



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. For your reference, 'the Act' refers to the *Migration Act 1958* and 'the Regulations' refers to the Migration Regulations 1994.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

0801189

1 July 2009, Sydney

Ms S Durvasula, Member

SKILLED – AUSTRALIAN-SPONSORED OVERSEAS STUDENT (RESIDENCE) (CLASS DE) – SUBCLASS 881 – A delegate of the Minister refused to grant the applicant a Subclass 881 visa as he did not meet cl.881.215 of the Regulations because he did not have the required relationship with his sponsor. On the application, the applicant claimed that his sponsor was his uncle and submitted documentation showing his family composition. The delegate refused the application on the basis that the sponsor was the applicant's first cousin once-removed, not his uncle. The sponsor claimed that he was the applicant's uncle through adoption, following the death of his father. He claimed he was adopted by his grandfather and that his uncle and his father were raised in the same household for a substantial part of his youth. After his father passed away, his paternal uncle came to his village to help his family. This uncle was quite wealthy and lived in Dhaka where he had his own businesses. As the sponsor was a good student, his uncle agreed to adopt him. The sponsor claimed that his mother agreed to this and asked this uncle to take him into his family. No other siblings moved and no formal documents were signed. The sponsor claimed he moved to Dhaka to live with his uncle and his family and he attended school there. The applicant provided a letter from a Bangladeshi lawyer stating that between 1971 and 1975 there were no specific adoption rules or proceedings in Bangladesh and that the remaining family members took responsibility for orphaned or father-less children.

Held: Decision under review set aside

Based on the evidence, the Tribunal accepted that, following the death of the sponsor's father in 1973, he was customarily adopted overseas by his paternal uncle, the applicant's paternal grandfather, in accordance with the usual practices of recognised customs within Bangladeshi Islamic culture. The Tribunal accepted that after his father passed away in 1973 the sponsor went to live with his paternal uncle. He was 12 years old at the time and spent his formative teenage years being raised by this uncle. Although his biological mother was still alive, the sponsor stopped having a continuing relationship with her. She gave permission for the paternal uncle to care for the sponsor and she relinquished care of him. The sponsor's paternal uncle assumed exclusive care and responsibility for all matters pertaining to the sponsor's welfare. Therefore, the Tribunal accepted that the applicant looked upon his paternal uncle and aunt as his new parents and he was closer to them than he was to his biological mother. On this basis, the Tribunal was satisfied that the child-parent relationship between the sponsor and his paternal uncle was significantly closer than any such relationship between the sponsor and any other person. Based on country information, the Tribunal accepted that there is no provision for legal adoption in Bangladesh and it was satisfied that formal adoption was not available or was not reasonably practicable in the circumstances. The Tribunal was satisfied these arrangements had not been contrived to circumvent Australian migration requirements and that the adoption took place in order to provide for the welfare and education of the sponsor, not for migration purposes. Also, the adoption took place in 1973, well before any of the parties considered migrating to Australia. The Tribunal found that the sponsor is the adopted son of the applicant's paternal grandfather under r.1.04. Therefore, he is the adoptive brother of the applicant's father, and in turn, the adoptive uncle of the applicant. He therefore had one of the relationships with the applicant that is set out in cl.1128BA(3)(I)(iii) and he was found to have met cl.881.215 of Schedule 2. Accordingly, the Tribunal remitted the application for reconsideration, with the direction that the applicant met cl.881.215 of the Regulations.

0901249

22 June 2009, Melbourne

Ms W Boddison, Member

SKILLED (PROVISIONAL) (CLASS VF) – SUBCLASS 475 (SKILLED – REGIONAL SPONSORED) – CL.475.214 – ENGLISH LANGUAGE REQUIREMENT – A delegate of the Minister refused to grant the applicant a Subclass 475 visa because he did not satisfy cl.475.214 of the Regulations as he did not meet the English language requirement. In his application, the visa applicant nominated his skilled occupation as Journalist and related professional. He provided an International English Language Testing System (IELTS) test with his application with an overall band score of 6.5, demonstrating a 'concessional competent' English level. The delegate stated that in order to satisfy cl.475.214 the applicant was required to provide evidence of having paid the required fee for English training to the relevant authority in the state/territory where the sponsor resided at the date of the visa application. The review applicant wrote to the delegate stating that she believed this requirement had not been clearly explained and that if they had known, the visa applicant would have re-sat the IELTS test. To do this, she claimed he needed more than 28 days. In her letter to the delegate, the review applicant stated "awaiting your reply so as to know what next step to take". The delegate refused the application 3 days later. The review applicant subsequently submitted a letter and receipt from the Adult Migrant English Program (AMES) acknowledging that the review applicant had paid \$2000 on behalf of the visa applicant for an English language program. The review applicant wrote to the Tribunal explaining that she was unhappy that the delegate had made a decision on the application when the 28 day period to respond to the Department's request for information had not yet expired. She also submitted a new IELTS test report for the visa applicant from January 2009 with an overall band score of 7.0. The review and visa applicant were advised by the Tribunal that the requirements of 'concessional competent' or 'competent' English were required to be satisfied at the time of application. The review applicant wrote to the Tribunal stating that she felt she had been badly advised by the Department noting that the visa requirements had changed just prior to the lodgement of the application which she felt had caused the problem. The review applicant informed the Tribunal that she had a large number of debts and was in financial difficulty and the payment she made to AMES was futile and non-refundable. She claimed she had paid the fee because she believed this was what the delegate was asking her to do.

Held: Decision under review affirmed

The Tribunal found that the visa applicant did not meet the requirements of cl.475.214 at the time of application and that he was not eligible for the visa sought. The review applicant requested that the Tribunal refer the case to the Department for consideration for ministerial intervention. The Tribunal noted that the current program for skilled migration commenced two months before the visa application was lodged and that prior to this, the English requirement had to be satisfied at the time of *decision*. It was previously common practice for the English fee to be paid during the processing of the visa and this was the review applicant's understanding of the procedure. Further, in the past, a subsequent IELTS test could be used to satisfy the English requirement. The Tribunal noted that the review applicant appeared to not have received correct advice regarding the new visa system, or that she may have made inquiries when the previous system was still in operation. It also noted that the visa applicant now has competent English and could have satisfied the requirements for 'concessional' English if the fee for English training had been paid before lodging the application. The Tribunal also took note of the review applicant's financial difficulties and the fact she had paid for the review when it could not succeed. As the applicant failed to meet the time of application requirements, the Tribunal affirmed the decision not to grant the visa applicant a Skilled (Provisional) (Class VF) visa. The Tribunal determined that it would refer the matter to the Department for consideration by the Minister pursuant to s.351 of the Regulations.

Partner and Family Visas

0803462

18 June 2009, Brisbane

Mr D Smyth, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 116 (CARER) – CL.116.211 – R.1.03 –

DEFINITION OF RELATIVE – A delegate of the Minister refused to grant the applicant a Subclass 116 visa as she was found not to be the carer of an Australian relative. The visa applicant is a 62 year old Indian woman whose husband is also included in the application. She was sponsored by her son, the review applicant, who is married and has a child. The review applicant claimed that his wife had become blind following surgery in October 2006 and that she is eighty per cent blind. The visa applicant stated that her daughter-in-law needed her assistance with daily tasks such as bathing, cooking, shopping and house cleaning. She claimed she would also look after her five-year-old grandson and she would be happy to care for her daughter-in-law for the rest of her life. Although her son provided assistance temporarily, he worked full-time and he was unable to provide the required ongoing daily care. She claimed her assistance would be invaluable to her daughter-in-law's physical condition and that her care would significantly improve the family's lifestyle. Although assistance had been sought, agencies advised they were unable to provide long-term assistance. Reports provided in support of the application state that the review applicant's wife's condition affects her ability to live independently and that her eye condition was permanent. One report stated that a shortage of medical professionals in Australia had impacted the number of places available in nursing homes and residential care and that it was unreasonable and impractical to expect another relative or resident to provide the required assistance as they also work and have their own families to care for. It was submitted that the visa applicant's ability to provide the substantial and continuing level of care required, had already been demonstrated while she was in Australia.

