



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

071796512

20 March 2009, Sydney

Mr C Packer, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 (BUSINESS (LONG STAY)) – CL.457.223(7A) – “THE BUSINESS” – A delegate of the Minister refused to grant the applicant a Subclass 457 visa on the basis that he did not satisfy cl.457.223 of the Regulations because he did not have adequate net assets to conduct the business. On the application, the applicant claimed “The company is running petrol station in Sydney and has explored other opportunities related to import of goods from overseas”. The petrol station had ceased activities, however the applicant claimed he still had an interest in the company which was an investment company, and was setting up a new business in Australia. He claimed he had a contract to assemble car audio equipment. The applicant also advised the company operated a courier service and frozen food distributions. Further, he claimed the business had links to his Egyptian business that was still running.

Held: Decision under review affirmed

The Tribunal found “the business” referred to in cl.457.223(7A) was the business enterprise or activity, rather than the entity conducting the business, therefore, it did not accept that the applicant’s company by itself could satisfy the Regulation. The Tribunal was not satisfied that the applicant operated a courier service and frozen food distribution. It also found that neither a proposed business nor the Egyptian business, which was separate from the Australian business, could satisfy the requirement that the applicant had been “conducting the business in Australia”. There was no compelling information to show that the applicant conducted any other business activities in Australia and the Tribunal concluded that the applicant satisfied cl.457.223(7A)(b) because at the time of application he had conducted the petrol station business as a principal for at least 15 months. The Tribunal considered that if the term “the business” in both cl.457.223(7A)(b) and (c) means an identified business, the plain grammatical construction is that it is the same business in each. The petrol station operating at the time of application ceased because it was not profitable. Therefore, the Tribunal was not satisfied that the business was of benefit to Australia and that the applicant had a genuine and realistic commitment to maintain an ownership interest, or direct and continuous involvement, or to make decisions that affected the overall direction and performance of the business, or there was a need for him to be temporarily resident in Australia to conduct the business. It further found, even if the business at the time of application could be a different business to that at the time of decision there was nothing to suggest that the applicant could meet those requirements since, on the material before it, the Tribunal was not satisfied there was any business in Australia being conducted by the applicant as a principal. It found that the requirements in cl.457.223(7A)(c)(i),(ii) and (v) were not met for the grant of the visa.

0803195

23 March 2009, Melbourne

Mr D Mitchell, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 (BUSINESS (LONG STAY)) – CL.457.223(4)(eb) – ENGLISH PROFICIENCY – JURISDICTION – A delegate of the Minister refused to grant the applicant a Subclass 457 visa on the basis that he did not satisfy cl.457.223(4) of the Regulations because he did not have an acceptable level of English language proficiency. The visa application was accompanied by an application for approval as a business sponsor from the applicant’s proposed employer and three business nominations. The applicant claimed the application for approval as a business sponsor was approved for two business nominations pursuant to r.1.20D(4) and the Department informed the proposed employer the lodged nominations exceeded those approved by one. The applicant claimed his proposed employer agreed to withdraw a nomination referred to only by its number. The number cited was the nomination relating to the applicant. The proposed employer submitted it was not his

intention to withdraw his sponsorship and he still wanted the applicant to work for him. The applicant also claimed that while the IELTS test results that accompanied the application showed the applicant achieved an overall score of 4.0 a further test showed an overall score of 4.5.

Held: Decision under review set aside

The Tribunal found there was a preliminary jurisdictional question because it appeared the applicant was not sponsored by an approved sponsor when he lodged the review application as required by s.338(2)(d) of the Act and 4.02(1A) of the Regulations. However, the Tribunal took into account that the applicant's business nomination was the only one linked to a nominee and the withdrawal referred only to the nomination number, not the applicant's name. It accepted that confusion may have arisen between the proposed employer and the Department as it considered it unlikely the proposed employer intended to withdraw the only nomination with a nominee. The Tribunal afforded the proposed employer and the applicant the benefit of the doubt and accepted that there was no intention to withdraw the applicant's nomination. It therefore found the withdrawal was not legally effective and it had jurisdiction in the matter. The Tribunal then considered whether the applicant had a level of English language proficiency equivalent to at least the level required to achieve an IELTS test average band score of 4.5 on the 4 test components of speaking, reading, writing and listening. The Tribunal had regard to the later IELTS test results and was satisfied the applicant had the requisite level of English proficiency and was satisfied he met cl.457.223(4)(eb) of the Regulations for the grant of the visa.

0808613

31 March 2009, Sydney

Mr D O'Brien, Principal Member

ESTABLISHED BUSINESS (RESIDENCE) (CLASS BH) – SUBCLASS 845 (ESTABLISHED BUSINESS IN AUSTRALIA) – CL.845.216 – DAY TO DAY MANAGEMENT OF THE BUSINESS – A delegate of the Minister refused to grant the applicants Subclass 845 visas on the basis that the primary applicant, as the owner of an interest in a main business in Australia, had not maintained direct and continuous involvement in the management of that business from day to day and in making decisions that affected the overall direction and performance of that business in the 12 months immediately preceding the making of the application. The primary applicant stated that she owned 100 per cent of a business, which was engaged in flooring and painting services. She claimed to be involved in all aspects of running the business, including giving quotes for jobs, meeting with builders, ordering supplies and scheduling jobs. She further claimed most work was picked up through her direct approaches to builders and owners. The primary applicant claimed she had three employees and a contractor whose fluent English had initially helped her win work, but who was no longer engaged with the business. An anonymous "dob-in" phone call asserted that the primary applicant only had a "paper" business and her employees worked elsewhere. The primary applicant also accidentally left a sheet of paper with prepared answers to questions typed in English at a cancelled interview. She claimed she had been nervous about the interview, had limited English and thought there might not be an interpreter, so had typed some prepared answers.

Held: Decision under review set aside

The Tribunal accepted that the primary applicant was the owner of an interest in the business concerned. Further, the Tribunal held it was clear that she managed the employees who performed the services in that she directed them in relation to the jobs to be performed and looked after their pay, superannuation, and workers compensation cover. It was also satisfied that while there was a person engaged on a contract basis to use his English speaking skills to win work for the company, it was clear that the primary applicant was the proprietor of the business and managed his role, dispensing with his services later when she no longer felt need of them. As to the primary applicant's involvement in making decisions that affected the overall direction and performance of the business, it was satisfied she had responsibility for the path the company took to seek to obtain and to secure work and for the jobs it did and for those it chose not to do. Therefore, the Tribunal accepted that during the relevant period the applicant maintained direct and continuous involvement in the management of the business from day to day and in making decisions that affected the overall direction and performance of the business. The Tribunal accorded no weight to the "dob-in" information as it was at odds with evidence showing the company as the employer. The Tribunal was also not concerned about the material the primary applicant took to the interview to "prompt" her as it was an important interview which she treated as such by preparing for it. The Tribunal was of the view that the

delegate's reference to this document as a "cheat sheet" reflected poorly on the Department. Thus the Tribunal found that the applicant satisfied the requirements of cl.845.216 of the Regulations for the grant of the visa.

Partner and Family Visas

0806774

4 March 2009, Sydney

Ms G Cullen, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 (SPOUSE (PROVISIONAL)) – CL.309.211 – R.1.15A(1A)(b) – GENUINE SPOUSE – A delegate of the Minister refused to grant the visa applicant a Subclass 309 visa on the basis that he did not meet cl.309.211 of the Regulations because the applicants did not have a mutual commitment as a shared life as husband and wife to the exclusion of others. The applicants claimed they cohabited as husband and wife in Cambodia before their marriage when the review applicant became pregnant. They provided ultrasound and DNA reports, a birth registration statement and other evidence in support of their application.

