précis

The MRT-RRT Monthly Decisions Bulletin

No. 6 / 2008

26 May 2008

This bulletin covers recently published decisions of the Migration Review Tribunal and the Refugee Review Tribunal. The decisions summarised represent a cross-section of published decisions of the Tribunals. Selected summaries of Court judgments, of interest to the Tribunals, are also included.

Contents

MIGRATION REVIEW TRIBUNAL DECISIONS 2

- Business and Skilled visas 2
- Partner and Family Visas 3
- Student visas 4
- Visitor visas 6

REFUGEE REVIEW TRIBUNAL DECISIONS 7

- China 7
- Fiji 8
- India 8
- Indonesia 9
- Iran 9
- Korea 10
- Lebanon 10
- Pakistan 11

FEDERAL COURT JUDGMENTS 12

- MIAC v You 12
- SZHVM v MIAC 12
- SZJZN v MIAC 13
- Zhong v MIAC 14

FEDERAL MAGISTRATES COURT JUDGMENTS 15

- MZXSP & Ors v MIAC & Anor 15
- S1322 of 2003 v MIMA & Anor 15
- SZKSQ v MIAC & Anor 16
- SZLFX v MIAC 17
- SZLUN v MIAC & Anor 17
- Venkatesan v MIAC & Anor 18

LEGISLATION UPDATE 19

- Legislation Passed 19
- Legislation Pending 19

CASELOAD OVERVIEW 20

- MRT Decisions – April 2008 20
- RRT Decisions – April 2008 21

PUBLICATION OF TRIBUNAL DECISIONS 22

INDEX 23

MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

060805021
15 April 2008, Sydney
Mr R Inder, Member

ESTABLISHED BUSINESS (RESIDENCE) (CLASS BH) – SUBCLASS 845 – CL.845.212 – NINE MONTHS – A delegate of the Minister of Immigration and Citizenship refused to grant the visa applicants Subclass 845 visas on the basis that the primary applicant did not meet cl.845.212 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate was not satisfied that the primary applicant had been in Australia as the holder of a temporary substantive visa for at least nine months during the period of 12 months immediately preceding the making of the visa application. The applicants departed Australia on 12 November 2004 and returned on 13 March 2005. They applied for a Subclass 845 visa on 5 December 2005. The applicants claimed 'months' was not defined in the Regulations, and that a legislative intention behind cl.845.212 was that the clause should not be construed narrowly so as to preclude applicants who fell short of the nine months in Australia by a matter of days. The applicants also claimed humanitarian and hardship arguments ought to be considered including that the applicant had established a sound and effective business in Australia and had 3 Australian-born children.

Held: Decision under review affirmed

The Tribunal found that the applicants had not been in Australia for at least nine months during the period of 12 months preceding the making of the visa application. The Tribunal considered the definition of 'calendar month' in the *Acts Interpretation Act* 1901 (Cth) and considered itself bound to apply it. In doing so, the Tribunal found that while the applicants returned to Australia on 13 March 2005, in order to satisfy cl.845.212 the applicants would have had to have returned to Australia on or before 6 March 2005. Accordingly, the Tribunal found that the applicants did not satisfy cl.845.212 and therefore did not satisfy cl.845.221. The Tribunal also recommended that as their failure to meet this criteria was by such a narrow margin and was so technical in nature, favourable consideration be given to granting the visas on compassionate or humanitarian grounds as the hardship of refusing the visas on the primary applicant's Australian business and family would not be commensurate in nature to the failure to meet this criteria by just a few days.

071856077
24 March 2008, Sydney
Mr G Short, Senior Member

BUSINESS SPONSORSHIP – S.140L – SPONSORSHIP APPROVAL BAR - R.1.20CB(1)(e) - BREACH OF UNDERTAKINGS – MINIMUM GAZETTED SALARY – NOMINATED OCCUPATION – A delegate of the Minister for Immigration and Citizenship decided to bar the applicant business as a sponsor under s.140J(2) of the *Migration Act* 1958 (the Act). The delegate found the applicant had breached its undertakings under to s.140H of the Act and r.1.20CB of the Migration Regulations 1994. These undertakings were to ensure that sponsored persons were paid at least the gazetted minimum salary, not to employ persons in breach of Australian immigration law and to notify the Department of any changed circumstances affecting the business' capacity to honour its sponsorship undertakings or contributing to its approval as a sponsor or of a nomination. The delegate decided to bar the applicant from sponsoring additional individuals under existing approvals and, for two years, from making future applications for sponsorship approval or nominating persons or activities in relation to Subclass 457 (Business (Long Stay)) visas.

Held: Decision under review set aside

The Tribunal found that the applicant had breached its undertaking to ensure that sponsored employees would be paid at least the gazetted minimum salary. It found that the applicant paid wages to sponsored employees based on actual hours worked during pay periods and not a 'salary' which, although undefined under the Act and Regulations, ordinarily meant a fixed payment made by employers at regular intervals. The Tribunal also found that the applicant had breached its undertaking not to employ persons contrary to Australian immigration law. Condition 8107 attached to the visas of the applicant's sponsored employees prohibited them from working in a position or occupation inconsistent with the nominated position of Residential Care Officer. This involved providing care and supervision for children or disabled persons in group housing or government institutions. However, the position or occupation in which the sponsored employees were being employed most closely corresponded to that of Personal Care or Nursing Assistants, who assist with patient care in a range of health care facilities or in the client's own home. The Tribunal found that the applicant breached its undertaking to notify the Department of a change of information

relevant to approval of nominations. However, the Tribunal decided not to take any action under s.140L of the Act, having regard to the severity of the breaches and the applicant's past conduct as required by r.1.20HA. The applicant did not deliberately flout its undertakings, the breaches were different from those alleged and the Department was aware of the nature of the work in which the sponsored employees were to be engaged at the time it approved the sponsorships and nominations. The Tribunal considered that the correct and preferable decision in the circumstances was to set aside the decision imposing a sponsorship bar on the applicant.

071937249
19 March 2008, Melbourne
Ms R Gagliardi, Member

BUSINESS SPONSORSHIP – s.140L - SPONSORSHIP APPROVAL BAR – R.1.20CB(1)(e) – BREACH OF UNDERTAKINGS – COOPERATE WITH DEPARTMENT MONITORING – A delegate of the Minister for Immigration and Citizenship barred the applicant under s.140J of the *Migration Act* 1958 (the Act) for a period of 12 months from making future applications for approval as a standard business sponsor in regard to Subclass 457 visas. Regulation 1.20CB(1)(e) of the Migration Regulations 1994 required the applicant to undertake to cooperate with the Department's monitoring of the applicant and the sponsored employee. The applicant failed to submit Monitoring Form 1110 to the Department. The delegate found that this failure was a breach of the undertaking in r.1.20CB(1)(e). The applicant declined to attend a Tribunal hearing and did not respond to the Tribunal's requests for further information.

Held: Decision under review affirmed

The Tribunal found that the applicant had consistently refrained from engaging with either the Department or the Tribunal to provide an explanation as to why the applicant had failed to submit Monitoring Form 1110 to the Department as required by r.1.20CB(1)(e). The Tribunal noted that the bar imposed was at the lower end of the 6 months to 5 years scale of possible sanctions. The Tribunal found that the sanction was appropriate and reasonable given the applicant had had several opportunities to return the monitoring form to the Department. The Tribunal held that a breach of the undertaking to cooperate with Department monitoring was a serious breach because it impeded the Department's ability to assess the applicant's compliance with other undertakings.

