



The MRT-RRT Monthly Decisions Bulletin

No. 3 / 2009

6 April 2009

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

0800889

10 February 2009, Melbourne

Mr G Haddad, Member

STANDARD BUSINESS SPONSORSHIP – R.1.20D(2)(c)(ii) – SATISFACTORY RECORD OR DEMONSTRATED COMMITMENT TO TRAINING

– A delegate of the Minister for Immigration and Citizenship refused to approve the applicant as a Standard Business Sponsor on the basis that it did not have a satisfactory record or demonstrated commitment towards training Australian citizens and permanent residents in accordance with r.1.20D(2)(c)(ii) of the Migration Regulations 1994 (the Regulations). The applicant traded in retail and wholesale fashion. It submitted a business plan that contained a well-documented in-house training plan together with other business manuals and documentation. The applicant gave evidence that it had also undertaken to stock one staff member's new fashion brand that was selling well and expected to extend that commitment in the future.

Held: Decision under review set aside.

The Tribunal had regard to the staff manuals, business plan and the history and development of the business. Apart from the well-documented training plan and credible oral evidence regarding training, including on-the-job training, the Tribunal had particular regard to the fact that the applicant's approach to training was different from the regular training approach. It noted a "satisfactory record" of training required the applicant to make, or be committed to making, a reasonable contribution to the training of the Australian workforce having regard to the nature and extent of its business. It further noted that on-the-job training that was not quantifiable could provide the basis of a satisfactory record of training. As such, the Tribunal was satisfied the business had a satisfactory record and demonstrated commitment to training, including on-the-job training and met the criterion in r.1.20D(2)(c)(ii) of the Regulations. It also found it met the other criteria in r.1.20D(2) to be approved as a standard business sponsor.

0800623

12 February 2009, Melbourne

Dr A Gregory, Member

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

– A delegate of the Minister for Immigration and Citizenship refused to grant the primary visa applicant, her spouse and child Skilled – Australian-Sponsored (Migrant) (Class BQ) visas. The delegate found the primary visa applicant had not been employed in a skilled occupation for the requisite period and so did not satisfy cl.139.217 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Although the primary visa applicant nominated the skilled occupation of 'Financial Dealers and Brokers', she claimed to have work experience as a 'Hairdresser'. She claimed that she was employed in a hair salon in Iran between 1991 and 2005. Officers from the Australian High Commission in Iran visited the salon and reported that the premises was a small room in a residential flat and displayed no signage, the claimed business had not been registered with the relevant hairdressing guild, and there was no telephone number listed for the business. They identified discrepancies in the work reference regarding the periods of employment, hours worked and remuneration and the business owner was unable to provide evidence to confirm the duties stated in the work reference. The review applicant stated that hairdressers in Iran did not have signage or register because the government was harsh on hairdressers and fashion. She claimed that most of the hairdressing work was done from private homes and it was easier not to have a sign otherwise you could be targeted and subject to inspections and bribery by officials. The review applicant stated that the primary visa applicant sat for an examination in hairdressing in Australia and passed it very well.

Held: Decision under review affirmed.

The Tribunal found the evidence from the primary visa applicant's employer to be conflicting and not reliable. It noted the visa applicant did not provide any other evidence to support her work experience as a hairdresser or any other work experience as a financial dealer or broker. As such, the Tribunal found that there was insufficient evidence to support the claims of employment experience. The Tribunal was not satisfied that the visa applicant had been employed in a skilled occupation for the requisite period for cl.139.217(1). It further found that the primary visa applicant did not obtain the necessary education qualifications specified in cl.139.217(2) and therefore did not meet cl.139.217. Accordingly, the Tribunal found that the visa applicants were not entitled to the grant of Skilled – Australian-Sponsored (Migrant) (Class BQ) visas.

0800833

12 February 2009, Sydney

Mr T Delofski, Member

DISTINGUISHED TALENT (RESIDENCE) (CLASS BX) – SUBCLASS 858 – cl.858.223(2)(b) – PUBLIC INTEREST CRITERION (PIC) 4005 – UNREASONABLENESS OF MEDICAL ASSESSMENT –

A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Distinguished Talent (Residence) (Class BX) visa because he did not satisfy cl.858.223(2)(b) of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate found it was not unreasonable to require the applicant's daughter to undergo medical testing to determine whether she met PIC 4005. The applicant claimed he and his wife had separated and she lived a settled life in England with their daughter. The applicant's wife and daughter were not applicants and he claimed they had no desire or intention to live in Australia. The applicant claimed his daughter had a developmental disability making it unlikely that she would meet the requirements in PIC 4005. However, he claimed that, while she would require institutional care if her mother predeceased her, a sizeable inheritance would provide her with total support. He further claimed he had no way of forcing his wife to undergo a PIC 4005 medical assessment. The applicant claimed that as a mining engineer, for ten years he had made valuable contributions to Australia, financially, economically, culturally and intellectually. He claimed there was a chronic shortage of skilled and experienced mining engineers and that he had developed a mining safety system manufactured in and installed throughout Australia. He claimed these contributions far outweighed any costs that may be incurred in the unlikely event that his daughter accessed community services in Australia in the future.

Held: Decision under review set aside.

The Tribunal accepted that neither the applicant's wife nor daughter wished to reside in Australia. The Tribunal also accepted that the applicant had made and continued to make considerable economic, financial, intellectual, cultural and social contributions to Australia and that this would be largely lost if he was forced to leave. The Tribunal noted that, if the applicant's daughter underwent a medical assessment and did not meet PIC 4005, it would be obliged to find that the applicant did not meet cl.858.223 of the Regulations and affirm the decision to refuse to grant the visa. Taking account of all the circumstances, the Tribunal considered that it would be unreasonable to require the applicant's wife and daughter to undergo health assessments in relation to PIC 4005. Accordingly, The Tribunal found the applicant met cl.858.223(2)(b) of the Regulations for the purposes of the grant of a Subclass 858 visa.

0808815

20 February 2009, Sydney

Ms S Pinto, Member

SKILLED (PROVISIONAL) (CLASS VC) – SUBCLASS 485 - CL.485.213 – R.1.15F – TWO YEAR STUDY REQUIREMENT –

A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Skilled (Provisional) (Class VC) visa on the basis that she did not satisfy cl.485.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because she did not meet the "2 year study requirement" in r.1.15F of the Regulations. The applicant provided evidence that she had completed a Certificate III in Hospitality and a Diploma of Hospitality Management in a 16 month period. The delegate, applying a Departmental policy, which required a total registered duration of at least 92 weeks, found that the two courses had a total registered duration of 81 weeks and therefore did not comprise "2 academic years" of study.

Held: Decision under review set aside.

The Tribunal found that as holiday weeks and work-based training were included in the duration of the courses they were completed in 16 calendar months. The Tribunal accepted that, while compressed into a shorter than normal period, the courses took place over 4 semesters. It noted "2 academic years study" was not defined and there was no requirement that it be of a specific duration only that it totalled at least 16 calendar months. The Tribunal was unclear how the policy applied by the delegate formulated two academic years as 92 weeks, but it was not satisfied that policy was consistent with the legislation and considered it appropriate to depart from it. It considered that each academic year was generally comprised of 2 semesters. Consequently, the courses were completed as a result of at least 2 academic years study. The Tribunal also found all instruction for the courses was conducted in English and the applicant met r.1.15F of the Regulations. The Tribunal found the applicant satisfied the two year study requirement in the period of 6 months ending immediately before the day on which the application was made and that the courses were relevant to her nominated skilled occupation. Accordingly, the applicant met the criteria in cl.485.213 of the Regulations.

