# précis

## 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

**0803878**
**29 August 2008, Sydney**
**Mr G Short, Senior Member**

**TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 (BUSINESS (LONG STAY)) – CL. 457.328 – PUBLIC INTEREST CRITERION 4017 – AUSTRALIAN CHILD ORDER -** A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a subclass 457 visa on the basis that the applicant did not meet cl.457.328 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The applicant at the time was five years old, and a citizen of the USA. She first came to Australia in 2004 with her parents on a tourist visa. She and her parents were granted subclass 457 visas on 2 June 2004 valid until 2 June 2007. On 1 June 2007, the applicant's mother applied for a further subclass 457 visa which included the applicant as a secondary applicant. The applicant's parents separated in late 2004 and her father subsequently returned to the USA. In October 2007, her mother initiated divorce proceedings in the Family Court. The delegate found that the applicant did not meet Public Interest Criteria (PIC) 4017 as no court documents or legal papers had been provided to confirm that the laws of the applicant's home country permitted the removal of the applicant. The delegate found that the father did not consent to the grant of the visa. Further, as the proceedings in the Family Court had not reached their conclusion there was no 'Australian Child Order' in force in relation to the applicant. On 11 August 2008, an order was made by a Judicial Registrar under the Family Law Act that, among other things, until further order the applicant is to live with her mother. The father's adviser argued that the grant of the subclass 457 visa would not be consistent with the orders as these were interim orders only, and may be revoked or varied at any time.

**Held:** Decision under review set aside

The Tribunal considered that the issue in the present case was whether the applicant could meet one of the alternatives in PIC 4017, which required 'the grant of the visa to be consistent with any Australian child order in force in relation to the applicant'. The Tribunal found that the order made was an 'Australian Child Order' being a parenting order which deals with whom the child is to live with. The Tribunal found that the grant of the visa would be consistent with the order, notwithstanding that it was made 'until further order'. The legislative scheme did not require that final orders be made before PIC 4017 is satisfied. The Tribunal was further satisfied that the applicant met PIC 4018 as there was no compelling reason to believe that the grant of the visa would not be in the best interest of the applicant.

**071831009**
**28 August 2008, Melbourne**
**Mr P Katsambanis, Member**

**TEMPORARY BUSINESS ENTRY (CLASS UC) - SUBCLASS 457 – VISA REFUSAL – CL.457.223(4)(d) – RELEVANT PERSONAL ATTRIBUTES AND EMPLOYMENT BACKGROUND –** A delegate of the Minister for Immigration and Citizenship refused to grant the applicants subclass 457 Temporary Business Entry (Class UC) visas. The delegate was not satisfied that the primary visa applicant had the suitable personal attributes and employment background that were relevant to, and consistent with, the nature of the activity to be performed. The applicant claimed to be employed as a cook at a seafood restaurant. The Department of Immigration and Citizenship (the Department) conducted a site visit to the primary visa applicant's claimed place of employment. The only report relating to the site visit was an email which stated that this was 'A non-genuine referral outcome, See below for photos', with seven photographs were attached. The delegate found that the applicant did not meet cl.457.223(4)(d) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations).

**Held:** Decision under review set aside

The Tribunal found that based on the photographs of the site visit report and in absence of any other information to the contrary, it was unable to make any finding that the primary visa applicant's claims were not genuine. It found the photographic evidence pointed strongly to the genuineness of the claims made by the applicants. The Tribunal found that the statement of 'A non-genuine referral outcome. See below for photos' was not supported by the attached photographs. It also found that if there was any other evidence, deductions or findings from the site visit, it would expect such evidence to be on the Departmental file, and there was no such evidence on the file at all. Based on the evidence before it, the Tribunal found that the primary visa applicant was at all relevant times a cook at Fuzhou Gulou Huangqi Seafood Restaurant as claimed. Accordingly, the Tribunal found that the applicant met the requirements in cl.457.223(4)(d) for the grant of the visa.

## Partner and Family visas

**071857046**
**28 August 2008, Sydney**
**Mr D O'Brien, Principal Member**

**PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – CL.309.211 – R.1.15A - GENUINE AND CONTINUING RELATIONSHIP –** The applicant applied for a Partner (Provisional) (Class UF) visa. The visas was refused by the primary decision maker on the basis that the applicants did not satisfy cl.309.211 of the *Migration Regulations* 1994 (the Regulations) because the parties were not in a genuine and continuing spouse relationship. The review applicant claimed she met the visa applicant when she and her son were having lunch at a crowded restaurant. The waiter asked if she would share her table with the visa applicant and they subsequently engaged in casual conversation. The review applicant stated that she formed the view that the visa applicant had a caring attitude and was a family man. The applicants claimed they were compatible in many ways including their past marriage break ups and because they both had sons. After they had courted for some time he proposed marriage to her. They were married soon after and lived together in a unit recorded as the address on a joint account. Household bills were also in joint names. The applicants travelled to China where the visa applicant remained. After the review applicant's return to Australia they had frequent contact including daily text messages. The review applicant made a return visit to China and supplied photographs of the applicants with family and friends and on outings.

**Held:** Decision under review set aside.

In considering whether the applicants were in a married relationship in accordance with r.1.15A(1A) of the Regulations, the Tribunal had regard to all the circumstances of the relationship including those set out in r.1.15A(3) of the Regulations. It accepted their claims regarding their joint financial and household arrangements before the visa applicant left Australia and in particular noted their caring attitude towards each other's children. It accepted the photographic evidence when considering the social aspects of the relationship and was satisfied about the genuineness of the applicants' commitment to each other and the emotional support the review applicant drew from the visa applicant. It found that at the time of application and decision the applicants had a mutual commitment to a shared life together as husband and wife to the exclusion of all others and that the relationship was genuine and continuing. Therefore, the Tribunal found the applicants were spouses and met the criterion in clauses 309.211 and 309.221 for the grant of a subclass 309 visa.

**071249404**
**8 September 2008, Melbourne**
**Mr P Katsambanis, Member**

**OTHER FAMILY (MIGRANT) (CLASS BO) VISA – SUBCLASS 115 – VISA REFUSAL – R.2.07(4) – VALIDITY OF VISA APPLICATION – RESIDENTIAL ADDRESS –** A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant an Other Family (Migrant) (Class BO) visa because the first named visa applicant (the applicant) did not satisfy cl.115.211 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations) as the applicant was not a 'remaining relative'. On the visa application form, the applicant nominated 'X' as her residential address. Regulation 2.07(4) of the Regulations provides that a visa application is not valid if an applicant does not set out his or her residential address in the approved form or a separate document accompanying the application. Information derived from a Departmental site visit indicated that the applicant was not living at the stated residential address. The applicant insisted during the Departmental interview that she lived at the residential address indicated in her application but that she also resided at the 'Leap Viraksal' guest house. The review applicant confirmed at hearing that the visa applicant was not living at the address stated on her visa application form as her residential address at the time of application but was residing elsewhere.

**Held:** Decision under review set aside

The Tribunal considered the applicant's representative's submission that r.2.07(4) required a 'residential address', which need not be the correct address. The Tribunal was of the view that the regulation did not require '*a* residential address', but rather required an applicant to set out *their* residential address. The Tribunal found on the available evidence that at the time of application the applicant resided at an address not specified within her visa application. As she had not set out her residential address in her application form or in an accompanying document, the applicant did not satisfy r.2.07(4) for the making of a valid visa application.

