



The MRT-RRT Monthly Decisions Bulletin


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

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

0802721

30 July 2008, Adelaide

Ms D Morgan, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) VISA – SUBCLASS 457 (BUSINESS (LONG STAY)) – CL.457.223(4)(d) – PERSONAL ATTRIBUTES – EMPLOYMENT BACKGROUND – COOK – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Subclass 457 visa because he did not satisfy cl.457.223(4)(d) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate was not satisfied that he had personal attributes and an employment background relevant to his proposed employment as a cook. The delegate found that the applicant had given incorrect information concerning his employment at a restaurant in New Delhi following a site visit by Departmental officers who investigated his claims. The applicant submitted that his former manager did not remember him because he worked during the evening shift and would not recognise a photograph since his appearance had changed. The applicant provided evidence at hearing from the manager that he had worked as a trainee but never directly below him and evidence that he planned menus and discussed daily supply needs as a sous-chef.

Held: Decision under review set aside

The Tribunal accepted the applicant's oral evidence, finding it to be consistent with his prior claims. The manager's statement was given significant weight since it corroborated the applicant's claim that he had worked as a restaurant chef. The evidence provided at review therefore satisfied the Tribunal that he had worked as a sous-chef at a New Delhi restaurant for approximately four years following an initial training period of around six months. Furthermore, the Tribunal found that the applicant worked in Australia as the cook in charge of a restaurant for approximately one and a half years. The Tribunal was satisfied that the applicant had an employment background and personal attributes relevant to and consistent with the occupation of cook for which he had been sponsored. Accordingly, it found that the applicant satisfied cl.457.223(4)(d).

071576466

7 August 2008, Melbourne

Mrs Rosa Gagliardi, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) VISA – SUBCLASS 457 (BUSINESS (LONG STAY)) – CL.457.223(4)(d) and (e) – EMPLOYMENT BACKGROUND AND PERSONAL ATTRIBUTES – SKILLS – A delegate of the Minister of Immigration and Citizenship refused to grant the visa applicant a Subclass 457 visa on the basis that he did not satisfy cl.457.223(4)(d) & (e) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate considered the applicant did not have the required employment background and amount of experience relevant to and consistent with the role of a cook. In particular, the delegate found the document he provided as a reference from Fuzhou Phoenix Hotel, where he claimed to have worked for 4 years was 'non-genuine' based on evidence gathered from a site visit by Departmental officers.

Held: Decision under review set aside.

The Tribunal found on the evidence that the Departmental officers conducting the site visit attended the 10th floor of the hotel, whereas evidence suggested that the applicant worked on the third floor. While persons on the 10th floor did not know the applicant's name, several others were aware of him as the 'fat guy' who wanted to work overseas. In light of the evidence submitted to demonstrate that the applicant had worked as a cook, the Tribunal placed diminished weight on the conclusions arrived at by the Departmental officers. The Tribunal

accepted evidence provided by the applicant, including payslips from 2005 to 2008, verbal testimony from his immediate employer at Fuzhou Phoenix Hotel, his qualifications, and the fact that he was awarded a prize for carving in 2002. On balance, the Tribunal accepted that the applicant has had at least 3 years experience as a cook, and that he had the personal attributes and employment background necessary to perform as a cook. It was therefore satisfied that that applicant met cl.457.223(4)(d) and (e).

071700498

4 August 2008, Sydney

Mr G Short, Senior Member

BUSINESS SKILLS – ESTABLISHED BUSINESS (RESIDENCE) (CLASS BH) – SUBCLASS 845 (ESTABLISHED BUSINESS IN AUSTRALIA) – CL.845.216 – DIRECT AND CONTINUOUS INVOLVEMENT IN MANAGEMENT OF A BUSINESS

A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Business Skills – Established Business (Residence) (Class BH) visa on the basis that the applicant did not satisfy cl.845.216 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate was not satisfied that, in the 12 months immediately preceding the making of the application, the applicant, was the owner of an interest in a main business in Australia, had maintained direct and continuous involvement in the management of that business from day to day and in making decisions that affected the overall direction and performance of that business. The applicant claimed to have an interest in a grocery shop business. She gave evidence as to her major management responsibilities and activities undertaken, including meeting customers and suppliers, repainting walls, replacement of some of the machinery and general renovations to the business. She said this had led to a steady growth in the business. She also submitted letters from some of her suppliers, essentially confirming the applicant's involvement in the business.

Held: Decision under review set aside.

The Tribunal found that, during the relevant period, the applicant had the requisite interest in a grocery shop business. The Tribunal also considered that over the course of the processing of the application the applicant demonstrated her direct involvement in the management of the business and in making decisions which have affected the overall direction and performance of that business. Having regard to all of the evidence before it, the Tribunal found that during the relevant period the applicant did maintain direct and continuous involvement in the day to day management of the business and in making decisions that affected the overall direction and performance of the business. It was therefore satisfied that the applicant met cl.845.216.

0713543314

24 July 2008, Melbourne

Ms W Boddison, Member

SKILLED – AUSTRALIAN SPONSORED (MIGRANT) (CLASS BQ) VISA – SUBCLASS 139 – CL.139.217 – EMPLOYED IN A SKILLED OCCUPATION

A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Subclass 139 visa as the delegate was not satisfied that the applicant had been employed in a skilled occupation for a period of, or for periods totalling, at least 12 of months in the 18 month period immediately before the day on which the visa application was made as required by cl.139.217 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The applicant nominated his skilled occupation as Sales Manager (ASCO 12310-11) and claimed to have worked for an automotive manufacturing company. However, the delegate was not satisfied on the evidence before her that the applicant had been employed in that skilled occupation for the relevant period. The applicant claimed that the Department had not undertaken the appropriate level of investigation into his claimed employment and provided the Tribunal with further information and evidence from his employer.

Held: Decision under review set aside.

The Tribunal examined the tasks and responsibilities that the applicant performed during the relevant period of employment. The Tribunal was impressed with the applicant's evidence and level of knowledge of the industry in which he worked. He understood the role of market research and the Tribunal accepted that he was responsible for advertising, monitoring of sales, approval of discounts and the supervision of sales staff. The Tribunal noted that the applicant clearly undertook virtually all of the duties of a Sales and Marketing Manager as set out in ASCO code 12310-11. The Tribunal further accepted that the applicant worked in this role between September 2004 and March 2006. Accordingly, the Tribunal was satisfied that the applicant had been employed in a skilled occupation for the relevant period and that he therefore met the requirements of cl.139.217.

Partner and Family visas

071715856

14 August 2008, Melbourne

Mr G Ledson, Member

PROSPECTIVE MARRIAGE (TEMPORARY) (CLASS TO) – SUBCLASS 300 (PROSPECTIVE MARRIAGE) – CL.300.216 – R.1.15A - GENUINE INTENTION TO LIVE TOGETHER AS SPOUSES – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa on the basis that she did not satisfy cl.300.216 of the *Migration Regulations* 1994 (the Regulations) because she and the review applicant failed to establish that they genuinely intended to live together as spouses. The applicants claimed they were married in a traditional ceremony but were unable to register the marriage in Vietnam. They claimed despite the fact that the review applicant was old enough to be the visa applicant's father the marriage had not been arranged and they loved each other. They claimed the review applicant returned to Vietnam several times living with the visa applicant as man and wife. An ultrasound was provided as proof the visa applicant was pregnant and the review applicant volunteered to take a paternity test. He was also anxious for the baby to be born in Australia. The applicants also provided evidence of the review applicant's assistance to the visa applicant and her family, their families' acceptance of the marriage and that his work colleagues were aware of the situation.

Held: Decision under review set aside.

In considering whether the applicants had a genuine intention to live together as spouses the Tribunal had regard to the considerations for a spousal relationship set out in r.1.15A(3) of the Regulations. It put significant weight on the fact that the review applicant returned to Vietnam on four occasions during which the applicants lived together as a spousal couple. The Tribunal accepted the visa applicant was pregnant and the review applicant was the father. It found they intended to raise their unborn child together once they were reunited and legally married. It also accepted that the applicants represented themselves socially as a couple and found they would share financial resources and responsibilities. The Tribunal considered that the applicants' commitment to their child was a strong indicator of their commitment to the relationship and it was satisfied they had a genuine intention to live together as spouses. Therefore, the Tribunal found the applicants met the criterion in cl.300.216.

071763465

11 August 2008, Melbourne

Ms M Cameron, Member

PARTNER (PROVISIONAL) (CLASS UF) VISA – SUBCLASS 309 (SPOUSE (PROVISIONAL)) – R.1.15A – GENUINE SPOUSE RELATIONSHIP - A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Partner (Provisional) (Class UF) Subclass 309 visa on the basis that he did not satisfy cl.309.211 because the delegate did not accept the applicant was the spouse of his sponsor within the meaning of r.1.15A of the *Migration Regulations* 1994 (the Regulations). The delegate refused the visa on the basis of the limited evidence of the parties' relationship, concerns regarding the different religions of the applicants and the haste with which the relationship developed after the visa applicant's divorce. The applicants submitted to the Tribunal statutory declarations attesting to the genuineness of the relationship, medical reports of the applicants' attempts to conceive a child, as well as statements, photographs, and evidence of money transfers and telephone contact.

Held: Decision under review set aside.

The Tribunal considered that the balance of evidence was in favour of the visa applicant being the spouse of the review applicant. The Tribunal found the applicants provided detailed and consistent statements regarding the relationship and noted the supporting statements of the applicants' friends. The Tribunal considered the evidence of telephone and written correspondence demonstrated that the parties had remained in contact while the applicants lived in separate countries. While noting the delegate's concerns regarding the applicants' different religions, the Tribunal also noted statements from the Vietnamese Christian Community that the review applicant had been undertaking a faith instruction program with the intention of joining the Catholic Church. The Tribunal considered the developments in the relationship in the year that had elapsed since the delegate's decision, including the time the applicants spent together in Vietnam and their attempts to conceive a child. The Tribunal was satisfied that having regard the applicants' circumstances since the delegate's decision, at the time of application the applicants had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship was genuine and continuing.

