.15 – The applicant applied for an Other Family (Migrant) (Class BO) visa in August 2005 on the basis that she was the review applicant's remaining relative. A delegate of the Minister for Immigration and Citizenship refused to grant the visa because the visa applicant did not satisfy cl.115.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) as she was not a remaining relative within the meaning of r.1.15 of the Regulations. The visa applicant had a brother and mother living in New Zealand, with whom she had been in contact. The review applicant claimed that contact was only made with them in order to execute a document and no other contact had occurred since 2001.

Held: Decision under review set aside.

The Tribunal found that the visa applicant was the remaining relative of the review applicant within the meaning of r.1.15(1) of the Regulations. It found that the brother and mother were not eligible New Zealand citizens within the definition of r. 1.03 but were 'overseas near relatives' within the meaning of r.1.15(2), The Tribunal was also satisfied that the visa applicant had not had contact with her brother and mother within a reasonable period prior to making the application and that the only contact was to facilitate the mother's relinquishment of her life interest in the family home. As the visa applicant satisfied all the other requirements of r.1.15 of the Regulations, the Tribunal concluded that she met cl.115.211 and cl.115.221.

071749660
10 October 2007, Sydney
Mr D O'Brien, Member

REMAINING RELATIVE – OTHER FAMILY (MIGRANT) (CLASS BO) VISA – SUBCLASS 115 – CL.115.211 – REMAINING RELATIVE – R.1.15 – The applicant applied for an Other Family (Migrant) (Class BO) Subclass 115 Remaining Relative visa on 24 August 2007 which was refused by a delegate of the Minister for Immigration and Citizenship. The delegate was not satisfied that the applicant met the definition of "remaining relative" as defined in r.1.15 of the *Migration Regulations* 1994 (the Regulations). The sponsor and applicant shared the same biological mother but had different biological fathers. However, the delegate found that as the sponsor had been adopted, the legal links to his birth family were deemed to be severed at the time of adoption. Therefore, the delegate considered that the sponsor could not be considered to be the applicant's 'brother' as required by r.1.15 and the applicant did not satisfy the requirements of cl.115.211 at time of application.

Held: Decision under review set aside

The Tribunal considered the effect of adoption orders made under Australian Adoption Acts and found that an adopted child was regarded in law as the child of the adoptive parent(s) and the adoptive parent(s) as the parent(s) of the adopted child. Further, the adopted child ceases to be regarded in law as the child of the birth parents and the birth parents cease to be regarded in law as the parents of the adopted child. Having considered the circumstances, the Tribunal considered that the sponsor was properly to be regarded as the brother of the applicant for the purposes of r.1.15(1)(a). The Tribunal was therefore satisfied that the applicant met cl.115.211 and cl.115.212 for the grant of the visa.

060983593
10 October 2007, Melbourne
Ms W Boddison, Member

PARTNER (PROVISIONAL) (CLASS UF) VISA – SUBCLASS 309 – CL.309.211 – SPOUSAL RELATIONSHIP – The applicant applied for a Partner (Provisional) (Class UF) visa on 31 August 2006. A delegate of the Department of Immigration and Citizenship refused to grant the visa because he was not satisfied that the visa applicant and sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others or that the relationship between them was genuine and continuing, or they lived together or did not live separately and apart on a permanent basis. Evidence was submitted concerning a previous visa application to Australia, the conclusion of a previous relationship, wedding photographs, living arrangements at her home, the relationship between the visa applicant's daughter and her father, the death of the visa applicant's father, the sponsor's employment, health and weekend activities and responsibility for the care of his children.

Held: Decision under review affirmed

The Tribunal found that the review applicant was an Australian citizen and that at the time of the visa application the applicants were married to each other under a recognised marriage. The Tribunal found that the applicants lived in separate countries and, notwithstanding money transfers from the review applicant, did not pool finances or jointly own assets. It found significant the conflicting evidence provided by the applicants regarding their living arrangements after the wedding, particularly responsibility for the care of children. The review applicant did not represent himself to be married to fellow employees and none of the applicants' relatives from Australia attended the wedding. Phone cards provided to the Tribunal did not indicate who the review applicant had called. The review applicant appeared unaware that the visa applicant had previously applied to migrate as a prospective spouse. The visa applicant was also unaware of the review applicant's access to his children, weekend activities or back injury, thus suggesting that they were not in close contact. Furthermore, evidentiary discrepancies concerning the visa applicant's father's death were significant since it indicated that they did not derive emotional support from one another. The Tribunal accordingly concluded that they did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship was not genuine and continuing. The Tribunal was therefore not satisfied that the visa applicant could satisfy cl.309.211 or the requirements for the grant of a Subclass 310 visa.

Student visas

060935015
3 October 2007, Melbourne
Ms K Kirmos, Member

VISA CANCELLATION – SUBCLASS 573 HIGHER EDUCATION SECTOR VISA – CONDITION 8202(3)(b) – ACADEMIC RESULT – TERM – SEMESTER – A delegate of the Minister cancelled the applicant's Subclass 573 Higher Education Sector visa on 3 November 2006 under s.116(1)(b) of the *Migration Act* 1958 (the Act) because the applicant breached condition 8202(3)(b) of her visa. The applicant's education provider sent her a s.20 notice stating that she had failed to achieve satisfactory academic results in the course running from 10 October 2005 to 29 September 2006 because she had failed 4 out of 5 subjects she was enrolled in. The applicant claimed that the s.20 notice was incorrect as she did not study 5 subjects although her adviser stated that the applicant was uncertain as to how many subjects made up her course. The applicant had approached her education provider to resolve this issue by seeking positive certification of her results but they refused. The Tribunal sought further details from the applicant's education provider, particularly with respect to the course length and how it was divided. The applicant's education provider advised that it did not use trimesters or terms for the applicant's course and was only able to provide results for progress tests undertaken during the entire period from 10 October 2005 to 29 September 2006.

Held: Decision under review set aside

The Tribunal had regard to the dictionary definition for term and semester and found that both referred to periods of less than a year. Despite the education provider being able to state precisely when the applicant's course started and finished, the Tribunal found that the course extended for approximately 1 year and was thus for a period greater than a term or semester. Noting that condition 8202 required certification of the applicant's academic result for each term or semester, the Tribunal found that the applicant's education provider did not divide the course into terms or semesters. Based on this information, the Tribunal found that it was impossible to determine whether the applicant had breached condition 8202(3)(b) and that the Tribunal could not be satisfied that she had done so. Accordingly, the

Tribunal was not satisfied that the ground for cancellation under s.116(1)(b) existed and set aside the decision under review to cancel the applicant's Subclass 573 visa.

Other visas

060812200

21 September 2007, Sydney

Mr G Short, Senior Member

SPECIAL ELIGIBILITY (RESIDENCE) (CLASS AO) – SUBCLASS 832 – CL. 832.212 – WHETHER GREATER PART OF THE APPLICANT'S FORMATIVE YEARS SPENT IN AUSTRALIA – The applicant applied for a Special Eligibility (Residence) (Class AO) visa in June 2005. A delegate of the Minister for Immigration and Citizenship refused to grant the visa on the basis that the delegate was not satisfied that the applicant had, before turning 18, spent the greater part of his formative years in Australia, as required by cl.832.212(4)(d) of Schedule 2 to the *Migration Regulations* 1994. The applicant arrived in Australia from South Korea when he was 17 years old. The applicant claimed that since that time he has integrated into the 'way of life' in Australia. He presented statements from psychologists attesting to the applicant's claim that he had successfully assimilated into Australian society, had 'unlearned' the values of South Korea, and that his formative years had not begun until he was 17 years old.

Held: Decision under review affirmed

The Tribunal found that the applicant had not spent the greater part of his formative years in Australia. The applicant had spent approximately 11 months in Australia prior to turning 18. The Tribunal referred to the judgment of *Nafeh v MIMA* [2004] FCA 199 that the criterion in cl.832.212 requires consideration of the events, experiences and circumstances affecting the particular applicant 'as formed'. The Tribunal took into account Departmental policy and the applicant's own statutory declaration and found that the time the applicant spent in South Korea was more influential on his development than the brief period he spent in Australia before turning 18. Finding that the applicant had been educated in South Korea, formed religious beliefs and friends, and was influenced by his strict upbringing in South Korea, the Tribunal concluded that the applicant was unable to satisfy cl.832.212.

