



The MRT-RRT Monthly Decisions Bulletin

No. 1 / 2008

7 January 2008

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

061005194

1 November 2007, Melbourne

Ms S Muling, Member

SKILLED – TEMPORARY BUSINESS ENTRY (CLASS UC) VISA – SUBCLASS 457 – CL.457.233 – EMPLOYMENT BACKGROUND – The applicant applied for a subclass 457 visa identifying the nominated position of Leather Goods Maker. He was sponsored by an Australian leather goods manufacturer. The application was refused by a delegate of the Minister for Immigration and Citizenship on the basis that the applicant did not satisfy cl.457.233(4)(d) and (e) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate found that he did not have the required skills, experience or employment background necessary to perform the nominated occupation. The delegate also found that the documents he had submitted in support of his application were not genuine.

Held: Decision under review set aside

The Tribunal made further inquiries with the Department of Immigration and Citizenship and found that it was unable to verify the genuineness of one of the applicant's references because the referee was unable to provide any documentary evidence such as receipts or payment vouchers to confirm payments made by the applicant. The Tribunal found it to be plausible that the inability to furnish any substantiating evidence reflected the nature of the leather manufacturing industry in India and providing work on a piecemeal contractual basis. The Tribunal found that the applicant had the personal attributes and employment background relevant to and consistent with the nature of the activity to be performed. On the basis of the work references the Tribunal was satisfied that the applicant had demonstrated that he had the skills necessary to perform the approved nominated occupation and accordingly satisfied certain criteria for the grant of the visa.

071210510

12 November 2007, Sydney

Ms A Younes, Member

SKILLED – INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) – SUBCLASS 880 – CL.880.230 – REGISTERED COURSE – The applicant applied for a Skilled – Independent Overseas Student (Residence) visa and her application was refused by a delegate of the Minister for Immigration and Citizenship. The applicant nominated her skilled occupation as Tradesperson and Related Worker. The applicant provided a Certificate III in Food Processing (Retail Baking) Cake and Pastry awarded by the City College of Professional Development. This qualification was provided to Trade Recognition Australia (TRA) and formed the basis of the TRA's decision to issue a skills' assessment for the nominated occupation. After the date of application, cl.880.230(1) was amended to include a time of decision requirement that a relevant assessing authority must have assessed the applicant's skills as suitable for the nominated skilled occupation. Clause 880.230(2) was also amended to require that if the skills assessment was made on the basis of a qualification obtained in Australia whilst the applicant held a student visa, that qualification must have been the result of full time study in a course registered under the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS).

Held: Decision under review affirmed

The Tribunal found that the amendments to cl.880.230 operated retrospectively and included the application made by the applicant. This was consistent with *Hu & Anor v MIAC & Anor* [2007] FMCA 1710 which held that cl.880.230(2) applied to applications made but not finally determined prior to 1 July 2006. At the time the applicant's qualification was issued, the issuing College was not a CRICOS registered course. The Tribunal found that the applicant did not have a skills assessment

made on the basis of a qualification obtained in Australia as a result of full time study in a registered course and accordingly did not satisfy the requirements for the grant of the visa.

061008032

20 November 2007, Perth

Ms L Ward, Member

BUSINESS SKILLS (RESIDENCE) (CLASS DF) VISA – SUBCLASS 892 (STATE/TERRITORY SPONSORED BUSINESS OWNER) VISA – CL.892.211 – OWNERSHIP INTEREST – ACTIVELY OPERATING MAIN BUSINESS – AT LEAST 2 YEARS IMMEDIATELY BEFORE VISA APPLICATION – The applicants applied for Business Skills (Residence) (Class DF) visas on the basis of the primary visa applicant's ownership interest in relevant businesses. A delegate of the Minister for Immigration and Citizenship refused to grant the visa because he or she was not satisfied that the primary visa applicant had and continued to have an ownership interest in one or more actively operating main businesses in Australia for at least two years immediately before the visa application was made. The delegate found that the primary visa applicant held an interest in a business called Jumbo House Pty Ltd through her shareholding in another company called Jun Han Pty Ltd, was a director of Utopia (Aust) Pty Ltd from 2001 to 2004 and that Jun Han Pty Ltd was not a qualifying business for the purposes of the visa application. The primary visa applicant provided documentary evidence to the Tribunal setting out her interest in Jun Han Pty Ltd, the company's consecutive interests in Utopia (Aust) Pty Ltd and subsequently Jumbo House Pty Ltd and her directorship of all three companies. The primary visa applicant also gave evidence of her role as operations manager for the Utopia Restaurant and the restaurant's business activity statements.

Held: Decision under review set aside

The Tribunal found that the primary visa applicant held an ownership interest in the Utopia Restaurant through Utopia (Aust) Pty Ltd from 2001 to 2004 and subsequently Jumbo House Pty Ltd. The primary visa applicant's ownership interest in the restaurant business was held consecutively through the two companies. The Tribunal relied on Australian Securities and Investments Commission (ASIC) documents to find that Jun Han Pty Ltd partly owned Jumbo House Pty Ltd from 2004 and an accountant's letter to find the company partly owned Utopia (Aust) Pty Ltd from 2001 until they were transferred in 2004. ASIC documents also indicated that the primary visa applicant partly owned Jun Han Pty Ltd. The Tribunal was satisfied that the primary visa applicant maintained her direct and continuous involvement in the two companies which traded as Utopia Restaurant, held at least ten percent of the total value of the business through her shareholdings and met the requirements for 'main business'. Referring to Departmental policy relating to consecutive ownership of businesses, the Tribunal was satisfied that the primary visa applicant held an ownership interest in one or more actively operating main businesses in Australia for at least two years immediately before the visa application was made, thereby satisfying cl.892.211 for the grant of the visa.

071743266

22 November 2007, Sydney

Ms S Pinto, Member

SKILLED - INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) VISA – SUBCLASS 880 – CL.880.215 – RELEVANCE TO OCCUPATION – A delegate of the Minister for Immigration and Citizenship refused the applicant's Subclass 880 Independent Overseas Student (Residence) visa because he was not satisfied that the applicant's Diploma and Master of Commerce (Electronic Business) were relevant to the occupation of Pastry Cook. The delegate found that the applicant did not meet the requirements of Item 1128CA(3)(l) of Schedule 1 to the *Migration Regulations* 1994 (the Regulations) for the purposes of cl.880.215 of Schedule 2 to the Regulations. Upon review, the applicant claimed that there was no clear definition of the word 'relevant' and it should be interpreted according to Departmental policy. She claimed that her electronic business studies had strong relevance to the occupation of Pastry Cook because they enabled a bakery/pastry shop owner to efficiently manage across different pastry cooking processes through an internet-enabled online presence. The applicant claimed that she could apply her knowledge to supervise and

manage across different functions such as production, marketing, stocking/supply, human resources and accounting in a small to medium sized bakery/pastry business.

Held: Decision under review set aside

The Tribunal considered Departmental policy and found that a broad interpretation of the definition of 'relevant' was given in the context of cl.880.215. As it found the legislation to be consistent with Departmental policy, the Tribunal considered that it was appropriate in the circumstances to be guided by policy. The Tribunal was satisfied that the "skill set" underpinning the qualification of her electronic business degree could be utilised to develop, operate and manage an on-line pastry business and complemented the applicant's nominated occupation of Pastry Cook. The Tribunal was satisfied that the applicant had established that each of the qualifications mentioned in subparagraph 1128CA(3)(i) or (ii) of Schedule 1 were relevant to the skilled occupation. Accordingly the Tribunal found that the applicant met cl.880.215 for the grant of the visa.

Partner and Family Visas

W0505316

31 October 2007, Melbourne

Mr P Katsambannis, Member

OTHER FAMILY (RESIDENCE) (CLASS BU) – SUBCLASS 835 – CL.835.212 – CL.835.213 – CL.835.221 – REMAINING RELATIVE – OVERSEAS NEAR RELATIVE – R.1.15 – The applicant applied for an Other Family (Residence) (Class BU) visa on the basis that he was the review applicant's remaining relative. A delegate of the Minister for Immigration and Citizenship found that the applicant did not satisfy cl.835.212 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations), and was not a remaining relative within the meaning of r.1.15. The applicant was an Indian citizen, who had lived in Dubai between 1990 and 2003. Of 10 living siblings, 5 brothers and 3 sisters lived in Australia, with one sister each in the United States and United Arab Emirates. The delegate found that the applicant had had recent contact with two of his sisters who lived in India and the United States. The visa applicant and both sisters were present at a birthday party held for his mother in Australia in 2002. The visa applicant claimed not to have any contact with his sisters at the party, and that he has not had contact with them for a considerable period.