Partner and Family Visas

071504763
19 March 2008, Sydney
Mr D O'Brien, Principal Member

OTHER FAMILY (MIGRANT) (CLASS BO) - SUBCLASS 115 (REMAINING RELATIVE) – R.1.15 – NEAR RELATIVE – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicants Other Family (Migrant) (Class BO) Subclass 115 (Remaining Relative) visas on the basis that the primary applicant did not satisfy cl.115.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate interviewed the primary applicant's spouse (the second named applicant) and recorded that he mentioned he had a sister who resided in Iran. The delegate found that the definition of remaining relative in r.1.15 was not met. The second named applicant claimed that he was an only child and that there was a misunderstanding of his statement at the delegate's interview due to the difference in dialect during the interpretation process. He claimed that he was referring to a friendly neighbour in Afghanistan who assisted his parents after he had left Afghanistan. The second named applicant claimed that he thought of her as a sister but she was not related to him in any way. The second named applicant also submitted an Original Family Register for his father which certified that he was the only child.

Held: Decision under review set aside

The Tribunal accepted the explanations of the second named applicant and accepted the evidence of the Original Family Register. The Tribunal found that the second named applicant did not have any siblings. The primary applicant had 2 living siblings who were Australian citizens and usually resident in Australia. The Tribunal accepted that the primary applicant's eldest brother went missing when he was about 16 years old and was probably deceased. The Tribunal found that the parents of both the first and second named visa applicants were deceased. The Tribunal was therefore satisfied that the first and second named visa applicants did not have near relatives other than near relatives who were Australian citizens. The Tribunal was satisfied that the primary applicant met the definition of remaining relative in r.1.15 at the time of application and time of decision and therefore satisfied cl.115.211 and cl.115.221.

Student visas

0800544
28 March 2008, Sydney
Ms K Raif, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 571 – VISA CANCELLATION – CONDITION 8202(3)(a) – COURSE ATTENDANCE – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 571 (Schools Sector) visa under s.116(1)(b) of the *Migration Act* 1958 (the Act) on the basis that the applicant had breached condition 8202(3)(a) in relation to attendance. The applicant was notified by his education provider that he attended only 55% of the scheduled contact hours in the relevant term. The applicant did not provide comments and the delegate decided to cancel the visa as the applicant had breached condition 8202. The applicant provided medical certificates and other medical information to the Tribunal and claimed that his poor attendance was due to a medical condition.

Held: Decision under review affirmed

The Tribunal considered the medical certificates provided by the applicant and found that they did not evidence an opinion of the doctor as to the applicant's inability to attend classes due to his medical condition. The Tribunal was not satisfied that the applicant's non-attendance was due to his medical condition because, after considering the education provider's attendance records, the Tribunal found that the applicant had attended some of his classes in the period when he claimed to be unfit to attend due to his illness, but not others. The Tribunal found that whatever the applicant's medical condition, his non-attendance was not caused by it. No other explanations were put forward by the applicant. The Tribunal was satisfied that the applicant had not complied with condition 8202 and the ground for cancellation in s.116(1)(b) existed. The Tribunal further found that the non-compliance was not due to exceptional circumstances beyond the applicant's control. In accordance with s.116(3) of the Act, such circumstances were prescribed circumstances in which the cancellation was mandatory.

0800689
9 April 2008, Sydney
Mr S Roushan, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 573 – VISA CANCELLATION – CONDITION 8202(3)(a) – SATISFACTORY COURSE PROGRESS – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 573 (Higher Education Sector) visa under s.116(1)(b) of the *Migration Act* 1958 (the Act). The delegate found that the applicant had breached condition 8202(3)(a), as her education provider certified that the applicant had not achieved satisfactory course progress, and her non-compliance was not due to exceptional circumstances beyond her control. The Tribunal received a copy of a letter from the Department of Education, Employment and Workplace Relations (DEWR), stating that its assessment of a complaint by the applicant about her education provider's actions was that the education provider was in breach of Standards 8 and 10 of the National Code when issuing the notice under s.20 of the *Education Services for Overseas Students Act* 2000 to the applicant.

Held: Decision under review set aside

As DEWR found that the applicant's education provider was in breach of Standards 8 and 10 of the National Code when issuing the s.20 notice to the applicant, the Tribunal accepted that the certificate issued by the applicant's education provider was invalid. As the certificate was invalid, it followed that the education provider had not certified the applicant as not achieving satisfactory course progress. The Tribunal found that the applicant had not failed to comply with condition 8202(3)(a). The Tribunal was not satisfied that the ground for cancellation in s.116(1)(b) existed and therefore the circumstances for cancellation of the visa did not arise.

071636562
3 April 2008, Sydney
Ms G Cullen, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 – CL.572.227 – EXCEPTIONAL REASONS FOR GRANT – The applicant applied for a Student (Temporary) (Class TU) visa to undertake a course in English followed by an Advanced Diploma of Business Management. The applicant was in Australia to visit his sister on a Short Stay (Visitor) (Class TR) visa and had previously been studying in Ireland. A delegate of the Minister for Immigration and Citizenship refused to grant the visa on the basis that the applicant did not meet cl.572.227 of Schedule 2 to the Migration Regulations 1994, which required that applicants who made applications in Australia, were holders of Class TR visas, and were subject to Assessment Level 2, 3, 4 or 5, had to demonstrate exceptional reasons for the grant of

the visa. The applicant claimed exceptional reasons existed in that he needed to stay in Australia to support his sister and her family as they were experiencing severe hardship. The applicant provided a substantial number of medical reports and statements to support his claim.

Held: Decision under review set aside.

The Tribunal found that the applicant had applied for a Subclass 573 visa while in Australia, was subject to Assessment Level 4 and was the holder of a Class TR visa. He was therefore required to establish exceptional circumstances to satisfy cl.572.227. The Tribunal accepted that the reason the applicant decided to transfer his studies to Australia was to provide necessary support to his sister, his brother-in-law and their children who were facing difficulties due to their emotional and physical conditions. The Tribunal found that exceptional reasons existed for the grant of a Subclass 572 visa.

071712231
18 March 2008, Sydney
Ms B Connolly, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 – VISA CANCELLATION – CONDITION 8202(3)(a) – COURSE ATTENDANCE – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 572 (Vocational Education and Training Sector) visa under s.116(1)(b) of the *Migration Act* 1958 on the basis that the applicant breached condition 8202(3)(a) in relation to attendance. The education provider certified that the applicant attended 55.81% of the contact hours scheduled. The applicant claimed that he had not received adequate advice from his education provider that his attendance was below 80% as there were difficulties logging into his student email account and that this was one of the methods by which the education provider purported to have notified him. The applicant also claimed that he had changed his postal address numerous times during the relevant period and notified the education provider in each instance, but that the education provider was not diligent or accurate in its record keeping and that mistakes had been known to occur in relation to student records.

Held: Decision under review set aside

The Tribunal identified discrepancies between primary material provided by the education provider and information sent to the applicant under the s.20 notice. The Tribunal also found the standard of record keeping of the education provider in relation to its student records and its accuracy in determining matters related to those records lacked considerable rigour. Given the serious inaccuracies identified, the Tribunal was not able to be satisfied as to the accuracy of the education provider's records, and was therefore unable to have the requisite level of satisfaction that the applicant had not complied with condition 8202(3)(a) of his visa. As the Tribunal found that there were no grounds for cancelling the applicant's visa, the decision to cancel his visa was set aside.

