



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

071115705

22 May 2008, Melbourne

Ms G Hamilton, Member

SKILLED – AUSTRALIAN-SPONSORED (MIGRANT) (CLASS BQ) VISA – SUBCLASS 138 – CL.138.225 – QUALIFYING SCORE – DESIGNATED SECURITY DEPOSIT – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Subclass 138 visa as the delegate was not satisfied that the applicant had achieved the qualifying score when assessed under points test in Subdivision B of Division 3 of Part 2 of the *Migration Act* 1958 (the Act). The delegate found that the applicant was 15 points short of the pass mark of 110 points. After the delegate's decision, the applicant and her spouse sat further English language tests which entitled them to an additional 10 points. The Tribunal wrote inviting the applicant to make a deposit of \$100,000 in a designated security for a term of not less than 12 months, which would have entitled her to 5 bonus points under Part 8 of Schedule 6A of the Migration Regulations 1994 (the Regulations). However, on 30 November 2007 State Treasuries ceased accepting deposits.

Held: Decision under affirmed

The Tribunal found that although the applicant qualified for an extra 10 points on the basis of her and her spouse's improved English language test results, her total score was 105 points, 5 points short of the pass mark. She did not have the qualifying score under the points test and therefore did not meet cl.138.225 of Schedule 2 to the Migration Regulations 1994. The Tribunal noted that applicant was in a position to theoretically make a \$100,000 deposit in a designated security. However, the bonus points were only available if the funds had in fact been deposited. The Tribunal also noted that the case could be characterised as involving unique or exceptional circumstances where the public interest may be served by the Minister exercising his powers to substitute for the Tribunal's decision a more favourable one.

071561135

19 May 2008, Melbourne

Mr D Thomas, Member

BUSINESS SKILLS (RESIDENCE) (CLASS DF) VISA – SUBCLASS 892 – CL.892.212 – TOTAL VALUE OF NET ASSETS – GOODWILL - A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Business Skills (Residence) (Class DF) Subclass 892 visa on the basis that he did not satisfy cl.892.212 of Schedule 2 to the Regulations. The essential impediment to applicant satisfying cl.892.212 was the accounting treatment of 'goodwill' and its corresponding effect on the valuation of the visa applicant's assets in the business. The applicant was a partner in the business, together with his wife and daughter. The partnership funds were divided between the partners such that the applicant received 91.2% of the funds. The applicant claimed the partnership purchased the business for \$150,000. The applicant also claimed the purchase price was attributable to the purchase of the business lease, and that the lease purchase was described in financial statements as goodwill. Following the Tribunal's request for further information pursuant to s.359(2) of the *Migration Act* 1958, the applicant submitted details of the valuation of the goodwill, calculated under Australian Accounting Standards Board Standard 3 (AASB-3)

Held: Decision under review set aside

The Tribunal was satisfied that the partnership purchased the business at \$150,000 and that the applicant had an ownership interest in a main business in accordance with r.1.11(1)(a) of the Regulations. The Tribunal considered relevant policy and accepted that the purchase price reflected goodwill at a value of \$150,000, valued in accordance with AASB-3. The Tribunal had the benefit of an explanation by the accountant as to how he reached the valuation of goodwill and accepted that explanation. The Tribunal found that the goodwill was an asset of the business; was purchased by the applicant and other partners in a reasonable arms-length transaction; and there were good reasons to believe the genuineness of the sale and the value of the goodwill. The Tribunal referred to the financial statements subsequent to purchase and considered that the value of the net assets had not reduced below the original purchase price. The Tribunal therefore had no reason to believe the value of the goodwill was impaired between the date of purchase and the date of application. The Tribunal found that the value of the net assets in the main business was AUD\$167,030, and that throughout the 12 months immediately before the application was made, the applicant and his spouse had an ownership share of 95.6% of the net assets, or \$159,681. As this figure was at least \$75,000, the applicant satisfied cl.892.212(c) and accordingly satisfied cl.892.212 as a whole.

071943712

3 April 2008, Melbourne

Ms R Gagliardi, Member

SKILLED DESIGNATED AREA-SPONSORED (CLASS BQ) VISA – SUBCLASS 139 – VISA CANCELLATION – S.109 – BOGUS DOCUMENTS – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 139 visa under s.109 of the *Migration Act 1958* (the Act). The delegate found that he had not complied with ss.101 and 103 of the Act by giving incorrect answers on his visa application and providing bogus documents. The applicant had submitted the results from an International English Language Testing System (IELTS) test to acquire his visa. However, the Document Examination Training and Liaison Unit of the Department of Immigration and Citizenship, using facial matching software, concluded that another person had sat this test. The applicant submitted to the Tribunal that his visa should not be cancelled, as he was unaware that his migration agent had sent someone in his place, he was willing to sit an IELTS test and he occupied an important role in an Australian company.

Held: Decision under review affirmed

The Tribunal found that the applicant had not complied with ss.101 and 103 of the Act in the manner described in the s.107 notice. The visa application was incorrect and a bogus document was submitted. The applicant had admitted the document was bogus, did not attempt to rectify the situation and took advantage of the document to obtain a visa. He had never sat an IELTS test and the Tribunal was not satisfied that he would have passed. It accepted that he occupied a key position within an importing company employing Australians but there was limited information suggesting that he could not be replaced or that the company was unable to function prior to his arrival. It accepted that his spouse would suffer some hardship due to separation. However, they had no children and there was no evidence that cancellation would breach Australia's non-refoulement obligations. The Tribunal was satisfied that the applicant's visa should be cancelled.

0800092

23 May 2008, Melbourne

Ms R Gagliardi, Member

BUSINESS (LONG STAY) (CLASS UC) VISA – SUBCLASS 457 – VISA CANCELLATION – S.116(1)(a) – TERMINATION OF EMPLOYMENT – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's visa under s.116 of the *Migration Act 1958* (the Act) because circumstances permitting the visa grant no longer existed. The applicant's employment as a boilermaker had been terminated after he allegedly assaulted a work colleague. By leaving the sponsor in relation to which his visa was granted, the delegate concluded that condition 8107 was breached and cl.457.223(4)(i) of Schedule 2 to the Migration Regulations 1994 was no longer satisfied. The applicant submitted to the Tribunal that his visa should not be cancelled, referred to character references and prior Tribunal decisions and claimed that he, his spouse and son would suffer social and economic hardship in their country of origin.

Held: Decision under review affirmed

The Tribunal was satisfied that circumstances permitting the grant of his visa no longer existed and the ground for cancellation in s.116(1)(a) of the Act was made out. It noted that the applicant had been dismissed even though he had not instigated the altercation or been charged. The applicant had been unable to acquire a new sponsor and may find it difficult to obtain employment notwithstanding an industry shortage. In terms of the extent of the breach, the Tribunal accepted that his workplace behaviour could have been potentially dangerous but on the basis of character references found he would not ordinarily resort to physical violence. The Tribunal also considered the degree of hardship that may be caused to him and his family members in South Africa. The Tribunal took into account submissions that cases had been remitted where similar circumstances have applied but noted that the Tribunal is required to assess each case on its merits. Considering the circumstances as a whole, the Tribunal concluded that the applicant's visa should be cancelled.

Partner and Family visas

071790352

30 April 2008, Adelaide

Ms D Morgan, Member

PARTNER (RESIDENCE) (CLASS BS) VISA – SUBCLASS 801 – SPOUSE – CL.801.221 – R.1.15A – A delegate of the Minister for Immigration and Citizenship refused the applicants Subclass 801 (Spouse) visas as the delegate was not satisfied that the first named visa applicant (the applicant) was the 'spouse' of the sponsoring spouse as defined by r.1.15A and as required by cl.801.221(2) of Schedule 2 to the Migration Regulations 1994. The applicant had informed the delegate that she and her sponsoring spouse had separated and that the sponsoring spouse had withdrawn his sponsorship. The applicant claimed before the Tribunal that her relationship with her sponsoring spouse had resumed, that they had made plans to cohabit again and that her sponsoring spouse was willing to re-sponsor her.

