



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

071971024

15 January 2009

Mr P Katsambanis, Member

BUSINESS SKILLS (RESIDENCE) (CLASS DF) – SUBCLASS 892 – CL.892.211 – ACTIVELY OPERATING MAIN BUSINESSES IN AUSTRALIA FOR AT LEAST 2 YEARS IMMEDIATELY BEFORE THE APPLICATION IS MADE – MAIN BUSINESS – R.1.11(d) – QUALIFYING BUSINESS – R.1.03

– A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Business Skills (Residence)(Class DF) Subclass 892 visa on the basis that the applicant did not satisfy cl.892.211(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate was not satisfied that the applicant had, and continued to have, an ownership interest in one or more actively operating main businesses in Australia for at least 2 years immediately before the application was made. The applicant submitted that he had been the director of the company called Lady Bug Pty Ltd (Lady Bug) since 2001 and that the major activities of the business were retail and wholesale. It was also submitted that although the business's BAS statements reflected no sales prior to April 2006 the applicant had been very active in establishing the business, including sourcing goods, negotiating with suppliers and making several trips to India to ensure that his goods were manufactured to his requirements.

Held: Decision under review set aside.

The Tribunal accepted that the business operated for the purposes of making a profit through the provision of goods to the public and was not operated primarily or substantially for the purposes of speculative or passive investment. It did not consider it material that the business had not actually sold goods to the public for the entirety of 2 year period required in cl.892.211(1). The Tribunal considered it sufficient that the applicant was actively working for part of this 2 year period to establish the business so that it could provide goods to the public and that he did commence sale of goods to the public as soon as possible. It found that Lady Bug was a 'qualifying business' as defined in r.1.03 and, therefore, the applicant met the requirements of r.1.11(1)(d). The Tribunal also found that Lady Bug was a 'main business' for the purposes of cl.892.211(1) and that it had operated in Australia for at least 2 years before the application was made. Accordingly, the applicant met the requirements of cl.892.211(1).

0805292

16 January 2009, Sydney

Mr D O'Brien, Principal Member

SKILLED (RESIDENCE) (CLASS VB) – SUBCLASS 885 – CL.885.213(b) – R.1.15C – COMPETENT ENGLISH – TEST CONDUCTED NOT MORE THAN 2 YEARS BEFORE THE DAY ON WHICH THE APPLICATION WAS LODGED

– A delegate of the Minister for Immigration and Citizenship refused the application for a Skilled (Residence) (Class VB) Subclass 885 Skilled Independent visa because the applicant had not demonstrated a competent level of English as required by cl.885.213(b) of Schedule 2 to the Migration Regulations (the Regulations). Relevantly, r.1.15C of the Regulations provided that a person had competent English if the person had achieved, in a test conducted not more than 2 years before the day on which the application was lodged, an IELTS test score of at least 6 for each of the 4 test components of speaking, reading, writing and listening. The applicant had completed an IELTS test prior to the application but had achieved a score of 5 for writing. He undertook further IELTS tests after the application was lodged and, in one more recent test, scored higher than 6 for each of the 4 components. The applicant's representative submitted that the most recent IELTS test met the requirements of r.1.15C. It was submitted that r.1.15C was to be construed as permitting an IELTS test conducted later than the day on which the application was lodged. The submissions suggested that the Tribunal should take an expansive view of the provision given its ambiguity and the applicant's circumstances.

Held: Decision under review affirmed.

The Tribunal found that, in the most recent IELTS test, the applicant obtained scores of at least 6 in each of the test components. However, the Tribunal was of the view that the applicant was unable to rely on these results to evidence competent English because the test was not conducted not more than 2 years before the day on which the application was lodged, rather it was conducted after the application was lodged. In the Tribunal's view, the wording of the requirement was clear and required the test to be conducted within a specified period before the application was made. The fact that competent English was a time of application requirement also indicated that the test must have been conducted before the application was made. There was no evidence before the Tribunal that the applicant had achieved a score of at least 6 for each of the test components in a test that met the requirements. The Tribunal was not satisfied that the applicant met r.1.15C and the requirements of cl.885.213(b).

071946908

19 January 2009, Melbourne

Mr P Katsambanis, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 – CL.457.223(4)(d) – PERSONAL ATTRIBUTES AND EMPLOYMENT BACKGROUND – A delegate of the Minister for Immigration and Citizenship refused the application for a Temporary Business Entry (Class UC) Subclass 457 visa on the basis that the applicant did not satisfy cl.457.223(4)(d) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the applicant did not have personal attributes and an employment background that were relevant to and consistent with the nature of the activity to be performed. In a series of telephone verification checks conducted by officers of the Department of Immigration and Citizenship (DIAC), contradictions arose as to the size of the restaurant in which the applicant was employed, the applicant could only name one dish he cooked and did not know where the ingredients were purchased. These contradictions and issues led the delegate to not be satisfied that the applicant was a 'cook' as claimed.

Held: Decision under review set aside.

The Tribunal accepted the trade qualifications provided by the applicant, including a certificate of graduation from a training school and an occupational qualification certificate, and found that the applicant held qualifications as a 'cook' as claimed. The Tribunal noted the contradictions and issues in the evidence given to DIAC, however, the Tribunal had had the opportunity to observe a DVD provided to it showing the applicant working in a kitchen and producing a number of dishes and placed significant weight on this. Based on its observations of the applicant's performance in the DVD, the Tribunal was of the view that the applicant was a highly experienced cook who was able to work well under pressure in a commercial kitchen environment. The Tribunal found the applicant demonstrated that he had good control of the wok, was clearly familiar with the layout of the kitchen, was able to cook a wide variety of dishes and was able to command and control other staff working in the kitchen. It was satisfied that the applicant had personal attributes and an employment background which were directly relevant to and consistent with the activity of 'cook'. Accordingly, the Tribunal found that the applicant met the requirements of cl.457.223(4)(d).

0800233

21 January 2009, Melbourne

Mr T Connellan, Member

SKILLED – DESIGNATED PROVISIONAL (CLASS UZ) – SUBCLASS 496 – CL.496.215 – EMPLOYMENT IN A SKILLED OCCUPATION – A delegate of the Minister for Immigration and Citizenship refused the application for a Skilled-Designated Provisional (Class UZ) Subclass 496 visa on the basis that the applicant did not satisfy cl.496.215 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate was not satisfied that the applicant was employed in the skilled occupation of 'Office Manager', because when an officer at the Australian High Commission called the applicant's previous employer, a manager was reported stating that the applicant had not worked for the organisation for the relevant claimed period, had not worked in the nominated occupation, and he did not sign the reference letter. Before the Tribunal, the applicant provided his bank records and various references, including a statutory declaration from the same manager who was reportedly provided adverse information. The same manager also gave oral evidence at the Tribunal's hearing that the applicant was employed in the position of

Office Manager - Accounts for the claimed period and he had signed the reference letter for the applicant in that position.

