



## 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

0800741

3 April 2008, Melbourne

Dr D Thomas, Member

### **SKILLED – INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) – SUBCLASS 880 (SKILLED – INDEPENDENT OVERSEAS STUDENT) – CL.880.222 – SKILLED OCCUPATION – A**

A delegate of the Minister refused to grant the applicant a Subclass 880 visa on the basis that he did not satisfy cl.880.222 of the Regulations because he did not have a qualifying score in relation to the general points test. The delegate was not satisfied that the visa applicant had been employed in a skilled occupation. In relation to the points allocated for work experience under the 'bonus points' component of the points test, the applicant stated that he wished to claim points available under Schedule 6A81(b) of the Regulations, which provides that 5 points may be awarded when the applicant has been employed in Australia in a skilled occupation for a period of, or for periods totalling, at least 6 months in the 48 months immediately before the date of application while holding a substantive visa authorizing him to work. The applicant claimed to have been employed for the relevant period as a 'Sales representative – contractor' selling telecommunication products and services and that this constituted being employed in a skilled occupation for the purposes of Schedule 6A81(b). For most of the time he was employed, the applicant could not work for more than 20 hours per week because of his student conditions, and he sometimes worked less than 20 hours per week because of his studies. The applicant claimed to not be clear about the difference between a contractor and an employee. The applicant's representative claimed that the ASCO occupation Sales Representative 2222-13 was on the skilled occupations list and was the appropriate occupation. He noted that the applicant was an independent contractor, but that the definition of employment for migration purposes did not require the applicant to be classified as an employee.

**Held:** Decision under review affirmed

The Tribunal noted that the applicant had not disputed the scores awarded for the qualifications under Schedule 6A, except for the points allocated for work experience under the 'bonus points' component (Item 6A81). The Tribunal further noted that case law regarding the meaning of 'engaged in an occupation' does not explicitly consider the question of whether an Independent Contractor is 'employed' and the usual distinction is made between a contract of employment (between an employer and an employee) and a contract of services (between a principal and an independent contractor). The Tribunal considered whether the visa applicant was an 'employee' or a 'contractor', and found that while the evidence was finely balanced, the visa applicant was an employee. On the evidence, the Tribunal was satisfied that the applicant was employed as a salesman. The Tribunal considered the occupational classifications of Technical Sales Representative, ASCO Group 2222, and Sales Representatives, ASCO Group 6211. The Tribunal found that the descriptions of those positions comprised activities principally dealing with business and professional-end users. The activities of the applicant were those engaged primarily at the retail level. The Tribunal was satisfied that the position of the visa applicant was not to be found in ASCO groups 2222 or 6211. The Tribunal found that the nearest ASCO code for the applicant's occupation was Door-to-Door Salesperson, ASCO Code 2893-15. This occupation was not listed on the relevant skilled occupation list. The Tribunal found that the applicant had not given evidence that he had been employed in Australia in a skilled occupation for the relevant period and on this basis could not attract any points under Part 8 of Schedule 6A. The points score awarded to the applicant at the time of primary decision and at the time of review by the Tribunal both amounted to a total of 115 points. The pool and pass marks that constituted the qualifying score required in cl.880.222 were both 120 points. As such, the Tribunal found that the applicant did not achieve the qualifying score of 120 points, and that the applicant was not entitled to the grant of the visa.

0801920

16 April 2009, Melbourne

Mr D Young, Member

**TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 (BUSINESS (LONG STAY)) – CL.457.223(4) – PERSONAL ATTRIBUTES AND EMPLOYMENT BACKGROUND** – A delegate of the Minister refused to grant the visa applicants a Subclass 457 visa on the basis that the first named visa applicant did not satisfy cl.457.223(4)(d) of the Regulations because the applicant did not have personal attributes and an employment background that were relevant to and consistent with the nature of the activity to be performed. The review applicant sought approval as a business sponsor of the position of farm overseer. The responsibilities described by the review applicant included the daily organisation and managing of the farm and staff of a 1000 acre, commercial flower farm. The visa applicant claimed to be a farm manager on a 4 acre allotment in Albania. He claimed his duties included planning and directing work, induction and training of two horticultural staff and growing crops which required little maintenance. The visa applicant submitted a Certificate III in Production Horticulture, the result of a college interview assessing his work experience and skills.

**Held:** Decision under review affirmed

The Tribunal noted that the position to be filled was described as a farm overseer in ASCO Code 4611-11, which required an Australian Qualifications Framework Certificate III or higher qualification and at least three years' relevant experience. The Tribunal accepted on the evidence that the visa applicant had some farming experience of a very general and non-specialised character on a very small allotment in Albania, growing crops the majority of which required little maintenance once planted. The Tribunal found that his duties were primarily 'hands on' farming activities and he had minimal or no supervisory or managerial experience. His skills did not remotely approximate the skills required in the nominated position as farm overseer of a large, highly-organised commercial flower farm. Consequently, the Tribunal found the visa applicant did not satisfy cl.457.223(4)(d). The Tribunal rejected as devoid of credibility the purported Certificate III in Production Horticulture conferred on the visa applicant after a brief college interview. Therefore, the Tribunal was not satisfied that the visa applicant possessed the skills required to perform the duties of the nominated position and did not meet cl.457.223(4)(e). Accordingly, the Tribunal affirmed the decision not to grant Temporary Business Entry (Class UC) visas.

## Partner and Family Visas

071958766

2 April 2009, Melbourne

Mr D Mitchell, Member

**CHILD (MIGRANT) (CLASS AH) – SUBCLASS 101 (CHILD) – CL.101.213 – FULL-TIME COURSE OF STUDY** – A delegate of the Minister refused to grant the visa applicant a Subclass 101 visa on the basis that he did not satisfy cl.101.213 of the Regulations. He completed his secondary education and began university studies. Two years later, his parents and three siblings migrated to Australia and he remained in the Philippines. He studied continuously until the end of first semester in October 2006. He did not re-enrol for Second semester 2006-2007. He claimed he was sick and was depressed because his family had left, he felt alone and this affected his studies. A university transcript showed he was not enrolled in Second semester 2006-2007 or First semester 2007-2008. He applied for his visa in 2007 while he did not study full-time. He claimed there were compelling reasons for reuniting the family and asked this be considered because he was the last remaining relative of the review applicant and lived on his own in the Philippines.

**Held:** Decision under review affirmed

The question for the Tribunal was whether the visa applicant was engaged, participated in or entered full-time study between the beginning of Second semester 2006-2007 and June 2007. The Tribunal found he was not enrolled for Second semester 2006-2007 or for First semester 2007-2008 when he applied for the visa in June 2007. He was not engaged in, or participated in, or entered upon a full-time course of study and had not undertaken full-time study in the seven months before he lodged his visa application. The Tribunal was not satisfied that since turning 18 he had, at the time of application, been undertaking full-time study at

an educational institution leading to the award of a professional, trade or vocational qualification. Accordingly, he did not satisfy the criteria for a Subclass 101 visa. There was no provision for the Tribunal to waive compliance with the Regulations on compelling compassionate, humanitarian or any other grounds.

**071965892**

**24 April 2009, Sydney**

**Ms D Barneston, Member**

**PARTNER (TEMPORARY) (CLASS UK) – SUBCLASS 826 (INTERDEPENDENCY) – CL.826.212 – R.109A(2)(c) – COMMITMENT TO A SHARED LIFE – GENUINE AND CONTINUING** – A delegate of the Minister refused to grant the applicant a Subclass 826 visa on the basis that the applicant and her sponsor did not satisfy the requirements of r.1.09A(2)(c) of the Regulations. The delegate was not satisfied that the applicant and her sponsor were in an interdependent relationship within the meaning of r.1.09A of the Regulations. The applicant and her sponsor (her aunt) began their relationship when the applicant arrived in Australia to care for the sponsor after a knee operation. The applicant claimed that the sponsor's recovery took longer than anticipated, and the applicant extended her visitor visa to continue caring for the sponsor. At the end of the extension, the pair discussed the applicant staying and living together and decided to try as they had been living together for 6 months by then. In a written statement, the applicant claimed that she wished to be with her sponsor to support her physically and mentally in a more permanent way as she had come to care deeply about her and loved her very much. The sponsor claimed to have come to love the applicant and depend heavily on her help, and described their relationship as one which she imagined a mother and daughter who lived together would share. A number of statements from third parties regarding the relationship between the applicant and the sponsor were submitted in support of the application, along with financial records, postcards to show that people see them as living together and photos showing the pair undertaking social activities together.

**Held:** Decision under review affirmed

The Tribunal was not satisfied on the basis of the material before it that the applicant was, at the time of application and decision, in an interdependent relationship with her sponsor. The Tribunal acknowledged the statements submitted from a number of witnesses concerning the relationship between the parties, but noted that these statements indicated that the witnesses characterised the parties' relationship as that of a carer and caree, albeit a loving one. The emphasis was on the sponsor's dependence on the applicant for physical and household assistance. The Tribunal noted that the parties had lived together for over six months at the time of application, and that there was a statutory presumption that where this was the case, the fact was taken as strong evidence that the relationship was genuine and continuing. However, the Tribunal was not satisfied that this presumption outweighed the actual evidence before it as to the nature of the parties' relationship. The Tribunal noted that the definition of 'interdependent relationship' contemplates a range of relationships beyond same sex relationships, so long as the parties can establish the requirements of exclusive mutual commitment to a shared life, a genuine and continuing relationship and are not living separately and apart on a permanent basis. The Tribunal found that while the parties cared deeply for each other, and the applicant provided care for the sponsor, there was little evidence that they were accepted socially as a couple or presented themselves as such; indeed, the parties described themselves as being like a mother and a daughter. Consequently, the Tribunal was not satisfied that, at the time of application and decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of all others, or that the relationship was genuine and continuing. The Tribunal, therefore, found that they did not satisfy the requirements of r.1.09A(2)(c) and was not satisfied that the applicant and sponsor were in an interdependent relationship within the meaning of r.1.09A. Accordingly, the applicant did not satisfy cl.826.212 of the Regulations.