**071437808**
**8 September 2008, Sydney**
**Ms S Durvasula**

**OTHER FAMILY (MIGRANT)(CLASS BO) – SUBCLASS 115 (REMAINING RELATIVE) – CL.115.211 – REMAINING RELATIVE - WHETHER RELATIONASHIP AS CLAIMED -** A delegate of the Minister for Immigration and Citizenship refused the applicant a Subclass 115 visa on the basis that the applicant was not the remaining relative of an Australian relative and therefore did not satisfy cl.115.211(1) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The visa applicant, a national of Ethiopia, claimed to be the remaining relative of his sister (the sponsor), who was a resident of Australia. The applicant claimed that both his parents were deceased and that his sisters resided in Australia. However, the two sisters, on their own visa application did not include the visa applicant as their brother. A statutory declaration in support of the sisters' visa application from the review applicant's aunt also made no mention of the visa applicant. On this evidence, the delegate was not satisfied that the visa applicant was the younger brother of the review applicant, or that they were otherwise related. Before the Tribunal, the review applicant submitted that her mother left the daughters to give birth to the visa applicant as he was conceived out of wedlock. In 2003, they received information that they may have had a brother. The visa applicant was also looking for his mother as she abandoned him later in life. He managed to locate her at a church where she was a member, and hospitalised her as she was severely ill. In 2004, the sisters travelled to Ethiopia to see their mother before she passed away and they were informed that the visa applicant was their brother. They claimed that at the time they lodged their visa application, they were unaware of his existence. After the hearing, the Tribunal invited the review applicant and the visa applicant to undergo DNA testing to establish whether there was a blood relationship between them.

**Held:** Decision under review affirmed

The Tribunal was not satisfied that there was sufficient evidence that the visa applicant and the review applicant were half brother and sister. The DNA report stated a half sibling index of 0.13 was inconclusive evidence of a half sibling relationship. The report stated that on average, half siblings would share 25% of the DNA of the common parent. Further, the Tribunal considered the evidence

as to how the review applicant's mother apparently gave birth to the visa applicant to be vague and unconvincing. The Tribunal did not accept that if told about her brother, the review applicant would not have asked for more information. The Tribunal noted that neither the review applicant nor visa applicants had first hand knowledge of their claimed half-sibling relationship; the only evidence was the hearsay evidence of the now deceased mother. Given the circumstances, the Tribunal was unable to give any weight to the hearsay evidence. The Tribunal was not satisfied that the visa applicant was the brother or half brother of the review applicant as claimed and therefore not a remaining relative**.** Accordingly it found the applicant did not meet cl.115.211 of Schedule 2 to the Regulations.

**071658904**
**17 September 2008, Sydney**
**Ms R Mathlin**

**PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – CL.309.221 – VALIDITY OF MARRIAGE – SUDAN -** The visa applicant applied for a subclass 309 visa on the basis of his marriage to the review applicant, his second wife. A delegate of the Minister for Immigration and Citizenship refused the visa applicant the visa on numerous criteria, but in particular, that at the time of his marriage to the review applicant on 3 December 2006, the review applicant was still married to his first wife, and therefore, the marriage was not a valid marriage. The review applicant claimed that he and his first wife were divorced in 2003 by verbal agreement according to Sudanese law and custom. However, he provided a divorce certificate which stated that a decree nisi was issued on 4 June 2007, taking effect from 5 July 2007. The review applicant provided letters of confirming that this was Sudanese custom, along with evidence that he had been sending $300USD every month to the visa applicant since November 2006.

**Held:** Decision under review set aside

The Tribunal accepted that the applicants were married in 2006, but found that the review applicant was not divorced from his first wife until 5 July 2007. As both applicants were residing in Australia at the time, a divorce under customary law was not valid in Australia. Having found that the parties were not validly married, the Tribunal considered whether they were defacto "spouses" under r.1.15A(2). Having regard to the factors set out in r.1.15A(3), the Tribunal was satisfied they were in a spousal relationship. In particular, the Tribunal accepted that the review applicant provided financial support to the visa applicant; that the parties were known among family and their community as a married couple; and that they had discussed their plans for their future life together. However, the Tribunal was not satisfied that the relationship existed for 12 months preceding the date of application as required by r.1.15A(2)(d). It nevertheless found that the requirements in r.1.15A(2)(d) did not apply as there were compelling and compassionate circumstances for the grant of the visa. The Tribunal noted that both the review applicant and visa applicant had been forced by circumstances beyond their control to leave their home country. Further, the Tribunal accepted that the review applicant did not intentionally marry the visa applicant while still legally married to someone else; and that the visa applicant should not be required to remain in her tenuous situation because of this oversight. In these circumstances, the Tribunal was satisfied that the visa applicant had established compassionate and compelling reasons for the grant of the visa. The Tribunal was therefore satisfied that the applicants were spouses for the purposes of r.1.15A and they therefore met cl.309.211 and cl.309.221.

## Student visas

**0801043**

**11 September 2008, Sydney**
**Mr G Short, Member**

**STUDENT (TEMPORARY) (CLASS TU) – SUCLASS 573 (HIGHER EDUCATION SECTOR) – VISA CANCELLATION – s.116 – CONDITION 8202(3) – WHETHER EXCEPTIONAL CIRCUMSTANCES -** A delegate of the Minister for Immigration and Citizenship cancelled the applicant's subclass 573 visa under s.116(1)(b) of the *Migration Act* 1958 (the Act). The delegate was satisfied that the applicant had not complied with condition 8202(3)(a) and (b) as in force prior to 1 July 2007, as he did not have satisfactory attendance in his course nor did he achieve satisfactory academic results. The Tribunal (the first Tribunal) affirmed the decision under review. On appeal, that decision was remitted to the Tribunal for reconsideration. The Tribunal's second decision, differently constituted, was also remitted by the Court for reconsideration on the basis of *Dai v MIAC* [2007] FCAFC 199. The applicant claimed before a third, differently constituted Tribunal (the third Tribunal), that his education provider had not accurately kept attendance records; had not taken into consideration his approved late course starting date; and had given him incorrect information regarding deferral of two subjects. He also claimed to have been upset over the death of his fiancé in India; the ill-health of his father; and that the cancellation of his visa would cause financial hardship to his family.

**Held:** Decision under review affirmed.

As a result of the decision in *Dai*, the third Tribunal confined itself to whether there had been non-compliance with condition 8202(3)(a), and, if so, whether the non-compliance was due to exceptional circumstances beyond the applicant's control. The third Tribunal found, on the basis of the education provider's attendance records, that the applicant had only attended 68.75% of his scheduled contact hours for his Academic English course and only 67.14% of his scheduled contact hours for his Foundation Studies course. The third Tribunal therefore found that a breach of condition 8202(3)(a) was established. On the basis of the evidence before it, the third Tribunal found the education provider's attendance records to be accurate; rejected the applicant's claims that his approved late start had incorrectly been considered; and did not believe that he had been told by his education provider to simply 'stop attending' classes if he wished to defer. Whilst the third Tribunal accepted that his fiancée had died in India, the applicant's failure to mention it at his departmental interview, together with his statement that he was only a 'bit upset' following her death, led it to find that this was not an exceptional circumstance beyond his control. In addition, the third Tribunal also found that his father's ill health, and financial hardship his family might face as a result of his visa cancellation, were not exceptional circumstances beyond his control. In accordance with s.116(3), the prescribed circumstances existed for the cancellation of the visa.

**0802863**
**26 August 2007, Sydney**
**Mr A Mullin**

**STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – VISA CANCELLATION – S.137L – CONDITION 8202(3)(b) – SATISFACTORY COURSE ATTENDANCE – WHETHER EXCEPTIONAL CIRCUMSTANCES -** The applicant sought review of a decision not to revoke the automatic cancellation of his subclass 572 (Vocational Education and Training Sector) visa for breach of condition 8202(3)(b) of the *Migration Regulations* 1994 (the Regulations). The applicant's education provider had sent the applicant a notice under s.20 of the *Education Services for Overseas Students Act* 2000 (the ESOS Act) certifying that he had not achieved satisfactory course progress in January 2008. The applicant claimed he did not receive this notice. The applicant further claimed that in mid October 2007 he had notified his Education Provider that he was withdrawing from his course and moving to Sydney. The applicant had sent his education provider a copy of the acknowledgment from the Department of Immigration and Citizenship that he had lodged an application for a Student Dependent visa. The applicant also claimed that he had advised his education provider by telephone that he wished to withdraw from the course and changed his address. The applicant argued that his loneliness due to his separation from his girlfriend and problems he experienced with his flat mates, who were from

different cultures, constituted exceptional circumstances beyond his control pursuant to s.137L(1)(b) of the *Migration Act* 1958 (the Act), justifying revocation of the visa cancellation.