Held: Decision under review set aside

In considering the elements in r.1.15A(3), the Tribunal placed little weight on the absence of evidence of a financial relationship as the applicants had not had an opportunity to build a permanent life together. It considered that the visa applicant was a student and the review applicant only twenty and did not expect them to have significant assets to share. Despite the delegate's views that they would not cohabit immediately upon the review applicant's arrival given the traditional nature of Cambodian society and the date of the child's conception was while they were in different countries, the Tribunal was satisfied the applicants cohabited for 13 weeks. The Tribunal did not accept the delegate's concerns that the visa applicant fabricated answers to give the perception that he fathered the child, the review applicant had limited knowledge of his character and personal circumstances, or that there was no evidence of communication between them. Rather, it accepted the DNA evidence confirming the visa applicant was the father and the date of conception apparent from the ultrasound, taking into account that the report's due date was calculated from the first day of the last menstrual period rather than the actual date of conception. It viewed this as strong evidence supporting cohabitation which it found went to the nature of their household and commitment to each other. The Tribunal found that the parties had socialised together and represented themselves to other people as being in a marital relationship despite the delegate's concern that the review applicant's family had not attended the wedding. It accepted that her mother was ill, her father dead, and her aunt had attended. It also accepted her mother met the visa applicant's parents to discuss the marriage. The Tribunal was satisfied the applicants had a mutual commitment to a shared life as husband and wife, to the exclusion of all others, and the relationship was genuine and continuing. Accordingly, the visa applicant was the spouse of the review applicant and they met the requirements of cl.309.211 and cl.390.221 of the Regulations for the grant of the visa.

071952986

13 March 2009, Melbourne

Mr P Tyler, Member

CONTRIBUTORY PARENT (MIGRANT) (CLASS CA) – SUBCLASS 143 (CONTRIBUTORY PARENT) – CL.143.211 – AUSTRALIAN CITIZEN – A delegate of the Minister refused to grant the visa applicants Subclass 143 visas on the basis that they did not satisfy cl.143.211 of the Regulations because they were not the parents of a person who was a settled Australian citizen, Australian permanent resident, or eligible New Zealand citizen. The applicants claimed they arrived in Australia in 2000 and were the holders of Long-Stay Temporary Work visas when their son, the review applicant, was born in 2004. The primary visa applicant claimed that in 2005 he met with the Victorian Shadow Minister for the Environment to discuss his immigration options. He claimed that he provided all his documents and was told that because the review applicant was born in Australia he was entitled to an Australian passport. The primary visa applicant further advised that he went to the Post Office and filled in the forms, and that a Post Office officer rang the Department and was told to include a copy of his passport and visa with the passport application. Ten days

after the Post Office forwarded the application to the Passport Office, the primary visa applicant received the review applicant's Australian passport by registered mail. He claimed that he believed, having received the passport, that the review applicant was an Australian citizen who could sponsor the applicants. The primary visa applicant claimed that in 2008 he and his family wished to travel overseas, however, at the airport immigration desk, they were stopped and after questioning, his son's passport was taken by the Immigration Officer.

Held: Decision under review affirmed

The Tribunal accepted that the primary visa applicant was the parent of the review applicant but found no evidence that the review applicant was a settled Australian citizen. It found that the fact that the review applicant was issued an Australian passport did not of itself make him an Australian citizen. It noted s.10(2)(a) of the *Australian Citizenship Act 1948* stated a person born in Australia shall be an Australian citizen by virtue of that birth only if a parent was, at the time, an Australian citizen or a permanent resident, or the person had been ordinarily resident in Australia throughout the period of 10 years commencing on the day the person was born. The Tribunal was not satisfied the review applicant met the requirements of that section. Further, the Tribunal was not satisfied the review applicant was an Australian permanent resident because he was not the holder of a permanent visa, nor was there any evidence to indicate that he was an eligible New Zealand citizen. Therefore, the applicants did not meet cl.143.211(a) of the Regulations. The Tribunal also found that the primary visa applicant had never held a Contributory Parent (Temporary) Subclass 173 visa or a substituted Subclass 676 visa. Therefore, the applicants did not meet cl.143.211(b) of the Regulations. The Tribunal noted the primary visa applicant's concerns about the negative impact on his 11 year old son who had lived most of his life in Australia and was unable to speak his parents' native language. However, it did not have the power to waive mandatory visa criteria, although it did note that the Minister may intervene once the Tribunal had made an unfavourable decision. Accordingly, the Tribunal found that the primary visa applicant did not satisfy cl.143.211 to the Regulations.

0900483

18 March 2009, Sydney

Ms K Raif, Member

CHILD (RESIDENCE) (CLASS BT) – SUBCLASS 802 (CHILD) – CL.802.213 – ADOPTED CHILD – A delegate of the Minister refused to grant the applicant a Subclass 802 visa on the basis that she did not meet cl.802.213 because her sponsor was the adoptive parent of the applicant and the adoption did not meet any of the alternative provisions in that Regulation. The applicant presented a copy of an adoption order and a birth certificate naming the sponsor and her husband as her parents. The applicant claimed that in the absence of her sponsor she would not have anyone to care for her, as her biological mother had to hide from her family who disowned her and her father did not want anything to do with the family. The applicant claimed that the sponsor could not have children and made a rushed decision when she and her husband adopted the applicant who was born suddenly and prematurely. Consequently, she and her husband did not have a chance to reside overseas for 12 month. The applicant further claimed that her sponsor had been unaware that she could seek approval for the adoption from a competent authority in Australia as required under Article 14, Chapter IV of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (the Adoption Convention). The applicant claimed that her sponsor had provided special care for her since birth because she was premature and if the visa was not granted, she would give up her job and return to Malaysia in order to reside with the applicant.

Held: Decision under review set aside

The Tribunal was not satisfied on the evidence before it that the adoption of the applicant was in accordance with the Adoption Convention and an adoption compliance certificate was in force in relation to the adoption. It was, therefore, not satisfied that the applicant met cl.802.213(2) of the Regulations. The Tribunal accepted that the Sponsor was an Australian citizen at the time when the adoption took place and thus the applicant did not meet cl. 802.213(3). Further, it found that no evidence had been presented to demonstrate that before the adoption, a competent authority in Australia had approved the sponsor as a suitable adoptive parent, or the sponsor and her husband as suitable adoptive parents, for the applicant precluding the applicant from meeting cl.802.213(4). The Tribunal found that the sponsor had not resided overseas for a period exceeding 12 months when the adoption took place and did not meet cl.802.213(5)(b)(i) of the Regulations. However, it accepted the applicant's claims about her circumstances and relationship with the

sponsor, finding she had cared for the applicant since birth and formed a close relationship with the child. The Tribunal was satisfied that these circumstances constituted compelling or compassionate circumstances so that cl.802.213(5)(b)(i) should not apply to the applicant. The Tribunal was also satisfied that cl.802.213(5)(c) did not apply and the sponsor had lawfully acquired full and permanent parental rights by the adoption satisfying cl.802.213(5)(d) of the Regulations. Consequently, the Tribunal found that the applicant satisfied the requirements of cl.802.213 of the Regulations for the grant of the visa.

0805214

20 March 2009, Melbourne

Ms R Gagliardi, Member

CHILD (MIGRANT) (AH) – SUBCLASS 117 (ORPHAN RELATIVE) – CANCELLATION – S.109 – SS.101, 103, 104 – INCORRECT INFORMATION – BOGUS DOCUMENTS – CHANGED CIRCUMSTANCES – A delegate of the Minister cancelled the applicant's Subclass 117 visa under s.109 of the Act on the basis that he had not provided correct information on his visa application, provided bogus documents, and failed to notify the Department of changed circumstances. The applicant was granted the visa as an orphan whose mother was deceased and father was missing, presumed dead. Subsequently, visitor visa applications were lodged in the names of his father and mother, although the applicant claimed it was his stepmother using the false identity of his deceased mother. While the applicant admitted that he was aware of his father's location, he claimed that at the time of his application his father's whereabouts was unknown. He claimed that he subsequently discovered that his father had secretly married another woman in Eritrea after he was married to the applicant's mother and had a daughter with his new wife. He further claimed that his father had used the refugee documents of the applicant's mother and sister to take his other family to Sudan and then to Saudi Arabia. The applicant claimed he did not inform the Department of these events as he was unaware of his obligation to do so. The applicant also gave various explanations for what appeared to be alterations to his Eritrean passport. The applicant's claims were confirmed by his siblings, other relatives, and community members, who also stressed his success at university and his community work with new migrants.