071186202

27 September 2007, Sydney

Ms P Wearne, Member

DISTINGUISHED TALENT – SUBCLASS 858 – VISA REFUSAL – CL.858.211 – SCHEDULE 3 CRITERION 3004 – CL.858.212 – The applicant, a volleyball player from Tonga, applied for a Distinguished Talent (Residence)(Class BX) visa in Australia. The applicant claimed that he had distinguished talent in the area of sport. A delegate of the Minister for Immigration and Citizenship refused to grant the visa on the basis that the applicant did not meet cl.858.211(2)(a) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations), which required the applicant to satisfy Schedule 3 criteria 3001, 3003 and 3004 as he was not the holder of a substantive visa at the time of application. The delegate found that the applicant did not satisfy Schedule 3 criterion 3004, which, among other things, required that the applicant was not the holder of a substantive visa because of factors beyond his control, there were compelling reasons for granting the visa and the applicant would have been entitled to be granted the visa applied for if the applicant had applied for the visa on the day when the applicant last held his substantive visa.

Held: Decision under review set aside

The Tribunal found that the applicant was a credible witness who was able to substantiate his claims with a considerable amount of supporting material, including references from various prominent people in volleyball from Australia, Tonga and New Zealand. The Tribunal accepted that the applicant had an internationally recognized record of exceptional and outstanding achievement and was prominent in volleyball. The Tribunal accepted the applicant's evidence that he had been involved in schools, community groups and churches and was an asset to the Australian community. The applicant was nominated by Sydney Lions Volleyball Club, which the Tribunal accepted was an Australian organisation having a national reputation in volleyball. Accordingly, the Tribunal found that the applicant met cl.858.212 of Schedule 2 to the Regulations. The Tribunal also considered the circumstances under which the applicant lodged the visa application after his substantive visa had expired. It accepted that the applicant placed his application with the delivery agent DHL several days before the expiry date of his substantive visa and DHL delivered the application to the Department three days after the expiry of his substantive visa, thus beyond the applicant's control. The Tribunal further accepted that the applicant had contributed significantly to the Australian volleyball community as an exceptional player, coach and a role model to others. Based on all the evidence the Tribunal

considered that there were compelling reasons for the grant of the visa. The Tribunal considered that the applicant would have been entitled to be granted the visa applied for if he had applied for the visa on the day when he last held a substantive visa. Consequently, the Tribunal found that the applicant satisfied Schedule 3 criterion 3004 and accordingly cl.858.211(2) and cl.858.212.

REFUGEE REVIEW TRIBUNAL DECISIONS

Burma

071564682

18 September 2007, Sydney

Ms A Younes, Member

BURMA (MYANMAR) – POLITICAL OPINION – MEMBER OF THE WA PEACE PARTY – RETURNEES TO BURMA – RACE – WA ETHNICITY – The applicant claimed to fear persecution for reasons of his and his relative's membership and association with the Wa Peace Party, their Wa ethnicity and his being a returnee to Burma as an asylum-seeker in Australia. He claimed that members of the Wa Peace party have been interrogated and detained by the Burmese authorities. He further claimed that members of his family had been harassed by the authorities and had fled overseas to avoid being harmed. Before the Tribunal, the applicant gave inconsistent evidence as to his ethnicity and also made new significant claims not raised in his initial protection visa application, including that he had to report to and was threatened by Burmese Intelligence.

Held: Decision under review affirmed

The Tribunal found that the applicant was not credible because of his inconsistent evidence and his new substantial claims were found to be fabricated to advance his refugee claims. The Tribunal did not accept that the applicant or his relative had ever been a member of or involved in any of the activities of the Wa Peace Party, had been harmed in any way by the Burmese authorities for any actual or imputed political activities, or that he or his relative was of Wa ethnicity. It did not accept that members of the applicant's family had been harassed by the authorities and fled overseas. It was also not satisfied that the applicant or any other family member had a political profile which could be perceived to be opposed to the Burmese regime. The Tribunal was satisfied that there was not a real chance that the Burmese authorities would find out that the applicant had sought asylum in Australia. The Tribunal acknowledged that whilst there would be a real chance that the applicant on his return would be questioned by the Burmese authorities, it was not satisfied that the applicant would be subject to disproportionate punishment amounting to persecution. The Tribunal was therefore not satisfied that there was a real chance that the applicant would suffer persecution for a Convention reason in the reasonably foreseeable future if he were to return to Burma.

China

071555521

18 September 2007, Sydney

Ms C Carney, Member

CHINA – PARTICULAR SOCIAL GROUP – GOVERNMENT ACQUISITION OF LAND – POLITICAL OPINION – DEMONSTRATIONS – The applicant claimed to fear persecution on the basis that he belonged to a particular social group of Chinese who have been deprived of their land by Chinese authorities. The applicant also claimed to fear persecution due to his involvement in the organisation of demonstrations held in response to the government's acquisition of his land and that of others in his area. The applicant claimed that he was a person of interest to Chinese authorities and would be at risk of persecution if he returned to China. The applicant claimed that he left China on a valid passport, but that he had disguised his appearance before departure.

Held: Decision under review affirmed

The Tribunal found that the evidence of the applicant lacked sufficient detail concerning the demonstrations and was at times confused and inconsistent with his previous representations. The Tribunal did not accept that the applicant was involved in demonstrations against the acquisition of land or that he would suffer serious harm as a result of any such involvement. The Tribunal referred to current independent country information regarding exit controls in China and noted that the applicant left China using a valid passport. The Tribunal was of the view that if the applicant was a person of interest, it was unlikely that he would have been able to leave China on a valid travel document. The Tribunal found that the applicant was not of adverse interest to Chinese authorities. The Tribunal concluded that the applicant did not have a well-founded fear of persecution on the basis that he was a member of a particular social group, on account of his political opinion or for any other Convention reason.

071524714
26 September 2007, Sydney
Mr J Cipolla, Member

CHINA – RELIGION – CHRISTIANITY – The applicant claimed to fear persecution on the basis of her religion. The applicant claimed that she and her family converted to Christianity during a period in which a family member was dying of a serious illness. The applicant claimed that she regularly attended an underground house church service. The applicant further claimed that two of her family members were arrested at a house church gathering and were placed in detention. The applicant claimed that her business was affected by the arrests and she was later forced to close the business due to interference from the Public Security Bureau. The applicant claimed that there was no real religious freedom in China. The applicant stated that she would continue to practise Christianity and attend house churches if she were to return and feared persecution for those activities.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a Christian. The Tribunal found the applicant to be a credible witness who demonstrated a comprehensive understanding of Christianity. The Tribunal noted that the applicant continued to practise Christianity in Australia and had also been involved in protests against the lack of religious freedom in China. The Tribunal accepted that the applicant practised Christianity in underground churches in China and continued to do so after her family members were arrested. The Tribunal found that the applicant's claims were consistent with independent information that members of Christian house churches have experienced varying degrees of harassment and persecution in China. The Tribunal concluded that the applicant would face a real chance of persecution if she returned to China. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Fiji

071493820
17 September 2007, Sydney
Ms B Forsyth, Member

FIJI – PARTICULAR SOCIAL GROUP – FIJI INDIAN WIDOWED WOMAN WITHOUT SUPPORT – RACE – POLITICAL OPINION – WIDOWED WOMAN – The applicant claimed she experienced racial harassment from the Fijian community and amongst other reasons left Fiji because of political unrest. The applicant claimed that after her first husband died she was left with nothing and no one to turn to for help and support, nowhere to live because her house and all her possessions were burgled and burnt down, and that she had no means of earning a living. The applicant's children live in Australia or India. None remain in Fiji. The applicant had spent significant time in Australia and married an Australian citizen who has since died. The applicant was granted temporary and permanent visas on the basis of her relationship with her second husband but her permanent visa was cancelled because she failed to notify the Department of her husband's death. The applicant was unable to explain why she believed she was a refugee but discussed her fear that people would rob and destroy houses and that the government was not helping. The applicant said she would face moral, emotional, verbal and economic hardship if she had to return to Fiji. The applicant's agent submitted that her claims were driven by strong subjective fears resulting from material changes to her personal circumstances.

Held: Decision under review affirmed.

The Tribunal found that the applicant made various claims including on the basis of political unrest, harassment from indigenous Fijians and as a member of a particular social group, namely as a Fijian Indian widow in her mid-fifties who does not have family or financial support in Fiji, a house or the ability to earn an income. The Tribunal accepted the applicant's explanation that her harassment referred to burglaries in the late 1990s. The Tribunal found that she was not claiming her house was burnt by Fijian neighbours or due to community tensions and that the burglaries and fire were not due to any Convention related reason. The Tribunal accepted that she did not know how political instability had affected her. The Tribunal found that there was nothing in the applicant's past experiences and particular circumstances to suggest that she had been, or would be, harmed for any Convention reason. The Tribunal also found that any subjective fear held by the applicant was not well founded. The difficulties faced by the applicant did not involve any systematic and discriminatory conduct for the essential and significant reason of one or more Convention grounds and therefore did not constitute persecution.

