



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.

Contents

MIGRATION REVIEW TRIBUNAL DECISIONS.....	2
BUSINESS AND SKILLED VISAS	2
PARTNER AND FAMILY VISAS.....	4
STUDENT VISAS	4
OTHER VISAS	5
REFUGEE REVIEW TRIBUNAL DECISIONS.....	7
CHINA	7
EGYPT	8
INDIA	8
INDONESIA	8
IRAQ.....	9
KOREA	10
LEBANON	10
ROMANIA	11
FEDERAL COURT JUDGMENTS.....	12
SZHKA v MIAC.....	12
SZGWN v MIAC.....	13
SZJRI v MIAC	13
MIAC v SZLFX.....	14
FEDERAL MAGISTRATES COURT JUDGMENTS.....	15
BAJWA v MIAC & ANOR.....	15
BALINENI v MIAC & ANOR.....	15
SZG XK v MIAC & ANOR.....	16
SZLQY v MIAC & ANOR.....	17
SZLSP & ANOR v MIAC & ANOR	17
S2012 OF 2003 v MIAC & ANOR.....	18
SZLPJ & ANOR v MIAC & ANOR	19
SZMCD v MIAC & ANOR	19
LEGISLATION UPDATE	21
LEGISLATION PASSED	21
CASELOAD OVERVIEW.....	23
MRT DECISIONS – JULY 2008.....	23
RRT DECISIONS – JULY 2008.....	24
PUBLICATION OF TRIBUNAL DECISIONS.....	25
INDEX.....	26

MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

071860978

19 June 2008, Sydney

Ms S Pinto, Member

STANDARD BUSINESS SPONSORSHIP – R.1.20D(2)(c)(ii) – TRAINING – A delegate of the Minister for Immigration and Citizenship refused to approve the applicant as a Standard Business Sponsor on the basis that the applicant did not have a satisfactory record or demonstrated commitment towards training Australian citizens and permanent residents in accordance with r.1.20D(2)(c)(ii) of the Migration Regulations 1994 (the Regulations). The delegate found that the documents provided by the applicant did not adequately explain the training activities undertaken. The applicant's business imported cars from Japan which were not available anywhere else in Australia. He claimed the cars had to be modified to meet strict Australian standards. It was claimed the applicant employed a Consultant to educate staff in the specific requirements for each vehicle and gave staff Occupational Health & Safety training. The applicant also provided other documentation relating to the business.

Held: Decision under review set aside.

The Tribunal found the applicant's evidence detailed and consistent. It found regulatory requirements for vehicle modification to ensure compliance with Australian safety standards were complex and required intensive training and supervision. The evidence established to the Tribunal's satisfaction that regular in-house or in-service training was undertaken and the applicant had committed considerable financial resources to training. The Tribunal was therefore satisfied the applicant had a satisfactory record of training Australian citizens and permanent residents in accordance with r.1.20D(2)(c)(ii). The Tribunal was further satisfied that the applicant met all other requirements in r.1.20D for approval as a standard business sponsor.

071467029

12 June 2008, Melbourne

Ms D Buljan, Member

EMPLOYER NOMINATION – R.5.19(4)(C) – NOMINATED POSITION – QUALIFICATIONS – EXCEPTIONAL APPOINTMENT - A delegate of the Minister for Immigration and Citizenship refused the applicant's application for approval of an Employer Nomination under the Regional Sponsored Migration Scheme. The delegate was not satisfied that r.5.19(4)(c) of the Migration Regulations 1994 (the Regulations) had been met because the work to be performed by the nominated position of Production Horticulturalist did not require a person with a diploma or higher qualification. The delegate was not satisfied that the nominated position was an exceptional appointment. Before the Tribunal, the applicant submitted that the delegate's decision was affected by jurisdictional error and that the Tribunal lacked jurisdiction to review a nullity. It was also submitted that the delegate wrongly went behind a certificate from the relevant Regional Certifying Body for the purposes of r.5.19(4)(e). Evidence was provided concerning the employment conditions, duties and skills associated with the nominated position. It was also claimed that this was an exceptional appointment given local labour shortages and because a reliable worker, knowledgeable in horticultural production issues, rather than inexperienced seasonal contractors would contribute to the business's success.

Held: Decision under review affirmed.

The Tribunal was satisfied that it had jurisdiction to review the decision irrespective of whether the delegate complied with s.57 of the *Migration Act* 1958. The Tribunal also found that it was not bound to approve the Employer Nomination merely because there was a certificate from the Regional Certifying Body in accordance with r.5.19(4)(e). Considering the evidence, including submissions from relevant industry bodies, the Tribunal found that the work to be performed required the appointment of a person with a Certificate III qualification rather than a diploma or a 'higher qualification' as required by r.5.19(4)(c). The Tribunal was also not satisfied that appointment was 'exceptional'. While noting the applicant's need for skilled labour in the current environment, the Tribunal found skill shortages were not unique or exceptional in the applicant's operations; rather the issue was common across the agricultural and horticultural sectors. Accordingly, r.5.19(4)(c) was not satisfied and the application for approval of an Employer Nomination refused.

071635702

18 June 2008, Sydney

Mr J Duignan, Member

BUSINESS SKILLS – ESTABLISHED BUSINESS (RESIDENCE) (CLASS BH) – SUBCLASS 845 – CL.845.215 – NET ASSETS OWNED IN MAIN BUSINESS IN AUSTRALIA OF AT LEAST \$100 000 – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicants a Business Skills – Established Business (Residence) (Class BH) Subclass 845 visa on the basis that the first named applicant did not satisfy cl.845.215 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate found that the first named applicant did not hold assets of at least AUD\$100 000 in the businesses relied upon in respect of the application. The applicants relied upon the first and second named applicant's shareholding in two main businesses. Before the Tribunal, the applicants submitted that the delegate erred in the relevant calculation for the net assets owned in one of the businesses. It was submitted that loans which had been assigned to the applicants from the previous owners should be used in the calculation of total net assets because the relevant policy did not indicate that the loans had to originate with the applicants, or whether they could be assigned.

Held: Decision under review set aside.

The Tribunal was of the view that the appropriate way to treat the loans in considering the net assets of the applicants was that they should be treated as having been written off by the previous owners of the business. The previous owners clearly assigned those loans so that they had no further call on the company, and the sale price of AUD\$85,000 indicated that they were not regarded by seller or purchaser as having their full value at the time of the sale. For this reason, the Tribunal came to the view that the loans, totalling AUD\$415,000 should not be included in any calculation of the net assets held in the business after its purchase in 2003. The Tribunal formed the view that the loans should be treated as written off entirely and should therefore be removed from the calculation in their entirety. After making the relevant calculations without having regard to the assigned loans, the Tribunal found that the applicant met cl.845.215, as the available evidence supported a conclusion that the first and second named applicants together owned assets of at least \$100,000 at the time when the application was made and during the relevant 12 month period for the purpose of that clause.

071678684

30 May 2008, Sydney

Ms S Pinto, Member

INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) VISA - SUBCLASS 880 – CL.880.222 – POINTS TEST - ENGLISH LANGUAGE – DESIGNATED SECURITY - A delegate of the Minister for Immigration and Citizenship refused the application for an Independent Overseas Student (Residence) (Class DD) subclass 880 visa on the basis that the applicant did not satisfy cl.880.222 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he did not have the qualifying score when assessed under the points test. In relation to the English language requirement in Part 3, the applicant stated that he had sat IELTS tests and had achieved at least 5 for each of the 4 test components, but had been unable to achieve 6 for each of the 4 test components. He claimed he felt unwell when he had to sit the test and could not concentrate. He claimed his English skills were adequate to live and work in Australia. The applicant also advised that he was able to deposit \$100,000 into a designated security. The applicant claimed that the Department had closed the option of depositing a security and expressed frustration at this. His entitlement to points under other parts was not in dispute.

Held: Decision under review affirmed.

On the basis of the IELTS test results provided the Tribunal found the applicant was entitled to 15 points in accordance with Part 3 of Schedule 6A. The Tribunal was not satisfied that it was not reasonably practicable or necessary for the applicant to be tested under IELTS. The Tribunal accepted advice from the applicant that the option to deposit a security was no longer available and considered it unfortunate that the Department had effectively precluded this as an option whilst the legislation remained applicable for at least some applicants. However, in circumstances where the applicant had not deposited \$100,000 into a designated security for a period of at least 12 months, the Tribunal was unable to find that he met item 6A81(a) of Schedule 6A. The Tribunal found the number of points to be awarded to the applicant was 110 at the time of the primary assessment and the time of the Tribunal's assessment. At those dates, the pass mark was 115 points and the pool mark was 115 points. Accordingly, the Tribunal found that the applicant failed to achieve the qualifying score required to pass the points test or to be placed into the pool. The applicant did not meet cl.880.222 which was a prescribed criterion for the grant of the visa.