Held: Decision under review set aside.

The Tribunal accepted the evidence given to it by the manager from the applicant's previous employer. The Tribunal found that the applicant satisfied the criteria specified in cl.496.215, in that, for the required period he was employed in a role that satisfied the description of 'Office Manager'. It found that the applicant performed duties that were in general alignment with the tasks specified for the position of Office Manager in ASCO Code 32911-11. Accordingly, the Tribunal found that the applicant met cl.496.215.

Partner and Family Visas

071961266

15 January 2009, Melbourne

Mr P Fisher, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – CL.309.211 – R.1.15A – SPOUSE RELATIONSHIP – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Partner (Provisional) (Class UF) Subclass 309 visa on the basis she did not satisfy cl.309.211 or cl.309.221 of Schedule 2 the Migration Regulations 1994 (the Regulations) because was not in a 'spouse' relationship in accordance with r.1.15A. The visa applicant had been refused a Partner visa with her sponsor on two previous occasions because of concerns about the *bona fides* of their relationship. The sponsor claimed before the Tribunal that he had no material contact with his ex-wife after their separation and that he and the visa applicant had presented fraudulent witness statements in past applications out of a mistaken belief that the visa would be refused without them.

Held: Decision under review set aside.

The Tribunal accepted that genuine applicants for a Partner visa sometimes submitted false evidence in the mistaken belief they would be refused visas without it and found that the applicants fell into this category. The Tribunal further accepted that the sponsor's first marriage was severed both legally and financially, as evidenced by the grant of divorce. The Tribunal noted the applicants' three attempts at obtaining a Partner visa demonstrated their persistence and, on the evidence before it, including financial transfers, written statements of support and numerous records of communication, was satisfied that they met the requirements in r.1.15A for a spouse relationship. Accordingly, the Tribunal was satisfied that the visa applicant met the criteria in cl.309.211, 309.221 and 309.223 of the Regulations for the grant of a Subclass 309 visa.

0806335

15 January 2009, Sydney

Mr D Connolly, Member

PARTNER (MIGRANT) (CLASS BC) – SUBCLASS 100 – CL.100.321 – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant, a six year old child, a Partner (Migrant) (Class BC) Subclass 100 visa on the basis that she did not satisfy cl.100.321 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the primary applicant, her father, was no longer the 'spouse' of the sponsor as defined by r.1.15A of the Regulations. The sponsor advised the Department of Immigration and Citizenship (DIAC) that, since the granting of the Subclass 309 visa, the father had disappeared leaving the applicant in her care. She also advised DIAC of the withdrawal of her sponsorship. However, she stated that the applicant could stay with her until she was collected by the father.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant entered Australia on a Subclass 309 visa as a member of the family unit of her father who was then missing. Consequently, her visa status remained the same as that of her father who had not been granted a Subclass 100 visa. The Tribunal found that the applicant did not meet

the criteria in cl.100.321 as she was not a member of a family unit of a person who had been granted a Subclass 100 visa. The Tribunal took into account representations made by the former sponsor that she was willing to be the applicant's carer until her father's return. In view of the child's age and, due to the lack of evidence before the Tribunal that the applicant would be cared for on her return to China, the Tribunal recommended that the Minister consider intervening in this case.

0807368

21 January 2009, Sydney

Ms K Raif, Member

PARTNER (MIGRANT) (CLASS BC) – SUBCLASS 100 – CANCELLATION – S.109 – S.107 – NOTICE OF INTENTION TO CONSIDER CANCELLATION – ADEQUATE PARTICULARS – A delegate of the Minister for Immigration and Citizenship cancelled the applicant's Subclass 100 visa on the basis the applicant had not complied with ss.101, 103 and 105 of the *Migration Act* 1958 (the Act). The applicant was issued with a Notice of Intention to Consider Cancellation (NOICC) under s.107 of the Act. The applicant stated in his application for the visa that he had not previously been married but inquiries by the Department of Immigration and Citizenship (DIAC) showed that he was married at the time of entering the marriage which was the basis of the grant of the Subclass 100 visa. The delegate found that the applicant had provided a 'bogus document', which certified there was no record of a marriage in his name. The applicant also failed to notify DIAC that he had provided an incorrect answer on his application. The applicant claimed that he believed the earlier marriage was not valid because it was a 'shotgun marriage' entered into under duress; the applicant and his sponsor continued to have a committed relationship; and they intended to marry properly and have children.

Held: Decision under review affirmed.

The Tribunal was satisfied that the applicant was already validly married at the time of entering into the subsequent marriage and that he had stated that he had not previously been married in his visa application. The Tribunal found that the NOICC did not sufficiently particularise the applicant's non-compliance with ss.103 and 105 in accordance with s.107. However, it found that the NOICC was valid in its dealing with s.101. The Tribunal held there was non-compliance with s.101 of the Act in the way described in the NOICC. In considering whether the visa should be cancelled, the Tribunal noted the applicant's contrition, ongoing relationship, community contribution, and that separation resulting from cancellation may cause emotional hardship for the applicant and his sponsor. However, the Tribunal considered that these were outweighed by the circumstances in favour of cancelling the visa, including his failure to correct the information, knowing that it was false, in order to achieve a particular migration outcome, his period of previous unlawful stay in Australia, and his continuous and considerable disregard for Australia's immigration laws. It found that the visa should remain cancelled.

Visitor visas

0805722

15 January 2009

Ms G Cullen, Member

TOURIST (CLASS TR) – SUBCLASS 676 – CL.676.211 – CL.676.221(2)(a) – GENUINE INTENTION TO VISIT – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Tourist (Class TR) Subclass 676 visa on the basis that she did not satisfy cl.676.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied a genuine visit was intended. The applicant was a 48 year old woman from China who had been married to the review applicant for over 3 years. She claimed the purpose of her visit was to see her husband who was to undergo a cataract operation and for a holiday. The applicant had never entered Australia and had never applied for a spouse visa. Before the Tribunal, the applicant submitted that she would return to China because she was unemployed and needed her parents' support and they needed her care. It was also submitted that if the applicant had wanted to come to Australia permanently, she would have applied for a spouse visa, as she was eligible to come as the review applicant's spouse.

Held: Decision under review set aside.