India

071437064

21 August 2007, Sydney

Ms B Forsyth, Member

INDIA – POLITICAL OPINION – COMMUNIST PARTY OF INDIA – The applicant feared persecution arising from his involvement with the Communist Party of India (CPI). The applicant claimed that he was a committee member of the Youth Committee of the CPI and the Student Federation of India (SFI). He claimed that in the late 1990's he became a committee member of the CPI(Marxist) (CPI(M)) and that he knew secrets about it. He further claimed that he subsequently left the CPI(M) and joined the CPI(Marxist-Leninist) (CPI(ML)). The applicant claimed that the CPI(M) attacked him many times and that he was arrested for several days when he was blamed for a murder involving a member of the Bhartiya Janata Party (BJP). He claimed that he was charged, went to court and was acquitted before being released on bail. In addition, the applicant claimed that the CPI(M) beat him several times before he escaped to Bangalore. However, the applicant claimed that the CPI(M) called his relative's house and told them that they would kill the applicant.

Held: Decision under review affirmed

The Tribunal was not satisfied that the applicant was ever involved with the Youth Committee of the CPI(M). It found that he was unaware of the SFI, the powerful student arm of the CPI(M), until the Tribunal raised the issue, and then changed his evidence to claim that he was involved in the SFI. The Tribunal was not satisfied that the applicant had a role in the CPI(M), or a role which involved acquiring knowledge of party secrets. It was also not satisfied that the applicant joined or had a role in the CPI(ML) as claimed. The Tribunal was also not satisfied that the applicant was arrested or received verbal threats while in Bangalore because there was no reason for the CPI(M) to arrest or pursue him. It also found it implausible that he would be released on bail if he was acquitted of all charges as claimed. The Tribunal did not accept that he was beaten by the CPI(M) or his personal safety threatened on account of his lack of knowledge of when the CPI(M) came into power. The Tribunal found that there was not a real chance that the applicant would suffer serious harm from the CPI(M) or the police. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason now or in the foreseeable future.

071543400

17 September 2007, Sydney

Ms P Wearne, Member

INDIA – PARTICULAR SOCIAL GROUP – HOMOSEXUAL MEN – The applicant was a Sikh man who claimed to fear persecution on the basis of his homosexuality if he returned to India. The applicant claimed to have had homosexual relationships with other men. He also claimed that he had been subjected to verbal and physical abuse from sections of the Sikh community, and had been banned by the local arbitration committee from remaining in his local area. The applicant claimed that homosexual sex is illegal in India and he feared further violence if he were to return. The applicant feared he would not be protected by the police against further violence.

Held: Decision under review set aside

The Tribunal accepted on the basis of independent information that homosexual men in India, and homosexual Sikh men in India, constitute particular social groups which are subjected to persecution by Indian authorities and groups in the community. It was satisfied that the applicant had engaged in homosexual conduct and that his evidence was credible and consistent with the independent information. The Tribunal was satisfied that the applicant had a well-founded fear of persecution because he had suffered physical attacks and threats due to his homosexuality. These attacks and threats amounted to 'systematic and discriminatory' conduct by anti-homosexual groups in the context of inaction by the Indian authorities. The Tribunal accepted that the essential and significant reason for the harm the applicant might suffer if he were to return to India would be for his membership of a particular social group. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

071488576

19 September 2007, Sydney

Ms A O'Toole, Member

INDIA – POLITICAL OPINION – MEMBER OF BHARATIYA JANATA PARTY – The applicants were a husband and wife who claimed to fear persecution for reasons of their family's involvement with the Bharatiya Janta Party (BJP).

The applicant husband claimed to have been a member of the BJP and organised BJP publicity during elections. The applicant husband claimed that he became a target of local Muslim opponents to the BJP and had been attacked by Muslim groups. He claimed that Hindu-Muslim riots in his area had resulted in threats against his family as well as against many Hindu leaders. The applicant husband feared that he would be killed if he returned to India. He did not believe that the Indian police would protect his family as he could not afford to pay the police for their protection.

Held: Decision under review affirmed.

The Tribunal was not satisfied that the applicant husband or any members of his family were persecuted for reasons of their actual or imputed political opinion. The Tribunal was not satisfied that the applicants were threatened by Muslim groups or were associated with the BJP. The Tribunal did not consider the applicant husband to be a credible witness. It identified several inconsistencies and contradictions in the applicant's evidence, including contradictions concerning his membership of the BJP and in relation to injuries he claimed to have suffered. The Tribunal did accept the applicant husband's evidence about police being unwilling to protect his family. However, it also found no credible evidence that the applicants would suffer serious harm in the reasonably foreseeable future if they returned to India. The Tribunal accordingly found that the applicant did not have a well-founded fear of persecution for a Convention reason.

Lebanon

071454724

30 August 2007, Sydney

Ms N Dougall, Member

LEBANON – PALESTINIAN BORN IN LEBANON – The applicant stated that he belonged to the Palestinian ethnic group and his religion was Muslim. His citizenship was Palestinian and his country of former habitual residence was Lebanon. The applicant claimed that he may be harmed or mistreated by the Lebanese government and his relative's ex-spouse if he returned to Lebanon. He claimed the ex-spouse threatened him because the ex-spouse was not allowed into Australia and the applicant had previously supported his relative during an earlier incident. The applicant further claimed that the authorities in Lebanon cannot and will not protect him if he returns because he is a Palestinian. He claimed the government will harass him and he will be stopped at checkpoints and abused. He also claimed that if returned to Lebanon he will have no civil or property rights or opportunities to secure lawful employment.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was Palestinian and stateless and that Lebanon was the applicant's country of former habitual residence. The Tribunal found that the applicant had the capacity to earn a livelihood and would not in the reasonably foreseeable future be denied the capacity to subsist. The Tribunal found the applicant's claims that he had been threatened by his relative's ex-spouse to be credible, however it found the threats were a criminal matter and were not made for a Convention reason. As the threats were vague and lacking in detail, the Tribunal found that there was no real chance that the applicant would face any more than a verbal threat if he returned to Lebanon. The Tribunal further found that if the threats became more serious or the ex-spouse harmed the applicant, he could obtain assistance from the police. The Tribunal found that harassment and delay at checkpoints was discriminatory, but was not persecution involving serious harm. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason if he returned to Lebanon in the foreseeable future.

Nepal

071487719

30 August 2007, Sydney

Ms S Durvasula, Member

NEPAL – POLITICAL OPINION – NEPAL CONGRESS PARTY – MEMBERSHIP OF PARTICULAR SOCIAL GROUP – TEACHER'S WIVES – The applicant claimed that she would be persecuted by the Maoists if she returned to Nepal because she was the wife of a school teacher, supported the Nepal Congress Party (NCP) and had spoken out against the Maoists and refused to give them money. The applicant claimed that school teachers are prime targets of the Maoists and that her husband, having witnessed atrocities committed against school teachers, resigned from his job and fled the country. The Maoists continued to come to her house, threaten her and increased their demands as they knew her husband was away. The applicant complained to the police and army, but she said they did nothing except

threaten to put her in gaol. The applicant's husband returned and gave money to the Maoists and after that they assaulted her for lying to them. The applicant claimed she was assaulted by the Maoists a second time after refusing to give money and then moved to Kathmandu where she moved from place to place because the Maoists were looking for her. Since moving to Kathmandu, the applicant's husband remained in his village and one of her children lived with a grandmother whilst the other went to boarding school in Kathmandu. The applicant claimed that she was a supporter of NCP and promoted its activities to recruit new members. At hearing, the applicant stated that she knew little about NCP and that she was not a strong or active follower.

Held: Decision under review affirmed.