060826391

17 June 2008, Sydney

Ms S Leal, Member

SKILLED – INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) VISA – SUBCLASS 880 – CL.880.223 - VOCATIONAL ENGLISH - A delegate of the Minister for Immigration and Citizenship refused to grant the applicant an Independent Overseas Student (Residence) Subclass 880 visa on the basis that the applicant did not satisfy cl.880.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate found he did not have vocational English as defined by r.1.15B of the Regulations. The applicant completed six IELTS tests and did not score five or more, in each of its components, in any of the tests. He contended that an IELTS test was not necessary and the Tribunal should instead consider whether the applicant had vocational English on the basis of his Australian study and vocational experience, particularly as his brother, who lodged his subclass 880 visa only days after the applicant, had not been required to sit for the test.

Held: Decision under review affirmed.

The Tribunal found that the pre-1 November 2005 policy gave Departmental officers discretion to require that an IELTS be undertaken by the applicant. The Tribunal found the exercise of the discretion in relation to his brother's application was not material or relevant to the applicant's case. The Tribunal found that the applicant did not have 'vocational English' as defined in r.1.15B(3) (and amended by the Migration Amendment Regulation 2006 (No. 6)) as it was not satisfied that the applicant had achieved a score of at least five or more for each of the four test components of speaking, reading, writing and listening in a test conducted during the processing of the application. As the applicant had an IELTS test score in a test conducted during the processing of the application, the exercise of the discretion in r.1.15B(4) could not be considered. As the Tribunal was not satisfied that the applicant had vocational English, he did not meet cl.880.223.

Partner and Family visas

071721476

23 May 2008, Melbourne

Mr G Haddad, Member

CHILD (MIGRANT) (CLASS AH) - SUBCLASS 117 (ORPHAN RELATIVE) – CL.117.211 – NOT TURNED 18 AT TIME OF VISA APPLICATION – R.1.14 – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Child (Migrant) (Class AH) Subclass 117 (Orphan Relative) visa on the basis that she did not satisfy cl.117.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Based on the visa applicant's passport, which indicated that she was born on 1 January 1989, the delegate found that she was not an orphan relative within the meaning of r.1.14(a)(i), being over 18 years of age at time of application on 13 February 2007. The visa applicant provided on her visa application form a different birth date of 5 July 1989. Before the Tribunal, the review applicant provided a copy of the family Koran to further support the contention that the visa applicant was under 18 at time of visa application. The family Koran indicated that the visa applicant was born in approximately 1996. The review applicant claimed that the interpreter who assisted him in completing the visa application form made a mistake in converting the date of birth from Islamic Calendar to the Western Calendar. He claimed that the date of 1 January should not be taken literally, as it is the Afghan custom to record only the year of birth and citing New Year's Day as the date of birth was notorious. If accepted that the visa applicant was born on an intermediate date in 1989, there was over 87% chance that the visa applicant was less than 18 years of age at time of visa application.

Held: Decision under review affirmed.

The Tribunal accepted that the date and month was sometimes selected arbitrarily in Afghanistan and other countries and was prepared to consider that 1 January did not necessarily represent the exact date in all cases. However, the Tribunal observed the discrepancies between the translation of the family Koran and the interpreter's reading of the same record in the original language during the hearing. This, combined with other inconsistencies in the review applicant's oral evidence led the Tribunal to conclude that the visa applicant had fabricated much of the evidence. The Tribunal found that even if the date of birth recorded in the family Koran was reliable, the visa applicant would be considerably younger than had been submitted. Thus, it found that none of the dates of birth appeared to plausibly provide a date of birth for the visa applicant on which the Tribunal could rely. The Tribunal considered that, on balance, it was unable to reach a conclusion on the evidence that the visa applicant had not turned 18 at the time of the visa application. It therefore found that the visa applicant did not meet the requirements of r.1.14(a)(i). Further, the Tribunal did not accept that the visa applicant's father had died and therefore the visa applicant did not meet r.1.14(b).

Student visas

0800388

18 June 2008, Sydney
Ms R Mathlin, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – VISA CANCELLATION – S.116(1)(b) – CONDITION 8202(3)(b) – SATISFACTORY COURSE ATTENDANCE – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 573 (Higher Education Sector) visa under s.116(1)(b) of the *Migration Act* 1958 (the Act). The delegate found that the applicant had breached condition 8202(3)(b), as his education provider had certified that he had not achieved satisfactory course attendance. The applicant was invited to a hearing but did not attend due to a medical condition. The hearing was rescheduled for a later date but the applicant did not appear on the rescheduled date.

Held: Decision under review affirmed.

The Tribunal found that the education provider certified that the applicant had not achieved satisfactory course attendance. The Tribunal noted that the applicant indicated to the delegate that he was late in paying course fees, which caused him to miss two days of his course. As the applicant did not attend the hearing, the Tribunal was unable to be satisfied on the available information that these circumstances amounted to exceptional circumstances beyond his control. The Tribunal further noted the applicant appeared to claim to the delegate that he was not informed that his education provider intended to report him or of his subsequent appeal rights. Based on the information available, the Tribunal was unable to be satisfied of the matters alluded to by the applicant. The Tribunal found that there was no information before it which would suggest that the education provider had not complied with the requirements of the National Code. The Tribunal was therefore satisfied that the applicant had not complied with condition 8202(3)(b) 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 which made cancellation mandatory.

0800901

30 June 2008, Sydney
Ms B Connolly, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – CL.572.223 – ENGLISH LANGUAGE PROFICIENCY - A delegate of the Minister for Immigration and Citizenship refused the applicant a Subclass 572 visa as the delegate was not satisfied that the applicant met cl.572.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations). In particular, the applicant had failed to provide evidence of his English language proficiency for the purposes of item 5A404 of Schedule 5A to the Regulations and cl.572.223(2)(a)(i)(A).

Held: Decision under review set aside.

The Tribunal found that the applicant undertook his IELTS test on 31 May 2008, some 19 months after he lodged his application for the visa. The wording of cl.5A504(1)(a)(ii) required that the applicant achieve the relevant score 'in an IELTS that was taken less than 2 years before the date of application'. The Tribunal found that '2 years before' establishes the date of reference on which the expression 'taken less than' operates. The Tribunal interpreted the words 'taken less than' as permitting evidence of test results taken more recently or taken since the reference date. On this interpretation, the Tribunal accepted evidence of the applicant's IELTS test taken on 31 May 2008 and found his score reached the proficiency level required by cl.572.223(2)(a)(i)(A).

Other visas

071066401

5 June 2008, Melbourne
Ms K Kirmos, Member

DISTINGUISHED TALENT (RESIDENCE) (CLASS BX) - SUBCLASS 858 - CL.858.212(2) – INTERNATIONALLY RECOGNISED RECORD OF ACHIEVEMENT - The applicant applied for a Distinguished Talent (Residence)(Class BX) visa on the basis of his achievements as a gymnast. A delegate of the Minister for Immigration and Citizenship refused to grant the visa on the basis that the applicant did not meet cl.858.212 of Schedule 2 to the Migration Regulations 1994 (the Regulations), because the delegate was not satisfied, among other things, that the applicant had an internationally recognised record of achievement in gymnastics, despite evidence of future potential. The applicant submitted numerous documents including references, press clippings, awards and results. The applicant submitted that he had a record of achievement in gymnastics at junior national level but had few opportunities to compete.

Held: Decision under review affirmed.

The Tribunal accepted that, at the time of the visa application, the applicant was an outstanding junior athlete in Western Australia who competed nationally. However, the Tribunal found that the applicant's achievements had been limited to national competition. While acknowledging that the applicant had a future potential to succeed at the international level, it was not open to the Tribunal to disregard the requirement that at the time of application, the applicant have an internationally recognised record of exceptional and outstanding achievement. The Tribunal was not satisfied that there was any evidence of international achievement and found that the applicant did not satisfy cl.858.212(2)(a), and accordingly cl.828.212.

071188202

29 May 2008, Melbourne

Ms J Ellis, Member

CULTURAL/SOCIAL(TEMPORARY) (CLASS TE) VISA – SUBCLASS 428 – CL.428.311 – MEMBER OF FAMILY UNIT – CUSTOMARY MARRIAGE - A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Cultural/Social (Temporary) (Class TE) Subclass 428 visa on the basis that she was not a member of the family unit of a Subclass 428 visa holder. The visa applicant applied as the spouse of a subclass 428 visa holder. She claimed that she married the visa holder according to the Hindu religion. The parties did not register their marriage as it was not necessary to do so under Indian law. Evidence before the Tribunal suggested the applicant was 17 years old at the time of marriage. The review applicant gave evidence that because the visa holder was a Hindu priest, the religious aspect of the wedding was more important than the fact that the visa applicant was under 18 years old at the time of the wedding and that the marriage was not registered. The review applicant's representative claimed that even though the visa applicant should have been at least 18 years old to marry, this did not mean the marriage was invalid according to Indian law. It was claimed that in the alternative, the applicant was the de facto of the visa holder under r.1.15A of the Migration Regulations 1994 (the Regulations) as they had lived together for over 12 months.