0800478

24 February 2009, Sydney

Ms C Carney, Member

INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) – SUBCLASS 880 – CL.880.222 – POINTS TEST – BONUS POINTS QUALIFICATION – ITEM 6A81 – EMPLOYED IN A SKILLED OCCUPATION IN AUSTRALIA – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant an Independent Overseas Student (Residence) (Class DD) visa on the basis that the applicant did not satisfy cl.880.222 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he did not have the qualifying score when assessed under the points test. The delegate did not award the applicant any points for the Bonus Points Qualification under Item 6A81(b) of Schedule 6A to the Regulations. The applicant claimed that he worked as a Cook for the requisite period while holding a Subclass 573 visa subject to Condition 8105. He provided documentary evidence, including payslips, group certificates and certification from the restaurant at which he worked as a cook on a permanent part-time basis for 20 hours per week in the relevant period detailing the applicant's duties.

Held: Decision under review set aside.

The Tribunal was satisfied on the documentary and oral evidence that the applicant was performing the full range of duties of a Cook for at least 6 months during the relevant period while holding a visa authorising him to work. The Tribunal further found that 'Cook' was a skilled occupation under the relevant instrument. As such, it found that he met the requirements of Item 6A81 and was entitled to 5 points for Part 8 of Schedule 6A. The Tribunal found the number of points to be awarded to the applicant was 120 at the time of the primary assessment and the time of the Tribunal's assessment. At those dates, the pass mark was 120 points and the pool mark was 120 points. Accordingly, the Tribunal found that the applicant achieved the qualifying score required to pass the points test. Thus, the Tribunal was satisfied that the applicant met cl.880.222 for the grant of the visa.

Partner and Family Visas

071844431

26 February 2009, Sydney

Ms P McIntosh, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – CL.309.211 – CL.309.221 – R.1.15A – SPOUSE – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant a Partner (Provisional) (Class UF) visa on the basis that she did not satisfy cl.309.211 and cl.309.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate was not satisfied that the visa applicant and the review applicant were in a genuine 'spouse' relationship as defined in r.1.15A. The delegate drew an adverse inference from information indicating that the review applicant had travelled on the same flight as his ex-wife shortly before his marriage to the visa applicant. The review applicant claimed

that the relationship with his first wife had ceased years earlier and he had not travelled on the same flight with his ex-wife as stated in the delegate's decision. The applicants provided numerous photographs and other documents, including money transfer records, telephone records, air tickets, registration of stay cards and various invoices and receipts.

Held: Decision under review set aside.

The Tribunal found that the review applicant's commitment to the relationship led him to provide considerable financial support to the visa applicant over a number of years. It also accepted that the couple lived together for a period totalling over 12 months. The Tribunal was satisfied that family and friends regarded them as being in a genuine married relationship. It was satisfied that they could verbally communicate in a manner consistent with a high level of commitment. On the basis of their compelling oral evidence it was satisfied they had drawn companionship and emotional support from each other and saw the relationship as long-term. The Tribunal was satisfied that the review applicant's relationship with his first wife had irrevocably broken down before he met the visa applicant and that the review applicant did not travel with his ex-wife. The Tribunal drew no adverse inference from the fact that he was previously married to another woman. The Tribunal was satisfied that the applicants had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship was genuine and continuing. As such, it was satisfied they met the requirements in r.1.15A for a married 'spouse' relationship. Accordingly, the Tribunal was satisfied that the visa applicant met cl.309.211 and cl.309.221 of the Regulations.

0800502

10 February 2009, Sydney
Mr D O'Brien, Principal Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 115 – CL.115.211 – CL.115.221 – REMAINING RELATIVE – R.1.15 – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant an Other Family (Migrant) (Class BO) Subclass 115 visa on the basis that she did not meet cl.115.211 and cl.115.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate was not satisfied that the visa applicant was a 'remaining relative' of the review applicant within the meaning of r.1.15 of the Regulations. The delegate was not satisfied that the visa applicant's three siblings in Ethiopia were dead as three letters provided purportedly to certify the death of two siblings and the disappearance of one sibling were found not to be genuine, following investigations conducted by officers from the Australian High Commission. The review applicant insisted that the letters were provided to the visa applicant by someone who was a member of the relevant organisations and supplied further evidence in the form of witness statements and photographs. Both the review applicant and the visa applicant gave evidence before the Tribunal and asserted that they had lost their siblings.

Held: Decision under review set aside.

The Tribunal accepted the difficulties faced by applicants attempting to provide official documentation to support claims of death in countries such as Ethiopia where death certificates were non-existent or hard to obtain. The Tribunal found that the three letters were unreliable, however, it found that the visa applicant might not have been at fault in relation to those documents. On the basis of the consistent accounts given by the review applicant and the visa applicant, the Tribunal accepted that two of the siblings had died as claimed. The Tribunal also found that the missing sibling was deceased, based on the account of the circumstances surrounding his disappearance and consideration of the common law presumption of death after seven years. Thus the Tribunal was satisfied that, at the time of application and at the time of decision, the visa applicant was a 'remaining relative' of the review applicant in accordance with r.1.15 and therefore met cl.115.211 and cl.115.221 of Schedule 2 to the Regulations.

0807598

23 February 2009, Sydney
Ms A MacDonald, Senior Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 114 – CL.114.211 – R.1.05A(1)(a) – DEPENDENT – A delegate of the Minister for Immigration and Citizenship refused to grant the visa applicant an Other Family (Migrant) (Class BO) Subclass 114 visa on the basis that she did not meet

cl.114.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because she had not been financially dependent on the review applicant for a reasonable period. The applicants claimed that, at the time of application, the visa applicant was financially reliant on the review applicant. The applicants provided a breakdown of the visa applicant's average monthly outgoings and income as well as additional expenses. The income included a pension regularly received from the British government. The review applicant agreed at hearing that the visa applicant was able to subsist on her pension but without additional support from the review applicant would not have much of a life.

Held: Decision under review affirmed.

The Tribunal did not dispute that the review applicant provided considerable emotional support and was willing and able to support the visa applicant financially. The Tribunal accepted the evidence of the visa applicant's income and expenses but found that expenses relating to her dog, transport, upkeep of her husband's gravestone, dental and general medicine costs could not be considered. The Tribunal found that, at the time of application, the visa applicant did not meet the definition of 'dependent' in r.1.05A(1)(a) of the Regulations because she was not wholly or substantially reliant on the review applicant for financial support to meet her basic needs for food, clothing and shelter, but rather relied on her pension. As such, the Tribunal was not satisfied that the visa applicant met the definition of 'aged dependent relative' in r.1.03 and therefore did not meet cl.114.211 of the Regulations.

Student visas

0803538

12 February 2009, Melbourne

Mr T Connellan, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – CL.573.235 – CONDITION 8202 – COMPLIED SUBSTANTIALLY – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Student (Temporary) (Class TU) visa on the basis that he did not satisfy cl.573.235 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he had not been enrolled in a registered course so had not complied substantially with condition 8202(2)(a) of his previous visa. The applicant claimed he was not enrolled because his parents were temporarily unable to pay his school fees. He claimed he did not realise his failure to enrol caused him to be in breach of his visa. The applicant claimed he had re-enrolled and had nearly completed the course. He expressed remorse over what had happened and claimed it would be catastrophic if he could not finish his studies in Australia.