Held: Decision under review affirmed

The Tribunal was satisfied that the applicant and her sponsoring spouse had a relationship but that it did not bear the hallmarks of a spouse relationship under r.1.15A. The Tribunal accepted that the sponsoring spouse was willing to re-sponsor the applicant and that cohabitation was not essential in order for it to find a spouse relationship was genuine and continuing. However, the Tribunal found the sponsoring spouse was not committed to the relationship for the long term based upon his oral and written evidence including the absence of plans for the future. The Tribunal found the lack of cohabitation was compounded by an absence of financial, social and mutual commitment to the relationship for the long term. As the applicant was not in a spouse relationship as defined in r.1.15A and required by cl.801.221(2), and as she did not satisfy the alternative requirements, she could not meet cl.801.221 which was an essential criterion for the grant of the visa.

071937867

6 May 2008, Sydney

Ms Phillipa Wearne, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – VALID MARRIAGE – R.1.15A – SPOUSE – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Partner (Provisional) (Class UF) Subclass 309 visa on the basis that he did not satisfy cl.309.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he did not meet the definition of 'spouse' in r.1.15A of the Regulations. Further evidence of the relationship was provided to the Tribunal.

Held: Decision under review set aside

The Tribunal accepted that the visa and review applicant were married in 1974 in Sudan in what they referred to as a 'spiritual marriage'. It accepted evidence that the marriage was registered by way of a Contract of Marriage dated 25 April 1999 and that there was no evidence to suggest that the marriage was invalid under s. 88D of the *Marriage Act* 1961. The visa applicant claimed, and the Tribunal accepted on the evidence, that he had married a second wife in 1990 and divorced her in 1995. The parties fled Sudan and moved to Egypt in 1999 because of the civil war. They lost contact after the visa applicant returned to Sudan to look for one of their daughters. They came back in contact in 2005 and the review applicant has since visited him in Egypt, provided financial assistance and kept in regular phone contact. The Tribunal accepted strong evidence from the applicants' children which indicated that the parties were in a married relationship at the time of application and continued to be at the time of decision. The Tribunal was satisfied that the visa applicant was at all times the 'spouse' of the review applicant and therefore met the requirements of cl.309.211 and cl.309.221.

0802319

12 May 2008, Sydney

Ms K Raif, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 102 – CL.102.211 – ADOPTION – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Child (Migrant) (Class AH) Subclass 102 visa on the basis that the visa applicant did not satisfy cl.102.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate found that the sponsor had not resided overseas for more than 12 months at the time of application and there was no evidence that the adoption had been approved by a competent authority or that the adoption had been made in accordance with the Adoption Convention. Before the Tribunal, the review applicant

provided no further evidence and consented to the Tribunal deciding the review without the applicant appearing before it.

Held: Decision under review affirmed

The Tribunal found that the review applicant had not been residing overseas for more than 12 months at the time of the application. Accordingly, the Tribunal was not satisfied that the visa applicant met cl.102.211(2). There was also no evidence before the Tribunal that a competent Australian authority had approved the review applicant as a suitable adoptive parent. Further, clauses 102.211(3)(d) and 102.211(4)(e) both related to 'prospective adoptive parents' while evidence before the Tribunal indicated that the adoption took place prior to the date of application. For these reasons, the Tribunal was not satisfied that the visa applicant met the requirements of subclauses 102.211(3) and (4). The Tribunal was satisfied that the adoption took place in an Adoption Convention country, being the Philippines. However, there was no evidence before the Tribunal to suggest that the adoption was made in accordance with the requirements of the Adoption Convention. The Tribunal thus found that the visa applicant did not meet cl.102.211 of Schedule 2 to the Regulations and could not be granted the visa.

Student visas

060799841

18 May 2008, Melbourne

Mr P Fisher, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 573 – CL 573.223 – GENUINE STUDENT - A delegate of the Minister for Immigration and Citizenship refused to grant a Subclass 573 visa to the applicant because he did not provide evidence that he was a genuine student for entry and stay, as required by cl.573.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations). He did not respond to the Department's request for further information. In particular, he did not provide evidence that he had successfully completed year 12 or a copy of his attendance records. The Tribunal had before it evidence from the applicant's previous education provider which indicated that his enrolment had been terminated due to low attendance. The applicant indicated that he did not wish to appear at a hearing before the Tribunal and he did not respond to the Tribunal's invitations to comment on adverse information pursuant to s.359A of the *Migration Act 1958*.

Held: Decision under review affirmed

The Tribunal noted that there was no evidence before it to suggest that the applicant had completed his previous course of study. Rather, the evidence indicated that the applicant's enrolment had been terminated. Further, the Tribunal noted that there was no evidence before it that the applicant was enrolled in any course of study and that despite the opportunity to do so, the applicant had not provided any evidence beyond that which was before the delegate. In the absence of relevant evidence, the Tribunal was not satisfied the applicant was a genuine applicant for entry and stay as a student within the terms of cl.573.223(2)(a)(iii) and therefore did not meet an essential requirement of cl.572.223.

Other visas

071369724

7 May 2008, Melbourne

Ms R Gagliardi, Member

RETURN (RESIDENCE)(CLASS BB) VISA - SUBCLASS 155 – CL.155.212(3) – COMPELLING REASONS FOR ABSENCE – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Return (Residence)(Class BB) Subclass 155 visa. The applicant claimed to have close personal ties to Australia and that her ties to Britain were tenuous as the applicant only had an older brother living in England whereas both of her children and grandchildren whom she keeps close contact with were living in Australia. She further claimed that she was unable to return to Australia within the relevant period due to personal, emotional and financial issues. The applicant claimed that her former husband pursued a financial settlement through the courts in England during their divorce in 1997. She then delayed her return until she was able to rebuild her finances. She also did not feel comfortable returning to Australia when her former husband was living near the children with his new wife.

Held: Decision under review affirmed

The Tribunal considered that the applicant's circumstances did not present themselves as forceful or compelling. While the Tribunal found it would have been unreasonable to have expected the applicant to have made any life changing decisions prior to the settling of her financial affairs, following this turbulent period of divorce and settlement, the Tribunal was unable to discern compelling reasons why the applicant may not have returned to Australia. The Tribunal found that rather than there being compelling reasons for the applicant's continued absence from Australia, there were a series of every day life circumstances that meant the applicant was not ready, both financially and emotionally, to sever her ties with Britain. While it accepted that the goals the applicant was pursuing in England, which prevented her from returning to Australia, were reasonable and legitimate goals, the Tribunal was not satisfied that they were compelling reasons for the applicant's more than five year absence from Australia. Having regard to the policy and all the available evidence, the Tribunal was not satisfied the applicant met cl.155.212(3) of Schedule 2 to the Migration Regulations 1994.

071643912

30 April 2008, Sydney

Ms J Ciantar, Member

RETURN (RESIDENCE) (CLASS BB) VISA – SUBCLASS 155 – CL.155.212(3) – COMPELLING REASONS FOR ABSENCE – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Return (Residence) (Class BB) Subclass 155 visa on the basis that he did not satisfy cl.155.212 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The applicant claimed to have substantial personal ties with Australia as his parents and sister were in Australia and as he felt he needed to support his father due to his father's deteriorating health. The applicant stated that he could not return to Australia earlier as he could not leave his wife and 2 young children without financial and emotional support.

Held: Decision under review affirmed

The Tribunal accepted that the applicant had substantial personal ties to Australia. The Tribunal found that the applicant did not satisfy cl.155.213(2)(a) because he last departed Australia as a holder of subclass 976 visa. In regard to the requirements in cl.155.212(3)(a), the Tribunal was satisfied that the applicant was an Australian permanent resident less than 10 years before the application was lodged, however, as the applicant had been absent from Australia for periods totalling more than 5 years, the Tribunal considered whether there were compelling reasons for the visa applicant's absence. The Tribunal accepted that at the time of the birth of each child it would have been difficult for the visa applicant to return to Australia and to be separated from his wife and new child. However, the Tribunal was not satisfied that this amounted to compelling reasons for his absence. The Tribunal was of the view that the applicant's plan to return to Australia resulted from his father's poor health, however it did not accept that the change in his father's health was the reason for the visa applicant's previous absence from Australia. The Tribunal was not satisfied the applicant was absent from Australia due to compelling reasons. The Tribunal accordingly found that the visa applicant did not satisfy cl.155.212(3)(b).

