



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

071414113

31 January 2008, Sydney

Ms A MacDonald, Member

BUSINESS – NOMINATED POSITION – R.5.19(2)(e) – ADEQUATE PROVISION FOR TRAINING – A delegate of the Minister for Immigration and Citizenship rejected the applicant's application for approval of an Employer Nomination Scheme nominated position under r.5.19 of the Migration Regulations 1994 (the Regulations). The delegate was not satisfied that the applicant had made, and continued to make, adequate provision for training existing employees in work relevant to the business as required by r.5.19(2)(e). The applicant, an Islamic organisation, employed a Head Imam and two Assistant Imams. One of the Assistant Imams was the subject of the nominated position. Before the Tribunal, the applicant submitted that there was no formal training available in Australia for Imams. Training was only available overseas, but the Head Imam held short courses and seminars to train and familiarise Imams on the needs of the community. The Imams also attended lectures and workshops conducted by visiting scholars from overseas. The applicant provided supporting documents detailing the short courses conducted, examples of seminar and lecture programs and examples of training delivered by visiting scholars.

Held: Decision under review set aside.

The Tribunal accepted that the applicant, in conjunction with other Islamic organisations, had in place a training program for its Imams. It further accepted the training program was in the form of short courses and seminars and that the Imams also attended lectures and workshops conducted by visiting scholars from overseas. The Tribunal found that the applicant provided training for its employees. It was satisfied that the applicant had made, and continued to make, adequate provision for training existing employees in work relevant to the business. Accordingly, it found that the applicant satisfied r.5.19(2)(e).

071550885

8 February 2008, Perth

Ms L Ward, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) VISA – SUBCLASS 457 – VISA CANCELLATION – CONDITION 8107 – CESSATION OF EMPLOYMENT – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 457 (Business (Long Stay)) visa under s.116(1)(b) of the *Migration Act* 1958 (the Act) on the basis of non-compliance with a condition of his visa, namely condition 8107 of Schedule 8 to the Migration Regulations 1994 (the Regulations). Condition 8107 required that, where a visa is granted to enable a visa holder to be employed in Australia, the holder must not cease to be employed by the employer in relation to which the visa was granted. The delegate determined that the applicant had ceased to be employed by his sponsoring employer after two years of employment. Before the Tribunal the applicant claimed to have resigned due to stress arising from workplace issues. These issues including cultural differences with other staff left unresolved by management.

Held: Decision under review set aside.

The Tribunal noted that the applicant had ceased to be employed by the employer in relation to which his visa had been granted. It therefore found that the applicant had not complied with condition 8107 of his visa. As such the Tribunal was satisfied that the ground for cancellation existed under s.116(1)(b) of the Act. In exercising its discretion whether or not to cancel the visa, the Tribunal observed that there were no issues concerning the applicant's quality of work. It further noted that the applicant had cooperated with the Department of Immigration and Citizenship. The Tribunal accepted that, in a context where an employer could jeopardise an applicant's visa application, the treatment to which the applicant had been subject had left him stressed and vulnerable. In assessing the hardship of cancelling the visa on family members the Tribunal noted that Migration Series Instruction 368 identified the effect on children as a primary consideration. The Tribunal concluded that the applicant's two children would be best served by continuing their education in Australia. On balance it found that the applicant should remain in Australia to minimise disruption to his children. Accordingly the Tribunal substituted a decision that the applicant's visa not be cancelled.

071658571

8 February 2008, Sydney

Mr S Roushan, Member

CULTURAL/SOCIAL (TEMPORARY) (CLASS TE) – SUBCLASS 428 – VISA CANCELLATION – CONDITION 8107 – CESSATION OF EMPLOYMENT– A delegate of the Minister for Immigration and Citizenship cancelled the applicant’s Subclass 428 (Religious Worker) visa under s.116(1)(b) of the *Migration Act* 1958 (the Act) on the basis of non-compliance with a condition of her visa. Condition 8107 of Schedule 8 to the Migration Regulations 1994 required that, where a visa is granted to enable a visa holder to be employed in Australia, the holder must not cease to be employed by the employer in relation to which the visa was granted. The applicant claimed that she left her position at the Chinese Korean Church (CKC) because she was underpaid and her appointment was removed without explanation. She claimed that she was ignored and insulted by CKC as she was threatened with visa cancellation. The applicant claimed that she was ignorant about condition 8107 and worked for another Church as an Assistant Pastor after her resignation. The applicant also claimed that both her children were studying in Australia and cancellation of their visas would cause them enormous difficulties.

Held: Decision under review affirmed.

The Tribunal noted that the applicant had not disputed that she resigned from CKC and had stated she was ignorant of the requirements of condition 8107. As such it found that she had breached condition 8107(a)(i). For this reason the Tribunal was satisfied that the ground of cancellation in s.116(1)(b) of the Act existed. In considering whether to exercise its discretion to cancel the applicant’s visa, the Tribunal had regard to relevant circumstances including those set out in Migration Series Instruction 368. The Tribunal noted the applicant’s evidence that she came to Australia in 2001 to further her children’s education. In its view, the purpose of the applicant’s travel and stay in Australia was not consistent with the purpose of the visa which was the subject of cancellation. The Tribunal accepted the applicant’s reasons for leaving her position at CKC, but noted she took no steps to notify the Department of Immigration and Citizenship of her changed circumstances. It was empathetic to the fact that cancellation of the applicant’s visa would mean the applicant’s children would have to return to Korea which could result in some hardship. However, it found none of these factors amounted to significant hardship as the applicant’s children were 20 and 22 years of age. It also found that, while the applicant would not be in a good financial situation as she had sold all her Korean assets and spent all her savings while living in Australia, there was nothing before the Tribunal to suggest she would be unable to engage in employment to support herself. The Tribunal concluded that considering all the circumstances as a whole the visa should be cancelled.

071709252

31 January 2008, Melbourne

Ms L Spieler, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 – VISA REFUSAL – CL.457.224 – PIC 4014 – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Subclass 457 (Business (Long Stay)) visa on the basis that the applicant did not satisfy cl.457.224 of Schedule 2 of the Migration Regulations 1994 (the Regulations). The delegate was not satisfied that the applicant met the requirements of Public Interest Criterion (PIC) 4014, which required that, where an applicant has had a visa cancelled, the application for a new visa must be made more than three years after departure from Australia. The delegate found a previous subclass 457 visa had been cancelled so the visa applicant was subject to the exclusion period. The applicant had last departed Australia only two and a half years before the new visa application was lodged. The delegate further found that there were no compassionate or compelling circumstances justifying a waiver. The review applicant submitted to the Tribunal that the visa applicant had previously been employed by his business as head chef. His business was now experiencing extreme financial pressure, in part, because he had been unable to find a suitable replacement for the visa applicant.

Held: Decision under review affirmed.

The Tribunal accepted that where a business operated by an Australian citizen has to close down that may constitute compassionate or compelling circumstances affecting the interests of an Australian citizen. However, the Tribunal considered the review applicant’s claims as to the visa applicant’s role in the business exaggerated. In any event, it found the business had suffered substantial losses during the period of the visa applicant’s claimed previous employment. The Tribunal further found that the review applicant had not provided a satisfactory explanation of how the visa applicant’s presence would overcome the business’s financial difficulties. As such, it was not satisfied that the circumstances affecting the review applicant’s business interests were compelling such as to justify waiver of the three year exclusion period.

071195250

18 February 2008, Sydney

Mr S Roushan, Member

SKILLED — INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) – SUBCLASS 880 – VISA REFUSAL – CL.880.230 – SKILLS ASSESSMENT – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Subclass 880 (Skilled – Independent Overseas Student) visa on the basis that the she did not satisfy cl.880.230 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Clause 880.230(2) required that a qualification obtained in Australia must be the result of full time study of a registered course. The delegate found that she did not attend a registered course as the college was not registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). The applicant provided a Certificate III to Trades Recognition Australia (TRA) for a skills assessment in respect of her nominated skilled occupation as a pastry cook under the Australian Standard Classification of Occupations. Although TRA had provided the applicant with a positive skills assessment, the Certificate was not a qualification obtained as a result of study in a registered course within the meaning of the Regulations. During the course of the review the applicant submitted a further qualification.

Held: Decision under review set aside

The Tribunal found on the evidence that the applicant had been awarded a Certificate III from a second institution which was registered under CRICOS. It also noted that the applicant had lodged a second application for a skills assessment to TRA, including evidence of this new qualification obtained from the second college and details of relevant work experience. TRA provided a positive assessment. The Tribunal was satisfied that a relevant assessing authority had assessed the skills of the applicant as suitable for her nominated skilled occupation of pastry cook. Furthermore, there was no evidence before it that the information given or used as part of that skills assessment was false or misleading in a material particular. Accordingly the Tribunal was satisfied that the applicant met cl.880.230 for the grant of a Subclass 880 visa.

Partner and Family Visas

061058584

23 January 2008, Melbourne

Mr G Robinson, Member

PARTNER (PROVISIONAL)(CLASS UF)– SUBCLASS 309 –VISA REFUSAL – CL.309.211 – CL.309.221 – SPOUSE RELATIONSHIP – A delegate of the Minister for Immigration and Citizenship refused to grant a Subclass 309 (Spouse (Provisional)) visa on the basis that the visa applicant did not satisfy cl.309.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate found that the visa applicant and the review applicant were not in a genuine spouse relationship. At the Tribunal, the review applicant provided details of how they first met, the development of their relationship and eventual marriage. The applicants maintained regular contact over the telephone, resided together in Cambodia and the visa applicant was nominated as the sole beneficiary of the review applicant's superannuation. They also claimed that their relationship was widely recognised by their respective families, friends and work colleagues including senior public officials. Documentary evidence acquired since the date of the visa application, including statutory declarations, letters of support, telephone bills, bank account statements, hotel receipts and a cohabitation certificate, were also provided.