**0801978**  
**27 April 2009, Sydney**  
**Mr D O'Brien, Principal Member**

**PROSPECTIVE MARRIAGE (TEMPORARY) (CLASS TO) – SUBCLASS 300 (PROSPECTIVE MARRIAGE) – CL.300.216 – GENUINE INTENTION TO LIVE TOGETHER AS SPOUSES** – A delegate of the Minister refused to grant the applicant a Subclass 300 visa on the basis that the visa applicant did not satisfy cl.300.216 of the Regulations because the delegate was not satisfied that the visa applicant and the review applicant genuinely intended to live together as spouses. The review applicant had two previous spousal relationships before he developed a relationship with the visa applicant. The delegate was concerned that a statutory declaration by the review applicant stated that he had applied for a divorce from his second wife so that his relationship with the visa applicant could proceed. The delegate believed this suggested that the review applicant was preparing for his marriage to the visa applicant before having communicated with her and on this basis the delegate queried the review applicant's motivation for entering into the relationship. The review applicant claimed that after the failure of his prior relationships, he sought the assistance of his parents in locating a partner from a Vietnamese family. He claimed that his parents knew a family in the village in Vietnam from which they came from who had an eligible daughter (the visa applicant). The review applicant's mother rang the visa applicant's mother to raise the prospect of the applicants making contact with each other. Following this initial contact, the parties spoke to one another regularly by phone. The review applicant and his mother and other relatives travelled to Vietnam to meet the visa applicant, where the couple decided to confirm the relationship and became engaged. After an engagement celebration with family and friends, the applicants claim to have lived together for a week in a city hotel. The delegate was concerned that the applicants did not undertake a traditional engagement ceremony. The review applicant claimed that he and the visa applicant had decided on a simple celebration which their friends could attend, and planned to have a traditional wedding ceremony when the visa applicant came to Australia. After returning to Australia, the review applicant kept in touch with his fiancée by telephone on a weekly basis. The applicants submitted phone cards for calls to Vietnam in support of the application and copies of invoices showing monthly money transfers from the review applicant to the visa applicant.

**Held:** Decision under review set aside

It was the Tribunal's assessment that the review applicant and visa applicant did genuinely intend to live together as spouses and that they, therefore, met cl.300.216 of the Regulations. The Tribunal's finding was based on consideration of all the circumstances of the relationship, including the evidence of the engagement celebration attended by friends and representatives of both families, the fact that the applicants lived together for a short time after the celebration, statements by the applicants made to the Tribunal about their long term commitment to one another,; and evidence of the parties constant telephone contact and of financial support provided by the review applicant to the visa applicant. The Tribunal did not share the delegate's concern about the timing of the review applicant's divorce from his second wife and noted that many would regard the initiation of divorce proceedings by the review applicant as the correct thing for him to have done before he sought to develop a relationship with the visa applicant. The Tribunal was satisfied that the time of decision criteria in cl.300.211, 300.214 and 300.216 continued to be satisfied. The criteria in cl.300.215 were not in dispute before the Tribunal, the delegate having made no finding in relation to them; therefore, the Tribunal could not make a finding on those criteria. Accordingly, the Tribunal remitted the matter to the delegate for reconsideration, with the direction that the visa applicant met cl.300.216.

**0801851**  
**27 April 2009, Sydney**  
**Ms K Raif, Member**

**CONTRIBUTORY PARENT (TEMPORARY) (CLASS UT) – SUBCLASS 173 (CONTRIBUTORY PARENT) – CL.173.212(3) – R.1.03 – CLOSE RELATIVE – GUARDIAN** – A delegate of the Minister refused to grant the visa applicant a Subclass 173 visa on the basis that she did not satisfy cl.173.212 of the Regulations because she was not sponsored by a person who was a close relative or a guardian of the child. The visa applicant was divorced and lived in Vietnam. Her son lived in Australia with her aunt who was his guardian and primary carer. She had daily care and control regarding his health, discipline and schooling. She attended to his emotional, educational, social and family needs, and had full parental responsibility for

him. The visa applicant's will appointed her aunt as executrix, trustee and guardian of her son and granted her power of attorney. The visa applicant claimed she became depressed after she visited and had to leave him. A psychological report stated she and her son had a strong bond and he was adversely affected by his separation from her.

**Held:** Decision under review affirmed

The main issue was whether the visa applicant met the sponsorship requirements. A guardian had powers, rights and duties vested by law or custom. There was no evidence these were conferred on the sponsor legally and the visa applicant's consent, will and power of attorney were insufficient. The bequest of guardianship rights in a will did not affect current guardianship. In the absence of formal orders, the definition was not satisfied by implied or intended guardianship. There was no relevant custom which vested the review applicant with any powers, rights and duties, and custom could not contravene existing statute law. The Tribunal was not satisfied the review applicant was a guardian of the child, she was not a close relative of the visa applicant and did not meet cl.173.212(3) of the Regulations. The Tribunal accepted there were compelling circumstances but had no discretion to waive the requirements. Neither the best interests of the child, or any compassionate and compelling circumstances affecting the visa applicant and the child, overrode the express statutory requirements.

**071690114**

**28 April 2009, Melbourne**

**Ms Kay Kirmos, Member**

**PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 (SPOUSE (PROVISIONAL)) – R.1.15A(2)(b) – AGE AT TIME OF MARRIAGE** – A delegate of the Minister refused to grant the visa applicant a Subclass 309 visa on the basis that she was under 18 years of age at the time of the wedding and lodgement of the application. The review applicant claimed that they had met through their families, who had been friends for a long time and that their relationship commenced over the telephone. The review applicant claimed that they met when he visited Dubai and with the support of their families they decided to marry. They both travelled to Somalia with their families where a wedding took place in a hotel over five days before 100 guests. The applicants remained in Somalia for 20 days and then returned to Dubai, where they honeymooned. The review applicant claimed he subsequently returned to visit the visa applicant in Dubai on three occasions, and they now have a baby daughter together.

**Held:** Decision under review set aside

The Tribunal indicated that it regarded the review applicant to have been domiciled in Australia, which meant that both parties were required to be at least 18 years of age for a valid marriage or a de facto relationship to have existed at the time of application. As the visa applicant was 17 years old at the time of the marriage and application, the Tribunal found that she did not meet the definition of spouse and that the marriage could not be recognised in Australia as a valid marriage. The Tribunal then considered whether the visa applicant intended to marry an Australian citizen at the time of application. The Tribunal found that it was clear from the visa applicant's statement that they had agreed to marry when they went through a ceremony in front of family and friends. Although that marriage was not valid under Australian law, the Tribunal accepted that the visa applicant did not intentionally enter into an invalid marriage with the review applicant and that they had wrongly believed that their marriage in 2007 would be valid. The Tribunal found that the applicants had provided evidence that they had, more recently, undergone a valid marriage. The Tribunal found that the relationship was genuine, particularly having regard to the birth of their child. The Tribunal was satisfied that the visa applicant had intended to marry at the time of application, that the marriage had taken place and that the applicant continued to meet the definition of spouse at the time of decision. Therefore, the visa applicant met cl.309.221 and cl.309.224 of the Regulations for the grant of the visa.

## Student visas

0901977

21 April 2009, Melbourne

Dr D Thomas, Member

**STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 571 (SCHOOLS SECTOR) – CANCELLATION – S.116 – R.2.43(2)(b) – CONDITION 8202(2)(a) – EXCEPTIONAL CIRCUMSTANCES BEYOND APPLICANT'S CONTROL** – A delegate of the Minister cancelled the applicant's Subclass 571 visa under s.116(1) of the Act on the basis that the applicant had not complied with Condition 8202(2)(a) of the Regulations as he was not currently enrolled in a registered course. The applicant was issued with a Notice of Intention to Consider Cancellation (NOICC) under s.119 of the Act. The applicant claimed that he was unaware he had to inform the education provider or the Department about ceasing his studies and did not know the reason for the visa cancellation. The applicant claimed he ceased studying in August 2008 as he had run out of money and needed to work to pay for study. He claimed he had failed his course, lost his wallet with \$1,000, was over 18 years old and wanted to experience Australian life. He found a job and began working in September 2008. The applicant confirmed he was not presently enrolled in a course. He claimed he was thinking of studying again and gave a number of reasons for the lateness in applying for a subsequent student visa.

**Held:** Decision under review affirmed

The Tribunal found that the NOICC provided to the applicant clearly set out the grounds of the alleged non-compliance and the applicant's response to the NOICC indicated that he understood the nature of the alleged non-compliance. Consequently, the Tribunal was satisfied that the applicant had sufficient information to adequately understand and therefore, respond to the NOICC. The Tribunal found that the applicant had breached Condition 8202(2)(a) as he had not been enrolled in a registered course since August 2008. The Tribunal noted that the applicant already held a student visa when he was working and hence, it gave no weight to his reasons for discontinuing his enrolment for over seven months. The Tribunal considered whether the non-compliance was not due to exceptional circumstances beyond the applicant's control. The Tribunal found that the applicant's decision to leave his course and work were neither exceptional circumstances nor beyond his control. Based on the evidence, the Tribunal was satisfied that the non-compliance with Condition 8202 was not due to exceptional circumstances beyond the applicant's control. Such circumstances were prescribed circumstances requiring mandatory cancellation in accordance with s.116(3) and r.2.43(2)(b). Accordingly, the Tribunal affirmed the decision to cancel the applicant's visa.

