



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.

NB:

From 2009, *Précis* will be published on a monthly basis. The first edition of 2009 is expected to be available on 2 February 2009.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

071811249

29 October 2008, Sydney

Mr H Wyndham, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 – CL.457.223(4)(d)&(e) – PERSONAL ATTRIBUTES AND EMPLOYMENT BACKGROUND – NECESSARY SKILLS TO PERFORM THE ACTIVITY – The delegate refused the application for a Temporary Business (Class UC) visa on the basis that the applicant did not satisfy cl.457.223(4)(d) or (e) of Schedule 2 to the *Migration Regulations 1994* (the Regulations) because he did not have the required skills, experience or employment background to perform the approved nominated occupation as a cook. The applicant submitted certificates and a VCD of him cooking. The Tribunal also received a report from the Consulate General of a site visit and opinions that the normal practice for assessing cooks favoured experience over qualifications in part due to the prevalence of fraud.

Held: Decision under review affirmed

The Tribunal watched the VCD in which the applicant cooked ten dishes in ten minutes. It found this to be very quick, but noted that the ingredients had been prepared beforehand. It found that the VCD clearly showed a demonstration for the benefit of the Tribunal and not a working chef in a restaurant preparing food for the consumption of clients. This limited the weight the Tribunal was prepared to give the VCD. It preferred the report of the Consulate General which gave an unfavourable verdict on the applicant's restaurant work. The Tribunal also accepted the view of the Consulate General that one certificate provided was, according to a senior employee for the issuing school, of no value. As certificates were easily obtained it further accepted the Consulate General's view they could be given little weight. The Tribunal therefore found the applicant was not a chef. As such, the Tribunal was not satisfied the applicant had the personal attributes and employment background required to perform the activity for which he was nominated. Nor did it accept that he demonstrated the necessary skills. The Tribunal found the applicant did not meet the requirements in cl.457.223(4)(d) or (e) of the Regulations for the grant of the visa.

0804641

12 November 2008, Sydney

Mr D O'Brien, Principal Member

TEMPORARY BUSINESS ENTRY (CLASS UC) VISA – SUBCLASS 457 – VISA CANCELLATION – S.116(1)(b) – CONDITION 8107 – INCONSISTENT POSITION OR OCCUPATION – FAMILY HARDSHIP – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 457 visa under s.116(1)(b) of the *Migration Act 1958* because he had breached condition 8107 of his visa. Condition 8017 of Schedule 8 to the *Migration Regulations 1994* required that the visa holder not work in a position or occupation inconsistent with the position or occupation in relation to which the visa was granted. The applicant was granted his visa on the basis of sponsorship as a sheetmetal worker. A compliance officer of the Department of Immigration and Citizenship located the applicant driving a hire car for another company during a field operation at Sydney airport. The applicant explained that when he arrived in Australia his sponsoring company had gone into liquidation. He claimed to have been working in the hire car job to cover his family's expenses including significant medical expenses incurred on behalf of his son. The Tribunal issued a summons to the sponsoring company requiring the production of wage records but it was not returned.

Held: Decision under review set aside

The Tribunal was satisfied that the ground in s.116(1)(b) for cancellation of his visa existed. It found that the visa holder had been working as a hire car driver, which was inconsistent with the position

of sheetmetal worker in relation to which the visa had been granted. It also found that he was still working for the sponsoring company which was unable to provide sufficient work for him. As to whether the visa should be cancelled, the Tribunal was satisfied that the applicant had breached his visa conditions for reasons of financial necessity, supplementing his income with afternoon or evening shifts driving hire cars to meet his family's necessities of life. Although cancellation of the applicant's visa would not have an undue adverse effect upon his children as the best interests of them would be to remain united with their parents, departure from Australia would cause family hardship because of the son's need for medical treatment and the unlikelihood of accessing the same quality of medical care in Lebanon. Accordingly the Tribunal set aside the decision under review and substituted a decision not to cancel the applicant's Subclass 457 visa.

071932713

31 October 2008, Sydney

Mr H Wyndham, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 – CL.856.213(c)(ii) – VOCATIONAL ENGLISH – EXCEPTIONAL CIRCUMSTANCES – A delegate of the Minister for Immigration and Citizenship refused to grant a Subclass 856 (Employer Nomination Scheme) visa on the basis that the applicant did not satisfy cl.856.213(c)(ii) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations), as he did not have Vocational English and exceptional circumstances did not apply to the situation. Before the Tribunal, the applicant claimed that he did not need vocational English in order to perform his job and that constituted exceptional circumstances. The applicant submitted recent IELTS test results which showed improvements in results from an average of 2.5 to an average of 4. Evidence was also presented that he had continued his study of English, and it was argued that it was reasonable to assume there would be further improvement if another test were to be done.

Held: Decision under review set aside

The Tribunal did not accept that there being no need for Vocational English – even if that were true – constituted exceptional circumstances for the purposes of cl.856.213. The Tribunal noted there were various policy reasons for the requirement that an applicant have Vocational English and they were not all satisfied merely because the work involved was conducted in a wholly or largely non-English-speaking environment. The latest IELTS results submitted by the applicant showed scores between 5 (reading) and 3 (speaking) for an average of 4, and this failed the requirement of achieving 5 in all four test components for Vocational English. However, the Tribunal considered that the applicant was clearly improving his English, and that an IELTS test if conducted at the end of his present course would show him more closely approximating and possibly achieving Vocational English. The Tribunal considered that these factors, together with the applicant's genuine intention to pursue English language studies constituted exceptional circumstances. The Tribunal therefore found that the applicant met cl.856.213(c)(ii).

Partner and Family visas

071784125

11 November 2008, Melbourne

Ms R Gagliardi, Member

PROSPECTIVE MARRIAGE (TEMPORARY) (CLASS TO) – SUBCLASS 300 – CL.300.216 – GENUINE INTENTION TO LIVE TOGETHER AS SPOUSES – PRE-MARITAL AFFAIR – 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, *inter alia*, cl.300.216 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate was not satisfied that the parties genuinely intended to live together as spouses. The applicants provided evidence in support of their application, including details about the history and development of their relationship, and the acceptance of their marriage by their families and friends.

Held: Decision under review set aside

The Tribunal noted its concern that the visa applicant appeared to breach her commitment to marry the review applicant by having an encounter with another man that led to the conception of a child. The Tribunal accepted the explanations provided by the applicants and found that the visa applicant was at no time in a spouse-like relationship with the father of the child. The Tribunal noted that a person was not necessarily excluded from being a spouse as defined in the Regulations if he or she engaged in an extra-marital (or pre-marital) sexual encounter. In considering whether the applicants had a genuine intention to live together as spouses, the Tribunal had regard to their perseverance through an application that had lasted several years. The Tribunal found the communications between the applicants during this period to be of great weight. The Tribunal accepted evidence of parties who had visited the visa applicant. The Tribunal also considered testimony of witnesses attesting to the genuineness of their relationship. The Tribunal was satisfied they had a genuine intention to live together as spouses. Accordingly, it found that the applicants met the criterion in cl.300.216.