Held: Decision under review set aside.

The Tribunal found the applicant had not strictly complied with condition 8202 but noted substantial compliance with the conditions to which his previous visa was subject was sufficient. It considered that the purpose of condition 8202 was to ensure that the people to whom student visas were granted were genuine students. The Tribunal accepted that his family's financial situation was the sole reason for the applicant's non-enrolment and, at the time, he did not realise the failure caused him to be in breach of his visa. The Tribunal recognised the breach was only for one semester and found its effect had little significance on the Australian community. The Tribunal accepted that at no stage had he deliberately flouted his visa conditions and, had he been aware of the ramifications, alternative arrangements would have been made. It found being unable to pay the fees was a legitimate reason for failing to enrol and the circumstances leading to the breach were beyond the applicant's control. It also took note of his impassioned pleas about the impact of a visa refusal and that his attendance and performance would be exemplary if granted another opportunity. The Tribunal found the applicant complied substantially with the conditions of his last held visa and was satisfied he met cl.573.235 of the Regulations.

Visitor visas

0807206

12 February 2009, Melbourne

Mr N Pullen, Member

TOURIST (CLASS TR) – SUBCLASS 676 – CL.676.215 – CRITERION 3004 – COMPELLING REASONS – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Tourist (Class TR) Subclass 676 visa on the basis that the applicant did not satisfy cl.676.215 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate found the applicant was not the holder of a substantive visa at the time of application and did not satisfy Schedule 3 criterion 3004. The applicant claimed that he had supplied all documentation to his former migration agent to enable him to lodge an application for a Subclass 485 visa but that agent failed to submit his Subclass 485 visa application before the expiry of his student visa, resulting in that application being found invalid. He applied for a Subclass 676 visa as he believed it would enable him to apply for the Subclass 485 visa. The applicant claimed that the migration agent's negligence was a compelling reason beyond his control.

Held: Decision under review affirmed.

The Tribunal found that the applicant did not hold a substantive visa at the time of application. The Tribunal noted that it was the responsibility of the applicant to ensure that his visa application was made before the expiration of his student visa notwithstanding the alleged negligence of the migration agent. The Tribunal did not accept that the conduct of the migration agent amounted to compelling reasons under criterion 3004(d) for not holding a substantive visa, or that there were any other compelling reasons such as a serious accident or illness. Accordingly, the Tribunal found that the applicant did not satisfy the requirements of criterion 3004 of Schedule 3 and did not meet cl.676.215 of Schedule 2 to the Regulations.

China

0806875

14 January 2009, Sydney

Mr D Dobell, Member

CHINA – RELIGION – CHRISTIAN – PARTICULAR SOCIAL GROUP – FAMILY MEMBERS – The applicant claimed to fear persecution for reasons of his religion and membership of the particular social group “family members of unregistered house church leaders”. The applicant claimed that he was a Christian and his father was the Pastor of an underground Christian church. He claimed that his parents, who were devoted Christians, were imprisoned and the authorities threatened him saying they knew he would follow his father’s path in the church. As a result, he was dismissed from public school and felt discriminated against at private school. His parents subsequently arranged for him to come to Australia on a student visa. The applicant further claimed that the whereabouts of his parents had been unknown for a year and he believed they had been arrested. He claimed that the police and courts were also looking for him.

Held: Decision under review set aside.

The Tribunal considered the applicant generally credible and believed he was telling the truth. While it had a number of concerns with his evidence, it took account of the fact that some undiagnosed mental health problem resulting from his experiences in China and possibly Australia may have affected his memory. The Tribunal accepted that the delay in his application was due to the applicant’s fear that the Chinese authorities would become aware of any activities in Australia and because he was unaware of his rights. The Tribunal accepted the applicant was the son of an underground Christian church leader, but found his knowledge of Christianity was gained merely from growing up in his father’s household and he was not a strong Christian in China. However, it noted that he might become a committed Christian. The Tribunal also accepted the applicant’s parents were missing and that he had been trying to locate them for a year. The Tribunal did not consider the applicant’s actions in Australia were consistent with someone who had contrived a plan to seek refugee status; rather they were of someone who was fearful and confused and somewhat desperate, financially and emotionally. Although the Tribunal considered that the applicant was at risk of persecution merely because of his family association to known church figures, it did not believe that, objectively, the risk was as high as he claimed. Nonetheless, it accepted that the applicant, as a committed Christian and son of a known underground Christian church leader who had previously been arrested, had a real chance of coming to the attention of the authorities and being officially interrogated resulting in torture and physical harm or suffering administrative or extra-judicial detention. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

0807045

22 January 2009, Sydney

Ms A Cranston, Member

CHINA – POLITICAL OPINION - FALUN GONG – PARTICULAR SOCIAL GROUP – FAMILY MEMBERS - The applicant claimed to fear persecution for reasons of her and her husband’s membership to Falun Gong. The applicant claimed her husband, who was a Falun Gong practitioner, left China before she did after taking part in demonstrations and criticising the Chinese Communist Party. The applicant claimed the police came to find out where her husband was, harassed her by visiting her at work and going to her child’s school, and she subsequently lost her employment. The applicant also claimed that she began practising Falun Gong after arriving in Australia. The applicant’s husband appeared before a differently constituted Tribunal that was not satisfied that he had engaged in Falun Gong activities in Australia otherwise than for the purpose of strengthening his refugee claims.

Held: Decision under review set aside.

Although the Tribunal had concerns about the applicant's claim of alleged events in China, it accepted she had participated in Falun Gong activities in Australia. However, it was not satisfied that she had done so otherwise than for the purpose of strengthening her refugee claims and disregarded that conduct. While the Tribunal acknowledged it had no reason to question the former Tribunal's findings in relation to the applicant's husband, it accepted that he had engaged in Falun Gong study and activities in Australia, including participation in major public events and protests, and that he displayed knowledge of Falun Gong at the hearing. The Tribunal was prepared to give the applicant's husband the benefit of doubt and accept he was now a genuine Falun Gong practitioner not engaged in Falun Gong activity at the behest or direction of the applicant. It found that it was likely that he was known to the Chinese government as a Falun Gong practitioner or perceived to be one. Based on independent information that family members of Falun Gong practitioners are of interest to authorities, the Tribunal found there was a real chance that serious harm would flow to the applicant by reason of her membership of her husband's family and his Falun Gong activities in Australia. It was further satisfied the applicant was not subject to s.91S of the *Migration Act* 1958. As such, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

0807319

28 January 2009, Sydney

Ms M Foster, Member

CHINA – RELIGION – CHRISTIAN – CATHOLIC – The applicant claimed to fear persecution for reasons of his religion. The applicant claimed he was a Christian, attended Sunday house services and, later, a church after it was built. He claimed he became a Catholic soon after he became a Christian and was baptised as a Catholic. The applicant claimed at one house gathering police broke in and, as a result, he was detained for a month and only released after his wife paid a sum of money. He claimed his company was monitored and harassed by the police and he had no choice but to transfer ownership of it to his friends. He claimed he attended church in Australia if he was not busy. He claimed he read the Bible occasionally and some booklets about the "big truth" and "small truth" of Catholicism.