Held: Decision under review set aside.

The Tribunal accepted that the applicants could provide only limited evidence of the financial aspects of their relationship since they lived in different countries. Although there were few opportunities to establish a shared household for the same reason, the Tribunal was satisfied that they lived together as a married couple when together in Cambodia. On the basis of the available documentary and witness evidence, the Tribunal also accepted that the applicants presented themselves as being married within their joint and respective social circles. Although originally introduced in an arranged fashion, the Tribunal accepted that they chose to pursue the relationship and remained in reasonably frequent contact. The Tribunal accepted that the visa and review applicants were in a validly-recognised marriage. For the purposes of r.1.15A of the Regulations, the Tribunal was satisfied that, at the time of application and decision, the visa and review applicants had a mutual commitment to a shared life together as husband and wife to the exclusion of all others, and that the relationship was genuine and continuing. Although presently living in different countries, the Tribunal was also satisfied that, at those times, the applicants lived together or did not live separately and apart on a permanent basis. It therefore found the applicants were in a spouse relationship and satisfied the requirements of cl.309.211 and cl.309.221 of the Regulations.

071493130

31 January 2008, Sydney

Mr H Wyndham, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – VISA REFUSAL – CL.309.211 – R.1.15A – SPOUSE RELATIONSHIP – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Subclass 309 (Spouse (Provisional)) 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 Regulations). The applicants submitted letters and a number of supporting statutory declarations. The review applicant claimed she was estranged from her brothers and as a result, the visa applicant had not met them, but the applicants' families otherwise had good relationships. The visa applicant gave evidence of contact with the review applicant's broader family. The review applicant claimed that she and her son lived with the visa applicant and his daughter and that she was responsible for household duties. Following her return to Australia in 2005, the review applicant claimed she had visited her husband in Fiji on two occasions.

Held: Decision under review set aside.

The Tribunal considered the letters between the parties were not genuine because they did not refer to their families, were written in English despite communication between the applicants being in Hindi and contained incorrect factual information. The Tribunal was not prepared to give these letters any weight. Nor was the Tribunal prepared to give great weight to the statutory declarations because it considered their authors appeared to have been coached. However, the Tribunal accepted the claims given at the hearing by the applicants and evidence from the review applicant's son. It was satisfied that based on these claims, at the time of application and time of decision, the applicants were in a genuine spouse relationship within the meaning of r.1.15A of the Regulations. Accordingly, the visa applicant satisfied cl.309.211 and 309.221 of Schedule 2 to the Regulations for the grant of the visa.

071865982

4 February 2008, Sydney

Mr S Roushan, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – VISA REFUSAL – CL.309.227 – ASSURANCE OF SUPPORT – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a subclass 309 (Spouse (Provisional)) visa on the basis that the visa applicant did not satisfy cl.309.227 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate found an Assurance of Support (AoS) that had been requested was not provided. The sponsor claimed that she was able to provide support to the visa applicant so that he would not need to rely on welfare services. At the Tribunal, the sponsor provided evidence that she was the recipient of a Disability Support Pension of \$115 a month and her monthly expenses were approximately \$500 with other expenses from time to time such as the care of her pets, the dentist or house maintenance. She also submitted documents showing that she owned her own house, a luxury car and other assets totalling approximately \$450,000 and had no outstanding debt. The visa applicant gave evidence that he held a Bachelor of Arts degree, had been employed as a court clerk for five years and had worked as a salesman. Evidence was provided that the visa applicant had received an offer of employment. The visa applicant also claimed to have \$2000 savings and would be given money by his brother-in-law that he could rely on until he found employment.

Held: Decision under review set aside.

The Tribunal was satisfied that the sponsor was in a position to provide financial assistance to the visa applicant if needed. It also accepted that the visa applicant's offer of employment was genuine. The Tribunal also considered the review applicant's physical and mental condition including her extreme anxiety and depression as a consequence of not being about to provide an AoS. The Tribunal found that these factors outweighed the inability of the sponsor to provide financial assistance to the visa applicant. It also considered that the grant of the subclass 309 visa was only for a finite period and if circumstances changed it was always open to the delegate to request an AoS when the visa applicant applied for a subclass 100. In these circumstances the Tribunal was not satisfied that the visa applicant was likely to need any of the Social Security allowances that are recoverable under the AoS Scheme. Accordingly, the Tribunal was satisfied that an AoS should not be requested. Therefore the visa applicant satisfied cl.309.227 of the Regulations for the grant of the visa.

071770635

25 January 2008, Sydney

Ms K Raif, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 101 – VISA REFUSAL – CL.101.211 - FULL-TIME STUDY – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a subclass 101 (Child) visa on the basis that the visa applicant did not satisfy cl.101.211(2) of Schedule 2 of the Migration Regulations 1994 (the Regulations). Clause 101.211(2) required that, if the visa applicant had turned 25 at the time of application, he had undertaken a relevant full-time course of study within 6 months or a reasonable time after completing the equivalent

of year 12. The delegate found that the period of five years since the visa applicant turned 18 was not a reasonable period for him not to be enrolled in full-time study. The review applicant claimed that her son stopped studying after he turned 18 because he was depressed and she could not support him financially. She thought the review application was lodged before he turned 25 and any delay was due to the unreliable postal service in the Philippines.

Held: Decision under review affirmed.

The Tribunal found that the period of five years after the visa applicant had turned 18 was not a reasonable time for the visa applicant not to have undertaken studies. This was despite the visa applicant's claimed depression and the review applicant's financial problems. The Tribunal found that the visa application was made by the visa applicant a day after the visa applicant had turned 25. Clause 101.211(1)(b) of the Regulations required the applicant to not have turned 25 at the time of application, unless he was a dependent child. The Tribunal found that the review applicant's claim that her son was depressed was not sufficient to meet the definition of "dependent child". Therefore, the Tribunal found that the visa applicant did not meet cl.101.211 of the Regulations at the time of application.

Student visas

071072882

13 February 2007, Melbourne

Mr G Robinson, Member

STUDENT – STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – VISA REFUSAL – CL.573.211 – 28 DAYS – FRAUD BY AGENT – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a subclass 573 (Higher Education Sector) visa on the basis that the visa applicant did not satisfy cl.573.211(3) of Schedule 2 of the Migration Regulations 1994 (the Regulations). Clause 573.211(3) required the application to be filed within 28 days after the last substantive visa ceased to be in effect. The applicant engaged an agent to lodge her visa application and assumed the agent had taken care of the application. However, it later became evident that the agent had not submitted the application. The applicant attempted to contact the agent, but was told he was no longer working at the agency.

Held: Decision under review affirmed

The Tribunal found that at the time of application the applicant was not the holder of a substantive visa and was required to have lodged the application within 28 days of when the last visa ceased to be in effect. It further found the applicant's visa application was clearly outside the 28 day requirement. The Tribunal had regard to the High Court's decision in *MIMIA v SZFDE* [2006] FCAFC 142 which addressed applications affected by fraud. The Tribunal found that having engaged and instructed an agent, the applicant was entitled to expect that agent to fulfil his duties competently and professionally. Although that did not occur and may have amounted to fraud on the decision-maker or decision-making process, the Tribunal did not consider itself bound not to affirm the decision. To do so would have had the effect of making a decision not authorised by the legislation giving the Tribunal a discretion the Parliament had not intended. The Tribunal was of the view that the discretion to set aside a decision affected by fraud is a judicial discretion and not a discretion enjoyed by the Tribunal. The Tribunal noted that the strict application of the legislation may lead to outcomes that seem harsh and unfair. However the remedy for such cases has been provided under s.351 of the *Migration Act 1958* which grants a broad discretion to the Minister to substitute a more favourable decision. The Tribunal found that the applicant did not meet cl.573.211(3)(c) of the Regulations for the grant of the visa.