Held: Decision under review set aside

The Tribunal found that it was clear from the application that the visa applicant claimed to be the carer of her son, the review applicant. The material submitted with the application also clearly referred to the review applicant's need for assistance in providing direct assistance to his wife. The Tribunal was satisfied that the review applicant's wife was a member of his family unit thereby meeting r.1.15AA(b)(i). The Carer Visa Assessment Certificate indicated that, because of her condition, the review applicant's wife would continue for at least 2 years to require direct assistance in attending to the practical aspects of daily life. Based on this, the Tribunal found that the review applicant's wife exceeded the impairment rating of 30 and therefore met the requirements of r.1.15AA(1)(c). The Tribunal took into account a doctor's opinion that the review applicant's wife's condition has had "a devastating impact on her ability to live independently". It also attached significant weight to this opinion expressing that the review applicant's wife required supervision for her safety 24 hours a day seven days a week. The Tribunal found that although the review applicant had recruited various relatives to supervise and assist his wife, when he did not have such assistance available, this caused him great stress and difficulty. The Tribunal accepted that the review applicant experiences considerable difficulty in balancing the demands of providing for the family, looking after his son and providing for his wife's care needs. He is able to do so at present only with the assistance of relatives in the short-term. The Tribunal found that he has a permanent or long-term need for assistance in providing direct assistance to his wife. The Tribunal is satisfied that this assistance cannot reasonably be obtained from her relatives in Australia and it is satisfied that they are unable or unwilling to provide the assistance required. The Tribunal is satisfied that, in spite of her age, the visa applicant would be willing and able to provide the review applicant with substantial and continuing assistance of the kind needed. Accordingly, the Tribunal found that the first named visa applicant satisfied the requirements of cl.116.211, 116.212 and 116.221 of the Regulations.

082781

9 June 2009, Brisbane

Ms H Johnston, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 117 (ORPHAN RELATIVE) – S.116 – CANCELLATION – AUTHENTICITY OF DOCUMENTS – A delegate of the Minister refused to grant the applicant a Subclass 117 visa because the delegate could not be satisfied that the visa applicant's parents were deceased and that the applicant was orphaned. Further, the delegate could not be satisfied of the custody and travel issues associated with a visa grant. In respect to the delegate's concern that the death attestations were not genuine, the agent noted that credibility concerns had arisen in respect to a number of DIAC clients as a result of fraud allegations made by an officer of the Afghan Consulate in Quetta. The agent further noted that the death attestation itself and the letter stating the death attestations are a fake, appear to be issued and signed by the same person. The agent submitted that all of her clients are adamant that they went to the Afghan Consulate in good faith to obtain the verification of the death of the person to whom the documents refer. The agent pointed out the difficulties associated with obtaining 'official documents' such as death certificates in countries like Afghanistan to provide the level of evidence required by the Department, particularly if people die at home. She argued that, in such circumstances, the alternative evidence provided by the visa applicant should be accepted. She further argued that lack of clarity regarding the correct method for obtaining death certificates for Afghans who die outside of Afghanistan – the visa applicant's father died in Pakistan – adds to the difficulties. A copy of a certificate and a receipt for burial payment (translated) issued by the Hazara Cemetery Committee Quetta were provided relating to the death and burial of the visa applicant's father in 2004. Also, several statutory declarations were provided stating that they were told of the deaths of the review applicant's father. The review applicant is the older brother of the visa applicant.

Held: Decision under review set aside

The Tribunal accepted that there is no formal system of registration of births in Afghanistan and, accordingly, it had no option but to rely on less formal evidence than usual in making its findings about the visa applicant's age. The visa applicant's translated identity card confirms his place of birth and states that in 2005 his age was ascertained as 16 years old. The Tribunal found that the visa applicant had not turned 18 at the time of application and therefore he met the requirements of r.1.14(a)(i). The Tribunal was satisfied, on balance, that the sponsor is the brother of the visa applicant. The Tribunal was provided with additional material, including statutory declarations, extracts from the Register of the Hazara Cemetery and a burial receipt/certificate. Having considered all the information before it, the Tribunal accepted that the visa applicant's parents were deceased. The Tribunal noted the two statements signed by Asad Ullah Pashtoon of the General of Islamic Republic of Afghanistan, Quetta, on which the delegate relied. In one statement, the writer attests to the visa applicant's parent's deaths being in 2002 and 2004. In the other statement, the writer states that the attestation issued earlier is a fake. The Tribunal gave no weight to either of these statements. The Tribunal acknowledged that, according to Hazara custom, the eldest male relative on the paternal side of Afghani families generally takes responsibility for the guardianship of children when their father has died. On that basis, the Tribunal considered that the review applicant is responsible for the visa applicant as he is the eldest male child in the family. The Tribunal accepted the arguments that migration to Australia would be in the best interests of the visa applicant who presently lives in Quetta, Pakistan. The Tribunal accepted that the review applicant wants to give his sibling the opportunity of a better life in Australia with him and his family where they appear to be well settled. The Tribunal is satisfied that there is no compelling reason to believe that the grant of Subclass 117 visa would not be in the best interests of the visa applicant and therefore he meets the requirements of r. 1.14(c). Given the above findings, the Tribunal concluded that, at the time of application, the visa applicant was an orphan relative of his Australian relative, being the review applicant, and he therefore satisfies cl. 117.211(a). Accordingly, the Tribunal found that the visa applicant satisfied cl. 117.211 of the Regulations.

0801934

9 June 2009, Melbourne

Mr P Murphy, Senior Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 (SPOUSE (PROVISIONAL)) VISA – CL.309.211 – CL.309.221 – A delegate of the Minister refused to grant a Subclass 309 visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 of the Regulations. The delegate was not satisfied the visa applicant and his sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, or that the relationship between them was genuine and continuing. The review applicant claimed she attended a family funeral in Vietnam, met the visa applicant in a restaurant and when she returned to Australia she and the visa applicant kept in contact. She claimed that she returned to Vietnam, the visa applicant proposed to her and they married two months later, but there was no honeymoon as the review applicant was pregnant and unwell. The delegate was concerned that ultra sound records indicated the possibility that the review applicant had conceived whilst still in Australia, rather than after her return from Vietnam, which suggested a relationship with her former partner, the father of her older child. Departmental movement records indicated that on a previous trip to Vietnam, the review applicant travelled with her mother, son, and former partner on the same flight. She claimed this was because her mother had attempted to reconcile the review applicant with her former partner. However, she denied any relationship with him and, once in Vietnam, they went their own ways. The review applicant claimed she received financial support from her ex-partner for their son and a Child Support Agency assessment confirmed the father's financial obligations. She was adamant her son was the visa applicant's child and both applicants were prepared to have DNA testing to establish this.