REFUGEE REVIEW TRIBUNAL DECISIONS

China

071945034

28 March 2008, Melbourne

Ms N Burns, Member

CHINA – ONE CHILD POLICY – PARTICULAR SOCIAL GROUP – BLACK CHILDREN – The applicants, nationals of the People's Republic of China (China), claimed to fear persecution for reasons of membership of a particular social group. The applicant mother claimed that her child was born out of wedlock and in contravention of China's one-child policy. She claimed that as a result, she would face persecution in the form of sterilisation, severe economic hardship, as well as discrimination. The applicant child was born in Australia and the mother made claims on his behalf. The applicant mother contended the child would not be registered because he was born in contravention of the one child policy and, consequently, would be denied access to basic services such as health care and education. She also claimed she did not have the financial capacity to pay the exorbitant fines to avail the child of the chance to be registered.

Held: Decision under review set aside

The applicant child's claims were considered against China, the mother's country of nationality. The Tribunal found the applicant child was a member of a particular social group of 'black children' or 'children born outside of officially approved parameters'. The Tribunal further found it would be unlikely the child would be registered on return to China, as the applicant mother did not have access to funds required to pay all of the associated levies. As a consequence, the Tribunal found the applicant would be subject to discriminatory treatment including not gaining access to medical care, education, or employment. The denial of such access constituted serious harm amounting to persecution. The Tribunal also found the applicant mother was a member of a particular social group of 'women who have had a child in contravention of the one child policy and outside of wedlock'. The Tribunal found there was a real chance that the applicant mother would suffer economic hardship affecting her ability to subsist if she returned to China. The Tribunal accepted she may be forcibly sterilised, which the Tribunal also found to be serious harm. The Tribunal found that the applicant mother faced a real chance of persecution for reason of membership of a particular social group. The Tribunal accordingly found the applicants were persons to whom Australia had protection obligations.

Iran

0800670

1 May 2008, Melbourne

Ms J Ellis, Member

IRAN – RELIGION – CHRISTIAN – S.91R(3) – The applicant claimed to fear persecution for reasons of her religion (as a Christian convert); her membership of a social group (Iranian women); and her actual and imputed political opinion. The applicant claimed that she became interested in Christianity and renounced Islam whilst in Iran and that she had since been baptised in Australia and become a regular member of a church. She claimed that she had been threatened with being summoned to the Revolutionary Court if she did not stop speaking out against the government in Iran, and that if she returned to Iran she would be punished for being an apostate and would not be able to practise her religion. The applicant was supported before the Tribunal by the minister who had performed her baptism and with whom she often underwent bible study classes.

Held: Decision under review set aside

The Tribunal accepted that the applicant had been attending church whilst in Australia and that she had been baptised. Although the Tribunal had concerns about the speed with which her baptism had been performed, it found her to be a truthful witness in relation to her long held interest in Christianity and also placed great weight upon the evidence of her witness that she was a genuine and committed Christian. The Tribunal had regard to s.91R(3) of the *Migration Act 1958* and was satisfied that the applicant's involvement in the church since her arrival in Australia was because of a genuine faith in Christianity and not for the purposes of strengthening her refugee claims. The Tribunal accepted that there was a real chance that if the applicant returned to Iran she would face persecution for reasons of her religion. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Latvia

0801520

2 May 2008, Sydney

Mr. A Jacovides, Member

LATVIA – POLITICAL OPINION – STATE PROTECTION – EUROPEAN UNION – The applicant claimed to fear persecution for reasons of imputed political opinion. He claimed he was harassed by unknown persons who accused him and his relative of dishonouring the independence of Latvia after his relative was granted refugee status in Australia. The applicant claimed to have received threatening anonymous telephone calls and was told to stop expressing his opinions. He claimed that he was unlawfully detained by several men in uniform and was harassed and threatened during the detention. The applicant also claimed that he approached the police and reported the death threats but the police were unable or unwilling to assist him. He further claimed that he did not want to live in Europe as he had health problems and preferred to be in Australia with his family.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was a citizen of Latvia. It accepted the applicant's claims that he was threatened and harassed by persons who objected to his opinions. The Tribunal accepted that the applicant was unlawfully detained by unknown persons who threatened to kill him. It also accepted that the police were unable to assist him, but found that this was because he could not provide to the police any useful information on which they could act. The Tribunal was not satisfied that he was denied protection by the police. Moreover, based on country information, the Tribunal found that Latvia was part of the European Union and citizens of Latvia could freely reside and enter any of the other European Union countries. The Tribunal was satisfied that the applicant, as a citizen of Latvia, would have access to a reasonable level of protection by the state in Latvia and throughout the European Union. The Tribunal considered the applicant's claims that he suffered from ill health and preferred to be in Australia where he had family, but found that these concerns related to his individual preference and were beyond the scope of the Refugees Convention. It found that the applicant had not taken all possible steps to avail himself of his right to enter and reside within other European Union countries. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Lebanon

0800113

17 April 2008, Sydney

Ms P Leehy, Member

LEBANON – PARTICULAR SOCIAL GROUP – HOMOSEXUAL – The applicant, a citizen of Lebanon claimed to fear persecution for reasons of his homosexuality. The applicant had been twice married in Lebanon and had children. He came to Australia on a temporary partner visa, but his sponsor withdrew her sponsorship after the marriage broke down. The applicant had separated from his wife after realising that he was a homosexual. He claimed to have developed relationships with other men and had a partner who was granted a protection visa on account of his homosexuality. The applicant claimed he could not return to Lebanon as his sexuality had become known among family and friends in Lebanon.

Held: Decision under review set aside

The Tribunal had initial difficulties accepting that the applicant was a homosexual, given his past migration history, and that he was an older man who has been twice married with children. However, the Tribunal accepted consistent and strong evidence from the applicant and his partner given at the hearing along with evidence from a witness who worked at a service attended by the applicant. The Tribunal accepted that the applicant was a practising homosexual and that his family had pressured him into two marriages. The Tribunal accepted that the applicant's family was strict and religious, and that if returned, there was a real chance that his family would abuse and seriously harm him. It further accepted that even if his family did not harm him, the applicant would have to conceal his sexuality to avoid harm from other non-state actors and that this would amount to persecution in the Convention sense. The Tribunal accepted that there was a real chance that state protection would not be afforded to him because of his homosexuality. The Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations.

071727058
8 February 2008
Ms R Gagliardi, Member

LEBANON – RELIGION – JEHOVAH’S WITNESS – The applicant claimed to fear persecution as a Jehovah’s Witness. The applicant claimed there was serious hostility towards Jehovah’s Witnesses in Lebanon from other faiths. She claimed her relative had been bashed and that their places of worship were routinely stormed. She claimed to have been discriminated against at school and as a working professional and she was forced to change her name to avoid being recognised. She claimed an integral part of her faith requires proselytising and distribution of publications and that she would continue to practice overtly and covertly if returned and thereby attract possible serious harm.

Held: Decision under review set aside

The Tribunal accepted testimony from third parties which strongly indicated that the applicant was a committed Jehovah’s Witness and that her extended family members in Australia were established members of that faith. The Tribunal accepted the applicant’s claims that she and her family had been harmed in the past and had been forced to conceal their identities and to undertake prayer sessions covertly. The Tribunal concluded that there was a real chance that the applicant would suffer physical harassment, intimidation and other forms of abuse if she were to continue to overtly and covertly practise her religion in Lebanon now or in the reasonably foreseeable future. The Tribunal further found that she had been forced to curtail her proselytising activities due to her fear of harm and this restriction on her beliefs and practices for fear of harm, in itself, amounted to serious harm. The Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations.

Mongolia

071848546
7 May 2008, Sydney
Mr J Duignan, Member

MONGOLIA – PARTICULAR SOCIAL GROUP – LESBIAN – STATE PROTECTION – The applicant claimed to fear persecution for reasons of her membership of a particular social group as a lesbian. The applicant claimed that she became interested in same sex relationships from early adolescence and had long term relationships but kept them hidden from relatives and colleagues. She claimed that when her work colleague discovered her sexual orientation she became isolated from her work and was ultimately forced to leave employment. The applicant also claimed that that her own family would not accept her sexual orientation and pressured her into entering a heterosexual relationship. While she entered into a heterosexual relationship and had a child, she claimed to have continued association with lesbians. After the birth of her child, the applicant claimed that her heterosexual partner became aware of her sexual orientation and was repeatedly violent towards her. She claimed that he threatened to kill her and take away their child. The applicant claimed that she sought protection from the authorities but the police often dismissed her claims and made reference to her sexual orientation.