## Visitor visas

0808958

6 March 2009, Sydney

Mr D O'Brien, Principal Member

**SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 (SPONSORED FAMILY VISITOR) – CL.679.224 – GENUINE VISIT** – A delegate of the Minister refused to grant the visa applicant a Subclass 679 visa on the basis that she did not satisfy cl.679.224 of the Regulations. The visa applicant's husband sponsored his wife as a visitor, not as a spouse. He suggested that she visit Australia and that he would follow her later to Vietnam and then live together. He did not own a home and had limited funds. He claimed it was difficult to successfully sponsor his wife on a spouse visa and the process involved too much time. He was unemployed, was awaiting a workers compensation payout and would receive the age pension in Vietnam. His wife lived in Vietnam with her mother and siblings, operated a small business from home and supported herself on her savings. She wanted to visit Australia because she missed her husband. She stated that she would respect the visa period specified and after she returned to Vietnam, her husband would join her. Her husband claimed that if the visa was not granted, he would go to Vietnam but his wife would never see Australia because she could not afford the trip.

**Held:** Decision under review affirmed

The issue for the Tribunal was whether the visa applicant's intention to visit Australia was genuine. The overriding consideration was that the applicants were married. The Tribunal noted that the fact of their marriage and the visa applicant's personal circumstances would encourage her to stay in Australia with her husband rather than return to Vietnam when her visa expired. She had no ongoing employment in Vietnam, her home business was casual and she had siblings who could take care of her elderly mother. The sponsor's circumstances were relevant to the visa applicant's intentions because they were married. His desire for companionship and the need to remain in Australia after the visa applicant returned to Vietnam made it hard for the Tribunal to accept they both would not be strongly motivated to remain together in Australia beyond the period of the visa. The Tribunal was not satisfied that the expressed intention of the visa applicant to visit Australia was genuine. Accordingly, the Tribunal found the visa applicant did not satisfy the requirements of cl.679.224.

## Other visas

**0804426**

**9 April 2009, Sydney**

**Mr T Delofski, Member**

**OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 116 (CARER) – CL.116.221 – R.1.15AA(1)(e) – ASSISTANCE FROM AUSTRALIAN RESIDENT OR COMMUNITY SERVICES** – A delegate of the Minister refused to grant the applicant a Subclass 116 visa on the basis that he did not satisfy cl.616.212 and cl.116.221 of the Regulations. The applicant claimed to be a carer of the review applicant, his father and an Australian citizen. The sponsor was the review applicant's wife, the applicant's mother and an Australian citizen. The review applicant had four children and a brother and his family who were all resident in Australia. His children resident in Australia described their current circumstances and claimed they were unable to provide the requisite care to their father. The sponsor claimed that the review applicant had minimal contact with his brother and his family who would not be willing to provide the requisite care to the review applicant. She claimed that the applicant was both willing and able to provide to the review applicant substantial and continuing assistance of the kind needed and he had provided care to his father when he was in Fiji. Furthermore, the sponsor claimed the review applicant was on a long waiting list for home care services and was unlikely to be eligible for such community services for a considerable time. The sponsor stated that, given her current full-time employment in the aged care sector, she was familiar with the assistance from welfare, hospital, nursing or community services available in their region. She claimed that there were no services reasonably obtainable that provided the sort of culturally sensitive care that the review applicant needed.

**Held:** Decision under review set aside

The Tribunal accepted that the applicant claimed to be the carer of the review applicant. The Tribunal accepted all of the sponsor's claims. Based on the evidence, the Tribunal was satisfied that the review applicant could not reasonably obtain assistance from any other relative being an Australian citizen, Australian permanent resident or eligible New Zealand citizen. The Tribunal was also satisfied that the review applicant could not reasonably obtain assistance from welfare, hospital, nursing or community services in Australia. Therefore, the requirements of r.1.15AA(1)(e)(i) and (ii) were met. Accordingly, the Tribunal was satisfied that, at the time of decision, the visa applicant was a carer of the Australian relative, being the review applicant, and met cl.116.221.

# REFUGEE REVIEW TRIBUNAL DECISIONS

## China

0805331

30 April 2009, Melbourne

Mr T Connellan, Member

### **CHINA – PARTICULAR SOCIAL GROUP – CHILDREN OF PERSECUTED DISSIDENTS – RELIGION – CHRISTIAN – POLITICAL OPINION – FALUN GONG**

The applicant was a two year old child and lacked the capacity to make her own claims. The applicant's mother, in her capacity as guardian of the applicant, provided a statutory declaration with the visa application claiming that the applicant was born in Australia, was her third child and thus born in contravention of China's "One Child Policy", was at real risk of suffering persecution and discrimination in China due to classification as a "Black Child", that the Chinese consulate in Australia would not register the applicant's birth and that as such the applicant was effectively stateless. The applicant's mother and father had both unsuccessfully applied for protection visas in Australia. The applicant's mother claimed she would be persecuted for reasons of her religious beliefs and political opinion should she return to China which would negatively impact the life of the applicant. The applicant's mother claimed that she had been blacklisted by the Chinese government and had engaged in anti-government demonstrations in Australia when she became a Falun Gong practitioner for a brief time. She claimed that during this incident she placed a protest placard on the applicant's pram which was photographed by the media and that the photograph was subsequently published on the Internet.

**Held:** Decision under review set aside

On the basis of the evidence submitted to the Tribunal in support of the application, the Tribunal accepted that the applicant was the third child in her family and thus that her birth was in contravention of the "One Child Policy" and that she was therefore classified as a "Black Child". On the basis of the nationality law of China regarding the status of Chinese born overseas, the Tribunal did not accept the claim that the applicant was 'stateless', and found the applicant to have Chinese nationality. The Tribunal noted that the only grounds on which it believed the applicant may legitimately have claimed to fear persecution related to the claims that her mother was recorded protesting against the Chinese government and may, therefore, have been brought to the attention of the Chinese authorities. The Tribunal doubted the veracity of the applicant's mother's claim to have become a Falun Gong practitioner in Australia, and during that time she protested against the Chinese government and was photographed with the applicant by the media. However, in consideration of the 'what if I'm wrong' test, the Tribunal granted the applicant's mother the benefit of the doubt and accepted that these events took place. Having accepted that the events took place, the Tribunal believed that the applicant's mother engaged in the activities solely for the purpose of strengthening the refugee claims for herself and her family. The Tribunal noted that had the mother been the applicant in this case, her behaviour and the consequences would not have been taken into account in making a decision; however, the applicant was her child and could not be penalised because of the behaviour of a third party. The Tribunal found that the applicant's mother's protesting in Australia may have brought her to the attention of the Chinese authorities as a Falun Gong practitioner who had engaged in anti-government activities in Australia. As a result of this notoriety, the Tribunal accepted there was a real chance that the applicant's mother might face persecution and incarceration should she return to China now or in the foreseeable future. Such persecution would result in either the applicant also suffering incarceration or being separated from her mother. Consequently, the Tribunal found that the applicant faced a real chance of persecution as a member of the social group comprising children of persecuted dissidents, and that should the applicant suffer persecution as a result of her mother's incarceration, it would be for the essential and significant reason of her religious and political views, and therefore, Convention based. Accordingly, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

## Cote d'Ivoire

0901064

4 May 2009, Sydney

Ms R Mathlin, Member

**COTE D'IVOIRE – POLITICAL OPINION – FORCES NOUVELLES** – The applicant claimed to fear persecution for reason of her imputed political opinion as a Forces Nouvelles (FN) rebel supporter. She claimed that she was the partner of a military officer who gave her packages to deliver to his friend at another military base. She did not know the contents of the packages or why he did not deliver them himself. His friend joined the FN rebels and her partner was arrested, detained and accused of security offences. The applicant claimed she was also arrested, detained and charged with similar crimes because of the connection to her partner and his friend. She was subjected to violence, abuse and mistreatment while detained. She stated that a friend from the military helped her escape. The applicant claimed that she met a person in Singapore who lent her a French passport, and sold her an Australian visa and ticket. She passed through immigration clearances using the other person's identity. A psychologist's report stated the applicant suffered post-traumatic stress disorder (PTSD) as a result of her imprisonment and torture. The delegate did not believe the applicant's account because of inconsistencies and thought that her claims were implausible.

**Held:** Decision under review set aside

The applicant entered Australia on a French passport but claimed that she was a national from Cote d'Ivoire. The applicant's evidence confirmed her identity and the Tribunal accepted this as true. The Tribunal assessed the applicant's credibility against her written statement, the quality of interpretation and information given at her interview and the adverse effects of PTSD on the applicant's memory and capacity to recount experiences. The Tribunal found that the circumstances of her travel to Australia were implausible but were not a core or central element to her claims and not incompatible with credibility. Her central claims were coherent and consistent with information about Cote d'Ivoire. The applicant was not expected to explain the actions of other people and inconsistencies were related to minor details and to psychological and language problems. The Tribunal accepted that she remained under investigation and, if she returned, there was a real chance she would again be detained and subjected to physical abuse and torture which amounted to serious, systematic and discriminatory harm and therefore, persecution. Consequently, the Tribunal was satisfied the applicant had a well-founded fear of persecution for a Convention reason.

## Egypt

0900263

22 April 2009, Melbourne

Mr G Robinson, Member

**EGYPT – RELIGION – COPTIC CHRISTIAN** – The applicant claimed to fear persecution for reason of his religion as a Coptic Christian. He claimed that he and his family suffered ongoing discrimination at school and at work because they were Christians. He claimed Muslim men swore at him, defiled his religion, told him to attend the Mosque and convert to Islam. The applicant refused, was subsequently attacked with a knife and seriously injured. He claimed not all Muslims did such acts but their motivation was religious. His treating doctor at a Christian hospital did not write a report for fear of harm by the police. The applicant did not report the attack as the police did not provide protection to Christians and he feared being falsely charged and prosecuted as punishment for reporting on Muslims. He could not explain why he was targeted in this way. Numerous reports illustrating country of origin information (COI) on the treatment of Coptic Christians in Egypt were submitted in support of the applicant's claims.

