



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

071413403

17 October 2007, Sydney

Ms K Raif, Member

SKILLED INDEPENDENT (MIGRANT) (CLASS BN) VISA – SUBCLASS 136 – CL.136.213 – VISA CANCELLATION – BOGUS DOCUMENTS – FALSE INFORMATION – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 136 visa under s.109 of the *Migration Act* 1958 (the Act) because the applicant did not comply with ss.101, 103 and 105 of the Act. The delegate found that the applicant had included false information on his visa application and provided numerous bogus documents relating to his past employment experience. The applicant claimed that both he and his wife, the second applicant, were established in Australia with their daughter, an Australian citizen. The applicant claimed that cancellation of his visa and return to India would result in significant difficulties for himself and his family.

Held: Decision under review affirmed

The Tribunal found that the applicant had not complied with ss.101 and 103 of the Act and that it would be unnecessary to consider whether the applicant breached s.105 of the Act. The Tribunal found that the applicant may not have met the requirements for the grant of a visa under cl.136.213 of the *Migration Regulations* 1994 had he not included incorrect answers on the application form and not provided bogus documents in support of his application. The Tribunal accepted that returning to India may result in some difficulties for the applicant and his family, but concluded that the nature and extent of the breach outweighed the factors in their favour. Accordingly, the Tribunal was satisfied that the applicant's visa should be cancelled.

060461748

24 October 2007

Mr R Wilson, Member

STANDARD BUSINESS SPONSOR – R.1.20D(2)(A) – The applicant produced vegetables and applied for approval as a standard business sponsor. A delegate of the Minister for Immigration and Citizenship refused the application on the basis that the applicant failed to satisfy rr.1.20D(2)(a), which requires that the sponsor be lawfully operating a business in which the employment of the holder of a Subclass 457 (Business (Long stay)) visa would contribute to, among other things, the creation or maintenance of employment for Australian citizens or permanent residents or competitiveness within sectors of the Australian economy and r.1.20DA(2)(a) of the *Migration Regulations* 1994. The applicant claimed that the nominee had specialised skills for growing particular vegetables which constituted a significant portion of the applicant's business income. The applicant further claimed that the nominee would introduce new techniques to increase the competitiveness and productivity of the business, and accordingly create more local employment opportunities. The applicant claimed that the nominee's skills would also benefit Australian industry by enhancing the knowledge base of the Australian horticultural industry.

Held: Decision under review set aside

The Tribunal found that applicant satisfied the requirements of r.1.20D(2). It also found that r.1.20DA was not relevant to the application because the business operated in Australia and r.1.20DA related to approval for an overseas business. The Tribunal accepted the applicant's claim that the nominee would utilise his specialised technical knowledge to enhance the applicant's business and result in further employment opportunities. The Tribunal found that the nominee's technical skills would also enhance competition within the Australian economy. It was accordingly satisfied that employing the nominee would make a contribution to Australia with respect to creating or maintaining employment for Australian citizens or permanent residents, and to enhancing competitiveness within sectors of the Australian economy. The Tribunal accepted that the applicant would be the direct employer of the nominee, had a satisfactory record of training employees and would comply with its undertakings. The Tribunal found no evidence to suggest that the applicant did not satisfy the remaining rr.1.20D(2) or (2A) requirements for the approval of the standard business sponsorship.

061006627
30 October 2007, Sydney
Ms K Raif, Member

SKILLED – AUSTRALIAN-SPONSORED (MIGRANT) (CLASS BQ) VISA – SUBCLASS 138 – CL.138.215 – NOMINATED SKILLED OCCUPATION – CL.138.217 – The first visa applicant and his wife (the second applicant) applied for a Skilled Australian Sponsored (Migrant) visa as a pharmacist and internal auditor respectively. The visa was refused by a delegate of the Minister for Immigration and Citizenship on the basis that the first applicant did not satisfy cl.138.216 of Schedule 2 of the *Migration Regulations* 1994 (the Regulations), because he was not employed in a skilled occupation for the requisite period. Upon review he sought to rely on the qualifications and experience of his wife. He claimed that, by indicating 'pharmacist' on the visa application and not undertaking the required skills assessment, he had not nominated a skilled occupation for the purpose of cl.138.215. He claimed that the second applicant should be assessed as part of the application pursuant to cl.138.217 and r.2.27A of the Regulations.

Held: Decision under review set aside

The Tribunal acknowledged that 'pharmacist' was not a gazetted skilled occupation but concluded that the visa application demonstrated an intention to nominate for the skilled occupation of 'retail pharmacist'. The Tribunal did not consider that a skills assessment or an Australian Standard Classification of Occupations code was necessary for a nomination to be valid. The Tribunal concluded that the first visa applicant had nominated a skilled application and met the requirements of cl.138.215. The Tribunal found that since he also met the requirements of cl.138.214 and cl.138.216 the Tribunal was prevented from considering his wife pursuant to cl.138.217 and r.2.27A. Noting that the skills of the first applicant had not been assessed by the relevant assessing authority as to whether they were suitable for the occupation of 'retail pharmacist', the Tribunal remitted the application to enable the first applicant to seek such an assessment.

Partner and Family Visas

071700097
11 October 2007
Ms G Hamilton, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 115 – CL.115.211 – REMAINING RELATIVE – OVERSEAS NEAR RELATIVE – R.1.15 – A delegate of the Minister for Immigration and Citizenship refused to grant the applicants Other Family (Migrant) (Class BO) Subclass 115 Remaining Relative Visas on the basis that the primary applicant did not satisfy cl.115.221 of Schedule 2 of the *Migration Regulations* 1994 (the Regulations). The delegate found that she had an overseas near relative and was therefore not a remaining relative. The applicant lived in Turkey and was sponsored by her only brother, who has been an Australian citizen since 1998. The applicant's mother died in 1985. Her father and husband both died in 2003. The father had remarried in 1994 before separating with his second wife in 2000. The applicant never recognised the marriage personally, and did not have any contact with the second wife or her son. The delegate found that the step-relationship survived the death of the biological parent and accordingly the applicant had an 'overseas near relative'.

Held: Decision under review set aside

The Tribunal found that the sponsor was a settled Australian citizen who had turned 18 and was usually resident in Australia. The Tribunal found that the question whether the applicant's father's second wife was an 'overseas near relative' turned upon whether the definition of step-child as defined by the Regulations was satisfied. Under r.1.03 a step child means a person who is not the natural or adopted child of the parent but who is the natural or adopted child of the parent's current spouse. As the applicant's father was deceased at the time of application, he was not the current spouse of the alleged step-parent. The step-relationship between the applicant and the second wife was therefore severed. The Tribunal further noted that the applicant's father and his second wife had been separated for a considerable time before his death, and therefore were no longer spouses within the definition of r.1.15A(1A). The Tribunal was satisfied that the applicant had no overseas near relatives, met the requirements of r.1.15(1)(a) and (b) and accordingly satisfied cl.115.211 and cl.115.221.

071300297
22 October 2007, Sydney
Mr A Jacovides, Member

PARTNER (PROVISIONAL) (CLASS UF) VISA – SUBCLASS 309 – CL.309.211 – SPOUSE RELATIONSHIP – CREDIBILITY – A delegate of the Minister for Immigration and Citizenship refused to grant a Partner (Provisional) (Class UF) visa on the basis that the visa applicant was not the review applicant's spouse within the meaning of r.1.15A of the *Migration Regulations* 1994. The delegate found that the visa applicant and sponsor (review applicant) lacked credibility because they falsely claimed to have met three years before their marriage. At the Tribunal, the review applicant presented a range of evidence in support of his spousal relationship. The review applicant claimed that he provided false information to prevent his application being rejected. He feared that the Department would not consider the relationship to be genuine because the parties had in fact met only a short time before their marriage.

Held: Decision under review set aside

The Tribunal was satisfied that the visa applicant and review applicant had a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship between them was genuine and continuing, and that they did not live separately and apart on a permanent basis. The Tribunal considered that the substance of the delegate's credibility finding concerned the false information as to when the parties met. The Tribunal accepted the review applicant and visa applicant to be credible witnesses and accepted the review applicant's explanation for providing false information to the Department. The applicants had not provided false information in any other respect. Finding the applicant's claim of being in a genuine spousal relationship to be credible on the evidence, the Tribunal concluded that the visa applicant satisfied certain criteria for the grant of the Subclass 309 visa.