Held: Decision under review set aside

The Tribunal took into account a number of statutory declarations from the visa applicant's siblings in support of his application. The Tribunal accepted that these had been obtained by the applicant's representatives and that he had not contacted his sisters in the process. The Tribunal found that the applicant had 2 overseas near relatives and accordingly met the requirements of r.1.15(1)(d) of the Regulations. The Tribunal also found the applicant to be 'usually resident' in Australia and did not have to satisfy the requirements of r.1.15(1)(c). The Tribunal found that the applicant met all other requirements under r.1.15 of the Regulations and accordingly clauses 835.212, 835.213 and 835.221 for the grant of the visa.

060828211

31 October 2007, Sydney

Dr I O'Connell, Senior Member

OTHER FAMILY (MIGRANT) (CLASS BO) VISA – SUBCLASS 114 - AGED DEPENDENT RELATIVE – CL.114.211 – SUBSTANTIALLY DEPENDENT – A delegate of the Minister for Immigration and Citizenship (the delegate) refused the visa applicant's Other Family (Migrant) (Class BO) subclass 115 (Remaining Relative) visa on the grounds that the applicant did not meet cl.115.211 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate found that the visa applicant had maintained regular contact with her three overseas sisters and did not satisfy the requirements for a remaining relative visa, in particular r.1.15(1)(c)(ii) of the definition of remaining relative. The

delegate also found that the applicant did not satisfy the criteria for the grant of a Subclass 114 (Aged Dependent Relative) visa, particularly cl.114.221, as she was not wholly or substantially reliant on her Australian relative as required under r.1.03.

Held: Decision under review set aside

The Tribunal found that the applicant had had contact with her overseas near relatives within a reasonable period of time prior to making her Subclass 115 application, and that at least one of her overseas sisters had visited and stayed with her during the relevant period. The Tribunal also found that r.1.15(1)(c)(ii) could not be satisfied and the applicant could not meet cl.115.221. The Tribunal also considered the criteria for the grant of a Subclass 114 (Dependent Relative) visa. It found that, although the applicant received financial support from her overseas sisters and one of them owned her residence, it was satisfied that the financial assistance provided by the Australian relative was greater than that provided by any of her other sisters. The assistance from the Australian relatives was also greater than the pension and interest accrued on fixed term deposits received by the applicant. The Tribunal found that at time of application and time of decision the applicant was substantially dependent upon her Australian relative, thereby satisfying the definition of aged dependent relative in r.1.03, cl.114.211 and cl.114.221 for the grant of the visa.

071066831

15 November 2007, Melbourne

Ms D Morgan, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 116 – CL.116.221 – R.1.15AA - WHETHER ASSISTANCE COULD REASONABLY BE OBTAINED – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a subclass 116 (Carer) visa on the basis that she did not satisfy cl.116.211 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate found that she failed to meet the definition of 'carer' under r.1.15AA of the Regulations. The delegate found that reasonable care was available to the visa applicant's mother through family members in Australia. The mother suffered from asthma, hypertension and dementia. Responsibility for her care was spread amongst her daughters, two of whom lived with her, while the other lived a short distance away. The mother claimed that the presence of the visa applicant would assist with her care.

Held: Decision under review affirmed

The Tribunal accepted that the mother's medical condition will continue for at least 2 years and require a need for direct assistance in attending to the practical aspects of her daily life as required by r.1.15AA(2). However, on the evidence the Tribunal found that she could reasonably obtain the assistance she requires from her daughters who can share responsibilities in light of their other commitments. Accordingly, the Tribunal found that the visa applicant failed to meet r.1.15AA(e)(i) and consequently clause 116.221 for the grant of a carer visa.

060597497

21 November 2007, Sydney

Ms B Forsyth, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – MEMBER OF A FAMILY UNIT – R.1.12 – DEPENDENT – The secondary visa applicant was the son of a female primary visa applicant who had been sponsored for a partner visa. The Department of Immigration and Citizenship refused to grant a visa to the secondary visa applicant because the delegate was not satisfied that he was dependent on the primary applicant. The Department noted that no evidence had been submitted to show that the primary applicant supported the secondary applicant while she was living in Australia and found that the school enrolment certificate had been fraudulently produced. Further evidence of dependence was provided to the Tribunal including oral evidence concerning the secondary applicant's studies, authenticity of documents, living arrangements, financial support and his family. Following the hearing the Tribunal sought to verify the authenticity of documents submitted to the Tribunal regarding the secondary applicant's studies and directly contacted two education institutions to confirm his enrolment.

Held : Decision under review set aside

The Tribunal was satisfied that the secondary applicant was a close relative of the primary applicant and was further satisfied that he had never been married. The Tribunal was satisfied that at the time of application the secondary applicant was usually resident in the primary applicant's household but was no longer present in the household because the primary applicant was required to take up the grant of her subclass 309 visa and had been living in Australia. In the circumstances, the Tribunal found that the visa applicant remained usually resident in the primary applicant's household at time of decision. Although the Tribunal had difficulty accepting the oral and written evidence concerning the secondary applicant's studies, the inquiries confirmed his study and the Tribunal accepted this independent evidence. Evidence was provided that the secondary visa applicant did not work, was financially dependent on the primary applicant and did not receive any financial support from any other source, including his biological father. The Tribunal therefore found that the secondary applicant was and had been wholly or substantially reliant on the primary applicant for financial support to meet his basic needs and that this was greater than his reliance on any other source of support. The Tribunal found the visa applicant satisfied the definition of member of the family unit in r.1.12(1)(e) of the *Migration Regulations* 1994 (the Regulations), that he was a member of the family unit of the primary applicant and, therefore, satisfied the visa criteria in cl.309.311 and cl.309.321.

Student visas

071612006

6 November 2007, Melbourne

Mr G Haddad, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 – VISA REFUSAL – CL.572.223 – ITEM 5A408 – FINANCIAL CAPACITY – A delegate of the Minister for Immigration and Citizenship refused the visa applicant's application for a Subclass 572 visa on the basis that he did not satisfy cl.572.223 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). At the time of application the applicant was registered in a course for which subclass 573 was specified but at the time of review had changed his course to one for which subclass 572 was specified. Clause 572.223 required the applicant to satisfy financial capacity requirements under item 5A408(1) of Schedule 5A to the Regulations, namely that approximately \$30,000 be available to him at least three months prior to his visa application; that the funds continue to be available; and that he be able to show on request that the income of the person providing the funds is sufficient to accumulate this level. The applicant claimed that the financial capacity requirements were only a 'paper requirement', not unlike an assurance of support, but that he nevertheless had in excess of \$100,000 available to him.

Held: Decision under review affirmed

The Tribunal accepted bank statements as evidence of sufficient funds being available to the applicant at least 3 months prior to his application. However, the Tribunal identified a zero balance within the relevant period as evidence that the funds were not available to access at some stage. The Tribunal found that the wording in Schedule 5A required that the applicant 'has' access, which required a continuity of access to the funds. Although the applicant claimed that the funds had merely been removed from one account and re-invested elsewhere, it was unclear to the Tribunal on the material before it whether the funds were still accessible to the applicant. The Tribunal also found that the income of the person providing the funds, based upon his Australian Taxation Office notices and assessments, was insufficient to have accumulated the funds shown for the relevant periods. The Tribunal did not accept that evidence of a regular income of approximately \$25,000 per annum was sufficient to accumulate a sum of \$100,000. As the applicant did not satisfy cl.5A408, he could not satisfy the requirements of cl.572.223(1) and (3), and accordingly did not satisfy this criterion for the grant of the visa.