The Tribunal did not accept that the applicant was a supporter of the NCP or that she spoke out against the Maoists. The Tribunal found that the applicant demonstrated very limited knowledge of the NCP's political objectives, ideology or past achievements, was unable to provide further details of what she had told others to inspire them to join the party, did not raise the claim at hearing despite prompting by the Tribunal and told the Tribunal that she did not know much about the NCP. The applicant could only provide limited details as to what she said when speaking out against the Maoists. The Tribunal considered that if the Maoists had wanted to harm the applicant for having spoken out against them and having refused their demands they would not have waited for many years until when she claimed to have been attacked or that the applicant's family would have been attacked or demanded to provide her whereabouts after she left. The Tribunal found that the applicant's husband was not harmed by the Maoists and that she was not harmed whilst her husband was outside Nepal. The Tribunal considered inconsistencies in the applicant's evidence regarding the timeline of events and found that if the applicant had a well-founded fear of persecution by the Maoists she would not have spent the time claimed where she did. The Tribunal found that the applicant did not have a well-founded fear of being persecuted for reason of her political opinion or her membership of any particular social groups or for any other Convention reason.

Turkey

071487219

24 September 2007, Sydney

Mr J Silva, Member

TURKEY – RELIGION – MUSLIM – POLITICAL OPINION – NUR CEMAAT – The applicant feared persecution from the Turkish authorities on the basis of opposition to the 'secular' and Kemalist principles embodied in the Turkish constitution. He claimed to have taught and distributed unauthorised texts through his Nur Cemaat activities. The applicant claimed that the authorities had targeted him in the past by expelling him from school, abusing him whilst undertaking his military service, intimidating and detaining him and threatening to fabricate a criminal case against him. He claimed that they had also threatened and harmed his family members in the past. The applicant claimed that the authorities insisted that he stop his political and religious activities. He claimed that he would resume his political activities if he returns to Turkey and that the authorities will therefore renew their threats against him.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was a Nur Cemaat member because of his familiarity with its teachings and structure. It also accepted that the applicant considers Turkey's secular constitution and adherence to Kemalist teachings to be flawed. However, the Tribunal did not accept his claim that an association with Nur Cemaat establishes a dissident political profile in Turkey. The Tribunal found that the applicant's claims were of variable reliability and relevance and his generalised assertions about Turkish politics and Nur Cemaat were unsubstantiated or inconsistent with country information. It did not accept that the applicant had a dissident political or religious profile by virtue of his own past activities or association with other persons or that he has a strong political opinion that will motivate him to speak out against the Turkish constitution or system of government. The Tribunal found that he could return to Turkey and continue his low-profile local Nur Cemaat activities and express his views on political issues without facing a real chance of persecution. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

MIAC v Applicant A125 of 2003

[2007] FCAFC 162

Federal Court of Australia, Emmett, Weinberg, Lander JJ, NSD510 of 2007, 22 October 2007

This was an appeal by the Minister from a judgment of the Federal Magistrates Court quashing a decision of the Refugee Review Tribunal (the Tribunal), that the respondent was not a person to whom Australia had protection obligations.

The respondent claimed to fear persecution, in part based on upon his having been a teacher and principal at a private school in Nepal. In the protection visa application he indicated that he had resided at his family home until September 2001. At the hearing before the Tribunal, the respondent confirmed this but in response to the Tribunal's difficulty in accepting he would continue to reside in his home following claimed attacks, he stated he had moved in with a friend in Kathmandu in August 2001. In affirming the decision of the delegate, the Tribunal noted that the respondent gave evidence that he first mentioned this claim to the Tribunal and found this was a recent invention to assist his claims for protection. The Tribunal further found that the respondent's claims to have remained at his family home and to have continued to work at the school were inconsistent with his claims to have been persecuted.

The Federal Magistrates Court held that the Tribunal's reliance on the information that the escape to Kathmandu had been omitted from the visa application amounted to a breach of s.424A of the *Migration Act 1958* (the Act).

The Minister contended before the Federal Court that the Federal Magistrate erred in finding that the omission from the visa application of any reference to a move by the respondent to Kathmandu was information within the meaning of 424A. In addition, the respondent was granted leave to amend his application, contending that the Tribunal had failed to comply with s.425 of the Act and that it erred in the way it construed and applied the respondent's answers to questions in the visa application.

Held: per curiam, appeal allowed.

Breach of s.424A

- (i) The Tribunal did not fail to comply with s.424A on the basis of any 'omission' from the visa application. Only if the Tribunal had done so would the Federal Magistrate have been required to consider the significant of any such omission and where it could constitute information with the meaning of s.424A. His Honour erred in his appreciation of the Tribunal's reasoning.
- (ii) The Tribunal did not reject the respondent's evidence because of any failure to mention, in the visa application, his time Kathmandu. Rather, the Tribunal arrived at that conclusion because of the inherent improbability of the respondent's account and the inconsistencies in his answers to the questions put to him during the course of the hearing.

Breach of s.425

- (iii) The Tribunal did not breach s.425 of the Act. The Tribunal did bring to the respondent's attention its concern about his claim to have remained at his school up until the time he left Nepal. It did so by repeatedly asking him where he had lived prior to coming to Australia. It also clearly put him on notice that the timing of his having left the school was a matter of concern and therefore adequately informed him of the way in which his answers might be used.
- (iv) Section 425 does not require the RRT to identify the significance of the questions that it puts to a claimant or the ultimate matter or issue to which those questions go. That is not what is required by *SZBEL v MIMIA* (2006) 228 CLR 152 (*SZBEL*), and the respondent's submission is an attempt to import the requirements of s.424A(1) into s.425. *SZBEL* makes it clear that the Tribunal is not obliged to provide a running commentary upon what it thinks about the evidence that is given.

Use of the respondent's answers to questions on the visa application

- (v) The Tribunal did not misconceive the respondent's answers to questions 33 and 36 of the visa application form. The questions, as formulated, did not allow for any statement to be made about any temporary absences from his place of residence or require the respondent's last address. Likewise, a person does not cease to be "self-employed" merely because one has spent a month living with a friend. However, whatever the difficulties with the form of the questions, the evidence the respondent provided to the Tribunal at the hearing was clear and unequivocal. He stated that he lived at the designated address until he left to come to

Australia. His later qualification to that evidence was understood by the Tribunal and taken into account. The weight to be accorded to the evidence was a matter for the Tribunal.

SZKDP v MIAC
[2007] FCA 1487

Federal Court of Australia, Buchanan J, NSD 1063 of 2007, 27 September 2007

The applicants, husband, wife and child citizens of India, sought an extension of time to 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 applicant husband (the applicant) was not a person to whom Australia had protection obligations.

The applicant claimed to fear persecution from political opponents in India. The Tribunal found significant inconsistencies between the evidence of the applicant and the applicant wife at the hearing in relation to claimed harassment and attacks in India. After the hearing the Tribunal wrote to the applicant identifying the inconsistencies in the evidence of the applicant and applicant wife and giving the applicants an opportunity to comment but no response was received. The Tribunal found the applicant was not a credible witness and was not satisfied the applicant had a well-founded fear of persecution. It also found it would be reasonable for the applicant to relocate to another part of India.

At first instance the Federal Magistrate did not find any jurisdictional error in the Tribunal decision. In considering the application for extension of time, the Court considered the applicants' prospects of success. The applicant submitted different grounds in the draft notice of appeal from those made to the Federal Magistrate, namely that the Tribunal erred in interviewing the witness (applicant wife) and in considering relocation; the Tribunal was "interested to reject the applicant's claim" and the decision was not made on proper observation of the documents and witness.

The Minister, as model litigant, identified failure to comply with s.424A of the *Migration Act* 1958 (the Act) as a possible form of jurisdictional error that might be suggested by the complaint about the use of the wife's testimony.

Held: application dismissed.

- (i) There was no foundation for any suggestion of jurisdictional error in the process or decision of the Tribunal. The applicant had no prospects of success in an appeal if an extension of time to appeal were to be granted.
- (ii) In light of the High Court decision in *SZBYR v MIAC* [2007] HCA 26 the Minister did not make the concession that was made in *SZGSI v MIAC* [2007] FCAFC 110 that certain evidence by a co-applicant engaged the obligation in s.424A(1). However, even if any obligation under s.424A was engaged (which is open to doubt) it was satisfied in this case in relation to both the applicant and his wife.
- (iii) The Tribunal wrote to the applicant both in his own right and as an 'authorised recipient' for his wife (s.441G of the Act) and drew their attention to the parts of the evidence of the applicant and his wife which played a part in the decision to affirm the decision of the delegate.

SZGHS v MIAC
[2007] FCA 1572

Federal Court of Australia, Allsop J, NSD544 of 2007, 15 October 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 first appellant was not a person to whom Australia had protection obligations. The first appellant (the appellant) claimed to fear persecution in Fiji from the Taukei Movement and other extremists on the basis of his ethnicity (part European part Fijian) and his association with Indian Fijians. The second to fifth appellants (the appellant's wife and children) did not make protection claims of their own.