Student visas

0802672

6 August 2008, Sydney

Ms P Wearne, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 (VOCATIONAL EDUCATION AND TRAINING SECTOR) – VISA CANCELLATION – S.109 – INCORRECT INFORMATION – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 572 visa under s.109 of the *Migration Act* 1958 (the Act). The delegate found that the applicant had not complied with s.101 of the Act by giving incorrect answers on her visa application. The applicant failed to disclose that she had been known by another name, on which she had previously entered Australia on a tourist visa. That visa was subsequently cancelled and the applicant was removed from Australia. The applicant claimed that she did not change her name with the purpose of re-entering Australia. She also claimed that the agent who had completed the application had not asked her about her past.

Held: Decision under review affirmed.

The Tribunal found that the applicant had not complied with s.101 of the Act by failing to disclose that she had been known by another name as described in the s.107 notice. The Tribunal further found that the applicant also failed to disclose that she was removed from Australia and she owed a debt to the Commonwealth. The Tribunal found the applicant's explanation of her failure to provide correct answers to be unpersuasive and unsatisfactory. Having regard to other considerations, including that the applicant did not have any supporting documentation available in regard to the course she claimed to have studied for one year, the Tribunal was satisfied that the applicant's visa should be cancelled.

071612520
7 August 2008, Sydney
Mr C Packer, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 (VOCATIONAL EDUCATION AND TRAINING SECTOR) – CL.572.223(2)(a)(i)(A) – ITEM 5A404(d)(i) – COMPLETION OF SENIOR SECONDARY CERTIFICATE OF EDUCATION - A delegate of the Minister of Immigration and Citizenship refused to grant the visa applicant a Student (Temporary) Subclass 572 visa on the basis that he did not provide evidence of English language proficiency required by cl.572.223(2)(a)(i)(A) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The applicant provided a document from St James College which indicated that he had completed a Year 12 Higher School Certificate course. However, the document did not indicate that he had successfully completed the requirements for a Senior Secondary Certificate of Education, for the purposes of item 5A404 of Schedule 5A to the Regulations. The delegate found the academic transcript provided showed the applicant did not successfully complete any subject other than Chinese. Before the Tribunal, the applicant sought to argue that as he made a serious attempt to sit the High School Certificate (HSC) exam, he may be considered to have successfully completed the HSC.

Held: Decision under review affirmed.

The Tribunal did not accept the applicant's serious attempt to sit the HSC, where he had a result for 2 out of 5 subjects, satisfied item 5A404(d)(i). The expression, 'Senior Secondary Certificate of Education' in item 5A404(d)(i) required the successful completion of the HSC. The Tribunal found the document from St James' College appeared not to be directed at providing such a qualification. The certificate did not assess the sufficiency of the results in the course, nor does it say anything about the applicant's achieved level of English proficiency. The Tribunal found that the certificate itself does not establish that the applicant successfully completed the requirements for the HSC. Further, the Tribunal found that item 5A404(d)(i) is not expressed to encompass evidence that the applicant made a serious attempt to sit the HSC. The applicant did not satisfy any of the forms of English language proficiency set out in item 5A404, and he therefore did not satisfy the requirements of cl.572.223(2)(a)(i)(A).

Other visas

071727622
28 July 2008, Melbourne
Ms R Gagliardi, Member

RETURN (RESIDENCE) (CLASS BB) – SUBCLASS 155 (FIVE YEAR RESIDENCE RETURN) – CL.155.212(3A)(a) – SUBSTANTIAL BUSINESS, CULTURAL EMPLOYMENT OR PERSONAL TIES WHICH ARE OF BENEFIT TO AUSTRALIA - A delegate of the Minister of Immigration and Citizenship refused to grant the visa applicant a Subclass 155 visa on the basis that he did not meet cl.155.212(A) to Schedule 2 of the *Migration Regulations* 1994 (the Regulations) as he did not have substantial, cultural employment or personal ties which were of benefit to Australia. The applicant was granted a permanent visa in 1983 which was valid until 1988. He last exited Australia on 4 September 1993 and arrived again on 11 January 2000 on an Electronic Travel Authority. The applicant claimed he was away from Australia for this period because his parents were seriously ill in Sweden, and he needed to provide them with support in their last years. Before the Tribunal, the applicant submitted numerous statements and letters from a wide range of people attesting to his business and personal ties in Australia.

Held: Decision under review set aside.

The Tribunal found the applicant did have substantial business or personal ties which were of benefit to Australia. The Tribunal noted that the applicant had a son and daughter who are permanent residents in Australia and had few personal connections to Sweden as he is divorced

from his wife. The Tribunal further noted that he was in a *de facto* relationship with an Australian citizen and that he had assisted his partner in playing a recognised role in community life, via the development of sustainability projects and artwork. The Tribunal accepted the numerous letters that outlined the applicant's contribution to the economic life of Australia through his work with Swedex and the forest industry, and noted that the applicant had experience and knowledge that could benefit Australia given the environmental issues Australia will face in the future. The Tribunal also accepted that the applicant had compelling reasons for being absent from Australia for a continuous period of more than 5 years due to his parent's ill health. In particular, the Tribunal's findings were reinforced by the fact that the applicant took early retirement in order to look after his father. Consequently, the Tribunal was satisfied that the applicant met the requirements of cl.155.212(3A)(a).

071751851

25 July 2008, Sydney

Ms K Raif, Member

TOURIST (CLASS TR) VISA – SUBCLASS 676 (TOURIST) – CL.676.211 – CL.676.221 – GENUINE INTENTION ONLY TO VISIT – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Subclass 676 visa because the delegate was not satisfied that the applicant's expressed intention only to visit Australia was genuine as required by clauses 676.211 and 676.221 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate formed the view that the visa applicant was attempting to establish *de facto* residence in Australia as the applicant had previously travelled to Australia as a holder of a Visitor visa on numerous occasions. The visa applicant applied for the visa with the stated purpose of visiting her son (the review applicant) and his family in Australia. The review applicant claimed that the visa applicant preferred to remain in Australia permanently but she did not meet the criteria. He also claimed that the visa applicant was 70 years old and wanted to spend time with the grandchildren, and thus, her intention to only visit Australia was genuine.

Held: Decision under review affirmed

The Tribunal accepted that the visa applicant had previously complied with visa requirements and conditions of her previous visas. However, the Tribunal noted that the visa applicant had little contact with her son in Fiji and it found that she had no job commitments or many close relatives in Fiji. It found that these matters would act as an incentive for the visa applicant's continuous presence in Australia. The Tribunal did not accept that the duration of proposed stay, the purpose of the visit or other plans were consistent with tourism or visiting relatives. It found that the visa applicant had spent nine months each year in Australia for the past three years. Having regard to this evidence, the Tribunal formed the view that the visa applicant's intention was to establish temporary residence in Australia. The Tribunal was not satisfied the visa applicant's expressed intention only to visit Australia was genuine and therefore found she did not meet cl.676.211 of Schedule 2 to the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

Burma (Myanmar)

0802146

23 July 2008, Sydney

Ms M Foster, Member

BURMA (MYANMAR) – STATELESS - ETHNICITY – POLITICAL OPINION – ROHINGYA – S.36(3) – THIRD COUNTRY PROTECTION - The applicants, a husband, wife and their two children, claimed to fear persecution for reasons of their Rohingya ethnicity and the applicant husband's political opinion. The applicants claimed to be stateless and that Burma was their country of former habitual

residence. They claimed as Rohingyas they were severely discriminated against and failed to qualify for Burmese citizenship. The applicant husband claimed he led demonstrations in Burma and was arrested and held for a number of months during which he was beaten. After a relative secured his temporary release he fled Burma. He claimed that he joined a Rohingya association in Japan and believed he would be killed if he returned to Burma. The applicant wife claimed she was discriminated against in Burma so she left, married the applicant husband and moved with him to Japan where they held a form of residency status. She returned temporarily to her family in Burma for support when she was pregnant with her second child. She feared that she and the applicant children would be killed for the applicant husband's political activities if they returned to Burma. The applicant husband claimed he was discriminated against in Japan. He claimed he destroyed their Japanese travel documents and feared the authorities would take action against him and take away or cancel his Japanese visa.

Held: Decision under review set aside.

The Tribunal found the applicants to be generally credible and accepted that they were Rohingyas. It also accepted that they were stateless and that Burma was their country of former habitual residence. The Tribunal found the applicant husband's evidence about his political activities convincing. Based on independent information it found Rohingyas in Burma are discriminated against and due to the Burmese government's close monitoring of the population the applicant husband would come to the attention of the authorities if he returned to Burma, particularly given his long absence. It found a real chance the applicant husband would be subject to persecution in the form of arrest, detention and serious physical abuse for reasons of his political opinion and ethnicity. The Tribunal found the applicant husband had a well-founded fear of persecution for a Convention reason in Burma. The Japanese authorities were unable to give the Tribunal information about the applicant's status without the original travel documents which had been destroyed. The Tribunal was unable to find that the applicant husband had not taken all possible steps to avail himself of a legally enforceable right to enter and reside in Japan so s.36(3) did not apply to him. The applicant wife and children made a combined application with the husband and the Tribunal inferred that in addition to making their own refugee claims they also applied on the basis of their membership of his family. The Tribunal found the applicant husband satisfied the criterion in s.36(2)(a) for the grant of a protection visa and the applicant wife and children satisfied s.36(2)(b).