071301119
29 October 2007, Melbourne
Ms D Morgan, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 102 – CL.102.211 – ADOPTION – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicants Child (Migrant) (Class AH) Subclass 102 Adoption visas on the ground that the applicants did not meet cl.102.211 of Schedule 2 of the *Migration Regulations* 1994 (the Regulations). The delegate found that their sponsor and his wife had by-passed inter-country adoption procedures by adopting the applicants in Fiji. Further, cl.102.211(2)(ii) was not met as the sponsors had not been residing outside Australia for a period of 12 months before the application was made. Clause 102.211(3) was also not met because the review applicant was not approved by a competent Australian authority as being a suitable adoptive parent. Finally, cl.102.211(5) was not met because the adoptions were not made in accordance with the Hague Convention on inter-country adoption.

Held: Decision under review affirmed

The Tribunal noted that the applicants were implicitly asking for waiver of the 12 month requirement since it was not disputed that the review applicant did not meet the requirements of clause 102.211(2)(b)(ii). The Tribunal found that it had no power to waive the requirement. The Tribunal found that the review applicant had not been approved by a competent Australian authority to be a suitable adoptive parent of the visa applicants, and therefore did not meet clauses 102.211(3)(d) and 102.211(4)(e). The Tribunal also found that the adoption was not in accordance with Adoption Convention which required the agreement of both contracting parties in the adoption process. Fiji was not a Convention country and the review applicant had never involved Australia in the adoption process as required by clause 102.211(5) of the Regulations, thus not satisfying the requirements for the grant of the visa.

071279656
30 October 2007, Melbourne
Mr G Haddad, Member

CHILD (MIGRANT) (CLASS AH) VISA – SUBCLASS 117 – CL.117.221 – RELATIONSHIP BETWEEN REVIEW APPLICANT AND VISA APPLICANTS – PARENTS WHEREABOUTS UNKNOWN – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicants a Subclass 117 (Orphan Relative) visa. The visa applicants claimed to be the nieces of the review applicant. However, the delegate was concerned that the review applicant did not investigate the whereabouts of the visa applicants' parents with the Red Cross until 2006 given she first became aware they were missing in 2004. The Tribunal invited DNA evidence of this relationship. The report concluded that the review applicant and first named visa applicant were 17 times more likely or strongly likely to be related as aunt and niece and that the review applicant and second named visa applicant were found to have an approximately equal chance of being related as aunt and niece compared with unrelated individuals. The review

applicant claimed that she had received news that her sister, her sister's husband and four of their six children had attempted to flee to Yemen, the boat capsized, many drowned and she assumed that her sister and family had perished. The review applicant also claimed that she was initially unaware of the tracing service offered by the Red Cross.

Held : Decision under review set aside

The Tribunal found the review applicant's claim of not initiating a tracing inquiry was plausible as the Tribunal was aware that the Somali community had a strong network which its members relied on to search for missing family members. The Tribunal also placed weight on supporting statements from a Somali community organisation and Red Cross and was aware that death certificates were difficult to obtain in Somalia. The Tribunal accepted that the parents of the visa applicants were dead or of unknown whereabouts. The Tribunal also accepted that the visa applicants' births were not registered. On the basis of the DNA tests, the Tribunal found that it was persuaded that the review applicant and the second named visa applicant were aunt and niece. The Tribunal further found that both the visa applicants had not turned 18, did not have spouses, could not be cared for by their parents and that there was no compelling reason to believe that the grant of the visa would not be in their best interests. The Tribunal found that the visa applicants satisfied the requirements of cl.117.211(a) as well as met the requirements of cl.117.212 at time of application. They continued to satisfy cl.117.211(a) at the time of decision and accordingly the Tribunal was satisfied that the visa applicants satisfied cl.117.221.

Student visas

071407526

15 October 2007, Sydney

Ms A Duffield, Member

VISA CANCELLATION – SUBCLASS 573 HIGHER EDUCATION SECTOR VISA – CONDITION 8202(3)(a) – ATTENDANCE – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 573 Higher Education Sector visa under s.116(1)(b) of the *Migration Act* 1958 (the Act) because the applicant breached condition 8202(3)(a) of his visa. The applicant's education provider sent him a notice under s.20 of the *Education Services for Overseas Students Act* 2000 stating that he had only attended 71.90% of the contact hours scheduled in the term running from 25 September 2006 to 1 December 2006. The applicant attended the interview at the Department of Immigration and Citizenship and explained that he had been sick and his family was poor. The applicant provided medical certificates and ultrasound reports to the Tribunal and claimed that he was unable to attend classes because of pain caused by his kidney condition on seven specific occasions.

Held: Decision under review affirmed

The Tribunal was satisfied that the applicant had not complied with condition 8202(3)(a) because it was not satisfied that the applicant had attended his course for at least 80% of the 'contact hours' scheduled for the relevant period. The Tribunal considered the evidence provided to support his claim of absence but found that it did not support the applicant's claim that he suffered from a medical condition prior to the relevant dates. The Tribunal noted that the applicant's overall attendance for the duration of his studies was 81% and that his academic record had been certified by his education provider as satisfactory. However, the Tribunal was also concerned that evidence provided to it had apparently been fabricated. The Tribunal was satisfied that the applicant had not complied with condition 8202 and that the non-compliance was not due to exceptional circumstances beyond the applicant's control.

071519998

18 October 2007, Melbourne

Mr P Katsambanis, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 573 – NON-REVOCATION OF AUTOMATIC CANCELLATION – SECTION 137L – CONDITION 8202 – ACADEMIC RESULT – EXCEPTIONAL CIRCUMSTANCES BEYOND NON-CITIZEN'S CONTROL – The applicant held a Subclass 573 Higher Education Sector visa which was automatically cancelled under s.137J of the *Migration Act* 1958 (the Act). The applicant sought revocation of the automatic cancellation and a delegate of the Minister for Immigration and Citizenship decided not to revoke the automatic cancellation under s.137L of the Act. The applicant's education provider had sent a notice under s.20 of the *Education Services for Overseas Students Act* 2000 ('s.20 notice') informing her that she had breached condition 8202(3)(b) of her visa because she had not achieved an academic result that was certified to be at least satisfactory. The s.20 notice advised the applicant that her visa would be automatically cancelled unless she responded

to the notice within the specified time. The applicant claimed that the breach of condition 8202 was due to exceptional circumstances beyond her control in that her poor academic performance occurred due to monetary problems and personal family issues which had now been resolved. The applicant claimed that she experienced considerable stress and pressure, a grandparent was ill, her family had financial problems and had also endured problems arising from a flood in Jakarta. The applicant did not seek any medical, psychological or other professional assistance but was informed by the school counsellor that she was suffering depression.

Held: Decision under review affirmed

The Tribunal found that there was no evidence that the applicant's academic results had been certified by her education provider to be at least satisfactory and therefore had breached condition 8202(3)(b) of her Subclass 573 visa. The Tribunal found that the claim relating to the flood did not impact upon the applicant's academic result since it occurred after the semester in question. In relation to the applicant's claims concerning her grandfathers' illnesses, the Tribunal found that the applicant gave vague evidence of insufficient detail and provided no documentary evidence of the illnesses or treatments that were provided. On this basis the Tribunal was not satisfied that a grandparent suffered any illness during the period in question and did not impact upon the applicant's studies. The Tribunal also rejected the applicant's claim that she suffered stress and depression during the period in question. The Tribunal found that the applicant had not sought medical, psychological or other professional assistance for these claimed conditions or taken any medication for her problems. Given the rejection of the applicant's claims, the Tribunal was not satisfied that the breach of condition 8202 was due to exceptional circumstances beyond her control and accordingly affirmed the delegate's decision not to revoke the automatic cancellation of her Subclass 573 visa.