071731609

11 November 2008, Sydney

Ms P Wearne, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 101 – CL.101.211 – DEPENDENT CHILD – R.1.04 – ADOPTION

- A delegate of the Minister for Immigration and Citizenship refused the Child (Migrant) Subclass 101 visa on the basis that the visa applicant did not satisfy cl.101.211 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations) because she was not a dependent child of the sponsor (the review applicant). The visa applicant provided an adoption paper with her application which purported to show that she had been adopted in Myanmar by the review applicant, who was her aunt, at the age of three. The review applicant claimed that, although she had arranged to have the visa applicant cared for by the natural parents, she had provided financial support for the visa applicant's basic needs and schooling. Evidence before the Tribunal indicated that the relevant authority in Myanmar had certified that the purported adoption paper was not genuine and there was no record of the document being registered. The review applicant claimed that she was assisted by a lawyer and was not aware that the adoption paper was not registered.

Held: Decision under review affirmed

The Tribunal accepted that the review applicant had given truthful evidence in regard to her perception that she had legally adopted the visa applicant and that she continued to provide financial support to her. However, the Tribunal found that the adoption was not registered and therefore could not satisfy the formal adoption arrangements under Myanmar law, which required the registration of a *Kittima* adoption. Accordingly, the requirements for adoption under r.1.04(1) of the Regulations were not met. The Tribunal further found that there was no informal adoption under Myanmar law because the two recognised informal forms of Buddhist adoption, *Apatitha* and *Chatta Batta/Tha Haw Su*, required the adopted child to have lived with the adopting family. Accordingly, the requirements for adoption under r.1.04(2) of the Regulations were not met. The Tribunal found there was no adoption of the visa applicant by the review applicant and accordingly the visa applicant was not a dependent child of the review applicant and therefore could not meet the requirements of cl.101.211.

Student visas

071928516

30 October 2008, Sydney

Mr D O'Brien, Principal Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 – CL.572.223(2)(a)(i)(A) – ITEM 5A407 – ENGLISH LANGUAGE PROFICIENCY – A delegate of the Minister for Immigration and Citizenship refused to grant Subclass 572 visas to the applicants on the basis that the first named applicant (the applicant) was not a genuine applicant for entry and stay as a student because she did not satisfy cl.572.223 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate found that the applicant did not have the requisite English language proficiency as specified in Item 5A407 of Schedule 5A to the Regulations. In her visa application, the applicant had nominated a Diploma of Theology as her intended course. She provided evidence to the Tribunal of discussions with the Department of Immigration and Citizenship concerning whether a Subclass 572 or a Subclass 573 was appropriate. A college representative provided evidence that certain requirements did not apply. The applicants' representative sought an extension of time, submitting that the applicant was scheduled to sit the next available IELTS test. The extension was refused.

Held: Decision under review affirmed

The Tribunal found that Subclass 572 was the relevant subclass, given the Minister's specification in the relevant gazette notice that Subclass 572 was the relevant subclass for Diploma courses. Furthermore, as a matter of grammatical construction and statutory context, the Tribunal concluded that the IELTS test had to be taken less than two years before the date of the visa application. It considered whether the qualifications the applicant had obtained satisfied the language requirements. The Tribunal concluded that the applicant had not given it evidence, in accordance with the requirements in Schedule 5A for Subclass 572 and the assessment level to which she was subject, in relation to her English language proficiency for the purposes of each course of study that she proposed to undertake. Accordingly, the Tribunal found that the applicant did not satisfy the requirement of cl.572.223(2)(a)(i)(A) for the grant of the visa.

071632858

4 November 2008, Sydney

Ms L Nicholls, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 – CL.572.224(a) – PUBLIC INTEREST CRITERION (PIC) 4013 – The applicant, who had been the holder of a Subclass 572 which was due to expire, applied for a further Subclass 572 visa before the date of expiry. A delegate of the Minister for Immigration and Citizenship found that the applicant was affected by a risk factor as defined in PIC 4013 of Schedule 4 to the *Migration Regulations* 1994 (the Regulations) for the purposes of cl.572.224(a) of Schedule 2 to the Regulations. This was because less than three years had passed since the applicant's previous visa was cancelled under s.137J of the *Migration Act* 1958 (the Act), and there were no compelling or compassionate circumstances of a nature described in PIC 4013(1)(b) to justify the grant of the visa. The applicant submitted that there was no valid cancellation of the applicant's previous visa on the basis that condition 8202(3)(a) of Schedule 8 to the Regulations, as it stood before 1 July 2007, was invalid.

Held: Decision under review affirmed

The Tribunal found that the previous student visa held by the applicant was cancelled pursuant to s.137J of the Act. The Tribunal considered that the validity of the cancellation was related to the issue of revocation and a decision regarding revocation was not open to it. The Tribunal considered there was a divergence in the authorities but found that the weight of current authority favoured the view that condition 8202(3)(a) was valid. The Tribunal found that the current student visa application was made less than three years after the cancellation of the applicant's previous student visa. The Tribunal considered that applicant did not make any submission in relation to compelling and compassionate circumstances and found there was no evidence before it to support such circumstances. Accordingly, the Tribunal found that the applicant did not meet PIC 4013 for the purposes of cl.572.224(a).

0805006

5 November 2008, Melbourne

Ms R Gagliardi, Member

STUDENT (TEMPORARY)(CLASS TU) – VISA CANCELLATION – S.116(1)(b) – CONDITION 8202(2)(a) – ENROLMENT IN A REGISTERED COURSE – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's subclass 573 visa under ss.116(1)(b) and (3) of the *Migration Act* 1958 (the Act) and r.2.43(2)(b) of the *Migration Regulations* 1994 (the Regulations) as he was not and had not been enrolled in a registered course of study as required by condition 8202(2)(a) of Schedule 8 to the Regulations. The applicant had been granted a student visa to enable him to study an Advanced Diploma of Hospitality Management, followed by a Bachelor of Hospitality Management. Although the applicant completed the Advanced Diploma, he did not commence the Bachelor degree course. He claimed that the breach was due to exceptional circumstances, namely, he was preparing to become a permanent resident on the basis of his Advanced Diploma, and he was not aware that he was required to continue with his studies. The applicant was advised pursuant to s.359A of the Act that the Department of Immigration and Citizenship had made investigation and found there was no evidence that he was making such preparations. Although the applicant was invited to attend a hearing he did not, nor did he indicate that he wished to postpone the hearing to a more suitable date.