Held: Decision under review set aside

The Tribunal found that on balance the applicant was likely to have known that his father was alive at the time of application, and thus gave incorrect answers on his application in breach of s.101 of the Act. Because of the inconsistencies between the applicant's passport and visa application, the Tribunal also found that the applicant had provided false documentation and thus breached s.103 of the Act. The Tribunal did not accept that the applicant would have advised the Department immediately about changes to his circumstances had he known he was obliged to do so given that the reason he had been granted his visa was no longer accurate as he was, in effect, no longer an orphan. It therefore found that he had breached s.104 of the Act. In considering whether to exercise its discretion to cancel the applicant's visa the Tribunal noted that the applicant was still a minor, or close to a minor, when the application was commenced. It determined that if some elaborate chain of untruths had been presented to the Department (which the Tribunal had not been able to demonstrate was the case beyond all reasonable doubt) this occurred at the prompting of older family members. The Tribunal thus considered that it would be an extreme outcome were the applicant to be sent to Eritrea and expected to survive on his own and without support in what would be virtually a foreign country. The Tribunal noted that if the applicant was returned to Eritrea the course of his life would take a detrimental turn and the money and effort invested in his studies would be wasted. The Tribunal further took into account the applicant's apparent genuine desire to make a valuable contribution to Australian society and noted that he had proven himself as someone with a good reputation in his community. In considering the circumstances as a whole, the Tribunal concluded that the visa should not be cancelled.

Student visas

0808918

12 March 2009, Sydney

Ms D Dimitriadis, Member

STUDENT (TEMPORARY) (TU) – SUBCLASS 571 (SCHOOLS SECTOR) – CANCELLATION S.137L – CONDITION 8202(3)(b) – COURSE ATTENDANCE – A delegate for the Minister refused to revoke the automatic cancellation of the applicant's Subclass 571 visa under s.137L of the Act. The applicant's education provider sent him a notice under s.20 of the *Education Services for Overseas Students Act 2000* (the ESOS Act) certifying that he had not achieved satisfactory course attendance and had breached Condition 8202(3)(b) of the Regulations. The applicant failed to respond to the notification within 28 days and the visa was automatically cancelled under s.137J of the Act. The applicant claimed that his non-compliance was due to abdominal pain that prevented him from attending classes. The applicant also claimed that sometimes the pain was so strong that he could not get out of bed. He claimed he went to see a herbalist who told him to take Chinese medicines for a few months, but when this did not work he went to a Western doctor who diagnosed a peptic ulcer and prescribed medication. The applicant submitted a medical report stating that, although subsequent tests may provide evidence of an earlier condition, tests conducted during the review showed no disease, lesions or infections. The applicant further claimed that if he was more than 10 minutes late for class he was marked absent, but he still went because he wanted to learn. He also claimed he was the oldest son and his parents could only afford to send him to study in Australia. He claimed to need Australian qualifications in order to obtain a good job so he could care for his parents according to Chinese tradition.

Held: Decision under review affirmed

The Tribunal found no failure to accurately monitor the applicant's attendance, give him access to a complaints or appeals process, or concerns about errors, inappropriate actions or omissions in the process or reporting of the non-compliance. Therefore, it was satisfied that the applicant was sent a notice under s.20 of the ESOS Act as required by s.137J of the Act and the provisions that activated the automatic cancellation of the visa were enlivened. The Tribunal was further satisfied that the applicant's education provider had certified the applicant as not achieving satisfactory course attendance and found that he breached Condition 8202(3)(b). The Tribunal did not accept that the applicant's abdominal pain was so severe as to cause him to be unable to attend class or be late for school. It found this inconsistent with not going to a doctor until after his visa was cancelled and his statement he did not see a doctor because it was too much hassle, not a serious condition and he would get better. It also noted there was no medical evidence he suffered further pain between going to the herbalist and attending the doctor and tests showed no disease, lesions or infections. The Tribunal considered the applicant's evidence about his hopes and his family's hopes for him, and his obligations to support his parents when they became old. However, it was satisfied that his non-compliance with Condition 8202 was not due to exceptional circumstances beyond his control and the automatic cancellation of the applicant's student visa could not be revoked.

0802807

27 March 2009, Melbourne

Ms M Hodgkinson, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 (VOCATIONAL EDUCATION AND TRAINING SECTOR) – CL.572.223(2)(a)(i)(A) – COMPLETED A SUBSTANTIAL PART – A delegate of the Minister refused to grant the applicant a Subclass 572 visa on the basis that he did not have the requisite English language proficiency set out in cl.5A404(d)(iii) of the Regulations because he had not successfully completed a substantial part of a course (other than a foundation course) that was conducted in English and was leading to a qualification from the Australian Qualifications Framework (AQF) at the Certificate IV level or higher. The applicant claimed he was enrolled in an Advanced Diploma of Hospitality Management (Commercial Cookery) and submitted his course transcript showing that he had passed 21 out of 61 units. However, he claimed he had completed over 50% of a Certificate IV of Hospitality (Commercial Cookery) qualification nested in the Advance Diploma as per the requirements of the Hospitality and Tourism Training Package

Held: Decision under review set aside

The Tribunal accepted that the applicant had enrolled in an Advanced Diploma in Hospitality course and had completed 50% of the nested Certificate IV in Hospitality course in the 2 years prior to the application lodgement. The Tribunal noted that while it was guided by the Department's policy, it was not bound by it and if policy required more than the legislation stated, it was unlawful and an error on the part of the Tribunal to apply it. Subparagraph 5A404(d)(iii) of the Regulations requires that an applicant successfully completed a substantial part of a course leading to a qualification from the AQF at the Certificate IV level or higher. The Tribunal found the policy departed from the legislation in referring to *the course in which the applicant was enrolled*. The Tribunal considers that the policy should not be followed to the extent that it required that the applicant have completed a substantial part only of the course in which he was enrolled. The Tribunal further found that while the policy on nested courses was ambiguous there was no basis for requiring the applicant to complete the whole of the nested course, which would put him in a worse position than a student who had enrolled in a lower course. Consequently, the Tribunal was satisfied that, although it was not the course in which he was enrolled, in the 2 years prior to the application being lodged, the applicant successfully completed a substantial part of a course that was conducted in English and was leading to a qualification from the AQF at the Certificate IV level or higher, within the meaning of cl.5A404(d)(iii) of the Regulations. Accordingly, the applicant met the requirements of cl.572.223 for the grant of a Subclass 572 visa.

0808895

27 March 2009, Melbourne

Ms K Synon, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 (HIGHER EDUCATION SECTOR) – CANCELLATION – S.116(1)(b) – CONDITION 8202 – A delegate of the Minister cancelled the applicant's Subclass 573 visa under s.116(1)(b) of the Act on the basis that he did not comply with Condition 8202 of the Regulations because his education provider certified him as not achieving satisfactory course progress for s.19 of the Education for Overseas Students Act 2000 (the ESOS Act) and Standard 10 of the National Code of Practice for Registration Authorities and providers of Education and Training to Overseas Students (National Code). The applicant claimed the original notice under s.20 of the ESOS Act containing the certification included the wrong Certificate of Enrolment and the Department decided not to cancel the visa. He claimed he was then issued with a second notice. He further claimed the reasons his visa should not be cancelled were the same as when the Department originally decided not to cancel the visa. That is, the applicant claimed he passed 12 out of 13 subjects and had completed all but a two-day practical component for his Certificate IV in Hospitality (Commercial Cookery). He claimed to be awaiting an allocated date for that component and had started a Diploma in Hotel Management. He also claimed problems with his living arrangements had been resolved and he had intended to appeal the certificate but his friend had forgotten to send the letter.

Held: Decision under review set aside

The Tribunal was satisfied the applicant did not comply with a condition of his visa and the ground for cancellation in s.116(1)(b) of the Act existed. It found the applicant's course provider had, as a matter of fact, certified that he had not achieved satisfactory course progress for s.19 of the ESOS Act and Standard 10 of the National Code 2007. Therefore, he had not complied with Condition 8202(3)(a) of the Regulations. However, the Tribunal noted that a letter from the course provider sent, as part of its complaints and appeal process, between the first and second s.20 notices incorrectly advised the applicant of unsatisfactory attendance. As such, the Tribunal was satisfied that the certification process was defective in that it failed to properly advise of and implement an appropriate internal handling and appeals process as required under Standards 10.6 and 8 of the National Code. The Tribunal found non-compliance was due to exceptional circumstances beyond the applicant's control and therefore prescribed circumstances requiring mandatory cancellation in accordance with s.116(3) did not exist. In considering whether to exercise its discretion to cancel the visa, the Tribunal noted that, rather unusually, the Department had granted the applicant continuing (restricted) study rights suggesting that both the Department and the education provider were prepared for the applicant to continue in his studies. It also considered the fact that he had only failed one course and the education provider's handling of the matter relevant. Accordingly, the Tribunal concluded the visa should not be cancelled.