Held: Decision under review set aside

The Tribunal applied caution against strict reliance on data about the stages of pregnancy, since such data was not mathematically precise and individual factors created variations. Accordingly, the Tribunal was satisfied that the visa applicant was the father of the review applicant's child. The Tribunal found that the date of birth of the review applicant's child suggested conception could have occurred before she left Australia, but it could also have occurred equally soon after her return to Vietnam as the pregnancy was within the variable range. This was consistent with the review applicant's evidence and there was nothing which could safely refute that. The Tribunal found the birth certificate added some weight since it identified the visa applicant as the father and the child was a child of the marriage. Despite the delegate's concerns that the review applicant might be in another relationship in Australia, there was no objective evidence which satisfied the Tribunal this was the case. The Tribunal found that the previous relationship ended some years ago and there was nothing more recent to conclude that the review applicant was still in a relationship with her first child's father nor anyone else. It found the Child Support Assessment was consistent with the review applicant's evidence she was not in an ongoing relationship with her ex-partner and that it ended prior to her relationship with the visa applicant. The Tribunal found that the evidence that the applicants held themselves out as a married couple was reinforced by the review applicant's visits to Vietnam since their marriage and that there was a child of the marriage. The applicants expressed the intention that their relationship will be a long term exclusive one, included their mutual intent to raise their current child and this was an indicator of a spousal relationship. Despite the review applicant travelling to Vietnam with her ex-partner, the Tribunal was satisfied the existence of a spousal relationship between the parties outweighed the factors that suggested the absence of a relationship. The Tribunal was satisfied the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others. Accordingly, the Tribunal found the visa applicant satisfied the requirements of cl.309.211 and cl.309.221 of the Regulations.

0900381

9 July 2009, Sydney

Ms A Cranston, Member

PROSPECTIVE MARRIAGE (TEMPORARY) (CLASS TO) – SUBCLASS 300 (PROSPECTIVE MARRIAGE) – CL.300.214 – 'PARTIES HAVE MET AND ARE KNOWN TO EACH OTHER PERSONALLY' – A delegate of the Minister refused to grant the applicant a Subclass 300 visa as he was not satisfied that the applicant and the sponsor had met in person in April 2007 as claimed in the visa application. The applicant stated that she met the sponsor in Turkey in April 2007 through the sponsor's aunt who lives two streets away from her. She also claimed she knew the sponsor's mother from when she came to Turkey in 2005 to attend her father's funeral and stayed with the sponsor's aunt for 1-2 months.

The applicant claimed that her introduction to the sponsor was arranged by both of their mothers and on the following day, the sponsor and his mother returned to visit and they talked about themselves. She claimed she and the sponsor liked each other so they exchanged phone numbers. The sponsor has been married once previously. He claimed that their families had arranged that meeting and they had married the next day; however, his wife had changed her mind and requested a divorce on the following day. They divorced one week later. The applicant claimed to have been first introduced to the sponsor 2 days after his first marriage took place. He claimed to have met with the applicant four times in total before the sponsor and his mother returned to Australia in May 2007. After this, they claimed that their main avenue of communication was via the phone and that the sponsor had proposed over the phone three months after he returned to Australia. An engagement celebration was held in Turkey two months later; however, the sponsor did not attend this engagement as his mother was not well. In her application, the visa applicant submitted photos of an engagement celebration that had been conducted in Turkey by proxy. In support of the review, the applicant submitted additional photos showing her and the sponsor together in various social settings. The sponsor and his parents gave oral evidence to the Tribunal in support of the application. The sponsor's father stated that he wanted the parties reunited so they could start a family.

Held: Decision under review set aside

The Tribunal found that the sponsor presented at hearing as a person from a "close-knit family who was honest and unsophisticated". The Tribunal noted that the sponsor's parents, who also attended the Tribunal hearing, were clearly supportive of the sponsor's relationship with the applicant. The Tribunal found the sponsor's evidence at hearing to be consistent with the applicant's claims. Taking the parties' consistent evidence into account as well as the many photos submitted showing the applicant and the sponsor together, the Tribunal was satisfied that the parties had met and were known to each other personally. Thus, the Tribunal found that the applicant satisfied cl.300.214 of the Regulations.

Student visas

0901623

23 June 2009, Sydney

Ms J Marquard, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 (VOCATIONAL EDUCATION AND TRAINING SECTOR) – CANCELLATION – S.107 – CL.2.41 – BOGUS DOCUMENT – A delegate of the Minister cancelled the applicant's Subclass 572 visa on the basis that he had provided fake bank documentation in support of his visa application suggesting that he had deposited 500 000 Mauritius rupees in the bank on 11 April 2008. The applicant claimed that it had come as a shock to him that his visa had been approved based on fraudulent documents and he apologised. While he acknowledged that the bank document was fake he claimed that he was unaware of the agent's actions until receiving the Department's Notice of Intention to Consider Cancellation. He claimed that he had approached a Mauritian agent for assistance and paid him 200 000 rupees. He said the agent told him to transfer Rs 300 000 into a bank account for the paperwork to be completed, which he did. The applicant claimed the agent told him this was for school fees for one year and that someone would pick him up from the airport on his arrival. Once here, he found that the agent had only paid for 6 months of his school fees. He claimed he did not know the agent would use fraudulent papers on his behalf. When he tried to contact the agent, he claimed he was told that he was in gaol for fraud. He had since become aware that the agent was unlicensed, even though his licences were displayed in his office. He claimed he had now lost Rs 500 000. The delegate proceeded to cancel the applicant's student visa as he had not given correct answers on the visa application form. The applicant said he was a genuine student striving hard to complete his studies. He said he had not submitted any fake documents with his application and he was totally unaware of any fake documents submitted. Two newspaper articles outlining the police investigation regarding student visa fraud by the agent were provided in support of the application.

Held: Decision under review set aside

The Tribunal looked first at whether there was non-compliance under s107. The applicant confirmed that an incorrect answer was given on his application form as he did not have a 'floating rate fixed deposit' at the Banque des Mascareignes. Consequently, the Tribunal found that there was non-compliance by the applicant

in the way described in the s.107 notice. The Tribunal accepted the applicant's evidence that he relied on his agent to fill in his forms on his behalf and to organise funding. The Tribunal found that, while it was foolish of him not to obtain a receipt for funds which he had given to the agent, it accepted that the applicant naively believed that these funds would be applied towards his fees and expenses in Australia. The applicant's evidence was reinforced by the newspaper articles which appeared genuine and referred to the fraud committed in relation to student visa applications by the agent. The Tribunal found that, although the applicant did not have a bank account containing 500 000 rupees, he did have 500 000 rupees which the agent had taken. In reality, the applicant had access to funding which was misappropriated by a fraudulent agent. Therefore, the Tribunal was satisfied that the applicant had sufficient funds as required. The Tribunal then considered the applicant's study record in Australia and found that he had a high attendance rate, he had passed all subjects and that he was committed to his studies and career future. It found that he had a strong desire to complete his course. The Tribunal decided that there was non-compliance by the applicant in the way described in the notice given under s.107; however, it considered that the decision to exercise the discretion to cancel the applicant's visa was not the preferable decision in the circumstances of this case. The preferable decision was to not cancel the applicant's Subclass 572 visa. Accordingly, the Tribunal set aside the decision under review and substituted a decision that the visa should not be cancelled.

0902991

6 July 2009, Sydney

Mr M Cooke, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – VOCATIONAL EDUCATION AND TRAINING SECTOR – CANCELLATION – S.116(1)(b) – CONDITION 8202(3)(b) – EXCEPTIONAL CIRCUMSTANCES – A delegate of the Minister cancelled the applicant's subclass 572 visa under s.116(1)(b) on the basis that the applicant was certified as having not met the attendance requirement in condition 8202. The applicant claimed his parents' financial difficulties forced him to change his education provider, which caused his failure to meet the attendance requirement. He claimed that if he had remained with his education provider he would have met the requirement and that this was an exceptional circumstance beyond his control. He also claimed the cancellation of the remaining five weeks tuition should not have impacted his overall attendance. Although he claimed he spent months trying to get his education provider to decide whether to release him from his course, he was forced to absent himself to travel to the Gold Coast to enrol in TAFE where the fees were cheaper. This also allowed him to arrange accommodation as he was living in Brisbane. He claimed that if he had been allowed to leave when he first asked, he would have enrolled at TAFE at the correct time and he would have had a seamless transition to his new education provider. The applicant claimed that his education provider was wrong to forecast a failure of attendance by week 15 (the end of the course) when he had been given a release letter (unsupported by the education provider) to leave. The education provider stated that the applicant had 80% attendance by week 9 however his abrupt decision to cease his course meant he had breached condition 8202. The applicant claimed that he was then unable to start his new course as his visa had been cancelled.