**Held:** Decision under review set aside

The Tribunal found the applicant to be a credible witness and accepted the applicant's claim that he was attacked by a group of Muslim thugs, that this attack amounted to serious harm and that it was due to his religion. The Tribunal accepted that there was a real chance of him being attacked by that gang, or another like it, if he were to return to Egypt. COI supported the long history of discrimination against, and

persecution of, Christians in Egypt. The Tribunal noted that Islamic law is official in Egypt and it accepted that the security organs of the State reflect its Islamic character, and that they exhibited bias against Christians. The Tribunal accepted that the situation appeared to be worsening because of intolerance and hardline Islamic thinking; the police responded slowly to complaints from Christians and the State was reluctant to prosecute Muslims for crimes against Christians. The Tribunal also accepted that Coptic Christians in Egypt were reluctant to pursue their rights since they were fearful of retaliation by the perpetrators of the crimes against them, and possibly by organs of the State. The Tribunal considered the possibility of internal relocation; however, it accepted that there was no indication in the COI that certain areas of Egypt would be safer for Coptic Christians. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## India

**0808540**

**13 March 2009, Sydney**

**Ms C Long, Member**

**INDIA – RELIGION – CHRISTIAN** – The applicant claimed to fear persecution for reason of his religion. The applicant claimed that he was a Latin Christian from Kerala. He claimed that he had been detained and assaulted by police for speaking out against corrupt local police and reporting them when they threatened others. He submitted a media article in which he claimed he was named and his picture appeared as a person wanted for assaulting police. He claimed that he went into hiding in Tamil Nadu before leaving for Australia. He also claimed that he left the country years earlier due to clashes between Muslims and Christians. The applicant arrived in Australia on a passport in a different name to the name on his application. He claimed that he had to travel on a false passport to other countries before returning to Kerala because he feared harm from Muslims and was unable to obtain a passport in his real name as the government had his name. He claimed that he had given the passport to his wife to burn when he returned to Kerala. However, when they found out about World Youth Day, his wife informed him that she had given the passport to their priest instead of destroying it as he requested.

**Held:** Decision under review affirmed

The Tribunal accepted that the applicant was Christian; however, it had some doubts about his true identity. It did not accept the applicant told his wife to destroy a false passport, but then used it to come to Australia when he discovered it still existed. Instead, it found he used both the name on the passport and the name on his application. The Tribunal accepted independent information that there were violent clashes between the different religions and that Christians were sometimes targeted. It also accepted that protection was not always available to those who fear harm in these circumstances and that there was corruption and bribery amongst the police, the bureaucracy and politicians. However, the Tribunal also accepted the applicant worked in other countries then returned to work in Kerala and did not consider these actions consistent with his claims to fear harm in India. As such, the Tribunal did not find the applicant truthful; and gave the article and other corroborative evidence no weight as it did not consider them to be reliable. The Tribunal also rejected all the applicant's claims of harm and found no plausible evidence that there was a real chance that he would suffer harm in the reasonably foreseeable future. Consequently, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution within the meaning of the Convention.

**0900574**

**22 April 2009, Sydney**

**Ms P McIntosh, Member**

**INDIA – POLITICAL OPINION – ANTI-CHILD LABOUR** – The applicants claimed to fear persecution for reason of their political opinion. The primary applicant claimed to have a law degree and worked as a bank clerk. He claimed he was active in the fight against child labour in Gujarat. This involved educating families in villages about the law prohibiting the use of labour of children under 14 and raising funds for a non-government organisation (NGO) he had established with friends. The primary applicant claimed the purpose of his group was to prevent child exploitation through labour and educate local people about the law and their human rights. He claimed he had contact with various NGOs and trade unions opposed to the

use of child labour. As a result, he became an enemy of child labour contractors. The primary applicant claimed he had been threatened by labour contractors. A labour contractor and group of armed men came to a village and verbally abused him, a second contractor confronted and threatened him at his workplace and whilst escaping from another attempted attack, he was involved in a traffic accident. He claimed he did not report the threats to the authorities as child labour contractors had political connections and were very powerful. The primary applicant claimed that they would be able to find him and kill him even if he moved to another part of India.

**Held:** Decision under review affirmed

The Tribunal found that the primary applicant's level of knowledge regarding the law on the exploitation of child labour was minimal and was inconsistent with his having been active in this particular area of law. The primary applicant was unable to identify the law on which he based his belief on the illegality of child labour nor any international Convention to which India was a signatory relating to this issue. He was also unable to name any NGOs working in this particular area or operating at the time he left India. Consequently, the Tribunal was not satisfied that he was an activist working in the area of child labour. The Tribunal also found it implausible that he faced serious harm from child labour contractors as he was not an activist as he claimed, and he did not take obvious and immediate steps to protect himself or his family from the harm he claimed to fear, such as moving away, avoiding his workplace, reporting threats to the police or seeking advice on self-protection measures from other NGOs combating child labour. Therefore, the Tribunal was not satisfied that the applicants had a well-founded fear of persecution for a Convention reason.

## Montenegro

0900037

27 February 2009, Melbourne

Mr A Gentile, Member

**MONTENEGRO – POLITICAL OPINION – AGAINST SEPARATION OF SERBIA-MONTENEGRO – FORMER POLICE OFFICER** – The applicant claimed to fear persecution for reasons of his real and imputed political opinions because he had opposed the separation of the Union of Serbia and Montenegro and worked under the previous government as a police officer. The applicant claimed to fear retribution by persons he arrested when working as a police officer. The applicant cited the names of two persons whom he had arrested prior to 1995 who were now in powerful positions. The applicant claimed to fear harm from criminals, from the current government and from crime stemming from the change in government. The examples given by the applicant of the kinds of detriment experienced during his most recent stay in Montenegro included laborious customs and entry procedures and the police disallowing him to fire guns into the air according to custom during his wedding ceremony. In support of his application the applicant submitted excerpts from newspaper articles regarding the corruption of the current government and a case where a policeman who was investigating the murder of a journalist was killed.

**Held:** Decision under review affirmed

The Tribunal found that the examples given by the applicant about the kind of detriment experienced in Montenegro did not constitute persecution in terms of the Refugees Convention. It noted that the applicant had returned to Montenegro for three months before he last returned to Australia and had not reported any harm of any kind being inflicted upon him during this period. The Tribunal accepted the theoretical possibility that some person whom the applicant had arrested prior to 1995 when he was in the police force could seek retribution. However, the applicant had not provided to the Tribunal any evidence of particular people who would want to harm him, nor of anyone seeking to do so during his last visit to Montenegro. The Tribunal noted that the newspaper excerpts regarding the murder of a journalist and the police officer who was investigating the death did not, in itself, support the applicant's argument that he too would be harmed. The Tribunal considered that the applicant was expressing a subjective fear of harm, and given the passage of time and the vague nature of the threat as expressed by the applicant, the Tribunal found that the chance of his being harmed for having arrested someone prior to 1995 was remote and insubstantial. While the Tribunal accepted that corruption existed in the current government, it found that no precise connection between this corruption and the applicant's fear of future harm had been made. The Tribunal found the applicants claims vague and lacking in detail and did not accept that the applicant faced a real chance of

serious harm from criminals, the current government or because there had been a change of government or because of his previous work as a police officer. Further, on the basis of independent information, the Tribunal found that there had been no indication of any animosity or displays of animosity toward those who voted not to separate from Serbia. The Tribunal found that there was not a real chance that the applicant would be subject to harm of the kind and severity amounting to persecution for reasons of his imputed or actual political opinions should he return to Montenegro and thus, that his fear of persecution was not a well-founded fear of persecution for a Convention reason.

## New Zealand

0902229

5 May 2009, Sydney

Mr A Jacovides, Member

### **NEW ZEALAND – PARTICULAR SOCIAL GROUP – YOUNG SAMOAN MALES WITHOUT FAMILY –**

The applicant claimed to fear persecution for reasons of his membership of the particular social group, people who do not have any family in New Zealand. The applicant claimed that he was born in Samoa and was a New Zealand citizen. His family subsequently migrated to Australia. The applicant stated that he had been in prison for breaking and entering offences. He claimed that he was at risk of harm by criminal and ethnically based gangs in New Zealand and feared he would either be forced to join a gang or become targeted by the gangs. The applicant claimed that as a young male Samoan, without family and with a criminal record, he was particularly vulnerable to targeting by the gangs. Without his family's protection, support, and assistance, he may be forced to join a gang for protection. The applicant argued that the New Zealand authorities were incapable of providing effective protection to individuals targeted by the gangs as the gangs were powerful and the authorities could not control their activities. He further claimed, given his background, that New Zealand police would not be willing to protect him as he would be considered a trouble-maker and denied full access to the protection which would otherwise be available to New Zealand citizens.