Congo

0801679

15 July 2008, Sydney

Mr H Wyndham, Member

CONGO – PARTICULAR SOCIAL GROUP – IMPUTED POLITICAL OPINION – HOMOSEXUAL – COUNTRY OF REFERENCE – The applicant claimed he was a citizen of Congo and was born and lived in a village in Congo for a number of years before moving to another country. He claimed to fear persecution for reasons of his father's political activities and the persecution his father and other family members suffered as a result of those activities. The applicant travelled to Australia on a Congolese passport issued in one name but lodged his protection visa application in a different name. Before the Tribunal, the applicant further claimed fear of persecution because of his homosexuality. He claimed that a work colleague was jealous of him because he received favouritism from the supervisor, and began to spread rumours that the applicant was sleeping with the supervisor. He claimed that these rumours were circulated within the African community causing him to alienate himself because he was ashamed and humiliated. He claimed that if his homosexuality was known in Congo his life would be in danger and he would not receive any protection from the police.

Held: Decision under review affirmed.

The Tribunal found that the applicant was not a citizen of Congo due to his inability understand or even recognise the relevant African languages and French, which he claimed was his language of education. The Tribunal considered the applicant was from an English-speaking country in Africa, although the Tribunal was unable to determine which. The Tribunal found that the applicant's passport was bought and that it did not reflect his true country and origin. The Tribunal therefore rejected entirely his claims arising from his claimed nationality and the claimed political activities of his father. It further found that it could not assess his claims against any country of reference. The Tribunal did not accept that the applicant was either homosexual or bisexual and therefore did not accept that there was a real chance of the applicant suffering harm of any kind amounting to persecution for reasons of his sexuality. Consequently, the Tribunal was not satisfied the applicant had a well-founded fear of persecution for a Convention reason.

Colombia

071959605

27 June 2008, Sydney

Ms P McIntosh, Member

COLOMBIA – IMPUTED POLITICAL OPINION – PARTICULAR SOCIAL GROUP – FORCIBLE RECRUITMENT OF CHILD SOLDIERS – The applicant claimed to fear persecution because unbeknownst to her, her husband had been a member of political party and had covertly provided information to the guerrilla force, FARC-EP. Two of the husband's colleagues were killed and the applicant feared that FARC or paramilitary forces would look for her and her children if they were to return to Colombia. The applicant claimed she had received anonymous telephone calls and that family members of politicians in Columbia had been attacked. She submitted evidence of depression and anxiety in addition to country information concerning violence between paramilitary forces and FARC guerrillas and the forcible recruitment of child soldiers by armed groups.

Held: Decision under review set aside.

The Tribunal accepted that Colombia had a violent and unpredictable political environment. However, it was not satisfied that the husband, who gave evidence as a witness before the Tribunal, had been politically active as claimed. No evidence had been identified that his particular political party existed during the 1990s. Although he claimed that the party was only a local cell, he did not readily give oral evidence to that effect. The husband had been unable to explain why he acted as an informer or why the membership card he submitted did not contain any issue date or validity period. He may have led a "secret" life but there was no reason why he did not tell his wife that he was doing local community work. However, the Tribunal accepted that the forcible recruitment of children could constitute serious harm. The chance of this occurring to the applicant children as members of a particular social group was not remote. Although the applicant wife was not owed protection obligations, she was a member of the same family unit as her two children who did have a well-founded fear of persecution.

East Timor

0800484

1 May 2008, Melbourne

Mr P Fisher, Member

EAST TIMOR – PARTICULAR SOCIAL GROUP – MEMBER OF ETHNIC GANG - The applicant, and his sibling who was also included in the application, claimed to fear persecution arising from his membership of a particular social group. The applicant claimed to be a member of Group 1 who was target by members of rival Group 2. The applicant claimed he was identified by a Group 2 member at a building site, who later returned with fellow gang members and surrounded the building, taunting and threatening the applicant who in turn called his own fellow gang members for backup, leading to a confrontation between the two groups which the applicant escaped. The

applicant claimed he was differentially at risk on account of his ethnicity, and that he was identified as belonging to the Group 1 ethnic minority. The applicant claimed the protective capacities of East Timor were non-existent and he would not be afforded state protection.

Held: Decision under review set aside.

The Tribunal found that Group 1 could be characterised as a particular social group. It found the country information indicated that members of that group have a common characteristic other than a shared fear of persecution, and that this attribute distinguished the group from society at large. The Tribunal considered the application of s.91S, but found that because the applicant was not relying on his membership of his family for the formulation of his particular social group, but rather, he was relying on his membership of a gang. The Tribunal accepted the country information that Group 2 have previously engaged in persecutory conduct, and given the differential risk of harm, there was a real chance that the applicant would be harmed if returned to East Timor. The Tribunal accepted country information that the protective capacities of the East Timorese state are virtually non-existent, and that the local police and security forces are in fact infiltrated by Group 2. The Tribunal found that given the small size of East Timor, relocation was neither a safe or reasonable option in the applicant's circumstances. The Tribunal further found the sibling to be dependent on the applicant, and was therefore satisfied that he was a member of the family unit of the applicant.

India

0802058

24 July 2008, Sydney

Ms G Cullen, Member

INDIA – PARTICULAR SOCIAL GROUP – HOMOSEXUAL - The applicant, a citizen of India, claimed to fear persecution on account of his religious beliefs and homosexuality. The applicant claimed that terrorists approached his father to become a member of their organisation. When his father refused, threats were made against the family. The applicant's father and brother escaped to Australia, and the father later returned to India. The applicant claimed he was kidnapped and forced into a homosexual relationship with the terrorist leader. He claimed he was released a few weeks later, but had to continue the relationship to protect his family. The applicant claimed that, once community and religious clerics knew about the relationship, they threatened to ostracise his family and bring him to the attention of the authorities. The applicant went into hiding before escaping to Australia with his mother. The applicant claimed his father had since been kidnapped by the terrorists who demanded a ransom. The applicant provided a psychologist's report which noted that he had depression and contained an opinion that the applicant was a credible witness who was not trying to fabricate events of the past.

Held: Decision under review affirmed.

The Tribunal found the applicant's testimony to be internally inconsistent and inconsistent with other visa applications made by his family members. The Tribunal found that the applicant's father and sibling applied for visas to Australia before the threats taking place, which was inconsistent with the applicant's claim that they fled as a result of the threats. The Tribunal also found the applicant's evidence in relation to hiding to be highly inconsistent and implausible, in particular that he would have returned to live in his home village in that same year. While accepting the psychologist's diagnosis that the applicant suffered from emotional and mental symptoms, it noted that the psychologists' opinion was predicated on accepting as true the applicant's claims, which the Tribunal as a fact finder had rejected. The Tribunal therefore found that there was no real chance that the applicant would be harmed if returned to India, and therefore, his fear was not well-founded.

Indonesia

0801698
13 June 2008, Perth
Ms L Ward, Member

INDONESIA – PARTICULAR SOCIAL GROUP – THREATENED PERSON -The applicant claimed to fear persecution on the basis of his membership of a particular social group, namely people threatened by Person A and his family. The applicant claimed that Person A threatened to kill or injure him as Person A thought the applicant was involved in the breakdown of his personal relationship with a mutual friend, Person D. He claimed to have met Person A to discuss the problem at a designated place, whereupon Person A started punching him. The applicant claimed he escaped with the help of the police. The applicant claimed he could not relocate anywhere else in Indonesia, as Person A has a network of people who would help him throughout Indonesia.

Held: Decision under review affirmed.

The Tribunal found that the applicant gave consistent and straightforward evidence. However, the Tribunal found that the unifying characteristic of the applicant's claimed particular social group is the fear of persecution and therefore no particular social group exists. Further, notwithstanding that Person A was said to have threatened the applicant several years ago, the Tribunal found that no harm or further threats had been made by Person A to the applicant. The Tribunal found that the facts did not tend to support the applicant's claims that he would be killed or threatened if he returned to Indonesia. The Tribunal was not satisfied that there was a real chance that the applicant would, for the essential and significant reason of his membership of a particular social group or any other Convention reason, suffer serious harm if he returned to Indonesia now or in the reasonably foreseeable future. The Tribunal was not satisfied that the applicant had a well founded fear of persecution in Indonesia for a Convention reason.

Iran

0802231
30 July 2008, Sydney
Ms P McIntosh, Member

IRAN – RELIGION – ARMENIAN CHRISTIAN - S.91R(3) – The applicants, a husband and wife, claimed to fear persecution in Iran on the basis that the applicant wife was a Christian. The applicants claimed to have lived in a Christian area, where the wife had some contacts with other Christians. She claimed that men from the Komiteh visited their house and found a photo of Jesus Christ on the wall and other Christian material. The applicants claimed to have been interrogated and thereafter subjected to harassment. Since arriving in Australia, the wife had been attending church regularly and was baptised as a Christian.

Held: Decision under review set aside.

The Tribunal accepted that the applicants lived in a predominately Armenian Christian area and that the wife had come into contact with Christians. The Tribunal considered plausible the evidence of the applicants' child in Australia that they had developed an interest in Christianity in Iran and that the government has been increasingly intolerant of proselytising and of conversions from Islam to Christianity. The Tribunal accepted that applicants were the target of harassment by the Komiteh, and that this led to their decision to leave Iran. The Tribunal accepted that the applicant wife had been attending church in Australia since her arrival. The Tribunal put weight on the fact that the pastor who baptised her is generally reluctant to baptise Iranian converts because of his concerns that some have bolstered their protection visa applications through this means. That, coupled with her plausible, understated description of her interest in Christianity while in Iran, led the Tribunal to conclude that s.91R(3) did not apply. The Tribunal considered that current country information suggested that there was a real chance that the applicants would face serious harm if returned to Iran. Therefore, it was satisfied that the applicants had a well founded fear of persecution.

