



## 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

071966457

8 December 2008, Melbourne

Ms G Hamilton, Member

**SKILLED – AUSTRALIAN-SPONSORED (MIGRANT) (CLASS BQ) VISA – SUBCLASS 138 – CL.138.216 – NOMINATED SKILLED OCCUPATION – CL.138.225A** – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Skilled Australian Sponsored (Migrant) visa on the basis that he did not satisfy cl.138.216 of Schedule 2 of the *Migration Regulations* 1994 (the Regulations) because he was not employed in a skilled occupation for the relevant period of time. The visa applicant had nominated 'Internal Auditor' as his skilled occupation. The delegate found that the visa applicant's work experience was best characterised as that of an Accounts Clerk, which was not on the skilled occupation list. Before the Tribunal, the visa applicant submitted evidence including financial statements prepared in his capacity as an accountant; emails; and letters from the Human Resources section and a structure chart for his company.

**Held:** Decision under review set aside

The Tribunal noted that the delegate had asked questions of the visa applicant directed at whether he had been working as an Internal Auditor, when that was not his claim. It found that the visa applicant did not have to be employed in the same skilled occupation nominated in the visa application and it was possible that the delegate had perceived the information before it through a negative prism. The Tribunal found that various parties confirmed that the applicant was not only designated as an Accountant but he actually worked in that role for two companies. Based on all the evidence, the Tribunal found that the visa applicant had been employed in a skilled occupation for at least 24 months in the period of 36 months immediately before the day in which the application was made. Accordingly, the visa applicant met the requirements in cl.138.216 and cl.138.225A.

071602755

3 December 2008, Sydney

Ms P Pope, Member

**TEMPORARY BUSINESS ENTRY (CLASS UC) VISA – SUBCLASS 457 BUSINESS (LONG STAY) VISA – CL.457.224(a) – PUBLIC INTEREST CRITERION 4014 – COMPELLING CIRCUMSTANCES** – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Temporary Business Entry visa because he did not satisfy cl.457.224(a) of Schedule 2 to the *Migration Regulations* 1994 (the Regulations). The delegate found that the applicant failed to satisfy Public Interest Criterion (PIC) 4014 which required that applicants affected by a "risk factor" must apply for the visa more than three years after departing Australia unless compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, justify an earlier grant. Before the Tribunal, the review applicant company gave evidence that the visa applicant had been employed by it, he was found to be good at his trade and considered to be a capable and reliable employee. The witness also submitted that the applicant's skills as an expert mechanic specialising in Mercedes Benz vehicle repairs were difficult to find in Australia and the workshop faced closure if a mechanic could not be located.

**Held:** Decision under review affirmed

The Tribunal considered that the existence of compelling circumstances affecting Australian interests was a question of fact for it to be assessed in light of Departmental guidelines. There was no evidence before it, nor any claims, that there were compelling circumstances. The Tribunal accepted that the visa applicant was a skilled motor mechanic during the period of his employment with the company and was a desirable employee because he possessed skills which were in short supply. It also accepted that the business would employ such individuals if able to source them locally to operate more efficiently. However, the claim that

the workshop would close if the visa was not granted had not been substantiated to the Tribunal by any evidence such as business or financial records. The Tribunal found that the applicant did not satisfy PIC 4014 and accordingly did not meet the criterion in cl.457.224.

**0800462**

**9 December 2008, Melbourne**

**Mr G Haddad, Member**

**STANDARD BUSINESS SPONSOR – R.1.20D(2)(C) – DEMONSTRATED TRAINING RECORD OR COMMITMENT** – A delegate of the Minister for Immigration and Citizenship refused the applicant company's application for approval as a standard business sponsor under r.1.20D of the *Migration Regulations 1994* (the Regulations). The delegate refused to approve the sponsorship due to insufficient evidence in the application and was not satisfied that r.1.20D(2)(f) had been satisfied. Before the Tribunal, the company provided evidence including profit and loss statements, bank statements, a certificate of company registration and business activity statements. The evidence also included copies of training advice that four staff had attended a short course on the responsible service of alcohol.

**Held:** Decision under review affirmed

The Tribunal considered whether the applicant company would introduce, utilise or create new or improved technology or business skills, or had a satisfactory record or demonstrated commitment towards training Australian citizens and permanent residents, as required by r.1.20D(2)(c). There was no evidence before the Tribunal that the applicant would introduce, utilise or create new or improved technology or business skills. The Tribunal noted that the \$250 expended on staff training represented a small fraction of the company's total income, salaries and net profit and that all of the expenditure on training was in relation to the responsible service of alcohol course. The Tribunal was not satisfied, on balance, that the applicant's training record was reasonably commensurate with the nature and extent of its business operations. It was also not satisfied that it had a satisfactory record or demonstrated commitment towards training Australian citizens and permanent residents. The Tribunal found that the applicant did not meet r.1.20D(2)(c) and accordingly could not approve the sponsorship.

**0801652/0801653**

**2 December 2008, Melbourne**

**Ms D Buljan, Member**

**EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 857 (REGIONAL SPONSORED MIGRATION SCHEME) VISA – CL.857.221(A) – APPROVAL OF EMPLOYER NOMINATION** – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Regional Sponsored Migration Scheme (Class BW) visa because he did not satisfy cl.857.221(a) of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The delegate found that at the time of decision, the application for a permanent appointment under the employer nomination scheme lodged by the nominating company had not been approved. The company proposed to employ the applicant as a Chef under the Australian Standard Classification of Occupations (ASCO). Before the Tribunal, the applicant provided evidence of prior employment including an employer reference indicating that he was highly valued for his professional cooking skills. The applicant did not appear at hearing before the Tribunal.

**Held:** Decision under review affirmed

The Tribunal noted that the company's application for a permanent appointment under the Employer Nomination Regional Sponsored Migration Scheme (RSMS) had been refused. The delegate had not been satisfied that the work to be performed in the nominated position met r.5.19(4)(c) of the Regulations. This conclusion had been affirmed by the Tribunal in a separate decision. Accordingly, the applicant would be unable to satisfy the criteria for the grant of a subclass 857 visa because he did not have an approved appointment as required by cl.857.221(a). Although the applicant could only be considered against the criteria for a Subclass 857 visa in the circumstances, it also found that there was no approved appointment as required by cl.856.221(a) and therefore the applicant could not meet the criteria for the grant of a Subclass 856 visa. The Tribunal accordingly affirmed the decision under review, finding that the applicant was not entitled to the grant of a Regional Sponsored Migration Scheme (Class BW) visa.

**071962746**

**3 December 2008, Melbourne**

**Ms G Hamilton, Member**

**EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) VISA – SUBCLASS 856 (EMPLOYER NOMINATION SCHEME) VISA – CL.856.213(C)(ii) – VOCATIONAL ENGLISH - EXCEPTIONAL CIRCUMSTANCES** – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant an Employer Nomination (Residence) visa. The delegate found that she was unable to satisfy cl.856.213(c)(ii) of the *Migration Regulations 1994* (the Regulations), which required that an applicant have vocational English unless exceptional circumstances applied. The sponsor was a custom-made wig wholesaler and retailer. The applicant was a highly-skilled and experienced wig-maker who had been employed for several years. Before the Tribunal, the sponsor submitted that the wig-making industry in Australia was very small, that it was impossible to recruit local personnel having the requisite skill and that the applicant could understand many instructions immediately. Although the applicant's level of English was functional or less, she experienced no language difficulties since co-workers spoke Chinese and several were bilingual. She was also able to pass on her skills by demonstrating techniques to co-workers and communicating sufficiently in English. She also wrote the training manual which was then translated.

**Held:** Decision under review set aside

The Tribunal found that the applicant had been successfully working within an English-speaking environment for several years. It also found that her job was a craft where use of language was not integral. The Tribunal accepted that the applicant could communicate and physically demonstrate her skills to the small number of Australian employees working in the sponsor's business. The Tribunal found that the applicant was largely understood in a mainly English-speaking workplace and was able to understand most instructions including those relating to Occupational Health and Safety requirements and employee entitlements. The Tribunal also accepted that the applicant was regarded as an essential component of the sponsor's business. A compelling case had been made that her skills were very rare in Australia and that it would not be possible to replace her locally. Accordingly, exceptional circumstances applied and the Tribunal found that the applicant satisfied cl.856.213(c)(ii).

## Partner and Family Visas

**071672970**

**4 December 2008, Melbourne**

**Mr D Mitchell, Member**

**PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – CL.309.221 – R.1.15A – SPOUSE DECEASED** – A delegate of the Minister of Immigration and Citizenship refused to grant the visa applicant a Partner (Provisional) (Class UF) visa. After the review application was made, the applicants' agent informed the Tribunal the review applicant had died. He also informed the Tribunal he had no meaningful instructions and could no longer act. The Tribunal's attempts to contact the estate of the review applicant to obtain a withdrawal of the review application were unsuccessful.

**Held:** Decision under review affirmed

The Tribunal accepted that the review applicant died. It found that, ordinarily, in the case of a sole applicant, the death would have extinguished any review entitlement. However, it was unclear whether this extended to the death of a review applicant who was not the subject of the primary decision. Regulation 4.14(2)(a) of the *Migration Regulations 1994* (the Regulations) provided for an application to be withdrawn after the death of a review applicant suggesting the application continued after death. Therefore, the Tribunal found the review application continued in the name of the deceased's estate. However, as a result of the review applicant's death the applicants' marriage was dissolved and the visa applicant could not satisfy r.1.15A(1A)(a) for a marriage that was recognised as valid for the purposes of the *Migration Act 1958* at the time of decision. The Tribunal also found any spousal relationship that existed at the time of application ceased due to the review applicant's death so the visa applicant did not meet r.1.15A(2)(c)(i) and

(ii) for a de facto relationship. The Tribunal found the visa applicant did not meet the criterion in cl.309.221 of the Regulations for the grant of a subclass 309 visa.

**071935107**

**3 December 2008, Adelaide**

**Ms D Morgan, Member**

**PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – CL.309.211 – R.1.15A – SPOUSAL RELATIONSHIP** – A delegate of the Minister of Immigration and Citizenship refused to grant the visa applicant a Partner (Provisional) (Class UF) visa on the basis she did not satisfy cl.309.211 of Schedule 2 the *Migration Regulations* 1994 (the Regulations) because she did not meet r.1.15A. The parties had never physically met each other. Movement records showed the review applicant had not left Australia since first entering. The review applicant claimed he married the visa applicant by proxy according to Islamic rites with his brother representing him in Sudan at the marriage ceremony. Before the Tribunal, the review applicant claimed the visa applicant told him she did not want to come to Australia to be with him. As a result, the review applicant stated he intended to divorce the visa applicant.