Held: Decision under review affirmed

The Tribunal considered that, had the applicant attend the hearing, it would have explored with him why preparing to become a permanent resident would have negated the need to meet condition 8202 of his student visa and why such a matter would have constituted exceptional circumstances beyond his control, when it was within his control to keep an active enrolment until he was certain he had permanent residency. The Tribunal inferred that the applicant believed that he would be successful in becoming a permanent resident and therefore he did not need to maintain enrolment. However, it found there was no evidence that the applicant was making concrete preparations to become a permanent resident. Further, the Tribunal did not consider that making a mistaken choice or a bad decision constituted exceptional circumstances beyond the applicant's control as it was open to him to seek advice about whether it was possible to suspend the requirements of condition 8202 if he were to apply for permanent residency. While the Tribunal accepted that the applicant had been a good student throughout his previous studies, these were not matters that constituted exceptional circumstances. The Tribunal was satisfied that the applicant had not complied with condition 8202 and the ground for cancellation in s.116(1)(b) existed. The Tribunal further found that the non-compliance was not due to exceptional circumstances beyond the applicant's control. In accordance with s.116(3) of the Act, such circumstances were prescribed circumstances which made cancellation mandatory.

Other visas

071856425

31 October 2008, Melbourne

Ms R Gagliardi, Member

SPECIAL CATEGORY (TEMPORARY) (CLASS TY) – SUBCLASS 444 – CL.444.2 – BEHAVIOUR CONCERN NON-CITIZEN – S.32(2)(a)(ii) – S.5(1) – A delegate of the Minister for Immigration and Citizenship refused the application for a Special Category (Temporary) (Class TY) visa on the basis that the applicant did not satisfy cl.444.2 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate found that, as the applicant had been deported from the USA, he met the definition of 'behaviour concern non-citizen' in s.5 of the *Migration Act* 1958 (the Act), and was therefore unable to satisfy the criterion in s.32(2)(a)(ii) of the Act for the grant of the visa. 'Behaviour concern non-citizen' was defined in s.5 of Act to mean a non-citizen who had been "removed or deported from Australia or removed or deported from another country". The applicant claimed that he was deported from the USA following an extended period of remaining unlawful, the result of his trouble with an alcohol addiction and not having the strength to regularise his status. The applicant claimed that he regretted his actions; had turned his life around and no longer drank; that he had a historical connection with Australia including his sister and her family now living here; and that he

considered it his right to visit Australia and any adverse decision refusing him that right was curtailing his freedom in a manner that was not reasonable.

Held: Decision under review affirmed

The Tribunal found that the applicant had been deported from the USA and that he was therefore a 'behaviour concern non-citizen' as relevantly defined. The Tribunal further considered the applicant's claims that he did not wish to return to New Zealand because he felt he had a connection with Australia and that his freedom was being infringed upon, however concluded that it did not have any discretion to take these matters into account. As the Tribunal found the applicant to be a 'behaviour concern non-citizen' as defined in s.5 of the Act, it found that he did not satisfy the requirements of s.32(2)(a). Accordingly, the Tribunal affirmed the decision under review as the applicant did not meet cl.444.2 of the Regulations.

0806031

5 November 2008, Sydney

Ms G Cullen, Member

TOURIST (CLASS TR) VISA – SUBCLASS 676 – CL. 676.211 – CL.676.221 – GENUINE VISIT – PUBLIC INTEREST CRITERION (PIC) 4011 – RISK FACTOR – A delegate of the Minister for Immigration and Citizenship refused the application for a Tourist (Class TR) Subclass 676 visa on the basis that the applicant did not satisfy cl.676.211 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations) because the expressed intention to only visit was not genuine. The visa applicant was a 62 year old woman from Sri Lanka. The visa applicant was the mother of the review applicant and sought to visit the review applicant in Australia for six months to help her with the birth of her second child, and afterwards to assist her to look after her newborn and other son who was 3 ½ years old. The review applicant's doctor supported the application as the pregnancy was complicated due to gestational diabetes. The visit was also supported by the Antenatal Unit at Westmead Hospital. As with the previous visit for the birth of the first child, the review applicant undertook to provide the visa applicant with accommodation, food and all other facilities provided during her stay. The Reverend from the review applicant's church also supported the visit.

Held: Decision under review set aside

The Tribunal recognised the significant potential for violence to occur in Sri Lanka, however, it was satisfied that the visa applicant had been in that situation when she visited Australia previously and had complied with the visa conditions. It also noted that the visa applicant had not pursued permanent stay in Australia considering her daughter had been a resident for nearly five years. The Tribunal also noted that the visa applicant's husband, son and daughter-in-law lived with her in Sri Lanka and viewed this as a strong incentive to return. There was evidence that the visa applicant's husband had stable employment. The Tribunal found that the reasons for the visa applicant's visit were entirely reasonable and the need for the visit was strongly supported by medical evidence. The duration of the stay proposed, being 6 months, was consistent with her reasons for visiting. Thus, while there was some concern arising from the activities of other nationals of Sri Lanka and the general circumstances in the visa applicant's home country, the Tribunal was of the view that in this case the desire to only visit Australia was entirely truthful and the applicant was a genuine visitor in that respect. Further, the Tribunal believed that there was only a very little likelihood that the visa applicant would seek to remain in Australia beyond any period of stay authorised. The Tribunal found the visa applicant met cl.676.211 and cl.676.221 and the criterion in PIC 4011 of Schedule 4 to the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

Bangladesh

0804820

23 September 2008, Sydney

Mr A Jacovides, Member

BANGLADESH – POLITICAL OPINION – AWAMI LEAGUE (AL) – The applicant claimed to fear persecution for reasons of his political opinion. The applicant claimed he was an AL leader with a successful business including government contracts. He claimed that when the Bangladesh National Party (BNP) came to power they tried to destroy his business and kill him. He was continuously harassed and faced life-threatening harm while they were in government and was physically attacked on three occasions. He also claimed false charges were filed against him and he was on a list of people of particular interest to the current authorities for corruption. The applicant claimed the interim government would seek to imprison him and wanted to persecute or even kill him. He claimed he would not have access to protection or be able to defend himself against the false charges. He also claimed they targeted AL and he would not be able to express his political opinion if he returned to Bangladesh.