**Held:** Decision under review affirmed

The Tribunal was not satisfied that people without family in New Zealand were at risk of being subjected to persecution by gangs in New Zealand for reasons of their membership of that particular social group. The Tribunal accepted that as a young Samoan male with a criminal record, without family in New Zealand, the applicant may be vulnerable to targeting by the gangs, particularly in areas such as south Auckland where the gangs were active. Referring to independent information that suggested joining a gang was difficult as potential members had to perform difficult and sometimes dangerous tasks before they were permitted to join – that the gangs appeared to operate primarily in south Auckland and often involved teenagers – the Tribunal commented that it seemed unlikely that the applicant would be targeted by the gangs or forced to join. However, if the applicant was targeted by the gangs, the Tribunal found that New Zealand citizens had access to a reasonable level of protection provided by the State irrespective of their background. The Tribunal accepted that the authorities had not been able to eliminate the gangs or prevent their criminal activities but it was satisfied that the standard of State protection in New Zealand was consistent with international standards. The Tribunal acknowledged the applicant's argument that he would face considerable hardship if forced to return to New Zealand without his family; however, the Tribunal's role was limited to determining whether the applicant satisfied the criteria for the grant of a protection visa. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## Nigeria

0900773

30 April 2009, Sydney

Ms R Mathlin, Member

**NIGERIA – POLITICAL OPINION – ODUJA PEOPLE’S CONGRESS – NIGER DELTA MILITANTS – PARTICULAR SOCIAL GROUP – FAMILY – RELIGION – CHRISTIAN** – The applicant claimed to fear persecution for reasons of his imputed political opinion, membership of a particular social group and religion. He claimed to fear harm from the Odua People’s Congress (OPC) as a result of his involvement in an incident in a market he used to work at in Lagos. During this incident fighting, in which the applicant claimed to be involved, broke out after a trader refused to pay protection money to the OPC. The applicant claimed an OPC member pursued him for some time when he ran away from the market and that he overheard another OPC member saying that he knew where the applicant lived. He also claimed to fear harm from members of his family for reason of his refusal to take over the role assigned to him as head of the family’s traditional religion. The applicant claimed to be a Christian but, as his father’s oldest son, he was expected to continue the family practice of worshipping idols. He claimed that his father had hit the applicant in the head with a glass and threatened to kill him. The applicant also claimed to fear harm from militant groups in the Niger Delta region, his tribal home, because he refused to fight with them. He claimed to have been approached by young men involved with one of the militant gangs that supported his local chief and asked to join them. He claimed to have been harassed at his house but that he did not know whether it was his family or militants that were harassing him. In support of this claim the applicant submitted country of origin information regarding ongoing conflict in the Niger Delta region which had caused widespread human rights abuses.

**Held:** Decision under review affirmed

On the basis of independent information, the Tribunal accepted that the market in which the applicant worked in Lagos was affected by riots instigated by the OPC. However, it was not satisfied that the applicant had a well-founded fear of Convention persecution as a result. The Tribunal was satisfied that, eight years after these events, the risk of the applicant being sought out and targeted for harm as a consequence of his involvement was remote and speculative. The Tribunal noted that the applicant had not provided any evidence indicating that he remained of interest to the OPC and that while he may have been afraid, no objective basis for that fear was apparent to the Tribunal. In relation to the applicant’s claimed fear of harm from his family, the Tribunal expressed concerns about the reliability of the applicant’s evidence. The Tribunal noted that his accounts of his dealings with family members following the assault on him by his father were confused, incoherent and inconsistent; the Tribunal found some of his assertions inherently implausible. While the Tribunal accepted that the applicant and his father may have argued as claimed, it did not accept that this one incident constituted sufficiently serious harm as to be considered persecution. Nor, in the Tribunal’s opinion, did it disclose, in light of the deficient evidence, that there existed a real chance that future harm amounting to persecution would be carried out by members of his family. In relation to the independent information submitted regarding ongoing conflict in the Niger Delta region, the Tribunal saw no specific reference to the dispute in the applicant’s village which he claimed had caused him to flee. Even accepting that the applicant was asked, as claimed, to join a group of militants, the Tribunal was not satisfied that in the generally chaotic situation described in independent information, the applicant would have been further targeted by the gang. The Tribunal accepted that the applicant may have witnessed and felt threatened by the generally violent situation in the region; however, it was not satisfied, based on the information before it, that the applicant had a well-founded fear of persecution for a Convention reason.

## Somalia

0900571

16 April 2009, Melbourne

Mr G Haddad, Member

**SOMALIA – POLITICAL OPINION – PARTICULAR SOCIAL GROUP – YOUNG UNMARRIED WOMEN IN SOMALIA** – The applicant claimed to fear persecution for reason of her membership of a particular social group, young unmarried Somali women. The applicant lived in a city which was subjected to

frequent violence and bomb attacks. She claimed her mother had been killed, her father had disappeared and her older brother fled to avoid fighting. She was left to care for her younger siblings. The applicant claimed she later lived outside the city as an internally displaced person. There were many rapes and attacks on women and the applicant feared being attacked because she did not have protection from male family members, from her clan or from the government. She feared harm and mistreatment as a woman and from her clan. The applicant claimed young unmarried women without male protection were particularly vulnerable and constituted a particular social group. She feared returning because of her imputed political opinion, as a young Somali woman and because of violence which included rape.

**Held:** Decision under review set aside

The Tribunal was satisfied that the applicant feared persecution which was systematic and discriminatory against women in Somalia by a male dominated society where matters were dealt with by established custom. It found that there was no effective protection from the state, judiciary or police force. Rape against women was part of the violence between conflicting groups and perpetrated to cause dishonour and break down social cohesion. The Tribunal found that young unmarried Somali women without male protection could constitute a particular social group which was particularly vulnerable and that the applicant was a member of this group. Protection from the clans depended on whether the woman lived within her own clan. Internally displaced women were particularly vulnerable and there was no certainty that the applicant would be protected by her clan. The Tribunal noted that she could not safely relocate elsewhere as the risk of harm was not removed in other parts of the country. The Tribunal found that the applicant, as a young unmarried Somali woman, constituted a member of a particular social group and faced a real chance of persecution and serious harm because of her membership of that group. Consequently, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## Togo

**0900599**

**28 April 2009, Sydney**

**Ms S Leal, Member**

**TOGO – POLITICAL OPINION – UNION OF FORCES FOR DEMOCRATIC CHANGE** – The applicant claimed to fear persecution for reason of his political opinion. He claimed to fear persecution from the Togolese government and army for reason of his membership of the opposition party, the Union of Forces for Democratic Change (UFC). The applicant claimed that he and his mother had been attacked on different occasions by the Togolese army. He claimed that he became a member of the UFC in 2001 and came to have an active role and public profile as a party member. From this time, the applicant claimed to have come under attack, along with other members of the UFC. He claimed that government militaries beat his mother and brother severely on one occasion when looking for him at the family home. After this, he fled Togo to Ghana. The applicant did not register as a refugee there as he claimed to have witnessed Togolese refugees being sent back by force. He claimed to have returned to Togo and to have travelled with party delegates in 2005 during the election campaign until he was assaulted by Rally of Togolese People (RPT) militia and fled back to Ghana. In Ghana, the applicant claimed to have been beaten by Togolese men possibly associated with the RPT. The applicant claimed to have lived in close proximity to the President's sister and, consequently, he was kept under surveillance during election time. The applicant also claimed to have been attacked by men assumed to be associated with the Togolese government while living in Ghana. The applicant claimed to fear that he would be targeted for his involvement in the UFC in the lead up to the 2010 elections should he return to Togo, and that this danger had been exacerbated by the suspicious death of a relative who was a political figure and who had originally convinced him to join the UFC.

**Held:** Decision under review set aside

On the basis of independent information, the Tribunal accepted that, although the political situation in Togo had improved since 2005, human rights abuses continue and that there were concerns for further abuses in the lead up to the 2010 elections. The Tribunal accepted the applicant's claims and was satisfied that because of his membership of the UFC, the applicant had a well-founded fear of persecution on the basis of his political opinion. The Tribunal found that the harm threatened was serious harm, as it involved the threat of significant physical harassment or ill-treatment should the applicant be forced to return to Togo. The

Tribunal was satisfied that in light of previous surveillance and attacks, the applicant would be at risk of physical harm upon his return to Togo. The Tribunal noted that Togo is a small country with a national government run by the RPT party and that, given the applicant's previous targeting by Togolese attackers in Ghana, it would be difficult for him to escape attention and possible further attacks in Togo itself. Thus, the Tribunal was satisfied that relocation was not an option that was available to the applicant. The Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

## Vietnam

0900540

30 April 2009, Melbourne

Ms S Muling, Member

**VIETNAM – PARTICULAR SOCIAL GROUP – SEPARATED WOMEN – POLITICAL OPINION – ANTI-GOVERNMENT** – The applicant claimed to fear persecution for reasons of her imputed political opinion and membership of the particular social group, women who have left their husbands. The applicant claimed to be a Vietnamese citizen and left Vietnam to marry an Australian citizen. The applicant claimed as a woman who had left her husband and because of the imputed political opinion from her father's political opinion and activities she would be at risk of assault by members of the community and by the police and authorities. The applicant claimed she left her husband after the deterioration of their relationship. She claimed to fear harm from her former husband as he made threats to her mother that he would harm the applicant if he found her. She claimed that Vietnamese women considered to have deviated from the social norms by divorcing their husbands were punished and ostracised by the community. They were vulnerable to violence and sexual abuse. The applicant also claimed it would be difficult for her to gain employment if she returned to Vietnam due to her father's political profile. She claimed that her father had been very vocal about his opposition to the Communist regime in Vietnam and had subsequently fled the country. As a result, she claimed the family home was placed under police surveillance and, after her father's return to Vietnam, he had been unable to find employment. She claimed that family members had difficulties finding employment and she was only able to find a job through a neighbour.