REFUGEE REVIEW TRIBUNAL DECISIONS

Bangladesh

071716789

20 December 2007, Sydney

Ms P Wearne, Member

BANGLADESH – POLITICAL OPINION – BANGLADESH NATIONALIST PARTY (BNP) – The applicant claimed to fear persecution for reasons of his membership of the BNP. The applicant claimed he became involved in BNP politics at college. He claimed that as his involvement increased he came to the attention of a senior BNP leader and was appointed to an important position in the party. The applicant claimed that after the BNP's term in government, he was beaten by the supporters of the opposition party and his house was ransacked. He further claimed that under the caretaker government's state of emergency he was detained, interrogated, tortured and jailed over his connection with the BNP Parliamentarian. He was also charged by police for carrying out political activities during the emergency and forced to face court. The applicant feared he would be detained and killed like many of his fellow political activists and leaders.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness who gave consistent, plausible and detailed evidence supported by independent information. He was able to demonstrate a working knowledge of BNP politics and its activities at a local level. The Tribunal accepted that the applicant was targeted and assaulted by members of the rival political party and detained, interrogated, tortured and jailed by the caretaker government. It accepted that if the applicant returned to Bangladesh he would continue his involvement in the BNP. It further found there was a real chance that he would be detained and questioned because of his long and known involvement with the BNP and his close association, or perceived association, with one of its leaders. It found this constituted serious harm as required by s.91R(1)(b) of the *Migration Act* (the Act) and his political opinion was the essential and significant reason for the harm feared as required by s.91R(1)(a) of the Act. It also found that it involved systematic and discriminatory conduct as required by s.91R(1)(c) of the Act. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

China

071541878

19 December 2007, Sydney

Ms P McIntosh, Member

CHINA – RELIGION – POLITICAL OPINION – FALUN GONG – The applicant claimed to fear persecution for reasons of his association with his brother, a Falun Gong practitioner, and his own beliefs and practice of Falun Gong. The applicant claimed that his brother had been subjected to serious ill-treatment and discrimination because of his political activism and involvement in the Falun Gong movement. He claimed that because he provided work for his brother he was suspected of having information about his brother's activities or contact with Falun Gong. As a result he was detained and suffered ill-treatment, including torture. He also lost his business and was denied employment opportunities. He claimed to have suffered psychological consequences of his ill-treatment by police. The applicant claimed that he started practicing Falun Gong in Australia because it provided relief from his psychological illness. He claimed that he participated in Falun Gong gatherings, parades and public demonstrations. He also claimed he had participated in various protest activities critical of the Chinese government.

Held: Decision under review set aside.

Although the applicant's oral evidence was at times vague and he did not tell the Department of Immigration and Citizenship of his ill-treatment, on the basis of evidence from a psychologist the Tribunal found it would be unreasonable to conclude this pointed to a lack of truthfulness. It also noted the applicant's claims were consistent with independent information particularly that in the year he left China the most frequently used tactic was to make family members responsible for Falun Gong practitioners' activities. The Tribunal accepted that the applicant had been the subject of serious ill-treatment and discrimination in employment because of a political opinion imputed to him. The Tribunal was satisfied that the applicant primarily took up the practice of Falun Gong in Australia because it gave him some relief from his psychological illness. In the Tribunal's view the chance was not remote that he may face detention and interrogation on the basis of his association with his brother or his participation in Falun Gong activities

in Australia. Accordingly, the Tribunal found that the applicant had a well-founded fear of persecution for a Convention reason.

071660799

14 December 2007, Sydney

Ms L Ward, Member

CHINA – POLITICAL OPINION – TIBET – ANTI-GOVERNMENT– RELIGION – BUDDHIST – S.36(3) – The applicant feared persecution for reasons of his political activities and as a Buddhist born in Tibet. The applicant claimed that he was a political prisoner who served several years in jail. He further claimed once he was released he was not permitted to be involved in political activity. The applicant claimed he often travelled in secret between a relative's and friends' houses to distribute material he had left with his relative before his imprisonment. However, he noticed police began to pay attention and frequently asked him to go to the police station. The applicant claimed that he fled Tibet for India with fraudulent identity documents. He claimed he then lived and worked illegally in India. The applicant claimed that he fraudulently obtained an Indian Identity Certificate to leave India for Australia. He claimed the Certificate was a genuine document issued by the government, but was obtained using false information after paying a bribe. He further claimed the false information was far more than a "minor discrepancy". Therefore, he had no right to return to India. The applicant feared arrest and detention if he returned to Tibet.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was born in Tibet and was a citizen of China. It found the applicant to be honest and credible and accepted he was politically active in Tibet. The Tribunal further found the applicant continued to be politically active. The Tribunal accepted that the applicant was imprisoned by Chinese authorities for his political opinion, left China illegally, and lived and worked in India. The Tribunal was satisfied that the applicant's Indian Identity Certificate could not be considered valid. It found the applicant was not entitled to the Certificate therefore he could not use it to legally enforce the right which it purported to confer, namely the right to enter and reside in India within the meaning of s.36(3) of the *Migration Act* 1958. The Tribunal found that the applicant had a well-founded fear of persecution in China for a combination of his Tibetan Buddhist religion and political opinion. As such, it found that the applicant had a well-founded fear of persecution for a Convention reason.

071896978

13 February 2008, Sydney

Ms P Wearne, Member

CHINA – RELIGION – CATHOLIC – The applicant claimed to fear persecution for reasons of his Catholic religion. The applicant claimed police held him in a detention centre after he refused to give them free goods. Because he refused to confess to the crime of "disrupted public affairs" he was detained for months at a labour camp. The applicant claimed that after his release he was despondent because of injuries sustained in detention and loss of his business. He claimed he was introduced to an underground Catholic Church where he was "comforted and consoled". He then became a committed Christian who worked to repay the salvation given to him by delivering Bibles and other religious material to the leader of a youth group. He claimed the authorities are searching for him and he would be arrested and detained if he returns to China.

Held: Decision under review set aside.

The Tribunal found the applicant over all to be a credible witness and accepted that he gave a substantially truthful account of his claims. It found that evidence provided to the Department of Immigration and Citizenship and during an extensive hearing with the Tribunal was consistent although there remained some lingering unresolved concerns. Despite this the Tribunal accepted the applicant engaged in the claimed activities. It further accepted the applicant had become a committed Christian and a member of an underground Catholic Church where he found solace in his faith. The Tribunal accepted a Church representative's statement that the attended Catholic Mass every Sunday since arriving in Australia. His detailed knowledge of Christianity convinced the Tribunal he engaged in this activity otherwise than for the purpose of strengthening his claim to be a refugee. The Tribunal found there was a real chance the applicant would be detained for reasons of his religion. Accordingly, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

Fiji

071723892

5 December 2007, Sydney

Mr S Roushan, Member

FIJI – PARTICULAR SOCIAL GROUP – HOMOSEXUALS – The applicant claimed to fear persecution for reasons of his sexual orientation. The applicant claimed that from a young age he suffered physical and verbal abuse by family members for displaying behaviour and mannerisms that highlighted his sexual orientation. He claimed he was regularly beaten and subjected to repeated sexual abuse by a relative when a child. The applicant also claimed that as a result on occasion he required hospitalisation. The applicant claimed that his homosexual behaviour resulted in his ostracism from the community, including the church. After arriving in Australia the applicant claimed to have participated within the gay community and established homosexual relationships. The applicant claimed to fear further mistreatment by members of his own family and the wider community including the church if he was returned to Fiji.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was homosexual and that homosexuals in Fiji constituted a particular social group. The Tribunal found the applicant had been abused by family members, who beat him because they wanted to make him stronger, and that his behaviour and mannerisms made him more vulnerable to sexual abuse. It held that these experiences were serious enough to amount to persecution and were essentially and significantly for the reason of his perceived sexual orientation. However, the Tribunal was not satisfied that there was a real chance of persecution in the future. The applicant had not encountered serious harm from family members after leaving the family home and the Tribunal found they had no intention to inflict such harm. Further, there was no claim or evidence that he had been harmed by others. The Tribunal accepted that those who are “out and proud” face derogatory treatment and that treatment “can get physical if one replies”. But it also found the applicant was not a person who would engage in that form of verbal altercation. It accepted the applicant may be subjected to verbal abuse or other similar forms of discrimination, but was not satisfied that regular and petty discriminatory acts amounted to persecution. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Lebanon

071800256

18 December 2007, Sydney

Mr S Roushan, Member

LEBANON – RELIGION – JEHOVAH’S WITNESS – The applicants claimed to fear persecution because they are Jehovah’s Witnesses. The applicants claimed that as Jehovah’s Witnesses they were forced to practice their faith covertly in order to avoid the risk of harm. The first applicant claimed that throughout her lifetime she had to significantly limit her religious activities and expressions of belief. She also claimed she was threatened by members of the public on numerous occasions and these threats intimidated her into imposing considerable restrictions on her practice. It was also claimed that she could not rely on the authorities for protection. Since arriving in Australia, the applicants attended regular meetings of Jehovah’s Witnesses and the first applicant actively and openly preached her faith.

Held: Decision under review set aside.

The Tribunal found the first applicant to be a credible and reliable witness and accepted that she was a Jehovah’s Witness. It also accepted that her ability to proselytise her faith, a core obligation for Jehovah’s Witnesses, was severely curtailed and she was not able to overtly hold or attend meetings. It accepted independent information that Jehovah’s Witnesses lived in a tense and antagonistic environment where they could easily become the targets of harassment by authorities and private individuals. The Tribunal found that, in order to avoid harm, the first applicant was required to restrict her beliefs and practices over such a long period that cumulatively it amounted to persecution on the grounds of religion. It accepted her strong commitment to her beliefs and that she engaged in open conduct in Australia. It found the only reason she carried out her activities discreetly in Lebanon was her fear of and her desire to avoid harm and that, if returned, she would have to modify her conduct to avoid persecution. As the Tribunal could not require an applicant to take steps to avoid persecution it could not exclude as remote and insubstantial the chance she would face serious harm. Further, it was of the view that the state provided avenues for persecution of Jehovah’s Witnesses and the applicant had no adequate and effective state protection. It was therefore satisfied that the first applicant had a well-founded fear of persecution for a Convention reason. The Tribunal was also satisfied that the second applicant was a dependent of the first applicant for the purposes of s.36(2)(b)(i) of the *Migration Act 1958* and the fate of his application depended upon the outcome of her application.