061059152

22 October 2007, Sydney

Ms D Jordan, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 – VISA REFUSAL – CL.572.223(2)(a)(i)(A) – CL.5A404 – ENGLISH LANGUAGE PROFICIENCY – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Student (Temporary) (Class TU) Subclass 572 visa on the basis that the applicant did not have the requisite English language proficiency as specified in cl.5A404 of Schedule 5A to the *Migration Regulations* 1994 (the Regulations). The delegate found that he did not meet cl.572.223(2)(a)(i)(A) of the Regulations. The delegate considered that the applicant's International English Language Testing System (IELTS) test report had expired and he had not provided evidence showing that he had successfully completed a substantial part of a course leading to a qualification from the Australian Qualifications Framework at certificate IV level or higher no longer than two years prior to his visa application. Before the Tribunal, the applicant provided an IELTS test report with an overall band score of 6.5. The Tribunal also received a letter from the applicant's education provider confirming that the applicant had successfully completed 74% of a Diploma of Hospitality Management course leading to a qualification from the Australian Qualification Framework at certificate IV level.

Held: Decision under review set aside

The Tribunal found that the applicant met the requirements of cl.5A404 of the Regulations. The Tribunal found, based on the evidence from the applicant's education provider that he had successfully completed many units of a course conducted in English and leading to a certificate IV qualification under the Australian Qualification Framework. The Tribunal was therefore satisfied that the applicant had, less than 2 years before the date of the application, successfully completed a substantial part of a course (other than a foundation course) for the purposes of satisfying cl.5A404(d)(iii). Accordingly, the Tribunal found that the applicant satisfied cl.572.223(2)(a)(i)(A) to the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

Cameroon

071505435

12 October 2007, Sydney

Mr M Cooke, Member

CAMEROON – POLITICAL OPINION – PARTICULAR SOCIAL GROUP – MEMBER OF POLITICAL ORGANISATION WHO SOUGHT ASYLUM – The applicant claimed to fear persecution on the basis of her political opinion. The applicant had been an active member of an illegal political organisation in Cameroon that advocated for the succession of the current government. The applicant claimed that she would be persecuted if she returned to Cameroon on the basis of her political activities. She presented a convocation invitation that had been issued by Cameroon's Gendarmerie Nationale. The applicant further claimed that she would be detained and questioned by Cameroon authorities due to membership of a particular social group, namely members of this particular political organisation who had applied for asylum in Australia.

Held: Decision under review set aside

The Tribunal accepted that the applicant was an active member of the political organisation. The Tribunal found that she had a well founded fear of persecution. It also accepted that if she were to return to Cameroon, there was a real chance that she would be detained and questioned by Cameroonian authorities because of her membership of a particular social group, being members of a political organisation who had sought asylum in Australia. The Tribunal accepted independent information indicating that the applicant, owing to her political opinion, would be at serious risk of harm or torture if she were placed in detention in Cameroon. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

China

071576767

25 September 2007, Sydney

Ms J Marquard, Member

PEOPLES REPUBLIC OF CHINA – IMPUTED POLITICAL OPINION – PROTESTS AGAINST UNPAID WAGES – DISTRIBUTION OF ANTI-GOVERNMENT MATERIALS – The applicant claimed to fear persecution in China because of his involvement in protests against unpaid wages and the distribution of anti-government material. The applicant claimed that his family farm belonged to the government and was controlled by corrupt local officials who sold it to private businesses. The only benefit the applicant received was employment in the new business. As the business rarely paid salaries on time, the applicant and a colleague organised protests by the employees seeking their wages. The protest was violently stopped by the Public Security Bureau (PSB). The applicant claimed he and others were detained, mistreated, tortured, forced to pay fines and sign a confession. The applicant was dismissed from employment but pursued the unpaid wages and sent many petitions to various government agencies. The PSB continued to harass the applicant and the applicant's family urged him to desist. The applicant assisted his friend to distribute propaganda in protest against the government. The applicant claimed that after his family organised for him to leave China, his friend was arrested and his family interrogated by the police.

Held: Decision under review set aside

The Tribunal referred to independent information and found that in certain circumstances protesters against unpaid wages and anti-government protesters may be at risk of persecution. The Tribunal found the applicant's evidence to be consistent and credible and accepted his account of events in China regarding the appropriation of his farm without compensation, his employment with the new business, his involvement in organising protests and resulting treatment by the PSB. The Tribunal accepted that following the applicant's release he continued to petition for the payment of wages and became involved in distributing anti-government literature through the influence of his friend. The Tribunal found that there was a real chance that the applicant might be subjected to serious harm, including possible detention or torture amounting to persecution, were he to return to China in the reasonably foreseeable future. The Tribunal was satisfied that the persecution the applicant feared involved systematic and discriminatory conduct, was deliberate or intentional and involved selective harassment because of his imputed political opinion. Accordingly the Tribunal was satisfied that the applicant had a well-founded fear for a Convention reason.

071587305

27 September 2007, Sydney

Mr R Inder, Member

CHINA – RELIGION – ROMAN-CATHOLIC – The applicant feared persecution by the Chinese government and its agencies because he claimed to be a Roman Catholic Christian and a high-profile member of the underground church. The applicant claimed that he was involved in the underground Roman Catholic Church and Christian activities in China including, assisting the church leader, recruiting people to the underground church, evangelism and distributing Christian material. The applicant provided a letter from a church official in China which stated that the applicant was a famous Catholic and that all his family members had been baptised. He also claimed that he was detained and released and subsequently put on a government blacklist before fleeing to Australia. The applicant provided photographs of himself attending church in Australia and a letter from a priest which stated that the applicant had regularly attended the Chinese Catholic Mass held every Sunday since his arrival.

Held: Decision under review affirmed

The Tribunal found that the applicant demonstrated virtually no knowledge about the Bible, his Roman Catholic denomination, or his faith and was therefore not a Christian, a Roman Catholic, or a member of the underground church in China. It did not accept that the applicant assisted the church leader, evangelised or encouraged people to join the underground or Roman Catholic church, attended Bible study and other underground or Roman Catholic church activities in China. Nor did the Tribunal accept that he had been arrested by the police or was on their blacklist. Although the Tribunal was willing to accept that the letter from the Church official in China was genuine, it did not accept that the letter related to the applicant and therefore attached no weight to it. It accepted that the applicant went to church in Australia and the photographs provided by him, but the Tribunal was satisfied that the sole reason he did so was to enhance his claims for a protection visa. The Tribunal was satisfied that the applicant would not become involved in church activities such as joining an underground church or becoming a member of the Roman Catholic Church if he returned to China, now or in the reasonably foreseeable future. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

071649951

18 October 2007, Sydney

Mr A Jacovides, Member

CHINA – CRIMINAL CONDUCT – EXTORTION – The applicant claimed to fear persecution as a victim of extortion from a government official. The applicant claimed that in the late 1990s he was involved in a motor vehicle accident in which a policeman was injured. He claimed that he had since been harassed by a policeman seeking compensation from him. The applicant claimed that the policeman had threatened to harm him and members of his family if his demands were not met. The applicant claimed that, to avoid the policeman, he had lived in different locations in China for several years before arriving in Australia. He also claimed that the authorities would not protect him if he returned to China and may even participate in harming him.

Held: Decision under review affirmed

The Tribunal accepted that the applicant had been the subject of extortion and had been threatened with harm if he did not meet those demands. Although the Tribunal noted that fear from criminal conduct can be Convention related, and that a person may be subject to extortion for multiple reasons, the Tribunal did not accept that the criminal activities in this case were linked to a Convention reason. The Tribunal concluded that the applicant was targeted only for monetary gain. The Tribunal also considered whether the applicant would have access to protection from the State if the people he feared sought to harm him in the future. The Tribunal concluded that Chinese citizens had access to a reasonable level of protection by Chinese authorities in these circumstances. Accordingly the Tribunal was not satisfied that the applicant had a well-founded fear of persecution in China for any Convention reason.