Held: Decision under review affirmed.

The Tribunal found that the applicant was not credible and he was not nor had ever been a Christian or Catholic as he demonstrated little understanding of basic aspects of Christian or Catholic belief and practice and his evidence about significant aspects of his claims was inconsistent and vague. For example, he did not mention prior to the hearing he was a Catholic; he was adamant that Christianity was a branch or denomination of Catholicism; he did not know the date of his baptism or that water was used; and he could not show a real understanding about religious materials he claimed to have read. The Tribunal did not accept the applicant became a Christian or Catholic in China, or that he attended religious gatherings or a church in China, or that he practised Christianity or Catholicism in Australia. The Tribunal did not accept he was arrested, detained or harmed for reasons of religion and found he would not practise or wish to practise Christianity or Catholicism if he returned to China. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for reasons of religion or any other Convention reason.

India

0808012

18 February 2009

Mr D Dobell, Member

INDIA – POLITICAL OPINION – INDIAN NATIONAL LOK DAL PARTY (INLD) – The applicant claimed to fear persecution for reasons of his political opinion. The applicant claimed he was an INLD group leader and that during an election he and his family were threatened by Congress Party thugs. He claimed the police did nothing when he reported the threats, but also claimed he did not suffer any harm and remained at home continuing his work. The applicant claimed a few years later a powerful member of the Congress Party wanted him to join their party because he was very popular locally and competent in his party duties. He claimed he refused because the Congress Party was corrupt and because of this, and his organising a small protest and press conference, the Congress Party member made an order to kill him. The

applicant claimed he moved to another city and lived "in hiding", but he and his family were not searched for, threatened, or harmed by the Congress Party member.

Held: Decision under review affirmed.

The Tribunal was concerned about inconsistencies in the applicant's evidence, but was prepared to accept it as truthful. However, it found the initial threats were hollow, noting that the Congress Party did not follow through. Nor did the member of the Congress Party who threatened the applicant cause him or his family any harm between the two incidents despite the applicant staying in his hometown and continuing his party activities. The Tribunal was of the view that, as the Congress Party member was powerful, he may well have been in a position to follow through on his threats and concluded the killing order was either hollow or a very remote possibility. The Tribunal also noted both claims of harm took place in the applicant's hometown and he only moved to another city in the same state rather than further afield. The Tribunal was satisfied that any possible fear extended only to a very small geographic area, being the region in which the applicant was known to have been active in INLD and, at the absolute limit, was localised to the applicant's state. It held the applicant could relocate and live safely in other parts of India. Further, in its view the applicant's personal circumstances and past experiences indicated that he had the resources, skills and education to establish a suitable life for himself away from his region so relocation was reasonable. Accordingly, the Tribunal considered the applicant did not hold a well-founded fear of persecution for a Convention reason.

Indonesia

0804864

31 December 2008, Melbourne

Mr D Young, Member

INDONESIA – POLITICAL OPINION – INDEPENDENCE MOVEMENT – PARTICULAR SOCIAL GROUP – FAMILY MEMBERS – The applicant claimed to fear persecution for reason of his political opinion and membership to the particular social group consisting of "his family". The applicant claimed he came from a political family and, when he was young, he was broadly aware of the independence movement and political status of his district. He claimed he attended a flag-raising ceremony in his district where security forces pulled down the flag and began shooting randomly. The applicant further claimed members of his extended family had played an active and conspicuous role in the independence movement in both Indonesia and Australia. He claimed he associated with one distant family member in Australia who was one of the movement's founders and leaders. The applicant claimed that when he returned clandestinely to his district from overseas he founded an awareness group related to the independence movement. He claimed he was often questioned by police and on one occasion detained and beaten although he was released without charge. The applicant claimed he took part in protests and continued his political activities upon returning to Australia. The applicant claimed that his name was on a "wanted" list and that he was under surveillance by Indonesian authorities. He claimed he would be arrested and imprisoned if he returned to Indonesia.

Held: Decision under review set aside.

The Tribunal found that the applicant's claims had substance, in spite of a number of procedural distractions on the part of his agent and some fanciful embellishments by him and some of his witnesses. The Tribunal was satisfied on the evidence that the applicant was of mixed ethnicity and some members of the applicant's extended family had played an active role in the independence movement in the applicant's district, Indonesia and Australia. The Tribunal found that the applicant's own political activities were limited in scope and inarticulately rationalised. However, it determined that, given the strong and increasing presence of military and security forces in the applicant's district, their extreme sensitivity to any form of external scrutiny or criticism of Indonesian control of the district and the manifestly flawed electoral process that was claimed to have legitimized its annexation and a history of brazenly repressive and rights-abusive conduct towards dissidents (especially where members of ethnic and religious minorities), that the applicant faced a real chance of persecution for a Convention reason were he to return to Indonesia.

Israel

0807351

4 February 2009, Melbourne

Mr A Gentile, Member

ISRAEL – RACE – ETHIOPIAN – OBJECTION TO MILITARY SERVICE – The applicant claimed to fear persecution for reasons of his Ethiopian race. The applicant claimed he did not wish to return to military service, but he would be taken straight from the airport to fight the war if returned to Israel. He claimed that being black meant doing all the “low end” jobs in the army and on one occasion he was asked to go first in relation to an unexploded bomb. He also claimed that he was targeted to be killed at the Palestinian border because he refused to continue fighting. The applicant claimed to fear imprisonment because he refused to undertake further military service. The applicant claimed Ethiopian Jews were denied equal access to food and housing, received a lower standard of education and had no opportunity to obtain employment. He further claimed blood donations from Ethiopians were discarded because of their race and children were taught in school from an early age that black skin is bad. He claimed he could not accomplish anything in Israel because of obstacles all the time and felt like a second-class citizen.

Held: Decision under review affirmed.

The Tribunal found there was no evidence that conscription laws in Israel were other than laws of general application or that military personnel of Ethiopian background were treated any differently because of their race. It found the applicant was posted to a unit and discharged in the normal manner and was liable for further training or service along with all those who completed their compulsory service. It further found nothing about the applicant’s circumstances was advanced such that the Tribunal could determine that there was differential treatment for a Convention reason. Nor did it accept he had refused to serve or had been targeted to be killed. The Tribunal found the connection between the applicant and claims about blood and school segregation were tenuous, but accepted that he had been insulted and suffered some rejections of employment. However, it noted independent information indicated that society was appalled by instances of discrimination and there were initiatives to address the situation. The Tribunal found that while the incidences of harm claimed by the applicant were unpleasant and repugnant, the harm could not be considered serious harm in terms of the Convention. As such, the Tribunal was not satisfied the applicant had a well-founded fear of persecution for any Convention reason.

Jordan

0805551

15 January 2009, Sydney

Mr S Roushan, Member

UNITED ARAB EMIRATES / JORDAN – STATELESS – RACE – PALESTINIAN – PARTICULAR SOCIAL GROUP – GAZAN REFUGEES IN JORDAN – The applicant claimed to fear persecution for reasons of his Palestinian race, nationality and membership of the particular social group, “Gazan Palestinians in Jordan”. The applicant claimed he was born in the United Arab Emirates (UAE) to Palestinian refugees, but grew up in Jordan before returning to the UAE to work. He claimed that, after he arrived in Australia, his sponsoring company in the UAE cancelled his visa and the UAE passed new laws preventing him from entering the country. The applicant further claimed he did not have a right of return to Palestine. The applicant claimed he held a temporary Jordanian passport that had expired while he was in Australia and which the Jordanian Embassy had refused to renew. He claimed he could return to Jordan but as a Palestinian from Gaza he was not able to gain citizenship and consequently held no rights there.