071668366

20 November 2007, Sydney
Ms C Carney, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 573 – VISA CANCELLATION – CONDITION 8202(2)(a) – ENROLLED IN A REGISTERED COURSE – EXCEPTIONAL CIRCUMSTANCES BEYOND THE VISA HOLDER’S CONTROL – 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). The delegate found that the applicant breached condition 8202(2)(a) of her visa for failing to enrol in a registered course in Semester 1 of 2007. The applicant acknowledged that she had breached condition 8202(2)(a) but stated that there were exceptional circumstances beyond her control. She claimed that she was employed by the Fijian Government, studying on a scholarship provided by the Fijian Scholarship fund, and that her scholarship funds were frozen due to a military coup in Fiji.

Held: Decision under review set aside

The Tribunal found that the applicant was not enrolled in a registered course for the relevant term and accordingly had not complied with condition 8202(2)(a). However, the Tribunal accepted that the applicant was in Australia on a scholarship for a Master of Natural Resource Economics and pursuing a research project concerning the management of traditional fishing grounds in Fiji. It also accepted that her scholarship funds were frozen and her wages stopped due to the military coup. The Tribunal was satisfied that the breach was due to exceptional circumstances beyond the applicant’s control. Considering the applicant’s circumstances as a whole, the Tribunal concluded that the visa should not be cancelled under s.116 of the Act.

REFUGEE REVIEW TRIBUNAL DECISIONS

Bangladesh

071640442

2 November 2007, Sydney

Ms L Nicholls, Member

BANGLADESH – POLITICAL OPINION – MEMBER OF AWAMI LEAGUE – The applicant claimed to fear persecution from government authorities and Islamic fundamentalists due to his political activities as a leader of the Awami League. The applicant claimed to have become involved in Awami League politics during college and was an office holder in a small branch for a number of years. The applicant claimed to have faced pressure from Bangladesh Nationalist Party (BNP) activists and Islamic fundamentalists. He criticised BNP officeholders as corrupt and claimed that his opponents intended to kill him. The applicant claimed that he would not be protected by Bangladeshi authorities if he returned because they are influenced by a caretaker government which is currently hostile to politicians.

Held: Decision under review affirmed

The Tribunal contacted the Awami League and confirmed that the applicant was an office holder in a small branch. However, the Tribunal was informed that the applicant was not regarded as a high ranking official or influential member within the Awami League. The Tribunal referred to country information which indicated that political activists who had been arrested and charged had been high profile politicians, officials and business persons. There was no credible evidence to show that low profile members were at risk and the applicant had provided no evidence of previous harm. The Tribunal found that the caretaker and previous coalition government had taken strong measures against radical Islamic groups and had been successful in suppressing corruption and political violence. The Tribunal rejected the applicant's claim that he would be the subject of adverse attention upon return. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for any Convention-related reason.

Burma

071674634

26 October 2007, Sydney

Ms R Mathlin, Member

BURMA – POLITICAL OPINION – PRO-DEMOCRACY – The applicant claimed to fear persecution for reasons of her political opinion. The applicant claimed that she was part of the democracy movement. She claimed she took part in demonstrations and strikes, distributed leaflets critical of the military regime, collected donations, bought food and medicine for student activists, and supported the parents of students who had taken up arms. She also claimed that she attended a demonstration where she witnessed a relative being killed. The applicant claimed that she was detained and raped along with other women from the demonstration. The applicant claimed that the Burmese authorities were aware she had smuggled dissident material out of Burma. She claimed her husband had blamed her when the material was found in his possession, although she also claimed the authorities confiscated the material from her, but only discovered its content after she had left the country. The applicant further claimed to have been involved in anti-Burmese government political activities while in Australia. A psychologist's report diagnosed the applicant with depression and post traumatic stress disorder resulting from traumatic experiences, in particular the death of her relative and her rape. The applicant admitted that she had exaggerated her claims and provided false information in her application and during the review.

Held: Decision under review set aside

Although the Tribunal had concerns about the applicant's credibility it considered it significant that several essential claims were presented at each stage of the application and accepted that these formed the kernel of truth at the heart of the application. It found these were the death of the applicant's relative, the sexual assault and the smuggling of material. It also accepted that some inconsistencies were due to her psychological condition. The Tribunal accepted the applicant was part of the democracy movement, but found that she only distributed leaflets and collected donations. While it accepted that she had seen her relative killed at a demonstration and been raped, the Tribunal did not consider that these events, of themselves, would give rise to a well-founded fear of persecution. However, the Tribunal also accepted that the authorities were aware that the applicant had smuggled anti-government information out of Burma. It noted country information that Burmese returning after long periods were closely scrutinised and found it could not dismiss as remote or insubstantial the possibility that upon return the applicant would experience interrogation, disproportionate punishment, arbitrary detention or physical mistreatment. Accepting that torture of political prisoners in Burma was routine, the Tribunal accordingly found that the applicant had a well-founded fear of persecution for a Convention reason.

China

071415913

18 September 2007, Sydney

Ms C Carney, Member

CHINA – RELIGION – PARTICULAR SOCIAL GROUP – FALUN GONG – The applicant claimed to fear persecution on the basis that she had assisted people to practise Falun Gong in China. The applicant claimed that she had never practised Falun Gong, but managed a factory where she allowed the practice. The applicant claimed that some practitioners of Falun Gong had been detained by the Public Security Bureau (PSB) and had informed it about the applicant. The applicant claimed that she had been chased, detained and tortured by the PSB whilst pregnant. The applicant also claimed that she was released, but that the PSB had subsequently issued a detention notice for her. The applicant claimed that she fled China and spent time in countries X and Y prior to arriving in Australia on a false passport. The applicant also claimed that her child was in China with her mother.

Held: Decision under review affirmed

The Tribunal found the applicant's evidence at hearing and in a translated statement to be inconsistent and implausible. The Tribunal did not find the applicant to be a witness of credit. The Tribunal invited the applicant to comment in relation to its concerns about her claims, but no response was received. The Tribunal did not accept that the applicant had, or been perceived to have had, any association with Falun Gong. The Tribunal did not accept that there was a real chance that the applicant would be persecuted for reasons of any real or imputed religious beliefs or membership of a particular social group on the basis of her involvement with Falun Gong. Accordingly, the Tribunal concluded that the applicant did not have a well-founded fear of persecution for a Convention reason.

071567425

15 October 2007, Sydney

Mr R Derewlany, Member

CHINA – RELIGION – POLITICAL OPINION – FALUN GONG – The applicant claimed to fear persecution in China because of her practice of Falun Gong. The applicant claimed she started practising Falun Gong in the late 1990s. She claimed that she was under surveillance, lacked freedom, was forced to have an abortion, had salaries and annual bonuses deducted as punishment, had her residence demolished and was detained by the Public Security Bureau. The applicant submitted that she joined Falun Gong because she was dissatisfied with her employment,

the way the Communist Party operated in China and had protested against the demolition of her home. She claimed that she was watched, detained and harmed because of these activities, had to pay money for her release and did not feel safe in China. As a Falun Gong practitioner, the applicant claimed to practise, study and distribute information in China. The applicant gave evidence regarding her practice and understanding of Falun Gong at hearing, demonstrated her ability to perform the exercises and explained their purpose. The applicant submitted evidence, including photographs and a witness statement, of her involvement in protest gatherings, the distribution of Falun Gong information and her continued practice of Falun Gong in Australia.

Held: Decision under review set aside

The Tribunal accepted that the applicant had been a practitioner of Falun Gong since the late 1990s, had contact with other practitioners in China, and was involved with promoting and distributing information about Falun Gong. The applicant practised Falun Gong publicly in China until it was banned and continued her practise in private. Although rejecting that claimed problems regarding her employment, forced pregnancy and property demolition occurred because of her practice of Falun Gong, the Tribunal found that the applicant was detained for a period and had to participate in re-education because of her practice. The Tribunal was satisfied that the applicant's conduct in practising Falun Gong in Australia was otherwise than for the purpose of strengthening her claims. If the applicant returned to China, the Tribunal was satisfied that she would continue practising Falun Gong and there was a real chance the Chinese authorities would detect, detain and harm her for her beliefs. The persecution the applicant feared amounted to serious harm and her religion or political belief, being her belief in Falun Gong, was the essential and significant reason for the persecution. The Tribunal considered that there was no part of China she could reasonably be expected to relocate. The Tribunal accordingly found that the applicant had a well-founded fear of being persecuted for a Convention-related reason.