Held: Decision under review set aside.

The Tribunal found that the visa applicant and the visa holder were not in a marriage that was valid for the purposes of the *Migration Act* 1958. The Tribunal considered country information and accepted that marriages need not be registered under Indian law. Country information also suggested that a woman must be 18 years or older to enter into a marriage in India. The Tribunal found that the visa applicant was 17 at the time of her wedding and was not of marriageable age under s. 23B and s. 88D of the *Marriage Act* 1961. The Tribunal further considered that because the visa applicant was under 18 at the time of her wedding, the marriage may not be valid under Indian law. The Tribunal considered whether the visa applicant was in a de facto relationship with the visa holder. Based on the evidence provided by the visa applicant and the review applicant, the Tribunal was satisfied that, at the time of application, the visa applicant and the visa holder were in a de facto relationship and the visa applicant was the spouse of the visa holder. Accordingly, the Tribunal found the visa applicant was a member of the family unit of the visa holder and satisfied cl.428.311, 428.312 and 428.321 of Schedule 2 to the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

China

0801639

27 May 2008, Sydney

Mr G Short, Senior Member

CHINA – PARTICULAR SOCIAL GROUP – DISPOSSESSED FARMERS – POLITICAL OPINION – PROTEST ORGANISER – The applicant claimed to fear persecution after the local government confiscated his farming land without consent. He claimed to be a member of a particular social group, identified as ‘dispossessed farmers’ or ‘farmers of deprived land fighting for Living Right’, who had initiated litigation over several years without success. He also claimed to hold an adverse political opinion after organising a protest which was dispersed by police. He claimed to have been subjected to surveillance and, together with other ‘delegates’ acting for the farmers, detained and tortured before escaping to Australia when sought for arrest. He provided a ‘Notice of Detention’ issued by the Public Security Bureau and a ‘Certificate of Release from Detention’ to the Tribunal. He also produced press reports indicating that evicted farmers complained of inadequate compensation following forced removal including one concerning land requisition for state-level development in his home city.

Held: Decision under review affirmed.

The Tribunal found the applicant not to be credible. His inability to recall events was not explicable by his education and he was unable to provide details additional to the account contained in his protection visa application, thereby suggesting that another had drafted his statement. Although accepting that he was a farmer, the Tribunal did not accept that his land had been compulsorily acquired. The legal system did not deny basic rights to farmers as submitted but treated them no differently to urban residents. The Tribunal rejected the suggested particular social group because the feared persecution defined the group. As independent information indicated that official documents could be bought or forged, his documentary evidence was given little weight relative to his oral evidence. Independent information also cast doubt on his claims to have been arrested and detained. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

0801613

17 June 2008, Sydney

Mr R Derewlany, Member

CHINA – PARTICULAR SOCIAL GROUP - ONE CHILD POLICY – The applicants claimed to fear persecution because they breached China’s One Child Policy. The applicants claimed that they were penalised with a government social maintenance fee, which they did not pay in full as they believed the fine was unreasonable. They claimed that their child could not obtain Chinese citizenship or be enrolled at primary school. The applicants claimed that they had to bribe local police to obtain Chinese citizenship for the child but could not say anything to the local government about having bribed a police officer. The applicant claimed that he was arrested repeatedly and was detained by the authorities until a fine was paid. He claimed that the authorities damaged their house and he was forced to undergo litigation. The applicant claimed that he was unable to make a living in China as a driver because the government installed infrastructure on the route he used to drive his vehicle.

Held: Decision under review affirmed.

The Tribunal accepted that the applicants had breached China’s One Child Policy and were required to pay a social maintenance fee. However, the Tribunal found that China’s family planning policies are reflected in laws of general application. The Tribunal did not accept that the authorities applied the law in an unduly harsh or discriminatory manner for a Convention reason. It found that as the applicants were able to continue working without ongoing problems, the requirement to pay the fee did not constitute serious harm. The Tribunal did not accept that any problems in relation to official enrolment of their child for education were for a Convention reason, but were due to the applicants’ refusal to pay the outstanding social maintenance fee. It did not accept that the applicant was formally arrested or that the authorities asked the applicant or his wife to undergo litigation. Furthermore, the Tribunal found that the applicant was required to report to the authorities because he was required to pay social maintenance fee for breaching the One Child Policy and not because of any Convention reason. The Tribunal also did not accept that the authorities introduced the infrastructure for other than planning reasons. Accordingly, the Tribunal did not accept that the applicants had a well founded fear of being persecuted for a Convention reason.

Egypt

0800622

27 June 2008, Sydney

Ms K Hartman, Member

EGYPT – POLITICAL OPINION – The applicant claimed to fear persecution on the basis of his political opinion. He claimed to have been targeted by the ruling National Party because he had refused to join the party, had spoken publicly against it, and had also stood as an independent candidate in the general elections. He also claimed to have attempted to establish new political parties, as well as claiming that he was sacked from his employment, arrested, detained and tortured by the Egyptian authorities because of his political activities.

Held: Decision under review affirmed.

The Tribunal found that the applicant's evidence at the hearing was vague, lacked details, was internally inconsistent and was inconsistent with his written claims. The Tribunal found that the applicant's knowledge of Egyptian politics was not consistent with his claims that he had been involved in politics for many years, and that his lack of knowledge indicated that his claims to have stood as an independent candidate in the general elections and to have conducted meetings and given speeches were not true. The Tribunal also found the fact that the applicant had been able to depart Egypt when he did indicated that his claims to have been arrested, detained and accused of instigating young people against the regime were not true. Accordingly, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations.

India

071972350

24 June 2008, Sydney

Ms L Mojsin, Member

INDIA – PARTICULAR SOCIAL GROUP – PERSONS WITH A MENTAL DISABILITY – STATE PROTECTION – SERIOUS HARM – The applicant, a Muslim, claimed to fear persecution for reasons of membership of a particular social group. The applicant was severely injured in an accident while in Australia which resulted in his losing some mental capacity. The applicant claimed that he would suffer discrimination from his family, society and the State amounting to Convention harm because of his disability. He further claimed that the State was unable to address negative societal attitudes directed at persons with a disability and would not provide effective protection.

Held: Decision under review affirmed.

The Tribunal accepted the applicant could be a member of a particular social group being 'his family', 'persons with a disability', 'persons with a mental disability', 'Muslims with a mental disability' or 'persons with a mental disability who have returned from overseas'. The Tribunal found that the applicant returning to India twice indicated a lack of subjective fear of persecution. While accepting that there were negative societal attitudes in India towards people with disabilities and the effectiveness of programs and initiatives for disabled persons had been impaired by a lack of adequate funding, the Tribunal found that the State was willing and able to protect people with disabilities. The Tribunal was not satisfied that the applicant would be denied access to basic services or denied the capacity to earn a livelihood which would amount to serious harm. Consequently, the Tribunal was not satisfied the applicant had a well-founded fear of persecution for a Convention reason.

Indonesia

0801924

10 June 2008, Sydney

Ms C Carney, Member

INDONESIA – POLITICAL OPINION – ACEH INDEPENDENCE - The applicant was previously granted a Subclass 785 (Temporary Protection) visa. A delegate of the Minister for Immigration and Citizenship refused to grant the

applicant a further protection visa. The applicant claimed she was afraid to live in Aceh as she may be raped by the military. She said her parents were GAM supporters and that if she returned from overseas she would be suspected of being involved in politics and to have worked against the MOU and peace accord. The applicant claimed to be supportive of continuing the fight for an independent Aceh. She said she was still traumatised as she saw a friend shot and another person she knows well being tortured. The applicant claimed to have gone to meetings and events in Australia, but that she was not a high profile member of GAM. The applicant said she would find it difficult to live somewhere else in Indonesia and her representative submitted that relocation would not be practical as the applicant and her husband would be isolated and they could come to the attention of the military.

Held: Decision under review set aside.

The Tribunal accepted the applicant's evidence and found that she was a witness of truth. Her evidence was consistent with previous evidence given to the Department and consistent with the latest independent country information. The Tribunal found that the applicant came from a region where violence is directed at former GAM supporters. The Tribunal accepted that the Indonesian military have previously worked with militia to destabilise and punish populations that have been seen to work against their goals. The Tribunal accepted that if the applicant were to return to Aceh the local inhabitants would know she had returned from overseas and this could put her at risk. The Tribunal accepted that she had witnessed traumatic events and due to the deteriorating situation in Aceh she would be at risk if she were to return. The Tribunal considered whether the applicant could return to live in Jakarta. The Tribunal found that the applicant would have to apply for an identity card when she re-entered Indonesia which could bring her to the attention of authorities, she had no financial resources and her accent would mark her as an outsider. The Tribunal came to the conclusion that it would not be reasonable to expect a young traumatised woman to relocate within a conservative society such as Indonesia. The Tribunal accepted that if she returned to her province she would be at risk of rape, violence and being detained by local authorities and the Indonesian military. The Tribunal found that there was a real chance of persecution and was satisfied that the applicant's fear was well-founded.