Visitor visas

0808307

13 March 2009, Melbourne

Mr G Robinson, Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 (SPONSORED FAMILY VISITOR) – CL.679.214 – RELATIVE – A delegate for the Minister refused to grant the visa applicants Subclass 679 visas on the basis that they did not satisfy cl.679.214 as they were not sponsored by a relative who was a settled Australian citizen or settled permanent resident. The review applicant claimed that his wife was a temporary resident in Australia and did not qualify to sponsor her sister and her sister's husband. However, he claimed that he was an Australian citizen and could act as a sponsor for his sister-in-law and brother-in-law. The review applicant claimed to be a busy businessman with little time to care for his pregnant wife. He stated that he intended the visa applicants to visit Australia to assist with his wife's pregnancy and care for her and the baby.

Held: Decision under review affirmed

The Tribunal found that the primary visa applicant was the sister-in-law of the review applicant. As a sister-in-law or brother-in-law relationship did not fall within the definition of "relative" or "close relative" as defined in r.1.03 of the Regulations, the Tribunal found that the primary visa applicant was not sponsored in accordance with cl.679.214(a) of the Regulations. It further found that there was no suggestion that the review applicant was one of the types of persons set out in cl.679.214(b) and (c) who may also have acted as sponsors. Whilst sympathetic to the review applicant's family situation, the Tribunal held it did not have the discretion to allow the application as proposed by the review applicant. Consequently, the Tribunal found that the applicant did not satisfy the requirements for cl.679.214 of the Regulations for the grant of the visa.

Other visas

0801765

26 March 2009, Sydney

Ms K Raif, Member

WORKING HOLIDAY (TEMPORARY) (CLASS TZ) – CL.417.211 (WORKING HOLIDAY) – SEASONAL WORK – A delegate of the Minister refused to grant the applicant a Subclass 417 visa on the basis that he did not satisfy cl.417.211 of the Regulations because he had not carried out seasonal work in regional Australia for a total period of at least 3 months. The applicant claimed to have entered Australia on a Working Holiday visa and completed a 12 week fruit picking job so that he could remain for another year. He claimed he had worked five to six weeks on a Juicy Grapes farm when his employer, who knew that he was working for the 12 week period to extend his working holiday, offered him work with Garraway Earthmoving repairing dams. He claimed he then worked a further six weeks fixing dams. The applicant stated that he accepted the offer, thinking that he was helping the farmer, and assumed that this was a continuation of his previous work and would count towards the 12 weeks seasonal work.

Held: Decision under review affirmed

The Tribunal accepted that the applicant had previously entered Australia on a working holiday visa. It noted the definition of "seasonal work" appeared in cl.417.111, being any type of work undertaken as the employee of a primary producer. It further noted the legislation offered no definition of "primary producer", but the Macquarie Dictionary defined the term as "someone who works in a primary industry as a farmer, a fisher, etc. or a business or industry devoted to primary production". The Tribunal found that the applicant's work for Garraway Earthmoving was work for a dam construction company. It held that while the dams may have been constructed for use by the farmers, construction of a dam was not work in a primary industry or a business devoted to primary production. Nor did the fact that the applicant lived with the farmers render the dam construction business a primary business. As such, the Tribunal was of the view that Garraway Earthmoving was not a "primary producer". The Tribunal also considered guidance in the relevant Legislative Instrument, that the repair of dams was not work that constituted seasonal work. The Tribunal was not satisfied that any of the employment performed by the applicant, other than his employment for Juicy

Grapes, was seasonal work and found the five or six weeks he worked for the farm was not a period of at least three months. The Tribunal acknowledged the applicant's argument that he performed the work on the dam in good faith and expected the farmer to be aware of the visa requirements; however, it had no discretion with respect to those matters. Accordingly, the Tribunal was not satisfied that the applicant met the requirements of cl.417.211(5) of the Regulations for the grant of the visa.

REFUGEE REVIEW TRIBUNAL DECISIONS

Bangladesh

0808455

13 March 2009, Sydney

Mr G Short, Senior Member

BANGLADESH – PARTICULAR SOCIAL GROUP – HOMOSEXUALS – The applicant claimed to fear persecution for reasons of his membership of the particular social group “homosexuals in Bangladesh”. The applicant claimed to have had his first sexual homosexual relationship with a friend from school, followed by a brief affair with a fellow attendee at a church program and then a relationship with a College room mate. After moving out of College he claimed to have begun a relationship with his next door neighbour. The applicant claimed to have been caught having sexual intercourse, beaten and threatened to desist from homosexual behaviour in each of these relationships. The applicant further claimed that the sibling of his boyfriend had begun to follow him after discovering them having sex. He claimed that after arriving in Australia they lived in the same house, but in separate rooms, held hands in public and visited a renowned gay venue. An anonymous message received from Bangladesh stated that the applicant’s partner’s claims to be gay were “totally bogus”. The applicant claimed that the message was sent by his former representative because they were no longer using her services and she had lost money as a result.

Held: Decision under review affirmed

The Tribunal did not accept that the applicant was a homosexual, or that he had provided a truthful account of his past experiences in Bangladesh. The Tribunal did not accept the applicant’s account of his three homosexual relationships or that he was discovered having sex with each partner in the circumstances claimed. Nor did the Tribunal believe that he was beaten on each occasion. The Tribunal consequently did not accept that before the applicant left Bangladesh he was being followed by his partner’s sibling. The Tribunal noted that the applicant and his partner had given mutually corroborating evidence regarding their relationship. However, it found in a separate decision that it did not accept that the applicant’s partner was homosexual, and as such gave no weight to that corroboration. The Tribunal accepted the applicant and his partner fell out with their former representative, but noted the anonymous message only contained information about his partner suggesting the sender had knowledge of the partner, but not the applicant. It commented that it would not ordinarily place weight on such a message; however, it considered it significant that the informant was clearly close to the applicant’s partner and accordingly gave it some weight. The Tribunal accepted that since arriving in Australia, the applicant and his partner had held themselves out to other people as homosexual partners, held hands in the street and visited homosexual venues. However, as the Tribunal did not accept that the applicant was homosexual, it was not satisfied that he engaged in this conduct otherwise than for the purpose of strengthening his claim to be a refugee and therefore disregarded the conduct in accordance with s.91R(3) of the Act. Thus, the Tribunal did not accept that there was a real chance that the applicant would be persecuted if he returned to Bangladesh. Consequently, it was not satisfied he had a well-founded fear of persecution for a Convention reason.

China

0808438

5 March 2009, Sydney

Ms A O’Toole, Member

CHINA – RELIGION – TIBETAN BUDDHISM – The applicant claimed to fear persecution for reasons of his religion. The applicant claimed he was a Tibetan Buddhist. He claimed he attended a gathering in the ancient Monastery to read Buddhist Bibles and peacefully protest against Chinese oppression and violence towards religious freedom. The applicant claimed that while they were meditating, military trucks loaded with fully armed police raided the Monastery. They attacked the Buddhist followers with batons and beat people to the ground; their faces covered in blood regardless of old or young, male or female. The applicant claimed women were screaming for help and young children were crying. He further claimed when some followers started resisting with bare hands to protect the young they were violently subdued. The applicant

claimed he was handcuffed and kicked in the face. He claimed while he was detained he was beaten; asked if he was being directed by the Dalai Lama; told he was not Tibetan and was a traitor to the Han. The applicant claimed he was released when he undertook to report weekly to the police and that he could not leave the country without permission. He claimed that when he travelled to Australia and did not report, his family was subjected to constant surveillance and harassment. The applicant claimed that if he returned he would face arrest, torture, and mistreatment, and that the police would find him if he relocated.