Held: Decision under review affirmed

The Tribunal found that the education provider's action in forecasting a failure of attendance by the applicant was a product of the requirement of condition 8202 that he attend "the registered course undertaken by the holder" on the required scheduled contact days. Accordingly, the Tribunal did not accept the applicant's argument and found that the principle reason why he failed the attendance certification was because he absented himself from his course without permission from his education provider. As a result, the 80% attendance he had attained at week 9 evolved into a breach of condition 8202 by Week 10. This led to his certification for unsatisfactory attendance. The Tribunal found that the applicant had not complied with condition 8202 and that the ground for cancellation in s.116(1)(b) existed. The Tribunal did not accept that the claimed exceptional circumstances beyond the applicant's control, being the sudden need to change education providers because of his family's financial crisis, was a satisfactory basis to set aside the cancellation. The Tribunal observed that the applicant may have decided to change providers for good reason but this was not the source of his adverse certification. Although the applicant claimed that he was frustrated by the bureaucratic inertia of the education provider and that he was forced to take matters into his own hands, the Tribunal found that in deciding to absent himself from his scheduled course of his own volition, his action led to his certification as having unsatisfactory attendance. The Tribunal did not accept the applicant's claimed 'exceptional circumstances beyond the visa applicant's control' was a satisfactory

basis to set aside the cancellation. Accordingly, the Tribunal was satisfied such circumstances were prescribed circumstances in which the visa must be cancelled in accordance with s116(3) of the Regulations.

Visitor visas

0902299

24 June 2009, Melbourne

Ms L Kirk, Senior Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 (SPONSORED FAMILY VISITOR) – CL.679.224 – A delegate of the Minister refused to grant the applicant a subclass 679 visa on the basis that she did not satisfy cl.679.224 of the Regulations because she was not satisfied that the applicant genuinely intended only to visit Australia. The visa applicant is a 53 year old national of Sudan from Kassala State. She was widowed with one child, the review applicant. The stated purpose of the visit was for the visa applicant to visit her daughter who has a newborn baby and two other children. In refusing the visa, the delegate found that the visa applicant had not provided evidence of sufficient personal, financial or employment incentives to return to Sudan. The review applicant told the Tribunal that she had returned to Sudan to visit her mother in 2006 and her son had become very ill and had to be hospitalised. For this reason, she did not want to return to Sudan again. The visa applicant claimed that she has lived with her elderly mother for whom she has cared for many years. She lives in a house with four rooms, two of which she rents out to people in need of short-term accommodation. When the rooms are vacant the review applicant sends money to assist the visa applicant. The visa applicant claimed to have traveled outside Sudan on two occasions; to visit her sister in Cairo in 2007 and to undertake a religious pilgrimage in Saudi Arabia in 2004. On these occasions, she claimed to have hired a maid servant to live at her house to care for her mother. She claimed that she would make a similar arrangement for her mother during her proposed visit to Australia. The visa applicant claimed to live in a peaceful area of Sudan with no conflict. The review applicant told the Tribunal that during her stay, the visa applicant would help her around the house and with the children. She claimed that the visa applicant would return to Sudan to look after her mother as she is her sole carer.

Held: Decision under review set aside

The Tribunal found the review applicant and the visa applicant to be honest, credible and forthright witnesses. Based on their oral evidence and the visa applicant's bank account statements, the Tribunal was satisfied that the visa applicant received rental income from tenants sufficient to meet her and her mother's living expenses. The Tribunal gave weight to the visa applicant's ownership of her house and to the short-term leasing of two of its rooms. The Tribunal took into account independent information demonstrating that due to Kassala State's acute poverty, drought, famine, unemployment and land degradation, rebel insurgency had been of low intensity for over a decade. The Tribunal accepted that the visa applicant missed the review applicant and her grandchildren. It also accepted that the review applicant had reservations about taking her family to see the visa applicant in Sudan due to health risks. The Tribunal took into account the visa applicant's significant family ties in Australia but also had regard to the fact she was the sole carer of her elderly mother who had lived with her for nearly 40 years. The Tribunal also noted that on two previous occasions when the visa applicant had traveled outside Sudan, she had returned home to care for her mother. The Tribunal was satisfied that the visa applicant had a very strong motivation to return to Sudan at the expiry of her visa in order to continue to live with and care for her mother. The Tribunal found that the proposed duration of the visit for up to six months was consistent with the expressed purpose of the visa applicant's trip to Australia, and that her intention was to depart Australia prior to the expiry of her visa. Accordingly, the applicant was taken to have met cl.679.224 of the Regulations.

Other visas

0902921

24 July 2009, Perth

Ms L Ward, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 857 (REGIONAL SPONSORED MIGRATION SCHEME) – CL.857.311 – DEPENDENT CHILD – A delegate of the Minister refused to grant the applicant a Subclass 857 visa on the basis that he did not satisfy cl.857.311 of the Regulations because he had turned 18 and was found not to be wholly or substantially dependent on his father for his basic needs. Therefore, he was not found to be a dependent child of the family head or a member of his family unit at the time of application. The applicant's father, mother and two siblings were granted permanent residence through Subclass 857 visas. In support of the review, the applicant submitted evidence of his periods of employment and unemployment in the 12 months prior to the visa application. The applicant and his mother gave evidence to the Tribunal that the applicant had been unemployed and living with his family for 5 months (November 2007-April 2008). He was then employed for 4.5 months (April-September 2008), unemployed for 1.5 months (September-October 2008), and employed for 1 month (November 2008). The applicant claimed that in March 2007 he had moved away from his family to Perth, as his parents could not afford to send him to TAFE at that time and there were no local jobs. The applicant provided the Tribunal with evidence that at the time of review he was unemployed, living at home and about to commence a 6 month TAFE course, after which he was considering studying for a diploma.

Held: Decision under review set aside

The Tribunal found that at the time of its decision the applicant was 21 years old, lived with his family and was unemployed. The applicant's father worked full time and supported the applicant financially. On the basis of the documentation submitted to the Department and the sworn evidence of the applicant and his mother, the Tribunal found that, at the time of application, the applicant had been unemployed for 6.5 months in the preceding 12 months. The Tribunal found that during those periods of unemployment, the applicant lived in the family home, had no income and had all expenses for his basic needs for food, shelter and clothing met by his father. The Tribunal noted that there is no definition in the Regulations of what constitutes a 'substantial period' in relation to the length of the applicant's whole or substantial dependence on his father. The Tribunal was of the view that the applicant's 6.5 month period of dependency, out of the 12 months preceding the visa application, was a substantial period in the circumstances of the case. The Tribunal noted that the applicant was unable to commence his studies in 2007 as his father was unable to support him because he was not permitted to work for various periods. Consequently, the applicant obtained casual employment on several occasions. The Tribunal found that the applicant's father was now able to support the applicant's studies and accordingly, the applicant had resumed his dependence on his parents with the state of dependency likely to continue for 6 to 18 months. Based on the evidence, the Tribunal was satisfied that the applicant was a dependent child of his father's and therefore a member of his father's family unit. The Tribunal remitted the application finding that the applicant met the criteria for a Subclass 857 (Regional Sponsored Migration Scheme) visa.