Held: Decision under review affirmed

The Tribunal accepted the applicant supported AL and that he was attacked on three occasions, but did not accept he was a leader. It accepted that his support led to government contracts and a successful business. It also accepted that the business was less successful and he had difficulties with competitors when the BNP came to power. However, it was of the view that the applicant greatly exaggerated the harm faced and found that if the BNP had wanted to seriously harm the applicant or destroy his business they would have done so while in government. The Tribunal held that the applicant's difficulties while the BNP were in power related to his business rather than his political opinion. The Tribunal further held that the applicant was of no interest to authorities when he left Bangladesh because he was active and doing business until coming to Australia. It found no evidence police had a real interest in catching or punishing him for the false charges which could be dealt with properly by the interim government. The Tribunal also found the interim government was not targeting AL or its supporters and citizens were able to express their political opinions without adverse interest. Although there had been restrictions during the state of emergency, AL had continued to function and its members had opportunities and venues to express their views. The Tribunal was satisfied that the reduced level of political violence since the interim government came to power made political activities safer than under AL or BNP. It held that the applicant's fear that he would be prevented from expressing his political opinion was not well-founded. As such, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

China

0804272

30 September 2008, Sydney

Ms A Younes, Member

CHINA – RELIGION – CATHOLIC – The applicant claimed to fear persecution on the basis of her religion. She claimed to have been born into a Catholic family and that her parents had been active members of an underground Roman Catholic Church in China. She claimed that she was baptised at a young age. The applicant claimed that her father was involved in the distribution of Bibles and on two occasions she assisted. She claimed that when police seized the material and arrested the recipient in relation to the last delivery, hasty arrangements were made for her departure to Australia. The applicant claimed that, some months after her arrival, she was notified

by a relative that the police had discovered her involvement in the dissemination of the bibles and, as a result, her father was arrested and a summons was issued for her arrest. She claimed that the Chinese government would not permit her return to China and she would be arrested on arrival. The applicant further claimed to have become a member of a local Chinese Catholic group since arriving in Australia. The applicant provided evidence including a Certificate of Baptism and photographs of her parents praying in a house church.

Held: Decision under review set aside

The Tribunal found that the applicant demonstrated a sophisticated level of knowledge of Christianity, consistent with her claims. The Tribunal accepted that the applicant was baptised and that she and her family were associated with an underground church in China. With some reservation, the Tribunal accepted her father was involved in the transportation of bibles and that on two of these occasions she provided assistance. The Tribunal was not, however, satisfied that her father had been detained, or that she or her family had attracted any adverse interest from the authorities, on the basis that the applicant had not provided any corroborative evidence in support of this claim. The Tribunal accepted that the applicant had engaged in religious activities in Australia and was satisfied that she had engaged in those activities otherwise than for the purpose of strengthening her application for a protection visa. The Tribunal found the applicant to be a committed Catholic and was satisfied that, if the applicant were to return to China, there was a real chance she would be persecuted for her religious beliefs. Accordingly, the Tribunal found that the applicant held a well-founded fear of persecution for a Convention reason.

0804496

4 October 2008, Sydney

Ms R Mathlin, Member

CHINA – POLITICAL OPINION – FALUN GONG – The applicant claimed to fear persecution for reasons of his political opinion. The applicant claimed to be a Falun Gong practitioner who was detained following a raid on his practice site. He claimed he was tortured for a number of days for, among other things, being in possession of a Falun Gong tape. He was released. However, a friend who was in possession of more Falun Gong material was persecuted to death. The applicant claimed he attended Falun Gong exercise and study sessions in Australia as well as demonstrations and that Chinese spies were aware of these activities. He feared he would be persecuted to death if he were to return to China.

Held: Decision under review affirmed

The Tribunal rejected the applicant's claims as inconsistent with independent information. It found it extremely implausible that he practiced publicly and was under suspicion but was never found guilty of being Falun Gong or suffered any serious consequences. It also rejected that a quantitative difference in incriminating material would make such a substantial difference in the treatment of the applicant and his friend. The Tribunal accepted the applicant demonstrated some knowledge of Falun Gong, including the names of exercises, the main text, the Falun, which he claimed was implanted by Master Li, and had demonstrated one exercise. But it noted this information was readily available on the Falun Gong website and he was not able to provide a credible or persuasive account of his personal experience. It took account of difficulties in expressing abstract spiritual concepts through an interpreter and that individuals have different capacities to understand and verbalise the theoretical basis of Falun Gong. However, it did not consider the applicant would have any inherent difficulties if he were a genuine practitioner. The Tribunal found the applicant was not a credible witness, nor a genuine Falun Gong practitioner in China. It held that he engaged in his Australian activities to strengthen his refugee claims, not because of a belief in Falun Gong, and disregarded that conduct pursuant to s.91R(3) of the *Migration Act 1958*. As such, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Ethiopia

0802534

25 July 2008, Melbourne

Mr P Fisher, Member

ETHIOPIA – POLITICAL OPINION – COALITION FOR UNITY AND DEMOCRACY - The applicant claimed to fear persecution on the basis of being a member of the opposition party, the Coalition for Unity and Democracy (CUD). The applicant claimed that she was forced to resign from her professional job and detained because she was a CUD member. Among other evidence, the applicant provided a CUD membership card, a letter of support from the CUD and a letter from a government authority. These three documents were examined by the Department of Immigration and Citizenship's Document Examination Unit and found to be unreliable. Evidence also indicated that the Department received anonymous information that the applicant had not been involved in any political activities or demonstrations in Ethiopia and had not been a member of the CUD. The Tribunal put the substance of these allegations to the applicant.

Held: Decision under review affirmed

The Tribunal did not accept the applicant's claims about either her membership of the CUD or that she had been targeted by the Ethiopian authorities as a consequence of her political views or activities were truthful, because it did not accept that the documents provided in support of those claims were genuine. The Tribunal also formed the view that the documents had been altered to make them appear consistent with the applicant's claims. The Tribunal gave weight to the anonymous allegations received by the Department as they appeared relevant, credible and significant. For these reasons, the Tribunal rejected in their entirety the applicant's claims and did not accept that she had been involved in politics in the past, or had attracted any adverse attention from the Ethiopian authorities. Therefore, the Tribunal did not accept that there was a real chance that the applicant would encounter serious harm amounting to persecution for reasons of her political opinion or any other Convention reason in the event that she returned to Ethiopia, either now, or in the reasonably foreseeable future. Accordingly, it was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Indonesia

0802683

8 October 2008, Sydney

Mr R Wilson, Member

INDONESIA – POLITICAL OPINION – ACEH INDEPENDENCE - The applicant claimed to support the independence of Aceh from Indonesia and to not agree with the Memorandum of Understanding (MoU) which was signed in Helsinki on 15 August 2005. She claimed her fear of persecution was intensified because she was married to a man who was known to be opposed to the MoU and her family did not support the MoU. She claimed to fear harm from the Indonesian military and those members of the Free Aceh Movement (GAM) who supported the MoU. She claimed that the Indonesian authorities did not offer meaningful protection to the Acehnese people. She claimed that relocation would not be possible as she would be forced to reveal that she was a woman of Acehnese ethnicity who had been abroad and she would be forced to explain her reasons for temporary residence in Australia. It was claimed that it continued to be a criminal act in Indonesia to advocate for the independence of Aceh.