**Held:** Decision under review affirmed

The Tribunal accepted that the applicant's husband had made threats against her but found he had not demonstrated any interest in her or her whereabouts for over 4 years. The Tribunal did not accept that there was a real chance that her husband or a third party would seriously harm her because she had left him. It accepted that as a separated woman the applicant may suffer a level of shame, embarrassment and humiliation due to her status. However, country of origin information (COI) indicated that divorce was on the rise in Vietnam and there was an absence of evidence showing that separated or divorced women in Vietnam were targeted by the authorities or the general public. The Tribunal did not accept that the applicant's fear of persecution for reasons of her membership of any particular social group arising out of her separation from her husband was well-founded. The Tribunal accepted that the family home and the applicant's father's movements had been monitored by police after his return to Vietnam. However, it did not accept that he was politically active or had a political profile prior to his departure from Vietnam. It found he had only voiced his opinions and dissatisfaction with the Vietnamese government to family and friends. COI indicated that in 40% of returning refugees monitored between 1996 and 1999, there were no cases of returnees complaining of arrest, persecution or discrimination due to their political background or decision to flee. It did not accept that the applicant's father's inability to gain employment had continued because he had fled the country or due to his imputed political opinion. The applicant's situation differed from her father as she had left Vietnam legally to marry her husband. External sources provided that a bad family background had no real effect on an individual in Vietnam since the late 1990's and that from 1999 such persons were no longer discriminated against. In light of this information, and taking into consideration the applicant's own experiences in Vietnam, the Tribunal did not accept that the applicant would be persecuted if she returned to Vietnam because of her father's profile or her family background. Therefore, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

# FEDERAL COURT JUDGMENTS

## MIAC v Brar

[2009] FCAFC 53

Federal Court of Australia, Stone, Greenwood & Besanko JJ, NSD 1359 of 2008, 13 May 2009

This was an appeal by the Minister from a judgment of the Federal Magistrates Court setting aside a decision of the Migration Review Tribunal (the Tribunal) that affirmed the cancellation of the respondent's student visa under s.116 of the *Migration Act* 1958 (the Act) and r.2.43 of the Migration Regulations 1994 (the Regulations). The visa had been cancelled for breach of condition 8202(3)(a) of Schedule 8 of the Regulations as it appeared prior to 1 July 2007.

The Tribunal found that the respondent had breached condition 8202(3)(a) by failing to attend 80% of contact hours during the second term of his course, which ran from 10 April 2007 until 15 June 2007, and that there were not exceptional circumstances beyond the respondent's control pursuant to r.2.43(2)(b)(ii) of the Regulations. The Tribunal applied the version of condition 8202 as it existed prior to 1 July 2007, without any discussion of the issue.

The Federal Magistrates Court held that condition 8202(3) was invalid in its entirety following the Full Court decision of *Dai v MIAC* (2007) 65 FCR 458 (*Dai*) or, alternatively, condition 8202(3)(a) was not severable from condition 8202(3)(b). Further, in *obiter dicta*, Driver FM found that the Tribunal should have applied the amended version of condition 8202 as there could be no breach of the pre 1 July 2007 condition 8202(3)(a) until the Minister's delegate became satisfied that the visa holder's attendance level was not sufficient to meet 80%, and this did not occur until September 2007. His Honour expressed the view that no valid notice could be issued under s.20 of the *Education Services for Overseas Students Act* 2000 (ESOS Act) until the Minister directed his mind to the issue.

On appeal, the Minister contended that his Honour misconstrued the Full Court's decision in *Dai*, should have found that condition 8202(3)(a) was severable from condition 8202(3)(b) and should have found that the correct version of condition 8202 that applied was the pre 1 July 2007 version.

**Held: *per curiam*, appeal allowed.**

### ***Validity of condition 8202(3)(a)***

*per Stone J (Greenwood and Besanko JJ agreeing)*

- (i) *Dai* is not authority for the proposition that the form of condition 8202 applied by the Tribunal was invalid in its entirety. In the circumstances before the Full Court in that case, no question of the invalidity of condition 8202(3)(a) was raised, nor was its necessary for the Full Court to consider the issue of severability.
- (ii) Even if condition 8202(3)(b) was invalid, this would not affect 8202(3)(a). Condition 8202(3)(a) is severable from (3)(b).

### ***Applicable version of 8202***

*per Stone J (Greenwood and Besanko JJ agreeing)*

- (iii) The Tribunal was right to apply condition 8202(3)(a) as it existed prior to 1 July 2007. The transitional provision provides that amended version of condition 8202 applies if the breach occurs "on or after 1 July 2007". The respondent breached condition 8202(3)(a) at the earliest when he had missed more than 20% of the scheduled contact hours for the course in which he was enrolled. At the latest, his breach occurred at the end of the semester, which was on 15 June 2007.
- (iv) When considered in the context of the Act and Regulations as well as the ESOS Act, the purpose of the statutory scheme in relation to condition 8202(3)(a) is tolerably clear. Once it is no longer possible for a student to attend 80% of the scheduled contact hours for a course, that is once the student has failed to attend more than 20% of the scheduled contact hours, compliance with condition 8202(3)(a)

is not possible. At that point the holder is in breach of condition 8202(1). The breach does not occur when the Minister's delegate is unable to reach the required state of satisfaction.

- (v) Condition 8202 is not inconsistent with s.20 of the ESOS Act.

*per Greenwood J*

- (vi) Section 20 of the ESOS Act has an inter-relationship with "prescribed conditions" applied to a visa by reasons of the Act and Regulations and contemplates obligations cast on an education provider once a breach has occurred. If the true content of the obligation prescribed by the condition is for the student to attend for at least 80% of contact hours, a breach will arise independently of any state of satisfaction of the Minister.

### **SZLPO v MIAC**

**[2009] FCAFC 51**

**Federal Court of Australia, Lindgren, Stone & Bennett JJ, NSD 1227 of 2008, 1 May 2009**

**SZLQH v MIAC; NSD 970 of 2008**

**SZLPP v MIAC; NSD 1486 of 2008**

This judgment concerned an appeal from a judgment of the Federal Magistrates Court (*SZLQH*) and two applications for judicial review heard in the Federal Court's original jurisdiction (*SZLPO & SZLPP*), relating to decisions of the Refugee Review Tribunal (the Tribunal) that the applicants were not persons to whom Australia owed protection obligations.

Each of the three proceedings raised questions concerning the proper construction of s.424 of the *Migration Act* 1958 (the Act) in its form prior to 15 March 2009, in light of the decisions of the Full Court of the Federal Court in *SZKTI v MIAC* (2008) 168 FCR 256 (*SZKTI*) and *SZKCO v MIAC* (2008) 170 FCR 236 (*SZKCO*).

In *SZLPO*, the applicant, a national of Bangladesh, claimed to fear persecution by reason of his Ahmadiyya faith. Prior to the Tribunal hearing, he submitted a letter of introduction from the Ahmadiyya Muslim Jamaat, Krora, Bangladesh. The Tribunal subsequently sent an email to the Department of Foreign Affairs and Trade (DFAT) requesting that it contact the National Ameer of the Ahmadiyya Muslim Jamaat of Bangladesh to verify the authenticity of the applicant's letter and his claim to be a member of the Ahmadi community. DFAT in Canberra passed on, *verbatim*, the Tribunal's request to its post in Dhaka. One or more officers from the Dhaka Post met with the National Ameer at his office in Dhaka and a report in response to the Tribunal's query was given. The applicant contended that the Tribunal failed to comply with ss.424 and 424B of the Act by inviting the National Ameer to give additional information otherwise than by one of the methods in s.441A of the Act and r.4.35 of the Migration Regulations 1994 (the Regulations).

In *SZLQH*, the appellant, a national of Pakistan, claimed to fear persecution by Islamic extremists who viewed him as a political opponent who did not follow Islamic law in an appropriate manner. The appellant submitted to the Tribunal facsimile copies of a death certificate for his brother and a reference, both of which contained facsimile stamps dated earlier than the dates of the documents themselves. At the hearing, the Tribunal told the appellant that "if he had any more information or evidence that the death certificate was a genuine document, the Tribunal would consider it if it was received prior to the handing down of the decision which would not be before 28 days". An officer of the Tribunal also made a telephone enquiry with the Detention Centre at which the appellant was detained regarding any possible discrepancies in the date stamp on their faxes. The Tribunal's decision was made and dispatched to the appellant before the 28 day period referred to at the hearing had expired. The appellant contended that the Tribunal's oral invitation at the hearing, and its invitation to the management of the Detention Centre did not comply with the requirements of ss.424(2), 424(3) and 424B of the Act and r.5.02 of the Regulations.

In *SZLPP*, the applicant, a citizen of the People's Republic of China (PRC), claimed to fear persecution as a Falun Gong practitioner. Prior to the hearing, a Tribunal officer emailed the Department of Immigration (NSW OP-RRT Liaison Unit) advising that the Presiding Member had requested the applicant's original visitor visa application and a copy of his health examination. A Departmental officer responded and the Tribunal sent a further email replying to that officer seeking confirmation that the applicant had not submitted the results of his health examination yet. The applicant contended that the Tribunal failed to comply with ss.424, 424B and 441A because its invitation to a person within the Department did not specify the method or time

within which the information requested was to be provided. The applicant also contended that the Tribunal made a finding unsupported by evidence in stating that the applicant's comparison of Falun Gong to Kung Fu was "bizarre".

**Held: *per curiam*, applications by *SZLPO* and *SZLPP*, and appeal by *SZLQH*, dismissed.**

***Operation of s.424(2)***

- (i) "Additional information" within s.424(2) means "information additional to information previously given to the Tribunal by the invitee". Section 424(3) is workable only if the methods of giving an invitation are able to be used. Apart from a person in immigration detention, s.424(3) assumes, by reason of its reference to s.441A that the invitee is either a person to whom the Registrar can hand the document (such as a person who has given evidence before the Tribunal) or whose address the Tribunal already has. Ordinarily this will be a person who has already given information to the Tribunal.
- (ii) *Obiter*: The word "person" in s.424(2) means only a natural person. First, s.424(2) provides the voluntary equivalent of the compulsive power to summon an identified person to attend and give evidence in s.427(3). Second, in s.441A the person to whom the document is to be given is called the "recipient". In various ways subsections 441A(2), (3), (4) and (5) suggest that the recipient is a natural person. Third, the kinds of issues into which the Tribunal is required to enquire suggest information that an individual is able to give concerning an individual.
- (iii) The word "person" in s.424(2) is limited by reference to a person whose identity is known at the time of the extending of the invitation.
- (iv) Subsection 424(2) does not apply to an invitation to a person to supply a document to the Tribunal. A document is not "information". The two words mean different things, although a document may convey information.
- (v) The Tribunal's obligation to conduct a review under s.414(1) coupled with its power under s.415 provide authority for the Tribunal to request or invite someone to produce a document (or non-documentary information) to the Tribunal subject to any constraints found in the Act.