**Held:** Decision under review affirmed

The Tribunal found there was no evidence of any issue as to the validity of the marriage for the purposes of the *Marriage Act 1961* and found the applicants were validly married at the time of application and decision. However, based on the review applicant's evidence that he intended to divorce the visa applicant, the Tribunal found the spousal relationship had broken down. Consequently, the Tribunal determined that the applicants had failed to demonstrate a mutual commitment to their marriage to the exclusion of all others, or that their marriage was genuine and continuing as required by r.1.15A(1)(b)(i) and (ii). It further determined that the parties did not live together and they lived separately and apart on a permanent basis so failed to meet r.1.15A(1)(b)(iii)(A) and (B). Therefore, the applicants were not spouses and did not meet the criterion in cl.309.211 and 309.221 of the Regulations for the grant of a subclass 309 visa.

**071902520**

**28 November 2008, Brisbane**

**Mr T Delofski, Member**

**PARTNER (RESIDENT) (CLASS BS) VISA – SUBCLASS 801 – CL.801.221(6) – CHILD** – A delegate of the Minister of Immigration and Citizenship refused to grant the applicant a Partner (Resident) (Class BS) Visa on the basis that she failed to satisfy the requirements in cl.801.221 of Schedule 2 to the *Migration Regulations* 1994 (the Regulations) because the applicant was no longer the spouse of the sponsoring spouse. The applicant claimed she and her husband were married and had a son. She claimed they were in a genuine spousal relationship for more than a year after the birth of their son, at which time the relationship ceased. The applicant also claimed that she and the sponsoring spouse had agreed on access arrangements for their son. The sponsoring spouse informed the Tribunal that he had withdrawn his sponsorship of the applicant.

**Held:** Decision under review set aside

The Tribunal was satisfied that the applicant and the sponsoring spouse had been in a genuine spousal relationship and she would have met the requirements of cl.801.221(2) except that the relationship had ceased. The Tribunal was influenced by the fact that the applicant and sponsor had a son from the marriage and evidence that they lived together for over three years after the marriage. The Tribunal was further satisfied that the applicant and sponsor were the biological parents of the son, the applicant had ongoing access to the son, and as his biological father, the sponsor had formal maintenance obligations under s.3 of the *Child Support (Assessment) Act 1989*. The Tribunal noted that the applicant lost her Subclass 820 visa when the delegate refused her the grant of a Subclass 801 visa. Therefore, the Tribunal found the applicant met the requirements of in cl.801.221(6) of the Regulations except that she was not the holder of a Subclass 820 visa at the time of decision so did not meet cl.801.221(6)(a). The Tribunal remitted the application to the Department for reconsideration.

**071559418**

**25 November 2008, Sydney**

**Ms D Barnetson, Member**

**CHILD (MIGRANT) (CLASS AH) VISA – SUBCLASS 101 (CHILD) VISA – CL.101.213(1)(c) – FULL-TIME STUDY - REASONABLE PERIOD AFTER COMPLETING YEAR 12** – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Child (Migrant) visa because she did not satisfy cl.101.213 and 101.221 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The delegate found that the visa applicant had not been undertaking a full-time course of study at an educational institution leading to the award of a professional, trade or vocational qualification since turning 18 or within 6 months, or a reasonable time, after completing the equivalent of year 12 in the Australian school system. Departmental enquiries indicated that a particular university preparation course claimed to have been attended by the applicant was not in fact offered. Before the Tribunal, the applicant provided documentary evidence of her educational history, which showed she had taken several part-time courses of study between 2003 and 2006. The applicant then undertook a Diploma in Accounting and Finance in September 2006. Her representative also gave the Tribunal several exercise books and three text books, claiming that these were from her preparation course, although the applicant stated that these books related to another course.

**Held:** Decision under review set aside

The Tribunal was not satisfied that the university preparation course was provided at the institute as claimed. There was no evidence that the books provided at hearing were related to that course. Although that institute did offer an unlicensed coaching course which the applicant attended, it was not a full-time course of study leading to the award of a professional, trade or vocational qualification. The Tribunal found that a one year study gap was followed by a further break while she studied English part-time, thereby totalling a three year period since completing year 12 and commencing full-time study in the Diploma of Accounting and Finance. However, the Tribunal found that this period amounted to a reasonable time having regard to all the circumstances. The applicant had sought to enter university in 2003 but was unsuccessful. She was then prevented from completing a Pharmacy course through no fault of her own as the course unexpectedly closed. The applicant undertook relevant part-time study and enrolled in the Diploma of Accounting and Finance at the start of the next academic year, which was the first opportunity. Accordingly, the Tribunal was satisfied the visa applicant met the requirements of cl.101.213.

**0800571**

**16 December 2008, Sydney**

**Mr D O'Brien, Principal Member**

**OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 115 (REMAINING RELATIVE) – CL.115.211 – CL.115.221** – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant, and her four children, Other Family (Migrant) (Class BO) subclass 115 visas on the basis that she was not a remaining relative of the review applicant, her mother, and so did not meet cl.115.211 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The delegate found that the visa applicant remained in a spousal relation with a Mr Ly, who had siblings in Vietnam. The delegate relied on evidence from a phone call made by the Department during which a person gave Mr Ly's phone number as the visa applicant's home phone number; a statement from a local warden that the visa applicant and Mr Ly lived at the same address; a statement from a local shopkeeper to the effect that the visa applicant lived with Mr Ly; and the fact that Mr Ly had not changed his permanent address from that of the visa applicant until June 2005.

**Held:** Decision under review set aside

The Tribunal found that the visa applicant was not in a spousal relationship at the time of application and, therefore, Mr Ly's relatives were not her 'near relatives' under r.1.15(1)(c). The Tribunal accepted a number of statements from Mr Ly, the local warden and the shopkeeper which contradicted the evidence before the delegate. The Tribunal accepted that it was solely due to omissions to act on the part of Mr Ly that he did not change his household registration details. It further considered that the delegate gave insufficient weight to evidence that a site visit to the visa applicant's home found no evidence that a male lived there. In sum,

the Tribunal was satisfied that at the time of application and decision the visa applicant was a remaining relative of the review applicant, and therefore met cl.115.211 and cl.115.221.

## Student visas

**0801597**

**28 November 2008, Sydney**

**Mr D O'Brien, Principal Member**

**STUDENT (TEMPORARY)(CLASS TU) VISA - SUBCLASS 573 – CL.573.224(a) – PUBLIC INTEREST CRITERION 4003(a) – FOREIGN POLICY INTERESTS** – A delegate of the Minister of Immigration and Citizenship refused to grant the visa applicant a Student (Temporary)(Class TU) visa on the basis that she did not satisfy cl.573.224 of Schedule 2 to the *Migration Regulations 1994* (the Regulations) because she did not meet the Public Interest Criterion (PIC) 4003. The former Foreign Minister made a determination that the applicant, whose father was the Minister in Zimbabwe's Zanu-PF Parliament, was a person whose presence in Australia would be contrary to Australia's foreign policy interests. The current Foreign Minister decided not to revoke that determination. The applicant claimed her father had been seeking to retire for some time and would not be a Minister in any power-sharing government expected to be formed with Morgan Tsvangirai's Movement for Democratic Change Party. She also claimed she had never supported the Mugabe Government and she was not a threat to Australia.

**Held:** Decision under review affirmed

The Tribunal found the determination made by the former Foreign Minister remained in force. It could not go behind the determination and make its own assessment of what was contrary to Australia's foreign policy interests. The Tribunal commented that the applicant had made representations to the Minister, but, in its assessment, the circumstances referred to were highly unlikely to cause him to revoke the determination. The applicant's father was still a Government Minister even if only in a caretaker capacity. Although it was not a matter for it, the Tribunal observed that wider considerations than whether the applicant was a threat to Australia may arise in relation to the making of a determination by the Foreign Minister. The Tribunal was not satisfied that the applicant met PIC 4003 and therefore she did not satisfy cl.573.224(a) of the Regulations.

**0804221**

**3 December 2008, Melbourne**

**Ms K Synon, Member**

**STUDENT (TEMPORARY) (CLASS TU) VISA - SUBCLASS 573 – 116(1)(B) CANCELLATION - CONDITION 8202(2)(a) – EXCEPTIONAL CIRCUMSTANCES BEYOND VISA HOLDER'S CONTROL** - A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 573 Higher Education Sector visa under s.116(1)(b) of the *Migration Act 1958* on the basis that the applicant had not been enrolled and studying in a full time CRICOS registered course since 13 July 2007. This was not disputed by the applicant. However, the applicant claimed there were exceptional reasons beyond his control which prevented him from maintaining his course enrolment. He explained that he was supporting himself with an education scholarship from an Indian bank and that his father was his main sponsor. He claimed his father became ill and was unable to work which resulted in the bank refusing to release further funds for the applicant's enrolment fees in Australia. He said his father had high blood pressure and eyesight problems and while he is ok now it is unlikely he would be able to work again. The applicant had not told his father that the bank had refused to release more money and intended to work and support himself while studying. Medical reports for the applicant's father were provided.

**Held:** Decision under review set aside

The Tribunal found that the applicant had not been enrolled in a registered course since July 2007 and accordingly the applicant had not complied with condition 8202(2)(a). Whilst the diagnosis of an applicant's parent with a medical condition would normally not constitute exceptional circumstances, the current

situation was somewhat different. The Tribunal accepted the medical evidence that the applicant's father was ill and could no longer work. The Tribunal accepted that the applicant's ongoing finance from the bank was suspended until his father could provide evidence of his income. It considered that having his finances suspended affected the applicant's ability to enrol in his further English course as required by his education provider and that this amounted to exceptional circumstances beyond his control. The Tribunal considered further whether its discretion to cancel the visa under s.116(1)(b) should be exercised in all the circumstances. The Tribunal noted that the applicant had successfully completed three English courses and complied with all attendance requirements and was satisfied that the purpose of the applicant's travel to and stay in Australia was to study and that he intended to re-enrol if he received a positive outcome in relation to the review. The Tribunal concluded that the visa should not be cancelled.

**071908707**

**27 November 2008, Sydney**

**Ms L Nicholls, Member**

**STUDENT (TEMPORARY) (CLASS TU) VISA - SUBCLASS 572 – CL.572.222 – CONFIRMATION OF ENROLMENT** - A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Student (Temporary) (Class TU) subclass 572 visa on the basis that he did not meet cl.572.222 of Schedule 2 to the *Migration Regulations 1994* (the Regulations), because there was no evidence that the applicant was currently enrolled in an acceptable course of study and it appeared that his previous enrolment had been cancelled. The applicant had successfully completed the first semester of a course in Community and Welfare Work at Sterling College but could not enrol in the second semester on the day of enrolment. He claimed that he paid a late fee to Sterling College and an insurance fee to enrol, however, the college claimed they had no record of his enrolment and his visa had been cancelled. The applicant later submitted a letter of offer from Canterbury Technical Institute, which was issued provisionally subject to satisfactory completion of visa formalities, acceptance of offer and payment of fees and charges. The applicant's representative stated that he would receive his confirmation of enrolment on 24 November 2008 and that it would be faxed to the Tribunal that day. However, no confirmation of enrolment was received.