Held: Decision under review set aside

The Tribunal found the applicant had presented a credible and consistent account of her past experiences and activities that was supported by independent evidence. It accepted that from a young age the applicant found that she was a lesbian and had pursued lesbian relationships which led to considerable pressure from her family and difficulties in the workplace. While the applicant had entered a heterosexual relationship which resulted in the birth of a child, the Tribunal accepted that the applicant had at all relevant times seen herself as a lesbian. It also accepted that the applicant had suffered serious harm from her heterosexual partner because of her sexuality. Referring to the commencement of a gay and lesbian group, Tavilan, the Tribunal was satisfied that lesbians formed a particular social group within Mongolian society. Noting that the applicant had been subject to verbal abuse by police because of her sexual orientation, it found that there was no adequate or effective state protection to an international standard in respect of the applicant’s situation. Accordingly, the Tribunal found that there was a real chance that the applicant would face serious physical harm for reasons of her membership of the particular social group of lesbians in Mongolia.

Nepal

0800870

14 April 2008, Sydney

Mr A Jacovides, Member

NEPAL – POLITICAL OPINION – ANTI-MAOIST – The applicant claimed to fear persecution for reasons of his anti-Maoist political opinion. The applicant claimed to have been a member of the Communist Party of Nepal (Maoists). When he renounced his membership he was harassed and threatened and forced to flee the country. The applicant claimed the Maoists wanted him to work exclusively with them and he would be harmed or killed if he refused to cooperate with them. He claimed they considered him a traitor and he feared life-threatening harm if he expressed his political opinion, particularly from the Youth Communist League (YCL). The applicant also claimed his family continued to be harassed and that Maoists remained interested in his whereabouts. The applicant claimed the Maoists could do whatever they wanted and he would not have access to meaningful state protection.

Held: Decision under review set aside

The Tribunal accepted the applicant's claims. However, it noted that significant and positive political developments had taken place and was satisfied that the civil war between the Maoists and the authorities had ended. It was further satisfied civilians were no longer subjected to human rights violations and in general all sides had demonstrated a willingness to end hostilities. While there was sufficient evidence to support the view that political violence was not widespread or common and security would continue to improve, the Tribunal found Maoists targeted opponents, particularly by utilising the YCL, and it accepted persons expressing opposition to Maoists were at risk. The Tribunal was not satisfied the applicant could express his political views or safely return in the foreseeable future. It found he was at risk of life-threatening harm because he was and would continue to be identified as an opponent of the Maoists. The Tribunal found the government was not able to prevent violence against people targeted by Maoists and accepted the applicant would not be afforded a reasonable level of state protection. It also found the applicant could not avoid harm by relocating as he would attract adverse interest wherever he lived. The Tribunal considered whether the applicant could avoid persecution by living in India under the terms of the Treaty of Peace and Friendship. It was satisfied he had a right to enter and reside, but was not satisfied he could avoid persecution in India. As such, the Tribunal found that the applicant had a well-founded fear of persecution for a Convention reason.

Peru

0800435 and 0800437

6 May 2008, Sydney

Mr L Hardy, Member

PERU – PARTICULAR SOCIAL GROUP – FAMILY – The applicants, who were siblings, claimed to fear persecution for reasons of their imputed political opinion, as persons close to their father, and for reasons of their membership of a particular social group defined as members of the family of which their father is the head. The applicants' father was an official of an organisation in Peru who had knowledge of and witnessed the excesses of the Fujimori regime. The applicants claimed that they may be killed if their father gives testimony against the Fujimori regime. The applicants also claimed that even if their father did not give evidence against the former regime they would still be at risk and would be threatened, which would keep the applicants in a state of fear. One of the applicants claimed that they had been assaulted and threatened in connection with a warning letter to their father not to testify and had received an anonymous telephone call from a person with a similar interest in discouraging the father from testifying.

Held: Decision under review affirmed

The Tribunal accepted that the applicants were members of a particular social group reasonably defined as members of the immediate family of the father. The Tribunal accepted that one of the applicants was assaulted and threatened in connection with a warning letter to their father not to testify against the Fujimori regime. The Tribunal found that the applicants' father had no intention of being an informant or assisting any enquiries into the activities of the Fujimori regime. Therefore, the Tribunal was not satisfied that there was a real chance that harm would result from their father testifying against the Fujimori regime. With regard to the claimed threats and harm which kept the applicants in a state of fear even if their father did not give testimony, the Tribunal found that they had been few and far between over the past three years, and the recent threats had been verbal threats that were not accompanied by physical harm. The Tribunal found that these threats did not involve sufficient risk of serious harm to amount to persecution. Further, the Tribunal found that the reasons for the feared persecution were purely individual and arose from

individuals' efforts to avoid prosecution for crimes committed by them. As such the Tribunal was not satisfied the applicants faced a real chance of Convention-related persecution in Peru.

Sudan

071940601

2 April 2008, Melbourne

Mr P Fisher, Member

SUDAN – POLITICAL OPINION – ETHNICITY – CONSCRIPTION – The applicant claimed to fear persecution on the basis of being compelled to perform military service in Darfur. The applicant was born and resided outside Sudan with a parent but studied in Sudan, his country of nationality. The applicant had not participated in university demonstrations and as a result had been injured by students who held his neutral views against him. He claimed he would be sent to Darfur following his university education because he was from a non-Arab minority, lacked a political affiliation with the ruling National Party and a family relative had been imprisoned for membership of a political party. He also claimed that he would be denied professional employment opportunities consistent with his qualifications.

Held: Decision under review affirmed

The Tribunal accepted that the applicant experienced problems from university students who resented his failure to participate in political protests but did not accept that he risked the harm claimed on return. He was allowed to leave Sudan despite outstanding military service obligations, thereby suggesting that the authorities lacked an adverse interest in him. There was also no evidence that he would be sent to Darfur for his actual or imputed political opinion or because of his ethnicity. The Tribunal did not accept that the applicant on his own evidence was or would be politically active. Country information did not support the proposition that non-Arabs were selectively sent to Darfur or recruited selectively or discriminated against in the military. Discrimination in government and private employment for those lacking political connections did not amount to persecution. As there was no evidence that his relatives were politically active, there was no real chance of persecution for reason of membership of a particular social group comprising his family. Conscientious objectors could constitute a particular social group but were not cognisable in Sudan and did not suffer persecution for a Convention reason arising from enforcement of a law of general application. Accordingly, the applicant did not have a well-founded fear of persecution for a Convention reason now or in the reasonably foreseeable future.

Turkey

071645328

24 January 2008, Melbourne

Mr P Katsambanis, Member

TURKEY – POLITICAL OPINION – ETHNICITY – KURDISH - THIRD COUNTRY PROTECTION – The applicant claimed to fear persecution in Turkey for reasons of his political opinion. He claimed that he had been imputed with a political profile which was supportive of various Kurdish nationalist causes. The applicant feared that if he returned to Turkey he would be targeted and harmed by Turkish authorities due to his political profile.

Held: Decision under review set aside

The Tribunal accepted that the applicant was a Turkish national who was of Alevi religion and of mixed Kurdish and Alevi ethnicity. The Tribunal accepted that as a result of the applicant's ethnic background he became active in Kurdish causes in Turkey and, following his arrest and detention for these activities, he was closely monitored by Turkish authorities. The Tribunal referred to independent country information and media reports that evidenced the hardline approach of Turkish authorities towards Kurdish nationals. The Tribunal was satisfied that the applicant had a well-founded fear of persecution because of his actual and imputed political opinion as a supporter of Kurdish causes, Kurdish identity and Kurdish nationalism. It did not accept that it would be reasonable for him to relocate within Turkey. The Tribunal also considered whether the applicant could access protection in a safe third country. The Tribunal found that the northern part of Cyprus did not fit the definition of 'country' and therefore found that the applicant had no right to enter and reside in a third country. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

SZJGV v MIAC and Anor
SZJXO v MIAC and Anor
SZKBK v MIAC and Anor
[2008] FCAFC 105

Federal Court of Australia, Spender, Edmonds and Tracey JJ, NSD 1424 of 2007, 19 June 2008

These were appeals from decisions of the Federal Magistrates Court dismissing applications for judicial review of decisions of the Refugee Review Tribunal (the Tribunal) that the appellants were not persons to whom Australia had protection obligations. The matters were considered together as they involved the proper construction of s.91R(3) of the *Migration Act 1958* (the Act).