Held: Decision under review set aside.

The Tribunal found that the applicant was not excluded from the operation of the Convention by Article 1D as the “protection” provided for referred to the United Nations Conciliation Commission for Palestine, which had ceased. The Tribunal found the applicant was a stateless Palestinian and determined that his country of former habitual residence was the UAE. The Tribunal accepted that since arriving in Australia his visa status

had changed and he did not have the right to re-enter the UAE. However, it was of the view that the applicant's inability to return to the UAE did not amount to persecution and was satisfied he did not have a well-founded fear of persecution in relation to that country. The Tribunal further considered the applicant's ability to return to Jordan. The Tribunal accepted that the Jordanian Embassy had refused to renew the applicant's temporary passport. It found that, while refugee status was not accorded merely because a stateless person was unable to return to their country of former habitual residence, the Jordanian government's refusal to renew the applicant's passport was among a long list of discriminatory treatment to which it subjected Gazan refugees. The Tribunal was satisfied that the restrictions and discriminatory measures towards Gazan refugees adopted by Jordan would cause the applicant significant economic hardship threatening his capacity to subsist which it determined amounted to "serious harm". The Tribunal was further satisfied that the applicant did not have access to adequate and effective state protection and, therefore, had a well-founded fear of persecution for a Convention reason.

Kenya

0805553

4 December 2008, Adelaide

Ms D Morgan, Member

KENYA – PARTICULAR SOCIAL GROUP – PERSONS WITH A DISABILITY IN KENYA – ETHNICITY

– The applicant claimed to fear persecution for reasons of his membership to the particular social group "persons with a specific disability in Kenya" and his ethnicity. The applicant claimed that, due to his disability, he would suffer gross discrimination, humiliation and unfair treatment from the Kenyan community. He claimed that he would be deprived of basic opportunities and rights in most areas of life and high academic achievements. The applicant claimed that he had been prohibited from holding the position of counselor at a school and discriminated against in teaching promotions despite being overqualified. He also claimed his livelihood and access to employment appropriate to his qualifications would be affected. The applicant further claimed that he was forced to divorce his wife by his former parents-in-law for the same reason. The applicant claimed he was attacked by police 28 years earlier because of his ethnicity. He claimed that the Kenyan government and its legal framework would not protect him from violation of his rights because of its lack of concern for persons with disabilities.

Held: Decision under review affirmed.

The Tribunal found that there was entrenched discrimination against disabled persons in Kenya and accepted that the applicant had been discriminated against because of his disability in the workplace and by government officials, the community generally and his former wife's family. However, it found that this discrimination was not akin to the instances of serious harm set out in s.91R(1)(b) of the *Migration Act* 1958. The Tribunal acknowledged that the applicant was likely to encounter stereotyping, humiliation and discrimination in the future but this would not constitute persecution. The Tribunal accepted the attack by police constituted serious harm for reasons of the applicant's ethnicity. However, while it accepted that persons with his ethnicity in the applicant's province were subject to police brutality and victimization, it was not satisfied that this past event provided a reliable basis for determining that he would face a real chance of persecution in the reasonably foreseeable future. It further found the applicant was to shortly receive the accolade of a doctorate and his quest for knowledge had removed him from the nomadic lifestyle he was born to. As such, the chance of persecution for his ethnicity was remote. Consequently, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Stateless

0808551

10 February 2009, Melbourne

Mr P Fisher, Member

STATELESS – CL.866.232 – RESOLUTION OF STATUS VISA HOLDER – A delegate of the Minister for Immigration and Citizenship refused to grant the applicant a Protection (Class XA) Subclass 866 visa on the basis that the applicant had been granted a Resolution of Status (Class CD) Subclass 851 visa and,

therefore, could not satisfy cl.866.232 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The applicant claimed he arrived in Australia as the holder of a Subclass 451 Secondary Movement (Relocation) (Temporary) visa. The applicant claimed that he was advised that the Minister had agreed to exercise his power pursuant to cl.866.228A(b) allowing the applicant early access to a permanent Protection visa. He further claimed that he was then notified that, as a result of the abolition of Temporary Protection and Temporary Humanitarian visas, he had been granted a Resolution of Status visa. The applicant, who declined to withdraw his Protection visa application, claimed that he had not applied for, or agreed to, the grant of the Resolution of Status visa. The applicant appeared to believe that the Minister was trying to foist an inferior visa upon him and questioned the validity of the law that could grant him a visa he had not wanted and would not accept. The applicant claimed he did not hold a Resolution of Status visa. He pointed to the label in his travel document evidencing the Subclass 451 visa that indicated the visa was valid until a particular date and claimed he was and would be the holder of the Subclass 451 visa until that date.

Held: Decision under review affirmed.

The Tribunal found that the applicant had been granted a Resolution of Status visa. It rejected the applicant's claim that the visa evidence label in his travel document showed that he was still the holder of a Subclass 451 visa. Instead it found that pursuant to s.82(2) of the *Migration Act* 1958 the applicant's Subclass 451 visa ceased to be in effect at the point when the Resolution of Status visa was granted. Consequently, the Tribunal found that the applicant did not satisfy the requirements of cl.866.232 because, at the time of decision, he was the holder of a Resolution of Status visa.

United States of America

0806764

23 December 2008, Sydney

Ms A Younes, Member

UNITED STATES OF AMERICA – PARTICULAR SOCIAL GROUP – EMOTIONAL HARDSHIP – The applicant claimed to fear persecution for reasons of his membership of the particular social group "those people whose return to Australia is foreclosed by the operation and implications of s.501 of the *Migration Act* 1958". The applicant claimed he had a child in Australia whom he would lose access to if he were deported from Australia because the contact orders he had in respect of the child were not enforceable overseas. The applicant claimed this would cause him "great emotional hardship" and mental and emotional torture, which was mental persecution. He also claimed he had already suffered "mental breakdowns" while in detention and would be at further risk if removed from Australia, although he was not on any medication. The applicant stated the United States authorities would be unable to provide him with assistance as there was no law obliging them to assist citizens to gain residence in another country or that would permit them to arrange for his child to go to the United States or live with him. The applicant produced a psychologist's report stating he suffered from anxiety and that he had previously been heavily addicted to a substance.

Held: Decision under review affirmed.

The Tribunal found that the applicant was capable of putting his case in full and accepted that he had a child in Australia. It also accepted that if deported from Australia, he would not see his child for an indefinite period, which would cause him emotional hardship. The Tribunal considered that, were it to accept that there was a particular social group of "those people whose return to Australia is foreclosed by the operation and implications of s.501 of the *Migration Act* 1958", or any other particular social group, it did not accept that the harm feared was for that reason. Rather, it found it was a consequence of his potential removal from Australia. The Tribunal did not accept that if the applicant were deported to the United States there was a real chance that he would suffer Convention-related harm in the reasonably foreseeable future. Further, the Tribunal was satisfied that the inability of the United States authorities to assist the applicant was not for any Convention ground. Consequently, the Tribunal found that the applicant did not have a well-founded fear of persecution for a Convention reason.