The appellant claimed to have suffered three serious incidents of harm while in Fiji. The first occurred at a time when a pro-Fijian government was in power. The second occurred during 1999 in the lead up to elections which resulted in the Indo-Fijian dominated Fiji Labour Party (FLP) coming to power. The appellant was attacked after campaigning for the FLP. The third occurred after the election of the FLP government.

The Tribunal accepted the appellant's claims as to the three assaults but was not satisfied that there was a real chance that the appellant would be subject to similar incidents in the future. The Tribunal relied on the changed circumstances in Fiji, including that there were no elections looming and a pro-Fijian government was in power. Considering some newspaper articles that were submitted, the Tribunal found that, while supporting his claim of

“ructions” between the Fiji Armed Forces and the government, they provided no information specific to the appellant’s circumstances.

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) The Tribunal made a jurisdictional error by failing to address the appellant’s claims to have a well-founded fear of persecution by reference to his claims, to the possibilities of future persecution and to the reasonably foreseeable future and not merely the immediate future.
- (ii) The Tribunal dealt with the three incidents based on immediate facts – no elections looming and the character of the present government. This reflected a focus on immediacy which involved no real assessment of whether in the future, with elections looming, with the appellant campaigning for the FLP, he would not face a similar beating for the same reasons, or threats from the Taukei Movement who had already targeted him.
- (iii) The material submitted by the appellant, taken together with the second incident, with the appellant’s associations with the FLP and with the need to look to the reasonably foreseeable future, underpinned the appellant’s fears that the political circumstances in the reasonably foreseeable future may begin to approximate the racially charged atmosphere of 1999. The Tribunal did not look at all the material from the perspective of the reasonably foreseeable future and did not address the claims having regard to the material before it.
- (iv) The Tribunal’s use of the word “would” reflects a possible attention to “probabilities” rather than examining the matter in the manner required by *MIMA v Rajalingham* (1999) 93 FCR 220.
- (v) The Tribunal’s findings on state protection were inadequate to prevent the operative error in the decision.

SZJBA v MIAC
[2007] FCA 1592
Federal Court of Australia, Allsop J, NSD 1390 of 2007, 16 October 2007

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

The Tribunal found that the appellant, a national of Fiji, had provided inconsistent evidence at the hearing and in earlier statements, and was not a credible witness. The Tribunal put this information to the appellant via his migration agent in a s.424A letter inviting him to comment on the information by 25 January 2007. On 25 January the Tribunal received a fax from the appellant’s adviser. On 29 January the Tribunal wrote to the appellant’s adviser informing her that the Tribunal had not granted an extension of time to respond to the letter, but that the Member would not take any steps to finalise the decision until 31 January, after the requested extension of time, and would consider any material submitted on or before that date. The Tribunal did not receive any submissions or materials before that date and affirmed the decision under review.

Before the Federal Magistrate, the appellant argued that the Tribunal had failed to consider the appellant’s five page submission forwarded to the Tribunal as a fax on 25 January 2007. The covering page of the fax noted that there was a ‘cover sheet + 5 pages’, and the first paragraph noted that ‘I am forwarding Mr. [SZJBA’s] response to the “invitation to comment on information” letter from the Tribunal dated January 18, 2007.’ The cover sheet then went on to request an extension of time for further information. It was argued before the Federal Magistrate that the migration agent had had a conversation with a person or persons at the Tribunal who had confirmed receipt of the fax. The Minister submitted evidence that the Tribunal had received only one page, the covering page, and not the five page submission. Evidence was given indicating that the Tribunal’s usual practice was to create a “Case Note” of conversations such as those described and that no relevant Case Notes had been recorded in this case. The Federal Magistrate found no jurisdictional error, commenting that whilst the headings on the fax ‘might have put an alert reader at the Tribunal on notice that not all pages which had been intended to be sent were actually sent, or at least had not been received, the Tribunal is not obliged to make inquiries...’.

Before the Federal Court, the appellant argued that the Federal Magistrate had erred in not finding that the *Migration Act 1958* (Cth) (the Act) contained obligations on the Tribunal to make appropriate inquiries of the appellant, failing taking into account the substance of the appellant’s submissions in the fax, and that the Tribunal’s conduct was unreasonable in this regard.

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

- (i) The Tribunal erred in failing to call the number given on the coversheet to ask where the apparently intended five page response was.
- (ii) The obligation of the Tribunal to give a real and meaningful invitation to comment carried with it the obligation to take reasonably open and regular administrative procedural steps to permit or facilitate fulfilment of the real and meaningful nature of the invitation.
- (iii) This was an important document. It was apparently a coversheet to a response to an invitation to comment. Reading it made clear that what had apparently been intended to be sent had not been received.
- (iv) The inaction of the Tribunal amounted to an undermining of the reality and meaningfulness of the invitation to comment. As such it was a jurisdictional error in that it undermined the steps in the conduct of the review undertaken pursuant to Part 7 of the Act. The failure to take the steps, which were required in the review process, subverted the opportunity to respond to an invitation contemplated by the statute as part of the review process.

MZXLB v MIAC

[2007] FCA 1588

Federal Court of Australia, Finkelstein J, VID 411 of 2007, 19 October 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 national of Turkey, claimed fear of persecution on a number of bases, including his Kurdish Alevi background and previous involvement in left-wing activities in Turkey. The appellant also relied on information about his brother's affiliation with the Turkish Workers' and Peasants' Liberation Organisation (TIKKO) and his alleged murder by government agents.

The Tribunal accepted much of the evidence provided by the appellant, but was not satisfied that the appellant had a well-founded fear of persecution if he returned to Turkey.

The Federal Magistrate found that the Tribunal had fully considered the evidence and claims put forward by the appellant and had made a decision that was open to the Tribunal to make.

On appeal, the appellant alleged jurisdictional error on two grounds. The first was that the Tribunal had failed to consider an essential integer of his claim, being that Turkish authorities would want to obtain knowledge about TIKKO that the appellant possessed (or would be perceived to possess) and that he would be targeted by authorities to provide this information. The second ground was that the Tribunal had failed to deal with a further integer of his claim in that he feared persecution based on his family's political profile.

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

- (i) The Tribunal failed to consider the first integer of the appellant's claims and made a jurisdictional error.
- (ii) The Tribunal's reasons were comprehensive and the first integer was clearly identified. However, the Tribunal did not expressly deal with this claim and it was not subsumed in the general findings. There was also no factual premise upon which the integer was based that had been rejected.
- (iii) The Tribunal was required to address: (a) whether the Turkish authorities suspect, or might suspect, that the appellant has knowledge of the activities of TIKKO; (b) whether there is a real risk that the Turkish authorities may try to extract that information; and (c) whether there is a real risk that the authorities might use persecutory methods to obtain that information.
- (iv) The Tribunal did not make a jurisdictional error in relation to the second integer in that it extensively dealt with the evidence concerning the political activities of the appellant's family.

SZHLM v MIAC

[2007] FCA 1100

Federal Court of Australia, Cowdroy J, NSD 704 of 2007, 23 October 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.

A prior decision of the Tribunal was set aside and remitted for fresh determination. The appellant, a Ukrainian national, attended a hearing during that first assessment. Upon remittal, the Tribunal sent the appellant a letter pursuant to s.424 of the *Migration Act 1958* (the Act) requesting additional information be provided by 19 July 2005. On 11 July the appellant informed the Tribunal he had appointed a new authorised recipient and on 12 July the Tribunal forwarded the s.424 letter to the appellant's new agent confirming the information must be received by 19 July. On 4 August the Tribunal wrote a s.424A letter noting the appellant had not responded to the first letter and requesting his comment on potentially adverse information by 18 August. On 10 August, due to an omission in the letter, the Tribunal extended the time to comment until 24 August. The appellant responded on 23 August.

The Tribunal affirmed the delegate's decision without giving the appellant a further opportunity to appear. It found it had discharged its s.425 obligation by inviting the appellant to a hearing before the Tribunal as originally constituted. Alternatively, it found the appellant had failed to respond to its s.424 letter within the prescribed time and by virtue of ss.424C(1), 425(2)(c) and 425(3) of the Act any obligation of the Tribunal to afford a hearing was discharged.

The Federal Magistrates Court agreed that s.424C(1) applied because the appellant had been invited to give additional information and had not given it within the time provided.