India

071494945

19 September 2007, Melbourne

Ms D Buljan, Member

INDIA – PARTICULAR SOCIAL GROUP – HOMOSEXUAL – The applicant claimed to fear persecution if he returned to India on the basis of his homosexuality. The applicant claimed to be from a conservative Sikh family. He also claimed to have had two homosexual relationships in India when he was a teenager but both had ceased more than a year before he arrived in Australia. The applicant claimed to have been the subject of two attacks as a direct result of the second relationship. In the first attack the applicant claimed that his parents had been injured. He alleged that the second attack was perpetrated by the relatives of his second partner. Since coming to Australia, the applicant claimed that he had pursued a homosexual lifestyle.

Held: Decision under review affirmed

The Tribunal accepted that homosexual men in India constitute a particular social group. However, the Tribunal found that the applicant was not a credible witness. The discrepancies in the evidence regarding the events the applicant alleged took place in India, his lack of knowledge concerning the situation of homosexuals in India and the homosexual scene in Australia, as well as the absence of anyone who could corroborate his claim that he was gay, led the Tribunal to the conclusion that he was not homosexual. Accordingly the Tribunal found that the applicant did not have a well-founded fear of persecution for a Convention reason.

071572774

15 October 2007, Sydney

Mr A Mullin, Member

INDIA – RELIGION – HINDU – PARTICULAR SOCIAL GROUP – FAILED CONSTRUCTION PROJECT – The applicant claimed to fear persecution on the basis of his religion. The applicant also claimed that he feared persecution and harm from several groups arising from his participation in a failed construction project in India. These groups included Muslim terrorists, Muslim trade unionists, police, creditors and a company. The applicant claimed that the project had partly failed due to extortion demands from Muslim terrorists. The applicant claimed that the terrorists would continue to pursue him should he return to India. The applicant also claimed that he would be at risk of harm from unionists and creditors who had suffered losses following the project's demise. The applicant further claimed that he would face arrest owing to his failure to appear at related civil and criminal court proceedings. The applicant claimed that he went into hiding prior to arriving in Australia.

Held: Decision under review affirmed

The Tribunal did not accept that the applicant would face criminal charges if he returned to India. The Tribunal also did not accept that the applicant would suffer serious harm at the hands of Muslim terrorist groups or Muslim trade unionists. The Tribunal found it unlikely that these parties would continue to have an interest in the applicant, particularly if he chose to live elsewhere in India. The Tribunal accepted that the applicant may be pursued by creditors and the company involved in the construction project, but found that neither ground would amount to harm for a Convention reason. The Tribunal found that the applicant would not be at risk of harm because he is a Hindu. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Mongolia

071559324

26 October 2007, Sydney

Ms N Dougall, Member

MONGOLIA – PARTICULAR SOCIAL GROUP – LESBIAN – RELIGION – SHAMANISM – The applicant claimed to fear persecution in Mongolia because she was a lesbian. The applicant claimed that she was beaten and detained after her gay partner's husband became aware of their secret relationship. She also claimed that she would suffer harm if she returned to Mongolia because she is a lesbian and because her family blamed her for the death of a relative due to the practice of Shamanism within her community. The applicant's protection visa application was accompanied by a statement which was translated by a friend who had better English skills. The applicant confirmed to the Tribunal that she was aware of the contents of the translated statement as she had first written it down in her native language for her friend to translate into English, and that her friend had read it back to her prior to signing it.

Held: Decision under review affirmed

The Tribunal did not accept that the applicant was a lesbian, that she had been involved in a gay relationship, that she had been beaten and detained, or that she had or would in the reasonably foreseeable future suffer harm from her family or community because of Shamanism if returned. The Tribunal identified a number of discrepancies between evidence in her statement, her interview with the department, her hearing and evidence to the Tribunal. The Tribunal did not accept the applicant's claim that the discrepancies were due to her friends' poor translation of her statement, as the applicant had confirmed with the Tribunal at hearing that her friend had a good understanding of English and that the contents were correct. The applicant had not made previous mention of poor translations, and the Tribunal was not prepared to accept that such difficulties had occurred. The Tribunal found that her earlier statements made no specific reference to Shamanism and even if the expression could not have been translated, her friend could have explained it in simple terms. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Pakistan

071661524

5 October 2007, Sydney

Ms K Raif, Member

PAKISTAN – POLITICAL OPINION – MEMBERSHIP OF PAKISTAN MUSLIM LEAGUE – The applicant claimed to fear persecution on the basis of his involvement with the Pakistan Muslim League (PML) as a Ward President. The applicant claims that he was falsely charged, imprisoned and harassed because of his role in organising mass strikes for the PML. He claimed to have fled Pakistan to Country A to escape arrest, but subsequently returned to Pakistan after several years. He did not apply for refugee status while in Country A, claiming that he was unaware of its immigration procedures. Following his return to Pakistan, the applicant claimed to have been arrested and faced further harassment. He travelled to Australia on a tourist visa and applied for protection more than one month after his arrival. The applicant claimed that should he return to Pakistan, he might participate in political activities, but had generally lost interest in politics.

Held: Decision under review affirmed

The Tribunal rejected the applicant's claim of being harmed as a result of his political activities and found there was no real chance the applicant would face persecution in the reasonably foreseeable future. It considered that the applicant's position of Ward President was not a significant position and that it was unlikely the applicant would be targeted by Pakistani authorities or opposition political parties. The Tribunal was not satisfied the applicant would face persecution because he had lost interest in politics and, if he did participate in political activities in the future, it was likely to be in a less significant role than he previously held. The Tribunal found the applicant lacked credibility in his explanation for not applying for protection in country A and his evidence concerning the duration of his imprisonment was inconsistent. The Tribunal also considered that the delay in applying for a protection visa indicated an absence of any genuine fear of persecution. Accordingly the Tribunal found that the applicant was not a person to whom Australia had protection obligations.

Sudan

071571629

15 October 2007, Sydney

Mr G Short, Senior Member

SUDAN – PARTICULAR SOCIAL GROUP – ETHNICITY – POLITICAL OPINION – MINORITY RIGHTS ACTIVIST

– The applicant claimed to fear persecution on the basis that he belonged to a particular ethnic group in Sudan. The applicant also claimed that he had been politically active by asking for rights on their behalf. The applicant claimed that he left Sudan because he feared for his safety from government officials who had mistreated and threatened him with death. He claimed that if he were to return, he would be arrested, detained, tortured and possibly killed by Sudanese officials. The applicant further claimed that he had previously been detained and tortured by the intelligence service in a second country due to his ethnic background and refusal to assist them. The applicant claimed that the Sudanese government would not protect him as they were responsible for persecuting people from his ethnic group.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was a member of the ethnic group. The Tribunal considered information contained in a previous protection application made by him in another country. The Tribunal found there to be significant inconsistencies between the information provided in that application with the current one and also in evidence provided by the applicant at hearing. The Tribunal found the applicant not to be a credible witness. The Tribunal referred to independent information indicating that people of the same ethnic group in Sudan were not

experiencing discrimination on the basis of ethnicity. The Tribunal did not accept that the applicant engaged in political activities. The Tribunal did not accept that there was a real chance that the applicant would be persecuted for reasons of his ethnicity or political opinion. Accordingly, the Tribunal concluded that the applicant did not have a well-founded fear of persecution for a Convention reason.

Turkey

071362222

19 September 2007, Melbourne

Ms J Ellis, Member

TURKEY – POLITICAL OPINION – IMPUTED SUPPORT FOR KURDISH RIGHTS – The applicant and his wife claimed to fear persecution on the basis of being a Kurdish Alevi and for his real or imputed pro-Kurdish political opinion. The applicant claimed that over several years, he had been arrested, detained and tortured on a number of occasions, had suffered financially as a result of being a Kurd, and that members of his family had been similarly persecuted. The applicant claimed he had relocated in various provinces in Turkey to escape persecution, but remained subject to adverse treatment because of his imputed political opinion. He fled Turkey but did not seek asylum because to do so would leave his wife and children to continue to suffer in Turkey. The applicant later became a member of the local Kurdish Association. The applicant submitted to the Tribunal psychological and medical reports suggesting that the applicant was suffering post-traumatic stress disorder resulting from his arrests, detentions and torture.