071586982

19 October 2007

Ms S Durvasula, Member

CHINA – POLITICAL OPINION – RELIGION – PARTICULAR SOCIAL GROUP – FALUN GONG – The applicant claimed to fear persecution because he was a Falun Gong practitioner. The applicant claimed that he was a dedicated practitioner, but did not come to the authorities' attention because he practised secretly in his home and at his friend's house. He did not discuss Falun Gong with his family. The applicant claimed the authorities saw him putting up posters about Falun Gong and against the Chinese Communist Party. He claimed his employer paid for him to take a

vacation to Australia and that, after he left, his family was questioned and he was investigated, expelled from the Communist party and dismissed from his job. He also claimed his wife was detained because he was suspected of being a Falun Gong practitioner. The applicant claimed he practised Falun Gong and joined demonstrations in Australia. He provided photographs, articles and third party evidence of those activities and a letter from his former employer corroborating his claims.

Held: Decision under review set aside

The Tribunal found the applicant's evidence consistent with his written statement and corroborated by other information. He provided a detailed account of his practice, confidently explained Falun Gong philosophy and demonstrated the exercises. The applicant could describe key Falun Gong events, the nature of the posters and how he put them up without being detected. The Tribunal accepted all the applicant's claims. The claim that his wife was detained was sufficient to bring him to the attention of the authorities. It drew no adverse conclusion from the fact that he could obtain a passport and travel to Australia because this was prior to discovery. It also found that his practice in Australia was otherwise than for the purposes of strengthening his claims. The Tribunal accepted that "rank and file followers" unwilling to renounce Falun Gong are subject to physical or mental torture and mistreatment. It found that the applicant would not change his beliefs, could not reasonably relocate if he returned and that there was a real chance he would be detained. The Tribunal was accordingly satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Colombia

071498471

25 October 2007, Sydney

Ms G Cullen, Member

COLOMBIA – RETRIBUTION BY INFLUENTIAL FAMILY – CREDIBILITY – The applicant claimed to fear persecution by a powerful Colombian family ('the family'), whose daughter he had arranged to marry. He claimed that the family would seek revenge on him because he owed their daughter money in exchange for marriage. The applicant further claimed that the family would target him because he had dishonoured the daughter, being of a lower social standing than the family. He claimed that he would face persecution because he would be unable to find future employment since the family had significant influence over Colombian businesses.

Held: Decision under review affirmed

The Tribunal did not find the applicant to be a credible witness. The Tribunal identified several contradictions and inconsistencies in his evidence. It also referred to contrasting evidence given by a member of the family which supported the applicant and his intended marriage. The Tribunal placed little weight on the applicant's purported tape-recording of the marriage arrangement because it could not be verified and that, in any event, it did not support the applicant's claim that the family would harm him upon his return to Colombia. The Tribunal did not accept the applicant's claim that he dishonoured the daughter of the family, would be harmed for not paying the money he claims to owe, or that he would be unable to obtain employment. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution within the meaning of the Convention.

Egypt

071601913

16 October 2007, Sydney

Ms R Mathlin, Member

EGYPT– RELIGION – CHRISTIANITY – The applicant claimed to fear persecution because of his religious beliefs. The applicant claimed to be a Coptic Christian who was active in his local church. He claimed that he was harassed, detained and persecuted by the local police after seeking to expose the alleged kidnapping of a Christian girl by Muslims. He claimed the police threatened to institute serious criminal charges if he did not desist and that he fled before they could do so.

Held: Decision under review set aside

The Tribunal accepted that the applicant was a Coptic Christian who was active in his local church. The Tribunal was satisfied that the applicant was harassed, detained, mistreated and threatened by the local police because of his intervention in the alleged kidnapping and that there was a real chance that such attacks would continue if he returned to Egypt. The Tribunal was satisfied that the claimed events had the character of a religious dispute occurring in the context of religious tensions between Coptic Christians and Muslims. The Tribunal was satisfied that the applicant would continue with his religious activism and that this could lead to further confrontations with the police. Independent information also indicated that Coptic Christians had experienced varying degrees of harassment and persecution in Egypt. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Lebanon

071509463

19 September 2007

Ms B Forsyth, Member

LEBANON – POLITICAL OPINION – HEZBOLLAH – RELIGION – SHI'A – MARRIED TO SYRIAN – The applicant claimed he was assaulted by a group of men because they assumed he was a member of Hezbollah before the applicant escaped, never returning to Tripoli. He claimed that Syrian officers and a high profile family took assets from his father's business without payment. When his father pursued the matter he was insulted and threatened with jail. The applicant claimed that a relative was stopped by the military and assaulted, resulting in a medical condition. He also claimed that his father died of medical negligence and his siblings complained of poor health care. The applicant claimed that there was war in Lebanon, all Shi'a areas were bombarded by Israel and his family had fled to Syria. He claimed that he could not relocate to the north because of war and a fear of another war amongst Lebanese or between Lebanon and Israel. The applicant claimed that he would suffer harm because of low wages, loss of income and lack of employment. He said he closed his business and sold his equipment. He also claimed that he would suffer harm because his wife was Syrian although born in Lebanon.

Held: Decision under review affirmed

The applicant admitted that he did not belong to Hezbollah, his encounter with the group was a chance case of mistaken identity and he never encountered them again. The Tribunal was satisfied that the chances of future harm from the men or other anti-Hezbollah groups for reasons of his religion, imputed political opinion or any other Convention reason was remote. The Tribunal noted that the incident with his father's business occurred when the applicant was a teenager and he did not mention other incidents. It found there was no real chance he would suffer harm as a result of his relationship with his father who had passed away. The Tribunal found there was no real chance he would have a similar experience to his relative for a Convention reason or suffer serious harm from his relationship. The applicant did not claim and the Tribunal was not satisfied that the applicant's father received poor medical care for any Convention reason nor was Lebanon's poor health care systematic and discriminatory. The Tribunal accepted there had been a war in Lebanon, that his family's city was bombed and they were forced to Syria. However, it found the war had ended and most citizens, including the applicant's family, had returned. The Tribunal found there was no real chance he would suffer serious harm if he returned. The Tribunal considered increased tension between Sunnis and Shiites but found that the real chance of conflict was restricted to Beirut. It found a risk of further conflict with Israel but found Hezbollah and the military would be targeted not the applicant, nor Shi'a as a class of person. The Tribunal also found the economic hardship the applicant would face because of the lack of employment did not constitute persecution or serious harm. The Tribunal was satisfied that the chance of harm because the applicant's wife held Syrian citizenship was remote. Accordingly the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Nepal

071637020

24 September 2007, Sydney

Mr A Jacovides, Member

NEPAL – POLITICAL OPINION – RASHTRIYA PRAJATANTRA PARTY – The applicant claimed to fear persecution from his political opponents in Nepal on the basis of his support for the monarchy and conservative Hindu views. He claimed to be an active member of the Rashtriya Prajatantra Party (RPP). The applicant claimed that on several

occasions, while participating in RPP political activities, he was targeted for attack by members of the Youth Communist League and he was at risk of life-threatening harm. The applicant claimed that the authorities were unable to protect him during those attacks.

Held: Decision under review set aside

The Tribunal accepted that the applicant was a devout Hindu, a committed monarchist and a political activist with the RPP, who had been targeted by members of the Youth Communist League. The Tribunal was satisfied that significant and positive political developments have taken place in Nepal since the civil war had ended and that Maoists and the authorities were no longer commonly subjecting civilians to human rights violations. Nonetheless, the Tribunal found that the applicant, as an outspoken political activist, was one of a small group of citizens who had been severely disadvantaged, and were now at risk of harm, because of increasing sentiment against the monarchy. The Tribunal was satisfied that although violence against the monarchists was not widespread or common, the government could not provide a reasonable level of protection for political activists like the applicant, in the reasonably foreseeable future. Accordingly the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Pakistan

071631672

20 September 2007, Sydney

Ms L Symons, Member

PAKISTAN – POLITICAL OPINION – PERCEIVED OPPOSITION TO JIHADIST GROUP – The applicant stated that a jihadist group recruited his child and sent him to a city where he was killed. He spoke to its leader on several occasions and made a report against him to the police. He claimed that members of the jihadist group chased him and fired a gun at him but he was not harmed. He did not report this incident to the police. He felt unsafe in his village and decided to take his children to Karachi. Some of the group's followers in the village threatened that they would kill him if they saw him there again. They also delivered letters to his house threatening continued harassment if he did not withdraw his complaint. He did not report these letters to the police. He claimed that the police did nothing in relation to his child's killing and that he was scared to live in Karachi. He also claimed that if he returned to Pakistan he would be killed and that it would be impossible to live in Karachi because the jihadist group would not leave him alone.