Held: Decision under review set aside

The Tribunal accepted that the applicant was a practicing Tibetan Buddhist and that he had a profile as a Tibetan Buddhist who had attended a silent protest at the Monastery in support of the views of the Dalai Lama and the practice of Tibetan Buddhism. It was satisfied that all Tibetan Buddhists, especially those of Han ethnicity, have a real chance of persecution because of their religious practice. The Tribunal also accepted that the applicant had discontinued his reporting and departed China, showing a blatant disregard for restrictions placed upon him that it found would attract adverse attention. It noted that prior to the incident the applicant held a good position and lived happily in China and accepted he did not anticipate that he would be the victim of persecution. It was satisfied that the harm feared was physical harassment or mistreatment sufficiently serious to constitute persecution. It was further satisfied that the essential and significant reason the applicant would face persecution was for reasons of his religion. The Tribunal could not exclude as remote and insubstantial the chance that if he returned to China he would face persecution. The Tribunal was also satisfied that relocation was not a safe option for the applicant. Accordingly, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

0808443

9 March 2009, Sydney

Mr D O'Brien, Principal Member

CHINA – RELIGION – CATHOLIC – The applicant claimed that he feared persecution for reasons of his religion. The applicant claimed that he was brought up by Catholic parents and attended an underground Catholic church. He claimed that he and his fellow brothers and sisters were arrested and detained while attending an underground church gathering at his house. He claimed they were taken to the police station where they were beaten with clubs. The applicant claimed that he came to Australia to avoid being arrested again and put in jail or a mental hospital. He claimed he did not attend Catholic Mass regularly in China, but had been baptised and attended Catholic Church in Australia.

Held: Decision under review affirmed

The Tribunal placed no emphasis on minor inconsistencies as they occur for a variety of reasons unconnected with the credibility; however it expected the applicant to be able to give a coherent account of central elements and found his evidence was not consistent with his claim to be a Catholic. It found that his description of his baptism ritual did not approximate the rite in the Christian religion, despite information indicating the rite in underground Catholic churches in China was the same as that followed in the universal Catholic Church. It further found he did not know the Lord's Prayer, a universal prayer of all Christian denominations, and was unable to name the Old or New Testaments as constituting parts of the Bible. Nor could the applicant explain the significance of Easter or Christmas. The Tribunal expressed concerns about his claim not to have attended Mass regularly despite regular attendance at Mass being one of the central obligations of a Catholic. A fundamental inconsistency in the applicant's story about whether he and his brothers and sisters were beaten by police, lead the Tribunal to find that he was not arrested and detained as a result of any involvement in an underground church. Further, the Tribunal found the applicant's evidence about his attendance at Catholic Church in Australia vague, and concluded if he did so it was for the purpose only of strengthening his claim to be a refugee. It therefore disregarded this conduct in considering his claims in accordance with s.91R(3) of the Act and found that there was nothing to point to his being a genuine Catholic. Consequently, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Fiji

0808669

17 March 2009, Melbourne

Ms N Burns, Member

FIJI – POLITICAL OPINION – ANTI-GOVERNMENT – RELIGION – CHURCH MEMBER – The applicant claimed to fear persecution for reasons of her political opinion and religion. The applicant claimed protection on the basis of political instability and the fact that Fiji did not have a democratically-elected government. She claimed that the political instability had affected her capacity to earn an income in the tourist industry and with the overall cost of living she feared she would be unable to financially support her family. She claimed that after the December 2006 coup, the general instability led to a decline in tourist numbers that resulted in her being temporarily out of work. The applicant further claimed she feared being held liable for speaking against the military interim government in her visa application. She confirmed that she had not spoken out against the government at any other forum and had never been politically active. The applicant also claimed to fear being targeted by the military due to her religion as she was a member of a Church in which several members had been arrested and killed by the military during the December 2006 coup.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was legitimately upset about the lack of democracy in Fiji and genuinely concerned about employment opportunities. However, it found that the applicant did not have a political profile and, apart from her visa application form, had not spoken out against the interim government. The Tribunal did not find any clear evidence that people who criticised the interim government were targeted for serious harm or otherwise faced discriminatory treatment. It found the applicant had not suffered serious harm in the past and did not accept that she faced a real chance of suffering persecution due to her political opinion and the broader political instability now or in the reasonably foreseeable future. The Tribunal accepted that several Church members had been killed during the 2006 coup, however, there was no evidence to suggest that this was for the essential and significant reason of their religion. The Tribunal had regard to articles reporting human rights abuses, deaths in custody, restrictions on speech and press freedoms, and about the Methodist church speaking out against the interim government. However, as they did not mention the applicant's church the Tribunal gives them little weight. While there were reports of societal abuses or discrimination based on religious belief or practice, these reports were isolated and the Tribunal accepted the government generally respected religious rights and freedoms. The applicant herself did not identify specific problems that she suffered for reasons of her religion and the Tribunal found there was no real chance she would be persecuted for that reasons. The Tribunal found no suggestion that the applicant would be denied employment opportunities for an essential and significant reason of her political opinion or religion or for any other Convention-related reason as she and her husband had been able to find employment in the past. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

India

0806712

18 March 2009, Sydney

Mr J Duignan, Member

INDIA – RELIGION – DERA SACHA SAUDA – POLITICAL OPINION – CONGRESS PARTY – The applicants claimed to fear persecution for reason of their religion and political opinion. The primary applicant claimed his family would be harmed by members of the Shiromani Akali Dal political party for their Dera Sacha Sauda faith and his support of the Congress Party. The primary applicant claimed party members came to his shop, broke things and accused him of selling illegal goods. He claimed they accused his Guru of being against Sikhism, demanded he close his shop and stop spreading "false propaganda", and threatened the disappearance of his family. They also disrupted a religious gathering at his house, damaging cars, and attacked him with an iron rod that required hospitalisation for several days. The primary applicant claimed he sought assistance from the police who refused to write up reports and threatened him. The applicants claimed they moved to another district, but were discovered so they arranged to come to Australia. The

applicants confirmed that they could move elsewhere in India but claimed that running a business would be very difficult.

Held: Decision under review affirmed

The Tribunal noted recent episodes of hostility between established Sikh groups and followers of Dera Sacha Sauda arising from a perception that the Guru of the Dera Sacha Sauda had insulted a Sikh figure and the death of a Sikh man by the Guru's bodyguard. It accepted this had resulted in large scale protests and harm directed at followers of Dera Sacha Sauda. The Tribunal further accepted that the applicants had been affected by the intimidation and harm claimed and were well-known in their local area for their support of Dera Sacha Sauda. However, the Tribunal held that the fact that the applicants were not harmed after leaving their local area, despite Akali party members being aware of their location shortly after their departure, indicated that threats would not be acted upon and the harm was localised. It was of the view that while the antipathy between the Punjab Akali Dal Government and the Dera Sacha Sauda and the applicants' past experiences may have given rise to concerns about future protection in Punjab, this would not be the case outside that state. While initially the Punjab Government did not act to protect Dera Sacha Sauda followers, the Tribunal found it notable that the Central Government, dominated by the Congress Party, took an active interest and subsequently security forces did protect them from Sikh groups and their activities. Therefore, the real threat to the applicants did not extend to India as a whole and they were able to access real and effective protection by returning to another area. The Tribunal was further of the view that the applicants possessed the attributes, resources, support and capacity to settle successfully elsewhere. Consequently, the Tribunal was of the view that none of the applicants could be said to hold a well-founded fear of persecution for any Convention reason.

Korea, Republic Of

0809091

5 March 2009, Sydney

Ms Christine Long, Member

REPUBLIC OF KOREA – NO VALID APPLICATION – It was claimed on the visa application form that the applicant left Korea without the permission of the authorities to visit and help her relatives in another country and that she would be sentenced and seen as a spy if she returned to Korea. However, the applicant claimed she did not complete the application form and had no knowledge of what was written on it, the signature was not hers, she had not paid any money and it was lodged without her knowledge. She states that there is no problem or issue such as religion or war that would prevent her returning to South Korea and confirmed she did not fear returning to her country because of any Convention ground. The applicant claimed that she provided a photograph to a church member she thought would be submitted to the Minister as her children have grown up in Australia and she would like to remain. She claimed to have integrated well into life in Australia and the Australian society, and her children were unfamiliar with the life and culture in Korea. She claimed her youngest son did not speak Korean and it would be very difficult for them to return to Korea as they had gone to school in Australia. She requested that the family be permitted to remain in Australia on compassionate grounds.

Held: Decision under review set aside

The Tribunal accepted that none of the applicants signed the application form or paid for the application. It accepted that the applicant believed that an application was being made to the Minister for her and the family to stay in Australia on compassionate grounds because they had lived here for many years. The Tribunal accepted further that the visa application was lodged without the knowledge of the applicant and that she did not consent to or authorise any other person to lodge the application or to make the claims in the application. It noted that whilst it is not necessary for an applicant to actually complete the application form for it to be valid, it is nevertheless necessary for the applicant to have "made" the application that is it must be made with her knowledge and consent. Given the Tribunal's findings to the contrary, it held that the application for the protection visas was not valid. It followed that the Tribunal had no power to consider the merits of that application. Consequently, the Tribunal set aside the delegate's decision and substituted a new decision that no valid application for protection visas had been made by the applicant.