Nepal

0802453

3 July 2008, Sydney

Mr L Hardy, Member

NEPAL – PARTICULAR SOCIAL GROUP – BUSINESSMEN IN NEPAL – The applicant claimed to fear persecution for reasons of his membership of the particular social group, “businessmen in Nepal”. The applicant claimed to be a businessman and that his family owned and operated a company that undertook work throughout Nepal. He claimed he suffered various harm from the Janatatantric Terai Mukti Morcha (JTMM) including being abducted, detained and tortured. He also claimed they threatened to harm him if he did not pay them an exorbitant sum of money. The applicant claimed the rebels’ activities forced his family to change its approach to operating the business and that it suffered as a result of the instability in the region.

Held: Decision under review affirmed.

The Tribunal did not accept any of the applicant’s claims in relation to JTMM due to his vague, inconsistent and unreliable evidence. The Tribunal accepted that the applicant and his family were the most prominent and significant operators of the company and that the company was still running. It also accepted that political conflict in the region created difficulties for businesses dependent on security, however the applicant’s company was not solely dependent on work in that region. The Tribunal accepted that “businessmen in Nepal” was a particular social group, but found the applicant’s evidence did not help ground the view that there was a real chance of his facing serious harm for reasons of being a businessman. It found the business continued to operate in the relevant area, was capable of operating throughout Nepal, and its difficulties did not amount, even cumulatively, to persecution. It also held the applicant’s status as a businessman was not the essential and significant reason for the company’s difficulties which it found stemmed from fuel and transport costs. As such, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Thailand

0801177

10 July 2008, Sydney

Ms A O’Toole, Member

THAILAND – IMPUTED POLITICAL OPINION – The applicant claimed to fear persecution because of his attempt to help friend A, who refused to be a spy for the army intelligence. He claimed that friend A was tortured, harassed and abducted by the army for refusing to work as a spy. The applicant claimed that he helped friend A through his boss’ relative who was a member of the local government. He claimed that his friends ran campaign against the army and the terrorist organisation which attracted adverse attention from the army and the terrorists. The applicant claimed that because of his and other people’s involvement in this matter, persons including friend A and others were abducted and killed. He claimed that he suffered real harm when he started his business where he was stopped by the army and they raided his store.

Held: Decision under review affirmed.

The Tribunal accepted that there had been ongoing clashes between various factions in parts of Thailand and accepted that friend A and others were the victims of harm. However, the Tribunal was not satisfied that the applicant attracted any adverse attention because of his connection to those men. The Tribunal did not find the applicant to be credible on some key aspects of his claims and it did not accept that the applicant was the subject of threats or that his property was the subject of two raids by the authorities in Thailand. It found that given the degree of the credibility

problems with the applicant's evidence, the Tribunal could not give any weight to the statements relating to the applicant's material claims. Accordingly, the Tribunal did not accept that the applicant had a well founded fear of being persecuted for a Convention reason.

Ukraine

0802817

18 July 2008, Sydney

Mr D O'Brien, Principal Member

UKRAINE – POLITICAL OPINION – CORRUPTION – The applicant claimed to fear persecution arising from his involvement in litigation concerning the theft of goods from his former partner's business which resulted in the imprisonment of senior state officials. He feared detention from corrupt officials framing him on false criminal charges. He claimed the authorities would not protect him because of his prior political activities. He claimed to have been attacked distributing leaflets during a political campaign and beaten and detained for distributing posters, and that police failed to act on his report. He further claimed that state officials also sought his partner – who has subsequently received refugee status - in connection with smuggled political literature. The applicant submitted documents from the Prosecutor's Office requesting the return of seized property and indicating investigations. He also supplied a reference from a political party attesting to his membership and articles concerning the political environment.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was a minor member of a political party. However, independent information did not suggest that this would be a reason for serious harm. The essential and significant motivation for the persecution feared was that he was a witness to theft. Although the persons involved may have been officials, the Tribunal did not accept that they were acting on behalf of the authorities. The Tribunal accepted from media articles that corruption, press restrictions and privacy infringements occurred. However, exposing corruption would not occasion persecution because the Prosecutor's Office document suggested that law enforcement authorities were investigating civil servants. Furthermore, since the applicant's political opponents had lost power, any governance deficiencies could not adversely impact upon him for political reasons. Refugee status for his former partner had no bearing upon the Tribunal's assessment and he would not experience persecution for seeking protection in Australia. Accordingly, the applicant did not have a well-founded fear of persecution for any Convention reason.

FEDERAL COURT JUDGMENTS

MIAC v Mon Tat Chan

[2008] FCAFC 155

Federal Court of Australia, Moore, Marshall & Lander J, NSD 16 of 2008, 21 August 2008

This was an appeal by the Minister from a judgment of the Federal Magistrates Court setting aside a decision of the Migration Review Tribunal (the Tribunal) that affirmed that the respondent was not entitled to the grant of a student visa. The visa application had been refused on the basis that cl.573.211(3)(c) of Schedule 2 to the Migration Regulations 1994 (the Regulations) was not met as the visa application was not made within 28 days from when the last substantive visa held by the respondent ceased to be in effect.

The Tribunal found the respondent submitted a visa application on 27 March 2006 but that it was not a valid application as it was not accompanied by satisfactory evidence of either being enrolled or offered a place in a registered full-time course of study as required by Item 1222 of Schedule 1 to the Regulations. The Tribunal found the respondent made a valid visa application on 17 August 2006 with evidence of a confirmation of enrolment (COE) and the visa charge and this was more than 28 days after his Subclass 573 visa expired

Turner FM held that the student visa application made on 27 March 2006 became complete when the respondent made another student visa application on 17 August 2006 with the COE and visa charge. The application lodged on 27 March 2006 was not withdrawn or refused and therefore the application should have been considered when it became complete. The Minister contended that his Honour erred and should have found the respondent had not lodged a valid visa application until 17 August 2006.

Held: per Marshall & Lander JJ (Moore J dissenting), appeal allowed.

per Lander J (Marshall J agreeing)

- (i) An application cannot become valid prior to the applicant complying with the provisions of the Act and Regulations that make the application valid. An application for a visa is only valid if it satisfies the criteria and requirements prescribed under s.46 of the Migration Act 1958 (the Act).
- (ii) The lodgement of the second application on 17 August 2006 perfected the earlier application, thereby making it a valid application, but it did not become a valid application until 17 August 2006. An invalid application cannot be rendered valid to the date it was lodged because to do so would be inconsistent with the whole scheme of the Act. The Minister is not entitled to consider an invalid application.

per Moore J (dissenting)

- (iii) The expression "the application" in cl.573.211(3)(c)(i) is intended to refer only to the form. The process of applying for the visa began on 27 March 2006 and was completed on 17 August 2006. The date of application was 27 March 2006. That the respondent did not make a valid application until the visa application charge was paid in August 2006 does not dictate a conclusion that he did not satisfy the criterion that the application be made within 28 days of his last substantive visa ceasing to be in effect.

SHERZAD v MIAC

[2008] FCAFC 145

Federal Court of Australia, Moore, Lindgren and Buchanan JJ, NSD 578 of 2008, 18 August 2008

This was an appeal from a judgment of the Federal Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming the delegate's

decision to refuse to grant the visa applicant an Other Family (Migrant) (Class BO) Subclass 115 (Remaining Relative) visa.

The visa applicant was sponsored by his brother, the appellant. The visa applicant disclosed that he had a brother (the appellant), a mother and one sister who lived in Afghanistan and a second sister who resided in Iran. The Tribunal accepted that the family composition of the visa applicant was that of three overseas near relatives as defined in the applicable version of r.1.15(2) of the Migration Regulations 1994. The Tribunal did not accept that the visa applicant did not continue to have contact with his mother and sister living in Afghanistan. The Tribunal was also not satisfied that a period of fourteen months constituted a 'reasonable period' during which no contact had occurred. The Tribunal was not satisfied that the requirements of r.1.15(1)(c) of the definition of remaining relative were met.

The challenge to the decision of the Tribunal was based upon the contention that r.1.15(1)(c)(ii) is satisfied in the case of a person with two or three overseas near relatives, if the applicant has not had any contact with one of them within the relevant period and in this case the lack of contact with his sister in Iran, was sufficient in order for the visa applicant to be regarded as the 'remaining relative' of the appellant. The primary judge rejected the appellant's contended interpretation of r.1.15(1)(c)(ii) and held that the Tribunal did not fail, constructively or otherwise, to exercise its jurisdiction by failing to ask the correct question. The appellant maintained this contention on appeal, relying upon the singularity of the various terms in r.1.15(1)(c).

Held: *per curiam*, appeal dismissed.

- (i) Section 23(b) of the *Acts Interpretation Act* 1901 provides that words in the singular number include the plural. There was no contrary intention that would displace the operation of this provision in r.1.15(1). This construction is supported by *Elliott v MIMIA* [2006] FCA 67.
- (ii) The consequences of the construction relied on by the appellant would undermine the whole basis of the "remaining relative" concept.

SBZD v MIAC

[2008] FCA 1236

Federal Court of Australia, Gray J, SAD 159 of 2007, 14 August 2008

This was an appeal from a judgment of the Federal Magistrates Court upholding a decision of the Refugee Review Tribunal (the Tribunal) that the appellant, a citizen of the United Kingdom, was not a person to whom Australia had protection obligations.

The appellant claimed to fear persecution by vigilante groups for reasons of his membership of a particular social group, being child sex offenders or paedophiles or people perceived to be child sex offenders or paedophiles. The Tribunal accepted that there was a real chance of serious harm to him from vigilante groups by reason of his identification as a known child sex offender or paedophile and accepted he was a member of a particular social group for the purposes of the Convention. However, the Tribunal found that if he were attacked, his attackers would be actively pursued and prosecuted and that the protection available met international standards and therefore, the appellant would be able to obtain effective state protection from the harm feared from non-state actors, he would not be denied such protection for reasons of his membership of a particular social group and, accordingly, his fear of harm was not well-founded.