071844969

20 December 2007, Sydney

Ms K Raif Member

LEBANON – RELIGION – JEHOVAH'S WITNESS – The applicant claimed to fear persecution for reasons of his conversion to and belief in the Jehovah's Witness faith. The applicant claimed he was born a Sunni Moslem and had hated the Jehovah's Witness faith. After arriving in Australia he was introduced to it by a co-worker and became attached so he converted. The applicant claimed that for some time he had regularly attended a Congregation and participated in prayer meetings. He also claimed that he was attending intensive Bible study in preparation for Baptism. However, the applicant submitted his lack of study and inability to read meant he had a limited knowledge of the faith. He also claimed that he had been preaching to his wife in Lebanon, but had told her not to tell anyone about his conversion for fear of reprisals from relatives. The applicant further claimed it was known he was associated with Jehovah's Witnesses in Australia and that would cause him problems in the future.

Held: Decision under review affirmed.

The Tribunal did not find the applicant to be a credible witness. It did not accept he had converted to the Jehovah's Witness faith or participated in Jehovah's Witness activities to a significant level or for the stated period. The Tribunal was concerned that given his previous hatred, the applicant had not give a satisfactory explanation of why he had become involved with Jehovah's Witnesses. It noted that he appeared to have memorised some information and limited his answers to that information. It also noted that he was unwilling to provide details of the Congregation he attended. The Tribunal accepted that the applicant had some knowledge, but found that it was extremely rudimentary. Further, it rejected the applicant's submission on this point as it was not consistent with his claim of frequent and regular participation in prayer and study sessions. The Tribunal was not satisfied that the applicant engaged in religious activities in Australia otherwise than for the purpose of strengthening his claims. It did not accept that he genuinely intended to convert from Islam or undergo baptism. Nor did it accept that he preached to his wife. Further, the Tribunal did not accept that the applicant would engage in the practice of or associate with practitioners of the Jehovah's Witness faith in the future. The Tribunal rejected the applicant's claim that his association with Jehovah's Witnesses in Australia would cause him problems in the future because his involvement was limited and would not be known in his village. Therefore, it found that there was no real chance that the applicant would face persecution because of his religion. As such the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Pakistan

071781876

11 January 2008, Sydney

Ms P McIntosh, Member

PAKISTAN – POLITICAL OPINION – AWAMI NATIONAL PARTY – ANTI-TALIBAN – The applicant claimed to fear persecution for reasons of his support for the Awami National Party (ANP). The applicant claimed he would suffer harm from the government lead by President Musharraf. He also claimed his family was likely displaced from his village in the North West Frontier (NWFP) because of conflict between pro-Taliban and government forces. He said he considered the Taliban to be extremists. The applicant further claimed that psychiatric difficulties attributable to his experiences in Pakistan affected his memory and ability to give evidence.

Held: Decision under review set aside.

Although the applicant could not describe certain details, on the basis of a specialist's report that he suffered psychiatric problems which affected his ability to recount past experiences in situations such as the Tribunal hearing, the Tribunal accepted he was an ANP supporter in the NWFP. The Tribunal noted that ANP activists were harassed and detained by the Musharraf government. However, due to an escalation of events post-departure, the Tribunal considered whether the applicant had a well-founded fear of persecution in the NWFP by pro-Taliban forces because of his support for the ANP. The Tribunal noted the ANP leadership continued to oppose the Islamists in the NWFP by calling for an alliance of moderate, secular parties. It was satisfied that supporters of the ANP, including the applicant, would generally be regarded by religious extremist groups as political opponents. Given the level of violence employed by these groups and the unpredictability of the security situation, the Tribunal was satisfied the chance was not remote that the applicant might be harmed because of his political opinion. It found this chance was exacerbated by his psychiatric condition which might have limited his ability to protect himself or attracted hostility. The Tribunal found the applicant had a well-founded fear of persecution in the NWFP for reasons of his political opinion. The Tribunal also found that because of the applicant's ties to his village, concern for his family's safety and his psychiatric difficulties, it was not reasonable to expect him to relocate to another part of Pakistan. Accordingly, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

071894764
7 February 2008, Sydney
Ms L Symons, Member

PAKISTAN – RELIGION – AHMADI – The applicants claimed to fear persecution for reasons of their Ahmadi faith. The first applicant claimed she had had a lot of problems because of their belonging to the Ahmadiyya Muslim community. She claimed that according to Pakistani law they were non-Muslims and the government had the right to “go against them” if they were found performing Islamic activities. The first applicant claimed she had been identified as Ahmadi in their community and that her father-in-law was well known. She claimed her husband had to close down a successful business and suffered financial loss. The applicant claimed crowds of extremists gathered outside their house and yelled abuse at them and that they were threatened by mullahs. She also claimed the police were called, but refused to provide assistance. The applicant claimed that, if returned to Pakistan, they will be targeted for being unsuccessful in obtaining asylum.

Held: Decision under review set aside.

The Tribunal found the first applicant to be a credible witness. She gave evidence in an open and straightforward manner and was not prone to exaggeration or overstatement. The Tribunal accepted the applicants’ claims including that they were of the Ahmadi faith. The Tribunal noted independent information that there is long-term, widespread intolerance towards and harassment of Ahmadis. This included restrictions on religious practice, threats, physical violence and attacks. It accepted that policies of discrimination entrenched in the Constitution included a prohibition on calling themselves Muslims, referring to their faith as Islam, and preaching, propagating or inviting others to accept their faith. Violations resulted in three years imprisonment and a fine. The Tribunal found there was a real chance the applicants would face persecution for reasons of their religion. It further found the State would not provide the applicants with effective protection from harm. The Tribunal found the harm feared was not localised and it could not be avoided by the family relocating to another part of Pakistan. Accordingly, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

Zimbabwe

071637813
3 December 2007, Melbourne
Mr P Fisher, Member

ZIMBABWE – POLITICAL OPINION – MOVEMENT FOR DEMOCRATIC CHANGE – The applicant claimed to fear persecution for reasons of his and his family’s membership and involvement with the Movement for Democratic Change (MDC). The applicant claimed to have been assaulted by the ruling Mugabe regime for his political activities. This caused him to feel insecure and anxious in public places even in Australia. The applicant claimed that he and other members of his family had escaped Zimbabwe, but his father remained there. He claimed his father continued to participate in MDC activities. The applicant claimed that he would be beaten or killed if he were forced to return to Zimbabwe.

Held: Decision under review set aside.

The Tribunal noted that the applicant delayed in making refugee claims until his immigration status had become tenuous raising questions about the genuineness of his fear and was lackadaisical in his approach to his review. The applicant appeared to have a limited understanding of the determination process or the implications of failing to comply with procedural steps. In large part because of spontaneous corroborating evidence by the applicant’s sibling, the Tribunal considered these deficiencies were likely the result of fear, uncertainty and the lingering effect of his experiences, rather than any lack of bona fides. The Tribunal referred to extensive independent information which confirmed aspects of the applicant’s claims. It found his account of events and his experiences to be convincing and credible and observed the applicant appeared very distressed when describing them. As such the Tribunal was prepared to give the applicant the benefit of any doubt and accept his claims. The Tribunal found that there was a real chance of the applicant would be identified as an MDC supporter or a member of an MDC family and would encounter persecuted for that reason. The Tribunal found state protection was unavailable to the applicant because the threat came from government controlled entities. It also considered the deteriorating security situation and found that it was not safe or reasonable for the applicant to relocate. Accordingly, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

MIAC v Sok

[2008] FCAFC 18

Federal Court of Australia, French, Lindgren & Jacobson JJ, VID 888 of 2007, 5 March 2008

This was an appeal from a decision of the Federal Magistrates Court which had set aside a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate refusing the first respondent (Mr Sok, the applicant before the Tribunal) a Partner (Migrant) (Class BC) visa Subclass 100.

Before the Tribunal, the applicant had claimed for the first time that he suffered domestic violence. The Tribunal found that the relationship between the applicant and his sponsoring spouse had ceased and, relying on an expert opinion it had obtained pursuant to r.1.23(1B) of the Migration Regulations 1994 (the Regulations), that the applicant had not suffered relevant domestic violence. The Federal Magistrate set aside the Tribunal's decision on the basis that the Tribunal had failed to accord Mr Sok a hearing before referring to an independent expert for an opinion on the question whether Mr Sok had suffered relevant domestic violence.

On the hearing of the Minister's appeal, the Court raised the question whether the Tribunal was bound by the domestic violence provisions in Division 1.5 of the Regulations, including r.1.23, which on their face are addressed only to the Minister. Also at issue was whether Division 1.5 was invalid to the extent that it purported to bind the Tribunal and second, whether the Tribunal was required to invite the applicant to a hearing before seeking the opinion of an independent expert.

Held: per curiam, Appeal allowed. Application to Federal Magistrates Court dismissed.

- (i) The legislative regime providing for the seeking of the opinion of an independent expert has no application to the Tribunal in the exercise of its review function. The starting point for being taken under r.1.23 to have suffered domestic violence, in the case of a "non-judicially determined claim of domestic violence" is the reference in the definition of that expression in r.1.21(1) to r.1.23(1A), which provides that "an application for a visa" is taken to include a non-judicially determined claim of domestic violence in the circumstances set out in that subregulation. It is only in the application to the Minister that a person can be "taken" to have suffered domestic violence.
- (ii) The application to the Minister was not taken to include a non-judicially determined claim of domestic violence because the circumstances identified in paras (a) and (b) of r.1.23(1A) were not satisfied in connection with that application. It followed that r.1.23(1B) was not enlivened and the Minister was not required to "consider" the matter of domestic violence or to "seek" the opinion referred to in the regulation.
- (iii) Based on the fact that the relationship between Mr Sok and his sponsoring spouse had ceased, the Tribunal was bound to affirm the delegate's decision. The opinion of the independent expert that the Tribunal had obtained, purportedly pursuant to the regime that had applied to the primary decision-maker alone, could have no bearing on the question whether Mr Sok was to be taken as having suffered domestic violence.