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

- (i) The Tribunal failed to comply with its statutory obligations and denied the appellant procedural fairness by failing to invite the appellant to a hearing before affirming the delegate's decision.
- (ii) Despite the time limit fixed by the first s.424A letter, the Tribunal sent its second s.424A letter extending the time for submissions and, due to its own omission, on 10 August further extended the time to comply until 24 August. The requested information was received on 23 August, within the time limit. Section 424C(1) did not apply to disentitle the appellant from a hearing.
- (iii) By sending the two s.424A letters it was clear that the Tribunal required additional information to enable it to determine the application before it. If after receipt of such further information the Tribunal was still unable to make a decision favourable to the appellant it had an obligation pursuant to s.425 to invite the appellant to appear before it. The fact that a previous hearing was held did not discharge this obligation in view of the fact that the Tribunal requested further information.
- (iv) The original decision of the Tribunal having been set aside had "no operative effect". The reconstituted Tribunal was required to carry out its statutory functions under s.425 as if the first hearing had not taken place.

FEDERAL MAGISTRATES COURT JUDGMENTS

El Darwich v MIAC & Anor

[2007] FMCA 1350

Federal Magistrates Court of Australia, Turner FM, SYG 721 of 2007, 4 September 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of a delegate of the Minister to refuse to grant a Partner (Temporary) (Class UK) visa, or a Partner (Residence) (Class BS) visa.

The applicant made a non-judicially determined claim of domestic violence by providing 3 statutory declarations, one from himself and two from different competent persons. The Tribunal was not satisfied that the alleged victim had suffered relevant domestic violence and sought the opinion of an independent expert. The 'independent expert' provided an opinion that the alleged victim had not suffered relevant domestic violence. The opinion was made by 2 persons who were employed by Centrelink and were suitably qualified to make the assessment.

The applicant claimed that the Tribunal committed a jurisdictional error of law by taking into account a joint opinion of two persons as if it were the opinion of 'an independent expert' and that the Tribunal failed to comply with the requirements of s.359A of the *Migration Act 1958* (the Act).

Held: application dismissed.

- (i) The fact that two independent experts expressed the same opinion does not prevent the opinion from being the opinion of an independent expert on the matter. The expression 'an independent expert' in r.1.23 of the *Migration Regulations 1994* is not confined to the opinion of one independent expert. Section 23(b) of the *Acts Interpretation Act 1901* provides that "In any Act unless the contrary intention appears...words in the singular number include the plural and words in the plural number include the singular." No contrary intention is shown in the legislation in relation to the opinion of an independent expert.
- (ii) A breach of s.359A was not established. The names and qualifications of the independent experts and whether they were employed or contracted by a Gazetted organisation did not form the reason or part of the reason for the Tribunal affirming the decision under review. In any event, the information about the two independent experts was given in a further s.359A letter, except for their names. However, their names were not the reason, or part of the reason for the Tribunal affirming the decision that is under review.

SZKPQ v MIAC & Anor

[2007] FMCA 1658

Federal Magistrates Court of Australia, Cameron FM, SYG 1476 of 2007, 5 September 2007

The applicant, a national of People's Republic of China (China), sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that it did not have jurisdiction to review the decision of the delegate of the Minister that he was not a person to whom Australia owed protection obligations. The Tribunal found that his application for review was lodged out of time.

The applicant lodged his application for a protection visa on 9 December 2003. The application was refused on 2 March 2004 and the decision was notified to the applicant by letter dated the same day. The letter was addressed to the applicant and indicated that a "carbon copy" was sent to his nominated authorised recipient. The applicant's application for review was lodged on 20 March 2007. The Tribunal concluded that because the application had been made out of time it was not a valid application.

The applicant contended that the decision had not been properly notified by the Department and time had not begun to run. Therefore, his application for review was a valid application and should be considered by the Tribunal.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Department had not properly notified the applicant of his decision as the notification letter was not properly given to the applicant's nominated authorised representative according to s.494D of the *Migration Act 1958* (the Act).
- (ii) The structure of the Act makes it clear that if an authorised representative has been appointed, then that is the person referred to in the procedural provisions of the Act that set out the methods by which documents

may be given to a person. References to the “recipient” in ss.494B and 494C are references to the authorised representative. The letter should have been addressed to the authorised representative.

- (iii) It is not sufficient that the notification be sent to the applicant care of the authorised recipient, or that a letter to the applicant be copied to the authorised recipient. Nor would it appear sufficient that the envelope containing the letter addressed to the applicant may have actually been addressed to the authorised recipient.
- (iv) As the letter was addressed to the applicant and carbon copied to the authorised recipient, the notification was not done in a fashion which satisfied the requirements of the Act. Therefore, even if the applicant had actually received the notification the procedure required by the Act was not followed and there was not proper notification.

SZIDR v MIAC & Anor

[2007] FMCA 1653

Federal Magistrates Court, Cameron FM, SYG 1328 of 2007, 5 October 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 he feared persecution on the basis of his homosexuality. The applicant claimed to have suffered several incidents of serious harm as a result of his homosexual activity including one incident which resulted in the lynching of the applicant’s companion.

The Tribunal was not satisfied that the applicant was a ‘practicing homosexual’ and therefore a person to whom Australia had protection obligations. The Tribunal did not accept the applicant’s evidence was credible. The Tribunal also considered that there was no available evidence to support the applicant’s claim that his companion was lynched. The Tribunal put these issues to the applicant in a letter under s.424A of the *Migration Act 1958* (the Act).

The applicant contended that the Tribunal wrongly considered the particular social group to which the applicant belonged. He submitted that the Tribunal should have considered that the basis of his fear of persecution was his homosexuality and not whether he ‘practiced’ homosexuality. The applicant also contended that the Tribunal breached s.424A(1) of the Act. He submitted that the Tribunal relied in its decision on its searches of various ‘newspaper’ reports to verify the applicant’s lynching claim, whereas its s.424A letter only referred to searches of ‘independent country information’.

Held: Tribunal decision quashed and remitted for reconsideration

- (i) The Tribunal committed a jurisdictional error by only considering one particular claim of the applicant, which was persecution as a practicing homosexual. The Tribunal did not extend its consideration to whether the applicant had a well-founded fear of persecution by reason of his claimed membership of the wider particular social group of Nigerian homosexuals.
- (ii) Although it is apparent that the applicant’s claimed fear of persecution was pressed in the context of him wishing to have a sexual life without fear of persecution, his statutory declaration indicated that the fact of his claimed homosexuality was also a basis of his claim. The materials submitted in support of the application included information indicating that sexual orientation alone could be the basis of persecution in Nigeria.
- (iii) The Tribunal discharged its obligations under s.424A(1) of the Act. Applying *SZBYR v MIAC* [2007] HCA 26, the absence of evidence of the lynching incident was not ‘information’ for the purposes of s. 424A(1). The Tribunal was therefore not required to notify the applicant of the absence of news articles to corroborate the applicant’s claim.
- (iv) The reference to ‘independent country information’ in the s.424A letter was a short-hand reference to information sourced from disinterested parties. Local media and journalistic sources would be included in ‘country information.’

MZXPA v MIAC & Anor

[2007] FMCA 1619

Federal Magistrates Court of Australia, Burchardt FM, MLG 174 of 2007, 12 October 2007

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

The Tribunal sent the applicant a post hearing letter under s.424A of the *Migration Act 1958* (the Act) advising that certain named witnesses were either close relatives of or had been known to the applicant for many years and as such have a strong incentive to ensure the success of the application. The Tribunal explained that this information was relevant because an inference may be drawn that the evidence provided by the named witnesses was not genuine and lacked credibility.

The applicant claimed two grounds of appeal: firstly, that the Tribunal's decision was affected by apprehended bias; and secondly, that the Tribunal erred in a particular factual finding in circumstances where there was no evidence to support such a finding.

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

- (i) The presupposition that family and friends might be dishonest, as given to the applicant in the s.424A letter is not a proper observation and discloses a predisposition.
- (ii) Apprehended bias is made out giving rise to a jurisdictional error. In the circumstances of the case a hypothetical fair-minded lay person might reasonably apprehend that the Tribunal might not have brought an impartial mind to the resolution of the assertion to be denied.
- (iii) Whilst the matter is finely balanced and the reasons for decision given by the Tribunal are unimpeachable, it is not possible to be sure that the preconceived bias about the applicant's friends and relatives did not affect the other findings.

SZIWY v MIAC & Anor

[2007] FMCA 1641

Federal Magistrates Court, Smith FM, SYG 1544 of 2006, 12 October 2007

The applicant, a national of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that she was not a person to whom Australia had protection obligations. The applicant feared persecution for reasons of her Presbyterian religion.