**Held:** Decision under review affirmed

The Tribunal was not satisfied that the applicant had given the Tribunal a certificate of enrolment relating to a course of study in an acceptable course. There was no evidence which suggested that the application for the visa was made on a form 157E or that there had been a failure of electronic transmission which had prevented the education provider from sending a certificate of enrolment. Accordingly, the Tribunal was not satisfied that the applicant had met the requirements of cl.572.222 at the date of decision. There was no evidence to suggest that the applicant could meet the criteria for any of the other Student (Temporary) (Class TU) visa subclasses. The Tribunal affirmed the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

**0800023**

**3 December 2008**

**Mr B MacCarthy, Senior Member**

**STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 (VOCATIONAL EDUCATION AND TRAINING SECTOR) – CL.572.223(2)(a)(i)(A) – ENGLISH LANGUAGE PROFICIENCY** - A delegate of the Minister for Immigration and Citizenship refused to grant the visa on the basis that the applicant did not meet cl.572.223 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The applicant had not provided any evidence that he met the English language proficiency requirements of Schedule 5A to the Regulations, apart from results of an IELTS test taken 7 months after the date of application. Before the Tribunal, the applicant sought to argue that an IELTS test taken after the date of the visa application could meet the requirements of 'less than 2 years before the date of application'. The applicant further asked the Tribunal to exercise its 'discretionary power' to make a favourable decision. It was submitted that the applicant had initially commenced a 'Diploma in IT' at Mercury College in 2007, but that the institution was shut down before the applicant could finish his course. It was further submitted that the applicant was working with an Australian company who were seeking to sponsor him and, if he were obliged to leave the country, the employer may lose interest.

**Held:** Decision under review affirmed

The Tribunal found that the applicant had not taken any IELTS test 'less than 2 years before the date of application' and therefore could not satisfy item 5A407. The Tribunal further considered whether the applicant could meet item 5A407(d)(iii), having completed a 'substantial part' of a course conducted in English leading to a Certificate IV or higher qualification as a holder of student visa. The Tribunal found that the applicant had completed more than 40 units between March 2007 and the end of 2008. However, he was the holder of a student visa only until 2 April 2007 and, therefore, did not meet the requirements of item 5A407(d)(iii). The Tribunal further noted that while its subjective assessment was that the applicant had proficiency in English adequate for the purposes of the visa, the Tribunal lacked any discretion to waive the requirements of item 5A407.

## Visitor visas

**0800914**

**8 December 2008, Melbourne**

**Ms L Spieler, Member**

**TOURIST (CLASS TR) – SUBCLASS 676 (SHORT STAY) – CRITERION 3004 – CL.676.215** - The applicant applied for a Tourist (Class TR) visa on 6 February 2008. The application was rejected by a delegate of the Minister for Immigration and Citizenship on the basis that the applicant did not meet criterion 3003 of Schedule 3 to the *Migration Regulations 1994* (the Regulations), as she did not hold a substantive visa at the time of application. Her previous subclass 573 visa expired on 9 January 2008. In her application, the applicant stated that she wished to extend her stay in order to attend her graduation ceremony and to apply as a dependent on her husband's subclass 885 visa application. Her migration agent confirmed that she and her husband had instructed his firm to apply for a subclass 885 visas in the middle of 2007. However, due to handling errors within the firm, the application was not lodged on, or before, 9 January 2008. It was argued that the applicant's failure to hold a substantive visa was due to factors beyond her control.

**Held:** Decision under review set aside

The Tribunal found that as the applicant's last substantive visa was a subclass 573, she was subject to the requirements of criterion 3004, rather than 3003. In respect of criterion 3004(d) the Tribunal had to be satisfied that there were compelling reasons for granting the visa. The Tribunal considered that the applicant's desire to attend her graduation ceremony and her wish to apply as a dependent on her husband's application did not amount to compelling reasons for granting the visa. However, the Tribunal considered that the applicant had been studying with a view to lodging a skilled migration visa. While she was included in her spouse's application for a subclass 885 visa, it may be that the applicant herself had a better chance of satisfying the requirements for the visa. The Tribunal thus considered that the applicant had been unable to lodge a subclass 885 visa in her own right as a primary applicant. In the circumstances, it considered she should be afforded the opportunity to make a visa application onshore in accordance with her original plans. The Tribunal was therefore satisfied that there were compelling grounds for the grant of the visa.

# REFUGEE REVIEW TRIBUNAL DECISIONS

## Bulgaria

0806237

2 December 2008, Sydney

Ms P Wearne, Member

**BULGARIA – PARTICULAR SOCIAL GROUP – BUSINESS OPERATORS – MAFIA** – The applicant claimed to fear persecution from the mafia as a business operator. The applicant claimed that he had refused to allow their equipment on his business premises and they had demanded money from him. He also claimed that he was verbally threatened, his family felt threatened, his dog poisoned, the business premises damaged, and his car “stolen” then replaced undamaged. The applicant further claimed he had closed the business. The applicant told the Tribunal that if he relocated to another part of Bulgaria he would be tempted to return home and that he did not know if the same mafia group was in power. The applicant also claimed that the police did not assist with the incidents he reported and would not have assisted if he had reported others because of a mafia connection with ex-police officers. The applicant claimed he was not sure what would happen if he returned but he feared “old ones” may recognise him and kill or beat him.

**Held: Decision under review affirmed**

The Tribunal identified ‘Bulgarian business operators’ or ‘Bulgarian business operators in the 1990s’ as particular social groups. It accepted the applicant felt threatened and paid increasing amounts of money to the mafia. However, the applicant’s delay in leaving Bulgaria indicated he did not fear persecution. The applicant had admitted that he was undecided as to whether he should go or stay even after receiving a visa, had delayed in applying for protection in Australia, and was tempted to return to his hometown. The Tribunal noted the applicant had not claimed to have suffered past physical harm. Nor had he heard from the mafia when he closed his business. Therefore, the Tribunal found it difficult to accept that there would be continued interest in him or a threat to his life and safety. While the Tribunal accepted that, even after its entry into the European Union, Bulgaria continued to have problems with corruption and racketeering, these were considered surmountable and progress was being monitored. The Tribunal found the applicant’s fear did not result from systematic and discriminatory conduct directed against him either as an individual or as member of a particular social group. As such, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## Cameroon

0805238

18 December 2008, Sydney

Ms R Mathlin, Member

**CAMEROON – POLITICAL OPINION – PARTICULAR SOCIAL GROUP – UNION MEMBER** – The applicant claimed to fear persecution for reasons of his prior political activities. He claimed to have joined a particular political party, being the main opposition party within Cameroon, and to have organised party meetings and distributed material on their behalf. He also claimed to have been a union member and to have participated in civil strikes. The applicant claimed to have been detained by the authorities, interrogated, abused and forced to sign declarations denouncing the opposition party. He also claimed that he was released following intervention by a contact in a position of authority. Before the Tribunal, the applicant submitted documentary evidence including a membership card for the political party, a reference provided by one of its members, a letter confirming his union membership and a copy of an arrest warrant issued soon after his departure. A witness also provided evidence in support of his claim that he would be detained and tortured if returned.

**Held: Decision under review affirmed**

The Tribunal found that the evidence was surprisingly vague and deliberately evasive. It found that the applicant had not been truthful in relation to his claimed detention, relationship with his witness,

employment and political profile prior to departure. There were inconsistencies arising from his protection visa application, written documents, Departmental interview and evidence at hearing. Further inconsistencies were identified in response to Tribunal correspondence and concerning the witness's evidence. The Tribunal also had regard to information that it had acquired from an Australian Embassy that the applicant had not been employed in a fundraising organisation as claimed. Furthermore, no response had been received from a newspaper editor confirming that articles written about the applicant were genuine. The Tribunal gave no weight to the documentary evidence on account of independent information suggesting the ready availability of fraudulent documents and the applicant's overall lack of credibility. The Tribunal did not accept that the applicant had left Cameroon because he feared harm resulting from his political activities. Accordingly, the applicant did not have a well-founded fear of persecution for a Convention reason.

## China

**0805612**

**8 November 2008, Sydney**

**Mr J Cipolla, Member**

**CHINA – POLITICAL OPINION** - The applicant claimed to fear persecution for reasons of her political opinion. She commenced a relationship in China with a man whose family had connections to local government officials. Due to violence and infidelity, the applicant left the relationship and took their child with her. However, due to his connections, he was able to seek and gain custody of their child. The applicant was unsuccessful in obtaining access to her child, even after a number of years of approaching lawyers and various government agencies, all of whom feared bringing action against a person with such ties. The applicant attended his home on Chinese New Year in order to give her child gifts. She was refused access and the authorities were called. The applicant was arrested, detained and suffered physical assault. After her release, the applicant engaged in the production and distribution of anti-communist propaganda, which she distributed in her province and in Beijing.

**Held:** Decision under review set aside

The Tribunal found the applicant's account of her claims consistent and coherent. It accepted that she was subject to arbitrary arrest and detention, and that she has been of interest to the security apparatus in China since that time. On the basis of country information that persons involved in anti-government activities are targeted by the Chinese authorities, the Tribunal considered that there would be a real chance that the applicant would be subjected to arrest and imprisonment if returned to China. The Tribunal further considered whether the applicant could reasonably relocate within China. However, country information suggested that those who have voiced strong opinions against the government were targeted throughout China. The Tribunal was satisfied on the evidence that the applicant had a well founded fear of persecution for a Convention reason.

**0805423**

**22 November 2008, Sydney**

**Mr G Short, Senior Member**

**CHINA - RELIGION - CHRISTIAN** - The applicant claimed to fear persecution as a Christian. He claimed that he attended worship meetings and gatherings of an unofficial church in China, and allowed his factory to be used for such meetings. He also claimed that he donated some money to the church. He claimed to have been arrested, detained and fined, harassed by the police, and his personal file sent to the PSB and Religious Affairs Bureau. He claimed that his family in China told him that the Religious Affairs Bureau and police were looking for him and asking when he would return to China. The applicant claimed to have attended church after coming to Australia and applying for a protection visa.

**Held:** Decision under review affirmed

The Tribunal found the applicant's evidence to be evasive and inconsistent, and concluded that the applicant was not a credible witness. The Tribunal did not accept that the applicant was a Christian. It did not accept that he attended an official church in China or that he allowed his factory to be used for such meetings. In

addition, the Tribunal did not accept that he was arrested, detained and fined, harassed by the police or that his personal file was sent to the PSB and Religious Affairs Bureau. It did not accept his claim that the Religious Affairs Bureau and police were looking for him and had asked his family when he would return to China. The Tribunal accepted that he had attended Church in Australia, and had a rudimentary knowledge of Christianity. However, for the purposes of s.91R(3) of the *Migration Act 1958*, it was not satisfied that the applicant had attended church services in Australia otherwise than for the sole purpose of strengthening his claim to be a refugee. Accordingly, it found that the applicant did not have a well-founded fear of persecution for reasons of his religion, now or in the reasonably foreseeable future.