**Held:** Decision under review affirmed.

The Tribunal did not accept that sending the education provider a copy of the Department's acknowledgement that he applied for another visa constituted formal advice to the College of his wish to withdraw from the course. Similarly, the Tribunal found that an informal discussion with the education provider was not formal advice to the College that he wished to withdraw or change his address. The Tribunal was satisfied that there was notification of a breach of condition 8202 as required by s.20 of the ESOS Act and the ensuing automatic cancellation of the applicant's student visa under s.137J of the Act was valid as it was provided to the last address that the applicant had notified to his Education Provider. The Tribunal was not satisfied that the applicant's loneliness and separation from his girlfriend or the problems he experienced with his flat mates constituted exceptional circumstances beyond the applicant's control. Accordingly, it decided not to revoke the visa cancellation.

**0801512**
**25 August 2008, Sydney**
**Mr D Dobell, Member**

**STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – VISA CANCELLATION – S.137L – CONDITION 8202(3)(b) – SATISFACTORY COURSE ATTENDANCE – VALIDITY OF AUTOMATIC CANCELLATION -** The applicant sought review of a decision not to revoke the automatic cancellation of his subclass 572 (Vocational Education and Training Sector) visa for breach of condition 8202(3)(b) of the *Migration Regulations* 1994 (the Regulations). The applicant's education provider had sent the applicant a notice under s.20 of the *Education Services for Overseas Students Act* 2000 (the ESOS Act) certifying that he had not achieved satisfactory course progress. The applicant contended that the s.20 notice in this matter was not valid as it included an incorrect postcode.

**Held:** Decision under review set aside.

The Tribunal accepted that the applicant had provided his correct address and postcode to the education provider. The Tribunal found that the s.20 notice issued in this matter was not properly addressed in that it contained an incorrect postcode and, as a result, it was not a valid notice. The Tribunal found there was no notification of a breach as required by s.20 of the ESOS Act and the ensuing automatic cancellation of the applicant's student visa under s.137J of the Act was invalid. Accordingly, the Tribunal set aside the decision to refuse to revoke the automatic cancellation of the applicant's subclass 572 student visa and substituted a decision that the visa was not cancelled.

## Other visas

**0802154**
**18 September 2008**
**Mr T Delofski, Member**

**SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 (SPONSORED FAMILY VISITOR) – CL.679.224 – INTENTION TO ONLY VISIT** - A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a subclass 679 (Sponsored Family Visitor) because the delegate was not satisfied that the applicant's express intention to only visit was genuine. The visa applicant was sponsored by her daughter, and stated the reason for her proposed visit was to enable her to see her three grandchildren. She claimed to have every incentive to return to Cambodia as her husband and five other children were still there, and they have a prospering catering business.

**Held:** Decision under review set aside

The Tribunal accepted the applicant's evidence as to the purpose of her proposed visit. It further accepted that the applicant was happily married with five children in Cambodia, three of whom still resided with, and were dependent on her and her husband. The Tribunal noted that the applicant was relatively well off by Cambodian standards: she owned a house, a car, land and a prospering business. Further, it noted that any overstay by the visa applicant would jeopardise her ability to re-visit the review applicant and her grandchildren. On the evidence, the Tribunal was satisfied that the visa applicant's intention to only visit was genuine, and that she therefore satisfied cl.679.224 OF Schedule 2 to the Regulations.

# REFUGEE REVIEW TRIBUNAL DECISIONS

## China

**0803061**
**18 August 2008, Sydney**
**Mr D Dobell, Member**

**CHINA - RELIGION – PARTICULAR SOCIAL GROUP - POLITICAL OPINION - FALUN GONG** - The applicant feared persecution for reasons of her claimed practice of Falun Gong in China and in Australia. She claimed that all her family members were also Falun Gong practitioners. The applicant claimed that her parents were arrested, detained and tortured. She claimed that she was discriminated by her husband who injured her and had an affair after he discovered her Falun Gong practice. The applicant claimed that her husband arranged for her Australian visa and passport through a travel company and helped her to flee China for Australia. She claimed that she would be at risk from the authorities should she return to China.

**Held:** Decision under review set aside.

The Tribunal accepted that the applicant became a Falun Gong practitioner and learnt the exercises and the law through her parents, who were already Falun Gong practitioners. It accepted that her husband discovered that she was a Falun Gong practitioner, their relationship deteriorated and that her husband found a girlfriend. It also accepted that the applicant fled China with the help of her husband, together with a fellow Falun Gong practitioner. The Tribunal was satisfied that the applicant engaged in Falun Gong related protests and demonstrations in Australia otherwise than for the purpose of strengthening her refugee claims. It found that the applicant had a real chance of coming to the attention of authorities and was at real risk of serious harm, amounting to persecution, should she return to China because of her adherence to the Falun Gong movement. It also found that the movement had the qualities of a religion; it was a particular social group in China being a group with a shared world view and physical practice; and harm could also arise by virtue of the imputation of an anti-government political view by the authorities. Accordingly, the Tribunal found that the applicant was a refugee within the meaning of the Convention.

**0803386**
**9 September 2008, Sydney**
**Ms M Ford, Member**

**CHINA – RELIGION – CHRISTIANITY –** The applicant claimed to fear persecution for reasons of her Christian religion. The applicant claimed that she was born in a Christian family and was baptised when she was thirteen years old. She claimed that she regularly attended an unregistered family church which was prohibited by the government authorities. She claimed that she was detained, interrogated, humiliated and that she was repeatedly sent to brainwash classes, and as a result she suffered harm psychologically and physically. The applicant further claimed that she could not join registered churches because they were not suitable for her beliefs. The applicant also provided evidence that she attended a Christian church in Sydney.

**Held:** Decision under review set aside

The Tribunal found the applicant to be honest and therefore found her testimony to be reliable. It accepted that the applicant was a Christian and that she was baptised. The Tribunal accepted that the applicant practiced her Christian activities along with several other Christians in their

homes and she engaged in activities to spread Christianity across China. The Tribunal found that the applicant demonstrated an in depth knowledge of Christian doctrine in comments and responses she made to the Tribunal. It accepted that the applicant was monitored, detained and sent to brainwashing classes. The Tribunal also accepted that the applicant attended a Christian church in Sydney. It was satisfied that if the applicant were to return to China she would continue to engage in her Christian activities and therefore risk persecution. Accordingly, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

**0803227**
**22 August 2008, Sydney**
**Mr A Mullin, Member**

**CHINA – POLITICAL OPINION** - The applicant claimed to fear persecution from the Chinese Communist Party (CCP) for reason of his political opinion. The applicant claimed he was born in an area called 'Inner Mongolia of China', in China. He claimed that even though his province had an autonomous government, the CCP ignored it and behaved in an arrogant way towards the Mongolians. Some young people established a group whose purpose was to fight to save the Mongolian language, culture and nationality. The applicant joined the group and worked to recruit new members. The applicant claimed to have been arrested and detained for a few months and was released after promising not to participate in any activities against the CCP. He claimed the secret officials followed him everywhere, and he escaped by crossing the border to Mongolia where he lived illegally. The applicant entered Australia on a Mongolian passport in his name. He claimed that the passport was forged and obtained through a friend, and that he sent the passport back to Mongolia with a returning student.