Held: Decision under review set aside

The Tribunal accepted that the applicant's family were supporters of an independent Aceh. It accepted that the applicant's husband was an opponent of the MoU. The Tribunal accepted that the applicant was also against the MoU and, although not active, she would have an imputed political profile as an independent Aceh supporter because of her family's and her husband's

political position. The Tribunal accepted that it continued to be a criminal act in Indonesia to advocate for the independence of Aceh and individuals associated with groups which continued to favour Aceh's independence would run the risk of harassment, arrest or prosecution in Indonesia. Further, individuals associated with these groups would be at risk of harm from members and supporters of the mainstream GAM organisation. The Tribunal found that the police and the State would not protect the applicant because of her imputed political profile. The Tribunal was satisfied there was a real chance of persecution occurring to the applicant in the reasonable foreseeable future if she returned to Indonesia and that the applicant's imputed political opinion was the essential and significant reason for the persecution which she feared. It was further satisfied that relocation was not reasonable in the applicant's case. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention related reason.

Lebanon

0803572

0 September 2008, Sydney

Ms S Pinto, Member

LEBANON – RELIGION - SUNNI MUSLIM- POLITICAL OPINION - HARIRI FUTURE PARTY - The applicant claimed that he was a Sunni Muslim and a member and supporter of the Hariri Future Party. The applicant claimed that he attended a demonstration and was seen by Hezbollah supporters and following this was attacked by Hezbollah supporters. The applicant claimed that he received threatening telephone calls and visits at his workplace from Hezbollah. He also claimed to have maintained an extremely low profile prior to his departure from Lebanon for Australia. The applicant claimed that he feared returning to Lebanon because he would suffer harm from Hezbollah or their Shiite supporters.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was a Sunni Muslim and that he supported the ruling coalition party, the Hariri Future Party. However, the Tribunal found the applicant's evidence to be problematic and untruthful in some aspects due to inconsistencies between his written and oral claims, inconsistencies with independent evidence and implausibility. The Tribunal found that the applicant's evidence did not indicate anything other than low level involvement in the Party and did not establish that the applicant had any kind of political profile as a member of the Hariri Future Party. The Tribunal accepted that the applicant was working in Hezbollah controlled areas as a mobile tradesman and was entering Hezbollah controlled areas, however, the Tribunal did not accept that this would give the applicant a profile that was any different than any other low level member of the Hariri Future Party or that the applicant participated in any activities which drew the adverse attention of Hezbollah. The Tribunal did not accept that the applicant was ever attacked in Lebanon because he was a member of the Future Party or because he attended a demonstration nor did it accept that he subsequently went into hiding or needed to maintain a low profile in Lebanon as a result of these factors. The Tribunal did not accept that the applicant had ever been sought by Hezbollah or its Shiite supporters. The Tribunal was not satisfied that there was a real chance that the applicant would be targeted or harmed in the future by Hezbollah or its Shiite supporters in Lebanon simply because he was a Sunni or a supporter of the ruling coalition. The Tribunal was not satisfied that the applicant would suffer harm in Lebanon now or in the reasonably foreseeable future for any reasons associated with the Convention.

Nepal

0804770

5 November 2008, Sydney

Ms C Long, Member

NEPAL – POLITICAL OPINION – MAOISTS – The applicant claimed to fear persecution from the Maoists and the Young Communist League (YCL). He claimed that he was targeted by the YCL because he did not pay donations. He claimed that he supported the monarchy and he was blamed as a member of the Royal Nepal Army. The applicant claimed that his family and business was threatened in Nepal. He further claimed that he was accused of passing information to the Maoists and that he feared others from the Democratic Party who opposed the monarchy supporters. The applicant indicated that he travelled to another country for business and later returned to live and work at the same address in Nepal for a period of time before coming to Australia.

Held: Decision under review affirmed

The Tribunal accepted that the applicant had experienced trouble from the Maoists or those who supported the Maoists. However, it found that the applicant's claim that his family and business were threatened was not consistent with his evidence that his wife was still living in the same place, his children attended schools there and his business was still operating prior to his trip to Australia. The Tribunal did not accept that the applicant left Nepal because he feared harm from the YCL or Maoists as it found that if the applicant feared harm in Nepal, he would not have returned to live and work at the same address in Nepal from another country before he came to Australia. It found that there was no plausible evidence to conclude that there was a real chance that the applicant would suffer persecution from Maoists or anyone else in Nepal either now, or in the reasonably foreseeable future, for any Convention reason. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution in Nepal within the meaning of the Convention.

Nigeria

0802853

23 June 2008, Melbourne

Ms R Gagliardi, Member

NIGERIA – RELIGION – ETHNICITY – POLITICAL OPINION – The applicant claimed to fear persecution on the basis of his religion, ethnicity and political opinion. The applicant claimed because of his religion and membership of Tribe A, he had been the victim of violence perpetrated against him and his family by a group from a different ethnic and religious background, culminating in serious violence against the applicant and the death of the applicant's parent. The applicant also claimed that he had refused to join a group that opposed Western industries and was then targeted by members of that group. Following the disappearance of the applicant's sibling, he was forced into hiding. The applicant further stated that he would not receive protection from Nigerian authorities and he would not be able to relocate within Nigeria to avoid harm. The applicant provided statements from witnesses and a psychologist's report to corroborate his claims.

Held: Decision under review set aside

The Tribunal found the applicant to be a witness of credit and accepted that he and his family had been the victims of violence from a religious group because of their different religious and ethnic background. The Tribunal also accepted that the applicant had been targeted by a group that opposed Western industries and accepted the account of a witness that this group remained interested in the applicant. The Tribunal accepted that a number of lapses and inconsistencies in the applicant's claims were attributable to the distress of recounting the harm he had experienced in Nigeria. The Tribunal accepted that the applicant could not reasonably relocate within Nigeria because he was not able to avoid harm despite his attempts to relocate on several occasions. Country information indicated that the applicant could be seen as an 'outsider' and as a result was vulnerable to having his life taken as part of religious ceremony. The Tribunal also accepted the psychologist's report and considered that to return the applicant to a country where he had sustained severe trauma would mean he would continue to suffer further serious harm by way of psychological impairment. The Tribunal found that there was a real chance that the applicant would suffer serious, systematic and targeted harm were he to return to Nigeria, either now or in the

reasonably foreseeable future, for reasons of his religion, actual and imputed political opinion and ethnicity. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Turkey

0804995

30 September 2008, Sydney

Ms P McIntosh, Member

TURKEY - POLITICAL OPINION - CONSCRIPTION - The applicant claimed to fear persecution for reasons of his political opinion and non-performance of his military service after the expiration of the official deferral. He claimed to have taken part in leftist student politics while at university in City F. Although he was not a member, he supported local branches of the Republican People's Party (CHP) and the Democratic Left Party (DSP), both of which were legal parties. He claimed as a result he was twice abducted and beaten up by local fascist thugs to deter him from engaging in leftist politics. The applicant gave evidence that after finishing university he returned to his home village, from where he left Turkey two months later and that he was not threatened or harmed in his home village. The applicant stated that he did not wish to kill anyone or be killed in what was an unnecessary conflict. The applicant claimed to fear being either charged with offences arising from a failure to do military service without gaining a further deferral or being required to perform his military service for an extended period, if he were to return to Turkey.