The Tribunal accepted that the applicant's reason for coming to Australia was to support her husband. It accepted that after the operation and recuperation, she wished to return to China to be with her parents to look after them and for their financial support. The Tribunal accepted that if the applicant had wanted to stay in Australia permanently she would have applied for a spouse visa. Medical evidence confirmed that the review applicant needed someone to take her home post-surgery and the Tribunal was satisfied that the period of intended stay was consistent with the stated purpose of the visit. The Tribunal was satisfied that the applicant's intention to only visit was genuine and that she met cl.676.211 and cl.676.221(2)(a).

0806436

16 January 2009, Sydney

Mr D O'Brien, Principal Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 – CL.679.224 – GENUINE INTENTION TO VISIT – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Sponsored (Visitor) (Class UL) Subclass 679 visa because the delegate found that she was unable to satisfy cl.679.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate was not satisfied that the visa applicant's expressed intention to only visit Australia was genuine. The visa applicant, who resided in, and had never travelled outside, Lebanon was responsible for the daily care of her elderly father and had been previously refused a visa to visit Australia. Before the Tribunal, the review applicant provided evidence that she needed a short break from caring responsibilities, offered a personal guarantee and undertook to financially support the applicant's visit to Australia. The visa applicant provided evidence that she wished to visit family in Australia and would return to Lebanon to care for her dependent father, notwithstanding that she had other siblings residing in her home town.

Held: Decision under review set aside.

The Tribunal accepted that the applicant had a long-standing carer role and that her father was dependent upon her. This bond of attachment between the applicant and her father was a significant factor and a strong inducement encouraging the applicant to return to Lebanon. The Tribunal also found that the review applicant had a strong personality and exercised considerable influence over the visa applicant as her younger sister. The Tribunal noted that the current security situation in Lebanon was calm and that there was no evidence of any failure by the visa applicant to comply with the immigration laws of Australia or any other country. The review applicant had also previously sponsored other family members to visit Australia and successfully ensured compliance with their return obligations. The Tribunal found that the visa applicant satisfied cl.679.224 and, since there was very little likelihood of the applicant remaining in Australia, Public Interest Criterion 4011 for the grant of the visa.

REFUGEE REVIEW TRIBUNAL DECISIONS

Bangladesh

0805595

5 December 2008, Melbourne

Ms S Muling, Member

BANGLADESH – ETHNICITY – CHAKMA – RELIGION – BUDDHIST – PARTICULAR SOCIAL GROUP – CHILD OF A MIXED MARRIAGE – The applicant claimed to fear persecution for reasons of his Chakma ethnicity and Buddhist religion, and for being the child of a mixed Chakma/Bengali and Buddhist/Christian marriage. He claimed that as a low status person with social stigma attached to him, there was no prospect he could secure employment without assistance from family. He also claimed he was extremely vulnerable to being attacked by extremists of any sector including the Bengalis, the Chakmas or political or religious extremists, and that Bangladeshi security forces were corrupt, ineffective and could not protect him from the persecution he feared.

Held: Decision under review affirmed.

The Tribunal accepted the applicant was an ethnic Chakma male of Buddhist religion, and that he was born of a mixed marriage between Chakma Buddhist and Christian Bengali parents. The Tribunal also accepted that Chakmas within the Chittagong Hill Tracts were subjected to various forms of human rights abuses. However as the applicant and his family had not resided in the Chittagong Hill Tract area for very long time, it assessed his claims on the basis he was not from there. The Tribunal found that as he had been able to find employment in his area of expertise in the past, it did not accept that he had faced, or would face, difficulty finding employment on the basis of ethnicity, religion, or as a child of a mixed marriage. The Tribunal found that the applicant had been free to practice his chosen religions in Bangladesh by attending churches and temples, and any feeling of social exclusion that he felt as a result did not constitute serious harm within the meaning of the Convention. While accepting the applicant may have felt that he did not fit into either ethnic group, or possess his own discreet identity, the Tribunal did not accept that he had experienced any difficulties in the past which constituted persecution, or that he would face a real chance of serious harm now or in the reasonably foreseeable future for reasons of his parents mixed marriage. Accordingly, it found the applicant did not have a well founded fear of persecution for a Convention reason.

China

0803257

17 December 2008, Melbourne

Mr G Haddad, Member

CHINA – RELIGION – CHRISTIANITY – LOCAL CHURCH – The applicant claimed to fear persecution for reasons of her Christian religion. The applicant claimed to be a Christian and member of the Local Church in Fujian province. She claimed to have been born into a Christian family and was baptised at an early age. She claimed to have been detained and tortured by the authorities and provided various documents from authorities detailing her arrest and detention. The applicant claimed that she bribed authorities to obtain a passport and departed China legally. The applicant also submitted evidence that she had been attending the Local Church in Australia.

Held: Decision under review affirmed.

Despite its concerns about the applicant's credibility, the Tribunal proceeded on the basis that she was a member of the Local Church in China and she had attended the Local Church in Australia otherwise than for the purpose of strengthening her refugee claims. On the basis of independent information, the Tribunal did not accept the applicant's claims that as a member of the Local Church in the Fujian province she was unable to worship, or that she was persecuted for attending gatherings for religious practice. The Tribunal

found that the applicant had not suffered persecution for reasons of her religious beliefs or practice. The Tribunal did not accept the documents of arrest and release from detention as reliable on the basis of independent information. The Tribunal was satisfied that the applicant was of no adverse interest to Chinese authorities and that she was issued a passport and departed China without incident. The Tribunal was satisfied that the applicant did not have a profile which would result in her facing a real chance of persecution for reasons of practising her faith in the province. Accordingly, the Tribunal concluded that the applicant did not have a well-founded fear of persecution for a Convention reason.