In *SZJGV*, the Tribunal determined that under s.91R(3) it should disregard the appellant's Falun Gong related activities in Australia. It went on to list additional reasons it had had regard to in rejecting his claim that he was a Falun Gong practitioner in China, including "his recent attempts to construct a profile of a Falun Gong practitioner for himself".

In *SZJXO*, the Tribunal determined that under s.91R(3) it was required to disregard the appellant's involvement with Falun Gong in Australia. It went on to state that given its findings about the nature and motives for his contacts with Falun Gong in Australia it was not satisfied that there was any reason to believe he would become a Falun Gong practitioner if he returned to China.

In *SZKBK*, the Tribunal expressed the view that the appellant's failure to attend Church in Australia with any regularity indicated that she was not a committed Christian. It went on to state that it was not satisfied that she would attend an underground or unregistered church in China. A little later in its reasons, the Tribunal stated that, to the extent that the appellant had engaged in any religious practice in Australia, she had done so for the purpose of strengthening her claims of being a refugee and that the Tribunal disregarded such conduct in accordance with s.91R(3).

The appellants contended that, in each case, the Tribunal had taken the appellant's conduct in Australia into account in determining that the appellant was not a refugee, notwithstanding the failure of the appellant to satisfy it that the conduct was engaged in for a purpose other than enhancing the appellant's claim to be a refugee.

Held: *per curiam*, appeal dismissed

- (i) The Tribunal erred in law in contravening s.91R(3), by taking into account the appellants' conduct when it determined they were not refugees.
- (ii) Once the adjudication process has commenced, s.91R(3) can only be applied once primary findings of fact have been made. The Tribunal must decide whether or not conduct in which the applicant claims to have engaged in Australia has occurred. If it has not occurred then there will be nothing to disregard. Inaction can constitute conduct within the meaning of s.91R(3).
- (iii) Once the Tribunal declared that it was not satisfied that the appellant's conduct was undertaken for a purpose other than that of enhancing his or her claim to be a refugee, such conduct could not lawfully be brought into account. The conduct may suggest that such fear is or is not well-founded. In either case it must be disregarded.

Obiter

- (iv) A distinction might be drawn between an applicant's conduct and the reason or reasons for which that conduct has occurred. It is arguable that the Tribunal is only bound to disregard the conduct and may be able to rely on the motivation for the conduct for the purpose of bolstering or undermining the applicant's credibility. Such a distinction may not easily be drawn in many cases.

SZJGV

- (v) Having regard to the Tribunal's reasons as a whole, it is more likely than not that the Tribunal did have regard to the appellant's conduct in Australia; if only for the limited purpose of assessing the credibility of his claim to have been a Falun Gong practitioner in China and to have suffered persecution for having done so.

SZJXO

- (vi) The Tribunal did not have regard to the appellant's conduct in Australia for the purpose of deciding whether or not he had practised Falun Gong in China before coming to Australia. It did, however, have regard to his conduct in Australia for the purpose of determining that there was no reason to believe that he would be persecuted by reason of his Falun Gong activities should he return to China. It said that the nature of and the motives for the appellant's contacts with the Falun Gong movement in Australia was one of its reasons for concluding that he would not have any significant involvement with Falun Gong on his return to Australia.

SZK BK

- (vii) Had the Tribunal made its findings in relation to the appellant's conduct in Australia, then applied s.91R(3) and thereafter paid no regard to that conduct in its reasons, it could not have fallen into error. However, it expressly relied on conduct in Australia in determining that the appellant was not an active Christian and would not, therefore, face a real chance of persecution should she return to China. Only after these findings had been made was the relevance of s.91R(3) recognised and the statement made that the Tribunal disregarded the appellant's conduct in Australia. The Tribunal did not, however, return to the earlier analysis and consider whether or not it should be reviewed, given that certain evidence, originally relied on, was no longer to be taken into account.

SZK CQ v MIAC

[2008] FCAFC 119

Federal Court of Australia, Stone, Tracey & Buchanan JJ, NSD371 of 2008, 27 June 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, a national of Pakistan, was not a person to whom Australia had protection obligations. The appellant claimed to fear persecution for his membership of, and profile within, the Pakistani People's Party (PPP).

At hearing, the Tribunal asked the appellant to obtain confirmation from PPP officials of his standing and situation in the party. The applicant sent the Tribunal 2 documents: a letter from Mr A, Senior Vice-President of the Punjab PPP; and a letter from Mr K, a former PPP candidate. The Tribunal sent the documents to the Australian High Commission (AHC) in Islamabad, asking, among other things, to provide information from the authors as to how the appellant suffered as a result of his work for the party. The Tribunal wrote to the appellant under s.424A of the *Migration Act* 1958 (the Act), setting out the post's response, stating it may be the reason for the Tribunal not being satisfied he faced a real chance of harm and giving the appellant 14 days to provide comments on the information. The Tribunal found the letter from Mr A was not genuine and, as Mr K made no reference to the appellant being gaoled as claimed, the appellant had exaggerated his role and the harassment he suffered based on the failure. The Tribunal decision record was signed 1 day before the time for responding to the s.424A letter expired. The decision was handed down over four weeks later.

On appeal it was contended, among other things, that: the Tribunal failed to comply with r.4.35(3) of the Migration Regulations 1994 by making its decision prior to the expiry of the prescribed period; that the Tribunal failed to comply with s.424A(1)(a) and (b) by not providing particulars of information, being the questions asked of the AHC, and not ensuring that the applicant understood why the information referred to was relevant to the review respectively; and the Tribunal failed to comply with the requirements of ss.424, 424B and 441A in relation to the oral invitation at hearing to provide further information from party officials and the invitation to Mr A and Mr K for further information. The Minister argued that *SZKTI v MIAC* [2008] FCAFC 83 (*SZKTI*) was wrong and the Tribunal could proceed pursuant to s.424(1), rather than s.424(2) and not send an invitation in writing.

Held: *per curiam*, appeal allowed, RRT decision set aside and remitted for reconsideration

per Buchanan J (Stone & Tracey JJ agreeing)

- (i) The Tribunal failed to comply with the requirements of s.424(3) and failed to comply with s.424A(1)(b).
- (ii) The construction of s.424 approved by the Full Court in *SZKTI* was correct. The elements which must be present for the engagement of s.424(2) are: an invitation; to a person; to give information; which is additional information. These elements were present in relation to the request to the appellant at the hearing. The intention of s.424(2) is to provide some formality when the Tribunal intends to seek additional information from a person. There is no room for any election by the Tribunal to extend such an invitation informally under s.424(1).
- (iii) The obligation under s.424 does not apply to information provided by way of evidence or argument in an oral hearing.

- (iv) The significance of the information provided in the s.424A letter lay in what the two men contacted did not say, rather than what they did say. For the appellant to understand why the information in the AHC response might be relevant he needed to be informed of the questions to which the two men were responding. It was “reasonably practicable” for the Tribunal to give him the questions.
- (v) Although perhaps it would have been better had the decision not been signed before the expiry of the period for response to the s.424A invitation, the date of handing down was the date of decision. There was nothing to indicate the Tribunal was not prepared to consider further material from the appellant within the time which it had allowed.

obiter:

- (vi) Although the request to the AHC was in writing, there is nothing to suggest that the invitation to provide information which was extended to Mr A and Mr K was in writing. Prima facie, the provisions of s.424(2) were engaged with respect to the additional information sought from each of them.

per Buchanan J (Stone & Tracey JJ disagreeing)

- (iv) The use made of the response by the Tribunal depended on the context in which the response was given. The nature of the questions asked was equally a relevant fact or circumstance, and therefore ‘information’ required to be disclosed under s.424A(1)(a). The whole exchange was properly to be seen as ‘information’.