## Egypt

**0803410**

**11 December 2008, Melbourne**

**Mr A Gentile, Member**

**EGYPT – RELIGION – COPTIC ORTHODOX CHURCH** – The applicant claimed to fear persecution for reasons of his religion. The applicant claimed he was a member of an old Coptic Orthodox family and held a clerical position in the Coptic Church. He participated as a practising Coptic Orthodox person in the welfare of the Church and Coptic community. The applicant claimed that his duties involved printing and copying CDs, DVDs and videos of Church hymns, liturgy and sermons, and sending youths at the Archdiocese a weekly religious magazine via email. The applicant further claimed that, as a result of his involvement with the Church, he was arrested by the Egyptian police, received brutal beatings at the hands of their collaborators, and had his registered business shut down and his computer equipment confiscated. He also claimed that the Egyptian police had arrested his parents to force them to reveal his location.

**Held:** Decision under review set aside

The Tribunal accepted, among other things, that the applicant was an active member of the Coptic Church, had used his business facilities to copy material for the Church's use, that his involvement with the Church had been ongoing for a considerable period of time, and that his parents were detained to pressure him to return. The Tribunal found that evidence regarding the applicant's actual treatment in Egypt before his departure did not support his claims that he was physically assaulted or that his business was ransacked. However, the Tribunal accepted that the applicant had a profile as a person of Coptic religion who was in a position of responsibility in the Church and who had shown a propensity to follow through on complaints against the system and, in particular, the treatment of Copts. The Tribunal found that the chance he would be persecuted on return to Egypt for reasons of his religion could not be considered remote or insubstantial, and was, therefore, satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## Eritrea

**0806040**

**20 November 2008, Sydney**

**Mr A Jacovides, Member**

**ERITREA – POLITICAL OPINION – PARTICULAR SOCIAL GROUP – MEMBER OF UNAUTHORISED CHURCH** - The applicant claimed to fear persecution on the basis of her religion and political opinion. She claimed she was a member of an unauthorised evangelical church. As a result of her activities, she claimed to have been imprisoned and subjected to torture by the authorities. Thereafter, she refrained from further contact with her church. After her studies, the applicant was discriminated by the government in various ways because she was not considered to be a loyal subject. The applicant wanted to resign from her job and study overseas but she was not allowed to leave her employer or the country. The applicant was able to organise her departure from Eritrea by using a relative's connections. She claimed the relative and the person who facilitated her departure were arrested. She claimed that an adverse political opinion would be attributed to her because of her family background.

**Held:** Decision under review set aside

The Tribunal formed the view that the applicant was not subjected to persecution by the government of Eritrea at the time when she departed the country. Her ability to access tertiary education and employment suggested that she had a privileged lifestyle compared to many other citizens. However, the Tribunal accepted that the applicant was detained and subjected to treatment amounting to persecution for her involvement in an unregistered church. The Tribunal accepted that she would be prevented from attending a church of her choice if she returned to Eritrea in the reasonably foreseeable future and that this alone could give rise to a well founded fear of persecution. Nevertheless, the Tribunal found that the most immediate risk of serious harm which the applicant faced was due to the political opinion which would be attributed to her by the Eritrean government. The applicant's unauthorised departure, her application for refugee status, her criticism of the government and her family background, had and would continue to attract the adverse attention of the authorities. The Tribunal was satisfied that the applicant faced a real chance of serious harm, including detention and physical abuse for this reason.

## Fiji

**0806382; 0806818**

**2 December 2008, Sydney**

**Mr L Hardy, Member**

**FIJI – POLITICAL OPINION – ANTI-MILITARY – BAINIMARAMA INTERIM GOVERNMENT – INFANTS** – The applicants, infants born in Australia to Fijian parents, claimed to fear persecution for reasons of their father's political opinion. The applicants claimed, through their father, that they would be harmed because he had the profile of a critic of the army and interim government. Their father claimed he was wrongly imputed to have supported the George Speight coup in 2000 and that he was also opposed to the coup by Commodore Bainimarama in 2006. He claimed he had difficulties with the military when it was trying to quash the Speight coup and restore order, including being held at gun point, harassed and threatened by phone. He claimed he was a supporter of the ousted SDL Party and the Reconciliation Bill vehemently opposed by the military and widely considered a motivation for the Bainimarama coup. The applicants' father claimed he spoke to the media as an elected local community official criticising the coup and further claimed he might participate in a petition to Bainimarama. He claimed more happened than was reported and that people like him were killed and crippled for criticising the government.

**Held:** Decision under review affirmed

The Tribunal found the applicants were nationals of Fiji or had access to official recognition in view of being born to Fiji nationals. It further found the applicants' father was competent to speak on their behalf. The Tribunal did not accept the applicant's father was regarded as a Speight supporter or that he had difficulty from the army for this reason. The Tribunal found the father's claim he supported the Reconciliation Bill vague with no indication of the capacity or manner of that support. It did not accept he was a member of the SDL, took a public stand regarding the Bill, or attracted criticism from the army for doing or seeming to do so. It accepted that he gave an opinion about the coup to a newspaper and noted he would have had no control over the way or context in which his comment was published and did not consider it appropriate to disregard the conduct under s.91R(3) of the Act. Although the Tribunal accepted he sincerely criticised the coup on one occasion, it determined this was an isolated comment and was not satisfied the statement would give rise to the imputation that he was a significant opponent. The Tribunal was not satisfied the applicants would face significant harm as a result of what their father had said or done in Australia. The Tribunal was not satisfied that the applicants had a well-founded fear of persecution for a Convention reason.

## India

0805670

9 December 2008, Sydney

Dr I O'Connell, Senior Member

**INDIA – POLITICAL OPINION - CREDIBILITY** - The applicant claimed that he enlisted in the Indian Army and had retired from service. After his retirement, he was taken to the forest and forced to provide physical and escape training to a politically motivated group for over a year. He claimed the group threatened to kill him if he did not do as required. He stated that the police had raided the area and he was able to escape, however, one of the men arrested told the police about the applicant, including his name and address, and the police went looking for him. He claimed the police had a photo of him with the group and they suspected him to be one of them. The applicant also provided a letter from his former commanding officer which he said indicated that his life was in danger from district terrorists. The applicant claimed to fear three distinct groups should he return to India: the district terrorists by reason of a military operation he was involved in while serving in the Indian army; the politically motivated group from which he escaped; and the Indian authorities who supposed him to be a supporter of the group.

**Held:** Decision under review affirmed

The Tribunal accepted the applicant had served in the Indian Army and voluntarily retired. The Tribunal found the applicant's oral evidence was not credible in respect of key aspects of his claim. His claims were inconsistent and unpersuasive. The applicant was not able to elaborate on the threats to him or events in which he claimed to have suffered harm. The Tribunal found the letter purportedly written by the applicant's former Commanding Officer to be fabricated. The Tribunal did not accept his claim that the political group would kill him on return to India based on its findings that the applicant's oral evidence about his claimed kidnapping was unpersuasive. It did not accept that the Indian authorities would regard him as a member or associate of the political group such that they would wish to harm or kill him. The Tribunal was not satisfied that the applicant had a genuine fear of persecution and was not satisfied there was a real chance of persecution on his return to India.

0805760

10 December 2008, Sydney

Mr A Mullin, Member

**INDIA – RELIGION – POLITICAL OPINION – CHRISTIANITY** - The applicant claimed to fear persecution because of her social work among Hindu women and children of the 'scheduled tribes'. She claimed this work led to some of the women and children converting to Christianity. This was opposed by the Hindu community and she and other church workers received threatening telephone calls. In her protection visa application, she claimed that she and her family were assaulted by armed Muslims in 1994. At the Tribunal hearing, the applicant claimed that they had ignored these threats and this led to repercussions against their property and their activities. She also claimed that people from the Communist Party of India (Marxist) (CPI(M)), who lived in her village, came to attack her and she was forced to move away. The applicant did not know the names of these people. She also claimed that, in the attack in 1994, her relatives were killed and her house bombed. The applicant claimed that the current government in Kerala opposed her religion.

**Held:** Decision under review affirmed

The Tribunal was not satisfied that the applicant's account of having suffered past harm in India was credible because her evidence at the hearing was notably vague. The Tribunal accepted that the applicant was a Christian who was involved in a group of co-religionists teaching literacy skills to 'untouchable' Hindus, which resulted in a number of people converting to Christianity. However, the Tribunal was not satisfied that the applicant was ever forced to move away from her village or that she was forced to leave India and come to Australia. It accepted that the applicant would continue to involve herself in social welfare activities with Hindu untouchables and this may led to further conversions to Christianity. However, there was no information before the Tribunal which would indicate that there was a real chance that she would suffer harm for such activities. Further, even if the Tribunal were to accept she risked harm from the CPI(M), it

was not satisfied that she would not be able to find protection from the government in Kerala. In relation to the applicant's claim that she suffered harm at the hands of Muslims in 1994, the Tribunal found that the applicant did not claim to fear harm if she was to return to India for this reason. As such, the Tribunal was not satisfied the applicant had a well-founded fear for a Convention reason.

## Iran

0806698

31 December 2008, Sydney

Ms Phillipa McIntosh, Member

**IRAN – POLITICAL OPINION - CREDIBILITY – RELIGION –** The applicant claimed to fear persecution for reasons of his political opinion and religion. The applicant claimed that his name was 'Identity 1', and that he paid people smugglers to arrange for his travel to Australia by ship. Evidence gathered by the Department of Immigration and Citizenship, including the applicant's personal belongings, suggested that his real name was 'Identity 2', and that he was granted an Australian visa from 'City 2' in Iran. The applicant claimed he used the internet in Iran to gain access to controversial religious books and the bible. He claimed his home was searched by intelligence services and he was detained for a number of days without charge. After he was released, he considered himself to be under constant surveillance and was frightened because he was on a government black list. He also claimed that he used his web blog to pass on information to other Iranians about Christianity and, by implication, dissident political views. The applicant further claimed that he was a Christian 'at the moment', and that he had visited a church in 'City 2'.

**Held:** Decision under review affirmed

The Tribunal did not consider the applicant to be a credible witness. The Tribunal was satisfied on the evidence before it that the applicant's real name was 'Identity 2', and that he was granted an Australian visa in 'City 2'. The Tribunal was satisfied that he legally departed Iran and entered Australia by plane. There was no evidence beyond the applicant's own assertions that his home was raided by intelligence officers, that he was ever detained or had been of any interest to the Iranian authorities, or that he had visited a church in 'City 2'. Whilst the Tribunal accepted that he displayed some knowledge of Christianity, given his credibility problems, the Tribunal was not satisfied that any activities relating to Christianity in which he had participated in Australia were engaged in otherwise than for the purposes of strengthening his claims to be a refugee. Similarly, the Tribunal accepted the applicant had a web blog, but found that he had only added political and religious materials to it after his primary application was refused. The Tribunal was not satisfied the applicant had a well-founded fear of persecution for a Convention reason.

## Kenya

0803901

19 September 2008, Melbourne

Ms W Boddison, Member

**KENYA – RACE – ETHNICITY – TRIBAL AFFILIATION –** The applicants claimed to fear persecution on the basis of their tribal affiliations. The applicant belonged to Tribe A, and her husband to Tribe B. The wife, who had been studying in Australia, claimed that Kenya had experienced escalated violence after recent elections and that she was unable to return to her particular hometown. She claimed that due to tribal violence, a family member had been killed, her family uprooted and their property had been destroyed. The husband and wife both claimed that their circumstances were further complicated because they had married a member of a different tribe and would be targeted by both sides.