Obiter

- (iv) If Division 1.5 applied to the Tribunal, it was not invalid to the extent that it purported to bind the Tribunal.
- (v) If Division 1.5 applied to the Tribunal, the Tribunal was not required by s.360 of the Migration Act 1958 to invite Mr Sok to appear before it to give evidence and present arguments relating to the issue of whether he had suffered domestic violence, before it reached the state of not being satisfied that he had done so for the purposes of r.1.23(1B)(b).

MIAC v SZKPO

[2008] FCAFC 21

Federal Court of Australia, Branson, Emmett and Bennett JJ, NSD 1927 of 2007, 6 March 2008

This was an appeal by the Minister from a judgment of the Federal Magistrates Court quashing the decision of the Refugee Review Tribunal (the Tribunal) that the Tribunal did not have jurisdiction to review the decision of the delegate of the Minister to refuse to grant the respondent a protection visa.

The respondent visa applicant (the visa applicant) lodged his application for a protection visa in December 2003. The application was refused on 2 March 2004 and the decision was notified to the visa applicant by letter dated the same day with a copy of the decision record attached (the notification documents). The letter was addressed to the visa applicant and indicated that a “carbon copy” was sent by post to his nominated authorised recipient at an address at the foot of the letter. The visa applicant’s application for review was lodged on 20 March 2007. The Tribunal concluded that because the application had been made out of time it was not a valid application.

At first instance, the primary judge held that for a notification to be properly given to an authorised recipient under s.66 of the *Migration Act* 1958 (the Act) it must be addressed to that authorised recipient. His Honour, relying upon the judgments of *VEAN of 2002 v MIMIA* (2003) 133 FCR 570 (*VEAN*) and *SZFOH v MIAC* [2007] FCAFC 63 (*SZFOH*) found that although the notification of the delegate’s decision appeared actually to have been sent to the visa applicant and to his authorised recipient, it was not sufficient that a notification letter addressed to the applicant be copied to the authorised recipient.

The Minister contended that the Federal Magistrates Court erred in concluding that the sending of the notification letter to the visa applicant’s authorised recipient did not satisfy the requirements of the Act.

Held: per curiam, Appeal allowed. Application to Federal Magistrates Court dismissed.

- (i) The Federal Magistrates Court erred in not concluding that the requirements of s.494B(4) had been satisfied. The application to the Tribunal was out of time and the Tribunal was correct in concluding it had no jurisdiction to undertake a review.
- (ii) There is no basis for importing a requirement that documents given for the purposes of s.66 must contain a particular address. So long as the document is posted to the authorised recipient at the authorised recipient’s address, s.494B(4) is satisfied. It is irrelevant that an address other than the address of an applicant’s authorised recipient is included in notification documents.
- (iii) The scheme of s.494D(1) is that the authorised recipient is to be given the document that would otherwise have been given to the visa applicant. It is inconsistent with that notion that the document should itself be addressed to the authorised recipient rather than the visa applicant.
- (iv) The case of *VEAN* was distinguishable from this case. To the extent that *VEAN* suggests that notification documents must contain the address of the authorised recipient or may not contain the address of a visa applicant, the decision should not be followed. To the extent that *SZFOH* construed *VEAN* in this way, that construction was erroneous.

MIAC v SZLIX
[2008] FCAFC 17

Federal Court of Australia, Tamberlin, Finn and Dowsett JJ, NSD 2066 of 2007, 5 March 2008

This was an appeal from a judgment of Federal Magistrates Court setting aside a decision of the Refugee Review Tribunal (the Tribunal) that the respondent was not a person to whom Australia had protection obligations. The respondent claimed to fear persecution as a Falun Gong practitioner.

The application for review to the Tribunal indicated the respondent did not have an adviser authorised to act for him and did not appoint an authorised recipient. The respondent’s address for correspondence was a P.O. Box in Auburn. The Tribunal sent the respondent a hearing invitation to the P.O. Box address. The respondent attended the Tribunal hearing late, and stated that he did want to give oral evidence. The Tribunal therefore rescheduled the hearing. The Tribunal sent a second hearing invitation to the respondent at the P.O. Box address. The respondent failed to attend the second Tribunal hearing. Pursuant to s.426A of the *Migration Act* 1958 the Tribunal proceeded to affirm the decision without taking any further action to enable the respondent to appear before it.

At first instance, the respondent denied the signature on the application form was his, gave evidence that the P.O. Box address was the address of a friend, that this friend introduced him to a migration agent, that he informed the agent of his new contact address and phone number and if the agent needed to contact him he contacted his friend who told the respondent about “anything they want to know”. The Federal Magistrate held that the Tribunal in its decision-making was compromised by third party fraud because of the migration agent’s failure to inform the respondent of the second hearing date. The Court purportedly followed the High Court’s decision in *SZFDE v MIAC* (2007) 237 ALR 64 which requires that the agent in question is fraudulent in a way that affects the Tribunal’s Part 7 decision-making process.

The Minister on appeal contended that the Federal Magistrate erred in finding that this was a case where the Tribunal in its decision making process was compromised by “third party fraud”.

Held: per curiam, Appeal allowed. Matter remitted to Federal Magistrate for re-hearing.

- (i) It was not open to the Federal Magistrate to infer fraud. It was not open to his Honour to find that the appellant’s agent (if there was such a person) was an unregistered migration agent. The evidence concerning the conduct of the agent could not itself support a finding of fraudulent conduct by that person.
- (ii) It was not possible to properly infer from the evidence that it was the alleged migration agent’s dishonest failure that resulted in the Tribunal’s hearing invitation not being given to the respondent. It was equally as probable that the failure could have been ascribed to an error or omission of his friend.
- (iii) Even if it was assumed that the invitation reached the agent there was no substratum of facts which would justify the inference that the agent dishonestly omitted to inform the respondent. That failure could have easily been ascribable to oversight or negligence. The simple fact of a failure to inform or bare negligence or inadvertence will not necessarily be sufficient to give rise to fraud on the Tribunal.

MIAC v SZIQB

[2008] FCAFC 20

Federal Court of Australia, Branson, Emmett & Bennett JJ, NSD 1949 of 2007, 6 March 2008

This was an appeal from a decision of the Federal Magistrates Court which had set aside a 1999 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 first respondent gave evidence to the Federal Magistrate that he changed addresses before the date on which the letter advising of the Tribunal’s decision in February 1999 was sent and that he never received the decision. Although represented by a migration agent, the first respondent acknowledged he took no steps to approach the Tribunal until approximately seven years later at which time he authorised a friend to approach the Tribunal and a copy of the decision was obtained.

The Federal Magistrates Court declared that the decision of the Tribunal was invalid and of no effect. It ordered that the application for review be referred back to the Tribunal, differently constituted, to be heard and determined according to law.

On appeal, it was conceded the Tribunal decision was affected by jurisdictional error. The Minister (the appellant) contended that the Federal Magistrate had erred in refusing to exercise his discretion to dismiss the application to that court on the basis of the first respondent’s delay in instituting the proceeding.

Held: per curiam, Appeal allowed. Application to Federal Magistrates Court dismissed.

- (i) The exercise of the discretion to grant relief to the first respondent was based on an erroneous principle.
- (ii) The Federal Magistrate failed to give proper weight to a number of relevant considerations including, *inter alia*, the conduct of the first respondent; the strength or weakness of the claim for relief; compassionate and public policy considerations; and the obligations imposed on the first respondent by the *Migration Act 1958* and the Migration Regulations 1994 (the Regulations), including the obligation to give the Tribunal a notice in writing of an address, including a new address, at which documents relating to a review may be sent (r.4.39 of the Regulations).
- (iii) An applicant for judicial review of an administrative decision made more than seven years earlier was required to offer a satisfactory explanation of why the application was not made earlier. The evidence and submissions of the first respondent did not constitute a satisfactory explanation and the first respondent had made no real effort to ascertain the fate of his application to the Tribunal.

NBMB v MIAC

[2008] FCA 149

Federal Court of Australia, Flick J, NSD 1806 of 2007, 26 February 2008

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

protection obligations. The appellant, a national of Nepal, claimed to fear persecution, amongst other things, for reasons of her Christian religion.

The Tribunal had previously made a decision that the appellant was not a person to whom Australia had protection obligations which was quashed by the Federal Magistrates Court. A Senior Member of the Tribunal acting pursuant to a delegation from the Principal Member directed that a different member constitute the Tribunal for the purposes of the review. The appellant attended a hearing before the new Member, during which the Tribunal put to the appellant country information indicating that Christianity was a fast-growing religion in Nepal and that there was no evidence of proselytisers being persecuted or gaoled. The Tribunal declined to adjourn the hearing to take evidence from a witness as to the appellant's Christian commitment and the situation for Christians in Nepal. The Tribunal found that the appellant did not have a well-founded fear of persecution in Nepal.