***SZLPO***

- (vi) DFAT acted as agent for the Tribunal. An inference can comfortably be drawn that the request to the National Ameer was made orally by a person or persons from the DFAT Post in Dhaka. The Tribunal's invitation to the National Ameer was therefore not given by one of the methods specified in s.441A.
- (vii) However, since neither DFAT nor the National Ameer had previously given information to the Tribunal in the course of its review, any invitation was not an invitation to give "additional information", with the result that s.424(2) was not engaged.

***SZLQH***

- (viii) The Tribunal gave the appellant an "invitation" at the hearing to give "additional information", although it was not seeking to get any particular additional information. The Tribunal was required to give the invitation by one of the methods in s.441A and to comply with s.424B. The Tribunal did not comply with s.424(2), although the Tribunal did specify the way in which the additional information might be given for s.424B(1). By referring to receipt of the information, the Tribunal was indicating that it was to be in writing.
- (ix) The information to which the invitation related was information or evidence the appellant already had. Accordingly, it was to be provided from a place in Australia, namely the appellant's place of residence at the Detention Centre. Under r.4.35(2) the prescribed period for giving the additional information ended at the end of seven days after the date of receipt. Notwithstanding this, the Tribunal assured the appellant he would have 28 days. The Tribunal denied him procedural fairness by signing its decision only 21 days later.
- (x) Relief is refused on discretionary grounds. The information the appellant was invited to give could not have made any difference in the result as the Tribunal found that, assuming the death certificate

was genuine, it did not corroborate the appellant's claim. No practical injustice was suffered as a consequence of the making of the decision prior to the expiry of the 28 day period.

- (xi) The telephone enquiry to the Detention Centre did not constitute an invitation to a person who had previously given information to the Tribunal and did not attract the regime imposed by s.424(3).

**SZLPP**

- (xii) Section 424(2) did not apply to the request for the health examination results, being a request for a "document".
- (xiii) The request was also not made to a person who had previously given information to the Tribunal, so was not an invitation to provide "additional information".
- (xiv) Even if a document were information, by requesting a copy of the documents the Tribunal complied with that aspect of s.424B that requires a method by which the information is to be provided to be specified.
- (xv) *Obiter*: Rather than being made to a natural person, the request was to the RRT Liaison Unit. It is of no consequence whether "Antoinette" or some other officer within the Department responded.
- (xvi) The Tribunal is at liberty to act on the Tribunal member's expert knowledge. It was not required that the literature from which the member gained his knowledge of Falun Gong beliefs and practices be identified, let alone placed before the applicant.

**Patel v MIAC**

**[2009] FCA 392**

**Federal Court of Australia, Gray J, VID 676 of 2008, 23 April 2009**

This was an appeal from a decision of the Federal Magistrates Court dismissing an application for judicial review of a Migration Review Tribunal (the Tribunal) decision that it did not have jurisdiction to review a decision to cancel the appellant's visa.

The Tribunal wrote to the appellant on 25 September 2007 advising him of the decision to refuse his request for fee waiver and asking that he pay the prescribed application fee within a reasonable period, being by 18 October 2007. The letter was sent by registered post to the last address provided by the appellant though there was no evidence that Australia Post obtained any signature for the delivery of the letter. The appellant neither paid the fee nor responded to the letter. On 30 October 2007, the Tribunal decided that it did not have jurisdiction to review the decision. After being notified of the Tribunal's decision, the appellant telephoned the Tribunal and stated that he had not received any letter informing him of the outcome of his fee application. According to Tribunal records, an officer then telephoned the appellant and stated, in part, "*I confirmed that the Tribunal had met its legal obligation to notify him of the decision and the matter is now out of hands [sic] and we do nothing further to assist him.*"

The Federal Magistrates Court held that even if the appellant did not receive the letter it was plain that the Tribunal decision was correct because at the time of the Tribunal decision the appellant had not paid the required fee. The appellant told the Federal Court that he had been ready and able to pay the fee, if his fee waiver application was unsuccessful.

**Held: Appeal allowed. Writ of mandamus issued directing the Tribunal to hear and determine the application.**

- (i) The Tribunal wrongfully declined to investigate the applicant's assertion that he had not received the letter of 25 September 2007. The Tribunal had the power to consider whether a reasonable time had in fact elapsed after the deemed receipt of the letter and therefore whether its decision declining jurisdiction had been made properly.
- (ii) The fact that the Tribunal did not have evidence of actual delivery was significant. If the applicant had been successful in obtaining a finding of fact that he had not received the letter, the Tribunal would have been required to consider whether, in the light of that circumstance, the applicant had been given a reasonable time in which to pay the fee. If the Tribunal found that a reasonable time

had not elapsed, it might have considered that its decision was subject to jurisdictional error and therefore that it was necessary for it ignore its previous decision.

- (iii) The reasonableness of the time allowed must be determined, in each case, according to the circumstances of the case. If, in a particular case, the person to whom the letter is addressed has not received it in fact, that is one of the circumstances that must be taken into account in determining whether a reasonable time in fact has elapsed.

# FEDERAL MAGISTRATES COURT JUDGMENTS

## **Khant v MIAC**

**[2009] FMCA 328**

**Federal Magistrates Court of Australia, Raphael FM, SYG 2711 of 2008, 21 April 2009**

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 Visa (Class TU) subclass 573 visa. The applicant's visa was cancelled under s.116 of the *Migration Act* 1958 (the Act) on the basis that he had failed to comply with condition 8202 of his visa because he had ceased to be enrolled in a registered course.

The Tribunal wrote to the applicant, at the address given in his application for review, asking him to respond to certain information under s.359A of the Act and requesting additional information pursuant to s.359(2). No response was received and the Tribunal proceeded to make a decision without inviting the applicant to a hearing. In doing so, the Tribunal referred to the decision in *M v MMA* [2006] FCA 1247, in which the Federal Court found that once an applicant has lost their entitlement to a hearing, the effect of ss.359C(2), 360(3) and 363A is that the Tribunal has no discretionary power to invite the applicant to a hearing. The Tribunal also referred to the competing judgment of Riley FM in *Khergamwala v MIAC* [2007] FMCA 690, which followed *Uddin v MIMIA* [2005] FCAFC 218, noting that to the extent that it did retain any discretion to invite the applicant to a hearing, it was not persuaded to exercise that discretion in the circumstances.

The applicant contended, among other things, that the Tribunal had a residual discretion to invite the applicant to a hearing notwithstanding that the applicant had failed to respond to the Tribunal's invitations, and the Tribunal's exercise of that discretion miscarried.

**Held: Application dismissed.**

- (i) The Tribunal had no power to invite the applicant to a hearing once he had failed to respond to the ss.359A/359(2) letter.
- (ii) Section 359C gives the Tribunal the power to proceed make a decision on review without taking any further action to obtain the applicant's views upon the information requested. In other words, the Tribunal has a discretion as to whether or not it should try and make further contact with the applicant. Another way of obtaining the applicant's views upon the information would be by inviting the applicant to a hearing (s.360(1)). However, this obligation is restricted by s.360(2), which states the obligation to invite an applicant to a hearing does not apply where s.359C applies to the applicant. This is reinforced by s.360(3) which makes it clear that if s.360(2) applies, the applicant is not entitled to appear before the Tribunal. Section 363A removes any residual discretion the Tribunal may have to permit an applicant to a hearing, notwithstanding his or her loss of an entitlement to do so under s.360(3).
- (iii) The decision in *Khergamwala* did not give sufficient consideration to the context of the decision in *Uddin*. Given that the applicant in *Uddin* was not granted a hearing and the Full Federal Court failed to consider the effect of s.363A, the finding that the Tribunal was free to accord the applicant an oral hearing in these circumstances does not form part of the *ratio decidendi* of that case. The correct course is to follow *M*.

## **Singh v MIAC & Anor**

**[2009] FMCA 281**

**Federal Magistrates Court of Australia, Driver FM, SYG2855 of 2008, 23 April 2009**

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate to refuse to grant him a Temporary Business Entry (Class UC) Subclass 457 visa.

The delegate refused to grant the visa on the basis that the applicant had not substantially complied with the conditions of the applicant's earlier visa: cl.457.221 in Part 457 of Schedule 2 to the Migration

Regulations 1994 (the Regulations). In accordance with s.359 of the *Migration Act* 1958 (the Act), the Tribunal invited the applicant to provide additional information relevant to the review. The applicant failed to provide any information within the prescribed period and the Tribunal proceeded to make a decision without inviting the applicant to attend a hearing. The Tribunal was not satisfied that the applicant met the requirements of cl.457.223(4), namely that the applicant proposed to be employed in Australia by his sponsor (cl.457.223(4)(a)); and the applicant would be paid at the level specified in the nomination (cl.457.223(4)(f)). The Tribunal's reasons for decision also stated, "*Departmental systems ... show that the sponsor ... was approved as a sponsor for 2 years on 29 August 2006. That sponsorship has now expired.*"

The Court invited submissions on the issue of whether the applicant's failure to respond to the s.359 letter deprived him of a hearing pursuant to s.360 of the Act having regard to s.363A of the Act; and whether the Tribunal breached s.359A by failing to disclose to the applicant and invite comment on information derived by the Tribunal from "Departmental systems".