Held: Decision under review set aside

The Tribunal accepted the applicant's claims that he was arrested, detained and tortured for reasons of his imputed support for Kurdish rights and that this harm amounted to persecution. It found the applicant's claims to be consistent with independent country information and placed significant weight on the applicant's medical and psychological reports. The Tribunal found there would be a real chance the applicant would be persecuted if he were to return to Turkey because of his ongoing involvement in Kurdish political activities and because relocation elsewhere would not reduce the threat. The Tribunal found that random checks throughout Turkey may identify the applicant and subject him to further harm. The Tribunal also found that the applicant's wife was a member of a social group, being the family of the applicant, and that she was persecuted by reason of the opinion imputed to her husband. The Tribunal accordingly found that the applicant and his wife had a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

SZGYM v MIAC

[2007] FCA 1923

Federal Court of Australia, Graham J, NSD1837 of 2007, 12 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 claimed to fear persecution in China on the basis of her Christian beliefs. The appellant's husband had lodged a separate application for review.

The appellant had indicated in her protection visa and merits review application forms as well as her Response to Hearing Invitation forms that she required a Mandarin interpreter. No dialect was indicated. However, her husband had indicated to a Tribunal officer in the course of arranging a rescheduled hearing that the parties preferred a Fuzhou dialect interpreter to a Mandarin interpreter "though they could go ahead with "Mandarin" interp., but would be with difficulty;...". At the hearing, an interpreter was present and the language recorded was "Fuzhou-Mandarin".

The Tribunal, in its decision record, had noted that the interpreter had raised some concerns about the language in which he would be interpreting. The Tribunal recorded that the interpreter had spoken with the appellant and her husband and "did not feel that Fuzhou dialect is their particular dialect". The Tribunal also recorded that the appellant husband and wife agreed that they conduct the hearing in Mandarin and it was agreed that if they experienced any difficulties with interpreting, that the questions could be repeated and they were invited to raise their concerns as the hearing progressed. In its findings and reasons, the Tribunal found that the applicant's "oral evidence in respect to (sic) her religious beliefs and practises (sic) was equivocal and hesitant. She was unable to provide any meaningful detail on her claimed religious convictions or her religious associations ...".

Federal Magistrate Barnes dismissed the judicial review application on the basis that she was not satisfied that the use of an interpreter who spoke Mandarin and Fuzhou meant that the interpretation was inadequate or that it could be said that the applicant was effectively prevented from giving evidence at the hearing.

On appeal in the Federal Court, the appellant was asked whether she had been able to understand the interpreter's interpretation of English. She responded that she was "able to understand some of it, some of it I was unable to understand". No evidence of misinterpretation was before the Court.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal failed to comply with s.425 of the *Migration Act* 1958 (the Act) and denied the appellant procedural fairness. A fair hearing could not ensue by proceeding with the available interpreter in the face of his concern about the language to be interpreted and his feeling that the dialect which he spoke was not the appellant's dialect or that of her husband or of her son.
- (ii) The appellant was denied procedural fairness in circumstances where in the light of the interpreter's comments an adjournment was not ordered to facilitate the provision of an interpreter who could make himself understood in the appellant's own dialect.
- (iii) The possibility of difficulties of comprehension could not properly be addressed by proceeding with an interpreter who did not speak the relevant dialect on the basis that if there were any difficulties experienced the appellant could ask for questions to be repeated and could raise her concerns as the hearing progressed.

Auro v MIMA
[2007] FCA 1857
Federal Court of Australia, Collier J, QUD 333 of 2006, 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 an authorised officer of the Migration Review Tribunal (the Tribunal) refusing a fee waiver request under r.4.13(4) of the *Migration Regulations* 1994 (the Regulations) in respect of an application for review of a decision of the Minister's delegate to refuse to grant the appellant a Partner (Residence) (Class BS) subclass 801 visa.

The Tribunal notified the appellant in writing that the application fee would not be waived on the basis that the signatory to the letter was of the opinion that payment of the fee had not caused, nor was it likely to cause severe financial hardship, because the appellant failed to submit enough evidence to support her request, failed to provide any evidence of her estranged spouse's financial situation and the fact that she intended to start working at a relevant time. It appeared that a different officer had in fact been the authorised officer who made the decision for the purposes of r.4.13(4) of the Regulations.

The Federal Magistrates Court considered the appellant's argument that the Tribunal's decision was unreasonable because its finding was against the evidence and took into account irrelevant considerations as to spouse's financial situations and her future employment. It found that it was for the Tribunal to weigh the evidence and the spouse's financial situation and the appellant's future employment status were relevant considerations.

On appeal to the Federal Court, the appellant also challenged the validity of the communication of the Tribunal's decision to the appellant.

Held: Appeal dismissed

- (i) The Tribunal did not commit jurisdictional error.
- (ii) Whether payment of the fee would cause the appellant severe financial hardship was a decision for the Tribunal on the facts and material before it. The Tribunal was required to reach its decision on the evidence presented by the appellant, a state of satisfaction as to whether the payment of the fee required by the regulations had caused, or was likely to cause severe financial hardship to the appellant. The appellant does not bear an onus to satisfy the Tribunal that the fee should be waived, however it is clear that it is for the appellant to advance whatever evidence or argument she wishes to advance in support of her claim.
- (iii) The material sought by the Tribunal was probative material upon which it would make decisions, and the appellant was on notice from the contents of the application form that the Tribunal placed importance upon receiving that documentary evidence.
- (iv) The manner in which the letter from the Tribunal notifying the appellant of its fee waiver refusal was framed was clearly irregular. If the letter purported to be from the actual decision-maker, who was an authorised officer within the meaning of r. 4.13(4) of the Regulations, it should have been drafted in such terms that it be from that officer himself. However, the validity of the decision itself is not compromised. A decision that the prescribed fee not be waived was made by a person authorised to do so in the Tribunal. The Tribunal communicated that decision to the appellant. There is no provision in the Act which requires the decision of an authorised person to be communicated to the appellant by that authorised person.

SZIOZ v MIAC & RRT
[2007] FCA 1870
Federal Court of Australia, Besanko J, NSD 203 of 2007, 30 November 2007

This was an appeal from a judgment of the Federal Magistrates' Court. The Federal Magistrate dismissed an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations. The appellant, a national of the People's Republic of China, claimed to fear persecution on the basis of being a Falun Gong practitioner.

The primary decision found while the appellant was a Falun Gong practitioner, he would not face a real chance of persecution because he was not a 'practitioner of interest' to the Chinese authorities. The Tribunal affirmed the decision because it was not satisfied that the appellant was a Falun Gong practitioner. It received evidence from sources including a letter from the Falun Dafa Association (FDA) supporting the appellant's claimed knowledge of Falun Gong and his fear of persecution, as well as a letter from the People's Liberation Army (PLA) supporting the appellant's activities for the PLA. The Tribunal gave little weight to this evidence because it questioned the veracity of the FDA letter and the authenticity of the PLA document.

The Federal Magistrate dismissed the application for judicial review. Before the Federal Magistrate, the appellant claimed the Tribunal failed to comply with s.424A(1) of the *Migration Act* 1958 (the Act) because it failed to raise its proposed approach to the document regarding the applicant's Falun Gong knowledge and the letter from the PLA. The appellant also claimed that the Tribunal failed to afford him procedural fairness and breached s.425 of the Act. The Federal Magistrate rejected these claims. Before the Federal Court, the appellant first contended that the Tribunal did not afford him procedural fairness under s.425(1) of the Act by failing to put him on notice that the question of whether he was a Falun Gong practitioner was an issue before the Tribunal. His second claim was that the Tribunal's s.424A letter was deficient because it did not include concerns about corroborative information (including the FDA and PLA letters) and because it should have been sent prior to the hearing.

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

- (i) The Tribunal committed a jurisdictional error by failing to comply with s.425(1) of the Act. Applying the High Court's judgment of *SZBEL v MIMIA* [2006] HCA 63, the Tribunal was obliged under s.425(1) of the Act to notify the appellant that whether the appellant was a Falun Gong practitioner was an issue before the Tribunal. Because the issue before the delegate was whether the appellant was a Falun Gong 'practitioner of interest', whether the appellant was a Falun Gong practitioner was a separate issue, which was not part of a larger and more general issue that was clearly in dispute and was not within the scope of s.425(1).
- (ii) The Tribunal did not breach s.424A of the Act by not including reference to the evidence from the FDA or PLA, as they were not information for the purposes of s.424A, but conclusions drawn from gaps and deficiencies in the information. Other information provided by the appellant did not form a reason or part of the reason for affirming the decision because the Tribunal drew no adverse conclusions from them.
- (iii) There is no requirement that the s.424A letter be sent as soon as the Tribunal is satisfied there is adverse information subject to the s.424A obligation. Where the Tribunal considers adverse information exists prior to the hearing, it is not unreasonable for the Tribunal to see if such information is dealt with satisfactorily during the hearing.