071832149
20 March 2008
Ms M Hodgkinson, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 573 – VISA CANCELLATION – CONDITION 8202(3)(a) – EXCEPTIONAL CIRCUMSTANCES BEYOND THE APPLICANT'S CONTROL – delegate of the Minister for Immigration and Citizenship cancelled the visa applicant's Subclass 573 (Higher Education Sector) visa under s.116(1)(b) on the basis of failure to comply with condition 8202(3)(a). After initiating a performance review process to prevent her exclusion, the applicant lodged a withdrawal form which was endorsed by Swinburne University's international department. The applicant did not hear back from Swinburne University, and proceeded on the basis that she had withdrawn and did not need to proceed with the performance review. The applicant was subsequently granted another student visa for her studies at Central Queensland University. Before the Tribunal, the applicant argued that non-compliance was due to exceptional circumstances beyond her control.

Held: Decision under review set aside

The Tribunal distinguished reasoning of the Full Federal Court decision in *Dai v MIAC* [2007] FCAFC 199 and found that a certification from Swinburne University that the applicant had not achieved satisfactory course progress was valid and that grounds for cancellation under s.116(1)(b) existed. However, the Tribunal also considered that the non-compliance with condition 8202(3)(a) was due to exceptional circumstances beyond the applicant's control. Importantly, having acted on incorrect advice from the University that she could withdraw from her course, the applicant was deprived of her right to pursue the review process. The Tribunal was not satisfied that the grounds for mandatory cancellation existed and was satisfied that the exercise of the discretion to cancel the applicant's visa was not appropriate in the circumstances.

Visitor visas

071358788
2 April 2008, Sydney
Mr B MacCarthy, Senior Member

TOURIST (CLASS TR) VISA – SUBCLASS 676 – CL.676.211 – CL.676.221 – GENUINE INTENTION TO VISIT – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Subclass 676 visa because the delegate was not satisfied that the applicant's expressed intention only to visit Australia was genuine as required by cl.676.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The visa applicant, a Cambodian citizen, applied for the Tourist (Class TR) visa for the stated purpose of visiting his brother in Australia (the review applicant). The review applicant claimed that the visa applicant had family in Cambodia, that he owned and operated a business there, that he was engaged to be married and thus his intention to only visit Australia was genuine.

Held: Decision under review affirmed

The Tribunal accepted the visa applicant had a number of siblings in Cambodia but noted that he also had family in Australia. The Tribunal noted that during the hearing the visa applicant was unable to provide the street address and location of the business he purportedly owned. Further, information received by the Tribunal indicated that this business was in fact owned by the visa applicant's aunt. The Tribunal noted that during the hearing neither the visa applicant nor the review applicant could provide the full name of the applicant's claimed fiancée. Consequently, the Tribunal did not accept the visa applicant owned his own business in Cambodia or that he was engaged. The Tribunal considered that these claims were fabricated. The Tribunal was not satisfied the visa applicant's expressed intention only to visit Australia was genuine and therefore found he did not meet cl.676.211 and cl.676.221 of Schedule 2 to the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

China

0800522
31 March 2008, Sydney
Mr G Short, Senior Member

CHINA – RELIGION – CHRISTIAN – POLITICAL OPINION – PROTEST AGAINST POLLUTION – The applicant claimed to fear persecution for reasons of his Christian religion. The applicant claimed to be a practising member of an unauthorised Catholic Church, for which he organised services, conducted pre-marriage courses and conducted children's Bible study classes. The applicant claimed to have been the subject of surveillance by police because of his religious activities, but was not arrested or detained because the police lacked evidence against him. A Catholic priest gave evidence for the applicant that high profile members of the Catholic diocese had been arrested and that harassment of lay followers does not generally gain media attention. The applicant also claimed he had organised and participated in a protest against pollution caused by a steel factory. He considered he would be arrested for his participation in this protest if he were to return to China.

Held: Decision under review set aside

The Tribunal accepted that the applicant was a genuine and practising Catholic and that he had practised all his life in the unofficial or 'underground' Catholic Church. Country information suggested that authorities in the applicant's province were generally tolerant towards unofficial Catholic churches. However, the Tribunal considered incidents in which adherents of unofficial Catholic Churches had been subject to arbitrary arrests and that teaching children under 18 years old may be particularly dangerous. The Tribunal also accepted that arrests of lay people were less likely to make the news and that there had been a hardening of the attitude of the Chinese authorities towards the exercising of fundamental freedoms in the lead up to the Olympic games. The Tribunal accepted that the local authorities and Religious Affairs Bureau were aware of the applicant's involvement in the unofficial Catholic Church. The Tribunal also found that the applicant had some involvement in the protest against pollution in his village and, although this was likely to have been exaggerated, his involvement would have been known to Chinese authorities. The Tribunal found there was a real chance that if the applicant returned to China now or in the reasonably foreseeable future, he would be arrested or detained for reasons of his involvement in the unofficial or 'underground' Catholic Church and his involvement in the protest against pollution in his village. Accordingly the Tribunal found that the applicant had a well-founded fear of being persecuted for reasons of his religion and his political opinion.

071638082
20 November 2007, Sydney
Ms S Leal, Member

CHINA – RELIGION – YIGUAN DAO (TIEN DAO) – The applicant claimed to fear persecution on the basis of his religious belief in Yiguan Dao (also know as Tien Dao). He claimed that his friend, a Chinese national who had spent several years residing in another country, introduced him to Yiguan Dao. The applicant claimed that he arranged for a house in a nearby village to be established as a Yiguan Dao shrine and that he was involved in the printing and distribution of leaflets on Yiguan Dao. He claimed that a friend informed him that the authorities were on their way to the shrine; that he escaped and hid and that he was on a wanted list. The applicant claimed that a number of the members of his group had been arrested. He claimed he continued to practise his religion in Australia that if he returned to China he would be arrested, imprisoned or executed.

Held: Decision under review set aside

The Tribunal accepted the applicant was an adherent of Yiguan Dao. It further accepted that he arranged for a house in a nearby village to be established as a Yiguan Dao shrine; that he was involved in the distribution of leaflets on the religion; that the applicant was worshipping at the shrine when he was warned that the authorities were on their way there; that he escaped the authorities and hid; and that he received information that a number of the members of his group had been arrested. The Tribunal also accepted that the applicant continued to be an adherent of Yiguan Dao. Based on independent information, the Tribunal accepted that Yiguan Dao is banned in China and that, if the applicant returned, he would seek to continue to practise Yiguan Dao and would therefore be at risk of being arrested and detained. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution in China for reasons of religion.

071943656
10 March 2008, Sydney
Ms S Durvasula, Member

CHINA – RELIGION – CHRISTIAN – The applicant claimed to fear persecution for reasons of her Christian religion. The applicant claimed that she attended underground Christian house meetings at least once a week; that one such meeting was raided by the police; she was detained and tortured; and that following another such meeting she escaped before being caught but feared she was recognised. She claimed that following her escape the police came to her house with a warrant, and that she had obtained a passport and visa but did not leave China straight away as she was afraid the police would still be searching for her.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness and her oral evidence to be consistent with her written statement, other documentary evidence on file and the oral evidence of her witness. The Tribunal accepted that she was a practising Christian in China. The Tribunal was satisfied that the applicant attended church in Australia because she was a committed Christian and it is conduct otherwise than for the purpose of strengthening her claim under s.91R(3) of the *Migration Act* 1958. The Tribunal accepted there to be a real chance that she would not be able to freely practise her religion in the manner she wished if she returned to China now or in the reasonably foreseeable future; there was a real chance she would once again be arrested and detained; and that there was no place within China to which she could relocate where she would not have a well founded fear of persecution on account of her religion. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Fiji

071823443
11 March 2008, Sydney
Mr T Delofski, Member

FIJI – RACE – POLITICAL OPINION – PARTICULAR SOCIAL GROUP – SYMPATHETIC TO INDO-FIJIANS – TAUKEI MOVEMENT – The applicant claimed to fear persecution in Fiji for reasons of his political opinion and membership of a particular social group. He claimed to have been persecuted by native Fijians, in particular the members of the Taukei Movement (TM), because of his European origin, and his support of the Fijian Labor Party and the plight of Indo-Fijians. The applicant gave evidence that he was physically assaulted on numerous occasions, and was pressured to join the TM. The applicant feared the TM and other nationalist extremists would make his life miserable. The applicant conceded that the current interim government, under Commodore Bainimarama, had been good for Indo-Fijians. However, he claimed that the TM extremists were lying low, that the political situation is fluid and susceptible to change and that if the government were to change, there would be heightened risks of persecution for Fijians such as himself.