0806877

19 December 2008, Sydney

Mr D O'Brien, Principal Member

CHINA – RELIGION – CHRISTIANITY – The applicant claimed to fear persecution for reasons of her Christian religion. The applicant claimed that she and her husband were members of an unregistered church and were both baptized. The applicant claimed that she and her husband financially supported the church's activities and constructed a building which operated secretly as a church. The applicant claimed that, following the death of her husband in a car crash, she was physically attacked by family members, who blamed her for her husband's death, saying that she had introduced demons into the family through her faith. She claimed that she was forbidden from attending her husband's funeral, her children were taken away from her and she was forcibly admitted to a hospital. The applicant claimed that the police refused to protect her and, instead, warned her to stop participating in church activities. The applicant provided documentary evidence in relation to her husband's car accident and her hospital treatment. The applicant also provided evidence of her attending a church in Australia. The applicant claimed that she would not attend a registered church in China because members had to listen to messages from the Communist Party.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a devoted Christian and that, if she were to return to China, she would feel unable to practice her faith in a government registered church because of its political affiliations. The Tribunal found that the applicant had suffered serious harm as a result of systematic and discriminatory conduct when she was assaulted by her family members, had her children taken from her and was put, against her will, in a hospital for many months. The Tribunal accepted that the family violence against the applicant was motivated by a Convention reason and she suffered persecution for the Convention reason of religion. The Tribunal found that the applicant's church involvement in Australia was engaged in to satisfy her spiritual needs and was done otherwise than for the purpose of strengthening her refugee claims. The Tribunal found there was a real chance the applicant would suffer similar harm if she returned to China. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Egypt

0806101

23 December 2008, Sydney

Ms A Younes, Member

EGYPT – POLITICAL OPINION – ALWAFD PARTY – ANTI-EGYPTIAN AUTHORITY ACTIVITIES – The applicant claimed to be a member of the Alwafd party who participated in a peaceful demonstration and was arrested and charged. He claimed he was released on bail while in Egypt and was sentenced after coming to Australia for threatening social order in Egypt. He also claimed to have taken part in a named association and to have arrived in Australia after paying a bribe. He claimed that he feared imprisonment and mistreatment on return. The applicant provided several documents in support of his claim.

Held: Decision under review affirmed.

The Tribunal was not satisfied that the applicant was credible. Based on country information, the Tribunal found it implausible that if the applicant had been arrested and detained in relation to security matters or if he was of adverse interest to the Egyptian authorities, he would have been released only days after his

detention. The Tribunal was satisfied that the applicant's ability to depart Egypt was evidence that he was not of any adverse interest to the Egyptian authorities and that he was not on bail. The Tribunal did not accept that the documents provided by the applicant contained truthful or accurate information and did not give them weight. The Tribunal was not satisfied that the applicant was ever a member or supporter of the Alwafd party or a named association or that he was ever perceived to be so. The Tribunal was not satisfied that the applicant was involved in any actual or imputed anti-Egyptian authority activities or that he was ever arrested, detained, or ill-treated by the Egyptian authorities. The Tribunal was not satisfied that the applicant had suffered any Convention-related harm or that there was a real chance that he would suffer any such harm in the reasonably foreseeable future.

India

0806751

6 January 2009, Sydney

Mr A Jacovides, Member

INDIA – RELIGION – CATHOLIC – The applicant claimed to fear persecution as a devout Catholic. He claimed that he was targeted by Hindu extremists and others from the non-Christian majority in India. He also claimed that he was involved in community outreach work with his church and was prevented from undertaking it by persons who objected to his religious activities. In addition, he claimed that the authorities would not protect him from the persons he feared. He claimed that, relocating within India, to a predominantly Christian community, was not reasonable for him because he would suffer language, employment and networking difficulties.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was a Catholic and that he was targeted by non-Christians. It accepted that he was involved in community outreach work with his church and was prevented from undertaking it by persons who objected to his religious activities. The Tribunal found that the applicant was a multilingual, well-educated and resourceful person. It found that he had the ability and knowledge to relocate within India, and it was, therefore, reasonable for him to relocate to one of the several regions in India which had a large Christian community. The Tribunal also found that in those regions, Christians such as the applicant would have access to a reasonable level of state protection. Accordingly, it found that the applicant did not have a well-founded fear of persecution based on his religion, now or in the reasonably foreseeable future.

Montenegro

0806242

19 December 2009

Mr J Silva, Member

MONTENEGRO – POLITICAL OPINION – ETHNICITY – MONTENEGRIN – The applicant claimed to fear persecution on account of political opinion, ethnicity and religion. The applicant claimed to be a citizen of both Montenegro and Serbia. He claimed as an ethnic Montenegrin he was at risk of harm from ethnic Albanians. He also claimed that as an atheist he would be under pressure to adhere to a religion. The applicant further claimed he would be marked as a Communist because of his relative's associations with Josip Broz Tito. The applicant stressed the political situation in both Montenegro and Serbia is volatile. The applicant initially travelled to Australia to be with his fiancé and applied for a protection visa after his relationship had broken down. The applicant submitted email statements from friends to corroborate his claims of past harm.

Held: Decision under review affirmed.

The Tribunal assessed the applicant's claims against Montenegro. Although the applicant initially claimed to be a citizen of both Serbia and Montenegro, he later clarified that he was eligible for Serbian citizenship and had applied for it, without result. The Tribunal did not accept that the applicant faced a real chance of

persecution on the basis of his imputed political opinion due to his relative's links with Tito, as there was no information which suggested he would be at risk by the mere fact of being related to such a person. Similarly, country information suggested that the applicant faced no real chance of harm as a former Serbian resident returning to Montenegro. The Tribunal rejected the applicant's claim to have suffered harm in the past from Albanians. In particular, the Tribunal considered that the email evidence had been tailored for the purposes of the visa application. It found the applicant's claim was in stark contrast to country information which suggested that Albanians were a small minority in Montenegro and without influence or impunity that would represent a threat to the Montenegrin majority. While the Tribunal accepted that the applicant was an atheist, there was no country information to support his claim that he would be targeted by religious groups or others for that reason. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Nepal

0805569

2 January 2009, Sydney

Ms J Ciantar, Member

NEPAL – RELIGION – EVANGELICAL CHRISTIAN – POLITICAL OPINION – ANTI-MAOIST – The applicant claimed to fear persecution for reasons of his religion and imputed political opinion. The applicant claimed he was an evangelical Christian. He also claimed to fear Maoists and Hindu extremists who demanded bribes and forced his business to close. He further claimed that as a perceived member of a foreign non-government organisation (NGO) he would be imputed with an anti-Maoist political opinion. The applicant claimed he converted from Hinduism, after which he read the bible in Nepalese and English, spoke to his wife and two or three friends about God, and attended church once or twice. The applicant claimed he was ostracised from his family. He also claimed he attended church every one or two weeks in Australia.

Held: Decision under review affirmed.