**Held:** Decision under review set aside

The Tribunal accepted on the basis of independent information that post-election violence had been motivated by tribal allegiances. The Tribunal found that, although the risk of violence had abated since the early 2000s, circumstances in the applicant's hometown remained tense and it was not a remote or far-fetched possibility that the applicant would be persecuted in the future on account of her ethnicity if she

returned. The Tribunal accepted that there was a real chance that the applicant wife, as a member of Tribe A in a city where the majority was from Tribe B, faced a real chance of persecution. The Tribunal also found that it would not be reasonable for the husband and wife to relocate because, having married across tribes, she and her husband would not be accepted in other areas by either side. The Tribunal was satisfied that the applicant wife had a well-founded fear of persecution for a Convention reason and that her husband and child, as her spouse and dependent, were also owed protection obligations as members of her family unit.

## Nigeria

0805340

20 November 2008, Sydney

Mr R Wilson, Member

**NIGERIA – RELIGION – CHRISTIANITY – PARTICULAR SOCIAL GROUP – YOUNG CHRISTIAN MEN WHO REFUSE TO JOIN CULTS IN NIGERIA** - The applicant claimed to be a single Christian man from Nigeria who studied at Lagos Polytechnic. He claimed to fear a cult group which tried to forcefully recruit him. He feared they would take him by force if he did not do what they told him and they would torture, punish and possibly kill him. The applicant claimed that as a Christian he did not want to be forced to do bad things against people. He claimed the cult group sent him threatening notes and that his mother was attacked by cult members who were looking for him. He claimed that he could not seek protection from the police as the cult had connections with them. He also claimed he would not receive justice from the judiciary. The applicant provided documents and country information to support his application including attestations from a pastor in Nigeria, from the applicant's mother and from a Sydney church.

**Held:** Decision under review set aside

The Tribunal found the applicant to be credible as his evidence generally accorded with independent country information. The Tribunal accepted the medical report and found that his mother was beaten by cult members, who advised that her son would be located by the cult wherever he went in Nigeria. The Tribunal accepted that the applicant was Christian. The Tribunal accepted that cultism had not been eradicated from Nigeria's higher institutions, that powerful politicians foiled these programmes and that it was dangerous to report cult activities to the police. The Tribunal accepted that the authorities in Nigeria were not able to provide effective protection against cultism. The Tribunal found that young Christian men who refused to join cults in Nigeria formed a particular social group for the purposes of the Convention. The Tribunal found that the applicant would not be able to live freely and openly in Nigeria as a member of this particular social group and if he were to do so, there was a real chance that he would be killed. The Tribunal accepted that there was no part of Nigeria to which the applicant could reasonably be expected to relocate where he would be safe from the persecution which he feared. The Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

## South Africa

0803250

22 July 2008, Melbourne

Ms L Spieler, Member

**SOUTH AFRICA – RACE – MEMBERSHIP OF PARTICULAR SOCIAL GROUP – WHITE MALE OVER A CERTAIN AGE** – The applicant claimed to fear persecution because of his race and his membership of a particular social group, namely white males over a certain age. The applicant arrived in Australia as a dependant on his wife's visa. Since then, his marriage had broken down and his wife and children had been granted permanent residency. The applicant claimed that it would be difficult for him to get work if he returned to South Africa because the affirmative action laws discriminate against white males over a particular age. The applicant discussed his employment and business experience in South Africa, claiming that he may have been denied a promotion because of affirmative action. He also claimed to fear persecution because of the high crime rate in South Africa. It was implicit in his claims that whites are targeted. He stated that, in his circumstances, he would be denied the protection of the police and may be

mistreated by the police. The applicant claimed his greatest fear was that he will not see his children for a long time. The Tribunal considered country information relating to the applicant's claims.

**Held:** Decision under review affirmed

The Tribunal doubted whether the applicant had a subjective fear of persecution for a Convention reason given the circumstances of his departure from and subsequent return visits to South Africa, and the substantial delay in lodging his protection visa application. The Tribunal found the applicant's claim that affirmative action laws would adversely affect his job prospects to be speculative. It did not accept the applicant's claim to have suffered from racially motivated crime in the past. Whilst the Tribunal accepted the applicant may fear random criminal acts perpetrated for non-Convention reasons, it was satisfied that the government does not condone such criminal activity and police services would not be withheld from the applicant because of his race. The applicant's fear of being separated from his children did not fall within the scope of the Convention. The Tribunal was not satisfied the applicant faced a real chance of serious harm for a Convention reason if he returned to South Africa.

## South Korea

**0805932**

**28 November 2008, Sydney**

**Ms A Younes, Member**

**SOUTH KOREA – PARTICULAR SOCIAL GROUP – HOMOSEXUAL** – The applicant claimed to fear persecution as a homosexual. He claimed there was significant prejudice against gay and transgender people in South Korea. He claimed to have been the subject of police harassment at an annual gay rights parade and to have been subjected to other incidents of discrimination and physical violence. He claimed to have been in a number of major relationships where his partner had died and felt unable to openly grieve as this was seen as unacceptable. Working for a foreign organisation, combined with his sexuality and a history of abuse by his father, the applicant felt like an outsider in South Korea and claimed he would be harmed by government officials because of his membership of this group if he was to return.

**Held:** Decision under review set aside

The Tribunal accepted that the applicant was homosexual with transgender characteristics and accepted his claims regarding the incidents of harassment and violence. The Tribunal was not satisfied that the applicant had suffered serious harm or persecution for a Convention reason as a result of these incidents but accepted that an applicant does not need to demonstrate past harm in order to establish future harm. The Tribunal was satisfied that the comprehensive country information available demonstrated that whilst there were some positive initiatives, persecution of homosexual and transgender persons in South Korea occurs. It accepted there is a real chance that the applicant would be seriously harmed in the reasonably foreseeable future due to his membership to this particular social group should he return. The Tribunal was satisfied that while homosexuality is not illegal, Korea remains a conservative country where "coming out" is difficult and gay marriages are not accepted. The Tribunal found that the applicant held a well-founded fear of persecution for a Convention reason.

## Sri Lanka

**0804646**

**22 October 2008, Melbourne**

**Ms N Burns, Member**

**SRI LANKA – RELIGION – BUDDHISM – RACE – SINHALESE** – The applicant claimed that, as a Sinhalese Buddhist person living in a particular city, he would be targeted by roadside bombs or suicide attacks if he returned to Sri Lanka. He claimed that civilians had been killed by roadside bombs detonated by the Tamil Tigers and submitted photographic evidence of injured Sinhalese civilians to the Tribunal. He also claimed that the government would be unable to protect him from unidentifiable suicide attackers or terrorists. He claimed that his family's business had been threatened and that they were forced to pay a

financial tax to the LTTE in order to operate. Assets had also been destroyed by targeted bomb blasts or were confiscated when payments ceased. He also claimed to fear for his life due to increasing crime and inflation within Sri Lanka.

**Held:** Decision under review affirmed

The Tribunal accepted that the applicant was of Buddhist Sinhalese ethnicity. Although it accepted that his parents operated a business which had been affected by the conflict, it did not accept that this was for the reasons he claimed. Independent information indicated that the human rights situation in Sri Lanka was poor and, while there had been an increase in indiscriminate bomb attacks by the LTTE, civilians had not been specifically targeted for reasons of their religion or ethnicity. The photographs submitted by the applicant were given little weight since he was unable to explain their relevance to his claims. Furthermore, there was no independent information suggesting that the applicant would be denied State protection for a Convention reason. The Tribunal found that there was no real chance that the applicant would be abducted and that his fear of increasing crime and inflation rates was not essentially and significantly for a Convention reason. While the applicant was likely to experience restricted movement and inconvenience, these applied to the population generally and did not amount to persecution within the meaning of the Convention.

# FEDERAL COURT JUDGMENTS

## **Sood v MIAC**

**[2008] FCA 1797**

**Federal Court of Australia, Gordon J, VID 721 of 2008, 26 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 Migration Review Tribunal (the Tribunal) affirming the delegate's decision to refuse the appellant's application for Standard Business Sponsorship under s.140E of the *Migration Act 1958* (the Act).

Before the Tribunal, the appellant claimed to satisfy the requirements for business sponsorship under r.1.20D(2)(c)(i) of the *Migration Regulations 1994* (the Regulations), claiming that the jewellery manufacturing process used for his jewellery business was a sandcasting technique, an old technology used in traditional Indian jewellery manufacturing but not commonly taught or practised in Australia. After noting the appellant answered "no" to the question on the application form, "Will your business introduce, utilise or create new or improved technology or business skills?" the Tribunal concluded it was not satisfied the sandcasting technique was a new or improved technology or that the appellant was responsible for its introduction into Australia.

Upon appeal, the appellant made similar contentions to those at first instance. He submitted the Federal Magistrate erred in failing to find the Minister (and Tribunal) had a residual discretion to approve or reject an application under s.140E of the Act and failed to properly construe and apply the term "new" in r.1.20D(2)(c)(i).

### **Held: Appeal dismissed**

- (i) Section 140E contains no 'residual discretion' of the kind alleged. Such a reading is contrary to the express words of the section, the context, the legislative history and the case law. If the version of r.1.20D(2) as it existed at the time of *Shao v MIMA* [2005] FCA 478 did not contain a residual discretion, the addition of s.140E coupled with the change from "may" to "must" in r.1.20D(1) should not be seen to change that analysis.
- (ii) Regulation 1.20D(2)(c)(i) raises two questions – first, whether the technology or business skills are new or improved; and secondly, the manner in which the appellant deals with that technology or business skills in Australia. The word "new" should be understood as "new to Australia" rather than new generally. There are three ways an applicant can bring about the advent of new or improved technology or business skills in Australia: he can introduce it to Australia; he can utilise it in Australia; or he can create it in Australia.
- (iii) The Tribunal erroneously took the view that the second question could only be satisfied by introduction of the technology. However, the Tribunal's factual finding that sandcasting was not new to Australia was open to it. The appellant's own evidence suggested sandcasting was, at least to some extent, already utilised in Australia. A factual finding, even where based on an erroneous understanding of the law, cannot be disturbed on judicial review unless the finding could not have been made on the proper understanding of the law.

## **SZCOV v MIAC**

**[2008] FCA 1800**

**Federal Court of Australia, Spender J, NSD 1488 of 2008, 28 November 2008**

This was an appeal from a decision of the Federal Magistrates Court, dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellants were not persons to whom Australia had protection obligations. The appellants, a husband and wife, claimed to fear persecution should they return to the People's Republic of China (PRC), amongst other things, due to the first appellant husband's claim of involvement in Falun Gong.