Held: Decision under review set aside

The Tribunal noted that country information indicates the current interim government is sympathetic to the plight of Indo-Fijians. It found that while the interim government remained in power, the applicant would face a reduced risk of harm by indigenous Fijian nationalists and enjoy a high level of state protection. However, the Tribunal accepted that the political situation was highly fluid, that a change of government would likely lead to a significant rise in influence of nationalist indigenous Fijians and diminution of equitable treatment of the Indo-Fijian community. The Tribunal accepted that, in such circumstances, Fijians who are seen to be sympathetic to, and who are actively supportive of the Indo-Fijian community, would face a heightened risk of persecution. The Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

India

071559619
25 March 2008, Sydney
Ms S Leal, Member

INDIA – POLITICAL OPINION – CONGRESS PARTY – PARTICULAR SOCIAL GROUP – LOWER CASTE – The applicant claimed to fear persecution on the basis of race, political opinion and membership of a particular social group. He feared threats, persecution and murder by anti-social elements, local mafia and politicians should he return

to India. He claimed to have been physically and verbally abused on two separate occasions while employed in his family business because of his membership of a lower caste of the Hindu community. Although he reported these incidents to the police, the applicant claimed that they refused to investigate or assist, telling him that these attacks were a personal matter between him and his customers. The applicant claimed to have joined the Congress Party to resolve this situation but, lacking a proper income, ultimately departed for Australia.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was a member of a lower caste. The Tribunal found that none of his evidence disclosed any persecution on the ground of race. It accepted that he had suffered serious harm, including physical injury and shop damage, during systematic and discriminatory attacks. However, these incidents were not for reasons of his membership of a particular social group or political opinion. The first incident occurred when the applicant refused to provide services free of charge. The second attack was a personal grudge. His attackers threatened to assist other members of his caste to establish a competing business which they would not have done if the attacks had been motivated by the applicant's caste. The applicant joined the Congress Party after the attacks and the Tribunal found he would not be targeted on return for his political opinion. The Tribunal was not satisfied that State protection was discriminatorily withheld for a Convention reason but was withheld because the police considered the matter to be a civil business dispute. Moreover, the Tribunal considered the applicant could reasonably be expected to relocate within India. Accordingly, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations.

Indonesia

0801251
3 April 2008, Sydney
Mr H Wyndham, Member

INDONESIA – ETHNICITY – CHINESE – PARTICULAR SOCIAL GROUP – PHYSICAL DISABILITY – The applicant claimed to fear persecution for reasons of her Chinese ethnicity. For the same reason, she did not believe that she would receive State protection. She also claimed, in respect of her family, that they would have difficulty re-adjusting to life in Indonesia. Evidence was produced showing that the primary applicant suffered from a severe disability.

Held: Decisions under review set aside

The Tribunal accepted that the applicant was an Indonesian citizen of Chinese ethnicity. The Tribunal was not prepared to find in favour of the applicant on the basis of the claims actually made. However, the Tribunal found that the country information citied in the primary decision record strongly suggested that discrimination against persons with disabilities existed in Indonesia and that the applicant's access to support services for her disability could be limited by her ethnicity. In her situation, this would involve a level of harm amounting to persecution. The Tribunal was satisfied that there was a real chance of the applicant suffering harm amounting to persecution in Indonesia for reasons of a combination of her ethnicity and her membership of a particular social group, namely people with a physical disability. The Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations.

Iran

071911606
10 March, Sydney
Mr J Cipolla, Member

IRAN – PARTICULAR SOCIAL GROUP – WOMEN – ADULTERY – The applicant, a Muslim woman, claimed to fear persecution as she had committed adultery. She claimed that she entered Australia with her husband and children but that her husband subsequently departed Australia leaving her and their children behind. They eventually separated and she entered a relationship with another Iranian man who provided her with emotional and financial support. The applicant claimed her husband became aware of this relationship and threatened that if she returned to Iran he would obtain custody of their children and hand her over to the authorities to be punished for her infidelity. The applicant feared that if she were to return to Iran she would face death.

Held: Decision under review set aside

The Tribunal accepted that the applicant's estranged husband was informed of her relationship with another man. It further accepted that her husband had threatened to hand her over to the Iranian authorities to be punished for adultery. The Tribunal found that the chance was not remote that her husband would assault or attempt to assault her and also found that the authorities would not act to protect the applicant because of her membership of a particular social group being 'Iranian women about whom allegations of immoral behaviour have been made'. The Tribunal further found that the applicant would not be able to relocate within Iran due to her being the target of her husband and the target of the Iranian authorities. Accordingly, the Tribunal was satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Korea

071832368
20 December 2007, Melbourne
Mr Gary Ledson, Member

REPUBLIC OF KOREA – PARTICULAR SOCIAL GROUP – NATIONALS RETURNING AFTER A LONG ABSENCE – COMPULSORY MILITARY SERVICE – The applicant claimed to fear persecution upon returning to Korea because he had no family and friends there after spending his formative years in Australia and was abandoned by his aunt and her family. He claimed that he feared that he would feel like an alien. He also claimed to fear that he would have to serve in the military service as a compulsory obligation.

Held: Decision under review affirmed

The Tribunal found the applicant to be a credible witness. The Tribunal accepted the applicant's claims that: he had been abandoned in Australia by his aunt and her family whom he believed were his parents and siblings; he had spent a large period of his formative years in Australia; and he had no known relatives in Australia or Korea. It also accepted that the applicant had strong subjective fears of returning to Korea as claimed. The Tribunal identified the applicant as a member of a particular social group being Korean nationals returning to Korea after a long absence. However, the Tribunal found that the applicant would be able to receive the same rights and protections as other Korean nationals and the harm he feared did not amount to serious harm. The Tribunal further found that the laws requiring military service generally applied to all young Korean males and therefore were non-discriminatory laws of general application. While acknowledging there were strong humanitarian grounds that applied to the applicant's circumstance, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations.

Lebanon

071818233
15 February 2008, Sydney
Ms P McIntosh, Member

LEBANON – PARTICULAR SOCIAL GROUP – HOMOSEXUAL – The applicant claimed to fear persecution for reasons of his homosexuality. The applicant was previously married in Lebanon but claimed that since early manhood, he had suppressed his 'homosexual tendencies', because of 'society's attitude towards gays'. He claimed that he feared harm from his very conservative family and hid his sexual orientation from them. He claimed that the authorities would not offer him protection because homosexuality was considered an attack on the moral fibre of society. The applicant was supported by a number of witnesses attesting to his sexual orientation. The applicant also gave evidence that he is currently in a homosexual relationship, and the Tribunal also took evidence from his partner. The applicant submitted evidence from a medical practitioner that the applicant had told him during a consultation several years ago that he was having sexual contact with other men.