QAAA of 2004 v MIAC

[2007] FCA 1918

Federal Court of Australia, Collier J, QUD138 of 2006, 6 December 2007

This was an appeal from a judgment of the Federal Magistrates Court upholding 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 Iran, claimed, in part, to fear persecution on the basis that he had not resided in Iran for 26 years during which time he had resided in the United States, the "sworn enemy

of Iran", where he served for more than two years in the navy. He further claimed to have been a practising Christian and to have supported the former Shah and criticised the government that replaced him. In affirming the decision of the delegate, the Tribunal appeared to accept that the United States was the "sworn enemy of Iran" but found that the Iranian authorities could satisfy themselves that he posed no threat to Iran, having only served in the navy for two years and having only reached a relatively low rank.

The appellant contended before the Federal Court that there was no material before the Tribunal to support its conclusion that the applicant would not be of interest to the Iranian authorities as a result of his navy service. The appellant further contended the Tribunal's decision was both irrational and illogical in the sense of "Wednesbury unreasonableness" so as to amount to a jurisdictional error.

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

- (i) The Tribunal committed a jurisdictional error as its finding with respect to the view the Iranian authorities would take of his United States Navy service and accordingly the unlikelihood of the appellant being subject to persecution in Iran, was not open on the evidence before it.
- (ii) The material to which the Tribunal referred did not appear to be relevant to the findings of the Tribunal with respect to the appellant's navy service. The Tribunal appeared to mix in its findings the clearly separate issues of the political views and religious beliefs of the appellant with his active service in the United States armed forces. By implication, the Tribunal similarly mixed the evidence upon which it was relying in reaching its findings in respect of these issues. Further, the Tribunal did not refer to the obvious and serious tensions existing between the United States and Iran at the time of and in the year prior to the Tribunal decision, or to evidence of those tensions which were widely reported during 2003.

Obiter

- (iii) There was no error in the finding of the Federal Magistrate that the reasoning of the Tribunal was neither illogical nor irrational and in any event, these grounds do not appear to support claims of jurisdictional defect in terms of Australian law.

Dai v MIAC

[2007] FCAFC 199

Federal Court of Australia, North, Gyles & Edmonds JJ, NSD 30 of 2007, 20 December 2007

This was an appeal from a judgment of the Federal Magistrates Court which upheld a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to cancel the appellant's Student (Temporary) (Class TU) visa.

The appellant failed to maintain satisfactory academic progress and was placed on academic probation by her education provider. In May 2004, the education provider notified the appellant that her enrolment had been cancelled as a result of unsatisfactory academic performance. The appellant's visa was cancelled in July 2004 pursuant to ss.116(1)(b) & (3) of the *Migration Act* 1958 (the Act) and r.2.43(2) of the *Migration Regulations* 1994 (the Regulations) due to a breach of condition 8202(3)(b) in Schedule 8 to the Regulations. The applicable version of condition 8202(3)(b) required the appellant to achieve an academic result that is certified by the education provider to be at least satisfactory.

An issue arose in the course of argument on the hearing of the appeal as to how a visa holder could comply or fail to comply with the condition if required to provide certification, over which the visa holder has no control. In an Amended Notice of Appeal, the appellant contended that the Tribunal decision was affected by jurisdictional error because it had applied condition 8202(3)(b) to cancel the appellant's student visa when that condition was invalid.

Held: per North & Gyles JJ (Edmonds J dissenting) appeal allowed. Tribunal decision set aside and remitted for reconsideration

per North & Gyles JJ:

(i) The power to cancel the appellant's visa was not engaged.

per North J:

(ii) Following from the language of r.2.43(2) of the Regulations, the Minister must cancel the visa if satisfied "that the visa holder has not complied with condition 8202". The visa holder is the subject of the condition and it is the visa holder who must comply. Yet the condition required certification by the education provider that the academic result of the visa holder was at least satisfactory. This was to be the act of the education provider. The visa holder had no role to play in providing the certification. The achievement of the academic result was irrelevant unless certified. There is no role for the visa holder in compliance or non-compliance with the condition.

(iii) As there was no way in which the visa holder could not comply with condition 8202 it was not possible for the Minister to be satisfied that the visa holder had not complied with condition 8202.

per Gyles J:

(iv) The form of condition 8202 that was in force at the relevant time was ultra vires the legislation, at least in circumstances where subclause (3)(b) came into play, because it was both unreasonable and uncertain. It compelled compliance by the visa holder with requirements that were not practicable or certain.

(v) There is no statutory link between the *Migration Act* and the *Education Services for Overseas Students Act* 2000 (ESOS Act). There is no statutory obligation upon the education provider to certify results or any means of enforcing any such obligation. An education provider could fail to provide a certificate in the case of a visa holder who achieved a satisfactory academic result for reasons of incompetence, loss of records, closing down of the institution, corruption, personal animus and so on. Further, if certification could not take place until completion of the relevant term, course or semester, at what point does the visa holder fail to comply with the condition?

per Edmonds J (dissenting):

- (vi) Condition 8202(3)(b) is within the regulation-making power or powers conferred by s.41(1) of the Act read, if necessary, with s.504. What is being dealt with is a student visa. Academic progress is obviously relevant to the grant or revocation of a student visa. Academic progress or lack of academic progress is therefore within the scope of the enabling legislation.
- (vii) The achievement of an academic result is the act of the visa holder. That result exists before and independently of any certification. The recordation of that result, in the records of the education provider, is mandated by ss.33 and 44 of the ESOS Act, r.4.01 of the *Education Services for Overseas Students Regulations 2001*; and paragraphs 34 and 36 of the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students.
- (viii) There is no form or other requirement as to how the education provider is to certify the academic result. The mandatory recordation of that result in the records of the education provider amounts to certification for the purposes of 8202(3)(b). So understood, an education provider's refusal to provide a further or additional certification is not to the point because certification has already occurred.

FEDERAL MAGISTRATES COURT JUDGMENTS

SZKHV & Anor v MIAC & Anor
[2007] FMCA 1894

Federal Magistrates Court of Australia, Smith FM, SYG 779 of 2007, 12 November 2007

The applicants, a husband and wife who are nationals of India, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the applicant wife (the applicant) was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution for reasons of religion, membership of a particular social group and political opinion. The applicant claimed to be a Christian member of a scheduled caste and to have been involved with the People's War Group (PWG).

Whilst accepting that the applicant was probably a member of a lower caste group, the Tribunal found there was no credible evidence before it indicating that she would be subject to unequal treatment constituting serious harm. The Tribunal was not satisfied, based on her lack of basic knowledge about the Bible that the applicant was a Christian. The Tribunal further found it implausible that the applicant, as an ordinary organiser of the PWG, would be targeted for political reasons given that senior members of the PWG were able to live and work in India. In any event, the Tribunal found that the applicant could relocate to another part of India to avoid any adverse attention she faced from political enemies her community.

The applicant contended, amongst other things, that the Tribunal made a decision based on evidence which did not exist.

Held: Tribunal decision quashed and remitted for reconsideration

- (i) The Tribunal made a jurisdictional error by arriving at a conclusion without any evidence for the fact which the Tribunal believed disproved the applicant's claims of political persecution. The Tribunal's reasoning in relation to relocation was also affected by jurisdictional error of the kind identified in *SZATV v MIAC* [2007] HCA 40.
- (ii) The country information identified by the Tribunal left little doubt that Indian authorities were probably targeting leaders at all levels of the PWG. The country information was directly inconsistent with the line of reasoning followed by the Tribunal. The Tribunal failed to appreciate the true significance of the information and to take it into account when assessing the plausibility of the applicant's claims.
- (iii) The Tribunal did not address how the applicant could relocate elsewhere in India without continuing to face a risk of persecution based on her caste and her political opinions. The Tribunal fell into error by assuming that the applicant would in other parts of India cease to reveal herself as a person of low caste and an active Maoist supporter, in any manner which might bring her to the attention of persecutors of low caste Indians or the authorities. On the evidence before the Tribunal, such potential persecutors were not found only in her former locations in Kerala.