Held: Decision under review affirmed

The Tribunal accepted that the jihadist group was banned in the region and that it had been recruiting children for the purposes of a jihad. The Tribunal also accepted that law enforcement organizations in the province had been unsuccessful in arresting and prosecuting the leader for various criminal offences. The Tribunal noted that a number of the claims made by the applicant were consistent with independent country information and gave him the benefit of the doubt in relation to his substantive claims. The Tribunal was satisfied that the persecution that the applicant claimed to fear would involve serious harm and systematic and discriminatory conduct against him for reasons of his perceived opposition to the religious teachings and practices of the jihadist group. The Tribunal was also satisfied that the law enforcement agencies in the province were unable to protect him and that if the applicant were to return to live in his hometown in the foreseeable future there was a real chance of him being persecuted. However, the Tribunal considered that it was a remote and far fetched possibility that the applicant would be of sufficient interest to the jihadist group for it to pursue, locate and persecute him in Karachi or another part of Pakistan. As the applicant and his family were able to safely relocate, it accordingly found that he did not have a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

SZBHU v MIAC

[2007] FCA 1614

Federal Court of Australia, Gilmour J, NSD 294 of 2007, 24 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, a national of China, was not a person to whom Australia had protection obligations.

On 24 July 2002, the appellant applied to the Tribunal for a review of the delegate's decision. The address provided by the appellant in his application was in Granville, NSW. A handwritten note, dated 4 November 2002, allegedly signed by the appellant and faxed to the Tribunal, advised that he 'hope(d) to change his address to 2/90 Boyd Street, Cabramatta West NSW'. On 30 May 2003, the Tribunal sent a letter under s.425A of the *Migration Act 1958* (the Act) to the appellant at the Cabramatta address, inviting him to attend a hearing to give oral evidence and present arguments.

On 16 June 2003, in an alleged telephone conversation between the appellant and the Tribunal, the appellant allegedly acknowledged that he lived at the address provided in the 4 November 2002 letter. Evidence of this conversation was a file note recorded on the Tribunal's case management system. The note stated 'Applicant called...Confirmed his contact details on CMS are still correct. Applicant said he received the letter recently sent to him by RRT. I checked the log and noticed that the letter should probably be a hearing invitation'. During the Federal Court proceedings, the appellant denied that this conversation took place.

The appellant failed to appear on the proposed hearing date. The Tribunal proceeded to make a decision on the review pursuant to s.426A of the Act and affirmed the delegate's decision to refuse the appellant's application for a protection visa.

Federal Magistrate Emmett found at first instance that the s.425A letter had been sent to the appellant and as such, the Tribunal had properly exercised its discretion under s.426A to proceed to make its decision on review without taking any further action to enable the appellant to appear. However, there was no issue before her Honour as to whether the fax concerning the new address was actually from the appellant and whether this was, in effect, a notice of change of address.

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

- (i) The invitation letter was not dispatched in accordance with s.441A(4) of the Act because the 4 November 2002 letter was no more than an anticipated address of the appellant at some unstated time in the future and did not constitute a change of address.
- (ii) The Tribunal committed a jurisdictional error in its purported exercise of s.426A because it failed to comply with s.425 and s.425A of the Act.
- (iii) Section 441A(4)(c)(i) of the Act does not identify any particular method by which an applicant may provide an address for service and it would be sufficient if this address was provided orally.

SZJQP v MIAC

[2007] FCA 1613

Federal Court of Australia, Gilmour J, NSD 631 of 2007, 24 October 2007

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application to extend time for the filing of 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 wrote to the appellant, saying it was unable to make a favourable decision on the papers and invited the appellant to a hearing on 23 August 2006. The appellant did not respond and did not appear on the date of the hearing. Late on the day after the hearing the appellant faxed to the Tribunal a medical certificate saying that he was 'unable to attend work/study on 23/24 August 2006 due to a viral illness'. The Tribunal proceeded to make a decision under s.426A without inviting the appellant to a further hearing. It found that the appellant had been put on notice that it was unable to make a favourable decision but had failed to send further material or respond to the Tribunal's hearing invitation indicating that he would attend; the appellant had travelled some distance to the doctor's surgery on

the day of the hearing, when to travel to the hearing would have been less arduous; the rescheduling would have conflicted with the Tribunal's obligation to make a decision within 90 days; that the Tribunal's experience was that applicants with a genuine claim to protection obligations contact the Tribunal immediately if they are unable to attend a hearing and are able to provide satisfactory medical certificates; and the appellant did not appear to have ever had any genuine intention to come to a hearing.

Before the Federal Magistrate, the appellant argued that the Tribunal had failed to exercise jurisdiction by finding it could not reschedule a hearing unless it had 'cogent reasons', and that the Tribunal took into account irrelevant considerations in finding that it would not reschedule a hearing. The application to the Federal Magistrate was outside the 28 day time limit for review set out in s.477. In hearing the application to extend the time limit under s.477(2), the Federal Magistrate concluded that the Tribunal had complied with its statutory obligations, both in the conduct of its review and in the making of its decision, which was not affected by jurisdictional error, and that having no reasonable prospects of success, it was not in the interests of justice for time to be extended.

Held: Appeal allowed. Decision of the Federal Magistrates Court not to extend time set aside, and the time for making the application for review extended.

- (i) The Federal Magistrate did not, in her reasons, consider the effect of the medical certificate. This was arguably a relevant consideration and it was an error to ignore it. Arguably, the Federal Magistrate erred in concluding that the Tribunal had not fallen into error when directing itself as to the exercise of its discretion.
- (ii) The Tribunal should have accepted that the evidence before it, namely the medical certificate, was to the effect that the applicant was unable to attend the hearing by reason that he was unfit to do so. The Tribunal in a material sense disregarded the medical certificate and in doing so acted unreasonably. A refusal of an application for an adjournment for this reason may amount to procedural unfairness.
- (iii) The Tribunal arguably took into account irrelevant considerations in the exercise of its discretion. It is not, arguably, relevant to the exercise of discretion for the Tribunal to conclude that the applicant could have attended the hearing rather than go to the medical practice. It was also arguably irrelevant that the applicant did not either respond to the Tribunal's correspondence or advise it that he intended coming to the hearing. The 90 day time period, the Tribunal's experience with other applicants and the presumed non genuine intention of the applicant to appear at any hearing were also, arguably, irrelevant considerations.

SZJHL v MIAC
[2007] FCA 1713
Federal Court of Australia, Finn J, NSD 1450 of 2007, 9 November 2007

The appellant, a citizen of Pakistan, sought to appeal the judgment of the Federal Magistrates Court which upheld the decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations.

The appellant claimed to fear persecution in Pakistan because he was homosexual, had converted from being a Sunni Muslim to a Shia Muslim and was a member of the Jaffria Youth Pakistan. The delegate of the Minister of Immigration and Citizenship rejected the visa application, identifying concerns about the veracity of the appellant's claims. At the Tribunal hearing the Tribunal raised concerns regarding the appellant's credibility, identifying inconsistencies with the appellant's earlier evidence and within his evidence and referring to concerns about the genuineness of the documents he produced at hearing. The Tribunal sent a letter under s.424A of the *Migration Act 1958* (the Act) after the hearing in relation to the inconsistencies and inviting his comment on them. The appellant's response to the letter produced further inconsistencies. The Tribunal found that the appellant had fabricated his claims and that the documents he had produced were not genuine in concluding that the appellant did not have a well-founded fear of persecution.

The appellant contended that the inconsistencies between the response to the s.424A letter and the appellant's evidence at hearing constituted a new issue which required the Tribunal to invite the appellant to give evidence and present arguments pursuant to s.425 of the Act and *SZBEL v MIMIA* [2006] HCA 63.