The Tribunal, on two previous occasions, made a decision that the appellants were not persons to whom Australia had protection obligations. On both occasions, the decisions had been set aside by consent. On the third review, the Tribunal again affirmed the delegate's decision stating it was "implausible that [the first appellant] was a patron or ally of Falun Gong while in China". This and a number of other factors, including that the appellant failed to claim any personal involvement with Falun Gong in Australia, such as sending materials back to China in his visa application, and contradictions in the evidence of the appellants, led the Tribunal to conclude that the appellants had not been truthful in their account. The Tribunal did not accept that the first appellant sent Falun Gong materials to China after entering Australia and did not accept the first appellant engaged in Falun Gong practice or protest activities in Australia other than for the purpose of strengthening his claim to be a refugee and therefore disregarded that conduct under s.91R(3) of the *Migration Act 1958* (the Act).

On appeal, the appellants contended, among other things, that the Federal Magistrate erred in finding the Tribunal did not breach the requirements of s.91R(3) of the Act.

### **Held: Appeal dismissed**

- (i) It was open for the Tribunal to conclude that the attendance at Falun Gong practice sessions and studying Falun Gong in Australia (which the Tribunal accepted) had commenced after the filing of the initial application for a protection visa (which is why it was not referred to in the application), and was conduct engaged in only for the purpose of strengthening his claim for a protection visa. The conduct was properly disregarded as required by s.91R(3) of the Act.
- (ii) The claimed conduct of sending Falun Gong material to China did not engage s.91R(3) because the Tribunal found, as a finding of fact, that that conduct had not happened.
- (iii) The Tribunal misused words such as "plausible" or "implausible" to connote "acceptance" or "rejection" of a claim and wrongly used "implausible" interchangeably with "untruthful". An assessment that an account of events is "implausible" may provide a basis for concluding the events did not happen, and the claim that they did was untruthful, but the assessment of implausibility is not, in terms, a finding that the events did not happen.

### **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 had 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 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 319, in determining whether "information" falls within s.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

## **Kamruzzaman v MIAC**

**[2008] FMCA 1460**

**Federal Magistrates Court of Australia, Burnett FM, BRG 292 of 2008, 19 November 2008**

The applicant, a national of the Bangladesh, sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision not to grant the applicant a Skilled (Australian sponsor) (Migrant) (Class BQ) subclass 138 visa.

In his visa application form, the applicant nominated the occupation of a "Business and Information Professional [nec] (ASCO 2299 -79)". That occupation was included in the definition of "skilled occupation" in r.1.03 of the *Migration Regulations 1994* (the Regulations). Clause 138.216 of Schedule 2 to the Regulations required that, at the time of application, the applicant had to have been employed in a skilled occupation for a period of 24 months over the 36 months immediately before the application. The applicant submitted that, at time of application, he was employed by the Arab Bangladesh Bank as an assistant officer. The applicant claimed his duties extended beyond the responsibilities of a Bank Worker, essentially claiming that he was working as a Business and Information Professional [not elsewhere classified] and his superior acknowledged his responsibilities were compatible with that category. The Tribunal listed the tasks relevant to the occupations of "Bank Worker" and "Credit and Loans Officer" by reference to the ASCO dictionary and, after considering the applicant's evidence, concluded that he was employed as a "Bank Worker" or "Credit and Loans Officer" and these were not occupations on the gazetted Skilled Occupations List.

The applicant contended, among other things, that the Tribunal committed jurisdictional error by failing to take account of a relevant consideration, leading to it asking the wrong question.

Held: MRT decision remitted for reconsideration.

- (i) The Tribunal failed to give proper consideration to the occupation nominated by the applicant and failed to ask itself the correct question in addressing a principal issue in the application.
- (ii) The Tribunal failed to consider the relationship between skill levels and duties and whether or not the skill level associated with a Business Information Professional [nec] would be exercised in the performance of the occupation. Given the prerequisite levels listed for the nominated occupation and the absence of any detailed tasks, the Tribunal needed to examine the tasks undertaken by the applicant and assess whether they required an application of tertiary level skills or certificate level skills before any conclusion could be reached as to whether the applicant was a "Bank Worker", or "Credit and Loans Officer" or a "Business and Information Professional [nec]".
- (iii) The Tribunal reached a conclusion that was unreasonable, in that it was against the weight of the evidence. The Tribunal's exercise of its decision-making power was improperly used because it had failed to act on unchallenged evidence before it (letter from the applicant's employer which stated that his duties would fall within the category of "Business and Information Professional"), such that its ultimate conclusion was one no reasonable Tribunal would have reached. The Tribunal appeared to have focussed on "tasks" and not "skill" levels and, had it given appropriate consideration to the interface of skills to tasks, it would not reasonably have reached the view it did.
- (iv) The Tribunal asked whether or not the applicant was a "Bank Worker/Credit and Loan Officer", whereas the question it ought to have asked was whether he was employed as a "Business and Information Professional [nec]". By failing to ask the correct question, the Tribunal did not enquire into the responsibilities of a Business and Information Professional [nec] as set out in the ASCO dictionary and measure those factors against the applicant's duties.

**Kim & Ors v MIAC & Anor**

**[2008] FMCA 1553**

**Federal Magistrates Court of Australia, Scarlett FM, SYG 739 of 2008, 20 November 2008**

The applicants sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to refuse to grant Business Skills – Established Business (Residence) (Class BH) (Subclass 845) visas.

The first applicant, a Korean businesswoman, together with her husband and two daughters, appointed a migration agent to represent them before the Tribunal. The agent was nominated as the applicants' authorised recipient for the purposes of s.379G of the *Migration Act 1958* (the Act). When the Tribunal became aware during the review that his registration had been suspended, the Tribunal decided to additionally send copies of all correspondence to the applicants at their residential address. This included a letter to the applicants, sent care of the former agent, inviting them to a hearing. One day before the scheduled hearing, the first applicant personally delivered a letter advising that she no longer wished to attend, a fact noted by the Tribunal which completed the review and affirmed the delegate's decision.

The applicants contended that the Tribunal's decision should be set aside following *SZFDE v MIAC* (2007) 237 ALR 64, due to the former agent's fraudulent conduct in advising the first applicant not to attend the hearing. The first applicant gave evidence to the Court that the former agent had advised her not to attend the hearing and that he had prepared the documentation for her to take to the Tribunal. The former agent provided evidence that he had informed the first applicant of his suspension, agreed to remain her authorised recipient, undertook some administrative paperwork for her but denied advising her not to attend the hearing.

**Held: MRT decision set aside and remitted for reconsideration.**

- (i) The former migration agent acted dishonestly in his dealings with the first applicant which constituted fraud, thereby undermining the statutory process that the Tribunal was required to undertake.
- (ii) The former migration agent conducted 'business as usual' following his suspension and the first applicant had intended to attend the hearing until she received advice from him. That advice – to not attend the Tribunal hearing, that her English was insufficient, that an interpreter would not understand business dealings and that people usually won when they did not attend – was fraudulent. Any competent migration agent would be aware that applicants who do not attend hearings when the Tribunal had previously indicated that it was unable to make a favourable decision on the available information alone have a low prospect of success. Whilst that fact alone may evidence negligence, he withheld that he had been suspended and had a motive for her not to attend the hearing, which was dishonest because he misled her as to his status.

*Obiter*

- (iii) Migration agents whose registration has been suspended or lawyers who have been struck off should not continue to act as authorised recipients for correspondence from the Tribunal. Even if copies are also sent to applicants, this circumstance leaves the way open for negligent or dishonest behaviour. The Tribunal's actions in this case were inadequate. Nothing indicated that it asked the applicants if they still wished to retain him as their authorised recipient following the suspension of his registration.

**Kim v MIAC & Anor**

**[2008] FMCA 1577**

**Federal Magistrates Court of Australia, Smith FM, SYG 1267 of 2008, 27 November 2008**

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision that affirmed a decision that the applicant did not satisfy cl.573.227 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). This clause provided that applicants who are subject to an assessment level higher than level 1 and had not previously held a student visa, were precluded from being granted the visa onshore unless the applicant established exceptional reasons for the grant of the visa.

The Tribunal did not accept that the applicant's long association with Australia, her payment of tertiary fees, her desire to continue an education here and her difficulty adjusting to a return to South Korea could constitute exceptional reasons.

Counsel for the applicant submitted that the Tribunal failed to lawfully apply the exceptional reasons test in relation to each of the individual claims and to consider them on a cumulative basis.

**Held: Application dismissed.**

- (i) The Tribunal gave careful consideration to the case that was put forward by the applicant and its findings were open to it. The Tribunal did not fail to appreciate that exceptional reasons might be provided by an accumulation of personal circumstances despite the absence of any express discussion of them on a cumulative basis.
- (ii) Exceptional reasons are not intended to be found by deciding whether the visa applicant has the normal characteristics of an applicant who is not subject to the ban imposed by cl.573.227 nor by deciding whether he or she departs from the normal characteristics of the group who are subject to the ban. Rather, the decision-maker is required to assume that a visa applicant caught by the criterion should not be granted the visa unless some reasons can be positively identified which justify the grant of the visa. The reasons must be capable of being described as exceptional reasons in ordinary parlance. Beyond this, it is impossible to be generally prescriptive as to what those reasons might be, or must be, as a matter of law. The criterion should be allowed to operate so that a decision-maker is given a nearly unconfined discretion to address the particular circumstances of the case.

**Lee & Ors v MIAC  
[2008] FMCA 1523**

**Federal Magistrates Court of Australia, Smith FM, SYG 1771 of 2008, 25 November 2008**

The applicants sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate refusing to grant the visa applicants Business Skills (Residence) (Class BF) (Subclass 892) visas.

The issue before the Tribunal was whether the first visa applicant satisfied cl.892.214 of Schedule 2 to the *Migration Regulations 1994* (the Regulations) that required that neither the first visa applicant nor his spouse had a history of involvement in business activities that are a nature that is not generally acceptable in Australia. The Tribunal found that the first visa applicant admitted to breaking the law over a period of time by bypassing payroll tax, superannuation and workers compensation payments through cash payments to his casual employees. The first visa applicant claimed that these activities were common in the car wash industry because of the nature of the work and his employees, who were mainly backpackers and overseas students, expected to be paid in cash. While the Tribunal did not disagree about the employment scenario, it found that the applicant had a history of involvement in business activities over a prolonged and consistent period that were unlawful and were likely to be offensive to a large section of the community. The Tribunal found that the first visa applicant did not satisfy cl.892.214.

The applicants contended, among other things, that cl.892.214 was invalid because it was 'overly wide, vague and uncertain' as it lacked a meaningful identification of the standards of 'acceptability' for business activities that were to be applied by a decision-maker; or alternatively, that the Tribunal erred when applying cl.892.214 because the Tribunal confused the test of 'not generally acceptable in Australia' with a test of 'unlawful in Australia'.

**Held: Application dismissed.**

- (i) Clause 892.214 is not invalid for uncertainty or unreasonableness. The standards governing unacceptable business activities would usually be identifiable by reference to Australia's laws and prevailing business practices.
- (ii) The test in cl.892.214 of 'not generally acceptable in Australia' relates to the 'nature' of one or more 'business activities' in which the primary applicant has a history of involvement. It does not attach directly to the history of such involvement. It would therefore be an error for a decision-maker to ask

whether a history of involvement was not generally acceptable in Australia, rather than whether the nature of relevant business activities in which he was involved had that character. However, in some simple situations making findings about each element in cl.892.214 might not be necessary and the criterion can be viewed collectively.