Held: Decision under review set aside

The Tribunal had some doubt whether the applicant was a homosexual as claimed, but considered crucial the evidence from the medical practitioner that the applicant had told him some years before lodging the application that he was having sexual contact with other men. This, in addition to the evidence from the Gay and Lesbian Counselling service and a number of witnesses satisfied the Tribunal that the applicant was a homosexual. The Tribunal accepted that the applicant had been able to avoid harm in the past because he successfully hid his sexual orientation from his family and his community in Lebanon. The Tribunal accepted that his 'discreet' behaviour was motivated by a fear of harm and that, if returned to Lebanon, his need to avoid living openly as a homosexual, being motivated solely by a well-founded fear of serious harm, constituted persecution.

Pakistan

071868420
28 March 2008, Sydney
Mr D Dobell, Member

PAKISTAN – RELIGION – ISLAM – POLITICAL OPINION – TEHRIK NIFAZI SHARIAT MUHAMMADI – The applicant claimed to fear persecution on the basis of his religious beliefs and political opinion. He claimed to fear harm from a local extremist political party called Tehrik Nifazi Shariat Muhammadi (TNSM) which compelled individuals to fight, denied women's rights and objected to the assistance he had provided to international development non-governmental organisations (NGOs). He claimed to have narrowly escaped an attack and reported the matter to police. To support his claims before the Tribunal, the applicant provided letters from NGOs, police reports, newspaper articles and documents purportedly from religious scholars ordering his death anywhere within Pakistan in the interests of Islam.

Held: Decision under review affirmed

The Tribunal accepted on the basis of independent information that religious-based violence occurred in the applicant's province, that TNSM is active and that NGOs and locals who assist them risk serious harm. It doubted the applicant's claimed involvement with NGOs due to a lack of detail and evidentiary inconsistencies. The Tribunal was prepared to accept, given his generally credible version of events, that the applicant feared serious harm from TNSM within the province. However, there was no independent information suggesting that it operated beyond these boundaries and, even if it did, the applicant was a 'low profile' person. The Tribunal found that TNSM's view of what is in the 'best interests of Islam' would not be held by all Muslim groups in Pakistan and there was no evidence that the applicant would be at risk outside the province. The Tribunal concluded that the applicant could relocate and live safely in other parts of Pakistan and it was reasonable for the applicant to do so. Accordingly, the applicant did not have a well-founded fear of persecution in his country of nationality, now, or in the reasonably foreseeable future.

FEDERAL COURT JUDGMENTS

MIAC v You
[2008] FCA 241
Federal Court of Australia, Sundberg J, VID 672 of 2007, 6 March 2008

This was an appeal by the Minister from a judgment of the Federal Magistrates Court quashing a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate that the respondent was not entitled to be granted a Partner (Migrant) (Class BC) visa.

The delegate's decision record referred to a visit by Departmental officers to the respondent's home, during which they called the sponsor, who was not there but insisted that he was at home with his wife, at the house from which the officers were calling. The respondent attached a copy of the decision record to her review application. The Tribunal affirmed the decision on the ground that it was not satisfied the respondent and sponsor were in a spouse relationship, noting that there was a paucity of evidence.

At first instance, the Federal Magistrate quashed the Tribunal's decision because the Tribunal did not comply with s.359A of the *Migration Act* 1958 (the Act). His Honour found that the home visit information formed a significant part of the reason for the Tribunal's decision and was not persuaded that the Tribunal did not have to comply with s.359A with respect to this information, stating that the delegate's decision was attached to the review application form for the purpose of identifying it as a decision to appeal from, not to rely upon the evidence referred to in it.

On appeal the Minister contended that the Federal Magistrate erred in his approach to s.359A(4)(b) of the Act.

Held: Appeal allowed.

(i) The Federal Magistrate erred in failing to find that s.359A(4)(b) of the Act applies to all information included in the delegate's decision because the respondent gave that information to the Tribunal for the purpose of her application to the Tribunal, and in concluding that the respondent did not "give" the information contained within the delegate's decision to the Tribunal as she did not rely upon it.

(ii) The word used in s.359A(4)(b) is "gave" not "relied on". The respondent attached the delegate's decision (containing the home visit material) to the application to the Tribunal. Doubtless the respondent did not rely on the home visit material in the delegate's decision. Nevertheless, she "gave" the Tribunal the delegate's decision and thus gave it the information contained in the delegate's reasons. An applicant's purpose or intention that the Tribunal take some information into account may explain why information not directly given to it is taken to have been given to it by him or her. Resort to an applicant's purpose or intention has no application to a case where information is physically handed over.

(iii) Information need not be "volunteered" in order to be "given" for the purposes of s.359A(4)(b). It can be given in response to a question from the Tribunal rather than propounded by an applicant ab initio. The word "information" in s.359A(4)(b) is not confined to information the applicant thinks will advance his or her case or information upon which the applicant relies in support of the application. If what is given to the Tribunal is information, it is covered by s.359A(4)(b).

SZHVM v MIAC
[2008] FCA 600
Federal Court of Australia, Middleton J, NSD 1566 of 2007, 7 May 2008

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

The appellant did not appear at the Tribunal hearing and the Tribunal found that she had provided insufficient detail for it to be satisfied of her claims. Before the Federal Magistrates Court, the appellant claimed that she did not attend the Tribunal hearing because she was sick, did not know the Tribunal's telephone number and was not fluent in English.

On appeal, the appellant made the following claims for the first time. She sought and obtained the assistance of a migration agent to lodge her protection visa application. The agent also offered her employment as a live-in nanny for

his children, which she accepted. The agent told her not to tell anyone about their arrangement. The application was completed by the agent using a residential address at which the appellant never resided. About two weeks before the Tribunal hearing, the agent told her she had an interview with the Department. On the day of the hearing, the agent told her that the '"interview" was important but looking after his child was more important and instructed her to take care of the child. The appellant was sacked by the agent in December 2005. She sought the assistance of a Chinese-speaking agent, with whom she had trouble communicating. In August 2007, she found an interpreter who could assist her.

The appellant contended that as a consequence of the agent's conduct, she was denied a real and meaningful hearing and this subverted the Tribunal's obligations under s.425 and its exercise of the discretion under s.426A of the *Migration Act* 1958 (the Act). She also contended that the Tribunal should have considered that the reason for her failure to attend the hearing was due to the fact that the invitation was wholly in English and could not be understood by her. Further, the Tribunal failed to take a reasonably open and regular administrative step by calling her to enquire why she failed to appear at the hearing.

Held: Appeal dismissed.

(i) Even accepting the facts sought to be adduced, there was no evidence of a fraud on the Tribunal within the meaning of *SZFDE v MIAC* (2007) 237 ALR 64. The agent may have put his interests above the appellant's but that could not amount to a finding of fraud and is more properly characterised as 'bad' advice. Even accepting that the negative response to the invitation was procured by the purported agent's coercion, which might be characterised as duress, this does not amount to material dishonesty which conveys a false impression of another to the decision-maker such as to make the conduct cognisable as fraud.

(ii) There is authority that there was no obligation on the part of the Tribunal to ensure that the hearing invitation was in a language the appellant could understand. Even so, there was nothing to suggest that the Tribunal had any need to consider the possibility that the appellant did not understand or could not be properly informed of the hearing invitation.

(iii) The Tribunal must, where there is material before it that on its face suggests that an error has occurred, take simple administrative steps to address the issue. There was no material before the Tribunal which would have put it on notice of an error or irregularity which needed to be followed up administratively.