Lebanon

0807642

18 March 2009, Sydney

Mr H Wyndham, Member

LEBANON –RELIGION – ALAWI MUSLIM – The applicant claimed to fear persecution for reasons of his religion. The applicant claimed that he was an Alawi Muslim who came to Australia as the spouse of an Australian citizen. He claimed that marriage had failed but he had since re-married and they were expecting a child. The applicant claimed that he would be killed, shot or seriously wounded if he returned to Lebanon because of the on-going sectarian fighting between Alawi and Sunni Muslims. He claimed that the Alawi Muslims had been protected by the Syrians because the Syrian leadership was Alawi. He claimed the Syrians had left while he was in Australia and the Alawis were now at the mercy of the dominant Sunnis. The applicant claimed his religion meant that he would be believed to be pro-Syrian, which was dangerous. The applicant further claimed that several of his friends had suffered as a result of this situation. He submitted independent information about the situation for Alawis around Tripoli, together with a DVD showing funeral services and a letter from a Sheikh in support of his claims. The applicant also stated that the Alawi could not find security elsewhere in Lebanon as they would always be outsiders because of their religion.

Held: Decision under review set aside

The Tribunal accepted all the applicant's claims, however it informed him that the fact that he was now married to an Australia and they were expecting a child was not a relevant consideration because he had made no claims in that sense. The Tribunal found that the independent information supplied by the applicant and otherwise obtained confirmed his characterisation of the ethnic conflict in Tripoli. It accepted he could not find security elsewhere in Lebanon and there was a chance he would be viewed as pro-Syrian because of his religion. In the circumstances, the Tribunal accepted that a real chance existed that the applicant may suffer harm in Lebanon for reason of his religion. The Tribunal believed that it was difficult to say how high the chance of harm was, but was satisfied that it would be unsafe to say there was no chance. Therefore, the Tribunal accepted that there was a real chance of the applicant suffering harm amounting to persecution in Lebanon. It was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

Pakistan

0805727

6 March 2009, Sydney

Ms K Hartman, Member

PAKISTAN – PARTICULAR SOCIAL GROUP – MARRIAGE – The applicant claimed to fear persecution for reasons of his marriage to his wife. The applicant claimed he married his wife without the consent of their families. He claimed the only contact they had before they married was when they met on the track on her way to classes where they only spoke a few minutes so as not to arouse suspicion. They would also exchange letters during their brief contact on the track or at the shop where the applicant worked. The applicant also claimed that a few times she took half day's leave from school when they wanted to meet each other. He claimed that they hid in another town after their marriage, and that his wife's relative and a friend found and kidnapped them. The applicant claimed they took them back to his wife's home, threatened to kill the applicant and beat him until he was unconscious. The applicant also claimed that when he regained consciousness he found himself alone with the door open. He claimed he took a bus to Lahore, where he slept in a park until someone who had seen him sleeping in the park invited him to stay with him. He then contacted a friend who was overseas who invited him there to work. The applicant left Pakistan to join him two weeks later, but claimed he was forced to then flee to Australia when he saw the person who had kidnapped him and feared for his life. He claimed to fear his wife's family would kill him if he returned to Pakistan.

Held: Decision under review affirmed

The Tribunal did not find the applicant to be a truthful or credible witness. The Tribunal found that there were significant inconsistencies in the applicant's evidence regarding the circumstances under which he met

and married his wife. In particular the Tribunal found that the applicant could not explain how he could have met his wife on the way to school when she had completed school or at the store where he worked when he was unemployed. The Tribunal also noted inconsistencies regarding the dates and details given for his claimed kidnapping, beating and escape to Lahore. It viewed this as implausible given his claims that his kidnappers had threatened to kill him. It also found his evidence vague as he could not remember the address of the person who let him stay in Lahore; details about his visa or overseas work, as well as the reason for the two-week delay in leaving Pakistan and month-long delay between receiving his visa and coming to Australia. The Tribunal considered unconvincing the applicant's submissions that he had difficulty remembering things and was confused because of the beating and he was under pressure. The Tribunal further found that the applicant had provided false information to obtain his Business visa, indicating that he was prepared to provide whatever he thought was necessary to obtain the visa being sought. The Tribunal did not accept any of the applicant's claims finding they were fabricated in order to strengthen his claim to refugee status. The Tribunal found that there was no real chance that the applicant would face persecution if he returned to Pakistan now or in the reasonably foreseeable future due to his membership of a particular social group or any other Convention reason. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Turkey

0808664

16 March 2009, Melbourne

Ms W Boddison, Member

TURKEY – ETHNICITY – KURDISH – POLITICAL OPINION – KURDISTAN WORKERS PARTY – DEMOCRATIC SOCIETY PARTY – PARTICULAR SOCIAL GROUP – FAMILY – The applicant claimed to fear persecution for reasons of his ethnicity, political opinion, and membership to the particular social group of his wife's family. The applicant claimed he was regularly detained by the Turkish security forces for up to three days because of his wife's involvement in the Kurdistan Workers Party (PKK), his involvement in the Democratic Society Party (DTP), and because he was Kurdish. The applicant claimed he maintained close contact with his wife even after her activities lead to their divorce. This coincided with increased PKK attacks following the arrest of a prominent person and the applicant claimed his problems with the authorities increased because they did not believe he was separated. The applicant claimed that he started working with his wife in the PKK and was interrogated about her activities. The applicant also claimed that he supported the DTP and the police wanted him to become an informer because the DTP were seen as separatist. The applicant feared that if he returned he would again be under constant attack, surveillance; threatened, arrested, and tortured or killed.

Held: Decision under review set aside

The Tribunal found the applicant's knowledge of the DTP accorded with his claimed level of involvement and accepted that he was a supporter. However, it found the claimed frequency of his detention conflicted with information on treatment of persons with his profile and, as he was not a member, found it unlikely that he would have had the type of information police would seek. The Tribunal found the applicant was credible regarding his wife's activities and accepted that the authorities suspected her involvement in the PKK. The Tribunal also accepted that there was increased action against suspected supporters of the PKK after the prominent person's arrest. Based on information about persons who are family members of PKK members, the Tribunal accepted that this was a particular social group in Turkish society. However, it noted that relatives of PKK members were not persecuted if authorities were convinced that they did not have links to the PKK. Nonetheless, the Tribunal accepted the applicant was ill-treated when detained and that this amounted to serious harm. It also found it was not a remote or farfetched possibility that this treatment would continue if he returned to Turkey. It accepted that the cumulative effect of his Kurdish ethnicity, participation in DTP activities, and membership of the particular social group "persons whose family members were connected to PKK" would be reasons why he would be detained and questioned. Since the applicant feared Turkish authorities and the risks were higher in other parts of Turkey, the Tribunal found it was unreasonable for him to relocate to avoid persecution. Accordingly, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

Uganda

0808751

18 March 2009, Sydney

Mr S Roushan, Member

UGANDA – PARTICULAR SOCIAL GROUP – TRIBAL WOMEN – The applicant claimed to fear persecution for reason of her membership of the particular social group, women of a specific tribe in Uganda. She claimed to be at risk of undergoing female genital mutilation (FGM) if she returned to Uganda. The applicant claimed her father was an elder of a tribe and an important figure in the village. She claimed that as a female member of the tribe she had to participate in all cultural customs, including female circumcision. The applicant claimed to have witnessed friends and relatives suffer pain or die from the procedure. She further claimed she was first invited to participate in the ritual when she was in her teens. Her refusal to participate in female circumcision resulted in many written requests from her father, gradually turning into aggressive demands. To avoid her father and his fellow villagers, the applicant claimed she changed schools and moved from place to place over many years. She claimed she was abducted and taken against her will to her father's village with the intention of forcing her to undergo circumcision, and where she was beaten, but was able to escape. The applicant claimed the authorities would not protect her because they were unable to stop her community from forcing the practice upon her. She stated she would be unable to relocate within Uganda as her father's villagers were able to find her.