- (iii) A decision-maker faced with evidence suggesting questionable business activities associated with the applicant is required to identify the 'business activities', characterise their nature, and assess whether this is 'not generally acceptable in Australia'. The decision-maker must also address whether the evidence shows 'a history of involvement' by the applicant in the activities.
- (iv) The Tribunal did not misconstrue cl.892.214 or fail to take into account a relevant consideration. Although the Tribunal gave considerable emphasis to the illegality of the employment practices, the Tribunal did not confine its consideration to that element alone. The Tribunal also took into account how the conduct would be regarded generally in the Australian community.

### **Liang v MIAC & Anor**

[2008] FMCA 966

Federal Magistrates Court of Australia, Burnett FM, BRG 673 of 2007, 16 July 2008

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to refuse to grant Business Skills – Established Business (Residence) (Class BH) (Subclass 845) visas.

Clause 845.213 of Schedule 2 to the *Migration Regulations 1994* (the Regulations) required, at time of application, that the applicant had an "ownership interest" in one or more established main businesses in Australia for 18 months immediately preceding the application and continued to have an interest of that kind. Clause 845.216 required that, in the 12 months before the application, the applicant, as the owner of an interest in a main business or main businesses in Australia, maintained a direct and continuous involvement in its daily management and in making decisions affecting its overall direction and performance. A "main business", defined in r.1.11, included where the applicant has, or has had, an "ownership interest" in the business and the business is a "qualifying business" and provided that an applicant must not nominate more than two qualifying businesses as main businesses where he or she has, or has had, an ownership interest in more than one qualifying business that would otherwise be a main business. Clause 845.221 required that, at time of decision, the applicant continued to satisfy cl.845.213 to 845.218. The applicant nominated two main businesses, "Golden International Pty Ltd, trading as GNI Finance Corporation", a finance organisation, and "Golden International Pty Ltd", an export company. He was also a director of Golden Net International Pty Ltd (GNI) before ceasing his involvement in February 2005 and establishing United Link Corporation Pty Ltd as his main business in April 2005. The Tribunal found that GNI, being the applicant's main business, conducted two main businesses which he had nominated at the time of visa application and that he could not submit a third nominated main business, United, for consideration at the time of decision. The Tribunal also found that the applicant could not satisfy cl.845.221 because he had ceased to have a direct and continuous management involvement in GNI, which ceased to be a "main business", and United did not satisfy the definition of "main business".

The applicant contended that the Tribunal erred on several grounds, including by failing properly to understand or apply r.1.11 and cl.845.221 of the Regulations.

### **Held: Application dismissed.**

- (i) The Tribunal did not commit jurisdictional error in relation to its construction and application of r.1.11 and reached the correct conclusion in its interpretation of cl.845.221.
- (ii) The Tribunal did not err in assessing the applicant's first two businesses as being separate despite being owned by the one entity. The question whether the finance organisation and the export entity constituted separate businesses was a matter of fact to be determined by the Tribunal which concluded that they were. The term "business" has a meaning synonymous with "enterprise" or "undertaking" and it was not inappropriate or incorrect to not have regard to issues of proprietorship. A single proprietor may therefore conduct more than one "main business" for the purposes of the Act.

- (iii) The Tribunal was correct in not considering the nomination of United as a third “main business” as required by r.1.11(2).
- (iv) The construction of cl.845.221 requires an examination of whether the visa applicant had an “ownership interest” in a “main business” during the relevant period. These are factors over which visa applicants have subjective control. Because the applicant did not maintain a direct and continuous involvement in the management of a “main business”, he did not have an “ownership interest” in a “main business” in Australia of the kind nominated as the nominated business at the time between the making of the application and the decision. Accordingly, the applicant could not continue to satisfy cl.845.213 and 845.216 of Schedule 2 to the Regulations.

### **SZIPL v MIAC**

**[2008] FMCA 1501**

**Federal Magistrates Court of Australia, Driver FM, SYG 1432 of 2008, 3 November 2008**

The applicant, who originally claimed to be a national of Syria but later claimed to be a citizen of Iraq, sought review of a decision of the Refugee Review Tribunal (the Tribunal) that the applicant was not a person to whom Australia owed protection obligations. The applicant claimed to fear persecution on the basis of her religion, gender and imputed political opinion.

An initial decision of the Tribunal in which it found that the applicant was not a national of Syria but failed to make a finding on Iraqi nationality was set aside by the Federal Magistrates Court. On remittal, the reconstituted Tribunal wrote to the applicant’s advisor inviting the applicant to attend a hearing. As the applicant failed to attend the hearing, the Tribunal proceeded pursuant to s.426A of the *Migration Act 1958* (the Act) to make its decision on review without taking further steps to allow the applicant to appear before it. It found that the applicant was a national of Syria, and did not accept the applicant’s claims at the hearing of the previously constituted Tribunal that she was a national of Iraq and obtained her passport through bribery. The Tribunal found the applicant did not suffer persecution in Syria and was not satisfied she faced a real chance of serious harm for a Convention reason in Syria.

The applicant contended that the Tribunal failed to comply with its statutory duty under s.425 and s.424A of the Act. The use of the fax number identified in the authorised recipient form did not meet the requirements of the Act because the transmission by fax requires receipt of the fax, not simply the sending of it. Although the fax transmissions were successful, none of them were actually received by the authorised recipient because he had left the firm. The applicant also contended that the Tribunal failed to properly apply the law to the facts as found in its consideration of the applicant’s nationality.

#### **Held: RRT decision set aside and remitted for reconsideration.**

- (i) The Tribunal erred in asking itself the wrong question. Although the Tribunal stated that it had not accepted that the applicant was an Iraqi national and found that the applicant was a Syrian national, there was no consideration of the possibility of dual citizenship. In fact, there was no reasoned consideration of the possibility of Iraqi citizenship at all. Section 36(6) of the Act requires that the determination of nationality be made solely by reference to the law of the relevant country. The Tribunal was confronted by two questions as to nationality [claims that (1) the applicant was an Iraqi national and (2) that she was not a Syrian national] and effectively answered only one of them. This constitutes jurisdictional error.
- (ii) The Tribunal did not fail to comply with its statutory duty under s.425 and s.424A. Provided that the Tribunal used one of the postal or electronic addresses identified in the authorised recipient form in accordance with the Act, then the applicant is taken to have received the correspondence even though her authorised recipient did not receive it in fact.
- (iii) It is inherent in the use of the word “transmitted” in s.441A(5) that the electronic transmission must be successful in that it must be received by a device providing the opportunity for the communication to be seen and read by the intended recipient. It is not inherent that a facsimile, email or other electronic communication be seen and read by the intended recipient in order to be transmitted.

### **SZMLD v MIAC & Anor**

[2008] FMCA 1606

Federal Magistrates Court of Australia, Scarlett FM, SYG 1629 of 2008, 28 October 2008

The applicant sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that he was not a person to whom Australia had protection obligations. The applicant claimed to have been arrested and detained by the police as a result of his practice of Falun Gong.

The Tribunal accepted that the applicant participated in a public Falun Gong event in Australia and in public exercise sessions on two occasions. The Tribunal considered that this conduct was engaged in for the purposes of strengthening his claim to be a refugee and disregarded it as required by s.91R(3) of the *Migration Act 1958* (the Act). The Tribunal considered that the publication on a website of two photographs of the applicant at the Falun Gong event, would not lead to the perception that he was a Falun Gong practitioner or had an anti-CCP political opinion by the Chinese authorities, as there was not a real chance that he would be identified by the Chinese authorities as having participated in the event. The Tribunal could not discount that the independent action of a third party led to the photographs being published on the website. The Tribunal stated that, after considering the evidence cumulatively, it did not accept the applicant was a Falun Gong practitioner or that the applicant would be perceived as such by anyone.

The applicant claimed that the Tribunal did not comply with s.424A of the Act and that it asked him questions about Falun Gong that were too difficult and failed to assess such things as his particular background, his level of education and the level of his understanding of Falun Gong. The Minister, as model litigant, raised the issue of whether the Tribunal complied with s.91R(3) of the Act.

#### **Held: Application dismissed.**

- (i) No jurisdictional error was established. The Tribunal gave the applicant the benefit of the doubt when it found that there was no evidence that he had arranged for the publication of those photographs on the website. This was a finding of fact, and it was a matter for the Tribunal. The Tribunal distinguished the applicant's attendance at the event from the publishing of the photographs. This appears to be a narrow distinction and a rather generous finding, but was a finding of fact within the Tribunal's power to make. The publishing of the photographs was not strictly conduct engaged in by the applicant in Australia and therefore not covered by s.91R(3), thus it did not have to be disregarded.
- (ii) The evidence the Tribunal considered cumulatively could only sensibly be read as the evidence which it set out with the exception of the evidence of the applicant's conduct in Australia, which it had disregarded and there was no breach of s.91R(3) in that regard.
- (iii) The Tribunal had not failed to comply with s.424A of the Act as the information relied upon was information provided by the applicant and independent country information, both of which are excluded by s.424A(3). In relation to testing the applicant's Falun Gong knowledge, the applicant had not shown that the Tribunal failed to consider any relevant matter and asking hard questions is not a jurisdictional error.

### **SZMOK & Anor v MIAC & Anor**

[2008] FMCA 1710

Federal Magistrates Court of Australia, Raphael FM, SYG 1958 of 2008, 22 December 2008

The applicant husband and wife, nationals of Bangladesh, 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 was a political journalist for a newspaper and an active member of the Awami League. He claimed that as a result of writing reports publicising the illegal activities of BNP leaders and thugs in his local area he was threatened by the BNP and instructed to publish a retraction or be killed. He fled Bangladesh because he did not wish to compromise his principles. He claimed for the first time at hearing that there were false proceedings pending against him in Bangladesh. The Tribunal permitted him time to provide documentary evidence. In its reasons for decision, the Tribunal was not satisfied that the documents submitted by him after the hearing were genuine and found that his claim of pending proceedings lacked credibility. The Tribunal also "formed the view that there is no case against the

applicant in Bangladesh and it finds that there can be no genuine documents relating to such a case". It found that the documents had been fabricated to enhance his protection visa application and rejected all of his claims of persecution.

The applicants contended that the Tribunal failed to accord procedural fairness to the applicant and comply with s.422B(3) of the *Migration Act 1958* (the Act) by failing to warn him that it would reject corroborative documents as fabricated by him for the purposes of his refugee claim.