SZLBR v MIAC

[2008] FCAFC 85

Federal Court of Australia, Stone, Jacobson & Edmonds JJ, NSD 311 of 2007, 27 May 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, a Chinese national, was not a person to whom Australia had protection obligations.

The Tribunal invited the appellant to a hearing by letter sent to the appellant’s correct number and street address. However, the postcode was incorrectly specified by the Tribunal as “2000” instead of “2010”. Notwithstanding the error, the appellant responded to the invitation and appeared at the scheduled hearing. Following the hearing, the Tribunal sent the appellant invitations, by registered post, under s.424 and s.424A of the *Migration Act* 1958 (the Act), which were again correctly addressed except for the postcode. No response was received, although evidence before the Court was that the invitations had been received.

The appellant contended that the Tribunal failed to consider conditions in China and did not comply with s.424A of the Act.

Held: *per curiam*, appeal dismissed

- (i) Section 424A was not engaged as the Tribunal did not rely upon the adverse information referred to in the invitation.
- (ii) There are cogent reasons for concluding that the postcode is not part of the address and therefore the use of the incorrect postcode did not result in non-compliance with the Act in relation to the sending of the invitations.
- (iii) Even if the postcode is properly to be regarded as part of the address, and use of an incorrect postcode amounted to jurisdictional error, there was no practical injustice. As such, relief should be declined.
- (iv) The Tribunal did not fail to consider conditions in China.

MIAC v Yucesan & Anor

[2008] FCAFC 110

Federal Court of Australia, Emmett, Stone and Edmonds JJ, NSD 483 of 2008, 20 June 2008

This was an appeal by the Minister of a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) remitting the application for a Prospective Marriage (Temporary) (Class TO) subclass 300 visa for reconsideration with the direction that the visa applicant met various criteria, including cl.300.214 of the Migration Regulations 1994 (the Regulations).

The Tribunal found that at the time of application the parties had not met in person. However, the Tribunal noted that the term “met” was capable of differing interpretations and that it might go beyond meeting face-to-face to

include less direct forms of contact such as letters, telephone or internet. The Tribunal was satisfied that the ordinary meaning of the words “have met and are known to each other personally” did not exclude non physical person to person interactions. It found that the parties had met, albeit indirectly, by telephone, messaging and email and in the course of regular contacts could be said to have come to know each other personally.

The Minister contended that the Tribunal had committed jurisdictional error in that it misconstrued cl.300.214. The Minister submitted that the requirement for the parties to have met must mean meeting physically, face to face and that cl.300.214 requires two separate elements to be satisfied. It was submitted that the correct construction of cl.300.214 is directed to “weeding out marriages that are not genuine by ensuring that parties who have not actually met each other will not qualify”.

Held: appeal allowed, MRT decision quashed and matter remitted for reconsideration

- (i) The construction of cl.300.214 adopted by the Tribunal was not correct and the Federal Magistrate erred in holding that the Tribunal’s construction of cl.300.214 was correct.
- (ii) The context of cl.300.214, in particular the anticipation of physical cohabitation, provides no reason to depart from the primary sense of “have met” as requiring the parties to have come into each other’s company or physical presence. This is one of the indicators that their intention to marry is genuine.
- (iii) The decision to marry and live together as spouses involves a commitment to physical cohabitation, not just to a meeting of minds.

SZLAN v MIAC

[2008] FCA 904

Federal Court of Australia, Heerey J, NSD415 of 2008, 13 June 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 appellants were not persons to whom Australia had protection obligations.

The first appellant (the appellant) claimed to fear persecution by Maoists in Nepal resulting from Maoist demands for money from the appellant’s business. The Tribunal accepted that the appellant had been extorted by Maoists in the way claimed but found that the essential and significant reason for any harm feared was extortion or monetary gain, that there was no policy of Maoists targeting business people other than as suitably wealthy victims and found the appellant did not have a well-founded fear for a Convention reason in Nepal. Starting with the words “If the Tribunal is wrong about this ...” the Tribunal then found that the appellant was subject to s.36(3) of the *Migration Act 1958* (the Act) concluding that it was not satisfied that the appellant had taken all possible steps to avail himself of the right to enter and reside in India for which the Treaty of Peace and Friendship (the Treaty) provided. In consideration of s.36(5) it found that there was not a real chance the Maoists in Nepal would seek to extradite him and that any attempt to do so would fail as the necessary prerequisites would not be met.

The appellant contended that the Federal Magistrates Court had erred in finding that a fair reading of the Tribunal’s decision made it clear that the Tribunal did not express doubt about its findings and was doing no more than setting out an alternative bases for the decision and that the Tribunal’s finding that it was safe for the first appellant to return to Nepal was inconsistent with its findings in relation to extradition; that it did not properly apply s.36(3) as the Treaty only confers a right of residence and that it had failed to make a determination of whether the appellants had a well founded fear of persecution by reason of their membership of a particular social group constituted by wealthy Nepalis.

Held: appeal dismissed

- (i) The Tribunal did not err in finding that the appellant had a legally enforceable right to enter and reside in India in accordance with s.36(3). The issue is whether there was a right to ‘enter and reside’ in India rather than two separate rights, a right to enter India and a right to reside in India. No more was required than the matters which the Tribunal found to find the appellant had a right of entry to India. The appellant did not satisfy the Tribunal that he had taken all possible steps to avail himself of the right to enter and reside in India for which the Treaty provided.
- (ii) The Tribunal identified a relevant particular social group of wealthy Nepalis, but failed to address whether the extortionate demands placed upon the appellant were simply because of his perceived personal capacity to

provide an advantage for a self interested extorting party or whether the extortionate demands were placed upon the first appellant because he belonged to a particular social group.

- (iii) In using the phrase “If the Tribunal is wrong about this”, the Tribunal expressed doubt about its finding that the first appellant did not have a well-founded fear of persecution for reason of his political opinion or for reason of his membership of a particular social group. By failing to address all of the particular social groups which the Tribunal had contemplated the Tribunal did entertain doubt about its finding.
- (iv) The Tribunal’s finding that it was unlikely that the appellant could reasonably expect a fair trial in Nepal contradicted the finding that he would not face a real chance of persecution were he to return to Nepal. However, this finding was unnecessary given the Tribunal’s findings that there was no real chance the Maoists would seek to extradite him and that any attempt to extradite him would fail.

FEDERAL MAGISTRATES COURT JUDGMENTS

Ahmed & Ors v MIAC

[2008] FMCA 811

Federal Magistrates Court of Australia, Lucev FM, PEG 173 of 2008, 30 June 2008

The applicants sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate refusing to grant the visa applicants Skilled Australian Sponsored (Migrant) (Class BQ) visas.

The issue before the Tribunal was whether the second visa applicant satisfied Special Return Criteria (SRC) 5010 in Schedule 5 to the Migration Regulations 1994. SRC 5010 places a two year exclusion period on the ability of holders of certain student visas that are provided with financial support by the government of a foreign country to obtain further visas, unless there are compelling or compassionate circumstances to justify the grant of the visa.

The Tribunal found that the government of Bangladesh had provided "financial support" to the second applicant when he had previously held a Student Visa (Subclass 573). The Tribunal held that there was no indication that "financial support" intended to refer only to scholarships or formal sponsorship arrangements between a visa holder and a foreign government; nor was it limited to the payment of course fees only or living expenses. On this basis, and because one Bangladeshi government official had described the salary as "financial support", the Tribunal found that the half average salary the applicant had received as an employee the government of Bangladesh while he was on study leave in Australia was financial support. The Tribunal found that the second visa applicant did not meet SRC 5010.

The applicant contended, among other things, that the Tribunal did not properly interpret, and gave a wrong meaning, to the words 'financial support'; and as a consequence it erred in finding that the second applicant was provided by support by the Bangladeshi government.