The applicant was detained in immigration detention at the time of her visa and review applications. Her solicitor submitted to the Tribunal that it should take into account her on-going medical treatment for anxiety and depression in China and Australia, that she was subject to monitoring within the detention centre and that her health conditions would impact upon her ability to provide consistent evidence. A document from a Chinese church pastor also presented the applicant as a traumatised person. In its reasons for decision, the Tribunal found that the applicant was unable to elaborate upon any religious details and concluded that she had been "deceptive and untruthful". The Tribunal also gave no weight to oral evidence given at hearing by a religious Minister and found that it "cannot rely" on the documentary evidence.

The applicant alleged that she was denied a fair opportunity to present her case because of her mental impairments or because the Tribunal did not investigate and consider whether that was the situation.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal breached s.425(1) of the *Migration Act 1958*. The Tribunal failed to take into account that the applicant's capacity as a witness during the hearing was materially affected by mental impairments. The Tribunal did not sufficiently reflect upon the applicant's mental and personality characteristics when assessing her credibility, thereby resulting in unfairness. Substantively, it assessed the applicant's evidence given at the hearing as if she was a person without impairment. The Tribunal gave no express consideration to the applicant's mental condition which had been raised by her solicitor, both to the Department and the Tribunal. It can be inferred from the absence of any discussion on this topic in its statement of reasons that it thought such considerations were legally irrelevant.
- (ii) The Tribunal's failure to consider whether to investigate the applicant's mental capacities constituted a failure to comply with its duty to conduct a review imposed by s.414(1) and duty to hear the applicant under s.425(1). Procedurally, the Tribunal should have considered whether to call for medical records available at Villawood or other psychological assessments before reaching conclusions on the applicant's evidence and completing its review.
- (iii) Medical evidence before the Court, considered in light of the observations of the applicant's solicitor, medical records from Villawood and a reading of the transcript suggest that the applicant was probably suffering

mental impairments during the Tribunal's interview, and that these probably affected her ability to respond "normally" to the Tribunal's questions seeking to investigate and assess her claimed history. Had the Tribunal known of her medical condition it is probable that its evaluation of the applicant's credibility would have been materially affected and possible that its conclusions significantly different.

SZILV v MIAC & Anor

[2007] FMCA 1707

Federal Magistrates Court, Scarlett FM, SYG687 of 2006, 12 October 2007

The applicant, a national of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of imputed political opinion. The applicant did not attend the Tribunal hearing.

In making its decision, the Tribunal indicated that it "had a number of problems with the applicant's claims". In considering a claim about the difficulties encountered by the applicant's parents in China, the Tribunal referred to the fact that the applicant was resident in Australia when his parents first experienced these problems. The Tribunal also referred to information given in the protection visa application indicating that the applicant's parents' problems were due to his father's refusal to give a job to a relative.

The applicant claimed that the Tribunal, when affirming the delegate's decision, failed to comply with s.424A of the *Migration Act 1958* (the Act), in that information relied on in the decision was submitted in the initial application for a protection visa, but had not been included in the subsequent application for review.

The applicant also claimed that the Tribunal, in inviting him to attend a hearing, had failed to comply with ss.425A and 426 of the Act, in that the notice did not adequately notify him of the effect of s.426(2), which allows the applicant to give the Tribunal written notice that the applicant wishes to obtain evidence from other persons.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal committed a jurisdictional error in that it breached the requirements of s.424A(1). The Tribunal did not give the information to the applicant, ensure that the applicant understood why it was relevant, or invite the applicant to comment on it.
- (ii) The Tribunal relied on information that had been provided by the applicant in support of his application for a protection visa, but not as part of his application for review. The information was, therefore, not excluded by s.424A(3)(b).
- (iii) The Tribunal used this information as part of the reason for affirming the delegate's decision and the conclusions reached were more than a mere finding that there was an overall lack of detail in a situation where the applicant had not attended the hearing.
- (iv) The Tribunal's notice to the applicant did not breach the requirements of ss.425A and 426.

Bolat v MIAC & Anor

[2007] FMCA 1640

Federal Magistrates Court, Scarlett FM, SYG3588 of 2006, 16 October 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate refusing to grant him a Partner (Migrant) (Class BC) visa. The applicant had claimed that he was eligible for the visa due to domestic violence committed by his sponsor.

The Tribunal had obtained and forwarded to the applicant pursuant to s.359A of the *Migration Act 1958* (Cth) (the Act) an independent expert opinion, signed by two independent Centrelink experts, that the applicant had not suffered relevant domestic violence. In response, the applicant provided further material including a statutory declaration by a neuropsychologist. Noting that r.1.23(1C) of the *Migration Regulations 1994* (the Regulations) required the independent expert's opinion to be taken as correct, the Tribunal decided not to refer the further information to the independent experts in order that they might reconsider their opinion, because it did not consider that new evidence received after an independent expert opinion had been obtained invoked further obligations to reconsider domestic violence claims, and because the fresh evidence was not so different from the earlier claims that it needed to be referred to Centrelink for further consideration.

The applicant alleged that the Tribunal decision was affected by jurisdictional error in that the Tribunal had accepted the opinion of two persons as being the opinion of an independent expert as defined in r.1.23(1) and had failed to comply with s.359A in providing a letter but precluding the applicant's response to matters raised in the letter being taken into account.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal's decision not to refer the neuropsychologist's report to the independent experts constituted jurisdictional error.
- (ii) Section 359A required that the applicant be given the opportunity to comment on or respond to information. It is intended by the legislature to have some practical effect and requires the Tribunal to reconsider the applicant's domestic violence claim if the applicant produces fresh evidence.
- (iii) The neuropsychologists's report was clearly relevant evidence that the independent experts may or may not have considered would alter their opinion as to whether the applicant was the victim of relevant domestic violence.
- (iv) The Tribunal did not make a jurisdictional error by regarding the opinion of the two independent experts as being the opinion of an independent expert. For the purposes of r.1.23(1B) and 1.23(1C) it is a matter of no consequence whether the assessment is prepared by more than one person. It will still qualify as an independent expert's opinion provided that (a) each of the authors is a suitably qualified person; (b) the assessment is unanimous; and (c) the assessment is unequivocal.

SZIMG v MIAC & Anor

[2007] FMCA 1724

Federal Magistrates Court, Nicholls FM, SYG719 of 2006, 22 October 2007

The applicant, a national of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of his Christian beliefs, his claimed failure to have complied with the government's family planning policies, and his illegal departure from China.

The Tribunal sent a hearing invitation to the applicant's authorised recipient. In reply, it received a "Response to Hearing Invitation" form, notifying the Tribunal that the applicant did not want to attend the hearing and that he consented to the Tribunal proceeding to make a decision. In its decision record, signed before the scheduled hearing date and handed down after it, the Tribunal stated that, in the circumstances and pursuant to s.426A of the *Migration Act 1958* (Cth) (the Act), it had decided to make its decision on the review without taking any further action to enable the applicant to appear before it. Section 426A(1)(b) empowers the Tribunal to proceed make a decision on the review if the applicant "does not appear before the Tribunal on the day on which or the date and time on which the applicant is scheduled to appear."

The applicant contended that the Tribunal fell into jurisdictional error by proceeding to make a decision pursuant to s.426A of the Act before the scheduled date of hearing.

Held: application dismissed

- (i) While the Tribunal made a legal error in stating that it proceeded to a decision pursuant to s.426A of the Act, nonetheless the applicant's consent to the Tribunal's proceeding without enabling the applicant to appear at a hearing before it, meant that the obligation that the applicant be given the opportunity of a hearing pursuant to s.425(1) of the Act ceased at the time of the applicant giving his consent pursuant to s.425(2)(b) of the Act. The Tribunal therefore acted within its jurisdiction in proceeding to make a decision.
- (iii) A distinction can be drawn between s.426A of the Act and those other parts of the procedural code as set out in Division 4 of Part 7 which provide for mandatory obligations imposed on the Tribunal. Under s.426A of the Act, the Tribunal is not obliged to make a decision on the review without taking any further action to appear before it. Such action is discretionary.
- (iv) While it is plainly open for the Tribunal to consider, and act, on each of the matters set out in ss.425(2)(a), (b) and (c) prior to the invitation to hearing being issued, the Tribunal is not precluded from considering, and acting, on each of these matters after the invitation has been issued.