Held: Decision under review set aside

The Tribunal found the applicant gave evidence in a straightforward and unembellished manner, was entirely consistent and considered her to be a reliable and credible witness. The Tribunal accepted that the applicant was required to undergo circumcision due to the prevalence and the importance of the practice in her father's village. It noted that independent information supported the applicant's claim that she would continue to be placed under intense pressure to undergo circumcision and based on the evidence, the Tribunal could not make a confident finding that her father's efforts in locating and forcing her to undergo the procedure would cease. The applicant's chance of being forced to undergo circumcision could not be ruled out as remote or insubstantial. Clitoridectomy and excision were commonly practised in Uganda. The consequences of circumcision included severe psychological and physical injury, severe period pains, difficulties and complications due to an inability to pass urine, infections leading to sterility, complications during childbirth and loss of pleasure during sex. The Tribunal was satisfied that the harm the applicant would be subjected to involved "serious harm" as required by s.91R(1)(b) of the Act. The Tribunal was not satisfied that the applicant could safely relocate elsewhere in Uganda to lead a normal life and avoid being found and forced to undergo circumcision since her movements to different locations in Uganda had not deterred her father and his fellow villagers from finding her over the years. The Tribunal was satisfied that the essential and significant reason for the persecution feared by the applicant was her membership of the particular social group, women of a specific tribe of Uganda. The Tribunal considered that whilst only a small minority still practised FGM, it was lawful and local by-laws making it illegal did not impose deterrent punishment. Consequently, the Tribunal was satisfied that the applicant did not have adequate and effective state protection in Uganda and that the applicant had a well-founded fear of persecution for a Convention reason.

FEDERAL COURT JUDGMENTS

Saeed v MIAC

[2009] FCAFC 41

Federal Court of Australia, Spender, Buchanan & Logan JJ, NSD1956 of 2008, 1 April 2009

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Minister's delegate refusing to grant the applicant a Skilled - Independent (Subclass 175) visa.

The delegate obtained information from Australian immigration officers in Pakistan suggesting that the appellant had not been employed at a particular restaurant as claimed. The delegate did not disclose that information to the appellant or invite her to comment on it. As the Subclass 175 visa could not be granted while the appellant was in the migration zone and the decision to refuse the visa was not reviewable by the Migration Review Tribunal or the Refugee Review Tribunal, the obligations imposed upon the Minister (and his delegates) by s.57 of the *Migration Act* 1958 (the Act) did not apply to consideration of the appellant's application.

The critical issue in the appeal was whether, despite the fact that the obligation in s.57 did not apply, there was some other obligation to provide the appellant with 'procedural fairness'. The appellant contended that the legislative purpose intended by s.51A (and ss.357A and 422B) of the Act had not been accomplished by the terms in which it was drafted so that it was ineffective to exclude the common law requirement of procedural fairness. It was contended that the analysis by the Full Federal Court in *MIMIA v Lat* (2006) 151 FCR 214 (*Lay Lat*), which held to the contrary, was plainly or clearly wrong.

Held: Appeal dismissed.

- (i) The analysis in *Lay Lat* was not wrong, judged by any standard. The construction accepted in *Lay Lat* was not just the only approach which accommodated, rather than rejected, relevant and clear statements of legislative intent, but is the only one which allowed the harmonious operation of the provisions in question.
- (ii) There is no doubt that courts are not strictly bound by statements of legislative intent. The ultimate duty of a court is to give effect to the terms of the statute itself. However, the language of a statute is to be construed in accordance with apparent legislative intent unless such a construction is not reasonably open.
- (iii) The analysis in *Lay Lat* may not be dismissed on the basis that it was *obiter dicta* in light of its adoption and application in *SZCJ v MIMA* [2006] FCAFC 62. It was binding on the judge who decided *Antipova v MIMIA* (2006) 151 FCR 480 and should have been followed.
- (iv) Following the High Court's consideration of s.57 and the majority judgment in *Re MIMIA; Ex parte Miah* (2001) 206 CLR 57 (*Miah*), it could not be said that the operation of s.57(3) alone disclosed a legislative intent that there be no obligation to provide the information to the appellant whether under the Act or common law. However, the analysis in *Lay Lat* relied on reading s.51A(1) and s.57(3) together and was therefore not contrary to the majority approach in *Miah*.

SZMCD v MIAC & Refugee Review Tribunal

[2009] FCAFC 46

Federal Court of Australia, Moore, Tracey & Foster JJ, NSD 1292 of 2008, 15 April 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, a Pakistani national, was not a person to whom Australia had protection obligations.

The appellant claimed he had been persecuted by the Movement for the Enforcement of Islamic Laws. At the hearing, pursuant to s.424AA of the *Migration Act* 1958 the Tribunal put to the appellant that his

evidence was inconsistent with country information which suggested that the applicant would be able to relocate in Pakistan and this could result in the Tribunal forming a view that the applicant was 'not a refugee'. The Tribunal invited the appellant to comment on or respond to that information, inviting the applicant to ask for more time to respond if he so wished. The applicant declined the invitation, stating that he had no comments in response. The Tribunal affirmed the primary decision. At first instance, Scarlett FM held that the purported failure to comply with s.424AA did not result in jurisdictional error on the part of the Tribunal, nor could it do so.

The appellant contended, amongst other things, that the Federal Magistrate erred in law in holding that, a failure to comply with the obligations set out in s.424AA(b) did not constitute jurisdictional error.

Held: Appeal dismissed

- (i) The Tribunal did not fall into jurisdictional error in relation to s.424AA.
- (ii) Section 424AA does not create a duty to take particular steps independently of the existence of a duty under s.424A.
- (iii) A failure to comply with s.424AA, in circumstances where there was no obligation arising under s.424A(1), or that obligation was otherwise discharged, will not amount to jurisdictional error. The effect of a failure to properly comply with s.424AA is that the Tribunal will have purported to exercise a procedural discretion but will have in fact failed to do so in the manner required of the statute. The overriding obligation to provide the applicant with clear particulars of relevant information subsists and will be required to be discharged through s.424A.
- (iv) Where the information is country information and therefore either not *information* for the purposes of s.424AA or covered by the provisions of s.424A(3)(a), that information is not required to be given in accordance with s 424A(1). Accordingly, even if the Tribunal fails to comply with the requirements of s.424AA, such non-compliance is not determinative of jurisdictional error as the only consequence of that non-compliance would be that the Tribunal would not get the benefit of s.424A(2A).

obiter dicta:

- (v) There was no error in the Tribunal's relocation finding. Although it provided an alternate and independent ground for affirming the delegate's decision, there was no requirement for the Tribunal to consider the issue as there was neither uncertainty in its principal conclusions. .

FEDERAL MAGISTRATES COURT JUDGMENTS

Maan v MRT & Anor

[2008] FMCA 1738

Federal Magistrates Court of Australia, Jarrett FM, BRG 372 of 2008, 18 December 2008

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate to cancel his Student (Temporary) (Class TU) Subclass 573 (Higher Education Sector) visa under s.116 of the *Migration Act* 1958 (the Act). The applicant's Student visa was granted on 29 March 2007. Prior to 1 July 2007, the applicant received a number of warning notices from his education provider in relation to inadequate attendance. He was certified, in accordance with condition 8202, as not achieving satisfactory course attendance by his education provider on 24 September 2007. The Tribunal was satisfied, based upon his education provider's certification, that mandatory grounds for cancellation under ss.116(1)(b) and (3) existed as the applicant's non-compliance with condition 8202 was not due to exceptional circumstances. The Tribunal specifically noted that between July and September 2007, the applicant's attendance rate was only 27%.

The applicant contended: that the Tribunal failed to correctly interpret and apply which version of condition 8202 was attached to his visa at the relevant time; that it was obliged to identify a particular date as of which it was satisfied he was in breach; and that bereavement in one's family is of itself sufficient to enliven the 'exceptional circumstances' proviso in r.2.43(2)(b)(ii)(B) of the Migration Regulations 1994 (the Regulations).

Condition 8202 was amended on 1 July 2007.

Held: Application dismissed.

- (i) No jurisdictional error was established.
- (ii) A breach or non-compliance with condition 8202 occurs when the non-compliance is certified by the education provider not when the relevant student conduct occurs. In the case of certification of non-compliance on or after 1 July 2007, it is the current form of the condition which is applicable.
- (iii) It is not to the point that the Tribunal did not identify expressly in its reasons for judgment the period of time or the day upon which the breach was said to have occurred. The Tribunal's reasons make it clear that the relevant certification which was said to have been the non-conformity with condition 8202 was the certification given on 24 September 2007. That relied upon non-attendance which covered a period which stretched from 11 July 2007 to 24 September 2007. If not expressed it was at least implicit that the relevant breach took place after 1 July 2007.
- (iv) While bereavement of itself might as a matter of policy be the type of matter that could be considered in determining whether the 'exceptional circumstances' proviso is engaged, it will always remain a matter of fact to be determined by the Minister or the Tribunal as to whether that proviso is actually engaged having regard to the facts of a particular case.