REFUGEE REVIEW TRIBUNAL DECISIONS

Bangladesh

0901007

2 June 2009, Sydney

Ms D Barnetson, Member

BANGLADESH – POLITICAL OPINION – CHHATRA LEAGUE – AWAMI LEAGUE – CREDIBILITY –

The applicant claimed to fear persecution for reasons of his political opinion as a member of the Bangladesh Awami League. He claimed that as a student, he held a position in the Chhatra League and he was involved in every demonstration. Further, he claimed that in 1998, a false case was filed against him by his political opponents to ruin his political life. In 2001, he began working for an Awami League candidate and, in the election; the candidate was defeated by the Bangladesh National Party (BNP) candidate. Soon after, his house was ransacked and looted, and his brother was brutally tortured. He claimed that in 2002, he was elected to a position in the Awami League and he was attacked on a number of occasions by his political opponents. He claimed he was targeted because he spoke out against the government and he wrote an email to the Government Chief Advisor about "food crises, war fear and distribution problems". He claimed that because of his email, within days four powerful advisers were sacked. He claimed that because of his work, in 2008, the intelligence branch of the police came to his home in disguise to establish his credibility. As police can detain people for 90 days, he claimed that he fled to his wife's family and he got married and they lived there. After he left, his land was grabbed by one of the sacked ministers. He claimed he was also beaten one night around this time. He claimed that he feared harm from the sacked ministers and he would be targeted by a militant group, the Jama'atul Mujahideen Bangladesh (JMB), because they were religious and he was secular. He claimed he also applied for migration to two other countries and he has visited Australia on visitor visas on two previous occasions.

Held: Decision under review affirmed

The Tribunal found that, at hearing, the applicant was evasive and he avoided giving answers. He spoke over the Tribunal, gave convoluted and diversionary answers and, when not using his notes, he became hesitant and confused. The Tribunal found his evidence was contradictory and he made claims not stated in his application including not mentioning his wife. The Tribunal did not accept his claim that many events occurred prior to his arrival in Australia and were not in his application or statement because he did not have much time when he wrote it. The Tribunal found it unlikely he would not raise such significant issues in his initial claims and that the contradictions and omissions were not adequately or logically explained, and his evasiveness, confused evidence and hesitancy led the Tribunal to find he was not a credible or truthful witness. It was not prepared to rely on his evidence alone and, based on a lack of other evidence supporting his claims, the Tribunal found he was not a member of the Chhatra or Awami League; he was not threatened or harmed; he did not flee and remain in hiding; that his wife was not in hiding with their child; that his email did not lead to the sacking of several ministers who retaliated against him because of this and that he was not targeted or threatened by the BNP or the JMB as a result of his political involvement in the Awami League. The Tribunal noted that his previous applications for student visas to Australia were unsuccessful and found that his contradictory, and inherently implausible claims, together with his previous attempts to live in Australia, were for the purpose of staying in Australia. The Tribunal found that he did not leave Bangladesh because of any harm feared as a result of his political involvement in the Awami League or his claimed contribution to the sacking of ministers and their retaliation against him. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Brazil

0900705

28 April 2009, Sydney

Ms D Dimitriadis, Member

BRAZIL – POLITICAL OPINION – The applicant claimed to fear persecution from the Brazilian military, government and Masons. He claimed to have been threatened and accused of being a traitor and of being gay, which he is not. He claimed to have been prevented from working to earn a living and that the Brazilian authorities were unable to protect him from the harm he feared. He believed his telephone had been listened to and he submitted evidence that money had been illegally removed from his bank account before he came to Australia. He claimed that it was the government that stole the money in order to pressure and threaten him. The applicant claimed that he did not believe in the Brazilian system of governance and that he spoke openly about this with his friends at university and work. In the visa application the applicant submitted, amongst other things, a number of photographs of various subjects including a tree with initials carved in it, a bus in Sydney, graffiti on walls and photographs that the applicant claimed had incorrect digital dates. In his Departmental interview, the applicant stated that he had never undergone a psychiatric or medical examination, that he was perfectly healthy and that “there are symbols”. At the Department’s request, the applicant saw an intern clinical psychologist who provided a brief report. The applicant claimed that the morning before he traveled to Australia he went to a coffee shop and drug traffickers closed off the street and police arrived. He claimed that there was shooting and hand grenades and that everyone in the coffee shop was threatened. He claimed that the timing of the incident with the date of his departure from Australia was not a coincidence. The applicant also claimed that he had never been arrested or detained by authorities.

Held: Decision under review affirmed

The Tribunal was not satisfied that the applicant had a well-founded fear of being persecuted for a Convention reason. The Tribunal noted some concern about the applicant’s mental health however; there was nothing in the intern clinical psychologist’s report which led the Tribunal to conclude that the applicant was unable to give competent evidence. The Tribunal was satisfied that the applicant was able to give competent evidence at hearing and that he did so. The Tribunal found that there was no evidence that the applicant had been singled out or persecuted for one or more of the five Convention reasons. The Tribunal found that the applicant had not been targeted or isolated by the Brazilian authorities, the military or Masons. The Tribunal noted that the applicant perceived threats in a number of everyday occurrences and items, including graffiti and incorrect dates on digital photographs. The Tribunal accepted that the applicant may have been caught in crossfire between police and drug traffickers; however, it did not accept that he was targeted or persecuted for a Convention reason. The Tribunal accepted that the applicant believed the political system in Brazil was corrupt and the judicial system was non-functional. The Tribunal accepted that the applicant expressed these views to friends at university and work however; it was not satisfied that the applicant had been threatened or persecuted for expressing or holding these views. The Tribunal was also not satisfied that the applicant had a well-founded fear of persecution within the meaning of the Convention.

China

0902446

7 July 2009, Sydney

Ms Catherine Carney, Member

CHINA – RELIGION – CHRISTIAN – The applicant claimed to fear persecution for reason of his religion. He claimed to have come to Australia to care for his daughter and that when he was returning to China he learned from his parents by phone that his wife had been arrested because she had attempted to reveal the corruption prevalent within the Fuqin religious authority. He claimed that due to this, she has been detained and the corruption allegation had been “swept aside”. He further claimed that in China he was an assistant in a church, which his family had attended for over ten years. In April 2008, church members agreed to renovate the derelict cathedral building. The applicant’s wife attempted to ascertain the donations credited to the church on a number of occasions, without success. She appealed to higher authorities in order to obtain the requested data, but was warned by the Fuqin religious authority not to do so or she would be

punished. He claimed that when the Deputy Premier of China visited Fujin in November 2008, his wife had tried to give the Deputy Premier a petition that was issued by her church, but she was unsuccessful. She was taken away by security guards and police, along with other protesters. Later, she was charged with illegally congregating and disturbing public order and she was subsequently detained by the PSB. The applicant claimed he had contacted the media to help highlight his wife's case. The applicant provided documents and photos in support of his application.