Held: MRT decision quashed and remitted for reconsideration

- (i) The Tribunal failed to ask itself whether the payment of salary to the second applicant constituted financial support. If the Tribunal did ask itself this question, it so misconstrued or failed to have regard to the true nature of salary, that it failed to have regard to a relevant consideration, namely what the true nature of salary was and whether that amounted to financial support. These failures constituted a jurisdictional error.
- (ii) The Tribunal said what "financial support" is not and seems to have assumed that the half average salary payment constituted "financial support". In order to determine whether the payment of half average salary to the applicant constituted "financial support", the Tribunal ought to have considered whether the provision of salary was truly "support".
- (iii) To "support" is to take action to give a person "assistance, countenance, backing" or the "action of keeping from failing, exhaustion or perishing; esp. the supplying of a living thing with what is necessary for subsistence; the maintenance of life".
- (iv) The half average salary paid to the second applicant was payment in return for work which he had performed over the last few years. In that sense it was not support, financial or otherwise.

Lin v MIMA & Anor

[2008] FMCA 742

Federal Magistrates Court of Australia, Nicholls FM, SYG 2531 of 2006, 5 June 2008

The applicant sought judicial review of a decision of a delegate of the Minister for Immigration and Citizenship that the applicant was unable to apply for the Student (Temporary) (Class TU) visa, for which he had purportedly made an application. The applicant applied for the student visa one day before he applied to the Migration Review Tribunal (MRT) for review of an earlier decision of the delegate to cancel his previous student visa (the cancellation decision) pursuant to s.116 of the *Migration Act 1958* (the Act). A delegate refused the student visa application prior to the MRT's decision to affirm cancellation decision.

The applicant claimed and the Minister conceded that, although the language of the delegate's decision notification letter suggested that the decision was made to refuse an application for a student visa pursuant to s.65 of the Act, the delegate in fact rejected the application as invalid pursuant to s.48 of the Act because the applicant did not hold a

substantive visa at the time of visa application and had previously held a student visa that was cancelled under s.116 of the Act.

The applicant contended, among other things, that the delegate erred by deeming that application as invalid. The applicant claimed that, because his previous student visa was not cancelled properly as there was jurisdictional error in the cancellation decision for failure to comply with mandatory procedural requirements of the Act, it was “no decision at all” and he was not precluded from making a student visa application by operation of s.48 of the Act. The applicant also contended that even if the Tribunal can “cure” the cancellation decision when it later affirmed the decision, it was not open to the delegate to deem the student visa application as invalid before the Tribunal affirmed, or “cured” the cancellation decision.

Held: application dismissed.

- (i) The Tribunal had power to review the delegate’s decision as the jurisdictional error in the delegate’s cancellation decision did not deprive the Tribunal of jurisdiction to review the visa refusal decision.
- (ii) Although the delegate’s cancellation decision contained jurisdictional error, it was not “no decision at all”. It was a decision which had the consequence that it was a decision capable of being reviewed. It was this consequence that led the Tribunal to be able to “cure” the delegate’s decision: *Zubair v MIMIA* [2004] FCAFC 248.
- (iii) Section 349 of the Act distinguishes between varying the decision; and setting aside and substituting of a new decision, where a new decision is made or substituted for the delegate’s decision, from the situation in the current case where the Tribunal affirms the decision and, on the authority of *Zubair*, cures the decision of its jurisdictional error. In affirming the decision, the Tribunal does not make a new decision or substitute a new decision, but its conduct of the review operates to make good that which was affected in the delegate’s decision. That is, the delegate’s decision remains the operative decision as of its date.

SZLMD & Anor v MIAC & Anor

[2008] FMCA 724

Federal Magistrates Court of Australia, Cameron FM, SYG 3180 of 2007, 21 May 2008

The primary applicant (the applicant), a national of India, 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 in India because of extortionists and corrupt authorities.

The Tribunal invited the applicant to a hearing, but the applicant did not respond to that letter and neither he nor his wife appeared before the Tribunal. The applicant did not provide any further information to support his claims nor did he give the Tribunal the opportunity to explore relevant aspects of his claims and without further information from the applicant the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations.

The applicant claimed, *inter alia*, that the Tribunal failed to issue a meaningful invitation to the second applicant to attend a hearing pursuant to s.425A of the *Migration Act* 1958 (the Act) and the Tribunal made findings in the complete absence of evidence.

Held: application dismissed

- (i) Jurisdictional error on the part of the Tribunal was not demonstrated. The second applicant signed a declaration in the application for review which authorised the Tribunal to communicate with Applicant 1 or his or her authorised recipient about this application. The second applicant was authorising the Tribunal to communicate with the applicant on her behalf. The notice under s.425A of the Act was properly and adequately given to the second applicant: *SZKDB v MIAC* [2007] FMCA 1036. The Tribunal’s conclusion that the hearing invitation had been sent was well-based and thus it was entitled to proceed to make its decision when the applicants failed to attend its hearing.
- (ii) The appointment did not amount to appointment of the applicant as an authorised recipient under s.441G because it is an authority less expansive than s.441G contemplates. Nevertheless, the letter was sent to the second applicant’s agent, her husband, at the address on the review application as the legislation requires.
- (iii) The Tribunal did not make findings of fact in the absence of evidence. The Tribunal’s decision was based on an inability to make positive findings because of the dearth of evidence before it.

SZMBS v MIAC & Anor

[2008] FMCA 847

Federal Magistrates Court of Australia, Driver FM, SYG 680 of 2008, 4 July 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 on account of her religion.

The applicant claimed that she and her family converted to Christianity in 2006, and that she fled China to escape from harassment by Public Services Bureau officers with the help of her husband and other Christians. At the Tribunal hearing, the applicant tendered a document signed by Brothers Poh and Chen of 'The Local Church in Sydney', affirming she had been church regularly since 2007. During the hearing, the Tribunal – with the applicant's consent – telephoned Brother Poh and took evidence from him. The Tribunal found that the applicant was not a credible witness, finding that the applicant had given vague and inconsistent evidence. It disregarded her conduct of attending church in Australia under s. 91R(3) of the *Migration Act* 1958 (the Act), and concluded that the applicant did not have a well-founded fear of persecution for a Convention reason.

The applicant contended, among other things, that the Tribunal had breached its obligations under s.424A(1) in relation to her involvement in the local Church in both China and Australia, by not inviting her to comment on Brother Poh's evidence.

Held: application dismissed

- (i) The Tribunal decision was not infected by jurisdictional error.
- (ii) The evidence given by Brother Poh at the hearing was, to the extent it was relied upon by the Tribunal in its decision, favourable to the applicant, and was not in its terms a 'rejection, denial or undermining' of the applicant's claims. In any event, the Tribunal orally notified the applicant of the implications of s.91R(3). If there had been an obligation to disclose Brother Poh's evidence pursuant to s.424A, it was open to the Tribunal to make that disclosure orally pursuant to s.424A(2A). In the absence of a transcript of the hearing, it could not be concluded that there was no oral disclosure for the purposes of subsection s.424A(2A).
- (iii) This case was distinguishable from *SZKTI v MIAC* [2008] FCFC 83. Evidence was taken from Brother Poh during the hearing, with prior consent of the applicant. The Tribunal is empowered under s.427(1)(a) of the Act to take evidence on oath or affirmation and is empowered to administer such an oath or affirmation to a person appearing at a hearing. Appearing does not amount to requiring personal attendance. The circumstances are closer to those of *SZGBI v MIAC* [2008] FCA 599. Section 424 was not engaged. Rather, the Tribunal was proceeding pursuant to its general powers and, to the extent necessary, pursuant to s.427 and 429A which authorises the giving of evidence by telephone.

Tongburin v MIAC

[2008] FMCA 644

Federal Magistrates Court of Australia, Barnes FM, SYG 2369 of 2007, 4 June 2008

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to cancel the applicant's Student (Temporary) (Class TU) (Subclass 572) (Vocational Educational and Training Sector) visa.