SZJZN v MIAC
[2008] FCA 519
Federal Court of Australia, Madgwick J, NSD 1379 of 2007, 18 April 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) affirming the delegate's decision that the applicant was not a person to whom Australia had protection obligations.

The appellant claimed to fear persecution for various reasons, including his Catholic faith. The Tribunal found that the appellant, a Chinese national, was a low level Catholic in China but was not satisfied that this gave rise to a real chance of persecution. It accepted that the appellant's religious commitment may have intensified in Australia but was not satisfied he had developed a sustained or genuine interest in taking on a more prominent role. It was not satisfied that the conduct engaged in by the appellant in Australia (becoming an acolyte) was otherwise than for the purposes of strengthening his refugee claims. Consequently the conduct was disregarded by the Tribunal pursuant to s.91R(3) of the *Migration Act* 1958 (the Act).

The appellant contended, among other things, that the Tribunal misconstrued s.91R in relation to the *sur place* element of the claim and wrongfully excluded relevant material. Secondly, he contended the Tribunal incorrectly had regard to conduct in Australia in order to aid the rejection of his claim, but under s.91R(3) once the conduct was to be disregarded, it should have been disregarded for all purposes.

Held: Appeal dismissed.

(i) There was no error in the Tribunal decision that would result in issue of writs.

(ii) The term "the purpose" in s.91R(3) should be interpreted as meaning "the dominant purpose". It cannot be the position that, where an applicant has multiple purposes for engaging in conduct in Australia, no matter how relatively unimportant the s.91R(3) purpose may be, its existence will prevent the decision-maker from having regard to it.

(iii) Where such conduct is disregarded for one purpose of the assessment of the claim it must be disregarded for all such purposes. There was no breach by the Tribunal of that statutory injunction. The Tribunal rejected the appellant's *sur place* motivations and beliefs, but did not have regard to his conduct as an indicator of a likely higher profile if returned to China.

(iv) If conduct in s.91R(3) should be regarded as including ideas and beliefs motivating the conduct, the only infraction of the subsection by the Tribunal was in looking at such ideation with a view to considering whether it might assist the appellant in relation to his likely future conduct if returned to China, and coming to a negative conclusion. Any error was immaterial and did not taint the decision.

Zhong v MIAC
[2008] FCA 5077
Federal Court of Australia, Lander J, NSD 1467 of 2007, 21 April 2008

This was an appeal from a decision of a Federal Magistrate dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) which affirmed a decision to cancel the appellant's Preferential Relative (Migrant) (Class AY) (Subclass 104 (Preferential Family)) visa under s.109 of the *Migration Act* 1958 (the Act) because of a breach by the appellant of s.101 of the Act.

A Notice of Intention to Consider Cancellation under s.107 of the Act (the notice) was sent to the appellant. It stated, in part, "It has come to the Department's attention that you may not have complied with section 101…" and that the appellant may have provided incorrect information in that he failed to provide details of his de facto wife and child in his application for the Preferential Relative visa, The visa application was made on the basis that the visa applicant claimed to be the last remaining family member not yet in Australia. The Tribunal found the notice complied with s.107 and identified the breach with sufficient particularity. In deciding whether to exercise its discretion to cancel the visa under s.109(2) the Tribunal took into account, among other things, that the appellant had made some contribution to the community through the payment of tax but considered this was outweighed by the extremely adverse findings it had made regarding the provision of false and misleading evidence and fraudulent documentation.

The Federal Magistrate held that the notice complied with s.107 of the Act. His Honour held that the appellant's contribution to the community was generally referred to by the Tribunal and that in any event it was not necessary to do so given the Tribunal's findings that any positive factors were outweighed by the adverse findings regarding the false evidence. The same grounds argued before the Federal Magistrate were argued on appeal.

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

(i) The notice issued by the Department was defective and was not sufficient to engage s.107(1) of the Act as the Minister's delegate had not reached the statutory state of mind that he or she considered that the holder of the visa had not complied with one of the section or subsections referred to in s.107(1). The Minister or his delegate must consider that there has actually been non-compliance before either one is entitled to give the notice.

(ii) The notice did not particularise the possible non-compliance. It was not sufficient to state that the appellant might have breached s.101 of the Act. Rather it was necessary for the notice to give particulars of the fact and circumstances which gave rise to the possible breach of both paragraphs of s.101. It was not enough to generically claim that the appellant had breached a section of the Act.

(iii) The Tribunal failed to exercise its jurisdiction by not giving specific consideration to the contribution made by the visa holder to the community under r.2.41(k) of the Migration Regulations 1994 which is a prescribed circumstance to have regard to when considering a cancellation under s.109(1)(c) of the Act.

FEDERAL MAGISTRATES COURT JUDGMENTS

MZXSP & Ors v MIAC & Anor
[2008] FMCA 374
Federal Magistrates Court of Australia, Riley FM, MLG1307 of 2007, 3 April 2008

The primary applicant, a national of Iraq, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of his political opinion.

During the review, the original Tribunal member had prepared a draft decision before ceasing to be a member. The matter was reconstituted and the reconstituted Tribunal sent a further letter under s.424A of the *Migration Act* 1958 (the Act), and conducted a further hearing. The reconstituted Tribunal handed down the decision, which included large tracts of the draft decision. The Tribunal found that the applicants had the right to reside in the Netherlands under their temporary residence visas until 2010. It considered that they were not entitled to protection visas in Australia by virtue of s.36(3) of the Act.

The applicants contended, among other things, that the Tribunal had committed jurisdictional error: in failing to comply with s.424A of the Act by failing to give particulars of adverse information to all of the applicants; and in that the reconstituted Tribunal adopted in a wholesale manner the findings of the Tribunal as previously constituted.

Held: Application dismissed.

(i) No grounds of review were made out.

(ii) The alleged breach of s.424A of the Act was not made out. The first applicant had signed an undertaking that he would inform each of the other applicants of the contents of any communication received by him from the Tribunal and reply to the Tribunal on behalf of all the applicants. The other applicants had expressly authorised the Tribunal to communicate on their behalves with the first applicant. The s.424A letters themselves contained an express request for the first applicant to advise the other applicants about the Tribunal's invitation and stated that any response received from the first applicant would be regarded as a joint response unless stated to the contrary.

(iii) The reconstituted Tribunal did bring an independent mind to the review. It looked carefully at the draft decision, accepted most of it, but considered that further information and a further hearing were required, and considered that the draft decision on one point was wrong. The Tribunal, when reviewing the delegate's decision would not properly fulfill its task if it simply accepted the delegate's findings. However, the reconstituted Tribunal does not review the first Tribunal's decision. It was the task of the reconstituted Tribunal to finish the determination begun by the Tribunal as first constituted. In any event, it is not an error to adopt verbatim the reasoning of another, provided an independent mind is brought to the process.

S1322 of 2003 v MIMA & Anor
[2007] FMCA 1583
Federal Magistrates Court of Australia, Nicholls FM, SYG 2869 of 2006, 21 September 2007

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 to fear persecution on the basis of his political opinion. The Tribunal sent the applicant a letter pursuant to s.424A of the *Migration Act* 1958 (the Act). In its letter, in addition to nine items of s.424A information listed in the letter followed by the explanation of the consequences of not commenting before the due date, the Tribunal stated two further non s.424A matters, being the change of government in Bangladesh and the applicant's evidence that he relocated to Dhaka before leaving and suffered no harm. These matters were introduced with the words "In addition, the Tribunals notes…" and "the Tribunal also notes…". The Tribunal concluded in its decision that these last two non s.424A matters raised in its letter were "important" and were not the subject of any response by the applicant. The Tribunal affirmed the decision under review.