Held: Decision under review affirmed

The Tribunal accepted that the applicant supported the CHP and the DSP and accepted as plausible that he was assaulted on two occasions while a university student in City F. However, the Tribunal found that as an ordinary supporter of the DSP or CHP the applicant did not hold strong or sophisticated political opinions. The Tribunal was satisfied if the applicant were to return to City F, a town he had permanently left, he could express his political views to an extent commensurate with his level of political commitment without facing any real chance of harm amounting to persecution. In relation to military service, the Tribunal was satisfied that the applicant did not regard himself as a conscientious objector and would not be perceived as such if he were to return to Turkey. The Tribunal accepted that the applicant might face some penalty for failing to report to do his military service despite not having been granted a further deferral. However, the Tribunal was satisfied that the punishment he feared was the result of a law of general application. The Tribunal accepted that the applicant did not want to be killed or to kill others in combat, however, it was not satisfied that he would be punished discriminatorily for this reason. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Ukraine

0804436

15 October 2008

Mr G Short, Senior Member

UKRAINE – PARTICULAR SOCIAL GROUP – HOMOSEXUAL - The applicant claimed to fear persecution as a homosexual. The applicant claimed he became a 'gay activist' and that he founded an association with other homosexuals. He claimed, on several occasions, to have suffered discrimination and physical violence. The applicant claimed that the authorities in Ukraine turned a blind eye to homophobia, and that freedom and democracy in Ukraine was only on paper. The applicant claimed he visited Country F on a business trip with a delegation of businessmen but decided not to apply for asylum there, after talking to other homosexuals at a club about the treatment of homosexuals there. The applicant gave evidence that he had difficulties making

contact with homosexuals in Australia due to his English skills and that only his representatives, his flatmate and boyfriend knew of his sexuality.

Held: Decision under review affirmed

The Tribunal found that the applicant's claims were not credible. The applicant gave evidence over the course of four hearings. At the fourth hearing, the applicant conceded that he had not in fact gone to Country F after having claimed differently at the three previous hearings. The Tribunal considered that the fact that the applicant was prepared to lie about this matter affected his credibility, and that he had fabricated this part of his evidence. The Tribunal did not accept that the applicant was a homosexual, or that he was persecuted for reasons of his homosexuality or his membership of a gay organisation in Ukraine. The Tribunal found that if the applicant was a 'gay activist' in Ukraine, it was not unreasonable to expect that the applicant would become involved in similar organisations in Australia or to seek out friends in the gay community. However, he had not made any contacts in the gay community. The Tribunal did not accept the applicant's claim made at the third hearing that he had a boyfriend. As the Tribunal found the applicant was not a homosexual, it did not accept that there was a real chance that he would be persecuted for reasons of his sexual orientation or involvement in gay activism if he were to return to Ukraine. In the alternative, even if the applicant was a homosexual, the Tribunal considered that he could reasonably relocate to Kiev, where public attitudes to homosexuals were generally tolerant. The Tribunal found that the independent evidence before it did not suggest that there was failure on the part of the Ukrainian authorities to provide protection to homosexuals. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

SZJTK v MIAC

[2008] FCA 1712

Federal Court of Australia, Reeves J, NSD 1086 of 2008, 14 November 2008

This was an appeal from 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 on the basis of his Muslim beliefs and associations. The appellant repeated his claims when he attended a hearing conducted by videoconference between Sydney and Melbourne. The Tribunal found that the appellant was not a member of any Muslim organisation and therefore did not accept any of his related claims of persecution by Hindu extremists.

Before the Federal Magistrates Court, the appellant contended that, as the Tribunal hearing occurred by video conference, he did not appear 'before' the Tribunal and consequently there was a breach of s.425 of the *Migration Act* 1958 (the Act). The appellant also contended that the Tribunal had failed to consider an integer of his claim, that is, whether as a liberal Muslim in India he was at risk of harm from radical Hindus. The Federal Magistrates Court at first instance found that the Tribunal had not erred in law and that the appellant failed in his application because the Tribunal was entitled to arrange for the appellant to appear by video conference under s.429A of the Act and it was apparent from the Tribunal decision as a whole that the appellant's claims had all been addressed.

These contentions were again made on appeal.

Held: Appeal dismissed.

- (i) There was no breach of s.425 of the Act. The section requires the Tribunal to give an applicant an opportunity to appear before it, to give evidence and present arguments; this does not require that the appearance be "in person".
- (ii) In exercising the discretion in s.429A of the Act to allow an applicant's appearance to be undertaken by telephone, closed-circuit television, or any other means of communication, the Tribunal would generally need to consider whether an appearance using such technology would give the applicant a fair opportunity to give evidence and present arguments; whether it's questioning of the applicant is likely to be conducted fairly and effectively; whether it would be able to properly make any necessary assessment of the applicant's credibility; whether it may need to put a large quantity of documents to the applicant; and whether delays and costs may be caused if the appearance were not to be conducted in that way. In this case, there was no evidence that the appellant expressed any opposition to appearing before the Tribunal by video conference or that the Tribunal had any concerns that allowing the appellant to appear by means of that technology presented any difficulty. There was nothing in the transcript of the hearing to demonstrate that the appellant had been confused, disadvantaged or prejudiced in anyway by the use of the video conference facility to conduct the hearing.
- (iii) It is apparent from the Tribunal decision record that the Tribunal assessed the various claims made by the appellant and his evidence in support of them and set out its reasons for rejecting them.

SZJZB v MIAC & Anor

[2008] FCA 1731

Federal Court of Australia, Jagot J, NSD 1077 of 2008, 19 November 2008

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

The husband and wife appellants claimed to fear persecution in India for reason of the appellant husband's political and religious opinion. At hearing, the Tribunal questioned the appellant husband about where he had lived between January 2005 and May 2006 and when his shop was attacked. The Tribunal pointed out that his response about the former was inconsistent with what he said at the beginning of the hearing. The Tribunal took evidence from the appellant wife about the same issues which was inconsistent with the appellant husband's responses, although her response as to where he had lived was the same as his initial claim. In its reasons, the Tribunal referred to the "significant differences in evidence between the [appellant husband] and [appellant wife] concerning important aspects of the claims" and further stated that it "does not rely on such inconsistencies in reaching its decision and does not consider these to be adverse to the [appellant]". The Tribunal rejected the appellant husband's claims based on inconsistencies within his own evidence to the Tribunal.