The appellant contended that the Tribunal failed to apply the correct legal test in ascertaining whether he satisfied the requirement that his unwillingness to avail himself of the protection of the United Kingdom was the result of a well-founded fear of being persecuted. The argument was based on the proposition that the correct test was stated by McHugh J in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18 (2004) 222 CLR 1 (*S152/2003*) and not that of the majority.

Held: appeal dismissed

- (i) It is impossible to uphold the contention that the majority judgment in *S152/2003* cannot be taken as an expression of the authoritative test to apply when the issue is whether the country of nationality of an applicant for a protection visa alleges that that country lacks the ability effectively to protect him or her from the harmful actions of non-state antagonists.
- (ii) In assessing whether the state machinery of a country falls below the required standard for protection of its citizens, the majority's view in *S152/2003* expresses the authoritative test that the appropriate level of protection is to be determined by international standards. The Tribunal in this case applied the test expressed by the majority in *S152/2003*. It specifically found the level of protection offered in the United Kingdom meets international standards.
- (iii) There is no requirement that a state provide absolute protection for its citizens. Even if in fact the appellant might come to harm at the hands of vigilantes, his unwillingness to avail himself of the protection of the United Kingdom because the protection would not be absolute would not be sufficient to bring him within Art 1A(2) of the Convention.

SZBYH v MIAC

[2008] FCA 1157

Federal Court of Australia, Sundberg J, NSD 574 of 2008, 8 August 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 appellants were not persons to whom Australia had protection obligations. The appellants, a husband and wife, claimed to fear persecution should they return to India, amongst other things, due to the appellant husband's claim to have become a Jehovah's Witness.

The Tribunal had previously made a decision that the appellants were not persons to whom Australia had protection obligations which was quashed by the Court. The Tribunal invited the appellants to a further hearing. The invitation, which was directed to the appellant husband and addressed to the authorised recipient, stated that the Tribunal wished "to take evidence from your sister in law". The sister in law attended the hearing and gave evidence under affirmation.

The Tribunal rejected the appellants' claims in their entirety on the basis of their lack of credibility. In its decision record, the Tribunal referred to a discussion with the appellant husband at hearing in which he gave non-responsive answers to the Tribunal's questions asking him whether he was aware that Jehovah's Witnesses do not allow relationships to be maintained with non-Witnesses, or that there was a famous case in the United States which was illustrative of this separation requirement.

On appeal to the Federal Court, the appellants contended that the Tribunal had failed to comply with ss.424(2) and (3) of the *Migration Act* 1958 (the Act) when it invited the sister in law to give evidence at the hearing; and that there was no evidence to support the facts about Jehovah's Witnesses assumed by the Tribunal.

Held: appeal dismissed

- (i) Section 424(2) was not activated. The Tribunal did not invite the sister to give information. Rather it told the appellant's solicitors that it would like to hear evidence from her. In receiving her evidence and asking her questions, the Tribunal was exercising its power under s.427 of the Act.
- (ii) The Tribunal's rejection of the appellants' claimed fear of persecution on the ground of religion did not turn on its view that Jehovah's Witnesses required separation from other people. Rather, it turned on the Tribunal's comprehensive rejection of the credibility of the appellants and their witnesses. Even if the remarks were integral to its decision, the Member

had drawn on his own accumulated knowledge and acted on information he regarded as within the public domain.

SZIYG v MIAC

[2008] FCA 1143

Federal Court of Australia, Tracey J, NSD 1843 of 2007, 5 August 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 claimed to fear persecution for his Christian religion. The Tribunal found the appellant displayed little knowledge of Christian beliefs and found that he had attended church in Australia for the sole purpose of strengthening his claim to be a refugee and disregarded the conduct in accordance with s.91R(3) of the Migration Act 1958 (the Act). In assessing the appellant's well-founded fear, the Tribunal found he never engaged in religious activities in China and would not suffer harm because of his real or imputed religious beliefs. "Having found that the [appellant] attended Church services in Australia only for the purposes of enhancing his claims for protection", it found he would not be motivated to join an underground church on return to China.

The Federal Magistrate found that no breach of s.424A was established and no jurisdictional error was apparent in the Tribunal's application of s.91R(3) of the Act. The appellant largely maintained these contentions on appeal.

Held: appeal dismissed

- (i) The breach of s.424A was not made out and the Tribunal did not contravene s.91R.
- (ii) Before the Tribunal made the italicised observation it had already concluded that the appellant had not been a practising Christian in China. That being so it was hardly likely that he would join an underground Church or practise Christianity upon return to that country. At best, the Tribunal's reference to his Church attendance in Australia was an additional reason to support the conclusion to which the Tribunal had already come. It may be that the Tribunal was doing no more than restating its earlier conclusion.

SZLDV v MIAC

[2008] FCA 1211

Federal Court of Australia, Jessup J, NSD569 of 2008, 6 August 2008

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

The appellant, a citizen of China, claimed to have practised Falun Gong since 1997 and to have been detained and mistreated in 1999 and 2006. The appellant, in response to Tribunal questions regarding his involvement in Falun Gong activity in Australia stated he had not participated in Falun Gong activities since coming to Australia, nor had he sought to obtain any of the Falun Gong literature. The Tribunal found the appellant's inactivity in Australia indicated his lack of interest and lack of commitment to Falun Gong and was inconsistent with the actions of a genuine Falun Gong practitioner. The Tribunal was not satisfied that the appellant was ever a Falun Gong practitioner or was ever perceived as one and found there was no chance the appellant had acquired any "adverse regard" from the Chinese authorities during his absence from China.

The appellant contended for the first time on appeal that the Tribunal had not assessed his claims according to s.91R(3) of the *Migration Act* 1958 (the Act).

Held: appeal dismissed.

- (i) The Tribunal did not commit jurisdictional error by using to the appellant's disadvantage the circumstance that he had since arriving in Australia taken no steps to become involved in the practice of Falun Gong.
- (ii) The appellant relied only upon his conduct in China regarding his practice of Falun Gong. The appellant was informing the Tribunal in response to a question of something which had not happened. This did not amount to conduct engaged in by the appellant within the meaning of s.91R(3). The subsection was not applicable to that circumstance because it was not an element of the appellant's evidentiary case before the Tribunal. The appellant did not introduce the material in question.
- (iii) Inaction can constitute conduct in relevant respects but s.91R(3) refers not to conduct simpliciter but to conduct engaged in by the person. *SZJGV v MIAC* [2008] FCAFC 105 does not require the decision maker always to treat a situation in which nothing has happened as amounting to conduct "engaged in by the person".

SZLJB v MIAC

[2008] FCA 1233

Federal Court of Australia, Jacobson J, NSD 814 of 2008, 11 August 2008

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

The appellant, a Chinese citizen, claimed to fear persecution on the basis of his practise of Falun Gong. He claimed he attended Falun Gong meetings in Australia. The Tribunal rejected this claim, finding he had not had any involvement with Falun Gong practitioners or the movement in Australia. The Tribunal went on to find on the basis of all the evidence that he was not a Falun Gong practitioner, that he would not be perceived as a Falun Gong practitioner and that he had fabricated his claim.

The appellant contended the Tribunal erred on various grounds at first instance and on appeal. The Federal Magistrate held that no jurisdictional error was made out. The Minister on appeal raised the issue of compliance with s.91R(3) of the *Migration Act 1958* (the Act).

Held: appeal dismissed

- (i) None of the grounds of appeal could be supported.
- (ii) Having found that the appellant's conduct in Australia did not occur, s.91R(3) of the Act was not enlivened because there was nothing for the Tribunal to disregard.
- (iii) Inaction can constitute conduct within the meaning of s.91R(3) of the Act. Therefore, it might be said what was taken into account by the Tribunal was the appellant's failure to engage in particular activities that may have strengthen his claim for a protection visa. However, even if that were so, the Tribunal's finding that he did not attend the meetings cannot be said to have been conduct engaged in for the purpose of strengthening his claim to be a refugee.

SZLOX v MIAC & ANOR

[2008] FCA 1286

Federal Court of Australia, Jacobson J, NSD 854 of 2008, 12 August 2008

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

The appellant, a national of China, claimed to fear persecution on the Convention grounds of religion, imputed political opinion and membership of a particular social group. The Tribunal found that considering all the evidence, in addition to the appellant's statement that she had put income generation in Australia ahead of the practice of Falun Gong, it was not satisfied that she had ever been a Falun Gong practitioner or ever had any genuine interest in Falun Gong.

On appeal to the Federal Court, the appellant contended, amongst other things, that the Tribunal failed to consider the fact that she had been practising Falun Gong in Australia, and thereby breached s.91R(3) of the *Migration Act* 1958 (the Act).

Held: Appeal dismissed.

- (i) There was no breach of s.91R(3) of the Act.
- (ii) The conduct to which the Tribunal referred, namely the appellant's work-related activities in Australia, was not conduct upon which she sought to rely to support her claim to have a well-founded fear of persecution. Therefore, the Tribunal was not bound under s.91R(3) to disregard that conduct.
- (iii) The effect of s.91R(3) is that it is only enlivened where an applicant seeks to rely on conduct in Australia to support a claim to have a well-founded fear of persecution.

SZLXI v MIAC

[2008] FCA 1270

Federal Court of Australia, Cowdroy J, NSD 895 of 2008, 21 August 2008

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

The appellant, a citizen and demobilised soldier of the People's Republic of China (PRC), claimed to have been regarded by the PRC as an organiser of an anti-government movement and for inciting demobilised soldiers to protest against the government. Whilst accepting that the appellant may have served in the army, the Tribunal did not accept that he or his demobilised peers would be at risk or of interest to the authorities given that they were demobilised twenty years ago, or that he had participated in or incited others to protest against the government.

The appellant contended before the Federal Court that the Tribunal failed to comply with ss.424AA and 424A(1) of the *Migration Act* 1958 (the Act) by making its findings based upon incorrect information or evidence and raising incorrect issues in deciding the review application.

Held: appeal dismissed.