Iraq

0802435

2 July 2008, Sydney

Ms P McIntosh, Member

IRAQ – RELIGION – CHALDEAN CHRISTIAN – THIRD COUNTRY PROTECTION – S.36(3) – The applicant claimed to fear persecution for reasons of her Chaldean Christian religion. The applicant claimed she faced constant threats and feared going to church. She claimed a relative was kidnapped and she had to pay a ransom for his release which frightened her. Therefore another relative arranged for her to gain permanent residence in another country. However, the applicant claimed the relationship broke down. Her relationship with her relative was such that if she tried to return to the country she would tell the authorities the applicant had abandoned her permanent residency and she would not be able to re-enter.

Held: Decision under review set aside.

The Tribunal accepted the applicant was a Chaldean Christian and noted independent information which plainly illustrated Christians faced high levels of intimidation. They also faced harm for a political opinion imputed to them for their perceived association with the occupying countries. The Tribunal found that merely being Christian was sufficient to give rise to a well-founded fear of Convention related persecution. The Tribunal also found that the applicant had gained documentation of permanent residence in another country through a relative. However, it found that she did not have an existing, legally enforceable 'right' to enter and reside in that country. Rather it was dependent on the perception of the authorities as to whether she had intended to leave permanently and/or abandon her permanent residency. The Tribunal accepted she had lost the passport containing the documentation and the inevitable investigation of her status would lead authorities to evidence the relationship with the relative had broken down. The Tribunal further accepted the applicant's relative may inform the authorities she had intended to leave permanently. As a result, s.36(3) did not apply to the applicant with respect to that country. The Tribunal found that the applicant had a well-founded fear of persecution for a Convention reason.

0801550

12 June 2008, Sydney

Ms P Leehy, Member

IRAQ – CO-OPERATION WITH US FORCES – THIRD COUNTRY PROTECTION – S.36(3) – The applicant claimed to fear persecution by Iraqi nationals due to his and his family's cooperation and work for the American

forces in Iraq. The applicant had been given refugee status in country X but claimed that while he was living in country X he was threatened with serious harm by other Iraqis. The applicant claimed to have given his country X passport to people smugglers in order to travel to Australia.

Held: Decision under review affirmed.

The Tribunal rejected any claims that the applicant was directly threatened, or otherwise seriously harmed by Iraqis in country X. The Tribunal found that country X authorities had confirmed that the applicant was issued with a valid passport and as such, an application for a passport to replace that taken by smugglers was a mere formality. The Tribunal found that the applicant had a right to enter and reside in country X, and that this right has been acquired by the applicant pursuant to a process of assessment under country X law which found him to be a refugee. The Tribunal therefore found that the right of re-entry and residence was a legally enforceable and presently existing right. The Tribunal found that the applicant had not taken all possible steps to avail himself of his right to enter and reside in country X and, in fact, attempted to conceal this right from authorities in Australia from the time of his arrival up to the time of his Tribunal hearing. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution in country X. The Tribunal was also not satisfied that the applicant had a well founded fear of refoulement to Iraq or any country by country X authorities. Therefore the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations.

Korea

0800412

15 April 2008, Melbourne

Ms R Johnston, Member

REPUBLIC OF KOREA – PARTICULAR SOCIAL GROUP – SINGLE MOTHERS – SOCIAL SERVICES – The applicant claimed to fear persecution after becoming pregnant following her arrival in Australia. Although separated from her abusive partner, she feared that she would not be permitted to leave and was unwilling to abandon her child. If returned to South Korea, she claimed that she would lack family support and face social discrimination due to prevailing cultural conditions. This included denial of comparable health care and social security benefits from the government and an inability to secure the employment for which she was qualified due to adverse client perceptions.

Held: Decision under review affirmed

The Tribunal accepted that the applicant conceived a child out of wedlock after arriving in Australia, no longer contacted the child's father, found her personal circumstances distressing and held a genuine subjective fear of returning to South Korea. It also accepted that she may face some expression of hostility or disapproval from other South Koreans as a single mother. However, independent information suggested that the traditional social stigma attached to single mothers in South Korea was declining and they would not face ostracism amounting to serious harm. The government had been attempting to reduce discrimination against single mothers in relation to employment and housing and was enhancing the generally inadequate social security benefits available to them. Any difficulties encountered in balancing child care with employment would not result from Convention-related harm. Following registration, her child could access citizenship rights and medical, housing, employment and educational services. Accordingly the Tribunal was not satisfied that she had a well-founded fear of persecution for a Convention reason.

Lebanon

0801064

2 June 2008, Sydney

Ms P Pope, Member

LEBANON - RELIGION – CHRISTIANITY - The applicant feared persecution because he was a Muslim and his wife was a Christian. He claimed that the situation is not stable in Lebanon and he and his wife could not live in their area together. He also claimed that there were several Muslim groups in Lebanon, and if there was a sectarian war, it would spark trouble in his area. In response to the Tribunal's enquiry, he indicated that neither he nor his wife practise their respective religions in Australia.

Held: Decision under affirmed.

The Tribunal found that the applicant and his wife are unlikely to come to the adverse attention of family and local residents of Lebanon for reason of their religious beliefs and practice. They did not currently practise any religion in Australia. The Tribunal found that any harm the applicant described was speculative and was possible harassment or discrimination, not serious harm. The Tribunal found nothing in the applicant's evidence or in the independent country information to support a finding that the applicant would face serious harm in the place he is from because he is married to a Christian. The Tribunal found there was not a real chance that the applicant would suffer serious harm if he were to return to Lebanon in the reasonably foreseeable future. Accordingly, it was satisfied that the applicant did not have a well-founded fear of persecution based on his religion.

Romania

08000663

26 May 2008, Melbourne

Ms W Boddison, Member

ROMANIA – RACE – ROMA ETHNICITY - The applicant claimed he was continuously persecuted by the Romanian police, government and local officials because he was a gypsy. He claimed to have been denied education, forcefully placed into an institution and was accused and convicted of a crime which he did not commit. He claimed to have suffered serious physical abuse at the hands of the authorities over a long period of time. The applicant submitted medical evidence to the Tribunal confirming his injuries. The applicant claimed that his parents may have been involved in a gypsy organisation and that when they and a sibling left Romania, the situation became more difficult. The applicant claimed that if returned to Romania, he would be subjected to more abuse, mistreatment and physical harm.

Held: Decision under set aside.

The Tribunal found the applicant to be an impressive witness who gave his account in an unhesitating and plausible manner. The Tribunal accepted that the applicant was a member of the Roma ethnic group. It accepted that his parents were involved in a Roma organisation and this may have led to the family developing a profile which has been enhanced by his siblings leaving Romania. The Tribunal considered that once the applicant was convicted of a criminal offence it may have meant that he was constantly under the eye of the authorities and subjected to ill treatment. The Tribunal found that while country information suggested that steps are taken to improve institutional attitudes towards Roma in Romania, it also indicates that there are regular ill-treatment and abuse at the Roma simply because they are Roma. The Tribunal therefore accepted that the applicant had suffered serious harm amounting to persecution in the past for reasons of his Roma ethnicity. The Tribunal also considered whether it was reasonable for the applicant to relocate to avoid harm, but found that country information suggested that attitudes to the Roma people are entrenched throughout the country, demonstrated by high level politicians making derogatory comments about the Roma in national forums.

FEDERAL COURT JUDGMENTS

SZHKA v MIAC
SZGOD v MIAC
[2008] FCAFC 138

Federal Court of Australia, Gray, Gyles and Besanko JJ, NSD 625 of 2007, NSD 1937 of 2007, 5 August 2008

These were appeals from decisions of the Federal Magistrates Court upholding 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.425 of the *Migration Act* 1958 (the Act) upon reconsideration of a matter remitted by the Courts.

Each appellant had applied for review by the Tribunal and in each case the Tribunal gave an invitation to appear before it under s.425 of the Act. In each case, the first Tribunal affirmed the decision of the delegate and the appellant made an application for judicial review in which the Court ordered by consent that the Tribunal reconsider the matter. In each case, the Tribunal was reconstituted after the remitter of the application for review to it and the second Tribunal did not give the appellant a second invitation to appear before it under s.425 of the Act and affirmed the decision of the delegate.

The appellants contended that the Tribunal on reconsideration of an application for review was required to give an invitation to appear before it and had thus breached s.425 of the Act. In the alternative the appellants claimed the Tribunal breached s.425 in not giving the opportunity to give evidence and present arguments on certain identified issues arising in relation to the review.