SZGTZ v MIAC & Anor
[2007] FMCA 1898

Federal Magistrates Court, Raphael FM, SYG 2406 of 2006, 19 November 2007

The applicant, a national of Sri Lanka, 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 due to his imputed association with members of the Liberation Tigers of Tamil Eelam (LTTE).

The applicant claimed that in October 1999, he was on a motorcycle with his flatmate who was a Jaffna Tamil. He claimed that they were stopped by the police, driven to a police station,

questioned about the LTTE and beaten. He further claimed that he was injured, detained for six days and questioned about his association with his flatmate. The applicant was released after his uncle paid money to a police officer. Two weeks later, the applicant was again taken into custody because his flatmate's friend had been taken into custody and identified as an LTTE supporter. He was kept in detention for a day, but his uncle once again secured his release by paying money to the police.

The applicant provided the Tribunal with three documents to corroborate his claims: a report from his treating doctor in Australia which gave a diagnosis of memory loss and post traumatic stress disorder, a statement from the applicant's uncle and a statutory declaration from the applicant's mother. The Tribunal found that the applicant lacked credibility, in particular because of his apparent lack of detailed knowledge about personal matters relating to his flatmate and his friends. It did not give weight to the doctor's report based on its credibility finding. The Tribunal also did not give weight to the documents from the uncle and mother, in part, because they could have easily been contrived by the applicant giving his uncle and mother instructions as to what to write. The Tribunal found that they were a "self-serving fabrication written expressly for the purpose of enhancing the applicant's claim to be a refugee".

Held: Tribunal decision quashed and remitted for reconsideration

- (i) The Tribunal fell into jurisdictional error in the manner in which it dealt with the three pieces of corroborative evidence.
- (ii) The Tribunal was duty bound to provide the applicant with procedural fairness by raising with him concerns which it had that the documents from the mother and uncle were a fabrication and asking him to comment upon it. That right would arise both at common law and under s.425(1) of the *Migration Act* 1958.
- (iii) The Tribunal cannot dismiss corroborative evidence because of the applicant's untruthfulness, when the corroborative evidence itself points to a reason for the untruthfulness independent of any responses given by the applicant. In regards to the doctor's report, the Tribunal's rejection of the diagnosis does not necessarily follow from the rejection of the history. The applicant should have been asked questions about the diagnosis.

Silva v MIAC & Anor

[2007] FMCA 1955

Federal Magistrates Court, Riethmuller FM, MLG 282 of 2007, 23 November 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision that he was not entitled to the grant of a spouse visa. The applicant had sought a spouse visa in reliance upon the domestic violence provisions.

The Tribunal sought and accepted as correct the opinion of an independent expert about whether relevant domestic violence had occurred. That opinion stated that it was not established that the applicant had fear for his safety and wellbeing as a result of incidents of domestic violence committed by his wife. It said this was because the applicant had not taken any steps to protect himself, such as avoiding any contact with his wife; he was initiating contact with her, on his own, despite previous incidents; and he had reconciled with her on several occasions.

The applicant contended that the expert failed to deal with or consider the case presented by him. While the expert addressed whether the applicant feared for his safety, she had not addressed 'apprehension'. Regulation 1.23(2)(b) of the *Migration Regulations* 1994 (the Regulations) provides that a reference to relevant domestic violence is a reference to violence which, among other things, causes the alleged victim to 'fear for, or to be reasonably apprehensive about, the alleged victim's personal wellbeing or safety'.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal's reliance on the purported opinion amounted to jurisdictional error.
- (ii) The expert failed to consider the case as put by the applicant. In the context of the complex factual matrix of this case, bearing in mind the central role power imbalances play in domestic violence, specific consideration of whether the applicant was 'apprehensive' was required. Where the opinion fails to address the matters that were required to be considered it is not an opinion within the meaning of the Regulations, and as such the Tribunal's reliance upon it amounts to jurisdictional error.

Obiter:

- (iii) The fear or apprehension required by r.1.23(2)(b) of the Regulations is not a fear or apprehension limited to the moment of the event, but an ongoing fear of apprehension. That fear may not be present in situations where the victim of domestic violence is not in the proximity of, or in a relationship with, the perpetrator. Having regard to the nature of domestic violence, the section must contemplate a fear or apprehension about the victim's personal wellbeing or safety if in the proximity of, or continuing a relationship with, the perpetrator.
- (iv) There is no warrant for reading into the definition of 'independent expert' the qualifications of a 'competent person'. The Tribunal's finding that the person who gave the opinion was suitably qualified and employed by an organisation that is specified in a relevant gazette notice was open to it.

SZBJP v MIAC & Anor (No 2)

[2007] FMCA 1944

Federal Magistrates Court, Barnes FM, SYG2109 of 2007, 28 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 that he was not entitled to a Bridging E (Class WE) visa.

The applicant, in his application for a bridging visa indicated, without providing details, that he had applied for a substantive visa and was awaiting a decision in relation to an application for a visa other than a bridging visa. In its reasons for decision, the Tribunal found that there had been two applications for Ministerial intervention under s.417 of the *Migration Act* 1958 (the Act) in relation to him and that "no decision has yet been made on his current application". However, the Tribunal had identified three such applications in its initial outline of evidence and within its s.359A letter. On this basis the Tribunal accepted that the applicant had made a valid application for a bridging visa but was not satisfied that the criteria in subclauses 050.212(2) to (9) had been met either at time of application or decision.

The applicant alleged that the Tribunal failed to properly consider his application. In particular, it was contended that the Tribunal erred in its findings that he did not meet the criteria for a bridging visa.

Held: Application dismissed

- (i) The factual error made by the Tribunal in its findings and reasons was such as to give rise to jurisdictional error.
- (ii) There were three s.417 requests in relation to the applicant, all of which had been finalised by the time of the bridging visa application. The fact that the Tribunal recited the correct factual position in relation to his applications for Ministerial intervention in the introductory part of its decision (and also put the correct position to the applicant in the s.359A letter) did not establish that the misstatement in the findings and reasons part of the decision was simply a mistake in the nature of a typographical error. This error, which related to satisfaction of a criterion for the class of the visa sought, must be taken to indicate that the Tribunal failed to undertake an assessment of "only those facts and circumstances referable to the case of" the applicant and hence failed to discharge its review function.

There was no indication in the findings and reasons that the Tribunal did in fact consider the actual evidence concerning the bridging visa criteria relating to s.417 applications. The inference to be drawn in all the circumstances was that the Tribunal failed to have regard to or misconstrued the evidence before it on this issue in making its decision.

- (iii) Even if the Tribunal fell into jurisdictional error, relief was refused as a matter of discretion. The applicant now holds a substantive (Subclass 785 Protection (Class XA)) visa and there would be no utility in remitting the matter for reconsideration of the bridging visa decision.

SZGUR v MIAC & Anor

[2007] FMCA 1946

Federal Magistrates Court of Australia, Raphael FM, SYG 2637 of 2006, 28 November 2007

The applicant, a national of Nepal, 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. He claimed to fear persecution from the army or police because of his association with Maoist groups and, in particular, because his brother-in-law and uncle-in-law had allegedly been killed because of their associations with the Maoists.

The Tribunal did not accept that the applicant was involved in the Maoist movement, nor that his wife's family were Maoists and that some of their relatives were killed by reason of their involvement with the Maoists. The applicant had provided to the Tribunal some documents said to corroborate his claims. These included a newspaper article, which covered the killing of his claimed relatives by name, and his marriage certificate, which was claimed to show that his wife was related to these relatives. The Tribunal did not accept that the applicant knew anything about the killings other than what was in the newspaper article, and questioned the marriage certificate, which included the applicant's wife's married name, but the appellation 'Miss'.