**Held:** Decision under review affirmed

While the Tribunal expressed some doubts as to the truth of the applicant's claimed identity, it accepted that falsified documents may well be readily available in Mongolia. The Tribunal was willing to give the applicant the benefit of the doubt to the extent of accepting his real name as stated and that he was born in China. However, the Tribunal had concerns as to the accuracy of the applicant's involvement with the secret group. In particular, it noted there was a remarkable lack of circumstantial detail in his answers and little to indicate that he was speaking from first hand, authentic experience of struggle against Chinese rule. The Tribunal found the fact that the authorities released the applicant supported a view that he did not represent any significant threat to them. Further, the applicant did not claim to have pursued the rights of the Mongol people in China, or since his arrival in Australia. The Tribunal concluded that he had not taken any steps to express his political opinion, even when he has been free to do so. The Tribunal was not satisfied that he would express a political opinion adverse to the authorities if he were to return to China and accordingly found he did not have a well founded fear of persecution based on his political opinion.

## Israel

**0801842**
**7 July 2008, Melbourne**
**Mr D Thomas, Member**

**ISRAEL – PARTICULAR SOCIAL GROUP - POLITICAL OPINION – CONSCIENTIOUS OBJECTOR –** The applicant claimed to fear persecution on account of his objections to performing compulsory military service if returned to Israel. He claimed to have become a pacifist opposed to the government's military policies. The applicant submitted that he would be socially stigmatised on account of his political views and precluded from securing employment. He also claimed that conditions in Israel were not safe on account of continuing attacks from Hezbollah and terrorists as well as the prospect of escalating hostilities between Israel and its neighbours. Finally, the applicant submitted that the government and police would be unable to protect him from harm by extreme

political groups and criminal gangs.

**Held:** Decision under review affirmed

The Tribunal accepted that there were security issues in Israel due to armed conflict between Israel and neighbouring countries in addition to terrorist attacks. While the applicant's family may have temporarily relocated, there was no evidence that they or the applicant had been personally targeted. The Tribunal also accepted that the applicant was frustrated by the continuing uncertain climate and feared injury doing national service. However, the Tribunal found that he was not a conscientious objector: he did not hold any genuine moral, religious or other firmly-held convictions and his pacifism and political views were acquired in Australia. The obligation to perform military service, a non-discriminatory law of general application, did not prevent soldiers from voting in elections to effect change. There was no evidence to support his claims to fear harm from unidentified groups or that he would be unemployable. Expressing a minority opinion in a democracy and social rejection were not Convention grounds and the Tribunal was not satisfied that he would make his political views known. Accordingly the applicant did not have a well-founded fear of persecution for any Convention reason.

**071969401**
**12 March 2008, Sydney**
**Mr S Norman, Member**

**ISRAEL – PARTICULAR SOCIAL GROUP – POLITICAL OPINION – CONSCIENTIOUS OBJECTOR –** The applicant claimed to fear persecution for reasons of his political opinion due to his conscientious objection to compulsory military service. The applicant claimed as a schoolboy he participated in demonstrations during which he was arrested but released to his family after a matter of hours. He claimed he refused to enlist for service but due to an aged relative and his older brothers' service he was exempt under Israeli law. The applicant claimed he was later not called up as punishment for distributing Party brochures. The applicant further claimed he was called up during the Lebanon conflict but left alone when he said he had no military training. When he was called up again he said he could not serve due to his political opinion but was told he would be arrested if he did not report within a month. The applicant said while he would probably be told to work in a support role he may have to be a combatant which was against his political opinion.

**Held:** Decision under review affirmed

The Tribunal found the applicant's reasons for not wishing to perform military service included such things as a fear of personal harm, not wishing to harm anyone else, and disagreement with some of the actions of the Israeli military. However, it was not satisfied his aversion would give rise to a real chance of persecution for reason of his actual or imputed political opinion or any other Convention ground. The Tribunal found the Israeli authorities had been reasonable and did not appear to have the quality of arbitrariness, urgency, discrimination or malice commonly apparent when an applicant was being targeted for a Convention reason. It considered the laws of conscription in Israel were not inherently discriminatory, at least with respect to the present applicant, and was satisfied their application was simply applying a legitimate law in a legitimate and measured manner. The Tribunal noted that while increased tensions may have led to a "hardening attitude to pacifists" no recent information supported a conclusion an essential and significant reason for targeting pacifists or draft evaders would necessarily be for a Convention reason. The Tribunal therefore held that any harm arising from the applicant's refusal to undergo military service would be motivated for reason of a legitimate application of the laws of a sovereign State. As such the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## Kyrgyzstan

**0803537**
**29 August 2008, Sydney**
**Mr S Roushan, Member**

**KYRGYZSTAN – RACE – ETHNICITY – UZBEK –** The applicant claimed to fear persecution on the basis of her Uzbek ethnicity. She claimed that she and her husband had been beaten and racially abused by delinquent Kyrgyz youths who demanded that they leave the State. The applicant also claimed that those same youths confronted and physically assaulted her when returning home alone. She claimed to have visited a local police station to lodge a report but the officer concluded that she had been beaten by her husband. It was clear to her that the youths enjoyed police protection when they subsequently verbally abused, attacked and raped her at her workplace as punishment for complaining to the authorities. However, she did not report this incident to the police or attend a hospital for fear of the consequences from corrupt officials.

**Held:** Decision under review set aside

The Tribunal observed that the applicant provided oral evidence in a straightforward manner consistent with her written submissions and the independent information before it. The Tribunal accepted that the incidents occurred as claimed, largely as a result of unpremeditated acts committed by random drunk youths. However, the verbal, physical and sexual assaults were also committed for the essential and significant reason of race and amounted to serious harm. The Tribunal could not exclude the possibility that the applicant would be subjected to further physical harassment in future and that relocation would be unreasonable. The independent evidence also indicated that she would be denied State protection due to her Uzbek ethnicity given the rise of nationalism and anti-Uzbek sentiment in Kyrgyzstan. Accordingly the applicant was found to have a well-founded fear of persecution for a Convention reason.

## Malaysia

**0802390**
**30 July 2008, Perth**
**Ms L Ward, Member**

**MALAYSIA – RELIGION – CONVERSION TO CHRISTIANITY –** The applicant and her child claimed to fear persecution because the applicant was a Muslim who had converted to Christianity. The applicant claimed that by converting, she would be seen as having committed apostasy, which was a crime in Malaysia. She did not want to disclose the change in her religion to the authorities, fearing that if the authorities discovered her conversion, she would be separated from her child and the state would send her to an Islamic re-education facility. The applicant made claims on behalf of her child that even though the child was a Christian, the child would be identified on the compulsory MyKad identification card as Muslim because the child retained the applicant's Muslim name and would therefore be required to undertake Islamic religious classes.

**Held:** Decision under review set aside.

The Tribunal accepted the applicant had converted to Christianity and that her child was also baptised as a Christian. Based on the applicant's evidence and independent information, the Tribunal was satisfied that it would not be possible for the applicant to officially convert to Christianity without the fear of having her child removed and the applicant forcefully sent to a rehabilitation camp. The Tribunal accepted that apostates were sent to such camps and that being sent to a camp against the applicant's wishes would be a threat to her liberty. The Tribunal further accepted that having a child removed due to a parent's religious belief may constitute serious harm under s.91R of the *Migration Act* 1958. The Tribunal accepted that once the MyKad identified the applicant's child as Muslim, the child would be subject to Sharia law. It considered that Malaysia's religious conversion laws were laws of general application, but found that the conduct of the religious authorities towards Muslims who had converted to Christianity constituted

systematic and discriminatory harm to that group of persons. The Tribunal accordingly found that the applicants were persons to whom Australia had protection obligations.