The Tribunal did not accept that the applicant read the bible, practiced Christianity or evangelised in Nepal. The Tribunal gave consideration to advice from the applicant's pastor that his understanding was limited because he studied the bible in English with no mentor and his level of knowledge was consistent with a person reading the bible in a foreign language. However, it found the applicant had little knowledge of basic Christian beliefs despite claiming to have read a Nepalese bible and attended church in Australia over many years. The applicant also gave inconsistent evidence about his proselytising. It was not satisfied he attended church in Australia otherwise than for the purpose of strengthening his claims and disregarded that conduct. The Tribunal did not accept the applicant was threatened by Maoists or other extremists because of his religion or because he was perceived as a member of a foreign NGO. The Tribunal did not accept he was socially ostracised by his family, finding instead that he had a positive relationship with them. The Tribunal accepted the applicant ran a hotel and that the behaviour of Maoists led to the decline in tourism resulting in the business closing, but it found the situation had improved since the ceasefire and caretaker government. In any event, the applicant had not lived in his village for a few years and did not claim that Maoists approached him for money in the city where he was living before coming to Australia. As such, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Niger

0802172

19 December 2008, Sydney

Ms A Cranston, Member

NIGER – PARTICULAR SOCIAL GROUP – SLAVE – ETHNICITY – BELLAH – The applicant claimed to fear persecution for reasons of his membership of a particular social group and his ethnicity. He claimed to have been harassed, detained, ill-treated and threatened with death on account of his status as a slave of Bellah ethnicity. The applicant claimed to have travelled overseas after completing his education before becoming a member of a non-governmental organisation campaigning against slavery. He submitted correspondence from the president of the organisation indicating that he had been arrested after

participating in activities, including demonstrations, and experienced restrictions to his freedom of movement. Before the Tribunal, the applicant submitted country information concerning people trafficking in support of his fear that he would also be compelled to participate in military activities in northern Niger. After the hearing, he submitted a hearing transcript and claimed that the standard of interpretation had been deficient.

Held: Decision under review affirmed

The Tribunal took into account the applicant's concerns regarding the interpreting at hearing. Although accepting that 'slaves in Niger' was a particular social group, the Tribunal found that he was not a member of that group because, on his own evidence, he was not subject to another's control. Further, although it accepted that he was a member of a particular social group identified as 'people born into servitude', he would not be treated as a slave and any unfavourable discrimination he might experience would not amount to persecution. The Tribunal also accepted that Bellah people constituted a particular social group of which the applicant was a member but this was not the essential or significant reason for the harm he feared. Whilst the applicant was a member of an anti-slavery organisation, the Tribunal found that there was no real chance that he would suffer harm from the authorities because of any future activities. No weight was given to correspondence from that organisation because independent corroboration of the events described therein was absent. The Tribunal did not accept the applicant's submission that individuals were forcibly compelled to fight in the north as it was not independently reported. It found that there was no real chance he would be forced to take part in such fighting in the reasonably foreseeable future. Accordingly, the Tribunal concluded that he did not have a well-founded fear of persecution for any Convention reason.

Pakistan

0801380

16 September 2008, Melbourne

Ms S Muling, Member

PAKISTAN – RELIGION – SUNNI – CASTE – The applicant, a Sunni Muslim, claimed to fear persecution because of his relationship with a Shia Muslim girl from a rich family who became pregnant. The applicant claimed that in Islam a person from the Sunni religion was not allowed to be with a person from the Shiite religion, and as result of this, and because of the difference in their castes, the applicant claimed his parents were killed by his girlfriend's family for revenge. In support of his claims, the applicant submitted purported death certificates which were not issued by the Union Council of the town where the applicant claimed his parents had lived. Information from an unidentified source stated that the applicant's parents were not deceased, that he spoke to them everyday and that the applicant fabricated the death certificates. At the hearing, the applicant provided inconsistent evidence about when he was told about the death of his parents and which city in Pakistan he fled to.

Held: Decision under review affirmed.

On the basis of the inconsistencies in the applicant's evidence about the alleged events and the credibility issues in relation to the death certificates submitted by the applicant, the Tribunal did not accept that the applicant had ever had a relationship with the girl or that the relationship culminated in her becoming pregnant. Nor did the Tribunal accept that the girl's family had killed his parents or pursued him because of the alleged relationship. The Tribunal found that the applicant would not face a real chance of persecution from the girl's family or anyone else if he returned to Pakistan for reasons of his religion, caste, social status or any other reason. As such the Tribunal was not satisfied the applicant had a well-founded fear for a Convention reason.

Zimbabwe

0804396

3 October 2008, Perth

Ms L Ward, Member

ZIMBABWE – POLITICAL OPINION – MDC MEMBER – The applicant feared persecution for reasons of his actual and imputed political opinion. He claimed he was a member of the Movement for Democratic Change (MDC) Youth and had been involved in distributing pamphlets, participating in meetings and encouraging people to vote for MDC. He claimed he was assaulted and threatened by the authorities while he was at a youth meeting. The applicant claimed that his parents were also MDC members who distributed pamphlets, participated in meetings and provided an understanding in townships for what MDC stood for. He claimed they fled to another country after their property was looted and seized by ZANU-PF. He claimed they were targeted specifically because they were MDC supporters and as their son he would also be a target.

Held: Decision under review set aside.

The Tribunal accepted the applicant had consistently claimed he was an active member of MDC Youth and he was beaten and threatened with death by ZANU-PF and government agents as a result of this membership. It found the applicant's claims were entirely consistent with independent information and drew no adverse inference from the delay in him making an application for a protection visa. It found his explanation to be reasonable in circumstances where he was unaware of the protection visa process and where he had other immigration options available to him. Referring to independent information, the Tribunal accepted that actual or perceived opponents of the Mugabe regime were at risk of persecution in Zimbabwe and that a number of aspects of the applicant's claims suggested that there was more than a remote chance he would be viewed as an opponent. Accordingly, the Tribunal was satisfied there was a real chance the applicant would experience serious harm for a Convention reason.

FEDERAL COURT JUDGMENTS

MZXRS v MIAC

[2009] FCA 2

Federal Court of Australia, Jessup J, VID 750 of 2008, 9 January 2009

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

The appellant claimed to fear persecution in India for his political opinion. The Tribunal wrote to the appellant after the hearing pursuant to its obligations under s.424A of the *Migration Act* 1958 (the Act). The appellant responded with a letter containing 25 enclosures consisting of affidavits, statements and letters by third parties in support of the appellant's claims. The Tribunal decided not to proceed with a further hearing. The Tribunal wrote a further letter inviting the appellant to comment on independent information which indicated it was very easy to obtain false documents in India and drew his attention to consistent spelling errors in the documents originating from different people. The appellant responded that all documents were genuine and that the deponents could be contacted directly to verify authenticity. The Tribunal did not consider it necessary to contact each deponent. It appeared to accept the formal authenticity of the documents but in all the circumstances did not accept critical elements of the appellant's factual case.

The Federal Magistrate found no jurisdictional error for failure to make inquiries of those persons who had provided the affidavits and statements. On appeal, the appellant contended that the Tribunal's decision to proceed to a decision without making any attempt to obtain that information was so unreasonable as to vitiate the exercise of the decision-making power or constituted a breach of the rules of natural justice or was an improper exercise of the Tribunal's power.