Held: Appeal dismissed

- (i) Given the background of the case there was no issue for which a further opportunity for comment ought to have been provided.
- (ii) The delegate's reasons put in issue all of the claims that had been made at that stage and his credibility. The Tribunal did nothing to engender any expectation that these were no longer operative issues, rather it

accentuated their centrality both in the questions asked at hearing and in its s.424A letter. It was clear the entirety of the claims and the appellant's credibility was in issue. Any further inconsistencies exposed in his response to the s.424A letter or any greater doubts engendered about his credibility did not raise any new or unexpected issues. To hold otherwise in this case would give rise to "a circulus inextricabilis" of invitation and comment.

Prasad v MIAC
[2007] FCA 1739
Federal Court of Australia, Logan J, QUD 174 of 2007, 14 November 2007

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to refuse to grant the appellant an Other Family (Residence)(Class BU) subclass 835 visa.

The Tribunal found that the appellant and her husband usually resided in Australia at the time of visa application. The Tribunal was not satisfied that the appellant's husband had not had contact with his mother, who lived in New Zealand, within a reasonable time before making the visa application. As such, it found that the appellant failed to meet r.1.15(1)(c)(ii) of the *Migration Regulations 1994* (as in force prior to 1 November 2005).

The Federal Magistrates Court considered whether, on its true construction, r.1.15(1)(ii) had any application to the appellant, given the conceded inapplicability to her of r.1.15(1)(c)(i) as per *MIMIA v Hildago* [2005] FCAFC 192. The Federal Magistrates Court dismissed the application and found that the proper construction of r.1.15(1)(c)(ii) was that 'it stands alone as a criterion to be satisfied even when, as in this case, sub-regulation (c)(i) does not apply'.

On appeal to the Federal Court, the appellant argued that r.1.15(1) set out one 'related and integrated' criterion and that subparagraph (c) identified a particular type of 'overseas near relative' and the quality of the association between that overseas near relative and the visa applicant. Thus, the reference to 'that relative' in r.1.15(1)(c)(ii) was said to be a reference to the relative described in r.1.15(1)(c)(i).

Held: Appeal dismissed

- (i) The Tribunal did not commit jurisdictional error.
- (ii) The role that the conjunctive word 'and' plays within r.1.15(1)(c) is to indicate that there are two items of information sought in respect of each 'overseas near relative', not that the two items are interdependent, i.e. not to indicate that item (ii) is cumulative upon item (i). In each item, as a matter of construction, the expression 'that relative' refers to the term 'overseas near relative' that appears in the conditional clause that opens paragraph (c). If it transpires that the visa applicant or that person's spouse happens usually to reside in Australia all that means is that it is unnecessary to endanger Ministerial satisfaction in respect of one of the items specified in r.1.15(1)(c), not that this paragraph has no application whatsoever.
- (iii) A more natural reading of r.1.15(1)(c) is that it is directed to engendering Ministerial satisfaction with respect to two separate subjects in relation to each and any 'overseas near relative', whether that relative usually resides in a third country, a 'geographic' subject and the contact, if any, that the visa applicant or his or her spouse had with that relative within a reasonable time prior to the making of the visa application, a 'quality of contact' subject.

Applicant S298/2003 v MIAC
[2007] FCA 1793
Federal Court of Australia, Lander J, NSD 1133 of 2007, 22 November 2007

This was an appeal from an order of a Federal Magistrate 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 was born in Bangladesh and lived in South Africa from 1995-1997, before travelling to Australia on a false South African passport. The appellant claimed he was both a member and Joint Secretary of a branch of the Freedom Party in Bangladesh. He feared that he would be harmed by people associated with the Government, the Awami League, the army and police, and that he was subjected to violence on numerous occasions. The appellant submitted a photocopied document purportedly from an office holder of the Freedom Party attesting to his involvement in the party.

At the hearing, the Tribunal put to the applicant that there was advice from the Department of Foreign Affairs and Trade suggesting that fraudulent and bogus documents could be easily obtained in Bangladesh, and that such documents should be treated with circumspection. In response to a question from the applicant asking whether the Tribunal would like to see the original of the document, the Member told the applicant that it was not a matter of whether it was a photocopy or not and there was advice that original documents are easy to obtain in a fraudulent manner. The Tribunal went on to reject the appellant's claims, citing serious concerns about his credibility. In its decision, the Tribunal refused to place any weight on the document noting that as the document was a photocopy it could not be the basis of an investigation into authenticity by the Document Examination Unit.

The significant issue on appeal was whether the Tribunal had misled the appellant as to the significance of tendering an original document as opposed to a copy, and therefore denied him procedural fairness.

Held: Appeal allowed

- (i) The Tribunal denied the applicant a fair hearing and thereby fell into jurisdictional error.
- (ii) It may be inferred that the Tribunal misled the appellant into believing that tendering of an original would not advance his case. That advice was, on the Tribunal's own reasoning, wrong. An original document could have been investigated and if established as authentic, might have led the Tribunal not to make adverse credibility findings against the appellant.
- (ii) Not every statement made by the Tribunal to an applicant that is factually incorrect or may mislead will give rise to a finding of jurisdictional error. The statement or representation must give rise to unfairness in the sense that the applicant is denied a fair hearing.

SBTF v MIAC

[2007] FCA 1816

Federal Court of Australia, Lander J, SAD133 of 2007, 28 November 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 Bahrain, claimed to fear persecution on the basis of his actual and imputed political opinion and his Shia Muslim religion.

The appellant claimed, and the Tribunal accepted, that he had a subjective fear of persecution arising from his arrest, detention and torture in 1997. The Tribunal also accepted that the appellant had received threats from police upon release. However, the Tribunal did not accept that the appellant engaged in further political activity or had a political profile as a result. The Tribunal accepted that the applicant was a Shia Muslim and that Shia Muslims in Bahrain suffered from institutionalised discrimination, including political and employment discrimination and segregation. The Tribunal concluded that although Shias were subject to quite severe forms of discrimination, this discrimination was not of sufficient seriousness to amount to serious harm and was not persecution. The evidence before the Tribunal included two reports from a doctor which indicated that the appellant had suffered significant psychological damage due to his treatment by police in Bahrain and was on medication including anti-depressants and anti-psychotics.

The Federal Magistrates Court dismissed the application. Before the Federal Court, the appellant contended that the Tribunal had incorrectly applied the law in relation to what amounted to serious harm in accordance with s.91R of the *Migration Act 1958* (the Act) and failed to make findings in relation to a significant integer of the appellant's claim, namely the psychological harm suffered by him.

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

- (i) The Tribunal failed to consider an integer of the appellant's claims and thereby fell into jurisdictional error.
- (ii) The Tribunal was under an obligation to consider whether, if the appellant were to return to Bahrain, he would, as a result of the discrimination which members of his faith suffer in Bahrain, suffer serious harm in the form of psychological harm.
- (iii) The appellant's evidence and the two doctor's reports (individually or in combination) were sufficient to alert the Tribunal that a claim which was being pursued included a claim that he would suffer psychological harm if he returned to Bahrain.

- (iv) Section 91R(2) of the Act specifically states that the instances which are given in that subsection are not to limit what might amount to serious harm for the purpose of s.91R(1)(b). *SCAT v MIMA* (2003) 76 ALD 625 supports the contention that psychological harm may be serious harm within the meaning of s.91R of the Act.

FEDERAL MAGISTRATES COURT JUDGMENTS

Hu & Anor v MIAC & Anor

[2007] FMCA 1710

Federal Magistrates Court of Australia, Smith FM, SYG1959 of 2007, 3 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 that he was not entitled to the grant of a (Class DD) subclass 880 Skilled – Independent Overseas Student visa.

The applicant relied on a Certificate in "Food Processing (Retail Baking)" he had obtained while studying in Australia at the City College of Professional Development. That education provider was not registered under the *Education Services for Overseas Students Act 2000* at the time. The delegate and the Tribunal both found that the applicant failed to meet cl.880.230(2) of Schedule 2 to the *Migration Regulations 1994* (the Regulations), which is a 'time of decision' criterion requiring, amongst other things, that the qualification on which the applicant seeks to rely was obtained as a result of full time study in a registered course.