Held: per Besanko J (Gray and Gyles JJ agreeing), appeal allowed. RRT decisions quashed and remitted for reconsideration according to law.

per curiam

- (i) The Tribunal fell into jurisdictional error by failing to comply with s.425 of the Act on remittal as the appellants had not been given the opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review.
- (ii) In *SZGOD*, the issue that was important to the decision of the second Tribunal on remitter was whether the appellant was involved in the transport industry. The second Tribunal found that he was not. That issue was not apparent to the appellant prior to or at the hearing of the first Tribunal and was a fundamental one in the sense that his claims of political and trade union activity were based on it.
- (iii) In *SZHKA*, the second Tribunal placed significance on the use by the appellant of the term Falun Gong member as distinct from Falun Gong practitioner and this was not an issue apparent to the appellant.

per Gyles J (Gray J agreeing, Besanko J dissenting)

- (iv) The opportunity to be provided by virtue of s.425 to appear before the Tribunal face to face is not provided by an appearance before another Tribunal member on an earlier occasion in the course of an aborted review.

per Besanko J (dissenting)

- (v) In the absence of express words in the Act, it is not open to conclude that Parliament must have intended that in every case of a remittal from the Courts a second invitation to appear under s.425(1) must be given. It depends on the circumstances.

per Gyles J (Gray J agreeing) Obiter

- (vi) It is difficult to see an escape from the proposition that once an administrative decision is set aside for jurisdictional error, the whole of the relevant decision making process must take place again. Mandatory statutory obligations must be carried out again. Such a conclusion would not mean that what has taken place in the previous review cannot be taken into account in the second review if considered relevant.

per Gray J Obiter

- (vii) The member who comes to deal with the case may choose to rely on the record but is not compelled to do so. By virtue of s.422(2) and s.422A(3) the member who comes to constitute the Tribunal after its reconstitution may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted. Neither s.422 nor s.422A says anything about the exclusion of the Tribunal's

obligation under s.425(1). Having regard to the record is in no sense a substitute for the opportunity pursuant to s.425(1) to give evidence and present arguments about the issues.

SZGWN v MIAC

[2008] FCA 238

Federal Court of Australia, Gilmour J, NSD 2206 of 2007, 24 July 2008

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations. The appellant, a Chinese national, claimed to fear persecution for reasons of imputed political opinion and religion as a Falun Gong adherent.

A previous decision on the review was set aside by the Federal Magistrates Court and remitted to a second Tribunal, which conducted a further hearing. After that hearing, the appellant, through his solicitors, provided written submissions and a transcript of the hearing prepared by a NAATI-accredited expert which identified a number of interpreting errors. The Tribunal accepted there were interpreting errors and relied on the written transcript but rejected the appellant's claims due to lack of credibility and unresolved contradictions in his evidence. The Tribunal rejected the appellant's claims to be a genuine Falun Gong practitioner or sympathiser.

The appellant contended before the Federal Magistrates Court that the Tribunal failed to comply with s.425(1) of the *Migration Act 1958* (the Act) because the standard of interpretation at the hearing was so inadequate that he was effectively prevented from giving evidence. The Federal Magistrate found that the Tribunal had taken appropriate action to address the interpreting errors and there was no breach of s.425. On appeal, the appellant additionally contended that the Tribunal decision was vitiated by jurisdictional error due to a reasonable apprehension of bias.

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

- (i) The failure to provide adequate interpreting services meant that the Tribunal did not comply with s.425 and made a jurisdictional error.
- (ii) Errors in interpreting may be rectified by written submissions after the hearing. However, it will depend on the nature and extent of the errors. In this case neither the post-hearing written submissions nor the transcript were capable of curing the fundamental problems created by the poor interpretation. The incorrect interpretation of questions asked by the Tribunal Member could not be cured. The correct questions were never asked because they were poorly interpreted and it cannot be assumed what the answers would have been if this had not occurred. Furthermore, the negative impression in the mind of the Tribunal Member conveyed by the appellant's answers was impossible to eradicate after the hearing.
- (iii) The failure to ask for a further hearing did not affect the Tribunal's continuing obligation under s.425. The appellant did not consent to the Tribunal deciding the review without a further hearing pursuant to s.425(2)(a). Consent for these purposes would be required to be given in unambiguous terms.
- (iv) Apprehended bias was not demonstrated. The Member was not dismissive and the allegation that the Member 'deliberately disregarded' some of the evidence was completely without foundation. It was reasonable for the Member to re-direct his questions when they were seemingly producing unnecessarily long responses. The Tribunal Member was also the victim of poor interpretation.

SZJRI v MIAC

[2008] FCA 1090

Federal Court of Australia, Gilmour J, NSD 58 of 2008, 24 July 2008

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

The Tribunal was not satisfied that there was a real chance that an essential or significant reason for persecution directed towards the appellant was because he was a member of the Nepalese police force or by reason of his imputed political opinion. This was, it found, because the sole or dominant motive for the Maoists' targeting of the appellant was the satisfaction of a personal grudge against him and implicitly therefore not by reason of his imputed political opinion.

At first instance, the appellant argued that the Tribunal had made an error of law by assuming that the fact that an act was one of “revenge or retribution” necessarily makes it “non-political”. The Federal Magistrate dismissed the action.

On appeal, the appellant contended that the Federal Magistrate erred in law by refusing or otherwise failing to find that the Tribunal was in jurisdictional error when it concluded that the appellant’s fear of harm was not Convention related.

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

- (i) Although it acknowledged, by setting out the relevant passage from *MIMA v Singh* [2002] 209 CLR 533 (*Singh*), that revenge is not the antithesis of political struggle, the Tribunal failed to consider all of the relevant evidence necessary to enable it to find whether indeed the revenge threatened arose from one or both of the Convention reasons relied upon. That failure was a relevant error of law.
- (ii) The Tribunal did not properly instruct itself as to the law that, even where revenge is the immediate purpose or motive, that it can nevertheless sit within a political context, sufficient to attract the protection of the Convention. In substance, the Tribunal impermissibly concluded that vengeance was incompatible with a political motive. This in turn, it appears, led the Tribunal to side-step the question of the political nature of the Maoist insurgents operating in Nepal. The Tribunal did not discharge the necessary evaluation in relation to the reasons why the appellant was targeted and claimed to have a well-founded fear of persecution.
- (iii) It was unreasonable on the evidence before it for the Tribunal to conclude that the motive of revenge, if indeed that is what it was, was equivalent to a personal grudge. The question of motive, objectively viewed, should be considered against all the relevant circumstances. There was no evidence to warrant a conclusion that the appellant was threatened for reasons of personal animus or private retribution.
- (iv) The principles of analysis and characterisation of motives in *Singh* should not be read so as to confine their application only to cases involving consideration of Art 1F(b) of the Convention.

MIAC v SZLFX

[2008] FCAFC 125

Federal Court of Australia, Branson, Bennett and Flick JJ, NSD 625 of 2008, 27 June 2008

This was an appeal by the Minister for Immigration from the decision of the Federal Magistrates Court in *SZLFX v MIAC* [2008] FMCA 451 (*SZLFX*) quashing a decision of the Refugee Review Tribunal (the Tribunal) that the respondent was not a person to whom Australia owed protection obligations.

The applicant, a national of China, 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.

The Federal Magistrate in *SZLFX* held that the Tribunal committed jurisdictional error by failing to comply with s.424A of the *Migration Act* 1958 (the Act) and giving the requisite notice in relation to the Tribunal file note.

Held: Appeal dismissed.

- (i) Agreeing with the judgment of the Full Court in *SZKQC v MIAC* [2008] FCAFC 119, *SZKTI v MIAC* [2008] FCAFC 83 is not wrongly decided and should be followed.
- (ii) The first respondent’s contention must succeed on the basis that the appellant accepted that it must if *SZKTI* was rightly decided.
- (iii) The issue raised by the ground of appeal called for consideration, in the context of the duty imposed on the Tribunal by s.424A, the proper understanding of the approach adopted by the Tribunal in this case. In the

circumstances it was not necessary in the interests of justice to express a concluded view on this ground of appeal.

FEDERAL MAGISTRATES COURT JUDGMENTS

Bajwa v MIAC & Anor

[2008] FMCA 915

Federal Magistrates Court of Australia, Lloyd-Jones FM, SYG 3055 of 2007, 4 July 2008

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) that it did not have jurisdiction to review a decision of the Minister's delegate because the application for review was received by the Tribunal outside the statutory time limits.

The applicant and his dependent family members applied for Skilled Australian Sponsored (Class BQ) Subclass 139 visas and an authorised recipient was appointed pursuant to s.494D of the *Migration Act* 1958 (the Act). On the visa application forms, the authorised recipient indicated that he agreed to the Department communicating with him by fax, email or other electronic means as well as stating by way of notation that 'Hard copy of all correspondence must also be sent by mail' (the notation). The delegate notified the authorised recipient by email of the refusal of the decision in relation to the dependent family members. The Tribunal found the email notification of the Department's decision complied with s.66 of the Act and it had no jurisdiction because the review application was made out of time.

The applicant contended, among other things, that the wording of s.494D(3) which provides 'The first person may vary or withdraw the notice under subsection (1) at any time' gave the applicant the power to vary the terms of the prescribed form itself. He argued that the notation varied the address in the notice such that the authority to communicate by email was conditional upon the notation, therefore, the authorised recipient had to be notified both by email and in writing.