HIGH COURT JUDGMENTS

MIAC v Kumar & Anor

[2009] HCA 10

High Court of Australia, French CJ, Gummow, Hayne, Kiefel & Bell JJ, S473/2008, 11 March 2009

This judgment concerned a Minister's appeal from a judgment of the Full Federal Court that allowed an appeal from a judgment of Lloyd-Jones FM dismissing an application for judicial review of a Migration Review Tribunal (the Tribunal) decision that the respondent was not entitled to the grant of a Partner (Temporary) (Class UK) visa, or a Partner (Residence) (Class BS) visa.

At the Tribunal hearing, the respondent was given a letter pursuant to s.359A of the *Migration Act 1958* (the Act), which invited him to comment on information, received by the Tribunal "in confidence, stating that your marriage to your nominator is contrived for the sole purpose of migrating to Australia." The respondent denied that the allegation in the letter was true but did not provide any further comments or evidence within the stipulated period. The Tribunal found that there was insufficient evidence, having regard to the circumstances identified in r.1.15A(3) of the Migration Regulations 1994, for it to be satisfied that the applicant was in a 'spouse' relationship. The Tribunal's reasons for decision additionally stated that "[m]ost importantly, the credible and significant adverse information before the Tribunal leads the Tribunal to find that the visa applicant and the nominator are not in a genuine and continuing spousal relationship."

The Full Federal Court upheld a submission by the respondent that the Tribunal made a jurisdictional error by failing to comply with the requirement imposed by s.359A to disclose to him "the identity of the informant and the full nature of the information". The Court found that the information, including the identity of the informant, was not non-disclosable information for the purposes of the exception in s.359A(4). Considering the definition of 'non-disclosable information' in s.5(1) of the Act, the Court accepted that the information was capable of precise identification and that it was imparted in circumstances importing an obligation of confidence, but found that the general law does not protect confidences about such matters as the commission of crimes and frauds.

Held: *per curiam* appeal allowed.

- (i) The Tribunal complied with s.359A(1) by notifying the respondent that it had received information, in confidence, which stated that his marriage was contrived for the sole purpose of his migration to Australia, and inviting his response.
- (ii) The circumstances that the information supplied in confidence to the Tribunal may have disclosed or related to the commission of offences by the respondent or others did not deny to the information and the identity of the informer the character of non-disclosable information within the meaning of s.359A(4).
- (iii) The obligation imposed by s.359A(1) does not arise if disclosure by the Tribunal would found an action by the informant or another person (not being the Commonwealth) for breach of confidence. While this invites attention to the body of doctrine in private law concerned with the protection, particularly by equitable remedies, of confidential information, caution is required in the immediate translation into public law of such private law concepts. The translation must accommodate the scope and purpose of the public law regime.
- (iv) Section 359A is designed to afford, to applicants, a measure of procedural fairness and, to informants, protection, lest without that protection, information be withheld and the Tribunal be denied material which assists the performance of its functions. The preservation of the informant's disclosures tends to advance not obstruct the operation of the spousal visa provisions of the Act.

FEDERAL COURT JUDGMENTS

Liang v MIAC

[2009] FCA 189

Federal Court of Australia, Logan J, QUD242 of 2008, 3 March 2009

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) which affirmed a decision by a delegate of the Minister for Immigration and Citizenship not to grant the appellant an Established Business (Residence) (Class BH) Subclass 845 visa.

Clause 845.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations) requires, at the time of application, that an applicant has had an ownership interest in one or more established main businesses in Australia for 18 months immediately preceding the application and continues to have an ownership interest of that kind. Clause 845.221 requires an applicant to continue to satisfy cl.845.213 at the time of decision. The definition of "main business" in r.1.11 includes a requirement that, if the applicant has, or has had, an ownership interest in more than 1 "qualifying business", the applicant must not nominate more than 2 of those businesses as main businesses. The appellant nominated two main businesses with his visa application, each operated by the same company, Golden Net International Pty Ltd (GNI). When trading as "GNI Finance Corporation", GNI carried on a finance business. The second, identified business operated by GNI was an export business. After lodgement of application, the appellant registered a second company, United Link Corporation Pty Ltd (United), which operated a computer business, on which the appellant sought to rely as one of his main businesses at the time of decision. The Tribunal found that GNI conducted two main businesses which the appellant had nominated at the time of visa application and that he could not nominate a third main business operated by United, for consideration at the time of decision. The Tribunal also found that the appellant could not satisfy cl.845.221 because he did not continue to satisfy cl.845.213.

The appellant contended that a legal entity could not operate more than one business. As such, only one business had been nominated by the appellant at the time of application and it followed that it was possible to nominate and to rely upon United as a second main business. The appellant further contended that the Tribunal failed properly to understand or apply cl.845.213 and therefore cl.845.221 of the Regulations.

Held: Appeal dismissed.

- (i) There is nothing about the meaning of the word, "business" as used in the context of the Regulations which carries with it the necessary corollary that a legal entity can only have or conduct one "business". It was open to the Tribunal, as a question of fact, to conclude that GNI operated two main businesses.
- (ii) This conclusion, and the limitation of nominating two business in the definition of "main business" in r.1.11, have the necessary consequence that there was no error in the Tribunal's concluding that it was not able to consider United for the purposes of deciding whether it was satisfied that the appellant met the visa criteria.

Obiter

- (iii) The Full Court in *Xiang v MIMIA* (2004) 81 ALD 301 counselled that the effect of the word "continues" depends on the context in which it is used and may differ in respect of an activity or a status. Having regard to the activity related aspect of "main business" in r.1.11(1)(b) and when United was established, the finding that the appellant did not have an interest in a main business at the time of decision flowed inevitably from the correct meaning and application of cl.845.221 read with cl.845.213. The Tribunal also correctly found that the appellant did not have an ownership interest in United in the 18 months preceding the date of the visa application.
- (iv) Clause 845.213(a) carries a temporal limitation which looks to the 18 months immediately preceding the application. There is a further and cumulative temporal limitation in cl.845.213(b) that the "ownership interest" in one or more "main businesses" over the period of 18 months immediately preceding the application must be maintained, "continue", throughout whatever period elapses thereafter until the application is made. In the other words, the intention, reflected in the language

of cl.845.213(b), is that there should be no gap in the holding of an "ownership interest". The continued interest must also be one "of that kind". In context, the reference in cl.845.213(b) to "of that kind" is to be read as a reference to the "main business" or businesses referred to in cl.845.213(a).

SZMPT v MIAC

[2009] FCA 99

Federal Court of Australia, Jacobson J, NSD 1872 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 Refugee Review Tribunal (the Tribunal) decision that the appellant was not a person to whom Australia had protection obligations.

The appellant, a national of China, claimed to fear persecution for reason of her political opinion, claiming that she had protested against illegal reclamation of land in her home town by the local authorities and that she had joined a local group which printed and distributed leaflets critical of the government. The Tribunal rejected the appellant's claims to have been involved in distributing anti-government leaflets, noting that this claim was not credible given her previous lack of political involvement.

The appellant claimed, among other things, that the Tribunal breached s.424A of the *Migration Act* 1958 by failing to supply her with particulars of information about similar protection visa claims that were made by other individuals using the same migration agent. The Federal Magistrate at first instance held that s.424A was not engaged because the Tribunal did not refer to or rely upon the information relating to the similarity of claims of the other applicants.