**Held: MRT decision quashed and matter remitted for reconsideration.**

- (i) The Tribunal made a jurisdictional error in not disclosing pursuant to s.359A(1) the information received that showed, according to Departmental systems, the approved status of the sponsor had ceased.
- (ii) Although not a determinative factor in its decision, the fact that the Tribunal referred to the sponsorship expiry indicated that it did consider it to be of some significance. There is no doubt that the expiry of the sponsorship approval was, objectively, information that would support affirming the delegate's decision.
- (iii) The Tribunal's obligation under s.359A in relation to the lapsing of the sponsor's approval was triggered by the occurrence of that event. That is, prior to this event the relevant information was not disclosable information for the purposes of s.359A(1).
- (iv) The decision of Tracey J in *M v MIMIA* (2006) 91 ALD 629 was plainly right and should be followed. However, even if the Tribunal did have a discretion to conduct a hearing, there was no breach of s.360. The applicant should have been put on notice by the s.359 letter that an issue in the review was the information (or lack of it) being sought by the Tribunal. Secondly, the Tribunal would be entitled to decide not to have a hearing provided that it acted judicially. The High Court's statement in *SZBEL v MIMIA* (2006) 228 CLR 152, that the Tribunal's obligation to inform an applicant of the essential and significant issues upon which the review will turn can only be satisfied at hearing, only applies in circumstances where the applicant is entitled to a hearing.

**SZLTF v MIAC & Anor**

**[2009] FMCA 401**

**Federal Magistrates Court of Australia, Cameron FM, SYG 233 of 2009, 4 May 2009**

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

The applicant claimed to be a teacher and to fear persecution because of his involvement in a teacher's union and his desire to uphold justice in relation to his school's management of a number of grievances. The Tribunal accepted that the applicant was a maths teacher at a village school but found implausible his claim that he and other dissatisfied teachers took their grievances to state authorities given that the school was not an official state school. The Tribunal further concluded that a number of the applicant's claims were undermined by inconsistencies in his evidence and therefore rejected his claimed involvement with a teacher's union. The Tribunal stated that this was "the main reason" for its rejection of the applicant's claim to have gone to state authorities. The Tribunal found that the applicant was an unreliable witness to a very significant extent.

The applicant contended that the Tribunal had breached s.425 of the *Migration Act* 1958 (the Act) by failing to bring to the applicant's attention a determinative issue, i.e., that it was implausible that the applicant took his complaints to government bodies because the school where he worked was a non-government

institution. The applicant further contended that the Tribunal had breached s.422B(3) of the Act by failing to act in a way that was fair and just in applying s.425 of the Act.

**Held: Application dismissed.**

- (i) The Tribunal failed to meet its obligations under s.425 and s.422B(3). However, the Tribunal's decision should stand as it was ultimately grounded on another independent and unimpeached basis.
- (ii) The Tribunal did not alert the applicant to the determinative significance of him making complaints to government bodies although his school was not a government school. Nor did the Tribunal give him an informed opportunity to give evidence and present arguments in relation to that issue.
- (iii) It is not enough to say that the delegate's decision had put everything in issue. The delegate rejected all the applicant's claims but the Tribunal accepted that the applicant was a teacher. The Tribunal thereby made an issue which had not been significant to the delegate, significant to and determinative of its decision. In the absence of an invitation from the Tribunal to address the issue identified above, the applicant could not have known that this matter, which was irrelevant to the delegate's decision and not even referred to by him, would take on a determinative significance in the Tribunal's mind.
- (iv) What the Tribunal expressed to be "the main reason" for its decision provides a separate basis for its decision, independent of its finding that it was implausible that the applicant and his colleagues approached government authorities. The Tribunal's rejection of the applicant's claim that he was involved in union activities was based on the inconsistencies which the Tribunal identified in his evidence. It cannot be said that the two bases of the Tribunal's decision were so related by intermediate credibility findings that they should not be regarded as separate and independent grounds for the Tribunal's decision.

## 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. 4) (SLI 2009 No. 84) (Legislative Instrument – F2009L01746)**

These Regulations amend the Migration Regulations 1994 to allow the Minister for Immigration and Citizenship to specify in an instrument in writing the length of an academic year for the purposes of the 2 year study requirement and the points test for most General Skilled Migration visas. These Regulations also rename the 2 year study requirement the “Australian study requirement” in accordance with the fact that the length of the study requirement is to be specified by the Minister. These Regulations commenced on 15 May 2009 and apply to an application for a visa made on, or after, that day.

#### INSTRUMENTS

##### **Migration Regulations 1994 – Specification for the purposes of paragraph 1212B(3)(a) – Addresses (Legislative Instrument – F2009L02057).**

This instrument, registered on 22 May 2009, specifies the addresses for lodgement of applications for an Investment Retirement Visa (Class UY). Effective from 25 May 2009.

##### **Migration Regulations 1994 – Specification for the purposes of paragraph 1217(3)(a) – Addresses (Legislative Instrument – F2009L02058).**

This instrument, registered on 22 May 2009, specifies the addresses for lodgement of applications for a Retirement Visa (Class TQ). Effective from 25 May 2009.

##### **Migration Regulations 1994 – Specification for the purposes of paragraphs 1104AA(3)(a) and 1202A(3)(a) – Addresses (Legislative Instrument – F2009L02056).**

This instrument, registered on 22 May 2009, specifies the addresses for lodgement of applications for Business Skills (Provisional) (Class UR) visas and Business Talent (Migrant)(Class EA) visas. Effective from 25 May 2009.

##### **Migration Regulations 1994 – Specification under paragraphs 1124(3)(aa), 1130(3)(b) and 1221(3)(a) – Addresses for Applications for Offshore Parent Visas (Legislative Instrument – F2009L01827).**

This instrument, registered on 20 May 2009, specifies that all applications for offshore parent visas are sent to a particular place for processing and specifies the postal and courier addresses to which applications should be sent. Effective from 25 May 2009.

##### **Migration Regulations 1994 – Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2009 (Legislative Instrument – F2009L01242).**

This Notice revokes Migration Regulations 1994 – Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2008 and specifies the minimum salary level that must be paid to Subclass 457 visa holders. Effective from 15 May 2009.

##### **Migration Regulations 1994 – Specification under regulation 1.03 – Definition of Academic Year (Legislative Instrument – F2009L01654).**

This instrument, registered on 14 May 2009, provides the specific number of weeks which determines the measure of one, two and three academic years for meeting the Australian study requirement or points test as part of applying for General Skilled Migration (GSM). Effective from 15 May 2009.

**Migration Regulations 1994 – Specification of addresses for the purposes of paragraph 1211(3)(ab) (Legislative Instrument – F2009L01640).**

This instrument, registered on 7 May 2009, specifies the relevant addresses for posted applications and applications delivered by hand or by courier for Extended Eligibility (Class TK) visas. Effective from 1 July 2009.

**Migration Regulations 1994 – Specification under regulation 1.03, subregulation 2.26B(1), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii), 1229(7)(b)(ii), items 6A11, 6A12 and 6A13 – Skilled Occupations, Relevant Assessing Authorities and Points for General Skilled Migration (Legislative Instrument – F2009L01446).**

This instrument, registered on 6 May 2009, specifies skilled occupations, the number of points awarded for each occupation and the bodies that are the relevant assessing authorities for each occupation for the residents of one or more countries. Effective from 15 May 2009.

**Migration Regulations 1994 – Specification under regulations 846.111, 855.111, 856.111 and 857.111 – Health Waiver – Participating States and Territories (Legislative Instrument – F2009L01449).**

This Specification, registered on 6 May 2009, supports provisions in the Regulations which require that applicants (and their non-migrating family members) for visa subclasses 846, 855, 856, and 857 satisfy Public Interest Criteria (PIC) 4007 if the applicants reside (or propose to reside) in Western Australia. Effective from 15 May 2009.

**Migration Regulations 1994 – Specification under subparagraph 1225(3)(a)(i) – Working Holiday Visa – Post Office Box Addresses (Legislative Instrument – F2009L01347).**

This Specification, registered on 6 May 2009, provides that applications for a Working Holiday visa are to be sent for processing to the Cairns post office box address. This reflects the relocation of second Working Holiday visa processing from the department's office in Hobart to the Cairns office. Effective from 15 May 2009.

## CASELOAD OVERVIEW

### MRT Decisions – May 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	2	12	0	3	17
Visitor refusal	35	11	0	5	51
Student refusal	18	15	7	8	48
Temporary business refusal	17	17	10	15	59
Permanent business refusal	5	5	1	0	11
Skill linked refusal	43	31	10	6	90
Partner refusal	58	20	4	3	85
Family refusal	23	12	1	0	36
Student cancellation	16	32	2	6	56
Sponsor approval refusal	3	3	1	1	8
Other	14	9	2	1	26
<b>Total</b>	<b>234</b>	<b>167</b>	<b>38</b>	<b>48</b>	<b>487</b>

### RRT Decisions – May 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	1	0	0	0	1
Bangladesh	1	6	0	2	9
Burma (Myanmar)	4	0	0	0	4
Cambodia	0	1	0	0	1
China (PRC)	16	52	0	1	69
Colombia	0	3	0	0	3
Cote D'Ivoire	1	0	0	0	1
Cuba	0	1	0	0	1
Egypt	1	4	0	1	6
Ethiopia	0	1	0	0	1
Fiji	1	5	0	1	7
Germany	0	2	0	0	2
Ghana	0	1	0	0	1
India	2	22	0	0	24
Indonesia	2	8	0	1	11
Israel	0	3	0	0	3
Kenya	2	0	0	0	2

Korea, Republic Of	1	4	0	0	5
Lebanon	4	5	0	0	9
Malaysia	0	18	0	2	20
Nepal	1	2	0	0	3
New Zealand	0	2	0	0	2
Nigeria	1	2	0	0	3
Norway	0	1	0	0	1
Pakistan	2	3	0	0	5
Senegal	0	1	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	3	2	0	0	5
Stateless	1	1	0	0	2
Syria	1	0	0	0	1
Taiwan	0	1	0	0	1
Thailand	0	1	0	0	1
Togo	0	2	0	0	2
Tonga	0	1	0	0	1
Turkey	1	0	0	0	1
Uganda	1	1	0	0	2
Vanuatu	0	1	0	0	1
Vietnam	0	2	0	0	2
Total	47	160	0	8	215

## 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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