This requirement was introduced by *Select Legislative Instrument 2006 no. 159*, which was registered on 26 June 2006. The transitional provisions indicate in r.4(3) that the relevant amendment applies in relation to an application for a visa "made but not finally determined" before 1 July 2006. The applicant applied for the visa in October 2005.

The applicant contended that s.12(2) of the *Legislative Instruments Act 2003* prevented the amendment being given effect by decision makers, notwithstanding the expressed intention of the amending regulation to apply the changed criteria to outstanding visa and review applications.

Held: Application dismissed.

- (i) The transitional provision of the amending regulation reveals a clear intention that the change to the 'time of decision' criterion applies to all future decision making by the Minister or his delegate, as well as the Tribunal, when addressing any undecided visa application.
- (ii) Section 12(2) only applies if the instrument "would take effect before the date it is registered". The amending regulation did not purport to take effect before the date of its registration. It did not remove or alter any rights as they stood at a past date. It is clear that it was only intended to operate in relation to future decisions on visas which had not been granted, and without any alteration to the past legal position of any visa applicant. The argument seeking to render ineffective the amendment which inserted cl.880.230(2) must fail.
- (iii) In the absence of any ambiguity in the transitional provision, there was no scope to consider the principles of statutory construction, which presume against interference with accrued rights.

Obiter:

- (iv) After application and before a decision is made, a visa applicant has no more than a right to compel the Minister to make a decision on whether he or she is satisfied as to the prescribed criteria which are relevantly in force at the time of the decision. The *Migration Act 1958* intends the regulations themselves to indicate the criteria which must be satisfied at the time of decision of any undecided or future visa application. It was open to the Minister to make an amending regulation which made clear that an amended time of decision criterion is applicable to decisions on outstanding visa applications. The applicant never acquired a right to compel the Minister to apply the previous criteria. He therefore would have no accrued rights as at the date of amendment which were affected so as to disadvantage him.

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: RRT 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.

Alimi v MIAC & Anor

[2007] FMCA 1520

Federal Magistrates Court of Australia, Riley FM, MLG 588 of 2007, 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 that the applicant’s brother was not entitled to the grant of a Partner (Provisional) (Class UF) subclass 309 spouse visa on the basis that he was a member of the family unit of the applicant’s spouse (“the primary visa applicant”).

The applicant’s father was killed and his mother abandoned him and his brother shortly after the birth of his brother. His brother started to live with him and his wife at the age of 13 when the applicant got married. After the applicant left Afghanistan in 2001, his brother had been living with his wife and his son since the son was born. The applicant sent money to his wife for the support of her, the son and his brother. The Tribunal affirmed the decision on the grounds that applicant’s brother was a dependent of the applicant rather than his wife and therefore failed to satisfy cl.309.311 of Schedule 2 to the *Migration Regulations 1994* (the Regulations) which required a secondary visa applicant to be a member of the family unit of the primary visa applicant.

The issue before the court was whether it was sufficient for the purpose of cl.309.211 if the applicant’s brother was dependent on the applicant rather than his wife. The applicant argued that the Tribunal misinterpreted the definition of member of the family unit in r.1.12 and the definition of dependent in r.1.05A for failing to take into consideration the Department of Immigration and Citizenship’s policy in the Procedures Advice Manual 3 (PAM3) on r.1.05A which stated that financial support may be attributed to a cohabitating couple even though only one of them may be in receipt of income.

Held: Application dismissed.

- (i) The Tribunal correctly understood the relevant Regulations. Regulation 1.12(1)(e)(iii) does not include a person who is a dependent on a spouse of the family head and is confined to a person who is dependent on the family head. The drafter of the legislation chose to include a spouse in the opening words of r.1.12(1)(e) but not in r.1.12(1)(e)(iii). There is no reason to conclude that the choice was anything other than deliberate or that the words of r.1.12(e)(iii) do not reflect the intention of the drafter. The applicant’s interpretation of

the Regulations requires the court to read in at the end of r.1.12(1)(e)(iii) the words “or a spouse of the family head”, that is not permissible under any principle of statutory construction.

- (ii) The Tribunal correctly applied *Drake v MIEA (No2)* (1979) 2 ALD 634 and the relevant regulation. That regulation was not consistent with the policy. To that extent, the policy was unlawful and the regulation had to prevail.
- (iii) It appears that the overall result in *Al Naqi v MIAC* [2007] FMCA 874 was correct. The ratio of *Al Naqi* appears to be that, at least in relation to secondary applicants for a partner visa, where the ultimate source of support is a particular person, the secondary applicant is not the dependent of that person’s spouse.

Lee v MIAC & Anor
[2007] FMCA 1802

Federal Magistrates Court of Australia, Cameron FM, SYG 1554 of 2007, 30 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 to refuse his application for a (Class UC) Temporary Business (Long Stay) visa (Subclass 457). The visa was refused on the finding that the applicant’s sponsor – KT Entertainment Ltd (KT) – was not approved as a ‘standard business sponsor’ pursuant to cl.457.223(4) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). KT applied for review and the Tribunal affirmed the delegate’s decision finding that KT did not meet the criteria.

The Tribunal sent the applicant a notice under s.359A of the *Migration Act 1958* (the Act) on 10 January 2007 inviting him to comment on KT’s failure to obtain approval. The applicant replied on 16 February 2007 seeking a two week time extension to find a new sponsor, in which he also noted two potential sponsors. The Tribunal rejected the request for extension and advised the applicant on 20 February 2007. A hearing was then scheduled for 26 March 2007 which was attended by the applicant.

The applicant contended that the Tribunal’s discretion miscarried by refusing the applicant an extension of time to apply for a second sponsorship, and in addition, by not inviting the applicant to provide more details in relation to his proposed sponsors. Further, it was argued that the Tribunal should have given reasons for the refusal. Lastly, it was contended that the Tribunal should not have proceeded with a hearing on the basis that it was unable to make a favourable decision, in circumstances where the applicant had sought to put further information before it.

Held: Application dismissed

- (i) The Tribunal committed a jurisdictional error by holding a hearing when it had no power to do so. Sections 362, 363 and 359C(2) of the Act together operate to hold that the Tribunal has no power to invite the applicant to a hearing when the applicant has failed to respond to a s.359A notice.
- (ii) Relief was refused in the Court’s discretion since the jurisdictional error did not deny the applicant procedural fairness. Once the Tribunal found that KT did not meet the criteria to be a sponsor, the Regulations required that it affirm the delegate’s decision. It followed that any information in relation to the proposed alternative sponsors could not have affected the decision made by the Tribunal. The applicant suffered no injustice by reason of the Tribunal’s action in excess of jurisdiction.
- (iii) The Tribunal was under no obligation to permit the applicant further time to respond to the s.359A notice, and there is no duty either at common law or under statute to give reasons for that decision.

SZJDY v MIAC & Anor
[2007] FMCA 1760

Federal Magistrates Court of Australia, Smith FM, SYG2164 of 2006, 2 November 2007

The applicant, a national of Russia, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that she was not a person to whom Australia has protection obligations. The applicant claimed she feared persecution because of her association with a company (Company E) that supported an opposition political party.

The Tribunal affirmed the delegate’s refusal to grant the protection visa on the basis that the applicant lacked credibility. It did not accept the applicant’s claims that she had a business arrangement with Company E, based on information it obtained through its own investigations. The Tribunal sent the applicant a letter under s.424A of the *Migration Act 1958* (the Act) detailing information that contradicted some of the applicant’s claims. The Tribunal did not include in this s.424A letter information it received that corroborated the applicant’s claim that she owned a

Company B which had an association with Company E. The Tribunal ultimately accepted that the applicant was the proprietor of Company B, despite generally finding the applicant lacked credibility.