Note: the judgment was delivered on 18 December 2008, but the written reasons were only recently made available.

SZMGR v MIAC & Anor

[2009] FMCA 174

Federal Magistrates Court of Australia, Smith FM, SYG 1246 of 2008, 20 March 2009

The applicant sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that he was not a person to whom Australia had protection obligations. The applicant was a Jordanian national with a Palestinian Muslim background, who had a temporary right of entry and residence in a European Country B.

The applicant claimed to fear persecution in Jordan and County B because of his promoting tolerance and human rights, his known religious profile for belief in God and abandoning Islam and his involvement with an extremist Muslim Sheik. He claimed that he had received constant harassment by Muslim extremists over several years, including that in County B he had received death threats over the phone, was followed and his car had been vandalised on a number of occasions. The Tribunal accepted the veracity of his claimed history of harassment, but found that the threats he feared in Country B did not amount to serious harm and did not give rise to any real chance of persecution within s.91R of the *Migration Act 1958* (the Act). In the alternative it concluded that the level of state protection in Country B was sufficient to remove any real risk of harm. It therefore found that Australia did not have protection obligations to the applicant under s.36(3) of the Act.

The applicant contended that the Tribunal considered only the risk of suffering death or serious physical assault. It failed to appreciate his claim that past harassment in itself had caused serious harm amounting to persecution and then failed to assess the risk of that continuing in the future.

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal committed a jurisdictional error by confining its consideration of the applicant's circumstances to his risk of death or serious physical assault and failing to consider whether the harassment which the applicant had suffered in Country B and feared in the future itself amount to persecution.
- (ii) The instances of serious harm listed in s.91R(2) provide only some non-limiting instances. The list cannot be construed as confining any other species of serious harm which might come with that term in s.91R(1)(b), whether by analogy or other process of reasoning.

In the present case it would have been open to the Tribunal to have concluded, looking at the applicant's history broadly, that the applicant had faced, and would face, such intolerable life in County B that his flight from that country was well understandable, and that the harassment he feared in that country involved, cumulatively, such as serious infringement of his human rights and human dignity as to involve serious harm of the person within s.91R(1)(b).

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 set aside 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.

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

REGULATIONS

Migration Amendment Regulations 2009 (No. 3) (SLI 2009 No.67) (Legislative Instrument – F2009L01253)

These Regulations amend the Migration Regulations 1994 to increase the minimum International English Language Testing System (IELTS) score required to be met by certain persons who are proposing to work in certain occupations, to satisfy the criteria for grant of a Subclass 457 (Business (Long Stay)) visa.

The amendments commenced on 14 April 2009 and apply only to visa applications made on or after that date.

INSTRUMENTS

Migration Regulations 1994 – Specification under paragraph 457.223(6)(a) and subclause 457.223(11) of Schedule 2 – Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa (Legislative Instrument- F2009L01243).

This instrument, registered on 8 April 2009, revokes the preceding Instrument (July 2008) and operates to specify the categories of 'exempted persons' under 457.223(11) and to specify the level of salary, and method of calculating the level of salary, for the purposes of subclause 457.223(6). Effective from 14 April 2009.

Migration Act 1958 – Revocation of section 499 Direction No. 36 (Legislative Instrument - F2009L01315).

This Direction revokes Migration Act 1958 Direction under section 499 – Visitor Applications (Direction No. 36 of 2005) which will not be replaced as guidance but will be incorporated into policy. Effective from 15 May 2009.

Migration Regulations 1994 – Specification under regulations 1.03 and 1.15G – Definition of "Superyacht" (Legislative Instrument - F2009L01302).

This instrument, registered on 16 April 2009, specifies that a Superyacht is any high value luxury sailing ship or motor vessel which is 24 metres or longer in load line length and not carrying cargo and used for sport or pleasure. Effective from 15 May 2009.

Migration Regulations 1994 – Specification under paragraph 1227A(3)(d) – Addresses for Superyacht Crew Visa Applications (Legislative Instrument - F2009L01299).

This instrument, registered on 16 April 2009, specifies the postal address, hand delivery address, or fax number, to which applications for a Superyacht Crew (Temporary) (Class UW) visa must be sent. Effective from 15 May 2009.

Migration Regulations 1994 – Specification for the purposes of subregulation 1.20N(4) and paragraph 1220B(3)(b) – Addresses (Legislative Instrument – F2009L01301).

This instrument, registered on 17 April 2009, specifies the relevant addresses for processing Subclass 470 visa applications. Effective from 15 May 2009.

Migration Regulations 1994 – Specification under paragraph 4011(2)(b) – Classes of Persons – Public Interest Criteria – Revocation of Risk Factor List (Legislative Instrument – F2009L01316).

This instrument, registered on 17 April 2009, revokes IMMI 08/033 (signed on 12 May 2008) specifying classes of persons that must be subject to the Risk Factor for the purposes of Public Interest Criterion 4011(2)(b). Effective from 15 May 2009.

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 (Legislative Instrument - F2009L01345).

This instrument, registered on 22 April 2009, lists the applicable foreign countries, the required educational qualifications and visa lodgement addresses for Work and Holiday visa applicants and specifies that nationals from Chile must lodge their visa application at the specified address. Effective from 15 May 2009.

Migration Regulations 1994 – Specification under subparagraph 1218(1)(b)(iii) – Travel Agents for PRC Citizens Applying for Tourist Visas (Legislative Instrument –F2009L01444).

This instrument, registered on 22 April 2009, specifies Approved Destination Status (ADS) scheme travel agents for the purposes of subparagraph 1218(1)(b)(iii) of Schedule 1 to the Migration Regulations 1994. Effective from 24 April 2009.

Migration Regulations 1994 – Specification under subparagraph 1225(3)(b)(i) – Class of Persons – April 2009 (Legislative Instrument - F2009L01343).

This instrument registered on 22 April 2009, lists the countries that are considered to be working holiday visa eligible countries, that is, countries with which Australia has a reciprocal Working Holiday arrangement or agreement. This instrument also sets out relevant conditions applying to nationals of those countries. Effective from 15 May 2009.

CASELOAD OVERVIEW

MRT Decisions – April 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	2	13	0	2	17
Visitor refusal	22	7	0	5	34
Student refusal	12	11	4	6	33
Temporary business refusal	11	16	12	6	45
Permanent business refusal	5	7	3	0	15
Skill linked refusal	69	21	11	11	112
Partner refusal	68	19	4	4	95
Family refusal	21	19	1	3	44
Student cancellation	5	22	0	4	31
Sponsor approval refusal	1	1	2	1	5
Other	6	12	2	4	24

RRT Decisions – April 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Algeria	0	1	0	0	1
Bangladesh	0	7	0	5	12
Brazil	0	1	0	0	1
Burma (Myanmar)	0	1	0	0	1
Canada	0	1	0	0	1
China (PRC)	20	60	2	1	83
Congo, Republic (Brazzaville)	2	0	0	0	2
Egypt	2	0	1	0	3
El Salvador	1	0	0	0	1
Fiji	1	7	1	1	10
Ghana	0	1	0	0	1
India	1	39	1	0	41
Indonesia	0	8	0	3	11
Iran	1	3	0	0	4
Iraq	1	1	0	0	2
Italy	0	1	0	0	1
Jordan	0	2	0	0	2
Kenya	1	1	0	0	2
Korea, Republic Of	0	6	0	1	7
Lebanon	2	3	0	0	5
Malaysia	0	12	0	0	12
Mongolia	2	0	0	0	2
Nepal	1	2	0	0	3
Pakistan	0	5	0	0	5

Peru	0	1	0	0	1
Russian Federation	0	1	0	0	1
Somalia	1	0	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	3	2	1	0	6
Togo	1	1	0	0	2
Tonga	0	1	0	0	1
Turkey	1	0	0	0	1
Uganda	0	2	0	0	2
Uzbekistan	1	0	0	0	1
Vietnam	0	3	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 at least 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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