## Nigeria

**0805254**
**17 September 2008, Sydney**
**Mr H Wyndham, Member**

**NIGERIA – POLITICAL OPINION – MOVEMENT FOR THE EMANCIPATION OF THE NIGER DELTA –** The applicant claimed to fear persecution for reasons of his political opinion as a member of the Movement for the Emancipation of the Niger Delta (MEND) from both the authorities and MEND. The applicant claimed that the people of the Niger Delta were not treated well so he joined MEND which was an illegal organisation. He claimed he attended meetings, wrote letters and participated in demonstrations. The applicant claimed the army and police came to demonstrations during which he sustained injuries. On one occasion he and others were arrested and taken to an army barracks, but managed to escape. The applicant also claimed his house and workshop were bombed and he could no longer live in the same place because the authorities were looking to arrest him. After a protest where many people were killed the applicant claimed he decided it was too dangerous and moved to Lagos. He claimed MEND discovered that his father was Yoruba, decided the applicant was a government spy, and started looking for him in Lagos. He therefore fled to Country A, but returned to apply for refugee status. He remained in hiding until he paid a friend to help him enter the airport through the cargo entrance directly onto the tarmac and onto the plane to Australia. The applicant claimed after he arrived in Australia his mother was killed and his wife attacked and hospitalised. His wife then disappeared with their children.

**Held:** Decision under review affirmed

The Tribunal rejected the applicant's claims. It did not accept the applicant was a member of MEND, was obliged to flee after being accused of being a spy, or that any one was looking for him with a view to harming him. The Tribunal did not accept the applicant's claims as to his ethnicity finding his mother's name, the clothing she and people at her funeral wore, and her place of burial were typically Yoruba. It did not accept MEND would not know he was Yoruba from the start and found if he had already been accepted and proven his loyalty new arrivals would not have been able to cause him problems. It found his lack of knowledge of MEND undermined the Tribunal's belief in his claims. It noted he did not know prominent MEND personalities, policy objectives or the Kaiama Declaration and demonstrations were not an activity for which MEND had gained notoriety. It also noted published reports did not mention MEND and conflicted with the applicant's account of one of the claimed attacks. The Tribunal did not accept a person could belong to an overwhelmingly Ljaw organisation for years without speaking some of the language. Although it was prepared to accepted, without finding, that the applicant's mother died and his wife was hospitalised it found the applicant had not submitted anything providing details of how his mother died or the purpose or nature of his wife's hospital treatment. It did not accept any of the claimed harm would occur if he returned to Nigeria and as such the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## Palestinian Territories

**0802865**
**20 August 2008, Sydney**
**Mr S Roushan, Member**

**PALESTINIAN TERRITORIES – ETHNICITY – PALESTINIAN – PARTICULAR SOCIAL GROUP –** The applicant claimed to fear persecution for reasons of his Palestinian ethnicity and his membership of a particular social group, namely, Palestinian males between 16 and 35 years. The applicant claimed he was pressured by militants in Camp A to join their ranks. He claimed he would face kidnapping, detention and death because he did not agree with fighting against Israel and they considered him a traitor. The applicant also claimed the Israeli Defence Force (IDF) detained residents of Camp A at a military site for a few days and partially demolished his house looking for militant fighters. He claimed he was unable to cross Israeli checkpoints out of the Occupied Territories in search of work and that on many occasions he was detained for many hours and subject to ill treatment. He claimed, however, he had no choice but to attempt to cross the checkpoints because he had to find work. The applicant claimed he was denied the capacity to earn a livelihood because it required an ID not issued to Palestinians between 18 and 35 without a family.

**Held:** Decision under review set aside.

The Tribunal found the applicant's country of reference and former habitual residence was the Palestinian Territories. It also found he did not fall within the terms of Article 1D of the Refugee Convention so was not excluded from the Convention. The Tribunal had doubts about the applicant's claims to have been pressured by militants in Camp A. However, on the basis of the evidence before it the Tribunal could not rule out the possibility of the applicant being seriously mistreated by Israeli forces. It noted independent information that Camp A was the site of frequent significant IDF operations including house demolition and the use of Palestinian civilians as human shields. It further noted that Israeli authorities in search of or in retaliation for rebellious actions by Palestinian militants had increasingly extended their punitive activities against militants to include the Palestinian population generally. The Tribunal accepted the applicant's encounters with the IDF as exemplifying the collective punishment directed towards citizens by the Israeli authorities in search of security and found Camp A residents were a prominent target of punishment directed against Palestinians collectively in excess of security requirements. The Tribunal found the applicant's experiences at checkpoints and bans imposed on males aged 16 to 35 consistent with independent information. It was satisfied the restrictions would cause economic hardship that threatened his capacity to subsist which it was satisfied amounted to persecution. The Tribunal was also satisfied there was a real chance the applicant's movements would continue to be severely restricted if he returned to the Occupied Territories. The Tribunal was satisfied that this harm would be directed towards the applicant for reason of his ethnicity as a Palestinian and as a male Palestinian aged 16 to 35 which it found constituted a particular social group. As the applicant would not have adequate and effective State protection available to him, the Tribunal was satisfied that he had a well-founded fear of persecution for Convention reasons.

## Turkey

**0800928**
**30 June 2008, Melbourne**
**Ms G Hamilton, Member**

**TURKEY – ETHNICITY – ARMENIAN – POLITICAL OPINION-** The applicant, a citizen of Turkey, claimed fear persecution because of his Armenian ethnicity and political opinion. He claimed that Armenians were ostracised in Turkey and had difficulty getting jobs and difficulty in expressing their ethnicity. Unlike his family, the applicant chose not to hide his identity and in early 2000s he visited a government department for information related to Activity A and attracted adverse attention from the police. The applicant claimed that after the visit the police interrogated, verbally and physically mistreated him. Further, he claimed to have set up an organisation with his Armenian friends to hold interviews and meetings about the Armenian genocide. The applicant claimed that the opposition groups and the police broke up the meetings and he was taken into custody where he was physically mistreated by the police, suffering several injuries.

**Held:** Decision under review affirmed.

The Tribunal did not accept that the applicant conducted Activity A as he was not able to elaborate on or substantiate this claim. It did not accept that the applicant had set up an organisation as claimed with his friends as there was no independent evidence of the existence of the organisation. The Tribunal found that the applicant's descriptions of some of the claimed activities were unrealistic in a way which indicated the artificial construction of an account of claimed conflict with the authorities. As such, the Tribunal did not accept that the applicant and his friends were attacked by the opposition group or tortured by the police. It did not accept that the applicant was active on the Armenian genocide in the past, and based on this did not accept that there was a real chance of the applicant becoming active or vocal on the issue in the reasonably foreseeable future. Whilst the Tribunal accepted that Armenians were the subject of intense prejudice in Turkey and that their religious and social organisations were subject to tight restrictions it did not accept on the evidence before it that people of Armenian background generally faced a real chance of serious harm amounting to persecution. Accordingly, the Tribunal was not satisfied the applicant had a well founded fear of persecution within the meaning of the Convention.

# FEDERAL COURT JUDGMENTS

**SZLWE v MIAC & Anor**
**[2008] FCA 1343**
**Federal Court of Australia, Perram J, NSD 979 of 2008, 19 September 2008**

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

The appellant claimed to fear persecution in Lebanon for reasons of political opinion, a matter found to have been properly dealt with by the Tribunal at first instance. His application for review to the Tribunal had also been signed by another individual "[a]s the migration agent named on this form". During the hearing the Tribunal informed the appellant that that person had been suspended from practice as a migration agent. The appellant indicated that he wished the decision record to be sent to him. At the conclusion of the hearing the Tribunal suggested that the appellant complete a form and that the decision would be sent to him. Both the letter inviting the appellant to the handing down and the decision statement were sent by facsimile to the former migration agent and also expressed to be sent "cc" to the appellant.

On appeal, the appellant contended that the sending of this correspondence to a person who had been suspended as a migration agent vitiated the Tribunal's decision.

**Held:** Appeal dismissed

(i) Although the person's authority to act as authorised recipient had been withdrawn under s.441G(3) of the *Migration Act* 1958 (the Act) and there was no evidence that the appellant had received the correspondence, the failure to notify the appellant of the decision was not a jurisdictional error.

(ii) An authority given to an authorised recipient under s.441G(3) may be varied or withdrawn at any time. The Act is silent on how an authority may be withdrawn. Although a withdrawal need not be express, there needs to be conduct by an applicant from which it may be implied or inferred that the Tribunal has been informed that an authority is no longer extant. Although the position was not clear, it can be inferred that the appellant communicated to the Tribunal that he wished to receive the decision himself following the person's suspension as a migration agent and that the Tribunal was informed that that person's authority was no longer extant.