Held: Application dismissed

- (i) The Tribunal correctly found that it did not have jurisdiction.
- (ii) Section 494D(3) is not intended to empower applicants to amend the approved form issued by the Minister under the Act and the Migration Regulations 1994.
- (iii) A party making a visa application may nominate one of the three different methods of notification in s.494B. Each of the three methods has significant and unique consequences and the three methods are not substitutable. Each form answered "Yes" and included relevant entries that substantially comply with the requirement of the question "Do you agree to the department communicating with you by fax, email or other electronic means?"
- (iv) The requirements under the Act were complied with. The effect of the valid notification is that all subsequent events and time limits are dependent on that notification date.

Balineni v MIAC & Anor

[2008] FMCA 888

Federal Magistrates Court of Australia, Scarlett FM, SYG 3450 of 2007, 30 June 2008

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate refusing to grant the applicant a Skilled-Independent Overseas Student (Residence) (Class DD) visa.

The applicant's visa was refused by the delegate as the applicant did not attain a qualifying score of 120 points under the 'points test' provided by Schedule 6A to the Migration Regulations 1994 (the Regulations). In his application, the applicant claimed 115 points, in addition to 5 bonus points for capital investment of \$100,000 in Australia (Item 6A81). The delegate assessed the applicant at 110 points, awarding the applicant 15 points for English language ability. The delegate did not assess the bonus points as the applicant would not have been able to reach the pass mark. On review, the Tribunal awarded the applicant 20 points for English language ability, leaving him with 115 total points. In consideration of the 5 bonus points for capital investment, the Tribunal wrote to the applicant under s.359A of the *Migration Act* 1958 (the Act) and noted that no evidence had been provided that the requisite funds had been deposited in a designated security for at least 12 months. The applicant's response was received outside of the time permitted and, as a result, the Tribunal made a decision without inviting him to a hearing. The Tribunal found that the

applicant had not deposited the requisite funds in a designated security and did not accept that he had the relevant funds available to him.

The applicant contended among other things that: the Tribunal misconstrued Item 6A81 in that it considered it required relevant funds to have been placed in a deposit at least 12 months prior to the relevant time; and the Tribunal failed to comply with its obligations under s.360 of the Act by finding that, owing to a failure of the applicant to respond to a s.359A letter within time, it was unable to invite the applicant to appear before it.

Held: MRT decision quashed and remitted for reconsideration.

- (i) The Tribunal committed jurisdictional error by misconstruing Item 6A81 and applying the wrong test. The test is whether the applicant 'has deposited' funds in a designated security, not whether the applicant has shown that he has the relevant funds available to him.
- (ii) The Tribunal did not erroneously interpret Item 6A81 to require the relevant funds to have been placed in a deposit at least 12 months prior to the relevant time.
- (iii) The requirement to have deposited funds cannot come into force until the Minister has complied with the necessary precondition, which is to complete the requisite form (Part A of Form 1134). In this case, the requirement to complete the form did not come into effect until the Tribunal, in the shoes of the Minister, advised the applicant that his language skill qualifications had been re-assessed at 20 points, thereby giving him a total of 115 points.
- (iv) The Tribunal did not misconstrue the effect of ss.360 and 363A and did not fall into error when it found it was unable to allow the applicant to appear before it at hearing.

SZGXX v MIAC & Anor

[2008] FMCA 822

Federal Magistrates Court of Australia, Smith FM, SYG 2859 of 2007, 10 July 2008

The primary applicant (the applicant), a national of Nepal, 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 that he was at risk from the Maoist insurgents if he returned to Nepal.

The Tribunal accepted that the applicant's family had suffered significantly from the Maoists in their home district, but considered that Kathmandu was safe and that there was not a real chance that the applicant would be persecuted by the Maoists there in the reasonably foreseeable future. The Tribunal also made findings that the applicant came within s.36(3) of the *Migration Act* 1958 (the Act) because he had the right to enter and reside in India on presentation of his passport in accordance with the 1950 Treaty of Peace and Friendship between India and Nepal (the Treaty).

The applicant claimed the Tribunal arrived at a finding as to the applicant's 'right' to enter and reside in India under the Treaty which was not open to it thereby vitiating its application of s.36(3) and that this finding also infected its conclusion that the applicant was not at risk of persecution by Maoists if he returned to live in Kathmandu.

Held: Application dismissed.

- (i) The Tribunal's independent alternative reason, that the applicant would be safe if he returned to live in Kathmandu, meant issues of a 'safe third country' under s.36(3) did not need to be addressed by the Tribunal. This finding was not affected by jurisdictional error. The Tribunal drew support from the fact that he could have moved to India if he had genuinely considered that he was in danger based on material suggesting the practical possibility of his being permitted to resettle in India, as distinct from a legally enforceable right of entry.
- (ii) An error of law occurred when the Tribunal arrived at an opinion on the effect of the Treaty which was not open to it. The language of the Treaty and of Article 7 in particular clearly does not purport to confer on Citizens of either Nepal or India a 'legally enforceable right to enter and reside' in the other country. Article 7 does not concern a right of entry and residence at all. It only requires equality of treatment in the matter of residence etc once permission to enter has been granted.
- (iii) The Department of Foreign Affairs and Trade reports relied upon did not give evidentiary support to the Tribunal's finding that the applicant had a right in accordance with the Treaty to enter and reside in India on

presentation of his passport. The statements did not provide evidence of the legal basis upon which movements of Nepalese across the border can occur. However, it was unnecessary to decide whether the Tribunal's conclusion that Australia's protection obligations to the applicant were excluded by s.36(3) was sufficiently supported by any evidence before the Tribunal, particularly since the applicant had the evidentiary burden of proof to the contrary.

SZLQY v MIAC & Anor

[2008] FMCA 692

Federal Magistrates Court of Australia, Emmett FM, SYG 3539 of 2007, 22 July 2008

The applicant, a national of the People's Republic of China, 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 practice of Falun Gong.

The Tribunal found the applicant not to be a witness of truth, concluding that the reason he had difficulty in readily answering questions about his claims was that his claims did not reflect his personal experience. The Tribunal ultimately rejected all of the applicant's claims of Falun Gong practice in China as false. The applicant gave evidence, including witness evidence, of his Falun Gong practise in Australia, including practising every day on his own, attending practise with others in a park almost every Saturday and attending weekly study sessions in Australia on Wednesday nights. The Tribunal found the last claim of weekly study sessions was false.

The applicant claimed that the Tribunal failed to take into account a consideration which it was required to take into account, namely, the promptness with which he had applied for a protection visa following his arrival in Australia. The Court also raised with counsel for the Department whether or not the Tribunal had complied with s.91R(3), in that the Tribunal did not appear to have made clear findings about all of the applicant's evidence and claims of his alleged Falun Gong activities in Australia and whether or not the Tribunal had disregarded such evidence.

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal's decision was affected by the jurisdictional error of failing to make clear findings as to whether or not any of the applicant's evidence of his Falun Gong activities in Australia were accepted, and the effect of s.91R(3) on any such findings in determining whether or not he was a person to whom Australia had protection obligations.
- (ii) The Tribunal was obliged to make clear findings as to whether or not it accepted or rejected the applicant's evidence of Falun Gong activities in Australia, including the evidence of his witness and supporting documents, because the enlivenment or not of s.91R(3) depended on that determination. While the Tribunal found the applicant's claims of attending study sessions on most Wednesday evenings to be false, it failed to make express findings on the remainder of his claims and evidence regarding his conduct in Australia.
- (iii) The promptness with which the applicant made his protection visa application is not a mandatory relevant consideration for the Tribunal.

SZLSP & Anor v MIAC & Anor

[2008] FMCA 950

Federal Magistrates Court of Australia, Cameron FM, SYG 3744 of 2007, 17 July 2008

The applicant husband (first applicant) and wife (second applicant), nationals of China, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that they were not persons to whom Australia had protection obligations. The first applicant, in the statement which accompanied his visa application form, claimed to fear persecution in China because of his practice of Falun Gong. In her visa application, the second applicant claimed to fear persecution because of her support of her husband's Falun Gong practise.

The Tribunal found that the applicants were not credible or truthful in their evidence and did not accept that any of the purported events in China, including the alleged events concerning the secondary applicant, occurred. The Tribunal concluded that the first applicant did not practise Falun Gong in China and was not a Falun Gong practitioner. The Tribunal was not satisfied that his Falun Gong activities in Australia were engaged in otherwise than for the purposes of strengthening his claim to be a refugee and disregarded such conduct pursuant to s.91R(3) of the *Migration Act 1958* (the Act). The Tribunal noted that the second applicant's claims largely relied upon the claims of the first applicant and did not accept that she suffered ill treatment as a result of his alleged practice of Falun Gong.

The applicants claimed, *inter alia*, that the Tribunal failed to consider the first applicant's conduct in Australia in relation to the second applicant's claims to fear persecution.

Held: Application dismissed.