Held: Decision under review affirmed

The Tribunal found the applicant to be a witness who lacked credibility due to his evasiveness, lack of detail, inconsistency and ineffective responses to the Tribunal's questions. This led the Tribunal to find that the applicant had been untruthful in his claims. The Tribunal rejected that the applicant had been involved in being a Christian petitioner since 1997, that he contacted or was contacted by the media to publicise his wife's detention and that she campaigned against the corruption of the religious authorities and he is therefore at risk. The Tribunal rejected the claim that the applicant and his wife spoke to people about her complaints, the corruption and that she arranged a petition and drafted formal complaints. It found that the applicant had exited China legally and on a passport in his own name and considered that if the Chinese authorities were interested in him he would not have been able to do so. The Tribunal accepted independent country information stating that fraudulent documents are easily obtained in China in exchange for money and it placed no weight on his wife's detention document which was provided as evidence. The Tribunal found the applicant did not know what religious denomination he belonged to or whether he was underground or not. It did not accept that his response overcame its concerns about his lack of knowledge of the church he claimed to belong to. The Tribunal formed the view that the applicant attended church in Australia simply in order to strengthen his claim for refugee status. The Tribunal was not satisfied that he had a real commitment to Christianity. The Tribunal rejected the applicant's claim that he or his wife are at risk from the authorities. After considering the applicant's claims individually and on a cumulative basis, the Tribunal found that if the applicant returned to China now or in the reasonably foreseeable future, there is no real chance that he would be persecuted for the reason of his political opinion, membership of a particular social group or for any other Convention reason. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason.

0902792

21 July 2009, Sydney

Ms A MacDonald, Senior Member

CHINA – RELIGION – FALUN GONG – The applicant claimed to fear persecution for reason of his religion as a Falun Gong practitioner. He claimed he first practiced Tai chi and Kung fu then Falun Gong. The applicant claimed that when Falun Gong was banned, practitioners gathered in Tian Jing City and this irritated the government. Although over 10 000 protesters appealed to Beijing, he did not attend protests from 1994 to 1999 because he was working; he got married and he was renovating a property. After Falun Gong was banned, the authorities started cracking down on practitioners and they required all practitioners to hand in their books and material and promise they would not practise anymore, which he did. Because he did not attend the protests, when the authorities began investigating after the ban, he was not high profile. The applicant's employer also asked him not to practise Falun Gong anymore. He claimed he did not become high profile until 2002 when his brother-in-law was detained for distributing Falun Gong material. Then, the applicant and his father-in-law were found by authorities to be conducting a family practice. He claimed that the worst time for him was after 2002 and in 2005 when they visited him most frequently. Because of this, he became ill and was hospitalised. He claimed he lost his job in 2005 due to his history and because he was not a Communist Party member.

Held: Decision under review set aside

The Tribunal found the applicant to be a credible witness and accepted his account of becoming involved in the practice of Falun Gong and that the benefits he claimed he obtained from this were typical of genuine practitioners. At hearing when asked, he correctly identified Falun Gong's 5 exercises. He also demonstrated the fourth exercise and clearly explained the movements. The Tribunal found he demonstrated a detailed knowledge of Falun Gong theory and practice. Accordingly, the Tribunal accepted he was a genuine Falun Gong practitioner who practiced in China until Falun Gong was banned. The Tribunal accepted that he had agreed to stop practising after the ban; however, he continued to be interrogated and investigated by the

authorities for his possible practice. It also accepted that his brother-in-law was arrested and detained as a Falun Gong practitioner. The Tribunal accepted there was a real chance the applicant would be identified as a Falun Gong practitioner in China whether he practiced or not and that he faced detention and torture for reasons of his actual and perceived beliefs. The Tribunal found that the persecution he feared involved serious harm and a threat to his life or liberty or significant physical harassment or ill treatment. It found that his religion, of Falun Gong, was the essential and significant reason for the persecution which he feared and that this involved systematic and discriminatory conduct. Accordingly, the Tribunal was satisfied that the applicant had a well founded fear of persecution for a Convention reason.

India

0808164

4 June 2009, Sydney

Ms L Nicholls, Member

INDIA – RELIGION – CHRISTIAN – The applicant claimed to fear persecution for reason of his Christian religion. He claimed to fear harm from members of the Muslim community in Kerala because of his involvement in a Christian group that opposed the unfair acquisition of coastal land by local Muslims. The applicant claimed to have worked as a fisherman and that there were often mid-sea disputes between groups of Muslim and Christian fishermen. He claimed to have become involved in a violent dispute between Muslim and Christian groups over land in coastal areas. He claimed that members of the Muslim community were trying to unfairly pressure poorer landowners into selling their land for below-market value. Some Christian youths were injured in one incident, and the applicant claimed that he was arrested because of his involvement. The applicant claimed that he was beaten and sexually assaulted in detention by local Muslims because of his opposition to the unfair land acquisition and that the police encouraged this mistreatment. He claimed to have been admitted to hospital for treatment after being released from detention on bail. He also claimed that he feared harm from members in the Muslim community should he return to India and that the police would not protect him.

Held: Decision under review affirmed

The Tribunal did not find the applicant to be a credible witness. The Tribunal found that the applicant was unable to provide a detailed account of the circumstances and events surrounding his claims even when the Tribunal highlighted at hearing that it was important to give specific details. The Tribunal found that independent information supported the applicant's claim that local fishermen in a number of villages, sometimes from different religious groups, were involved in various fishing disputes at the time the applicant worked in the fishing industry in Kerala. However, the Tribunal did not accept that a serious dispute between rival Christian and Muslim groups arose in the applicant's town at the time he claimed. The Tribunal found no independent information suggesting any dispute occurred and found the applicant's account of the claimed events vague and overly-generalised. The Tribunal found that the applicant could not provide a detailed account of his claim to have been arrested and released on bail and thus did not accept these claims. Further, the Tribunal could not find any evidence of the existence of the hospital to which the applicant claimed to have been admitted after being beaten and sexually assaulted in detention. The Tribunal accepted that the applicant may have been involved in some church-related activities; however it did not accept that he was involved in a lobby group negotiating land disputes between Christian landholders and members of the Muslim community. The Tribunal found that the applicant was unable to provide any clear details about the group's activities or details of his own role in those activities. As the Tribunal did not accept that he was involved in such a group, it did not accept that if he returned to India he would face a real chance of persecution by local Muslims for reason of his involvement in such a group. The Tribunal did accept that the applicant was Catholic and that he had been a member of the Catholic Church all his life. The Tribunal considered independent information and found that there is a large Christian community in Kerala and that the state provides a reasonable level of protection to all its religious minorities. Thus, it found that if the applicant returned to India now or in the reasonably foreseeable future, he would not face a real chance of persecution for reason of his Christian religion. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Iran

0902978

29 June 2009, Melbourne

Ms J Ellis, Member

IRAN – PARTICULAR SOCIAL GROUP – IRANIAN WOMEN WHO ENGAGE IN PRE-MARITAL SEX –

The applicant claimed to fear persecution on the basis of her membership of the particular social group 'Iranian women who engage in pre-marital sex'. She claimed to have been employed at a workplace that followed 'western' rules, where she did not have to wear a Hijab and she could speak to men. She claimed to have met a man at work, Person A, who became her boyfriend. Person A moved to Australia. When the applicant's work was closed by the Iranian government in 2007 she traveled to Australia on a working holiday visa and lived with Person A, where they were very happy. The applicant claimed that she did not tell her family that she was living with Person A. In 2008 the applicant claimed to have received a call from a girl, Person B, who said she was Person A's fiancée. Person A told the applicant that he would continue his relationship with Person B until he obtained his permanent residency. The applicant returned to Iran, where she received further calls from Person B. When Person A obtained his permanent residency he traveled to Iran and told the applicant that he could not marry her for a year, but asked her to return to Australia to live with him until then. The applicant moved to Australia, and claimed that on arrival Person A would not open his door to her. She claimed that he later rang and asked her to return but she no longer trusted him. She claimed she continued to receive calls from Person B so she decided to move to Melbourne to get away from Person A. The applicant claimed to fear returning to Iran because she had engaged in pre-marital sex with Person A, which is a punishable offence under Iranian law. The applicant claimed that she was under great pressure from her family to marry and that, in order to be married, she would have to undergo a medical examination arranged by her future husband's family to establish her virginity. They could then lodge a complaint against her to the authorities. She also claimed to fear her family, who would kill her for bringing shame on them. The applicant claimed, in particular, to be terrified of her brother who had been involved with the Basij voluntary militia for 5 or 6 years and wanted to control the lives of her and her sister.