(iv) Sending the correspondence to the former migration agent did not engage s.441G(2) since his authority had been withdrawn and the appellant cannot be deemed to have received them. It was inferred that the correspondence had not been sent to the appellant since he denied actual receipt and there was no postal log. Non-compliance with ss.430A(4)(b) or 430B(6)(b) of the Act was established.

**SZIAI v MIAC**
**[2008] FCA 1372**
**Federal Court of Australia, Flick J, NSD 1024 of 2008, 8 September 2008**

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

The appellant claimed to fear persecution should he return to Bangladesh due to his conversion to the Ahmadiyya Muslim Jamaat religion. The appellant provided the Tribunal with two 'certifications'

in support of his claim to have changed religions. Each 'certification' included an address and a mobile telephone number of the author. The Tribunal made an inquiry of the Ahmadiyya Muslim Association of Australia (the Association) as to whether the appellant was an Ahmadi. The Association replied that the 'certifications' were 'fake and forged'. The Tribunal invited the appellant to comment on that information pursuant to s.424A of the *Migration Act* 1958. In response, the appellant's representative did not request further inquiries be made but noted the 'certifications' contained a telephone number which could be used to contact the author. The Tribunal proceeded to accept the Association's evidence and affirmed the delegate's decision to refuse the protection visa.

On appeal, the appellant contended, among other things, that it was unreasonable for the Tribunal not to have made further enquiries of the authors of the documents.

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

(i) The Tribunal's decision was unreasonable for failure to make inquiries.

(ii) The Tribunal should have made an inquiry of either the authors of the documents or the Association. The issue to which the certificates were directed was centrally relevant to the decision reached. A simple phone call may have been all that was required. The importance of the decision to the appellant and his family warranted such a simple step being undertaken.

(iii) Having embarked upon its preferred course of making an inquiry of the Association, the Tribunal was thereafter committed to making a further inquiry to resolve the diametrically opposed evidence exposed before it. There may be no general obligation to make enquiries to test the authenticity of documents produced to the Tribunal, but where an enquiry initiated by the Tribunal places the authenticity of documents otherwise before it in issue, further enquiries should be made to attempt to resolve the conflict that emerges.

(iv) The fact that there was evidence before it which the Tribunal clearly regarded as reliable information did not absolve it of the requirement to make further inquiries. It may remain unreasonable not to make further enquiries where a finding is to be made which is centrally relevant to the decision to be made and where there is readily available further information which is of immediate relevance to the decision to be made.

**SZLWQ v MIAC**
**[2008] FCA 1406**
**Federal Court of Australia, Buchanan J, NSD698 of 2008, 15 September 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 it did not have jurisdiction because it had already reviewed the delegate's decision. Ultimately, the substantive issues in the appeal involved challenges to the first Tribunal decision, that the appellant was not a person to whom Australia had protection obligations.

During the hearing before the first Tribunal, the appellant had given written authority to the Tribunal to make enquiries about her to officials of the Jehovah's Witnesses, and to disclose her personal details. A Tribunal officer had addressed an enquiry by facsimile to the Administrative Center of Jehovah's Witnesses in Russia. A reply from a Mr K was followed by an exchange of facsimiles between the Tribunal officer and Mr K, including a facsimile of 22 May 2002 in which additional information was sought and personal details of the appellant were disclosed.

The issues in the appeal were (i) whether the Tribunal had breached Information Privacy Principle 11 by disclosing personal information and if so whether such breach would establish jurisdictional error and (ii) whether, on the basis of the principles identified by the Full Court in *SZKTI v MIAC* (2008) 168 FCR 256, the Tribunal had breached ss.424(3) and 424B of the *Migration Act* 1958 (the Act) in respect of the fax seeking additional information transmitted on 22 May 2002.

**Held:** appeal dismissed

(i) There was no breach of Information Privacy Principle 11 (assuming it applied) because the appellant consented to the disclosure about which she later complained.

(ii) The argument advanced by the appellant in reliance on the *Privacy Act* 1988 provided no basis for the relief that she had sought. Compliance with the *Privacy Act* 1988 was not a prerequisite for a valid Tribunal decision.

(iii) The facsimile of 22 May 2002 was an 'invitation' within the meaning of s.424(2) and conformed with ss.441C(5) and 424(3) of the Act. There was no breach of s.424B(1). Clearly, Mr K understood that he was being invited to respond to the facsimile in kind, by facsimile. The course of dealings between him and the Tribunal officer since the first enquiry by facsimile had established that as their mutual, and agreed, method of communication. The nomination of a facsimile number as a facility for the response was also a sufficient specification of a method of response.

(iv) Whether the provisions of s.424B(1) and (2) set up 'imperative duties' or establish 'inviolable limits or restraints' upon the Tribunal rather than provide control and flexibility to the Tribunal is not answered by the principles stated in *SZKTI*, *SZKCQ v MIAC* [2008] FCAFC 119 or *SZIZO v MIAC* [2008] FCAFC 122, none of which dealt with s.424B.

(v) There was no 'breach' of s.424B(2) and in any event any failure to comply strictly with its terms did not, in the circumstances of this case at least, amount to jurisdictional error on the part of the Tribunal. In contrast to s.424B(1), s.424B(2) does not, in terms, impose a direct obligation on the Tribunal about the terms of the invitation. The consequence of any failure to specify a period is that the facility in s.424C of proceeding to a decision in the absence of the information might not be available. In any event it could not be said that the information was not given before the time for giving it had passed. The information was given and the appellant had an opportunity to deal with it.

**SZLWI v MIAC**
**[2008] FCA 1330**
**Federal Court of Australia, Gilmour J, NSD 940 of 2008, 29 August 2008**

This was an appeal from a decision of the Federal Magistrates Court dismissing an application for judicial review of a Refugee Review Tribunal (the Tribunal) decision that the appellant was not a person to whom Australia had protection obligations. The appellant claimed to fear persecution should he return to China due to his Christian religion.

The Tribunal recorded in its decision that it had explained and invited the appellant's response to the Tribunal's concerns that it may not accept evidence given by his son and may find that it was vague. The Tribunal determined that the appellant was not a credible witness and did not accept his claims in relation to his Christian beliefs and practice in China due to his limited knowledge of significant aspects of Christianity. The Tribunal was not satisfied that the appellant's attendance at church in Australia had been conduct otherwise than for the purpose of strengthening his protection claims and disregarded it pursuant to s.91R(3) of the *Migration Act* 1958 (the Act). The Tribunal concluded that, as it did not accept "that the applicant has ever been a genuine practising Christian in China or Australia, the Tribunal does not accept that he will practice as a Christian in China upon his return. The Tribunal therefore does not accept that there is a real chance that he will be persecuted for reasons of religion if her returns to China now or in the reasonably foreseeable future" (emphasis added).

The issues on appeal included whether the Federal Magistrate had erred in failing to find that the Tribunal had breached s.424AA of the Act and whether the Tribunal had breached s.91R(3).

**Held:** Appeal dismissed

(i) The Tribunal committed jurisdictional error by contravening s.91R(3) when it relied upon findings as to the appellant's alleged practice of Christianity in Australia as a basis for finding that he would not practice Christianity in China upon his return and that accordingly there was no real chance that he would be persecuted for a Convention reason based on his religious belief. However, the Tribunal's findings in respect of the appellant's conduct in China would, independently of the findings as to his conduct in Australia, support the Tribunal's conclusions on the question of persecution. In those circumstances, no purpose would be served by granting the relief sought.

(ii) *SZJGV v MIAC* (2008) 102 ALD 226 makes clear that s.91R(3) is properly engaged even though the appellant's conduct was not addressed as evidence to support a sur place claim but only as corroborative evidence of his claims to have practised Christianity in China.