- (v) There was insufficient evidence to say that the agent acted in bad faith or fraudulently such that a finding of fraud could be made out. The “Response to Hearing Invitation” form was signed by the applicant himself. His evidence before the Court did not have the “ring of truth” about it.

Obiter:

- (vi) The elements of s.426A of the Act provide for an invitation pursuant to s.425 of the Act to appear at a hearing, and if the applicant does not appear at the scheduled time, plainly, the Tribunal may make a decision at that time. But it does not limit the making of such a decision only at that time and not at some time later. While the Tribunal was “in error” as at the date the decision was signed in purporting to proceed pursuant to s.426A of the Act (before the scheduled hearing date), this error is rectified by the operation of s.430B(4) of the Act and that at the date of handing down, which was well after the scheduled hearing date, the condition necessary to enable the Tribunal to have proceeded pursuant to s.426A of the Act had been met.

Sabra v MIAC & Anor

[2007] FMCA 1716

Federal Magistrates Court, Smith FM, SYG1052 of 2007, 24 October 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister’s delegate refusing to grant her a Partner (Migrant) (Class BC) visa. The Subclass 100 (Spouse) visa was refused on the basis that the applicant was not the spouse of her sponsoring husband.

The Tribunal affirmed the decision under review because it was not satisfied the applicant and her husband had met the requirements of r.1.15A(1A)(b) of the *Migration Regulations 1994* (the Regulations) and consequently did not satisfy the visa criteria. The Tribunal did not accept the applicant’s evidence in relation to the financial, household and social aspects of the relationship, as the Tribunal considered the applicant and her evidence lacked credibility. Further, the Tribunal said it was not satisfied that “they have been living together or not been living separately and apart on a permanent basis”.

The applicant contended that the Tribunal asked itself a wrong question by failing to address its finding on whether the applicant and her husband “live together” at the correct point in time.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal committed a jurisdictional error because it failed to consider whether the applicant and her husband were living together at the time of the decision. The Tribunal’s finding that the applicant and her husband did not live together for the period claimed implied that the finding was directed at a period of time before the date of decision.
- (ii) The Tribunal applied the wrong test in relation to time of decision criteria. Its description of the relevant law implied that the Tribunal needed a ‘continuing satisfaction’ that the applicant and her husband were living together or not living separately and apart on a permanent basis between the time of application and time of decision. Instead, the Tribunal should have asked itself whether the applicant and her husband were living together or not living separately and apart on a permanent basis at the time of the Tribunal’s decision.
- (iii) The Tribunal’s reasoning in relation to living together or not living separately and apart on a permanent basis may have tainted its reasoning in relation to whether the applicant and her husband had a mutual commitment to a shared life and had a genuine and continuing relationship.

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.14) (SLI2007, No.356) (Legislative Instrument – F2007L04099)

The *Migration Amendment Regulations 2007(No.14) (SLI2007, No 356)* amend the *Migration Regulations 1994* (the Principal Regulations), making a very limited number of changes to Carer visas, Work and Holiday visas and visa application charges. The commencement dates for amendments vary, for example, the amendments to Work and Holiday visas commence on 31 October 2007 and amendments relating to Carer visas commence on 1 January 2008.

In particular, the Regulations amend the Principal Regulations to:

- Remove the Assurance of Support requirement from subclass 116 and 836 (carer) visas
- Rectify an unintended consequence flowing from an earlier regulatory change – the *Migration Amendment Regulations 2007 (No.9)* – which prevented a refund of visa application charges for persons making a mistaken application except where they applied for a Class UC visa.
- Give effect to an arrangement recently entered into with the United States of America (USA) in relation to Work and Holiday visas and allow valid USA passport holders to make internet applications rather than paper applications;
- Insert condition 8503 and 8540 (Restrictions on holding substantive visa) as conditions that may be imposed on subclass 462 (Work and Holiday) visa holders; and
- Correct a minor typographical error in the visa criteria reference for public interest criteria 4019 (Australian Values).

INSTRUMENTS

Migration Regulations 1994 – Specification under regulation 1.17 and subparagraph 1222(1)(aa)(i) – Classes of Persons – November 2007 (Legislative Instrument – F2007L04279)

This instrument, commenced on 3 November 2007, specifies the classes of persons, in the case of application made by an applicant applying in Australia for a Student (Temporary) (Class TU) visa, who can use form 157A or 157A (Internet). This instrument operates to inform applicants for a Student (Temporary) (Class TU) visa about which form they can use to lodge an application in Australia, in particular which classes of persons are eligible to lodge online internet based applications.

Migration Regulations 1994 – Specifications under regulation 1.17 and subparagraph 1222(1)(a)(ii) – Classes of persons – November 2007 (Legislative Instrument – F2007L04278)

This instrument, commenced on 3 November 2007, specifies the class of persons in the case of an application made by an applicant outside Australia for a Student (Temporary) (class TU) visa, who can use form 157A or 157E. This instrument operates to inform applicants for a Student (Temporary) (Class TU) visa about which form they can use to lodge an application outside Australia, including the class of persons eligible to lodge online internet based applications.

Migration Regulations 1994 – Specification under paragraph 1124(1)(a) of Schedule 1 – Ability of Specified Work and Holiday Visa Applicants to make Internet Applications – October 2007 (Legislative Instrument – F2007L04105)

This instrument, commenced on 31 October 2007, specifies that nationals from the United States of America are a class of persons for the purpose of paragraph 1224A(1)(a) and, as such, will have the ability to make an internet application on form 1208E (internet) and also a paper application on form 1208.

Migration Regulations 1994 – Specification under regulations 1224A and 462.221 – Arrangements for Work and Holiday Visa Applicants from Thailand, Iran, Chile, Turkey and United States of America – October 2007
(Legislative Instrument – F2007L04108)

This instrument, commenced on 31 October 2007, lists the foreign countries (with the addition of the USA), specifies the education qualifications, specifies addresses and specifies that nationals from the USA may make their application in any foreign country.

Migration Regulations 1994 – Specification under subparagraph 1224A(3)(b)(iii) of Schedule 1 – Specified Work and Holiday Visa Applicants Excluded from Requirement to Provide Evidence of Government Support – October 2007
(Legislative Instrument – F2007L04111)

This instrument, commenced on 31 October 2007 specifies that nationals from the USA are a class of persons who are not required to provide evidence of support for the grant of the visa.

Legislation Pending

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

The *Migration Amendment (Sponsorship Obligations) Bill 2007* was introduced into the House of Representatives on 21 of June 2007. 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.

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

CASELOAD OVERVIEW

MRT Decisions – October 2007

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	4	5	0	1	10
Visitor refusal	11	5	0	3	19
Student refusal	11	10	3	2	26
Temporary business refusal	7	3	2	1	13
Permanent business refusal	6	2	0	1	9
Skill linked refusal	25	24	2	3	54
Partner refusal	60	44	6	12	122
Family refusal	16	12	4	0	32
Student cancellation	30	33	2	2	67
Sponsor approval refusal	2	0	1	1	4
Other	9	9	1	1	20

RRT Decisions – October 2007

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bangladesh	2	6	0	6	14
Brazil	1	0	0	0	1
Burma (Myanmar)	1	0	0	0	1
Cambodia	1	0	0	0	1
China (PRC)	19	53	0	2	74
East Timor	0	1	0	0	1
Egypt	1	0	0	0	1
El Salvador	1	0	0	0	1
Ethiopia	0	0	1	0	1
Fiji	0	3	0	0	3
India	2	29	3	4	38
Indonesia	1	12	1	1	15
Iran	3	1	0	0	4
Iraq	1	0	0	0	1
Israel	2	0	0	0	2
Jordan	1	0	0	0	1
Kenya	0	1	0	0	1
Korea, Republic Of	0	2	0	0	2
Lebanon	0	4	0	0	4
Liberia	0	1	0	0	1
Macedonia, Fmr Yugo Rep of	0	1	0	0	1
Malaysia	0	8	2	1	11
Mali	1	0	0	0	1
Nepal	5	2	0	0	7
New Zealand	0	1	0	0	1
Nigeria	1	4	0	0	5
Pakistan	0	4	0	4	8
Philippines	0	1	0	0	1
Russian Federation	1	0	0	1	2
South Africa	1	1	0	0	2
Sri Lanka	1	2	0	1	4
Sudan	1	1	0	0	2
Syria	1	0	0	0	1
Tonga	0	1	0	0	1
Turkey	2	0	0	0	2
Ukraine	0	2	0	0	2
United States of America	0	1	0	0	1
Vietnam	0	1	0	0	1
Zimbabwe	0	1	0	0	1

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.

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