Held: Appeal dismissed.

- (i) The Tribunal's approach was not so unreasonable that no reasonable decision-maker would have embarked upon a similar course
- (ii) There was no information before the Tribunal, not already available, which could readily have been obtained by the making of a simple inquiry. The substance of the matters relied upon by the appellant were already before the Tribunal in the affidavits and statements referred to and it was not suggested that there was any omission which should have been apparent to the Tribunal. The purpose of any such contact as was proposed, therefore, could not have been to obtain information and went beyond an inquiry of the kind contemplated by the authorities in *Luu v Renevier* (1989) 91 ALR 39, *Yang v MIMIA* (2003) 132 FCR 571 and *MIAC v Le* (2007) 164 FCR 151.
- (iii) The principle of vitiating unreasonableness in the context of a decision-maker's failure to make an inquiry is concerned with information as such. It is unlikely that mere opinions, assessments, or evaluations by third parties will constitute information in this sense. On the other hand, the authenticity of a document purporting to contain an expression of opinion, assessment or evaluation may constitute information within the meaning of the authorities.

Bodenstein v MIAC

[2009] FCA 50

Federal Court of Australia, Perram J, NSD 852 of 2008, 6 February 2009

This was an appeal from a judgment of the Federal Magistrates Court upholding a decision of the Migration Review Tribunal (the Tribunal) affirming a decision by a delegate of the Minister for Immigration and Citizenship not to grant the appellants Subclass 457 (Business (Long Stay)) visas.

In the case of independent executives, cl.457.223(7A)(c)(iv) of Schedule 2 to the Migration Regulations 1994 requires net assets of not less than AUD250,000; or a lesser amount that is adequate; to conduct the business. The Tribunal was not satisfied that the capital requirement had been met. The appellant had

sought to prove his compliance with the capital requirement by reference to two assets. With respect to a loan made by him to a trust, the Tribunal found that the appellant was the sole owner of the trust and the claimed asset was therefore fully offset by the trust's liability for the loan. The second asset was proceedings pending before the Supreme Court of New South Wales. The Tribunal accepted the appellant may be awarded a substantial sum of money if he was successful in his claim, however as it was not known when the matter would be decided by the Court, the Tribunal was not prepared to defer its decision until the appellant's court case was decided.

Before the Federal Magistrates Court, the appellant did not raise any matters which could show jurisdictional error in the Tribunal's decision. The appellant sought leave to raise new grounds on appeal and contended, among other things, that the Tribunal misinterpreted the meaning of 'asset' by not treating the Supreme Court proceedings as an asset and that the Tribunal was biased because it referred to the appellant's application for a fee waiver.

Held: Appeal dismissed.

- (i) The Tribunal did not misinterpret the expression 'asset'. The Tribunal implicitly accepted the proceedings in the Supreme Court were an asset, but that the asset comprising the proceedings was not presently, nor even proximately available. There could be no error in it therefore concluding that the asset was not available 'to conduct the business'. The words 'to conduct the business' qualify the expression 'net assets'. The business specified in the appellant's visa application was not the business of running a court case (for which he claimed he did not need any money); it was a paint business. The Tribunal's reference to the appellant's admission he was 'broke' was not an error as it was capable of being seen as saying a great deal about the assets available to conduct the paint business.
- (ii) It was legitimate for the Tribunal to be cognisant of the appellant's application for a waiver of the Tribunal's fees on the basis of impecuniosity and that there was an inconsistency between that and the appellant's assertion to the Tribunal that he had net assets in excess of \$250,000.
- (iii) The Tribunal and Federal Magistrates Court did not effectively dismiss or undermine the Supreme Court proceedings. The Supreme Court proceedings remained on foot. The removal of an alien by force of federal law could never be a contempt of purely state court proceedings. Further, a failure by the Tribunal to defer consideration of the matter until the determination of Supreme Court proceedings disclosed no error.

**SZMKL v MIAC
[2009] FCA 106**

Federal Court of Australia, Graham J, NSD 1779 of 2008, 12 February 2009

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

The appellant claimed to fear persecution as a Falun Gong practitioner in China and in Australia. The Tribunal was not satisfied the appellant was a genuine Falun Gong practitioner in Australia. The Tribunal did not refer expressly to s.91R(3) of the *Migration Act* 1958 (the Act), but stated that it was satisfied that the appellant only attended Falun Gong practice in Australia in order to strengthen her claim to be a refugee and that it had therefore disregarded her conduct.. It then stated that it was not satisfied that the applicant's conduct in Australia would become known to the authorities in China or that she would be perceived by the authorities as a Falun Gong practitioner.

The Federal Magistrate found that there was a breach of s.91R(3) but exercised its discretion to withhold relief on the basis that no injustice had occurred. On appeal, the appellant contended that her application was not considered reasonably by the Tribunal and the Court. The Minister, by way of a Notice of Contention, challenged the finding that there had been a breach of s.91R(3).

Held: Appeal dismissed.

- (iv) There was no breach of s.91R(3) by the Tribunal. When the Tribunal concluded that the appellant only began attending the Falun Gong practice at Parramatta Town Hall 'in order to strengthen her claims to be a refugee' and continued by saying 'The Tribunal is satisfied that the applicant only attended the Falun Gong practice at Parramatta Town Hall in order to strengthen her claim to be a refugee, and the Tribunal has therefore disregarded this conduct', the Tribunal was demonstrating an understanding of s.91R(3).
- (v) The Tribunal's finding that the appellant's activities would not come to the attention of the Chinese authorities was in the nature of a "belts and braces exercise", where it was addressing an "if I wrongly decided the satisfaction issue arising under s.91R(3)(b)" situation.

FEDERAL MAGISTRATES COURT JUDGMENTS

Goodreau v MIAC

[2009] FMCA 35

Federal Magistrates Court of Australia, Lindsay FM, PEG 95 of 2008, 11 November 2008

The applicant, a citizen of the United States of America (USA), sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate not to grant the applicant a Subclass 835 Other Family (Remaining Relative) visa, lodged in 2006.