(iii) Section 424AA does not impose any obligation on the Tribunal. It enables the Tribunal, if it chooses to do so, to give oral particulars of adverse information at a hearing that may otherwise need to be given under s.424A(1). If the Tribunal chooses to give oral particulars of information under s.424AA but fails to comply with the requirements of s.424AA(b), the consequence is not that it falls into jurisdictional error. Rather, s.424A(2A) is not engaged.

(iv) No s.424A(1) obligation arose in relation to the testimony of the son, either because the Tribunal complied with the procedure in s.424AA or, because it did not, in its terms, constitute a basis for denial, undermining or rejection of the appellant's claims.

**TIAN & Ors v MIAC & ANOR**
**[2008] FCA 1334**
**Federal Court of Australia, Emmet J, NSD 652 of 2008, 29 August 2008**

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a Migration Review Tribunal (the Tribunal) decision that affirmed a decision of the Minister's delegate refusing to grant Employer Nomination (Residence) (Class BW) visas.

The issue before the Tribunal was whether the primary visa applicant was a 'highly skilled person' within the meaning of r.5.19(3) of the Migration Regulations 1994 (the Regulations) as in force prior to 2 April 2005. The Tribunal considered that for the applicant to meet the requirements she must have completed the equivalent to formal training which, according to the Australian Standard Classification of Occupation (ASCO) dictionary for the relevant position, was five years. In addition, she was required to have been employed for three years before the lodgement of the application. The Tribunal was not satisfied on the evidence before it that the primary visa applicant was a highly skilled person as defined by r.5.19(3), therefore it found the primary visa applicant did not meet the requirements of cl.856.213(b) of the Regulations.

At first instance the Federal Magistrate held that r.5.19(3)(a) does not require that the period of 'equivalent experience' be at least three years, rather than the five year period accepted by the Tribunal using ASCO. Rather the work experience must be equivalent to at least three years of formal training.

On appeal to the Federal Court, the appellants contended that, in relation to r.5.19(3)(a), the Tribunal erred in applying the provisions of the ASCO dictionary that refer to a period of five years, and that the Tribunal failed to discharge its function of assessing and determining whether the approved appointment as marketing and sales manager was exceptional, in relation to r.5.19(3)(b).

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

(i) The Tribunal fell into jurisdictional error in asking itself the wrong question in relation to r.5.19(3)(a). The Tribunal misdirected itself in so far as it construed r.5.19(3)(a) in a way that

permitted it to treat the requirement as being satisfied only if five years equivalent experience had been completed.

(ii) In relation to r.5.19(3)(a), it is open to the decision maker to have regard to the ASCO Dictionary as a guide. However it is up to the decision maker as to what kind of experience will be equivalent to formal training, and it is not necessary for a person to have completed the relevant experience over a period of more than three years.

(iii) There was no material before the Tribunal upon which it could possibly have made a determination that the approved appointment was exceptional for the purposes of r.5.19(3)(b). The question of whether an approved appointment is exceptional is not one for the decision maker in relation to the application for a visa. There was also no effective request by the appellant's migration agent to treat the appointment as exceptional.

# FEDERAL MAGISTRATES COURT JUDGMENTS

**SZCOV & Anor v MIAC & Anor**
**[2008] FMCA 1171**
**Federal Magistrates Court of Australia, Nicholls FM, SYG3356 of 2007, 28 August 2008**

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

The applicant husband claimed that he had financially assisted an employee to establish a commercial advertising company that secretly distributed Falun Gong material. Following the employee's arrest, the applicant husband claimed to be perceived as a political dissident. The applicant wife claimed to have been arrested, detained and subjected to police harassment. The applicant husband also made significant claims after first applying for protection that, after arriving in Australia, he had asked individuals to take Falun Gong material to China and had attended Falun Gong practice sessions. In its reasons for decision, the Tribunal found it to be implausible that the applicant husband had been a patron or ally of Falun Gong in China, that both applicants lacked credibility and had presented contradictory evidence. The applicants' delay in applying for protection also contributed to the Tribunal's credibility finding. The Tribunal also disregarded the claimed conduct in Australia pursuant to s.91R(3) of the *Migration Act* 1958 (the Act).

The applicant alleged jurisdictional error on several grounds, including that the Tribunal failed to comply with s.91R(3) of the Act.

**Held:** Application dismissed

(i) There has been no breach of s.91R(3) of the Act or of the principles enunciated in *SZJGV v MIAC* [2008] FCAFC 10.

(ii) The applicant husband's claimed conduct that he asked people to carry Falun Gong material to China did not engage s.91R(3) because the Tribunal had made a finding of fact that this had not occurred.

(iii) The Tribunal accepted that the applicant husband had engaged in Falun Gong practice and activities in Australia. However, the Tribunal had considered s.91R(3) as required, found that it could not be satisfied that he had engaged in this conduct other than for the purpose of strengthening his refugee claims, and disregarded it when making its decision.

(iv) A distinction may be drawn between the conduct claimed by the applicant husband to have occurred in Australia and the quite separate "conduct" of the timing of the making of a protection visa application. The Tribunal focused upon the applicants' delay in making

protection visa applications and raising significant claims. Such delay, to the extent that it may be conduct in Australia, does not engage s.91R(3) because, contrary to being conduct engaged in by the applicant husband "for the purpose of strengthening" his claim to be a refugee, such conduct plainly leads to the negative of that proposition. It was not conduct upon which the applicants sought to rely to support their claim to have a well-founded fear of persecution which the Tribunal was bound to disregard.

**SZKJT v MIAC & Anor**
**[2008] FMCA 876**
**Federal Magistrates Court of Australia, Nicholls FM, SYG 947 of 2007, 28 August 2008**

The applicant, a national of the People's Republic of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution from the Chinese authorities for his failure to pay a fine for breaching the birth control policy and in relation to encouraging others not to make 'donations' for road construction to the government.

During the course of the hearing, the Tribunal questioned a friend of the applicant's father-in-law in China over the telephone. Subsequent to the hearing, the Tribunal sought an assessment of the genuineness of documents submitted by the applicant at the hearing to the Department of Foreign Affairs and Trade (DFAT) by email. The response was put to the applicant in a letter under s.424A of the *Migration Act* 1958 (the Act).

The Court considered whether the Tribunal's decision was affected by jurisdictional error for failure to comply with the procedures set out in s.424(2) and (3) for an invitation to give additional information.

**Held:** Tribunal decision quashed and remitted for reconsideration according to law

(i) The Tribunal committed jurisdictional error for failure to comply with the requirements of s.424 and s.424B in relation to the telephone call during the hearing and the request to DFAT.

(ii) The Tribunal's telephone call to the friend of the applicant's father-in-law's friend was an invitation to give additional information and was relied upon by the Tribunal as part of the making of its decision. The information was not given on oath or affirmation as no procedure pursuant to s.427(5) was undertaken. As the person did not give 'evidence', s.429A was not engaged. Nor was there a request by the applicant for the Tribunal to obtain evidence from that person (unlike in *SZGBI v MIAC* [2008] FCA 599). There was no authorisation for the Tribunal to take oral evidence under s.426(2).

(iii) The email to DFAT was a request for information pursuant to s.424 and on the authority of *SZKTI v MIAC* [2008] FCAFC 83 and *SZKCQ v MIAC* [2008] FCAFC 119, the Tribunal was bound to meet the requirements of s.424B in making that request.

(iv) Section 441A(5) relevantly required that the Tribunal use the address provided by the recipient "in connection with the review" (emphasis added). There was nothing to indicate that DFAT provided its address to the Tribunal in connection with the review for the purposes of s.424(3) and s.441A. Nor did the request specify the way in which the information was to be given as required by s.424B(1)(a). Further, the Tribunal provided more time to respond to the request than that prescribed in r.4.35 of the Migration Regulations 1994. This did not comply with the requirements set out in s.424B(2). The applicant's awareness that the Tribunal may make these further enquiries does not assist as to whether the Tribunal complied with the of s.424B(1) or (2).