On appeal to the Federal Court, the appellant contended that the decision was affected by apprehended bias; the Tribunal failed to comply with s.425 of the *Migration Act 1958* (the Act); and the Tribunal lacked authority or power to make the decision.

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

- (i) The Tribunal conducted its review in such a manner as to attract a reasonable apprehension of bias.
- (ii) The transcript of the hearing recorded a number of exchanges providing a sound basis for apprehending that the Tribunal had formed its own, firmly held, view that proselytisers were not encountering the persecution being contended by the appellant; that the appellant's responses were not being properly considered; and that the Tribunal was anxious to confine her explanations. This was reinforced by the refusal to adjourn the hearing to enable the witness to be called. The evidence sought to be called was of central relevance to the issues sought to be pursued by the appellant.
- (iii) It is of obvious importance that a Tribunal member remains, and is seen to remain, measured in the manner in which a hearing proceeds and is not seen to rush questions and answers such that an informed observer may justifiably form a view that the Tribunal is not carefully seeking and considering the evidence being adduced in a measured and careful manner.
- (iv) Section 425 of the Act does not confer upon an applicant a unilateral right to secure an adjournment of proceedings so that some particular evidence of a witness is in fact available. So long as an applicant has been given a meaningful opportunity to "give evidence and present arguments" even if it is not the particular evidence which an applicant may prefer, there has been no breach of s.425 of the Act.

Obiter:

- (v) There is no reason to impose any constraint upon the power of the Principal Member to direct who is to constitute the Tribunal conferred by s.421(2) of the Act. The decision of the initial Tribunal having been set aside, the exercise of the power conferred by s.421(2) of the Act thereafter arose for consideration. It is a power that can be exercised from time to time by the Principal Member – or his delegate - in light of all the circumstances, including the order of the Federal Magistrates Court and what is recognised as "justice being seen to be done". That power was exercised by a person with an appropriate delegation.
- (vi) A member may "not be available" for the purposes of s.422(1)(b) of the Act where an order is made quashing the decision of the Tribunal as originally constituted.

SZKHD v MIAC & Anor

[2008] FCA 112

Federal Court of Australia, Collier J, NSD1868 of 2007, 19 February 2008

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 Tribunal found the appellant to be inconsistent, vague and implausible, and disregarded her participation in Falun Gong activities in Australia pursuant to s.91R(3) of the *Migration Act 1958* (the Act). The Tribunal also noted the appellant's mental health issues and supporting psychologists report and stated in its decision that: "The Tribunal is mindful of the applicant's mental health issues and does not question the conclusions of the treating psychologist."

The appellant claimed on appeal that the psychological report which she had provided to the Tribunal corroborated her claims that she had been detained, and that the Tribunal had overlooked the report in the course of finding that

“the appellant was [not] in fact detained and imprisoned as claimed”. The appellant further claimed that the Tribunal had fallen into jurisdictional error in disregarding her conduct under s.91R(3) of the Act.

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

- (i) The Tribunal’s decision was infected with jurisdictional error for failure to give proper consideration to the consultant psychologist’s report.
- (ii) In stating that it did not question the conclusions of the psychologist, it naturally follows that the Tribunal accepted such conclusions as appeared from her report. It was clear from a plain reading of the report that her diagnostic formulations were inextricably linked with her acceptance of the factual claims of the appellant concerning her alleged incarceration in China. To take the view that the Tribunal accepted the psychological diagnostic formulations but rejected the factual basis of those formulations arguably makes a nonsense of the report, and is an interpretation which should not be accepted in the absence of a clear indication by the Tribunal. An equally likely interpretation of the Tribunal’s finding in relation to the report was that the Tribunal did not, in fact, take into account the report in any meaningful sense.
- (iii) Findings by the Tribunal as to whether the appellant had engaged in activities for the purpose contemplated by s.91R(3) of the Act are clearly findings of fact for the Tribunal, and there was no error demonstrated by the applicant in relation to the Tribunal’s construction and application of s.91R(3) of the Act to the facts of this case.

MIAC v MZXPA

[2008] FCA 185

Federal Court of Australia, Sundberg J, VID 1001 of 2007, 29 February 2008

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

The respondent claimed to fear persecution due to his political opinion, support for the Lebanese Forces and comments critical of the Syrian President. The Tribunal sent the respondent a post-hearing letter pursuant to s.424A of the *Migration Act* 1958 (the Act), advising that certain named witnesses were either close relatives of or had been known to the respondent for many years and as such had a strong incentive to ensure the success of the application. The Tribunal explained that this information was relevant because an inference may be drawn that the evidence provided by the named witnesses was not genuine and lacked credibility. The Tribunal went on to reject the respondent’s evidence as vague and contradictory, and found the respondent was not imputed with any adverse political opinion and did not make critical comments about the Syrian President.

The Federal Magistrates Court in the first instance held that, based upon the s.424A letter, the Tribunal held a preconceived bias about the respondent’s friends and relatives that gave rise to a jurisdictional error.

The Minister contended on appeal that the Magistrate erred in finding the Tribunal’s letter disclosed a predisposition or preconceived bias that a hypothetical fair-minded lay person might reasonably apprehend bias.

Held: Appeal allowed. Application to Federal Magistrates Court dismissed.

- (i) The Magistrate appeared to equate a predisposition with bias. Allegations of bias, whether actual or apprehended, must be firmly established. The evidence did not establish a reasonable apprehension of bias, let alone firmly establish it. The formation of a preliminary view or predisposition does not establish apprehended bias.
- (ii) The Tribunal’s encouragement to the respondent to supplement his material after a hearing, was not a prejudgement and did not show a mind so prejudiced in favour of a conclusion already formed that would not be altered irrespective of the evidence or arguments presented.
- (iii) Even if a case of apprehended bias had been made out, relief should have been refused in the exercise of the court’s discretion. The respondent was at all relevant times legally represented. His lawyers were aware of the facts upon the basis of which, much later, a bias claim was based. The bias claim was only used when the case went against the respondent.

FEDERAL MAGISTRATES COURT JUDGMENTS

SZHZD v MIAC & Anor

[2008] FMCA 4

Federal Magistrates Court of Australia, Barnes FM, SYG3486 of 2005, 8 February 2008

The applicant, a national of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia owed protection obligations. The applicant claimed to be an active member of the Awami League in Bangladesh who was targeted by the then ruling government as a result of his political activities, that false charges had been laid against him and he was unable to obtain protection of the authorities.

The applicant attended a Tribunal hearing. After the hearing, in response to an opportunity to provide additional evidence, the applicant's adviser provided documents including supporting letters from the General Secretary of the Bangladesh Awami League and the President of one of the ward branches in the city in which he lived in Bangladesh. The Tribunal did not accept the applicant was ever a worker, member or official of the Awami League. It found that the applicant completely lacked credibility on the basis of his own evidence and did not place weight on the letters of support. In relation to the claim of false charges the Tribunal was of the view that the applicant did not wish to continue with this claim but found that it did not accept that false cases were made against him having found that he had never been involved with the Awami League.

The applicant contended that: the Tribunal failed to provide the applicant with procedural fairness and breached s.425 of the *Migration Act* 1958 (the Act), by failing to give the applicant notice that the content of the letters would be rejected; the Tribunal's reasoning on this issue indicated apprehended bias and constituted a failure to have regard to relevant considerations; the Tribunal failed to take into account the claim of false charges or failed to afford procedural fairness as required by s.425 of the Act in relation to that matter.

Held: Application dismissed.

- (i) The Tribunal did not fail to comply with s.425 of the Act. The Tribunal clearly put the applicant on notice of its concerns about his claims to be a member and official of the Awami League and his credibility generally at the hearing. The manner in which the Tribunal indicated its concerns made it apparent that any further submissions and evidence relevant to matters addressed at the hearing would be assessed in light of such concerns. Section 425 of the Act did not require the Tribunal to put the applicant on notice of its concerns about the weight to be given to evidence provided in support of his claims in these circumstances or to put to him the manner in which concerns about credibility may impact on the assessment of corroborative material.
- (ii) Neither actual nor apprehended bias was established. The Tribunal gave the applicant time after the hearing to provide further information to it. It was not established that the Tribunal formed a view (or appeared to do so) at the Tribunal hearing that the applicant lacked credibility and that it was going to disregard subsequent material. The Tribunal's decision to disregard and give no weight to the letters was open to it. The Tribunal was of the view that the applicant's claims had been comprehensively discredited in such a way as to necessarily negate allegedly corroborative evidence. It therefore did not have to assess the corroborative material before coming to its conclusions on credibility.
- (iii) Whilst issue could be taken with the conclusion that the applicant did not wish to press or continue with the claim in his protection visa application about false charges on that basis that he did not mention it at the hearing or in his statutory declaration submitted after the hearing, there was no jurisdictional error because the Tribunal went on to address the claim as if it were pressed. Further, given the manner in which the false charges claims were dealt with in the delegate's decision the applicant was on notice that such claims may not be accepted. The Tribunal was not obliged to put such possibility to the applicant pursuant to s.425 of the Act or otherwise.