The applicant claimed she should have been told the full contents of information received by the Tribunal in the s.424A letter; in particular, information which supported her claimed associations with Company E. The applicant claimed that if she were told about the favourable information, she could have referred to it to support her general credibility. Because the Tribunal did not do so, it may have led the Tribunal to overlook the significance of that favourable information and was biased against the applicant.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal committed a jurisdictional error by failing to comply with the requirements of s.424A(1) of the Act. While the Tribunal included information that was the reason or part of the reason for affirming the decision, it did not include particulars of the context in which the information was given. This was required in order to enable the applicant to understand why it was relevant to the review. It was obviously practicable for the Tribunal to improve the applicant's understanding in that respect.
- (ii) The Tribunal should have revealed all the information arising from its independent investigation, including information favourable to the applicant. Not doing so precluded the applicant from appreciating the information's potential significance and denied the applicant a real opportunity to prepare a meaningful response to the letter.

Obiter:

- (iii) The Tribunal's selective disclosure and use of information obtained through its investigations may have given rise to a reasonable apprehension that it was not conducting its review with an open mind.

SZHLO v MIAC

[2007] FMCA 1837

Federal Magistrates Court, Nicholls FM, SYG 3109 of 2007, 8 November 2007

The applicant, a national of Egypt, 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 applicant claimed that he feared persecution on the basis of his religion.

The Tribunal did not accept the applicant's claims about persecution and found that his claims about persecution in Egypt were a 'recent invention to facilitate his application for a visa'. During the hearing the Tribunal asked when the applicant had first spoken to a migration agent. The applicant volunteered that he saw a solicitor a month after he first arrived in Australia. The Tribunal then proceeded to ask some questions about his discussion with the solicitor, including 'And did you ask him for any advice about migration or visas?'

The issue before the Court was whether the Tribunal's questions enquired into the content of the advice given by the solicitor, and/or whether the Tribunal was merely enquiring into whether or not the applicant had seen a solicitor. If the Tribunal had enquired into the content of the advice, the Tribunal was required to advise the applicant that he had a right to claim legal professional privilege.

Held: Appeal allowed; Tribunal's decision quashed; matter remitted to the Tribunal for reconsideration

- (i) The Tribunal committed a jurisdictional error by failing to advise the applicant that he was entitled to refuse to answer the questions which the Tribunal asked of him because they disclosed the contents of a confidential communication with his lawyer.
- (ii) The Tribunal's questions were designed to ascertain the content of privileged information and therefore the Tribunal was obliged to advise the applicant that he had a right to claim legal professional privilege.

Zhang v MIAC & Anor

[2007] FMCA 1855

Federal Magistrates Court of Australia, Cameron FM, SYG 1677 of 2007, 9 November 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to cancel the applicant's Student visa. The visa had been cancelled pursuant to s.116 of the *Migration Act 1958* (the Act) on the basis that the applicant had failed to maintain satisfactory attendance for term 8 of her course, in breach of condition 8202(3)(a) in Schedule 8 to the *Migration Regulations 1994*.

The Tribunal wrote to the applicant pursuant to ss.359 and 359A of the Act inviting her to comment on her apparent failure to meet the attendance requirement, and to provide any evidence which would indicate that her non-compliance was due to exceptional circumstances beyond her control. After the Tribunal hearing the Tribunal made inquiries with the education provider which advised the Tribunal that in term 7 the applicant's academic performance had been unsatisfactory and her attendance had been less than 80 per cent, even taking into account absences explained by medical certificates. The letter also advised that for term 8 her academic performance had been satisfactory but again, she had failed to meet the 80 per cent attendance requirement. The Tribunal sent a further s.359A letter inviting her to comment on the information about term 7. It affirmed the delegate's decision on the basis that she had not achieved an academic result certified by her education provider to be at least satisfactory for term 7, in breach of condition 8202, specifically 8202(3)(b), and that the non-compliance was not due to exceptional circumstances beyond her control.

The applicant alleged, among other things, that the Tribunal was not permitted to affirm the delegate's decision on grounds which were neither the subject of the Department's notice of intention to consider cancellation nor the delegate's decision.

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

- (i) The Tribunal's decision was affected by jurisdictional error.
- (ii) The Tribunal is not confined to whatever may have been the issues that the delegate considered. However the Tribunal did not give the applicant a real and meaningful invitation to attend a hearing to give evidence and present arguments in relation to the issues which it found to be decisive. As the determinative issue, the failure to have an academic result certified to be satisfactory, had not been one of the issues that the delegate had considered dispositive, s.360 required the Tribunal to alert the applicant to the significance of this criterion to the determination of the review application. As the Tribunal did not do so, it breached its obligations under s.360.
- (iii) Although the Tribunal's decision might be characterised as one which was based on the applicant's failure to comply with visa condition 8202, to characterise the matter in that way would be to fail to identify sufficiently the issues which were before the Tribunal. The real nature of the questions which the Tribunal asked itself included an identification of the academic performance criterion as being decisive.
- (iv) The letter inviting the applicant to comment on the information that the applicant had not achieved an academic result certified to be at least satisfactory did not satisfy s.360 of the Act. It was sent after the Tribunal hearing so that the Tribunal could meet its requirements under s.359A and it did not invite the applicant to attend a further hearing to give evidence and present arguments.
- (v) Because the Tribunal had not flagged to the applicant that her academic result was an issue in play, she could not have turned her mind to the presentation of evidence or arguments which would address the subsidiary question of whether her failure to obtain certification of a satisfactory academic result was the result of exceptional circumstances beyond her control. Consequently she was denied the opportunity guaranteed by s.360 to give evidence and present arguments on that issue. The Tribunal erred as a result.

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

Migration Act 1958 – Designated Migration Law
(Legislative Instrument – F2007L04440)

This Determination, commenced on 27 November 2007, makes Subdivision AF of Division 3 of Part 2 of the *Migration Act* 1958 (the Act) part of the designated migration law for the purposes of subsection 495A(1) of the Act. The instrument operates to allow the Minister to arrange for the use of a computer program to grant a Bridging Visa to applicants who have made valid applications for certain substantive visas.

Legislation Pending

The 41st Parliament was prorogued on Monday 15th October 2007 and the House of Representatives dissolved on Wednesday 17th October 2007 for the general election held on Saturday 24th November 2007. All bills before the House and Senate lapsed at prorogation. As such the following bills relevant to the Migration and Refugee Review Tribunals have lapsed.

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

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

Migration Legislation Amendment (Restoration of Rights and Procedural Fairness) Bill 2007
(Bill – C2007B00165)

CASELOAD OVERVIEW

MRT Decisions – November 2007

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	5	6	3	2	16
Visitor refusal	12	8	1	3	24
Student refusal	12	8	1	6	27
Temporary business refusal	7	10	5	3	25
Permanent business refusal	2	2	0	0	4
Skill linked refusal	34	16	3	1	54
Partner refusal	94	38	12	4	148
Family refusal	15	16	2	1	34
Student cancellation	46	45	6	9	106
Sponsor approval refusal	3	1	0	0	4
Other	13	13	1	2	29

RRT Decisions – November 2007

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bahrain	1	0	0	0	1
Bangladesh	0	7	0	6	13
Brazil	0	1	0	0	1
Burma (Myanmar)	1	0	0	0	1
Cameroon	1	0	0	0	1
Chile	0	2	0	0	2
China (PRC)	18	53	0	1	72
Colombia	0	1	0	0	1
Fiji	1	4	0	1	6
Ghana	0	2	0	0	2
India	2	28	0	2	32
Indonesia	0	8	0	2	10
Iran	1	0	0	0	1
Israel	0	1	0	0	1
Jordan	0	1	0	1	2
Korea, Dem Peoples Rep of	1	0	0	0	1
Korea, Republic Of	0	5	0	1	6
Lebanon	1	2	0	0	3
Malaysia	0	9	0	2	11
Mongolia	0	1	0	0	1
Morocco	1	0	0	0	1
Nepal	1	3	0	0	4
Nigeria	0	1	0	0	1
Pakistan	1	0	0	0	1
Philippines	0	4	0	0	4
Russian Federation	1	0	1	0	2
Singapore	0	2	0	0	2
Sri Lanka	2	4	0	0	6
Taiwan	0	0	0	1	1
Thailand	0	2	0	0	2
Turkey	3	0	0	0	3
Vietnam	0	1	0	0	1
Zimbabwe	1	0	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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