The Federal Magistrates Court concluded that the appellant wife's evidence about where the appellant lived could be seen as undermining his claim to a well-founded fear of persecution. However, as the appellant husband have given the same evidence at the beginning of the hearing before the Tribunal (that he later changed or qualified) the appellant wife's evidence was relevant not because of the facts asserted but because of inconsistency affecting an appraisal of the appellant husband's credibility. Thus the substance of what the appellant wife said did not contain a rejection, denial or undermining of the appellant's claims and was not information for the purposes of s.424A of the *Migration Act* 1958 (the Act). The appellants contended that the Federal Magistrates Court erred in finding no breach of s.424A.

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

- (i) The Tribunal failed to comply with s.424A. The appellant wife's evidence remained relevant to the assessment of the existence of the claimed well-founded fear of persecution despite the husband's initial evidence to the same effect. The nature of the appellant wife's evidence was centrally relevant to the substance of the appellant husband's claims of persecution in Hyderabad for political and religious reasons and not just to the appellant husband's credibility.
- (ii) Following *SZBYR v MIAC* (2007) 235 ALR 609 and *MZXBQ v MIAC* [2008] FCA 1731, in determining whether "information" falls within 424A(1), the focus of the inquiry must be whether the information contains any "rejection, denial or undermining of the appellant's claims to be persons to whom Australia owed protection obligations" and not the Tribunal's "particular reasoning on the facts of the case".
- (iii) The fact that the Tribunal did not use the wife's evidence to assess the substance of the claim is not an answer. The obligation in s.424A cannot be satisfied by oral notice, the particulars must be provided in the form of a document or consistent with the obligations in s.424AA.

FEDERAL MAGISTRATES COURT JUDGMENTS

Perera v MIAC & Anor

[2008] FMCA 1526

Federal Magistrates Court of Australia, Riley FM, MLG 710 of 2008, 12 November 2008

The applicant sought judicial review of a decision of the Migration Review Tribunal that affirmed a decision refusing to grant the applicant a Skilled-Independent Overseas Student (Residence) (Class DD) visa.

The Tribunal sent an invitation to attend a hearing to the applicant's representative who had been nominated as the applicant's 'authorised recipient'. Prior to the scheduled hearing, the Tribunal telephoned the representative to confirm the applicant's attendance at the hearing. The Tribunal was advised that the representative was overseas and may not return in time for the hearing. The Tribunal was also advised that the representative's office would advise what, if any, alternate representation arrangements would be put in place. No such advice was forthcoming, and the applicant failed to appear before the Tribunal.

The Tribunal affirmed the decision under review concluding that the applicant did not attain a qualifying score of 120 points under the 'points test' provided by Schedule 6A to the *Migration Regulations* 1994 (the Regulations). In particular, the Tribunal found the applicant could not be awarded any 'bonus' points under Item 6A81. It found that despite the applicant's assertions, 'there was no evidence before the Tribunal that supports [an intention to make a capital investment of \$100,000 under Item 6A81] or that the process has even commenced'. It further noted that the applicant had been provided with ample time and opportunity in the past to present such information.

The applicant contended that the Tribunal failed to adequately consider his intention to make a capital investment under Item 6A81, and erred in not making proper attempts to advise him or his representative of the hearing date.

Held: Application dismissed

- (i) The Tribunal did not fail to apply its mind to the question of the applicant's stated intention of making a capital investment. It implicitly did not accept that the intention was genuine.
- (ii) In any event, the Regulations required the applicant to have actually deposited \$100,000 at the time of application or decision. The applicant had clearly not done so.
- (iii) The Departmental guidelines (PAM3) providing for a certain approach to capital investment under 6A81 are not binding on the Tribunal.
- (iv) As the Tribunal sent the hearing invitation to the applicant's authorised recipient at the nominated address, the applicant was taken to have received the invitation. The applicant was given adequate notice of the hearing.
- (v) Unless compelling evidence was readily available, the Tribunal was under no obligation to make enquiries about whether the authorised recipient had received the invitation. No such evidence was available.
- (vi) The Tribunal was not obliged to reschedule the hearing date. Despite the initial advice of the representative's office that the Tribunal would be advised of any alternate arrangements, no further communication was received from the representative prior to the scheduled hearing date.

SZMHJ v MIAC & Anor

[2008] FMCA 1432

Federal Magistrates Court of Australia, Emmett FM, SYG 1299 of 2008, 23 October 2008

The applicant, a citizen 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 be a refugee on the basis that he was a Falun Gong practitioner.

The applicant sought judicial review of the first Tribunal's decision. This application for judicial review was subsequently remitted by consent to the Tribunal to be redetermined according to law. Between the first Tribunal decision and the second, the applicant changed his address. He informed the then Department of Immigration and Multicultural and Indigenous Affairs (the Department) of his change in address and included the new address as his address for service when he initiated the first Federal Magistrates Court proceedings; however he did not inform the Tribunal of his new address. The second Tribunal sent an invitation to comment on adverse information under s.424A(1) of the *Migration Act* 1958 (the Act) to the address provided by applicant when he lodged his review application to the first Tribunal. The reconstituted Tribunal did not send the letter to the last address provided to the Department or the Federal Magistrates Court. The applicant did not respond to this letter and the Tribunal proceeded to determine the matter without holding a second hearing pursuant to s.424C(2) of the Act.

The applicant contended, among other things, that the Tribunal had failed to send the s.424A letter to his latest address and made a decision without giving him a fair opportunity.

Held: Application dismissed.

- (i) In the circumstances, the Tribunal sent the s.424A letter to the last address provided by the applicant to the Tribunal in connection with the review. Accordingly, the s.424A letter complied with all statutory requirements. The applicant's evidence clearly was that the new address provided by the applicant to the Department and the Federal Magistrates Court in the application for judicial review of the first Tribunal decision was not communicated directly with the Tribunal. That application for judicial review only identified the Minister as the respondent. The Court ordered the Tribunal be included as second respondent three months after the first application for judicial review was filed.
- (iii) In those circumstances, s.425(2)(c) has the effect that the Tribunal is no longer obliged to invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. Accordingly, the Tribunal was relieved of the obligation of s.425(1) and the Tribunal was entitled to proceed without issuing a further hearing invitation to the applicant.

SZMLM v MIAC & Anor

[2008] FMCA 1493

Federal Magistrates Court of Australia, Cameron FM, SYG 1703 of 2008, 11 November 2008

The applicant sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that she was not a person to whom Australia had protection obligations. The applicant was a citizen of China who claimed she was a Falun Gong practitioner, had protested and been detained and had faced difficulties finding employment.