# 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

### ACTS

**Migration Legislation Amendment Act (No.1) 2008 (Legislative Instrument - F2008L03482).** This Act received royal assent on 15 September 2008. The Act amends the *Migration Act* 1958 by:

- removing the handing down requirement in relation to MRT and RRT decisions;
- creating a new position of Deputy Principal Member for the MRT;
- inserting a provision that makes clear that Tribunal notifications given to one applicant in a combined review application is taken to be given to all applicants included in that review application;
- qualifying authorised recipient provisions as they apply to the Minister;
- making changes to border protection provisions including those relating to aircraft and ship passenger and crew reports, crew and passengers on 'round trip cruises", and special purpose visas;
- clarifying the immigration status and clearance status of non-citizen children born in Australia;
- clarifying the requirements relating ton the requiring of a security;
- clarifying aspects as to the operation and effect of bridging visas;
- making clear that the character cancellation provisions (ss.501-501H) apply to transitional visas where the visa came to be "held" rather than "granted."

Different parts of the Act commence at different times, and a number of amendments are accompanied by application and transitional provisions.

### REGULATIONS

**Migration Amendment Regulations 2008 (No.6)**
**(Legislative Instrument - F2008L03476)**
These Regulations amend the Migration Regulations 1994 to provide for persons and organisations who the Minister refused to approve as a sponsor under r.1.20AA(2) to apply to the Migration Review Tribunal for review of that decision, facilitate the lawful entry and stay of persons from a select group of countries invited to undertake seasonal work in Australia in accordance with an approved program, and create a new Superyacht Crew (Temporary) (Class UW) and Subclass 488 (Superyacht Crew) visa. Effective from various dates commencing 9 August 2008.

### INSTRUMENTS

**Migration Regulations 1994 – Specification under paragraph 1225(3)(a) – Working Holiday Visa – Post Office Addresses – September 2008 (Legislative Instrument – F2008L03432)**. This instrument registered on 9 September 2008, specifies that the addresses to which applications for a Working Holiday visa using form 1150 must be sent and that applications for this visa are to be sent for processing to either Cairns or Hobart post office box addresses. Effective from 10 September 2008.

**Migration Regulations 1994 – Specification under subparagraph 1218(1)(b)(iii) – Travel Agents for PRC Citizens Applying for Tourist Visas – August 2008 (Legislative Instrument – F2008L03431).** This instrument registered on 9 September 2008, specifies that where Tourist visa (subclass 676)

applicants from the People's Republic of China (PRC) intend to travel to Australia as a member of tour group, the tour must be organised by a travel agent specified in the instrument. The instrument lists the travel agents in Australia who are approved to escort PRC tour groups who travel to Australia under the Approved Destination Status (ADS) scheme and lists the travel agents in the PRC who are able to lodge Tourist visa applications under the ADS scheme. Effective from 19 September 2008.

**Migration Regulations 1994 – Specification under subparagraph 1218(1)(b)(iii) – Travel Agents for PRC Citizens Applying for Tourist Visas – September 2008 (Legislative Instrument – F2008L03528).** This instrument registered on 28/09/2008, specifies that where Tourist visa (subclass 676) applicants from the People's Republic of China (PRC) intend to travel to Australia as a member of tour group, the tour must be organised by a travel agent specified in the instrument. Effective from 24 October 2008.

## Legislation Pending

**Migration Legislation Amendment (Worker Protection) Bill 2008**
**(Bill – C2008B00224)**
This Bill was introduced into the Senate on 24 September 2008. Schedule 1 of the Bill will amend the Migration Act 1958 to enhance the framework for the sponsorship of non-citizens seeking entry to Australia. The Bill is seeks to make amendments primarily to the business sponsorship scheme and ensure that the working conditions of sponsored visa holders meet Australian standards. The Bill will amend the sponsorship framework through four main measures: providing the structure for better defined sponsorship obligations for employers; by improving information sharing across all levels of government; expanding powers to monitor and investigate possible non-compliance by sponsors; and introducing meaningful penalties for sponsors found in breach of their obligations.

**Migration Amendment (Notification Review) Bill 2008**
**(Bill - C2008B00209)**
This Bill was introduced into the House of Representatives on 9 September 2008, and was passed with amendments on 24 September 2008. The bill seeks to clarify and provide greater certainty in some notification procedures to minimise errors and ensure visa applicants and visa holders are effectively notified of matters relevant to their dealings with the Department of Immigration and Citizenship. The Bill includes the following key changes to the notification scheme:

- Provide, in cases where other notification provisions would not apply to a minor, that where the Minister (or MRT/RRT 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 MRT/RRT 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;

- Provide 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 – September 2008

| Case category | Set Aside | Affirmed | No jurisdiction Withdrawn | No jurisdiction Other | Total |
|---|---|---|---|---|---|
| Bridging refusal | 1 | 5 | 1 | 1 | 8 |
| Visitor refusal | 33 | 20 | 1 | 2 | 56 |
| Student refusal | 37 | 24 | 9 | 6 | 76 |
| Temporary business refusal | 18 | 10 | 8 | 15 | 51 |
| Permanent business refusal | 3 | 4 | 2 | 0 | 9 |
| Skill linked refusal | 44 | 22 | 3 | 3 | 72 |
| Partner refusal | 94 | 25 | 6 | 0 | 125 |
| Family refusal | 21 | 32 | 2 | 4 | 59 |
| Student cancellation | 15 | 14 | 3 | 1 | 33 |
| Sponsor approval refusal | 3 | 2 | 1 | 4 | 10 |
| Other | 11 | 17 | 2 | 15 | 45 |

## RRT Decisions – September 2008

| Country | Set aside | Affirmed | No jurisdiction Withdrawn | No Jurisdiction Other | Total |
|---|---|---|---|---|---|
| Bangladesh | 4 | 6 | 0 | 5 | 15 |
| Cambodia | 1 | 0 | 0 | 0 | 1 |
| China (PRC) | 17 | 50 | 0 | 4 | 71 |
| Czech Republic | 0 | 2 | 0 | 0 | 2 |
| Egypt | 0 | 1 | 0 | 0 | 1 |
| Ethiopia | 1 | 0 | 0 | 0 | 1 |
| Fiji | 0 | 1 | 0 | 1 | 2 |
| Ghana | 0 | 0 | 1 | 0 | 1 |
| India | 1 | 14 | 0 | 1 | 16 |
| Indonesia | 0 | 7 | 0 | 1 | 8 |
| Iran | 1 | 3 | 0 | 0 | 4 |
| Kenya | 2 | 0 | 0 | 0 | 2 |
| Korea, Republic Of | 0 | 1 | 0 | 0 | 1 |
| Kyrgyzstan | 1 | 0 | 0 | 0 | 1 |
| Lebanon | 2 | 5 | 0 | 0 | 7 |
| Malaysia | 1 | 9 | 0 | 0 | 10 |
| Mongolia | 0 | 3 | 0 | 0 | 3 |
| Nepal | 1 | 4 | 0 | 1 | 6 |
| Nigeria | 0 | 1 | 0 | 0 | 1 |
| Pakistan | 3 | 1 | 0 | 0 | 4 |
| Palestinian Terr. (W.Bank/Gaza) | 1 | 0 | 0 | 0 | 1 |
| Philippines | 1 | 2 | 0 | 0 | 3 |
| Russian Federation | 1 | 0 | 0 | 0 | 1 |
| Serbia & Montenegro | 1 | 0 | 0 | 0 | 1 |
| Sierra Leone | 0 | 1 | 0 | 0 | 1 |
| Sri Lanka | 1 | 1 | 0 | 1 | 3 |
| Sudan | 1 | 0 | 0 | 0 | 1 |
| Syria | 0 | 1 | 0 | 0 | 1 |
| Taiwan | 0 | 1 | 0 | 0 | 1 |
| Turkey | 0 | 2 | 0 | 0 | 2 |
| Vietnam | 1 | 3 | 1 | 1 | 6 |

# 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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