- (i) There was no error by the Tribunal in its application of ss.424AA or 424A.
- (ii) What is not 'information' for the purposes of s.424A(1) is also not 'information' for the purposes of s.424AA. As s.424AA is merely an alternative form of notification available to the Tribunal, the exclusions contained in s.424A(3) apply with equal force to s.424AA.
- (iii) While the Tribunal found that there were inconsistencies in the appellant's evidence, it is well established that inconsistencies in evidence do not constitute 'information' for the purposes of s.424A (*SZBYR v MIAC* (2007) 235 ALR 609), and accordingly do not constitute 'information' for the purposes of s.424AA.

FEDERAL MAGISTRATES COURT JUDGMENTS

Brar v MIAC

[2008] FMCA 1026

Federal Magistrates Court of Australia, Driver FM, SYG 791 of 2008, 8 August 2008

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

The education provider purported to issue a notice pursuant to s.20 (the s.20 notice) of the *Education Services for Overseas Students Act 2000* (ESOS Act) on 26 June 2007 stating that the

applicant had attended 11% of contact hours in a particular term. The Tribunal had regard to information from the education provider, calculated the applicant's attendance and agreed with the figure of 11%. The Tribunal found the applicant failed to comply with condition 8202(3)(a) of Schedule 8 to the *Migration Regulations 1994* (the Regulations) of his student visa, that the applicant had not complied with condition 8202 and that the ground for cancellation in s.116 of the *Migration Act 1958* (the Act) existed. The Tribunal was also satisfied that the non-compliance was not due to exceptional circumstances beyond the applicant's control and as such, these circumstances were prescribed circumstances in which the visa must be cancelled.

The applicant contended that the Tribunal committed a jurisdictional error in applying condition 8202 in the form found to be invalid in *Dai v MIAC* [2007] FCAFC 199 (*Dai*).

Held: Tribunal decision quashed and remitted for re-determination according to law.

(i) The condition 8202(3)(a) applied by the Tribunal was invalid. It necessarily follows from *Dai* that subclause (3)(a) is invalid along with subclause (3)(b) because the two paragraphs are not severable from one another. A visa holder cannot comply with condition 8202 as it formerly stood without complying with subclause (3)(b). Further, subclause (3)(a) suffers from the same vice as subclause (3)(b) as there is nothing a visa holder can do to compel the provision of attendance records or affect the quality of them.

Obiter

(ii) The condition precedent to the issue of the s.20 notice is a breach of a condition. There could be no breach of 8202(3)(a) in the pre 1 July 2007 form until the Minister directed his mind to the issue of attendance. However, a notice under s.20 of the ESOS Act requires a determination by the education provider, not the Minister. It is unclear how there could ever be an automatic cancellation of a visa under s.137J on the basis of a breach of subclause 8202(3)(a) pursuant to a notice under s.20 of the ESOS Act.

(iii) The Tribunal, like the delegate, was in error in applying the pre 1 July 2007 form of the condition by reference to the date of the s.20 notice and in relying upon the s.20 notice as establishing the breach of the condition. In doing so it took account of irrelevant material and fell into jurisdictional error. The Tribunal failed to identify any particular date at which the applicant was in breach of the condition in order to determine which version of the condition was applicable. By failing to do so the Tribunal overlooked a relevant consideration and fell into jurisdictional error.

(iv) The only rational interpretation of the transitional provision in r.5(3) of the Migration Amendment Regulations 2007 (No.5) is that, a breach of a visa condition occurs when it has been found to have occurred. It speaks in terms of a specific time not a period. In the post 1 July 2007 version of the condition, that breach occurs when the non-compliance is certified by the education provider - that may relate to a period prior to 1 July 2007.

MATETE v MIAC & Anor

[2008] FMCA 573

Federal Magistrates Court of Australia, Cameron FM, SYG 3590 of 2007, 7 August 2008

This was an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) which affirmed a decision to cancel the applicant's Subclass 444 (Special Category) visa under s.109 of the *Migration Act 1958* (the Act) because of a breach by the applicant of ss.102, 103 and 105 of the Act.

A Notice of Intention to Consider Cancellation under s.107 of the Act (the notice) was sent to the applicant. It explained why the applicant may have breached ss.102, 103 and 105 of the Act. The Tribunal found that the applicant was properly served with the notice as required by the Act. It also found that the applicant filled in his passenger cards with incorrect answers, and thus there was non-compliance by the applicant with s.102 as described in the notice. The Tribunal concluded that the applicant's visa should be cancelled pursuant to s.109.

The applicant contended, among other things, that the Tribunal fell into jurisdictional error by failing to conclude that the notice had not been properly given to the applicant in accordance with the Act and the Migration Regulations 1994 (the Regulations) as he was not personally given the notice. The Minister brought to the Court's attention the judgment of Lander J in *Zhong v Minister for Immigration & Citizenship* [2008] FCA 507, and the validity of the s.107 notice was also considered by the Court.

Held: application dismissed.

- (i) Jurisdictional error on the part of the Tribunal was not demonstrated.
- (ii) The statutory precondition for the issue and service of the notice was satisfied. The wording of the notice demonstrated that the delegate considering the applicant's position did consider that there had been breaches of ss.102, 103 and 105 of the Act, although the notice could have been more clearly drafted. The use of the terms "may not have complied with" the relevant provisions was not conclusive of the delegate's opinion, but reflected the reality that the delegate might have been incorrect in his conclusion, and a willingness to consider such a possibility.
- (iii) Given the evidence before the Tribunal, the conclusion that the notice was personally served on the applicant was open to it and its conclusion that the notice had been served in accordance with r.2.55(3) was not erroneous.
- (iv) Sending the notice of visa cancellation to the applicant at Grafton Correctional Centre met the requirements of r.2.55(3)(c), which was the relevant legislation, and not s.494B. The applicant's last residential address known to the Minister was Grafton prison, and it was thus necessary and appropriate that the notice was sent to the applicant there.

NBKB v MIAC & Anor

[2008] FMCA 1046

Federal Magistrates Court of Australia, Barnes FM, SYG 348 of 2007, 30 July 2008

The applicant, a citizen of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that she was not a person to whom Australia owed protection obligations. The decision was that of a reconstituted Tribunal (the second Tribunal), made after the decision of the original Tribunal (the first Tribunal) was remitted by consent.

The applicant claimed to fear persecution in China for her practice of Falun Gong since 1997. She claimed to have been detained by the Public Security Bureau (PSB) for three days and sent to a labour camp. Before the first Tribunal, the applicant claimed she came to Australia to do business and that she intended to return to China, but was 'touched' by Falun Gong practitioners in a park, which reactivated her interest in Falun Gong. Thereafter she exercised at a park in Hurstville. The second Tribunal held a further hearing. The second Tribunal did not accept the applicant's claims about her Falun Gong practice in China to be credible. It found the applicant's conduct in Australia was undertaken for the purposes of strengthening her claims for refugee status and disregarded it under s.91R(3).

The applicant contended, among other things, that the second Tribunal breached s.424A(1) of the *Migration Act* 1958 (the Act) by failing to put to her for comment questions put to her by the first Tribunal relied upon to find a lack of credibility and breached s.425 in that the second Tribunal failed to identify in the hearing conducted by that member all the dispositive issues from that member's perspective, notwithstanding that the applicant might have known from delegate decision, or from a previous Tribunal hearing that these might be relevant issues.

Held: application dismissed

- (i) It was not established that questioning of the first Tribunal amounted to 'information' that the Tribunal considered would be part of the reason for affirming the decision within

s.424A(1). Even if questions may be characterised as “information”, the second Tribunal’s description of what occurred at the first Tribunal hearing and the questions asked reveal that relevant issues were raised with the applicant and she was given an opportunity to address concerns about her evidence. However, it was the applicant’s own evidence that could be said to be information that the second Tribunal considered would be the reason or part of the reason for affirming the decision under review, not the questioning that provided the framework in which such evidence was given to the Tribunal. Such evidence from the applicant was within the exception in s.424A(3)(b).

- (ii) The second Tribunal did not breach s.425, which requires review by the Tribunal, not the particular member. Section 425 requires identification of dispositive issues to the ‘review’ initiated under s.414(1) culminating in a valid decision. *SZBEL v MIMIA* (2006) 228 CLR 152 is not authority that a reconstituted Tribunal must in all cases take the applicant through evidence given to the delegate (or to the Tribunal as originally constituted) and tell the applicant what it accepts and what remains of concern.

Shi v MIAC

[2008] FMCA 1107

Federal Magistrates Court of Australia, Cameron FM, SYG 3961 of 2007, 6 August 2008

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister’s delegate to refuse the applicant’s Partner (Provisional) (Class UF) (Subclass 309) visa.

The applicant was sponsored in relation to a Subclass 309 visa by the brother of her sponsor’s former wife. The applicant did not tell the delegate of this connection and subsequently denied that the sponsor and applicant were related by marriage. The Tribunal invited the applicant to comment on this information pursuant to s.359A of the *Migration Act* 1958 (the Act), stating the information was relevant because it reflected on the overall credibility of the applicant and may indicate the marriage was contrived. The applicant claimed that her and her sponsor’s relationship would be viewed as dishonourable and against traditional values. The applicant submitted a number of documents to demonstrate the genuineness of her relationship with the sponsor. At the hearing, the Tribunal asked the review applicant to provide certain documents by a specified date. In its reasons for decision, the Tribunal considered that the marriage was contrived for migration purposes, based on the false information provided to the delegate and because it considered it implausible that the applicant and the sponsor did not meet while they were related by marriage.

The applicant claimed, among other things, that the Tribunal failed to comply with s.359A(1)(b) and failed to invite the application to give information in accordance with s.359(2) and (3) of the Act.

Held: application dismissed.