Held: Appeal dismissed.

- (i) Section 424A was not engaged, as not only was there no mention of the similarity of other applicants at the Tribunal hearing, it was not mentioned in the Tribunal's reasons or in any document generated by the Tribunal during the review process. The only inference available was that the Tribunal did not consider the information to be relevant. From the language of s.424A(1)(b), it follows that if the Tribunal does not perceive the information to be relevant, there can be no obligation under s.424A(1).
- (ii) The question of whether the Tribunal considered the information to be a reason for affirming the decision must be a question of fact.
- (iii) It does not follow from *SZBYR & Anor v MIAC & Anor* (2007) 235 ALR 609 that in making an assessment of whether s.424A(1) was engaged, a court can *never* have regard to the reasons of the Tribunal. While the Tribunal's reasons are not to be the starting point, the Court, in making its assessment, may draw inferences from the Tribunal's reasons as to whether the Tribunal considered the information to be a reason for affirming the decision.

SZMIP v MIAC

[2009] FCA 217

Federal Court of Australia, Flick J, NSD 2027 of 2008, 12 March 2009

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

The appellant, an Indian citizen of Christian faith, claimed to fear persecution on religious grounds. The appellant's younger sister was granted a protection visa after her application was considered by a differently constituted Tribunal. The Tribunal was aware of the sister's earlier application and referred to the different circumstances and available information upon which the decisions were to be made. It noted in its decision that substantial parts of the appellant's statement appeared to have been copied from her sister's. The Tribunal also found that the appellant had an opportunity to seek protection in the United Kingdom on two occasions but did not.

Before the Federal Magistrate, the appellant argued that there was some general unfairness in the fact that her sister had been granted a visa and not her, arising out of the same factual basis. The Federal Magistrate concluded that the Tribunal is not bound by the decision of another Tribunal. The Tribunal had explained adequately why it did not take the same view as the Tribunal reviewing the sister's application. The Tribunal did not err in law or fail to consider the relevant circumstances of the sister's case.

On appeal, the appellant contended that the Tribunal made a jurisdictional error and breached mandatory procedures, but failed to disclose further particulars.

Held: Appeal dismissed.

- (i) The decision of the Tribunal was free from jurisdictional error.
- (ii) The Tribunal was required to resolve the case before it and was not bound by a decision of a differently constituted Tribunal based upon different factual material. The reasons for decision disclose that the Tribunal was well aware of the contrary outcome of the sister's application and it went on to explain the basis upon which it reached that contrary result.
- (iii) Consistency is not an end in itself – a like result reached upon the basis of factually diverse materials may be the hallmark of injustice and not justice. There was no "inconsistency" or "inelegance" of the kind envisaged by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634.

FEDERAL MAGISTRATES COURT JUDGMENTS

Fan Fan v MIAC [2009] FMCA 123

Federal Magistrates Court of Australia, Scarlett FM, SYG 3131 of 2008, 26 February 2009

The applicant, a citizen of China, sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate not to grant him a Student (Temporary) (Class TU) visa because the applicant did not satisfy cl.572.223(2) of Schedule 2 to the Migration Regulations 1994 (the Regulations).

The applicant applied for the visa in April 2007. The applicant's agent submitted to the Tribunal an International English Language Testing System (IELTS) Test Report form dated 26 October 2007 showing the applicant sat a test on 13 October 2007 and obtained an overall Band Score of 5.5. Clause 572.223(2)(a)(i)(A) relevantly required that, at time of decision, the applicant gave to the Minister evidence in accordance with the requirements mentioned in Schedule 5A for Subclass 572 and the assessment level to which the applicant is subject in relation to the applicant's English language proficiency. The relevant provisions in Schedule 5A for assessment level 4 was cl.5A504(a)(ii), which required the applicant to have "achieved, in an IELTS test that was taken less than 2 years before the date of the application, an Overall Band Score of at least 5.5 ..." or cl.5A504(b)(ii) which required an Overall Band Score of at least 5. The Tribunal found that to meet this requirement the IELTS test must have been conducted no more than 2 years prior to the application and the applicant had not provided evidence in accordance with this requirement as the document submitted related to a test taken after he lodged the visa application.

The applicant claimed the Tribunal misconstrued the requirements of cl.5A404 and that the words in that provision should be construed as including an IELTS test taken during the course of the application.

Held: Application dismissed.

- (i) The Tribunal did not fall into jurisdictional error. The meaning of cl.5A404(a) and (b) is clear and unambiguous. The date of the application means the date of the application for the visa. The date of the application is the date by which the IELTS test must be taken. The time of the decision is the time when the Minister must be satisfied that there is evidence of the applicant's level of English proficiency.
- (ii) It is open to an applicant to sit for an IELTS test on one day and apply for a student visa the next. It is not necessary to produce the IELTS Test Report Form when the visa is lodged. It may not be available. However, it is incumbent on the applicant to submit the evidence before the decision is made. In this case the applicant did not sit for his IELTS test until after he had applied for his visa. The Tribunal correctly found that it could not be taken into account.

Kamal v MIAC & Anor [2009] FMCA 238

Federal Magistrates Court of Australia, Smith FM, SYG 2829 of 2008, 20 March 2009

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of a delegate of the Minister for Immigration and Citizenship, to refuse to grant him a Student (Class TU) Subclass 572 visa.

The visa was refused on the basis that the applicant did not meet the English language proficiency requirement in Item 5A404(a)(ii) of Schedule 5A to the Migration Regulations 1994 (the Regulations) for the purposes of cl.572.223(2)(a)(i)(A) of Schedule 2 to the Regulations. Those provisions would be satisfied if, at time of decision, the applicant gave evidence that he had "achieved, in an IELTS test that was taken less than 2 years before the date of the application, an Overall Band Score of at least 5.5."

After lodging his application for review in the Tribunal, the applicant attempted an IELTS test and achieved a 5.5 overall band score. Evidence of that outcome was provided to the Tribunal. However, the Tribunal found

that this was not evidence of a test falling within Item 5A404(a)(ii), because it was not taken within the period of two years before the date of the visa application.

The applicant contended that the Tribunal adopted an erroneous construction of Item 5A404(a)(ii).

Held: MRT decision quashed and remitted for reconsideration.

- (i) The Tribunal made a jurisdictional error in construing Item 5A404(a)(ii).
- (ii) The words of Item 5A404(a)(ii) are intended to raise a temporal limitation by reference to the date of the visa application. However, there is an ambiguity whether it refers to the application date only to specify a 'not earlier than' date for an IELTS test, or to delimit both a 'not earlier than' date and also a 'not later than' date.
- (iii) Addressing that ambiguity by reference to the language, statutory context and the administrative process under the *Migration Act* 1958, the first, more benevolent construction, requiring only an IELTS test that was taken on a date which is not earlier than the date which is 2 years before the date of the visa application, is correct.