- (i) The effect of s.91R(3) is limited to the claims of the person who engaged in the relevant conduct. Thus, the first applicant's conduct ought to be disregarded only in respect of his own claim to fear persecution and not in respect of the second applicant's claim.
- (ii) However, in the circumstances of this case, there was no *sur place* claim made expressly by either of the applicants and the fact that the Tribunal did not identify the existence of such a claim does not amount to error. The reference in the decision record suggests that the mention by the applicants' of the first applicant's practise in Australia was not to identify a separate basis upon which the couple might have well founded fears of persecution, but was made to underline the genuineness of the applicant's claimed adherence to Falun Gong. A conclusion that there was a *sur place* element would have required the Tribunal to undertake constructive or creative activity to identify such a claim.

S2012 of 2003 v MIAC & Anor

[2008] FMCA 954

Federal Magistrates Court of Australia, Driver FM, SYG 878 of 2008, 31 July 2008

The applicants, nationals of Fiji, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations.

The applicants claimed that they had been victims of crimes perpetrated by indigenous Fijians including that in 1994 the applicant wife had been assaulted and continued to suffer trauma from the assault, and that they were driven from their land in Tavua in 1995. They had moved and obtained other employment before leaving Fiji in 1996, but disputed that they would be able to obtain employment should they return to Fiji now. The Tribunal accepted that Fiji's land laws were biased against Indian Fijians and that the applicants had been driven from their leased land because of their race. It accepted that they would have to relocate from Tavua, because their lease had expired and was not renewed, but did not accept that they had a well-founded fear of persecution in Fiji. It was not satisfied that they would be denied employment because of their race, and considered that the continuing effect on the applicant wife of the assault was a matter of a "humanitarian nature" over which it did not have jurisdiction.

The applicants alleged among other things that the Tribunal failed to deal with the issue of relocation, and failed to take into consideration that the second applicant was a woman who is especially vulnerable as a member of a particular social group as a woman subject to the threat of rape.

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal fell into error by proceeding on the assumption that the applicants must accept the victory of their persecutors and live their lives differently elsewhere in Fiji. The fact that they were resigned to this course, and had indeed relocated and changed employment, did not mean that the permanent deprivation of land as a means of earning a livelihood was not a continuing act of persecution which the applicants could be expected to accept.
- (ii) The Tribunal also erred in failing to consider whether the second applicant faced a well-founded fear of persecution because of the risk of psychological harm should she be required to return to Fiji. The Tribunal accepted that she had been threatened with rape and assaulted, and it had been submitted that she continued to suffer the effects of trauma arising from the assault. Those factors, taken together, necessarily raised for consideration whether she would face psychological harm should she be required to return to Fiji. The risk of psychological harm from a forced return in circumstances where country information disclosed that random attacks might still occur was an issue requiring consideration in order for the Tribunal to complete its function.
- (iii) On the basis of the Tribunal's reasoning, the issue of relocation did not arise. However, if the Tribunal accepted that the applicants would suffer ongoing persecution in Tavua through the loss of their land, it would then be necessary for it to consider the issue of relocation in accordance with the Convention.

SZLPJ & Anor v MIAC & Anor

[2008] FMCA 928

Federal Magistrates Court of Australia, Barnes FM, SYG 3429 of 2007, 2 July 2008

The applicants, husband and wife nationals of India, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations.

The applicant husband had applied for a protection visa on the basis that he was a refugee. The applicant wife had applied as a member of his family unit. The applicant husband made general claims fearing persecution and did not provide sufficient facts to satisfy the delegate, but he indicated that further information would be provided. A statement was subsequently provided to the Tribunal, in which both the applicant husband and his wife made claims relating to their alleged fear of persecution. The Tribunal considered the refugee claims of both applicants and found that there was not a real chance the applicants would suffer persecution as contemplated by the Refugees Convention, hence they did not satisfy the criterion in s.36(2)(a) of *Migration Act* 1958, and nor could they satisfy the alternative criterion in s.36(2)(b) relating to members of the family unit.

Among other things, the Court considered whether there was any error in the Tribunal embarking on a consideration of the applicant wife's substantive claims to fear persecution in circumstance where she had not applied as a refugee in her own right.

Held: Application dismissed.

- (i) The Tribunal did not err in considering the applicant wife's own claims. As indicated by Black CJ and Allsop J in *SZGME v MIAC* [2008] FCAFC 91, if there was a valid application for a protection visa by the applicant as a family unit member, and there was no suggestion there was not a valid visa application by the applicant wife in this case, it had been refused and review of the refusal sought. Their Honours saw no basis for concluding that a further application had to be filed to permit consideration of a changed basis for consideration of a valid protection visa application and no reason why an applicant could not apply on the basis of both family membership and their own claims to be a refugee.
- (ii) Even considering the earlier authorities in *NAEA of 2002 v MIMIA* [2003] FCA 341 and *V120/00A v MIMA* [2002] 116 FCR 576 no error was established. The Tribunal considered the alternative criteria in s.36(2)(b) and found that the applicant wife could not succeed as a member of his family unit.
- (iii) In any event, even if the Tribunal had fallen into jurisdictional error in considering the applicant wife's claims, it would be futile to send the matter back to the Tribunal for redetermination because any such error would not affect the applicant husband's application and therefore the rejection of the applicant wife's claim as not satisfying the criterion in s.36(2)(b). Hence relief should be refused on that basis.

SZMCD v MIAC & Anor

[2008] FMCA 1039

Federal Magistrates Court of Australia, Scarlett FM, SYG 731 of 2008, 28 July 2008

The applicant, a national of Pakistan, 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 he had been persecuted by the Movement for the Enforcement of Islamic Laws (TNSM). He claimed he had been attacked, threatened and forced to join a jihad. At the hearing, pursuant to s.424AA of the *Migration Act* 1958 the Tribunal put to the applicant that his evidence was inconsistent with country information which suggested that TNSM was not influential in areas other than that of the applicant's home village, the applicant would accordingly be able to relocate in Pakistan and that if the Tribunal were to rely on this country information, it could form a view that the applicant was 'not a refugee'. The Tribunal invited the applicant to comment on or respond to that information, inviting the applicant to ask for more time to respond if he so wished. The applicant declined the invitation, stating that he had no comments in response. The Tribunal affirmed the primary decision partly because it found that the applicant could reasonably relocate based on country information, and there would be no real chance that the TNSM would persecute an individual such as the applicant elsewhere in Pakistan.

The applicant alleged jurisdictional error on several grounds, including that the Tribunal failed to comply with s.424AA by failing to ensure as far as reasonably practicable that the applicant understood the relevance of the country information put to him at the hearing.

Held: Application dismissed.

- (i) The Tribunal did not fall into jurisdictional error. There was no breach of s.424AA(a) or (b). The particulars given were sufficiently clear to indicate the Tribunal's concerns and the explanation given was sufficient to comply with s.424AA. The Tribunal offered the opportunity to comment or respond to that information, and told the applicant he could ask for more time in compliance with s.424AA.

Obiter

- (ii) A failure to comply with s.424AA is not of itself a jurisdictional error. If the Tribunal chooses to give oral particulars at a hearing, it must do so in the way set out in s.424AA(b). If it complies with s.424AA, the consequence is that s.424A(2A) applies and the Tribunal is relieved of its obligation under s.424A(1). If the Tribunal fails to comply with the requirements of s.424AA, the consequence is not that it falls into jurisdictional error. The consequence is that s.424A(2A) is not engaged. That may or may not mean the Tribunal has failed to comply with s.424A(1). This is the reason there is no need for an equivalent to s.424A(3) in s.424AA. The finding in *SZLTC & Ors v MIAC & Ors* [2008] FMCA 384 that the Tribunal does not enjoy the protections of s.424A(3) in s.424AA should not be followed. Section 424AA does not compel the Tribunal to orally give to an applicant particulars of country information: *SZLQD v MIAC* [2008] FCA 739.

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

REGULATIONS

Migration Amendment Regulations 2008 (No. 3) (SLI 2008 No. 166)

These regulations commenced on 9 August 2008 and make a number of changes to Business Skills visas, including changes to assets requirements for Subclass 845, 846, 890, 892, 893 visas; removal of assurance of support criteria for a range of permanent visas, including Subclass 856 and 857; changes to the Business Skills points test; and introduce a new sponsorship approval process for Subclass 415, 418, 420, 421, 423, 427 and 428 visas.

Migration Amendment Regulations 2008 (No. 4) (SLI 2008 No. 167)

These regulations commenced on 9 August 2008 and amend the Migration Regulations 1994 to exempt a specified class of persons (foreign dignitaries) from immigration clearance requirements.

Migration Amendment Regulations 2008 (No. 5) (SLI 2008 No. 168)

These regulations amend the Migration Regulations 1994 to repeal Temporary Protection visas (TPVs) and Temporary Humanitarian visas (THVs) so that all future arrivals in Australia who are found to engage Australia's protection obligations are granted a permanent Protection visa. The amendments also provide that holders of TPVs and THVs, and in some instances former holders of these visas who are in Australia, are eligible for a permanent Resolution of Status visa without the need to reassess protection obligations (subject to meeting health, character and security criteria).