Held: Decision under review set aside

The Tribunal found the applicant to be a truthful and credible witness and accepted that she came to Australia for the purpose of marrying Person A, that the relationship broke down and that she was left in a position where she feared returning to Iran because she had engaged in pre-marital sex. The Tribunal considered independent country information which found that in Iran, under Sharia law and the Penal Code derived from it, sex outside marriage is punishable, usually by flogging for the unmarried. The Tribunal noted that while such a penalty is abhorrent to Western standards and would be regarded as 'serious harm'; the law is of general application and does not operate in a discriminatory fashion. Therefore, the Tribunal found that punishment under that law would not constitute persecution for a Convention ground. However, the Tribunal found that Iranian women who engage in pre-marital sex constituted a particular social group and that there was a real chance the applicant's brother would seek to seriously harm her for reason of her membership of this group. The Tribunal accepted independent country information and found that the Iranian authorities would not act to protect her from this harm. The Tribunal also considered that it would be unreasonable for the applicant to relocate within Iran given her gender, age and lack of financial support. The Tribunal therefore accepted that there was a real chance the applicant would be subjected to persecution for reason of her membership of the particular social group, 'Iranian women who engage in pre-marital sex', if she returned to Iran now or in the reasonably foreseeable future.

Korea

0903238

26 June 2009, Sydney

Mr C Packer, Member

REPUBLIC OF KOREA – NO CONVENTION GROUND – The applicant claimed to fear persecution in Korea as she claimed she had suffered domestic violence from her former partner before she came to Australia in 1998. Also included in the application were the applicant's spouse and child. She claimed that her ex-fiancée had a mental problem and he had threatened and assaulted her. The applicant claimed that

on one occasion she jumped from a window, broke her ankle, and then hid. She did not specify when this event took place. The applicant claimed that her ex-fiancée would not stop looking for her and would harm her and her family in Korea. The applicant claimed that the Korean police do not act on complaints of domestic violence. The applicant did not submit any new information with her review application and she did not respond to the Tribunal's invitation to give oral evidence and present arguments at a hearing.

Held: Decision under review affirmed

The applicant did not appear before the Tribunal on the day of the scheduled hearing and no mail was returned unclaimed from the address the applicant advised for correspondence. Accordingly, the Tribunal proceeded to make a decision based on the material before it. The Tribunal noted that it had not had the opportunity, through the scheduled hearing, to obtain further information to test the veracity of the applicant's claims. The Tribunal could not be satisfied about the claimed events in Korea which led the applicant to leave the country or that she suffered harm in Korea. The Tribunal did not have the opportunity, through the scheduled hearing, to satisfy itself as to whether the applicant had a fear because of any Convention reason. The Tribunal therefore was not satisfied that the applicant had a well founded fear of persecution for any of the Convention reasons, or that she would suffer persecution for a Convention reason now or in the reasonably foreseeable future should she return to Korea.

Kosovo

0903110

13 July 2009, Sydney

Ms L Mojsin, Member

KOSOVO – DOMESTIC VIOLENCE – HONOUR KILLINGS – *KANUN* – CREDIBILITY – The applicant claimed to fear persecution for reason of domestic violence by her husband. She claimed that as a result of the war, they had lost their business, two houses and all of their money and personal possessions. She claimed that her husband was unable to deal with this and he began to physically abuse her and he threatened to kill her, their daughter and her family members. She claimed that he kicked her out in 2005 with nothing and she had to move around and stay with relatives. She later rented a unit in another city with her son and his family. She claimed there was no protection from the authorities and that when she reported it to the police, they told her to call them when her husband bashed her. She claimed he wanted to marry another woman and she agreed but she refused to move out of their home and this was part of the reason for his abuse. She claimed that she arranged to divorce her husband while she was visiting Australia in September 2006. When she returned to Kosovo in 2007, she stayed with her brother but her former husband bashed her in front of her sons. She claimed he threatened her and tried to throw her over the unit balcony. When he found out she was leaving for Australia, he pointed a gun at her and threatened her. She claimed she had called the police emergency line on one occasion but they could not hear her call as it was a loud building. She claimed she went into hiding, fearing a *Kanun* (honour killing) from her husband and that she felt it was culturally shameful to complain to the police or to live in a women's refuge. She claimed that when she applied for a visitor visa to Australia she told the Department that she resided with her husband in order to obtain the visa. The applicant's daughter advised that she would like the applicant to remain in Australia with her.

Held: Decision under review affirmed.

When questioned about the inconsistencies in information provided to the Department and the Tribunal, the applicant stated that she had sworn on the Koran for the Tribunal hearing but she provided answers to the Department just to get the visa. Based on the evidence, the Tribunal found the applicant was not a truthful witness. The Tribunal did not accept she had been assaulted and threatened by her husband, that she had suffered domestic violence nor that she would not receive state protection. The Tribunal did not accept the applicant's claims as to why the police had not heard her calls for help on two occasions. The Tribunal found the applicant had waited a year after her arrival to apply for a protection visa which indicated a lack of a subjective fear of persecution. The Tribunal accepted that customary laws of the *Kanun* for reciprocal honour killings existed, but found that the applicant's husband had not proclaimed a *Kanun*, only that he 'might'. The Tribunal found that women who suffered harm from their families for private reasons were not entitled to Convention protection although this may be persecution if the state is aware of it and does not

prevent it or protect the victim. The Tribunal accepted country information indicating that there were procedures to respond to and investigate domestic violence and that the authorities did provide effective protection for victims. The Tribunal accepted that women victims of domestic violence suffered a level of shame, embarrassment and humiliation on account of their status, but it found that emotional or social difficulties did not amount to serious harm and that the legal system and police provided an impartial system of justice. The Tribunal did not accept the applicant had nowhere to go in Kosovo or that her family would not assist her, or that state protection would be withheld from her. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Philippines

0903111

6 July 2009, Sydney

Mr Luke Hardy, Member

PHILIPPINES – PARTICULAR SOCIAL GROUP – PEOPLE WHO HAVE LIVED ABROAD – The applicants claimed to fear persecution as they were afraid of returning to the Philippines because they claim people who travel home after years abroad are known as *balikbayan* and are popularly perceived to be relatively well-off, making them attractive targets for robbers and kidnappers. The applicant husband came to Australia in 1986 and the applicant wife came in 1988. The applicant husband claimed that he came here to help his working aunt care for his ailing grandmother who died five years later. He claimed he did not flee the Philippines for any Convention-related reason. He claimed he and his wife remained here because he had a job working illegally and because his own sister had a child she needed help with, as she and her husband both work. The applicants claim that they have raised two children in Australia who are Australian citizens and who are now 31 and 25 years old. They submitted several news reports of individual attacks on *balikbayan* in the Philippines in recent times in support of their application. At the Tribunal hearing, the applicants withdrew their claims as refugees and stated that they were calling upon the Minister to exercise his non-binding discretion to grant them leave to remain for humanitarian reasons, as they have few friends or relatives in the Philippines and they have such strong family ties in Australia. They also asked that the interests of their adult children be considered compassionately.