SZKTQ v MIAC & Anor

[2008] FMCA 91

Federal Magistrates Court of Australia, Cameron FM, SYG1849 of 2007, 29 January 2008

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

The applicant feared persecution on the basis of his political and religious beliefs. He claimed to have been investigated in Georgia following the distribution of anti-government material and was baptised in Australia. The hearing invitation and other letters were addressed to the applicant. A copy of each letter was sent to the applicant at his residential address and a copy sent to his authorised recipient. In its reasons for decision, the Tribunal found that the applicant's claims concerning an imputed political opinion were far-fetched and his evidence unreliable, inconsistent and supported by false documents. Although the Tribunal accepted that the applicant could be identified as a Baptist in Georgia and there was evidence of occasional discrimination against non-traditional church members, it was not satisfied that he faced a real chance of persecution if returned.

The applicant alleged jurisdictional error on the basis that the Tribunal failed to comply with ss.425A and 426 of the *Migration Act 1958* (the Act) and exceeded its jurisdiction by questioning him about confidential communications with his migration agent without a warning that he need not answer.

Held: Application dismissed.

- (i) The Tribunal exceeded its jurisdiction on the basis of non-compliance with s.441G of the Act. None of the hearing invitation letters were addressed to the authorised recipient, although they were sent to the authorised recipient. A necessary condition precedent to the Tribunal conducting the hearing was not fulfilled.
- (ii) Relief was refused in the exercise of the Court's discretion. There was no failure by the Tribunal to accord common law procedural fairness. The applicant attended the hearing, did not submit that he had been disadvantaged by the way the letters were addressed and suffered no injustice. No complaint was made by the applicant or his agent prior to the hearing. It was unlikely that the Tribunal was aware that it was not complying with the statutory requirements. In all probability, both parties believed the s.425A notices were formally valid, acted on them as if they were and the breaches of ss.425, 425A and 441G of the Act could not have affected the outcome.
- (iii) The Tribunal had no duty to warn the applicant that he could refuse to divulge communications with his migration agent. The relationship between applicants and their migration agents is not akin to that between legal advisers and their clients, the latter protected by legal professional privilege which is a substantive right enforceable by its possessor against all parties. The confidentiality required of migration agents under the Migration Agents Regulations 1998 is no more than a duty owed by an agent to the client. It is not a substantive right enforceable against third parties. Applicants are not, absent reasonable excuse, permitted to refuse or fail to answer questions, including those dealing with communications with migration agents, which the Tribunal requires them to answer: s.433 of the Act.

SZLHA & Anor v MIAC & Anor
[2008] FMCA 143

Federal Magistrates Court of Australia, Scarlett FM, SYG 2770 of 2007, 4 February 2008

The applicant, a national of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that she was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution as a Falun Gong practitioner.

The applicant claimed to have commenced the practice of Falun Gong in 1996. She claimed to have been detained, beaten, abused and forced to write promises that she would not practice Falun Gong. Since her arrival in Australia, the applicant claimed to have attended Falun Gong practice and various protests against the Chinese Community Party (CCP). Based on adverse credibility findings against the applicant, the Tribunal did not accept that she was telling the truth about being a Falun Gong practitioner in China or that she was a Falun Gong practitioner in Australia. Whilst accepting the claims that the applicant had practised Falun Gong since arriving in Australia and attended protests and demonstrations against CCP, the Tribunal disregarded this conduct under s.91R(3) of the *Migration Act 1958* (the Act), finding the conduct to have been engaged in solely for the purpose of assisting the applicant's claim for refugee.

The applicant contended the decision involved an error of law on the grounds that the Tribunal did not carefully consider the information that was in favour of the applicant and it failed to comply with obligations under s.424A of the Act.

Held: Application dismissed.

- (i) There was no basis for finding a breach of s.424A of the Act.

- (ii) There was no misapplication of s.91R(3) of the Act. It sufficed that the applicant was unable to discharge the onus of proving that her conduct was engaged in otherwise than for the purpose of strengthening her claim to refugee status. However, that did not mean the Tribunal committed any error of law. It was unnecessary for the Tribunal to make a positive finding that the applicant had engaged in the practice of Falun Gong for the purpose of strengthening her claim to refugee status. While this finding overstated the effect of s.91R(3) of the Act, this was not to the detriment of the applicant since the Tribunal achieved a positive adverse conclusion in relation to a matter that the section only required the Tribunal to have been left in doubt: *SZJAA v MIAC* [2007] FMCA 164.
- (iii) The Tribunal did not make the error of examining only whether the applicant commenced the practice of Falun Gong in Australia for the purpose of enhancing her protection visa claim without considering whether the applicant carried on that practise for other reasons

SZBWJ & Ors v MIAC

[2008] FMCA 164

Federal Magistrates Court of Australia, Scarlett FM, SYG1830 of 2007, 21 February 2008

The applicants, nationals of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the Tribunal did not have jurisdiction to review the application.

The applicants lodged a second application for review of a delegate's decision that had previously been reviewed by the Tribunal, claiming that the application was within time because the delegate had not complied with relevant notification requirements and that circumstances in Bangladesh had changed. The Tribunal found that it did not have jurisdiction to review a decision twice, finding that changed circumstances was not a legal basis for the Tribunal to reconsider a delegate's decision.

The applicants contended that the Tribunal wrongfully denied itself jurisdiction because the only requirement under s.414(1) of the *Migration Act* 1958 (the Act) to enliven the Tribunal's duty to review a decision was a valid application under s.411 of the Act. They contended that s.411 of the Act did not specifically exclude previously reviewed decisions from the definition of "RRT-reviewable decision". The applicants further contended the principle that the Tribunal may only exercise its statutory function to review a decision once is not relevant where a second valid application is submitted. They submitted that *SZIV v MIMA* [2006] FMCA 322 (*SZIV*) and *SZJQY v MIMA* [2007] FMCA 713 (*SZJQY*) were wrongly decided and sought to distinguish them from the present case. Counsel for the Minister contended that the Act did not empower the Tribunal to re-exercise its power of review because the Tribunal was *functus officio*.

Held: Application dismissed

- (i) The Tribunal did not fall into jurisdictional error. Where the Tribunal concludes it has discharged its function under the Act to review a decision and a second application for review is not a valid application because the Tribunal no longer had jurisdiction in relation to that decision, there is no jurisdictional error.
- (ii) *SZIV* and *SZJQY* were correct in applying *SZBRB v MIAC* [2007] FCA 1492 (*SZBRB*), and by the principle of judicial comity, these authorities were binding upon the Court. Where the decision of a delegate has already been the subject of a valid review by the Tribunal, it is no longer an "RRT reviewable decision" under s.411 of the Act.
- (iii) Section 416 of the Act does not have relevance in circumstances where the Tribunal has already conducted a valid review of the delegate's decision.

SZGRK v MIAC & Anor

[2008] FMCA 147

Federal Magistrates Court of Australia, Raphael FM, SYG 2977 of 2006, 18 February 2008

The applicant, a national of Bangladesh, 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 fear of persecution because of his profile as a member of the Buddhist community. He claimed that his father was killed by local Bangladesh Nationalist Party (BNP) thugs and fundamentalist Muslims who also stole his family property, physically tortured him and threaten to kill him when he returned to his village after he became a Buddhist monk, fearing that he would try to claim his family property. He claimed that he would suffer persecution

because the fundamentalist Muslims led by BNP leader and Member of Parliament Mr Chowdhury harassed and tortured minorities believing that the minorities voted for his opposition. The Tribunal accepted the applicant's past claimed history, but found that the motivation of his persecutors was that they feared that he would attempt to recover his family property and there was no systematic persecution of minorities by fundamentalist Muslim groups. The Tribunal then found that the applicant would be able to live safely as a monk in some part of Bangladesh other than his village.

The applicant contended that the Tribunal did not ask itself whether it was reasonable in the circumstances to expect that he would be able to relocate to another part of Bangladesh, in particular, the Tribunal ignored his claim that he would have to return to his village in order to keep in touch with his family and community. He also contended that the Tribunal had failed to consider an integer of his claim arising out of the imputed political opinion, and the Tribunal's failure in taking this into account when considering relocation was a constructive failure to exercise its jurisdiction.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal fell into jurisdictional error in failing to consider an integer of the applicant's claim and this failure followed through to the consideration of relocation.
- (ii) The Tribunal failed to consider the applicant's claims arising out of the imputed political opinion claim that BNP powerbrokers like Mr Chowdhury might persecute active members of religious minorities because they would be seen as political opponents and supporters of the opposition.
- (iii) The Tribunal's view on relocation, given in the context of specific claims about specific incidents in a specific place, could not hold for a more general and unexamined claim which, if it was accepted, might severely restrict the availability of an alternative safe location to which it would be reasonable for the applicant to relocate.
- (iv) The Tribunal rightly did not consider the question of familial contact in the applicant's home village as preventing him from relocating, because the applicant had made it completely clear that he was too frightened to return.

SZKRZ v MIAC & Anor

[2008] FMCA 112

Federal Magistrates Court of Australia, Driver FM, SYG 1684 of 2007, 22 February 2008

The applicant, a national of the Congo, 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 Congolese authorities. He was accepted as a refugee in South Africa and granted a 'Certificate of exemption'. He subsequently travelled to Australia and claimed protection.

The Tribunal did not take a detailed account of the applicant's experiences in the Congo or of his fears about returning there because it found that he had effective protection in South Africa. The Tribunal contacted the South African Embassy and found that the applicant was entitled to renew his Certificate of exemption and that he had a right to enter and reside there. In August 2000 the Tribunal affirmed the decision not to grant a protection visa.