At issue was whether the applicant had a 'near relative' who was not usually resident in Australia or an Australian citizen or permanent resident within the meaning of r.1.15 of the Migration Regulations 1994. The only near relative concerned in this case was the applicant's biological father, Mr Charles Goodreau. The applicant claimed that her parents were never married; that her father was an itinerant alcoholic who was rarely home; and that the last time the applicant saw him was in 1997 when they argued and he pushed her into a wall. At hearing, the applicant asked the Tribunal to apply the common law presumption of death to assist in coming to the conclusion that her father was dead. The presumption is that *'if a person has not been heard of for seven years by persons who in the ordinary course would have expected to hear of him if he were still alive, it may be presumed that he is dead'*. The applicant submitted evidence that she had made unsuccessful efforts to locate her father through missing persons' agencies, the Red Cross, Alcoholics Anonymous, churches and funeral homes. The submission also contained information provided by an internet search engine 'Zabasearch', which indicated that a Charles L Goodreau, born 30 April 1935, had an address in Sanford, Maine, USA. The Tribunal was prepared to apply the presumption, but considered itself unable to do so because the database information suggested that Mr Goodreau was alive in 2003.

Before the Court, the applicant sought to submit affidavits from third parties to the effect that the Zabasearch information was unreliable and inaccurate.

Held: Application dismissed.

- (i) There was no jurisdictional error in the Tribunal's decision. None of the information impugning the reliability of the Zabasearch information was made available to the Tribunal. On the contrary, the Tribunal was implicitly asked to have regard to such information.
- (ii) Leave to adduce fresh evidence was refused. The purpose of the receipt of fresh evidence would be to contradict the evidence put to the Tribunal and upon which it relied. Receiving such evidence for such purpose would depart from the Court's duty hear the review according to law.

Obiter

- (iii) Receipt of the evidence would not have led to favourable outcome for the applicant. The Zabasearch information might have removed an impediment to the application of the presumption of death, but there would have been considerable difficulty in applying the presumption. The circumstances in which the applicant last saw her father in 1997, involving verbal and physical altercation clearly would lead to the conclusion that there would be no expectation that she would 'naturally hear' from him: *Axon v Axon* (1937) 59 CLR 395 at 401.

Choi v MIAC

[2008] FMCA 1717

Federal Magistrates Court of Australia, Smith FM, SYG 2289 of 2008, 12 December 2008

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) that affirmed a decision of the Minister's delegate cancelling her Subclass 572 Vocational Education and Training Sector visa under s.109 of the *Migration Act* 1958 (the Act).

The applicant's visa was cancelled on the basis that she gave incorrect information under s.101 of the Act by failing to declare a name by which she had also been known. The delegate had sent a Notice of Intention to Consider Cancellation under s.107 of the Act (the s.107 notice) to a residential address provided in the

online student visa application and also to a hotel address where immigration officers had found her working during a previous stay in Australia.

The Tribunal was satisfied that the delegate had reached the necessary state of mind as to non-compliance to engage s.107. The Tribunal found that the s.107 notice was sent to the last known residential and last known business address of the applicant and that she was taken to have received it under r.2.55 of the Migration Regulations 1994.

Counsel for the applicant submitted that as it was known that the applicant was previously removed from Australia, there was no evidence that the hotel was again her business address after her return to Australia and there was not proper service of the s.107 notice. It was also submitted that the s.107 notice fell foul of *Zhong v MIAC* [2008] FCA 507 because the delegate did not reach the state of mind that there had actually been non-compliance with s.101.

Held: Application dismissed.

- (i) Due service did occur under r.2.55 in relation to both notices and the applicant is to be "taken to have received the document". The first notice was sent to the last known residential address given by the applicant after she last entered Australia. It was open for the delegate and Tribunal to conclude that the hotel address was the last business address known to the Minister under r.2.55 for the purpose of giving notices concerning her current visa. In the circumstances to which r.2.55 is directed and considering the purposes which it serves in the legislation, a sensible construction would not confine the ordinary meaning of "*address last known to the Minister*" to addresses "*known*" after the person's last entry to Australia.
- (ii) The s.107 notice revealed that the delegate had arrived at a provisional opinion that there was a non-compliance which then empowered him to serve a notice under s.107. The sentence "*it has come to the Department's attention that you may not have complied with section 101...*" did not indicate a state of indecision by the delegate but was introductory of the topic of the letter and the opportunity to respond. Further wording in the s.107 notice that "*you did not answer the question*" and "*I consider you have used the following identities to enter and remain in Australia*" indicated that the delegate arrived at a conclusion about a non-compliance.

**WAMK & WAML v MIAC & Anor
[2009] FMCA 2**

Federal Magistrates Court of Australia, Lucev FM, PEG 181 of 2007, 16 January 2009

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

The applicants claimed to fear persecution in Burma because they supported the National League for Democracy (NLD) by, among other things, photocopying an NLD document, for which the mother's husband had been questioned and arrested after she had arrived in Australia. The mother also claimed that she had been sexually assaulted and detained on the day of the 1990 election when she was counting votes for the NLD. In response to a letter sent pursuant to s.424A of the *Migration Act* 1958, the mother provided a letter from her Parish Priest in Burma that certified that her husband had been detained by the Burmese Authorities for political reasons. The Tribunal accepted the mother's claims of detention and sexual assault following the 1990 election. However, the Tribunal found that this was a random event which occurred in the context of an indiscriminate post-election attack on civil society, and did not signify that the applicant was regarded as being of particular significance to the regime. The Tribunal did not accept that the mother (or her son) had photocopied NLD documents primarily because the mother did not make this claim in her protection visa application. The Tribunal noted the contents of the Priest's letter but on the basis of the factual conclusions about the mother's claims, found that her claims were implausible, opportunistic and inconsistent in important respects and did not accept them as truthful or accurate.

The applicants contended, among other things, that the Tribunal failed to have regard to a relevant consideration, namely the circumstances surrounding her arrest and detention and photocopying, and as such, mischaracterised the mother's claims. The applicants also contended that the Tribunal failed to

undertake any proper or rational assessment of the credibility of the letter from the applicant's Priest corroborating the mother's claim that her husband had been detained.

Held: Tribunal decision set aside and remitted for reconsideration.

- (iv) The Tribunal committed a jurisdictional error by failing to take into account a relevant consideration namely, the unchallenged evidence that the mother was detained, not as part of random sweep after the 1990 election, but whilst counting votes on the day of the election at the election booth which she was in charge of for the NLD.
- (v) A failure to consider corroborative documentary evidence can be justified where a Tribunal makes findings that evidence given is untrue or inherently implausible provided those findings are based upon cogent material or are not illogical or irrational findings. However, the Tribunal's findings about the mother's involvement in making photocopies and consequently her credibility were based on an entirely false premise, namely the mother did not make a claim about her photocopying NLD documents in her protection visa application, when in fact she did. The Tribunal's failure to have regard to the correct premise, and consequently to have regard to the Priest's letter was a failure to have regard to a relevant consideration.