The applicant contended before the Court that there was a denial of procedural fairness at general law on the basis that he was not provided with an opportunity to comment on the two non s.424A matters which were determinative

of the Tribunal's decision to affirm the delegate's decision. The application for review predated the introduction of s.422B of the Act.

Held: Tribunal decision quashed and remitted for reconsideration.

(i) The Tribunal failed to accord the applicant procedural fairness and thereby fell into jurisdictional error. The Tribunal, in misleading the applicant, failed to give the applicant the opportunity to make submissions in relation to issues which were critical to its decision.

(ii) The Tribunal's letter was misleading given its terms and presentation. Given the language used by the Tribunal, the lay out and placement of the items in relation to which it invited comment, and the separate provision of 'noting' of the other two items, the Tribunal was providing the opportunity to comment in relation to items one to nine, but was, at best, silent in this regard in relation to the two items presented as having been noted.

(iii) The Tribunal's error in misleading the applicant tainted the later consideration of the information and compounded the Tribunal's error. The Tribunal stated that it had not received any response from the applicant on the last two matters in the letter where no such invitation to comment was given.

SZKSQ v MIAC & Anor
[2008] FMCA 420
Federal Magistrates Court of Australia, Orchiston FM, SYG1752 of 2007, 2 April 2008

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

The applicant completed her protection visa application form as a member of her husband's family unit. The applicant and her husband claimed that her husband had been persecuted for being a Falun Gong practitioner. In a joint application for review, the applicant signed a declaration authorising the Tribunal to communicate with her husband or her adviser about the application. The Tribunal sent an invitation to hearing letter to the applicant and her husband through the adviser but only the husband attended. The husband subsequently lodged a Change of Contact Details form. The Tribunal sent a second hearing invitation letter directly to the applicant and her husband at this address and subsequently both attended the second hearing. The husband responded to a letter under s.424A of the *Migration Act* 1958 (the Act), also sent directly to the applicant and her husband at this address, indicating that he and the applicant had separated and requesting that her application be cancelled. No response was received from the applicant. In its reasons for decision, the Tribunal was not satisfied that the applicant or her husband were credible. It found that the husband had not been detained, the applicant was not at risk of persecution for association with Falun Gong practitioners and that neither had a well-founded fear of persecution for a Convention reason.

The applicant alleged jurisdictional error on several grounds, including that the Tribunal failed to properly consider or investigate the applicant's claims.

Held: Application dismissed.

(i) The Tribunal's decision was not affected by any jurisdictional error.

(ii) The Tribunal was entitled to send correspondence to the applicant at the address in the Change of Contact Details form, until notified otherwise by her. It was open to the applicant, at any time before or after she separated from her husband, to withdraw that direction and lodge a substitute Change of Contact Details form for herself but she did not do so. The s.424A letter was properly served on the applicant in accordance with the requirements of ss.424A and 441A of the Act. The Tribunal was under no obligation to delay the handing down of its decision simply upon notification by the husband that he and the applicant had separated (and where no request for an extension of time to respond to the s.424A letter had been received from the applicant and she had not provided the Tribunal with any telephone contact details). It was not for the Tribunal to investigate the current status of the applicant's address.

(iii) In any event, the Tribunal was not obliged to send a s.424A letter since its credibility findings were based upon evidentiary inconsistencies not constituting "information" for the purposes of s.424A: *SZBYR v MIAC* [2007] HCA 26 at [18].

(iv) The Tribunal comprehensively considered the applicant's case, both jointly with her husband and equally in her own right, its adverse credibility findings were open to it on the evidence and there was no obligation for the Tribunal to exercise its investigative and information-gathering powers under the Act.

SZLFX v MIAC
[2008] FMCA 451
Federal Magistrates Court of Australia, Raphael FM, SYG2652 of 2007, 11 April 2008

The applicant, a national of the Peoples' Republic of China, sought judicial review of the 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 a Falun Gong practitioner and that he went to a park to practise under the leadership of 'Mr Li' and that he ceased practising Falun Gong when his father came to Australia but later recommenced practice. The Tribunal rejected the applicant's claim that he was a Falun Gong practitioner based on inconsistencies in his evidence. The Tribunal also concluded that a committed Falun Gong practitioner in the applicant's position would not have stopped practising when his father left Australia. Prior to the hearing, the Tribunal recorded a file note of a conversation with a representative of a local Falun Dafa organisation, who stated he was not aware of a Mr Li being the leader; that they do not have leaders, but have coordinators for various sites. The Tribunal did not make any findings in relation to this note.

Before the Court, the applicant contended the Tribunal breached s.424A of the *Migration Act* 1958 by failing to give particulars of this file note. The applicant also contended apprehended bias in relation to the Tribunal's preconceived view of how a 'committed Falun Gong practitioner' should behave.

Held: Tribunal decision quashed and remitted for reconsideration.

(i) The Tribunal committed jurisdictional error by failing to comply with s.424A and giving the requisite notice in relation to the Tribunal file note. The note contained information that was capable of undermining the applicant's claim to be a Falun Gong practitioner.

(ii) It was not more probable than not that the failure to mention the file note meant that it was rejected by the Tribunal; accordingly no inference was drawn that the information was not material to the Tribunal's decision.

Obiter

(iii) The Tribunal's use of the term "a committed Falun Gong practitioner" leaves the Tribunal open to the criticism that it may have a template in mind, but it was not the case that the applicant's explanations for his conduct were not considered at all because they did not fit into the template. Something more than what occurred in this case was required for apprehended bias.

SZLUN v MIAC & Anor
[2008] FMCA 426
Federal Magistrates Court of Australia, Emmett FM, SYG 3926 of 2007, 8 April 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 on the basis of his political opinions. In his review application the applicant appointed his migration agent as his authorised recipient. The Tribunal invited the applicant to a hearing by sending a fax to his authorised recipient at the fax number identified on the application for review, evidenced by a Transmission Log with the letter being reproduced on it. No response or further communication was received by or on behalf of the applicant to the hearing invitation. The Tribunal then exercised its discretion pursuant to s.426A of the *Migration Act* 1958 (the Act) by making a decision on the review without taking further action to allow or enable the applicant to appear before it. The Tribunal affirmed the decision under review.

The applicant contended that the Tribunal failed to comply with its obligations under s.425 of the Act on the ground that there was no evidence that the Tribunal had faxed the hearing invitation to his authorised recipient and there was no evidence that his authorised recipient had received the fax. The authorised recipient filed a statutory declaration to the effect that he did not receive the hearing invitation from the Tribunal and it was the Tribunal's usual practice with his firm to immediately contact his firm to ensure the hearing invitation was received if the Tribunal did not receive a hearing response.

Held: Tribunal decision quashed and remitted for reconsideration.

(i) The Tribunal fell into jurisdictional error in failing to comply with s.425 of the Act.

(ii) The first respondent provided no evidence as to how the Transmission Log was generated and how it came to be in the form produced to the Court. Based on the evidence of the applicant's authorised recipient which was not challenged by the first respondent, the inference could not be drawn that the Tribunal sent the applicant an invitation by facsimile to his authorised recipient in accordance with ss.425 and 425A of the Act.