- (i) The Tribunal asked for additional information from the applicant without having put that request in writing. *SZKCO v MIAC* [2008] FCAFC 119 held that any failure to do so in relation to s.424, the equivalent of s.359, amounted to jurisdictional error. However relief should be refused. The applicant suffered no injustice by the Tribunal’s failure to comply with the procedural requirements of s.359. Applying a ‘forward-looking test’, a rehearing would be futile.
- (ii) The Tribunal complied with s.359(1)(b). The relevance of the information was correctly identified as being because the information may raise suspicions that the relationship was contrived. The Tribunal’s speculation as to the motivations for the contrivance was not a reason or part of the reason for affirming the decision and was not relevant to the review. The requirement in s.359A(1)(b) is an objective one which does not require a particular applicant to have actually understood the relevance of information. The qualification of reasonable practicability limits the Tribunal’s obligation to a requirement of clarity of expression and presentation commensurate with the applicant’s circumstances.

**SZBQS v MIAC & Anor
[2008] FMCA 812**

Federal Magistrates Court of Australia, Driver FM, SYG 698 of 2008, 22 August 2008

The applicant, a Bangladeshi national, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. The applicant claimed to fear religious persecution based on his Ahmadi or Qadiani faith.

The Tribunal did not accept the applicant's claims that he was an adherent of the Qadiani or Ahmadi faiths based upon information received in response to a letter it wrote to the Ahmadiyyah Muslim Association of Australia (AMAA). That letter, which was addressed to the Amir & Missionary In-Charge, requested advice on whether the applicant was known to the Ahmadiyya Muslim Jamat Bangladesh (AMJD) and requested that the office of the Bangladesh National Amir be asked to confirm the authenticity of letters the applicant had submitted to the Tribunal. The Tribunal's letter did not specify the manner or time in which the information should be provided.

The applicant contended, amongst other things, that the Tribunal's decision was vitiated by a failure to comply with the requirements of s.424B of the *Migration Act 1958* (the Act) in connection with the letter to the AMAA.

Held: application dismissed

- (i) The request to the AMAA was a request falling within the purview of s.424 and on the authority of *SZKTI v MIAC* [2008] FCAFC 83 and *SZKCO v MIAC* [2008] FCAFC 119, the Tribunal was bound to meet the requirements of s.424B in making that request. However, its failure to do so did not result in jurisdictional error.
- (ii) There is nothing to indicate that the AMAA provided its address to the Tribunal in connection with the review for the purposes of s.424(3) and s.441A. Section 441A(4) relevantly required that the Tribunal confirm the address of the AMAA for the purposes of the review. The consequence of s.441A not being followed is that s.441C(4) and r.4.35 do not apply to prescribe periods for the purposes of s.424B(2). In the circumstances, there was no obligation to specify a prescribed period for response; instead the response was to be given within a 'reasonable period'.
- (iii) The direction of a s.424 request to an address different from an address given by a recipient for the purposes of the review would be a serious breach constituting jurisdictional error. But a failure to confirm a previously known and correct address for the purposes of a particular review, provided the recipient will not be bound by the prescribed time limits for response and a reasonable time to respond is given, is not a jurisdictional error.
- (iv) Section 424B(1) applied notwithstanding that the AMAA is neither a body corporate, body politic nor a natural person. The Tribunal was seeking information from persons with authority to respond on behalf of the AMAA. It was to those "persons" and, in particular, the Amir and Missionary In-Charge, that the request was directed.
- (v) While the request did not explicitly specify the way in which the information was to be given, it implicitly required a written response, given that it was a formal request in writing and in the absence of an invitation to attend an interview. Section 424B(1) is not breached when it is obvious from the invitation what manner of response was called for.
- (vi) The approach by the AMAA to the Amir in Bangladesh was not in itself a s.424 request that was required to be in writing. It was sufficiently clear from the Tribunal's letter that the response called for was a written response providing information gathered from the Ahmadiyyah organisation in Bangladesh.

SZHIU v MIAC & Anor

[2008] FMCA 934

Federal Magistrates Court of Australia, Lloyd-Jones FM, SYG 3500 of 2007, 15 August 2008

The applicant, a national of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution as an Ahmadi.

The Tribunal found the applicant was not a credible witness and had fabricated his claim. The Tribunal found that the applicant was not an Ahmadi, did not have any association with the Ahmadiyya and would not be persecuted as an Ahmadi or imputed Ahmadi. In so finding it relied upon the applicant's lack of knowledge of Ahmadi beliefs, his account of his involvement in Bangladesh and his lack of any involvement with the Ahmadiyya community in Australia.

The applicant contended, among other things, that the Tribunal had made jurisdictional error by having regard to conduct in Australia in breach of s.91R(3) of the *Migration Act* 1958 (the Act).

Held: application dismissed

- (i) The Tribunal did not fall into jurisdictional error. There was no breach of s.91R(3) of the Act.
- (ii) Section 91R(3) was not invoked and it was unnecessary for the Tribunal to make any determination under that section. The applicant was not making any claim in respect of his involvement in the Ahmadiyya faith while in Australia. Consequently there was no claim to pursue this course in an attempt to strengthen his claim.

SZIHN & Anor v MIAC & Anor

[2008] FMCA 153

Federal Magistrates Court of Australia, Emmett FM, SYG1094 of 2007, 15 February 2008

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

The applicants claimed to fear persecution from the authorities due to their failure to bribe police for protection from criminals seeking to extort their business. The Tribunal affirmed the delegate's decision refusing a protection visa to the applicants.

A preliminary issue was raised that judicial proceedings were futile because the Tribunal lacked jurisdiction because the review application had been lodged outside the mandatory time period following notification as prescribed by s.412(1)(b) of the *Migration Act* 1958 (the Act) and r.4.31(2)(b) of the *Migration Regulations* 1994. The delegate's decision was sent to the applicants at their residential address. The residential address provided in his protection visa application was in response to question 14 "Your current residential address in Australia. Note: a Post Office box address is not acceptable as a residential address. Failure to give a residential address will result in your application being invalid." The applicant provided a post office box address in response to question 17, "Your current postal address in Australia".

The applicant submitted that the residential address was not provided 'for the purposes of receiving documents' within s.494B, but rather because, under s.52(3A) of the Act, visa applicants must tell the Minister the address at which they intend to live while the application is being dealt with. The Minister submitted that s.52 makes clear that a purpose for providing the applicant's residential address is for receiving documents from the Minister under s.494B. Section 494B does not require that the purpose for receiving documents be the sole purpose for providing the last residential or business address.

Held: application dismissed

- (i) In the circumstances, the Minister complied with the legislative scheme in giving notification to the applicant of the delegate's decision. The applicant failed to comply with the prescribed timeframe such that the Tribunal lacked jurisdiction and there is no utility in proceeding with this judicial review application.

SZKHC v MIAC & Anor

[2008] FMCA 1205

Federal Magistrates Court of Australia, Nicholls FM, SYG 730 of 2007, 28 August 2008

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

The applicant claimed to have been a Falun Gong practitioner for ten years in China and had practised at a park in Campsie once a week since arriving in Australia. The Tribunal rejected the applicant's claims to have been persecuted in China because of Falun Gong practice. It found that the applicant was not a credible witness and that his ability to do the Falun Gong exercises did not overcome the fact that he had no more than a peripheral knowledge of crucial aspects of Falun Gong practice and belief. It found he had never been a practitioner in China and that his practise was not genuine and was appropriated or learnt in Australia for the purposes of giving verisimilitude to his claim to be a practitioner in China.

The applicant contended, among other things, that the Tribunal did not consider his application in accordance with s.91R of the *Migration Act* 1958 (the Act) and did not consider that he had attended Falun Gong activities in Australia which may lead to his being persecuted on return to China.

Held: Tribunal decision quashed and remitted for reconsideration.

- (i) The Tribunal committed jurisdictional error in failing to properly address a claim and failing to properly consider s.91R(3) of the Act.
- (ii) The Tribunal failed to address the applicant's claim to have been a Falun Gong practitioner in Australia since his arrival and that this would give rise to a well-founded fear of persecution if he were to go back to China.
- (iii) Even if the distinction can be drawn between the applicant's knowledge of Falun Gong belief and the act of acquiring that knowledge, being his claimed practice of Falun Gong in Australia, the Tribunal still failed to decide whether or not the conduct that the applicant claimed to have engaged in Australia had occurred or not occurred. That is the threshold question that s.91R(3) requires the Tribunal to address.

SZLND & Ors v MIAC & Anor

[2008] FMCA 1047

Federal Magistrates Court of Australia, Nicholls FM, SYG 3243 of 2007, 31 July 2008

The primary applicant (the applicant), 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 was an infant born in Australia who claimed to fear persecution if he were to go to Indonesia, based on the treatment of Chinese Christians in Indonesia. The applicant father and applicant mother each made their applications on the basis of their membership of their son's family unit and had previously been refused protection visas and unsuccessfully sought review by the Tribunal.

The Tribunal found that it did not have jurisdiction in relation to the applicant father's and applicant mother's applications for review as the delegate of the Minister found their applications were invalid, being barred by s.48A of the *Migration Act* 1958 (the Act), a decision that was not an RRT-

reviewable decision. The Tribunal accepted that the applicant's ethnicity was Chinese, and that he was Christian. It found on the basis of independent evidence that since the applicant's father departed Indonesia, the Indonesian government had put in place changes that had improved the lives of the ethnic Chinese and the Christian Chinese and concluded that the applicant did not face a real chance of persecution if he were to go to Indonesia.

The applicant claimed, among other things, that the Tribunal had ignored information before it, misunderstood the claims and failed to wait for information to be provided. The Court also considered whether the evidence given by the applicant mother and father at hearing was information for the purposes of s.424A of the Act.