**SZMNP v MIAC & Anor
[2009] FMCA 28**

Federal Magistrates Court of Australia, Raphael FM, SYG 1837 of 2008, 23 January 2009

The applicant, a citizen of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision to refuse to grant protection visas on the basis that he was not a person to whom Australia had protection obligations.

The applicant claimed to be a taxi driver in China and feared persecution as a result of distributing Christian tracts to his customers. The Tribunal held a hearing which the applicant attended. After the hearing the Tribunal wrote to the applicant pursuant to s.424A of the *Migration Act 1958* (the Act) seeking his comments on information before the Tribunal, including a report from an undisclosed third party stating that the visa applicant's motivations for travelling to Australia were to travel on a tour with a female ('female X'), not being the person claimed to be his wife on the application form, with whom he stated was in a relationship, had known for many years and to whom he was to be married at the end of that year. It was also put to the applicant that female X had also absconded and applied for a protection visa (on different grounds) while in Australia, used the same residential and postal address as the applicant and was represented by the same migration agent. The Tribunal found the common features between the applications of the applicant and female X raised doubts about the applicant's claims and was one of many concerns the Tribunal had. The Tribunal did not accept the applicant was a genuine Christian or his claimed activities and persecution in China.

The applicant contended that the Tribunal failed to comply with s.424A of the Act and did not give clear particulars of the information by not also informing the applicant that the original source of the adverse information was alleged to be the applicant himself.

Held: Application dismissed.

- (i) The information which "would be the reason or part of the reason for affirming the decision under review" was that a report had been received indicating an alternative motive for the applicant wishing to come to Australia and the existence of that report cast doubt upon the credibility of the applicant. The existence of the report and the reason why it might be relevant was clearly explained in the s.424A letter. This did not constitute a jurisdictional error on the part of the Tribunal.

Obiter

- (ii) It is possible to argue that the Tribunal took into account the whole of the report from the third party and not just those parts that were the subject of the s.424A letter. This included contradictory evidence about the applicant's employment as well as the evidence about his relationship. *SZBYR & Anor v MIAC* [2007] HCA 26 says that a court must assess the information in question in terms of its dispositive relevance to the Convention claims advanced by the applicant.

LEGISLATION UPDATE

Legislative developments of relevance to the work of the Migration Review Tribunal and the Refugee Review Tribunal are noted below. The following Acts, Regulations and Instruments are accessible via the *Commonwealth Law of Australia* (COMLAW) website – (<http://www.comlaw.gov.au>)

Legislation Passed

ACTS

Migration Legislation Amendment Act (No.1) 2009

This Act was introduced to the Senate on 3 December 2008 and passed on 4 February 2009. It was introduced to the House of Representatives on 5 February 2009 and passed on 12 February 2009 without amendments. The Act amends 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 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.

The amendments commence on a date to be fixed by proclamation.

REGULATIONS

Migration Amendment Regulations 2009 (No. 1) (SLI 2009 No. 7) (Legislative Instrument - F2009L00267)

These Regulations amend the Migration Regulations 1994 to prescribe the timeframes for pre-arrival reporting on passengers and crew members who are on board ships due to arrive in Australia; and to provide for an infringement notice regime, as an alternative to prosecution, for operators of aircraft and ships who fail to provide the Department of Immigration and Citizenship with information on each passenger and crew member prior to their arrival in Australia.

Regulations 1 to 3 and Schedule 1 commenced on 15 February 2009 and Regulation 4 and Schedule 2 commence on 15 March 2009.

INSTRUMENTS

Migration Regulations 1994 – Specification under item 1224A and paragraph 462.221(c) – Arrangements for Work and Holiday Visa Applicants from Thailand, Iran, Chile, Turkey, United States of America and Malaysia - January 2009 (Legislative Instrument -F2009L00230). This instrument, registered on 29 January 2009, lists the educational qualifications and visa lodgement addresses for applicants for a Work and Holiday (Temporary) (Class US) visa and has been amended to specify that Malaysian applicants must hold tertiary qualifications or have successfully completed at least 2 years of undergraduate university study and have their visa application lodged at a specified address. Effective from 1 February 2009.

Migration Regulations 1994– Specification under regulation 1.03 – Designated APEC Economies - February 2009 (Legislative Instrument -F2009L00290). This instrument, registered on 13 February 2009, allows nationals of countries specified to be eligible to apply for the Temporary Business Entry (Class UC) visa and include Mexico, Canada and the USA to be members of the APEC Business Travel Card (ABTC) scheme. Effective from 15 February 2009.

Immigration (Guardianship of Children) Regulations 2001 – Specification for the purposes of regulation 4 – Welfare of Children: Offices that are Authorities - February 2009 (Legislative Instrument -F2009L00301). This instrument, registered on 13 February 2009, provides the offices that are authorities for the States and Territories for the purposes of regulation 4 of the Immigration (Guardianship of Children) Regulations 2001 in relation to the welfare of children in the relevant State or Territory. Effective from 15 February 2009.

CASELOAD OVERVIEW

MRT Decisions – February 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	1	3	0	0	4
Visitor refusal	32	12	1	5	50
Student refusal	16	8	0	4	28
Temporary business refusal	13	10	5	3	31
Permanent business refusal	8	5	3	0	16
Skill linked refusal	34	21	2	5	62
Partner refusal	54	18	11	0	83
Family refusal	22	22	0	2	46
Student cancellation	11	13	0	2	26
Sponsor approval refusal	4	4	1	0	9
Other	8	6	4	4	22

RRT Decisions – February 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	1	0	0	0	1
Bangladesh	2	5	0	2	9
Cameroon	0	1	0	0	1
China (PRC)	0	1	0	0	1
Egypt	11	73	1	2	87
Ethiopia	1	2	0	0	3
Fiji	2	0	0	0	2
Ghana	1	3	0	0	4
India	0	2	0	0	2
Indonesia	1	22	1	0	24
Iran	0	9	0	0	9
Israel	2	0	0	0	2
Kenya	0	2	0	0	2
Korea, Republic Of	2	0	0	1	3
Lebanon	0	8	0	0	8
Malaysia	2	4	0	0	6
Nepal	0	7	0	3	10
Nigeria	0	1	0	0	1
Pakistan	0	2	0	0	2
Philippines	0	5	0	0	5
Rwanda	0	1	0	0	1
Sri Lanka	1	0	0	0	1
Stateless	0	4	0	0	4
Taiwan	0	1	0	0	1
Tonga	0	2	0	0	2
Vietnam	0	1	0	0	1
Zimbabwe	0	4	0	0	4

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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