INSTRUMENTS

Migration Act 1958 – Revocation of section 499 Direction No. 27 – July 2008 – (Legislative Instrument - F2008L02741) This instrument, registered on 25 July 2008 operates to revoke the instrument 'Direction No 27 – Order for Consideration or Disposal of Applications for Visas under section 91 of the *Migration Act 1958*'.

Migration Regulations 1994 – Specification under regulation 1.20G(2) and subparagraph 1.20GA(1)(a)(i) - Minimum Salary levels and Occupations for the Temporary Business Long Stay Visa notice 2008 – July 2008 – (Legislative Instrument F2008L02846) This instrument, registered on 31 July 2008 revokes the 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 and increases the minimum salary level that must be paid to Subclass 457 visa holders by 3.8%. It takes effect from 1 August 2008

Migration Regulations 1994 – Specification under paragraph 457.223(6)(a) and subclause 457.223(11) of Schedule 2 – Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa – July 2008 – (Legislative Instrument F2008L02836) This instrument, registered on 31 July 2008 revokes the Specification under clause 457.223 of Schedule 2 – Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa – October 2007 and increases the salary to be paid to Subclass 457 Temporary Business (Long Stay) visa holders. It takes effect from 1 August 2008.

Migration Regulations 1994 – Specification under paragraph 5.19(2)(h) and (i), 121.211(b) and 856.213(b) – Occupations, Locations, Salaries, and Relevant Assessing Authorities for the Employer Nomination Scheme – July 2008 - (Legislative Instrument F2008L02847) – This instrument, registered on 31 July 2008 revokes the Specification under paragraphs 5.19(2)(h) and (i), 121.211(b) and 856.213(b) - Occupations, Locations, Salaries, and Relevant Assessing Authorities for the Employer Nomination Scheme - November 2006 and provides the occupations, locations, salaries, and relevant assessing authorities for the Employer Nomination Scheme. The Instrument operates to specify the occupations that tasks of a nominated position may correspond to, where those tasks may be carried out, which skills assessing authorities are responsible for determining whether an applicant has skills that are satisfactory for specified skilled occupations, and to specify minimum salary levels that must be paid to an employee in a nominated position.

Migration Regulations 1994 – Specification for the purposes of paragraph 1212B(3)(a) – Addresses – July 2008 – (Legislation Instrument F2008L02718) This instrument, registered on 29 July 2008 specifies centralised processing of

all Investor Retirement visa applications lodged on or after 9 August 2008 at the Immigration Department's office in Perth. This will affect all applicants for the Investor Retirement visa from that date.

Migration Regulations 1994 – Specification for the purposes of paragraph 1217(3)(a) – Addresses – July 2008 – (Legislative Instrument F2008L02719) – This instrument, registered on 29 July 2008 specifies addresses for Retirement (Temporary) (Class TQ) visa applications. It takes effect from 9 August 2008.

Migration Regulations 1994 - Specification under paragraph 459.214(c) - Organisations that may Sponsor Short Stay Business Visitors - July 2008 – (Legislative Instrument F2008L02848) This instrument, registered on 29 July 2008 specifies organisations that may sponsor a subclass 459 holders for the purposes of paragraph 459.214(c) of the Migration Regulations 1994. It is effective from 9 August 2008.

Migration Regulations 1994 - Specification under subparagraphs 1205(3)(c)(i), (ii) and (iii) - Addresses for Applications for the Subclass 420 (Entertainment) Visa - July 2008 – (Legislative Instrument F2008L02720) - This instrument, registered on 29 July 2008 specifies addresses for lodging an application for Subclass 420 visa.

Migration Regulations 1994 - Specification under clause 476.212 of Schedule 2 - Institutions and Disciplines - August 2008 – (Legislative Instrument F2008L03008) This instrument, registered on 7 August 2008 specifies a discipline of study and the overseas educational institution where that course of study must have been undertaken and completed for an applicant to be eligible for the grant of a Skilled – Recognised Graduate, Subclass 476 visa.

Migration Regulations 1994 - Specification for the purposes of regulation 1.41 - Student Visa Assessment Levels - July 2008 – (Legislative Instrument F2008L03025) This instrument, registered on 12 August 2008 amends several assessment levels for several countries in relation to each subclass of student visas. The amendments will move 43 countries across 118 education sectors to a lower assessment level rating. This will lower the minimum evidentiary requirements needed for the grant of a student visa for these selected countries and education sectors due to improving non-compliance levels from these countries. Nine countries across 18 sectors will move to a higher assessment level rating. This will increase the evidentiary requirements needed for the grant of a student visa.

Migration Regulations 1994 - Specification under subparagraph 1222(1)(a)(ii) - Classes of Persons - July 2008 – (Legislative Instrument F2008L03029) – This instrument, registered on 12 August 2008 specifies classes of persons, in the case of an application made by an applicant outside Australia for a Student (Temporary) (Class TU) visa, who can use form I57A or I57E.

Migration Regulations 1994 - Specification under subparagraph 1222(1)(aa)(i) - Classes of Persons - July 2008 – (Legislative Instrument F2008L03032) – This instrument, registered on 12 August 2008 specifies the classes of persons, in the case of an application made by an applicant applying in Australia for a Student (Temporary) (Class TU) visa, who can use form I57A or I57A (Internet).

CASELOAD OVERVIEW

MRT Decisions – July 2008

Case category	Set Aside	Affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	3	13	1	2	19
Visitor refusal	18	13	3	2	36
Student refusal	27	12	4	7	50
Temporary business refusal	26	13	7	7	53
Permanent business refusal	7	3	4	1	15
Skill linked refusal	35	22	7	4	68
Partner refusal	88	40	7	2	137
Family refusal	22	30	2	0	54
Student cancellation	19	20	0	5	44
Sponsor approval refusal	3	3	2	1	9
Other	11	15	3	6	35

RRT Decisions – July 2008

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bangladesh	0	6	0	12	18
Burma (Myanmar)	1	1	0	0	2
Cambodia	0	0	0	1	1
Cameroon	1	0	0	0	1
Chile	0	4	0	0	4
China (PRC)	15	72	1	1	89
Colombia	1	1	0	0	2
Congo, Republic (Brazzaville)	0	1	0	0	1
Egypt	0	1	0	0	1
Fiji	1	4	0	2	7
Germany	0	0	1	0	1
Ghana	0	1	0	0	1
India	2	10	0	8	20
Indonesia	0	20	0	2	22
Iran	0	1	0	0	1
Iraq	1	0	0	0	1
Israel	0	1	0	0	1
Jordan	1	0	0	0	1
Kenya	0	1	0	0	1
Korea, Republic Of	0	3	0	5	8
Lebanon	0	1	0	1	2
Malaysia	1	13	0	0	14
Mongolia	0	1	0	0	1
Nepal	1	3	0	0	4
Nigeria	1	0	0	1	2
Pakistan	2	3	0	2	7
Papua New Guinea	1	0	0	0	1
Philippines	0	2	0	0	2
Rwanda	0	1	0	0	1
Serbia & Montenegro	0	1	0	0	1
Somalia	0	1	0	0	1
South Africa	0	2	0	0	2
Sri Lanka	1	1	0	0	2
Syria	0	1	0	0	1
Thailand	0	2	0	1	3
Turkey	1	2	0	0	3
Ukraine	0	2	0	0	2
United Kingdom	0	1	0	0	1
Vietnam	0	2	0	0	2
Zambia	2	0	0	0	2
Zimbabwe	5	0	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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INDEX

Migration Review Tribunal Cases

Clause 117.211	4
Clause 573.223	5
Clause 845.215	3
Clause 858.212(2).....	5
Clause 880.222	3
Clause 880.223	4
Clause 428.311	6
Condition 8202(3)(b).....	5
Course attendance	5
Customary marriage	6
Designated security	3
English language proficiency.....	5
Exceptional appointment.....	2
Member of family unit	6
Net assets.....	3
Orphan relative	4
Points test.....	3
Qualifications	2
Regulation 1.20D.....	2
Regulation 1.14.....	4
Regulation 5.19(4)(c).....	2
Record of exceptional achievement	5
Section 116(1)(b).....	5
Standard business sponsorship	2
Training	2
Vocational English.....	4

Refugee Review Tribunal Cases

Aceh (Indonesia)	8
Chaldean Christian (Iraq).....	9
Christianity (Lebanon).....	10
Particular Social Group “Dispossessed Farmers” (China).....	7
Particular Social Group “One Child Policy” (China).....	7
Particular Social Group “Persons with a mental disability” (India)	8
Particular Social Group “Single mothers” (Korea).....	10
Political Opinion (China).....	7
Political Opinion (Egypt)	8
Political Opinion (Indonesia)	8
Race (Romania)	11
Religion (Iraq)	9
Religion (Lebanon).....	10
Roma ethnicity (Romania).....	11
Section 36(3).....	9
Serious harm	8
Social services (Korea)	10
State protection	8
Third country protection.....	9, 10