The applicant contended, amongst other things, that the Tribunal's dismissal of the applicant's claims regarding the killings of his relatives was unreasoned and lacked any rational foundation, and that this error was compounded by the dismissal of the marriage registration certificate and therefore the dismissal of any connection between the applicant and the young men reported killed in the newspaper article.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal was "selective of material going one way" by ignoring the personal details provided about the killing and relying only on the fact that the applicant made references to the press reports when considering the killing of the two brothers-in-law.
- (ii) It was similarly selective in relation to the marriage certificate by looking only at the reference to the bride and the title "Miss" and having no regard whatsoever to the fact that she was named as the grand-daughter and daughter of two people who shared surnames with those killed.
- (iii) Consideration of a document means consideration of it as a whole and not only of the material that goes one way. Whether that is indicative of a mind not open to persuasion or is a failure to consider important or relevant material going to a central consideration is difficult to say.

Chan v MIAC & Anor

[2007] FMCA 1943

Federal Magistrates Court, Turner FM, SYG 1643 of 2007, 6 December 2007

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision that he was not entitled to the grant of a student visa. The application was refused on the basis that cl.573.211(3)(c) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations) was not met as the visa application was not made within 28 days of the last substantive visa held by the applicant ceased to be in effect.

The applicant was advised by a Departmental officer on 27 March 2006 that his student visa application was not a valid visa application as it was not accompanied by satisfactory evidence of either being enrolled or offered a place in a registered full-time course of study as required by Item 1222 of Schedule 1 of the Regulations. The applicant's existing visa expired on 1 April 2006 and on 17 August 2006 the made a further student visa application with evidence of a confirmation of enrolment (COE) and the visa charge.

Held: Tribunal decision quashed and remitted for reconsideration

- (i) The Tribunal erred in law in confirming the decision that the visa applicant did not make his application within 28 days after his last substantive visa ceased to be in effect and that cl.573.211(3)(c) of Schedule 2 to the Regulations was not satisfied.
- (ii) The student visa application made on 27 March 2006 became complete when the applicant made another student visa application on 17 August 2006 with the COE and visa charge. The application lodged on 27 March 2006 was not withdrawn or refused and therefore the application should have been considered when it became complete.

**Rashid v MIAC & Anor
[2007] FMCA 1942**

Federal Magistrates Court of Australia, Turner FM, SYG 1576 of 2007, 6 December 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 Skilled – Independent Overseas Student (Residence) (Class DD) visa.

The applicant claimed that he was entitled to be allocated 5 points under item 6A81(c) of Schedule 6A to the *Migration Regulations* 1994 (the Regulations) because he had completed a Master of Management in the Bengali medium, which is a designated community language. He claimed evidence of this was given to the Department and the Tribunal failed to consider it. The number of points awarded by the delegate was 105. Both the pool and the pass mark for the purpose of cl.880.222 of Schedule 2 to the Regulations were 115 at the time of primary assessment and at the time of the Tribunal's decision.

The applicant further argued that if the matter was referred back to the Tribunal, the Tribunal would be obliged to accept new evidence of further International English Language Testing System (IELTS) scores.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal committed an error of law as it did not include 5 bonus points. There was evidence on the files that the applicant held qualifications that could be relevant to Item 6A81(c). Had the Tribunal not erred the applicant would have had 110 points.
- (ii) It was not futile to refer the matter back to the Tribunal as the Tribunal may admit further evidence of IELTS scores if it considers that they were obtained during the processing of the application. The Tribunal hearing will occur 'during the processing of the application' as the hearing before the Tribunal when reviewing the decision of the delegate is a hearing de novo.

**SZJRH v MIAC & Anor
[2007] FMCA 2037**

Federal Magistrates Court of Australia, SYG1915 of 2007, 14 December 2007

The applicant, a national of the People's Republic of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that she was not a person to whom Australia owed protection obligations. The applicant claimed to fear persecution on the basis of her involvement with Falun Gong.

There were three previous decisions of the Tribunal purporting to affirm the delegate's decision (T1, T2 and T3). Of significance, T3's decision had been remitted by consent with a note recorded on the orders that the Minister accepted that the application should be allowed on grounds of reasonable apprehension of bias. The decision of T1 was remitted by judgment on the basis that the Tribunal member's conduct at hearing was such as to vitiate the hearing and the decision. There was also doubt raised by the Court as to an apparent failure by T2 to raise an issue with the applicant at hearing.

The Tribunal (T4) took into account all previous material presented and decided not to invite the applicant to a hearing because it considered that it had the power to take into consideration the earlier Tribunal proceedings and that it was not bound to invite the applicant to a further hearing. In its decision, T4 referred to *SZEPZ v Minister for Immigration and Multicultural Affairs* (2006) 159 FCR 291 (*SZEPZ*) as authority that upon remittal of a matter by a court, the Tribunal is obliged to continue and complete the particular review, not commence a new review.

The applicant argued, among other things, that as T3's decision had been quashed on grounds of reasonable apprehension of bias on the part of T3 (as also had T1's decision, and with some doubt in relation to T2), it was not open to T4 to conclude that the previously constituted Tribunal had complied with its obligations under s.425 of the *Migration Act* 1958 (the Act) and that T4 therefore remained under an obligation to accord the applicant a hearing before a Tribunal member whose proceedings had not been affected by any apprehension of bias.

Held: Tribunal decision set aside and remitted for reconsideration

- (i) The Tribunal committed a jurisdictional error by failing to comply with its obligation under s.425 of the Act.
- (ii) The opportunity required to be given to an applicant under s.425 to present themselves in person at a hearing held by a person constituting the Tribunal includes a requirement that the hearing should be held by a person who is both actually and ostensibly unbiased, and who will bring an actually and ostensibly unbiased mind when making a genuine evaluation of the evidence given at the hearing.
- (iii) The case law suggests that it is essential for the Tribunal, on remitter, to consider whether a new hearing is required and, where it is not, how to exercise the discretion to appoint a new hearing. The Tribunal incorrectly found that a new hearing was not required.
- (iv) The complete absence of any discussion by T4 of the significance of what transpired in T3 suggested that T4 gave no consideration to the propriety of relying upon the proceedings of T3, whether in relation to its hearing or its s.424A letter.

Obiter:

- (v) The decision in *SZMLM v MIAC* [2007] FCA 1100 appears contrary to the weight of authority in the Federal Court and does not address the reasoning in *SZEPZ*. However, in the circumstances it is unnecessary to decide whether his Honour's opinion should be followed.

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

Legislation Passed

There has been no legislation relevant to the Tribunals passed since the last edition of Précis.

Legislation Pending

There is currently no legislation relevant to the Tribunals pending before Parliament. 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)

The 42nd Parliament will meet on 12 February 2008. If this Parliament desires to proceed with the proposed amendments in the above lapsed bills, then new bills would need to be introduced.

CASELOAD OVERVIEW

MRT Decisions - December 2007

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	3	6	0	2	11
Visitor refusal	3	6	0	1	10
Student refusal	18	8	4	6	36
Temporary business refusal	5	4	2	1	12
Permanent business refusal	2	4	1	0	7
Skill linked refusal	22	14	3	3	42
Partner refusal	67	18	7	5	97
Family refusal	13	6	0	3	22
Student cancellation	30	31	2	2	65
Sponsor approval refusal	0	4	1	0	5
Other	3	10	5	19	37

RRT Decisions – December 2007

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	0	1	0	0	1
Bangladesh	2	4	0	7	13
Bhutan	1	0	0	0	1
Cameroon	1	0	0	0	1
China (PRC)	13	36	0	2	51
Colombia	0	1	0	0	1
Egypt	0	1	0	0	1
Ethiopia	0	2	0	0	2
Fiji	0	2	0	0	2
Georgia	0	0	0	1	1
Ghana	0	2	0	0	2
India	1	12	0	0	13
Indonesia	0	5	0	0	5
Iran	0	2	0	0	2
Israel	0	1	0	0	1
Kenya	0	2	0	0	2
Korea, Republic Of	0	5	0	0	5
Kyrgyzstan	0	1	0	0	1
Lebanon	0	2	0	0	2
Malaysia	0	2	0	1	3
Mongolia	0	1	0	0	1
Morocco	1	1	0	0	2
Nepal	2	0	0	0	2
Nigeria	0	2	0	0	2
Pakistan	1	6	0	0	7
Philippines	0	1	0	0	1
Russian Federation	0	1	0	1	2
Serbia & Montenegro	1	1	0	0	2
Singapore	0	1	0	0	1
Sri Lanka	1	4	0	0	5
Turkey	0	1	0	0	1
Ukraine	0	1	0	0	1
Vietnam	0	3	0	1	4
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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