The applicant made three unsuccessful applications to the Minister under s.417 of the *Migration Act* 1958 (the Act). The third application was made after the decision of the High Court in *NAGV & NAGW v MIMIA* (2005) 222 CLR 161 (*NAGV*) and sought the exercise of the Minister's discretion on the basis of that judgment. On 28 May 2007, the applicant applied to the Federal Magistrates Court for review of the Tribunal's decision. The Court dismissed the application as incompetent, being outside time. The applicant then appealed to the Federal Court, and the Federal Court remitted the application to the Federal Magistrates Court on the basis of the Full Federal Court decision in *MIAC v SZKKC* (2007) 159 FCR 565.

The applicant contended that the Tribunal's decision was affected by jurisdictional error in that it had misconstrued s.36(2) of the Act in the manner set out by the High Court in *NAGV*. The Minister contended that the Court should exercise its discretion to refuse to grant relief on the basis of the delay in bringing proceedings since the decision in *NAGV*.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) As conceded by the Minister, the Tribunal's decision was affected by jurisdictional error in light of the High Court decision in *NAGV*.
- (ii) The third s.417 request to the Minister did not demonstrate acceptance by the applicant of the Tribunal decision. It invited the Minister to intervene to deal with an apparently invalid Tribunal decision, not to substitute a more favourable decision for a valid decision.
- (iii) There were compelling reasons why the Court should not withhold relief – jurisdictional error was conceded, and the applicant had sought to have the Minister deal with this error pursuant to s.417 of the Act. It was the Minister's refusal to exercise her discretion that obliged the applicant to bring this present proceeding. The delay of six months after the Minister's decision did not detract from the need for the applicant's protection visa claims to be dealt with according to law.
- (iv) Finally, the fact is that Australia's protection obligations to this applicant have never been considered in any meaningful sense.

SZKUI v MIAC & Anor

[2008] FMCA 126

Federal Magistrates Court of Australia, Driver FM, SYG 1910 of 2007, 8 February 2008

The applicant, a national of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution due to her practise of Falun Gong

The Tribunal sent the applicant an invitation to comment on information under s.424A of the *Migration Act 1958* (the Act) and also sent a hearing invitation pursuant to s.425 of the Act. The applicant did not respond to the s.424A invitation and did not respond to the hearing invitation or attend the hearing. The Tribunal proceeded to make its decision under s.426A of the Act and stated in its decision that “[n]o other information was held on [...] the Tribunal's file or on the Departmental file to enable the Tribunal to contact the applicant.” The Tribunal found that it was unable to be satisfied on the limited material before it that the applicant had a well-founded fear of persecution. It also stated “[The applicant] has chosen not to reply or attend a hearing [...]. This is not the behaviour of a person with a genuine fear of persecution”.

The applicant raised no arguable case of jurisdictional error to the Court. The Court identified two issues: whether the Tribunal erred in proceeding under s.426A of the Act as the applicant had provided a mobile telephone number to the Tribunal; and whether the Tribunal erred in drawing an adverse inference from the applicant's failure to attend the hearing.

Held: Application dismissed

- (i) It was open to the Tribunal to proceed pursuant to the discretion conferred by s.426A of the Act. The presiding member's error of fact in overlooking the telephone number provided by the applicant cannot invalidate the exercise of power under s.426A of the Act where there was no obligation on the Tribunal to make an attempt to contact the applicant by telephone.
- (ii) As a matter of good administration, where an applicant does not appear at a hearing and has not responded to a hearing invitation but has provided a telephone number for use by the Tribunal, it is desirable for the Tribunal to seek to contact the applicant. That is not, however, a legal obligation: *SZHSQ v MIMA* [2006] FCA 1295.
- (iii) There was no evidence that the Tribunal knew that the applicant had chosen not to reply or to attend the hearing. If the adverse inference was material to the Tribunal decision, it would point to jurisdictional error for the reason that there was no evidence or other material supporting it. However, the adverse inference was not determinative of the case. The Tribunal was unable on the evidence to reach the state of satisfaction required by the Act to support a decision favourable to the applicant. It would have been better if the inference had not been drawn at all, however, the inference did not support a finding of jurisdictional error.

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

There has been no new legislation, regulations or statutory instruments made in the preceding month.

Legislation Pending

Statute Law Revisions Bill 2008 (Bill - C2008B00108)

The Statute Law Revisions Bill 2008 was introduced in the Senate on 19 March 2008 and makes minor amendments to the *Migration Act* 1958 to repeal the definitions of 'new ESOS Act' and 'old ESOS Act' in s. 268AA of the Act.

BILLS REINTRODUCED TO THE SENATE

On 12 March 2008 the following Private Member's Bills were restored to the Senate Notice Paper for resumption of debate, following the prorogation of the 41st Parliament:

Migration Legislation Amendment (Access to Judicial Review of Migration Decisions) Bill 2007 [2008] (Bill - C2008B00076)

This is a Bill to repeal sections 486B and 486C of the *Migration Act* 1958 to remove restrictions on consolidated, joined or representative proceedings, and remove restrictions on applicants for judicial review in the Federal Court and Federal Magistrates Court actions in relation to certain issues.

Migration Legislation Amendment (Complementary Protection Visas) Bill 2007 [2008] (Bill - C2008B00077)

This is a Bill to amend the *Migration Act* 1958 to introduce a class of complementary protection visas which will provide protection for those people who do not meet the definition of a refugee under the Refugees Convention but who have compelling humanitarian or safety reasons to not return to their country of origin.

Migration Legislation Amendment (End of Mandatory Detention) Bill 2006 [2008] (Bill - C2008B00078)

This is a Bill to amend the *Migration Act* 1958 to end the mandatory detention of visa applicants and asylum seekers. It aims to require an officer to, as soon as practicable, take a person in detention before a Magistrate to determine whether the detention is appropriate in all the circumstances and direct the person in detention be released.

Migration Legislation Amendment (Migration Zone Excision Repeal) Bill 2006 [2008] (Bill - C2008B00079)

This is a Bill to amend the *Migration Act* 1958 to repeal provisions which provide for the excision from the migration zone of certain offshore places and prevent a person who arrives unlawfully at an "excised offshore place" from making a valid visa application unless the Minister determines it is in the public interest to do so.

Migration Legislation Amendment (Migration Zone Excision Repeal) (Consequential Provisions) Bill 2006 [2008] (Bill - C2008B00080)

This is a Bill to make consequential amendments to the *Migration Act* 1958 in relation to the repeal of the excision from the migration zone of certain offshore places.

Migration Legislation Amendment (Provisions Relating to Character and Conduct) Bill 2006 [2008]
(Bill - C2008B00081)

This is a Bill to amend the *Migration Act* 1958 in relation to the Ministerial discretion to assess the character or conduct of a non-citizen for the purposes of refusing a visa application or cancelling an existing visa.

Migration Legislation Amendment (Restoration of Rights and Procedural Fairness) Bill 2007 [2008]
(Bill - C2008B00082)

This is a Bill to amend the *Administrative Decisions (Judicial Review) Act* 1977 and *Migration Act* 1958 to remove the privative clause mechanism restricting access to Federal and High Court judicial review of administrative decisions made in relation to: immigration detainees; the natural justice hearing rule; the refusal or cancellation of visas on character grounds; and mandatory immigration detention.

Migration Legislation Amendment (Temporary Protection Visas Repeal) Bill 2006 [2008]
(Bill - C2008B00083)

This is a Bill to remove the category of Temporary Protection Visa.

CASELOAD OVERVIEW

MRT Decisions – February 2008

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	3	7	1	4	15
Visitor refusal	10	14	4	6	34
Student refusal	19	10	5	14	48
Temporary business refusal	6	8	4	4	22
Permanent business refusal	8	3	2	2	15
Skill linked refusal	32	9	7	3	51
Partner refusal	83	15	7	4	109
Family refusal	22	21	2	2	47
Student cancellation	62	24	4	2	92
Sponsor approval refusal	2	2	1	0	5
Other	8	18	5	3	34

RRT Decisions – February 2008

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bangladesh	1	7	0	4	12
Cameroon	1	0	0	0	1
China (PRC)	17	44	1	3	65
Croatia	0	1	0	0	1
Egypt	0	1	0	0	1
Ethiopia	2	1	0	0	3
Fiji	0	1	0	0	1
Guinea	1	0	0	0	1
India	2	10	0	4	16
Indonesia	0	6	1	1	8
Iran	1	0	0	0	1
Korea, Republic Of	1	1	0	1	3
Lebanon	4	0	0	0	4
Malaysia	0	5	0	0	5
Mongolia	0	0	2	0	2
Nepal	1	0	0	0	1
Nigeria	1	2	0	0	3
Pakistan	2	4	0	1	7
Palestinian Terr. (W.Bank/Gaza)	1	0	0	0	1
Philippines	0	2	0	0	2
Poland	0	1	0	0	1
Samoa	0	1	0	0	1
Sri Lanka	1	1	0	0	2
Taiwan	0	1	0	0	1
Thailand	0	1	0	0	1
Turkey	3	0	0	0	3
United Kingdom	0	1	0	0	1
Vietnam	0	2	0	0	2
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.

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

Editor: Rey Hyland

Contributors:

Kate Buring
Sue Burton
Steven Brnovic
Victoria Coleman
Talaishia Collis
Katherine Cook
Khanh Hoang
Denny Hughes
Jacquelin Plummer
Kerry Roh
Pallavi Sinha
Stephen Tully
Andrew Verduci
Michelle Wei
Rachel White

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

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