**Held: RRT decision set aside and remitted for reconsideration.**

- (i) The Tribunal committed a jurisdictional error by failing to put the finding that the documents were fabricated to the applicant.
- (ii) The allegation about the false case was critical because without it there was hardly anything to suggest that he had a well founded fear of persecution. The false case took his claim up another notch since if he went back to Bangladesh now the documents indicated that he was the subject of a false charge which could establish a well-founded fear.
- (iii) The applicant's credibility had not been irrevocably compromised by his previous testimony such that he was entitled to the procedural protection of s.424A (or 424AA) because to provide it would be "just and fair" (s.422B(3)). For the Tribunal to have issued a s.424A letter or reconstitute the hearing when it concluded the documents were forgeries would have been consistent with *WACO v MIMIA* [2003] FCAFC 171 and *WAGU v MIMIA* [2003] FCA 912. If the Tribunal believed that the late reference to false charges pushed its view of the applicant's credibility from tolerance of exaggeration to clear disbelief it could have said so without making the further finding that the documents were fabricated. Once it determined to go there the Tribunal was obliged to act fairly and put the matter to the applicant. In this case there was no reference to any evidence from which the finding of fabrication was made.

**SZMYT v MIAC  
[2008] FMCA 1718**

**Federal Magistrates Court of Australia, Driver FM, SYG3079 of 2008, 22 December 2008**

The applicant, a Chinese national, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations.

The Tribunal decision was handed down in October 2003 and in November 2008 the applicant filed the application for judicial review together with an application for an extension of time. Attached to those applications were copies of the Tribunal decision. The applicant claimed not to have known about the Tribunal hearing or decision until they were explained to him by volunteers from Balmain for Refugees in late 2007. Under cross-examination he asserted that he was never personally given a copy of the decision.

The Tribunal file indicated that in October 2003, the Tribunal wrote to the applicant at his last address for service enclosing a copy of its decision and reasons for decision. That letter was returned marked 'unclaimed'. In September 2007, the applicant requested access to documents under the *Freedom of Information Act 1982* and on 11 September 2007 was sent folios from his Tribunal file including the decision record. A further email from Balmain for Refugees requesting a copy of the decision was received by the Tribunal shortly thereafter.

The Court considered whether it had jurisdiction to entertain the application for judicial review in light of the operation of s.477 of the *Migration Act 1958* (the Act).

**Held: Application dismissed as incompetent.**

- (i) The applicant was actually notified of the Tribunal decision prior to the end of 2007 when he physically received a copy of the Tribunal decision in response to his Freedom of Information request. His application to the Court was well outside the maximum period of 84 days within which the Court may entertain an application pursuant to s.477.

- (ii) Section 477 speaks of actual notification, which does not occur until an applicant receives a copy of the Tribunal decision himself or herself. Following *SZKXX v MIAC* [2008] FCAFC 176, the manner of delivery is not significant, provided that it occurs. The operation of s.477 is not dependent upon successful delivery of the Tribunal's decision record within 14 days of the Tribunal decision. Rather it depends on actual physical notification, whenever that occurs.
- (iii) The Tribunal's attempt to comply with its notification obligations was sufficient to meet its statutory duty pursuant to s.430A.

## 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 (Worker Protection) Act 2008 (No.159 of 2008)**

This Act makes extensive amendments to the temporary business sponsorship scheme under the *Migration Act 1958* (the Act). Specifically it:

- amends the definition of 'approved sponsor';
- replaces the existing sponsorship undertaking requirements with new sponsorship obligations that will automatically apply to an approved sponsor;
- introduces civil penalties for sponsors who fail to satisfy a sponsorship obligation;
- enhances the existing sanction and enforcement tools in relation to sponsorship, which include:
  - barring a sponsor from sponsoring more people, or making further applications for approval as a sponsor;
  - requiring the taking or enforcing of a security bond;
  - providing that a person to whom a debt is owed in relation to a sponsorship obligation may apply to a court to recover that amount;
- establishes a monitoring regime to promote compliance with sponsorship obligations;
- ensures that personal information regarding current and former sponsored visa holders and approved sponsors can be disclosed to each other or to prescribed agencies of the Commonwealth or of a State or Territory; and
- ensures that where a partnership or unincorporated association is an approved sponsor, it is the persons who are the partners or members of the association's committee of management at any given time who are required to satisfy the sponsorship obligations.

This Act received Royal Assent on 18 December 2008. The substantive amending provisions commence on a day to be fixed by Proclamation, expected to be 1 July 2009.

##### **Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 (No.144 of 2008)**

This Act amends a number of Commonwealth laws to eliminate discrimination against same-sex couples and their children. This Act amends the *Migration Act 1958* (the Act) by:

- Defining the terms, adoption, child, de facto partner, member of the family unit, member of the same family unit, parent and spouse for the purposes of the Act and removing certain existing definitions of familial relationships;
- Specifying how certain familial relationships are to be traced or determined for the purposes of the Act;
- Amending the criterion for a protection visa in s.36(2)(b) to apply to a 'member of the same family unit as' rather than a 'spouse or dependent of' a non-citizen to whom Australia has protection obligations;
- Amending the definition of 'application for a protection visa' for the purposes of the bar on making a further protection visa application in s.48A, to reflect the amendment to s.36(2)(b); and
- Including reference to a 'de facto partner' or 'de facto relationship' where reference is made to a 'spouse' or 'marital relationship' in ss.83, 84, 87, 199, 205, 211, 212, 237, 241, 243, 245, 338 and 507.

This Act received Royal Assent on 9 December 2008. The amendments to the *Migration Act 1958* commence on 1 July 2009.

## INSTRUMENTS

**Migration Regulations 1994 – Specification for the purposes of subparagraphs 1205(3)(ba)(i), (ii) and (iii)-Addresses – November 2008 (Legislative Instrument -F2008L04451).** This instrument, registered on 4 December 2008, specifies the relevant addresses for lodging an application, whether the application is posted, delivered by courier or sent by facsimile, for the 416 visa. Effective from 5 December 2008.

**Migration Regulations 1994 - Specification under paragraph 5.36(1A)(a) – Payment of Visa Application Charges and Fees in Foreign Currencies – November 2008 (Legislative Instrument - F2008L04504).** This instrument, registered on 8 December 2008, informs DIAC's offshore clients of the amount in local currency that they should pay in respect of a visa application charge when applying for a visa to enter Australia in a country outside Australia and the external territories. Effective from 1 January 2009.

**Migration Regulations 1994 - Specification under paragraphs 5.36(1)(a) and 5.36(1)(b) – Places and Currencies for Paying of Fees - November 2008 (Legislative Instrument - F2008L04488).** This instrument, registered on 8 December 2008, informs DIAC's offshore clients which currency to use to pay a visa application charge when applying in a foreign country for a visa to enter Australia. Effective from 1 January 2009.

**Migration Act 1958 - Revocation of section 499 Direction No.35 - December 2008 (Legislative Instrument -F2008L04742).** This instrument, registered on 22 December 2008, revokes the 'Migration Act 1958 - Direction under section 499 - Order of Consideration of Applications for Sponsorship, Nomination and Visas under the Skill Stream of the Migration Program and the Temporary Residence Program' (Direction No. 35 of 2004). Effective from 1 January 2009.

**Migration Act 1958 - Revocation of section 499 Direction No.5 – November 2008 (Legislative Instrument -F2008L04745).** This instrument, registered on 22 December 2008, revokes the 'Migration Act 1958 - General Direction under section 499 - Visa Refusal under section 501' (Direction No. 5 of 1997). Effective from 23 December 2008.

**Migration (United Nations Security Council Resolutions) Regulations 2007 - Specification of United Nations Security Council Resolutions under regulation 4(1) - December 2008 (Legislative Instrument -F2008L04681).** This instrument, registered on 24 December 2008, specifies relevant United Nations Security Council Resolutions. Effective from 25 December 2008.

## Legislation Pending

### 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 second reading was adjourned on that date. The Bill seeks to amend the *Migration Act 1958* by:

- clarifying that the Migration Review Tribunal and the Refugee Review Tribunal 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; 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 – December 2008

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	2	7	1	1	11
Visitor refusal	34	33	4	2	73
Student refusal	13	21	2	2	38
Temporary business refusal	15	8	8	3	34
Permanent business refusal	6	9	3	1	19
Skill linked refusal	39	38	8	9	94
Partner refusal	72	25	5	2	104
Family refusal	23	12	3	0	38
Student cancellation	9	10	1	4	24
Sponsor approval refusal	1	2	1	1	5
Other	17	20	3	0	40

## MRT Decisions – January 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	1	12	1	0	14
Visitor refusal	28	13	2	6	49
Student refusal	7	13	7	7	34
Temporary business refusal	9	10	7	4	30
Permanent business refusal	6	5	1	2	14
Skill linked refusal	31	16	4	5	56
Partner refusal	58	31	6	6	101
Family refusal	13	21	0	0	34
Student cancellation	10	6	1	2	19
Sponsor approval refusal	0	4	1	1	6
Other	9	9	1	3	22

## RRT Decisions – December 2008

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	1	0	0	0	1
Bangladesh	0	5	0	4	9
Bulgaria	0	1	0	0	1
Burma (Myanmar)	1	0	0	0	1
Cameroon	1	1	0	0	2
China (PRC)	24	71	0	0	95
Egypt	1	3	0	0	4
Fiji	0	2	0	0	2
Former Yugoslavia	0	1	0	0	1
Ghana	0	1	0	0	1
India	0	22	1	1	24
Indonesia	2	13	0	0	15
Iran	0	2	0	0	2
Kenya	0	1	0	0	1
Korea, Republic Of	1	3	0	0	4
Lebanon	3	4	0	0	7
Libya	1	0	0	0	1
Malaysia	1	14	0	1	16
Montenegro	0	1	0	0	1
Nepal	2	0	0	0	2
Niger	0	1	0	0	1
Nigeria	1	0	0	0	1
Pakistan	0	4	0	0	4
Philippines	0	0	0	1	1
Serbia	0	1	0	0	1
Sri Lanka	0	5	0	0	5
Stateless	0	0	0	1	1
Tonga	0	1	0	0	1
Turkey	1	0	0	0	1
United Kingdom	0	2	0	0	2
United States of America	0	1	0	0	1
Vietnam	0	2	0	0	2
Zimbabwe	0	1	0	0	1

## RRT Decisions – January 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bangladesh	2	5	0	2	9
Cambodia	1	0	0	0	1
China (PRC)	15	80	1	4	100
Egypt	0	2	1	0	3
Fiji	2	3	0	0	5
Ghana	1	3	0	0	4
India	0	9	1	2	12
Indonesia	2	9	0	2	13
Iraq	0	1	0	0	1
Israel	0	1	0	0	1
Kenya	0	2	0	0	2
Korea, Republic Of	0	5	0	0	5
Lebanon	1	4	1	0	6
Liberia	1	0	0	0	1
Malaysia	0	7	1	0	8
Nepal	0	1	0	0	1
New Zealand	0	1	0	0	1
Nigeria	1	0	0	0	1
Pakistan	0	2	0	0	2
Palestinian Terr. (W.Bank/Gaza)	2	0	0	0	2
Philippines	0	3	0	1	4
Sri Lanka	3	1	0	0	4
Tonga	0	1	0	0	1
Vietnam	0	3	0	0	3
Yemen	0	1	0	0	1
Zimbabwe	0	1	0	0	1

## 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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