**MZXRE v MIAC & Anor
[2009] FMCA 99**

Federal Magistrates Court of Australia, O'Dwyer FM, MLG 273 of 2008, 17 February 2009

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

The Tribunal had previously made a decision that it lacked jurisdiction because the application for review was made outside the mandatory prescribed period. Prior to making that decision, the Tribunal had invited the applicant to a hearing at which the applicant gave evidence and presented arguments on the substantive issues. The Tribunal's first decision was remitted by the Federal Magistrates Court. Following the remittal, the Tribunal wrote to the applicant informing him that the case would be allocated to a new member and inviting him to provide any further material he wished the Tribunal to consider. The matter was, in fact, constituted to the same member, who again wrote to the applicant inviting him to provide additional evidence. That letter was returned unclaimed and the Tribunal made its decision on the review. Prior to the handing down of that decision, the applicant submitted three media reports and a statutory declaration, in which he complained that he had not been invited to a hearing. The Tribunal considered that material but proceeded to hand down the decision on the scheduled date.

The applicant contended that the Tribunal made jurisdictional errors by denying him procedural fairness; breaching s.425 of the *Migration Act* 1958 (the Act); appointing the same member to constitute the Tribunal following the remittal; and by utilising the evidence given at the previous hearing.

Held: Application dismissed.

- (i) There was no statutory requirement that the Tribunal hold a further hearing in the circumstances. It was feasible and appropriate for the same member to exercise the Tribunal's jurisdiction based on the hearing that had already occurred.
- (ii) There is a limited class of cases in which the Tribunal is required to invite the applicant to a further hearing after a matter has been remitted. This includes cases where the decision set aside was affected by bias or a breach of procedural fairness; where new issues are raised; and where the matter is remitted to a re-hearing before a different member. The comments of Gray and Gyles JJ in *SZHKA v MIAC* [2008] FCAFC 138 do not go so far as to set down a requirement that in all instances where a matter has been remitted to the Tribunal there is a necessity for another hearing.
- (iii) The jurisdictional error affecting the initial decision was not one that had 'infected' the hearing, no new issues had arisen and there was relatively little delay between the hearing and the determination of the review application on its merits.

- (iv) The exception in s.425(2)(c) also applied as a result of the failure to respond to the two letters inviting the applicant to give information. The return of the second letter did not render it "a hollow shell". As the letter was sent in accordance with s.441A(4)(c), s.441C(4) operated to deem the applicant as having received it, regardless of whether it was in fact received.
- (v) The principal member's power under s.421 to determine which member shall constitute the Tribunal was not fettered by the statement indicating that a different member would constitute the Tribunal. The frustration of any expectations created in the applicant was not as a consequence of any breach of statutory requirements and could not found a finding of jurisdictional error.

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 Act received Royal Assent on 25 February 2009. The amendments commenced on 15 March 2009.

REGULATIONS

Migration Amendment Regulations 2009 (No. 2) (SLI 2009 No. 42) (Legislative Instrument – F2009L01048)

These Regulations amend the Migration Regulations 1994 to permit certain holders of Subclass 457 (Business (Long Stay)) visas to continue to be regarded as members of the family unit of a primary Subclass 457 visa holder, or a dependent child of an interdependent partner of such a person, for the purpose of a subsequent Subclass 457 visa application.

The amendments commenced on 28 March 2009. They apply to:

- visa applications made on or after that 28 March 2009; and
- visa applications made prior to, but not finally determined by 28 March 2009.

Migration Legislation Amendment Regulations 2009 (No. 1) (SLI 2009 No.22) (Legislative Instrument – F2009L00689)

These Regulations amend the Australian Citizenship Regulations 2007 and the Migration Regulations 1994 to improve the operation of immigration and citizenship policy. In particular, the Regulations include two Schedules that:

- enable fees relating to Australian citizenship to be collected in certain foreign currencies; and
- broaden the visa conditions that can be applied to certain Bridging Visa E (Subclass 050 Bridging (General)) visas.

Regulations 1 to 3 and Schedule 1 commenced on 15 March 2009 and Regulation 4 and Schedule 2 commenced on 28 March 2009.

INSTRUMENTS

Migration Regulations 1994 – Specification under subparagraph 1218(1)(b)(iii) – Travel Agents for PRC Citizens Applying for Tourist Visas – February 2009 (Legislative Instrument – F2009L00709). This instrument, registered on 25 February 2009, lists the travel agents in Australia who are approved to escort PRC tour groups who travel to Australia under the Approved Destination Status (ADS) scheme. Schedule 2 to the Instrument lists the travel agents in the PRC who are able to lodge Tourist visa applications under the ADS scheme. Effective from 26 February 2009.

Migration Regulations 1994 – Specification of addresses for the purposes of paragraph 1211(3)(ab) – February 2009 (Legislative Instrument – F2009L00824). This instrument, registered on 4 March 2009, specifies addresses for lodgement of applications for Class TK visas. Effective from 1 April 2009.

Migration Regulations 1994 – Specification under paragraph 8205(a) – Designated Countries to Which Condition 8205 Does Not Apply – March 2009 (Legislative Instrument – F2009L01131). This instrument, registered on 26 March 2009, specifies designated countries to which condition 8205 does not apply. Effective from 28 March 2009.

Migration Regulations 1994 – Specification under clauses 846.111, 855.111, 856.111 and 857.111 – Health Waiver – Participating States and Territories (Legislative Instrument – F2009L01182). This instrument, registered on 25 March 2009, supports provisions in the Regulations which require that applicants (and their non-migration family members) for visa subclasses 846 (State/Territory Sponsored Regional Established Business in Australia), 885 (Labour Agreement), 856 (Employer Nomination Scheme) and 857 (Regional Sponsored Migration Scheme) satisfy Public Interest Criterion (PIC) 4007 if the applicants reside (or propose to reside) in the ACT and Victoria. Effective from 28 March 2009.

CASELOAD OVERVIEW

MRT Decisions – March 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	1	8	0	0	9
Visitor refusal	31	16	1	8	56
Student refusal	10	17	0	5	32
Temporary business refusal	17	16	15	5	53
Permanent business refusal	1	5	0	0	6
Skill linked refusal	34	16	11	9	70
Partner refusal	61	20	7	2	90
Family refusal	21	18	2	2	43
Student cancellation	19	14	2	0	35
Sponsor approval refusal	3	6	0	2	11
Other	14	8	38	7	67

RRT Decisions – March 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	0	1	0	0	1
Bangladesh	1	13	0	6	20
China (PRC)	21	86	0	0	107
Cote D'Ivoire	1	0	0	0	1
East Timor	0	1	0	0	1
Egypt	0	2	0	0	2
Ethiopia	1	2	0	0	3
Fiji	0	5	0	0	5
Ghana	0	2	0	0	2
India	0	40	1	1	42
Indonesia	1	5	0	0	6
Iran	0	1	0	0	1
Iraq	1	1	0	0	2
Israel	0	1	0	0	1
Kenya	3	2	0	0	5
Korea, Republic Of	1	3	0	2	6
Lebanon	2	1	0	0	3
Malaysia	1	14	0	1	16
Morocco	0	1	0	0	1
Nepal	1	4	0	0	5
New Zealand	0	0	1	0	1
Nigeria	0	2	0	0	2
Pakistan	0	8	0	0	8
Papua New Guinea	0	2	0	0	2
Russian Federation	1	0	0	0	1
Serbia & Montenegro	0	1	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	1	3	0	0	4
Syria	2	0	0	0	2
Tonga	0	1	0	0	1
Turkey	2	0	0	0	2
Uganda	1	2	0	0	3
Zimbabwe	1	0	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 40% 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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