The Tribunal rejected the applicant's claims to have been a Falun Gong practitioner in China and concluded that her conduct in Australia was engaged in solely to strengthen her protection claims. The Tribunal relied on the applicant's lack of knowledge of Falun Gong and the inconsistency between her ignorance and her claims to have been a Falun Gong practitioner since the age of 15 in finding that it was not satisfied that the applicant participated in Falun Gong activities in Australia otherwise than to strengthen her claim for refugee status. The Tribunal did not accept that at any point she had a genuine commitment to Falun Gong and disregarded her *sur place* conduct pursuant to s.91R(3) of the *Migration Act* 1958 (the Act).

The applicant claimed that the Tribunal failed to comply with s.424A and s.91R(3) of the Act in affirming the decision under review.

Held: Application dismissed

- (i) There was no breach of s.424A as the claimed particulars were either not information before the Tribunal or were information given by the applicant to the Tribunal and thus fell within the exception in s.424A(3)(b).
- (ii) There was no breach of s.91R(3). It was not the applicant's Falun Gong knowledge or the means by which she came by that knowledge which the Tribunal took into account, but rather, the applicant's lack of knowledge of Falun Gong.
- (iii) In any event, s.91R(3) speaks in terms of "conduct" not "knowledge". The fact that the Tribunal, given its lack of satisfaction concerning the applicant's motives for engaging in Falun Gong activities in Australia, was required to disregard that conduct, did not prevent it from testing the applicant's claims to Falun Gong adherence against her actual knowledge of its tenets and practices.

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 Amendment (Notification Review) Act 2008 (No.112 of 2008)

This Act seeks to provide greater certainty in respect of notification procedures, 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 Migration Review Tribunal and the Refugee Review Tribunal. The Act amends the *Migration Act 1958* (the Act) to:

- Provide, in certain cases, that where the Minister (or Tribunal member) forms a reasonable belief that an individual has care and responsibility for an applicant who is a minor, then the Minister or the Tribunal may communicate with that individual instead of the minor;
- Provide that if an error is made when giving a document to an applicant, the deemed receipt provisions in ss.379C, 441C and 494C of the Act will operate if the person nonetheless receives the document or a copy of it. However, if the person can show that the document was received after the time of deemed receipt, he or she will be taken to have received it at that later time.

The Act received Royal Assent on 31 October 2008. The amending provisions commenced on 5 December 2008.

REGULATIONS

Migration Amendment Regulations 2008 (No. 8) (SLI 2008 No. 237)

These Regulations amend the *Migration Regulations 1994* by:

- Amending the provisions governing the giving of documents relation to visa cancellations for consistency with the *Migration Amendment (Notification Review) Act 2008*;
- Providing that a person whose Subclass 651 (eVisitor) visa is cancelled on certain grounds is affected by a risk factor for the purposes of Public Interest Criterion (PIC) 4013;
- Including Resolution of Status (Class CD) visas in the definition of 'permanent humanitarian visa'; and
- Re-enacting the provisions relating to the Safe Third Country Memorandum of Understanding (MOU) with the People's Republic of China for the purposes of s.91D of the *Migration Act 1958*.

The amending regulations commenced on 5 December 2008.

INSTRUMENTS

Migration Regulations 1994 –eVisitor Eligible Passports –October 2008 (Legislative Instrument - F2008L04321). This instrument registered on 24 November 2008, provides the kinds of passports which are eligible passports for eVisitor visa applications. Effective from 25 November 2008.

Migration Regulations 1994 – Specification under subparagraph 1218(1)(b)(iii) -Travel Agents for PRC Citizens Applying for Tourist Visas -November 2008 (Legislative Instrument - F2008L04346). This

instrument registered on 25 November 2008, lists travel agents that PRC citizens must use, travelling as individuals or as a group, when applying for a 676 visa. Effective from 19 December 2008.

Legislation Pending

Migration Legislation Amendment (Worker Protection) Bill 2008 (Bill - C2008B00224)

This Bill was introduced into the Senate on 24 September 2008 and referred to the Legal and Constitutional Affairs Committee which tabled its final report on 10 November 2008. The Bill was passed in the Senate on 27 November 2008 and passed in the House of Representatives on 3 December 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 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 Legislation Amendment Bill (No. 2) 2008 (Bill - C2008B00282)

This Bill was introduced to the Senate and read a first time on 3 December 2008. The Bill seeks to amend the *Migration Act* 1958 by:

- clarifying that the Migration Review Tribunal and the Refugee Review Tribunal ('the Tribunals') may invite either orally (including by telephone) or in writing, review applicants or third parties to give information;
- reinstating effective and uniform time limits for applying for judicial review of a migration decision in the Federal Magistrates Court, Federal Court and High Court ('the Courts'); and
- limiting appeals against judgments by the Federal Magistrates Court and the Federal Court that make an order or refuse to make an order to extend time to apply for judicial review of migration decisions.

CASELOAD OVERVIEW

MRT Decisions – November 2008

Case category	Set Aside	Affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	1	9	0	1	11
Visitor refusal	30	25	1	2	58
Student refusal	20	40	2	4	66
Temporary business refusal	13	15	3	7	38
Permanent business refusal	5	8	1	2	16
Skill linked refusal	48	37	4	5	94
Partner refusal	63	23	9	2	97
Family refusal	24	23	3	1	51
Student cancellation	11	22	1	0	34
Sponsor approval refusal	2	2	0	1	5
Other	14	25	2	5	46

RRT Decisions – November 2008

Country	Set aside	Affirmed	No jurisdiction Withdrawn	No Jurisdiction Other	Total
Albania	1	1	0	0	2
Angola	1	0	0	0	1
Bangladesh	0	3	0	3	6
Burma (Myanmar)	0	1	0	0	1
Cameroon	2	0	0	0	2
China (PRC)	18	67	0	0	85
Colombia	0	1	1	0	2
Czech Republic	0	1	0	0	1
Egypt	2	3	0	0	5
Eritrea	1	0	0	0	1
Ethiopia	0	1	0	0	1
Fiji	1	3	0	1	5
Georgia	0	1	0	0	1
India	2	15	0	0	17
Indonesia	0	5	0	0	5
Iran	0	1	0	0	1
Korea, Republic Of	0	3	0	3	6
Latvia	0	1	0	0	1
Lebanon	2	7	0	2	11
Liberia	0	1	0	0	1
Malaysia	4	27	0	0	31
Nepal	0	1	0	0	1
New Zealand	0	1	0	0	1
Nigeria	1	0	0	0	1
Pakistan	1	2	0	1	4
Philippines	0	1	0	0	1
Sri Lanka	2	6	0	0	8
Stateless	1	0	0	0	1
Syria	2	0	0	0	2
Thailand	0	0	0	1	1
Turkey	1	2	0	0	3
Uganda	0	1	0	0	1
Vietnam	1	1	0	1	3
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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