Held: application dismissed

- (i) There was no breach of s.424A. The Tribunal did not receive information from sources other than the applicant. The applicant's parents plainly spoke to the Tribunal in their capacity as the applicant's representatives, the applicant being unable to speak for himself. Having regard to the 'Response to Hearing Invitation' form and the Tribunal's account of the hearing, the applicant's parents appeared at hearing in their own right (in relation to their own applications for review), but also as the representatives to speak on behalf of their infant son. They were clearly not there as witnesses.
- (ii) There was no error on any of the bases put forward. Any plain reading of the Tribunal's decision record reveals that it did not ignore claims. There was no indication that the applicant's father requested an opportunity to provide further information to the Tribunal, nor in the circumstances did the Tribunal have any obligation to provide any further time. The Tribunal was not required to make a finding as to the parents' real chance of persecution were they to return to Indonesia. It gave the applicant every opportunity to put forward his claims through his parents and considered each aspect of their evidence and submissions.
- (iii) The Tribunal decision that it had no jurisdiction in relation to the parents' applications for review was plainly correct.

SZMCY v MIAC & Anor

[2008] FMCA 934

Federal Magistrates Court of Australia, Driver FM, SYG 849 of 2008, 12 August 2008

The applicant, a Chinese national, 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 from Chinese authorities on the basis of his Christian faith and Catholicism.

The Tribunal affirmed the delegate's decision refusing the applicant a protection visa. The Tribunal found that the applicant had no genuine commitment to the principles of Catholicism or the Christian faith while in China. The Tribunal considered that the applicant may have acquired his limited knowledge of the Christian faith as a result of attendance at Mass in Australia. The Tribunal was not satisfied that the applicant engaged in religious worship or other activities in Australia otherwise than for the purpose of strengthening his claims to be a refugee and stated that it was required to disregard such conduct in accordance with s.91R(3) of the *Migration Act* 1958 (the Act). The Tribunal then found as the applicant had no genuine commitment to Christianity, he would not engage in religious activities in China and there was no real chance he would face persecution for reason of his religion if he returned to China.

In seeking judicial review, the applicant presented various unparticularised allegations of error by the Tribunal. The Court found no substance to the allegations but required the Minister to show cause why relief should not be granted in relation to the question of whether the Tribunal breached s.91R(3) of the Act in the light of the Full Federal Court decision in *SZJGV v MIAC* [2008] FCAFC 105,

in taking into account the applicant's conduct in Australia in finding that he had had no genuine commitment to Catholicism or Christianity.

Held: application dismissed

- (i) The Tribunal did not fall into jurisdictional error. There was no breach of s.91R(3) of the Act.
- (ii) On one interpretation of the Tribunal's reasons the finding he would not engage in religious activities because he has no genuine commitment to Christianity was no more than the fulfillment of the Tribunal's obligation to make a forward-looking assessment of risk of harm in China. The Tribunal found the applicant had no genuine commitment to Christianity in China, having rejecting his claimed involvement in China and disregarded the conduct in Australia. There was nothing that could point to genuine commitment.
- (iii) An alternative interpretation of the Tribunal's words is that, in stating that at the time of its decision the applicant had no genuine commitment to Catholicism or Christianity, the Tribunal was taking into account not only its finding about the applicant's conduct in China but also its finding in relation to the motivation for the applicant's conduct in Australia. This was not a breach of s.91R(3) as it would be a case of the Tribunal taking into account the motivation for the conduct rather than the conduct itself.

SZMEF v MIAC & ANOR

[2008] FMCA 1106

Federal Magistrates Court of Australia, Driver FM, SYG 986 of 2008, 4 August 2008

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

The Tribunal found the claims of past harm were vague and not substantiated. It found the applicant did not have the political profile he claimed. In finding that the applicant would not suffer future harm for a Convention reason it relied upon the delay of one month between the applicant's arrival and the making of the application in determining that the applicant did not have a genuine fear of persecution.

The applicant made various contentions. The Minister raised the issue of compliance with s.91R(3) of the Act in relation to the applicant's delay in applying for a protection visa.

Held: application dismissed

- (i) Where the Tribunal does not see anything in specific facts or circumstances that could (or could be intended to) enhance a protection visa claim s.91R(3) of the Act is not engaged. The Tribunal decision was free from error as it did not regard the applicant's delay in seeking protection as enhancing his claims.
- (ii) It was hard to envision any circumstance where delay in making claims could enhance those claims. The act of making a protection visa claim could not be conduct to enhance the claim; it is the claim itself. However, the timing of the claim may be material. For instance an applicant may seek to rely on his promptness in making the claim to enhance the claim, that might engage s.91R(3).
- (iii) Section 91R(3) may be engaged on the basis of inaction as well as action. The section may also be engaged independently of any reliance sought to be placed on the particular facts by an applicant.

SZMJJ v MIAC & Anor

[2008] FMCA 1115

Federal Magistrates Court of Australia, Emmett FM, SYG 1477 of 2008, 21 August 2008

The applicant, a Chinese national, 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 from Chinese authorities because she was a Falun Gong practitioner.

At hearing the Tribunal indicated that it was going to give her information which would be the reason or part of the reason for affirming the decision, it would explain the information and relevance of it and ask her to comment or respond and that if she wanted more time to comment or respond she could tell the Tribunal and the Tribunal would consider whether to adjourn the review. The Tribunal went on to find the applicant was not genuinely committed to Falun Gong. It made adverse credibility findings in relation to her claims of persecution in China; it did not accept that her husband's death had anything to do with Falun Gong and had regard to country information that suggested that if she had come to the authorities' attention and had a police record they would have been concerned about this in granting permission for her to go overseas. It found there was no real chance of Convention based persecution.

The applicant, among other things, made a general contention that she was denied procedural fairness. The Court considered the Tribunal's compliance with s.424A and s.424AA of the *Migration Act 1958* (the Act).

Held: application dismissed

- (i) The Tribunal did not fall into jurisdictional error.
- (ii) The Tribunal's words at hearing, referring in an unspecific sense to the requirements of s.424AA, could not be compliance with s.424AA of the Act. Section 424AA(b) requires specific compliance in respect of each piece of information intended to be given by the Tribunal. It must give "clear particulars" of each piece of information and do so in accordance with s.424AA(b) in respect of each of the particulars.
- (iii) Section 424AA does not impose any standard mandatory obligation on the Tribunal, unlike s.424A(1) of the Act. Therefore, a failure by the Tribunal to give information in strict accordance with s.424AA is not a jurisdictional error.
- (iv) The information to which the Tribunal had regard fell within sections 424A(3)(a) and 424A(3)(b), which exclude such information from the obligations of s.424A.

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

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

This Bill was introduced into the Senate on 25 June 2008 and, amongst other things, sought to abolish the Tribunal's handing down requirements and create the new position of Deputy Principal Member for the Migration Review Tribunal. The Bill has now been passed in both Houses but with government amendments, essentially removing the proposed original amendments relating to time limits for judicial review. The originally proposed provisions dealing with judicial review were the subject of some debate in the Senate and were removed to ensure swift passage of the Bill (the Bill also includes amendments that would address the recent Court decision of *Sales v MIAC* [2008] FCAFC 132 that prevented cancellation of some older transitional permanent visas). This Bill is yet to receive royal assent.

Legislation Pending

The Migration Legislation Amendment Bill (Notification Review) Bill 2008 (Bill - C2008B00209)

This Bill was introduced in the House of Representatives on 4 September 2008. Schedule 1 of the Bill will amend the notification provisions in the *Migration Act* 1958 that apply to the Department, the Tribunals. The Bill provides, in cases where other notification provisions would not apply to a minor, that where the Minister (or Tribunal member) forms a reasonable belief that an individual has care and responsibility for a minor, then the Minister (for primary decisions) or the Tribunal (for Tribunal decisions) may communicate with that person (instead of the minor) to notify that individual of a decision of the Minister or Tribunal about the minor; it provides that substantial compliance with the required contents of a notification document is sufficient unless the recipient is able to show the error or omission in the document causes them substantial prejudice; and it provides the deemed time of notification provisions will operate despite non-compliance with a procedural requirement for giving a document to an individual where the individual has actually received the document unless the individual is able to show they received the document at a later date in which case they will be taken to have received the document at that date.

CASELOAD OVERVIEW

MRT Decisions – August 2008

Case category	Set Aside	Affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	0	3	0	2	5
Visitor refusal	20	13	4	5	42
Student refusal	17	23	7	6	53
Temporary business refusal	23	9	10	19	61
Permanent business refusal	11	5	0	2	18
Skill linked refusal	38	23	4	5	70
Partner refusal	78	34	10	3	125
Family refusal	19	31	1	1	52
Student cancellation	22	13	1	5	41
Sponsor approval refusal	1	2	1	2	6
Other	18	6	3	5	32

RRT Decisions – August 2008

Country	Set aside	Affirmed	No jurisdiction Withdrawn	No Jurisdiction Other	Total
Bangladesh	0	7	0	6	13
Chile	0	1	0	0	1
China (PRC)	14	48	0	5	67
Colombia	1	0	0	0	1
Ethiopia	0	1	0	0	1
Fiji	0	0	0	1	1
India	1	7	0	2	10
Indonesia	0	14	0	4	18
Iran	2	0	0	0	2
Israel	0	1	0	0	1
Jordan	2	0	0	0	2
Korea, Republic Of	0	0	0	3	3
Lebanon	1	3	0	1	5
Lithuania	0	1	0	0	1
Malaysia	1	10	0	0	11
Mongolia	1	1	0	0	2
Nepal	3	2	0	1	6
New Zealand	0	1	0	0	1
Nigeria	0	1	0	0	1
Pakistan	1	2	0	0	3
Papua New Guinea	1	1	0	0	2
Philippines	0	0	1	0	1
Singapore	0	1	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	1	1	0	0	2
Stateless	0	1	0	0	1
Sudan	0	1	0	0	1
Syria	0	0	0	1	1
Ukraine	0	1	0	0	1
Vietnam	0	1	0	0	1
Zimbabwe	2	1	0	0	3

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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