The issue before the Tribunal was whether the applicant had complied with condition 8202(3)(a) of Schedule 8 to the Migration Regulations 1994 (the Regulations) which attached to her student visa. The Tribunal had regard to the education provider's attendance records and medical certificates provided to the Department and found that even when 29 days of 'explained absences' were taken into account, the applicant's attendance would still be significantly less than 80 per cent. The Tribunal was satisfied that the applicant had not complied with condition 8202 and that the ground for cancellation in s.116(1)(b) of the *Migration Act* 1958 (the Act) existed. The Tribunal was also satisfied that the non-compliance was not due to exceptional circumstances beyond the applicant's control and as such, these circumstances were prescribed circumstances in which the visa must be cancelled.

The applicant contended, among other things, that the Tribunal committed a jurisdictional error in the interpretation of condition 8202(3)(b) as the condition requires certification by the education provider and is invalid and *ultra vires* as a result of the Full Federal Court's judgment in *Dai v MIAC* [2007] FCAFC 199 and any cancellation is invalid

pursuant to purported breach of both 8202(3)(a) and (b). It was also contended that there was no evidence that the education provider kept attendance records.

Held: application dismissed

- (i) The reasoning of North and Gyles JJ in *Dai* in relation to condition 8202(3)(b) is not applicable to condition 8202(3)(a). *Dai* does not establish that the whole of 8202 (including subclause 8202(3)(a)) is *ultra vires* the legislation.
- (ii) The keeping of records by the education provider is a pre-requisite to the operation of condition 8202(3)(a). If such records are not kept, that aspect of condition 8202 would not apply to the visa holder's visa. However, the existence of such records does not mean that compliance with condition 8202(3)(a) cannot be controlled by the visa holder once it comes into play, as such compliance depends on the visa holder's attendance. Once the prerequisite is satisfied, it is then for the decision maker to determine whether he or she is satisfied that the holder attended for at least "80 per cent of the contact hours scheduled for each term and semester of the course"
- (iii) The fact that the education provider did not supply the Department or the Tribunal with its underlying source documentation for the attendance rate and breakdown is not such as to establish that the Tribunal erred in proceeding on the basis that the precondition was met so that 8202(3)(a) applied to the student visa in question.
- (iv) The information provided was such as to enable the decision maker not only to be satisfied that the education provider kept attendance records but also to calculate whether the visa holder had attended for at least 80 per cent of the contact hours scheduled for the semester in issue.
- (v) Medical certificates do not demonstrate "attendance" in terms of condition 8202(3)(a). Rather, they are relevant in relation to whether non-compliance was due to exceptional circumstances beyond the applicant's control, as provided for in r.2.43(2)(b)(ii)(B).

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 item 1224A and paragraph 462.221(c) - Arrangements for Work and Holiday Visa Applicants from Thailand, Iran, Chile, Turkey and United States of America - June 2008 (Legislative Instrument - F2008L02260) This Instrument, registered on 26/06/08 operates to list the foreign countries with which Australia has a reciprocal Work and Holiday (Subclass 462) Visa arrangement and to specify the required educational qualifications, the addresses for lodgement of applications for those applicants, and to specify the class of persons which may make applications in any foreign country. In particular, it specifies that applicants from the United States of America may make their application in any foreign country. The purpose is to specify that US applicants must hold secondary school qualifications. It takes effect from 1 July 2008.

Migration Regulations 1994 - Specification under regulation 1.20B, subregulation 1.20G(2) and subparagraph 1.20GA(1)(a)(i) - Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa - June 2008 (Legislative Instrument - F2008L02274) This instrument which was registered on 26 June 2008, specifies the methodology for calculating the minimum salary level using a salary formula, definitions and illustrative examples. The purpose of this Instrument is to exclude heavy truck drivers (other than heavy truck drivers working primarily on mining or construction sites), furniture removalists, automobile drivers and delivery drivers from the list of eligible occupations at Schedule C; and to make explicit the mutual exclusivity of Schedules C and D to the Instrument. It takes effect from 1 July 2008.

Migration Regulations 1994 - Specification under sub-item 1225(5) - Working Holiday Visa - Definitions of 'Specified Work' and 'Regional Australia' - June 2008 (Legislative Instrument - F2008L02264) This specification, registered on 26/06/08, provides the definitions of regional Australia and specified work, to encourage people on Working Holiday visas to live and work in regional Australia and support identified industries. Following 1 July 2008, holders of a Working Holiday visa who have completed three months of specified work in a defined regional area may be eligible for a further Working Holiday visa. This instrument also specifies the postcodes of the areas that are regional Australia.

Legislation Pending

Migration Legislation Amendment Bill (No.1) 2008 (Bill - C2008B00185)

The Migration Legislation Amendment Bill (No.1) 2008 was introduced in the Senate on 25 June 2008. Schedule 1 of the Bill will amend the *Migration Act 1958* to reinstate effective time limits for applying to the courts for judicial review of migration decisions and streamline the procedures for notifying parties of a decision of the Migration Review Tribunal and the Refugee Review Tribunal by, amongst other things, removing the requirement for the Tribunals to “hand down” their decisions. It will also create a new position of Deputy Principal Member for the Migration Review Tribunal.

CASELOAD OVERVIEW

MRT Decisions – June 2008

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	3	6	0	0	9
Visitor refusal	17	8	2	1	28
Student refusal	24	8	5	3	40
Temporary business refusal	19	4	6	5	34
Permanent business refusal	3	8	2	0	13
Skill linked refusal	22	26	5	2	55
Partner refusal	60	35	5	1	101
Family refusal	12	16	2	2	32
Student cancellation	18	15	1	3	37
Sponsor approval refusal	2	1	1	1	5
Other	17	19	4	3	43

RRT Decisions – June 2008

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	0	0	0	1	1
Bahrain	0	1	0	0	1
Bangladesh	2	2	0	16	20
Bolivia	0	1	0	0	1
China (PRC)	11	66	0	4	81
Colombia	0	1	0	0	1
Congo, Democratic Republic of	0	1	0	0	1
Egypt	0	2	0	0	2
Ethiopia	1	1	0	0	2
Fiji	0	1	0	0	1
Ghana	1	1	0	0	2
India	2	10	0	4	16
Indonesia	1	12	0	3	16
Iran	0	1	0	0	1
Iraq	0	1	0	0	1
Korea, Republic Of	0	3	0	0	3
Kuwait	0	1	0	0	1
Lebanon	0	3	0	0	3
Macedonia, Fmr Yugo Rep of	0	1	0	0	1
Malaysia	0	9	0	2	11
Nepal	2	1	0	0	3
Nigeria	1	1	0	0	2
Pakistan	1	2	0	1	4
Palestinian Terr. (W.Bank/Gaza)	1	1	0	0	2
Philippines	1	1	0	0	2
Romania	2	0	0	0	2
Samoa	0	1	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	3	5	0	0	8
Tanzania	0	1	0	0	1
Thailand	0	2	0	0	2
Tonga	0	1	0	0	1
Turkey	2	0	0	0	2
Uganda	0	2	0	0	2
Ukraine	0	0	1	0	1
Vietnam	0	1	0	0	1
Zimbabwe	2	3	0	0	5

PUBLICATION OF TRIBUNAL DECISIONS

The Migration Review Tribunal and Refugee Review Tribunal are required to publish decisions that are considered to be of “particular interest”.

Decisions which are regarded as of particular interest are decisions: identified as representing a broad cross-section of decisions having regard to factors such as the visa subclass and the outcome of the review; or where there is detailed consideration of legal arguments or policy issues; or where the factual circumstances are complex or unusual or where there is or is likely to be significant external interest; or where there is clear precedential value. The Tribunals aim to publish up to 20% of decisions made.

The Refugee Review Tribunal has a statutory obligation to ensure that the published version of a decision statement must not contain any information which may identify the applicant or any relative or other dependent of the applicant. Decisions that require extensive editing to meet this obligation, may not be published.

A selection of Tribunal decisions are available on the Migration Review Tribunal and Refugee Review Tribunal’s website located at <http://www.mrt-rrt.gov.au/>.

The website also contains information about how to apply to the Tribunals, how the Tribunals are organised, the function of the Tribunals, caseload statistics, as well as copies of this and previous Bulletins.

The website is updated on a regular basis.

The Migration Review Tribunal and the Refugee Review Tribunal shall not be liable for any reliance by any person on the summaries contained in this Bulletin. Each summary provides a guide only to each decision and should not, under any circumstance, be used as a substitute for the full text of a decision.

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