Venkatesan v MIAC & Anor
[2008] FMCA 409
Federal Magistrates Court of Australia, Burchardt FM, MLG 990 of 2007, 10 April 2008

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate to refuse to grant the applicant a Skilled – Independent (Resident) visa on the basis that she did not satisfy cl.880.214 of Schedule 2 to the Migration Regulations 1994 (the Regulations), which required the Minister to be satisfied that the applicant met the requirements of item 1128CA(3)(l) of Schedule 1 to the Regulations.

Item 1128CA (3)(l) requires that application by an applicant seeking to satisfy the primary criteria must be accompanied by a declaration that the applicant has, in the 6 months immediately before the day when the application is made, completed a degree, diploma or trade qualification for award by an Australian educational institution as a result of study of at least 2 years at that institution while the applicant was present in Australia. The Tribunal found that the applicant completed the academic requirements for the award of a graduate diploma from RMIT when his last results were entered into the student record on 2 August 2005. Since his application was made on 13 February 2006, it fell outside the 6 month period required by Item 1128CA(3)(l).

The applicant argued that he did not complete the academic requirements for his course until the University granted him credit transfers for four subjects on 13 September 2005, bringing him within the 6 month limit. It was argued that the word 'completed' meant 'to meet the requirements set', and that this can only mean circumstances where an applicant has an eligibility or entitlement to a degree. It was argued that the transfer of the four subjects was necessary, in the sense that without the approval of the University, the applicant was not able to complete his diploma because it could not be awarded.

Held: Application dismissed.

(i) The Tribunal did not fall into error in its approach to item 1128CA(3)(l) and cl.880.214.

(ii) The proper meaning to be ascribed to item 1128CA(3)(l) is that an applicant completes the academic requirements for a course when the applicant achieves the necessary results or credits to enable the applicant to be awarded the degree or diploma. The applicant had already completed and passed the relevant proportions of his course well before August 2006. There was nothing more for the applicant to do of an academic nature. Certain steps were required, but they were purely administrative steps that did not require any form of academic effort by the applicant nor any evaluation of any such effort by the university.

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

INSTRUMENTS

Migration Regulations 1994 - Specification under regulation 1.03 - Migration Occupations in Demand - May 2008 (Legislative Instrument - F2008L01524)
The purpose of this instrument, registered on 16/05/2008, is to specify skilled occupations as migration occupations in demand for the purposes of the definition of 'migration occupation in demand' in regulation 1.03 of the Regulations. The Instrument specifies occupations according to the Australian Standard Classification of Occupations (ASCO) classification system. This Instrument adds twelve occupations to the MODL; one managerial occupation, seven professional occupations, one associate professional occupation and three trade occupations. One professional occupation has been removed from the MODL.

Migration Regulations 1994 - Specification under paragraph 5.19(4)(e), subregulation 5.19(5), paragraphs 1.20GA(1)(e) and 2.43(1)(la) - Regional Certifying Bodies and Post Codes Defining Regional Australia for Certain Visas - May 2008 (Legislative Instrument - F2008L01641)
This instrument was registered on 20/05/2008. This instrument specifies the Regional Certifying Bodies that are approved to certify certain nominations made under the Regional Sponsored Migration Scheme and subclass 457 Business (Long Stay) visa programs. The Instrument also specifies the postcodes defining regional Australia for the purposes of the Regional Sponsored Migration Scheme and subclass 457 Business (Long Stay) visa program.

Legislation Pending

There were no new Bills of significance to the Tribunals introduced.

CASELOAD OVERVIEW

MRT Decisions – April 2008

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	2	10	0	1	13
Visitor refusal	14	10	2	3	29
Student refusal	38	13	7	7	65
Temporary business refusal	15	7	8	13	43
Permanent business refusal	6	7	3	1	17
Skill linked refusal	27	15	2	7	51
Partner refusal	73	29	9	2	113
Family refusal	27	34	2	0	63
Student cancellation	41	19	0	5	65
Sponsor approval refusal	2	1	1	0	4
Other	22	20	7	2	51

RRT Decisions – April 2008

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	0	1	0	0	1
Albania	1	0	0	0	1
Algeria	0	1	0	0	1
Armenia	0	1	0	0	1
Bahrain	0	2	0	0	2
Bangladesh	0	3	0	11	14
Burma (Myanmar)	1	1	0	0	2
Canada	0	1	0	0	1
China (PRC)	24	55	3	5	87
Colombia	0	1	0	0	1
Egypt	0	2	0	0	2
Ethiopia	0	1	0	0	1
Fiji	0	3	0	0	3
Ghana	0	3	0	0	3
India	0	13	0	6	19
Indonesia	1	9	0	0	10
Iran	1	1	0	0	2
Israel	0	1	1	0	2
Jordan	0	1	0	0	1
Kenya	0	1	0	0	1
Korea, Republic Of	0	3	0	0	3
Lebanon	0	2	0	0	2
Macedonia (FYRM)	0	1	0	0	1
Malaysia	0	17	1	1	19
Moldova	0	1	0	0	1
Mongolia	0	1	0	0	1
Nepal	4	1	0	1	6
Nigeria	0	1	0	0	1
Pakistan	3	2	0	2	7
Philippines	1	3	0	0	4
Portugal	0	1	0	0	1
Russian Federation	1	0	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	2	5	0	0	7
Sudan	0	1	0	0	1
Thailand	0	1	0	0	1
Tonga	1	0	0	0	1
Turkey	1	1	0	0	2
United Kingdom	0	1	0	0	1
Vietnam	0	4	0	0	4

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: Jacquelin Plummer

Contributors:

Steven Brnovic
Victoria Coleman
Talaishia Collis
Katherine Cook
David Corrigan
Khanh Hoang
Denny Hughes
Grace Ma
Pallavi Sinha
Stephen Tully
Andrew Verduci
Stephen Webb
Michelle Wei
Rachel White

Please note that any enquiries regarding this publication may be directed to the Editor on (02) 9276 5387 or at enquiries@mrt-rrt.gov.au

INDEX

Migration Review Tribunal Cases

Breach of Undertakings 2, 3
Clause 572.227 4
Clause 676.211 6
Clause 676.221 6
Clause 845.212 2
Condition 8202(3)(a) 4, 5
Cooperate with Department Monitoring 3
Course Attendance 4, 5
Exceptional Circumstances Beyond the Applicant's Control 5
Exceptional Reasons for Grant 4
Genuine Intention to Visit 6
Minimum Gazetted Salary 2
Nine Months 2
Nominated Occupation 2
Overseas Near Relative 3
Regulation 1.15 3
Regulation 1.20CB(1)(e) 2, 3
Satisfactory Course Progress 5
Section 140L 2, 3
Sponsorship Approval Bar 2, 3

Refugee Review Tribunal Cases

Chinese (Indonesia) 9
Christian (China) 7, 8
Compulsory Military Service (Korea) 10
Congress (India) 8
Ethnicity (Indonesia) 9
Islam (Pakistan) 11
Particular Social Group "Homosexual" (Lebanon) 10
Particular Social Group "Lower Caste" (India) 8
Particular Social Group "Nationals returning after a long absence" (Korea) 10
Particular Social Group "Physical Disability" (Indonesia) 9
Particular Social Group "Sympathetic to Indo-Fijians" (Fiji) 8
Particular Social Group "Women, alleged immorality" (Iran) 9
Political Opinion (China) 7
Political Opinion (Fiji) 8
Political Opinion (India) 8
Political Opinion (Pakistan) 11
Protest Against Pollution (China) 7
Race (Fiji) 8
Religion (China) 7, 8
Religion (Pakistan) 11
Taukei Movement 8
Tehrik Nifazi Shariat Muhammadi (Pakistan) 11
Yiguan Dao (China) 7