Held: Decision under review affirmed

Although the applicants withdrew their claims as refugees, the Tribunal did consider these claims and noted that the applicants appeared to agree as to why these claims would not succeed. The Tribunal accepted that *balikbayan* are a cognisable group in the Philippines and that some individual *balikbayan* have been killed or harmed over the years in different places and circumstances. However, the Tribunal could find no evidence to suggest that they were being harmed essentially and significantly *for reason of* being *balikbayan*. The applicants acknowledged that criminal desire for money leads criminals to target people who they think might be well-off and that this could include people imputed to be *balikbayan* or just people who seem to be well-off. The Tribunal found no evidence to suggest that the authorities and the state actively or tacitly condone the targeting by criminals of people for their money. The applicant husband himself indicated that he did not apprehend a real chance of being harmed in the way described. The Tribunal could find no evidence to suggest that he or his wife face a real chance of being harmed in such ways. Accordingly, the Tribunal found that they do not have well founded fear of Convention-related persecution in the Philippines. Thus, the Tribunal was not satisfied that the applicants were persons to whom Australia had protection obligations under the Refugees Convention and they did not satisfy the criterion for a protection visa. The Tribunal affirmed the decisions not to grant the applicants protection visas. The Tribunal referred the applicants' claims to the Minister with regard to s.417 of the Act.

Zimbabwe

0902859

20 July 2009, Melbourne

Ms N Burns, Member

ZIMBABWE – IMPUTED POLITICAL OPINION – MOVEMENT FOR DEMOCRATIC CHANGE – PARTICULAR SOCIAL GROUP – PERCEIVED FOREIGNERS AND SOUTH AFRICAN RESIDENTS WHO ARE FOREIGN BORN – The applicant claimed to fear persecution on the basis of his imputed political opinion, namely of being a Movement for Democratic Change (MDC) member planning to destroy the president. A delegate of the Minister refused to grant the applicant and his two children protection visas because they had obtained permanent residency in South Africa in 2007 and thus, they had the right to enter and reside in a safe third country. The applicant applied for a review arguing that, as a Zimbabwean and a foreigner, he had a well-founded fear of persecution in South Africa. The applicant, a pastor, claimed that in Zimbabwe he had supported the MDC's principles, particularly as the Mugabe regime became increasingly oppressive from 2002; however he had not been politically active. He claimed to have been the target of false allegations of MDC membership by an embittered member of his congregation who had Zimbabwe African National Union – Patriotic Front (ZANU-PF) connections. As a consequence he claimed he had been placed under constant surveillance by the ZANU-PF's Central Intelligence Organisation (CIO). The applicant also claimed that his wife's death in a car accident in 2002 was politically motivated and that he had been the prime target. Although the applicant and his children obtained permanent residency in South Africa, the applicant claimed he had been intimidated on two occasions when visiting the country, including being held up at knifepoint in 2007 because his Zimbabwean number plates had been recognised. He claimed that he faced a real chance of persecution in South Africa due to his race and membership of the particular social group 'perceived foreigners and South African residents who are foreign born'. He claimed that he could not depend on state protection in South Africa because of xenophobic violence amongst the population and authorities and that he feared being followed by Zimbabwean CIO officers.

Held: Decision under review set aside

The Tribunal found the applicant to be a credible witness and his evidence was consistent with his written claims and independent information. It accepted his account of how he came to the attention of the CIO in Zimbabwe and that he was under CIO surveillance because of his imputed political opinion. The Tribunal also accepted the applicant's claim that the car accident in which his wife was killed was deliberate and that it was targeted at him. The Tribunal noted country information indicating that the removal of political opponents through staged road accidents in Zimbabwe was not uncommon. On the basis of independent information, the Tribunal determined that it was too early to assess whether real reform had occurred in Zimbabwe and whether politically motivated violence remained a serious risk against MDC members and supporters. The Tribunal also referred to independent information indicating that systematic discrimination and harassment against foreigners does occur in South Africa, whether the targets are permanent residents or not. It accepted information suggesting that police in South Africa have an endemic problem with corruption and xenophobia, and that foreigners are blamed for crime and social unrest. The Tribunal accepted that the applicant had previously been threatened, harmed and suffered intimidation in South Africa on account of his race and his imputed political opinion. Therefore, it found he faced a real chance of serious harm were he to return to South Africa now or in the reasonably foreseeable future for reason of his membership of a particular social group comprising foreigners or perceived foreigners. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

HIGH COURT JUDGMENTS

MIAC v SZKTI & Anor

[2009] HCA 30

High Court of Australia, French CJ, Heydon, Crennan, Kiefel & Bell JJ, S515/2008, 26 August 2009

This judgment concerned a Minister's appeal from a judgment of the Full Federal Court that allowed an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the first respondent was not a person to whom Australia had protection obligations.

The first respondent claimed to fear persecution in China because of his membership of the Local Church. Following a hearing under s.425(1) of the *Migration Act* 1958 (the Act), the Tribunal invited the first respondent to provide additional information under s.424(2) and in response he provided a letter from two church elders attesting to the first respondent's activities with the church in Australia, with a mobile telephone number for one of them, C, and a request to contact C if the Tribunal had any questions. Two months later, the Tribunal telephoned C and questioned him about the first respondent. The Tribunal then wrote to the first respondent pursuant to s.424A of the Act, stating what C had said and advising that C's knowledge of the respondent appeared to be superficial and he did not know of the respondent's association with the Local Church in China. In its decision, the Tribunal relied on the information provided by C in concluding he was not a practising Christian in China and affirming the decision under review.

The first respondent did not allege any breach of s.424 of the Act at first instance and the application for judicial review was dismissed. On appeal, the Full Federal Court allowed the appeal on the basis that the Tribunal could not obtain information by telephone from C without complying with s.424(2) and (3) of the Act. On appeal to the High Court the Minister contended that s.424(1) was a general facultative power in aid of inquisitorial functions and distinguishable from both the compulsory process under s.427(3) and the formal statutory process under s.424(2) which could result in loss of a right to a hearing. The first respondent filed a Notice of Contention that the Tribunal failed to comply with s.425(1) in not issuing a second invitation to hearing to give evidence on additional issues arising from the Tribunal's enquiries of C.

Held: *per curiam* appeal allowed

- (i) No jurisdictional errors arose as a result of not following the procedures in ss.424(3) and 424B or because the Tribunal did not give the first respondent an additional hearing under s.425.
- (ii) The Tribunal can lawfully obtain information by telephone without following the formal procedures set out in ss.424(3) and 424B. The powers in ss 424(1) and 424(2) are, in law, significantly dissimilar. The general power to "get" information and the specific power to "invite" in writing are capable of co-existing. Further, an oral request for information would be authorised not only by s.424(1), but also by s.56(1) by reason of the operation of s.415 which gives the Tribunal all the powers and discretions that are conferred by the Act on the person who made the decision. The phrase "[w]ithout limiting subsection (1)" in s.424(2) means that the procedural restrictions on the specific power to issue an invitation to give additional information do not qualify the Tribunal's general power in s.424(1). Accordingly, the circumstances of this case did not involve a breach of either s.424(3) or s.424B.
- (iii) The Tribunal was not obliged to issue an invitation to the first respondent to again appear before it. The extant issue in this case was whether the first respondent had been an active Christian in China. C's evidence was additional evidence about an extant issue; it did not constitute the raising of a new or additional issue such as to trigger the obligation to give another hearing.

MIAC v SZLFX & Anor

[2009] HCA 31

High Court of Australia, French CJ, Heydon, Crennan, Kiefel & Bell JJ, S503/2008, 26 August 2009

This was an appeal by the Minister from an order of a Full Court of the Federal Court dismissing the Minister's appeal from a judgment of Raphael FM which set aside a decision of the Refugee Review Tribunal (the Tribunal) that the first respondent was not a person to whom Australia had protection obligations.

The respondent, a national of China, claimed to be a Falun Gong practitioner. He claimed to practise Falun Gong in Australia at a park under the leadership of a Mr Li. The Tribunal rejected the respondent's claim that he was a Falun Gong practitioner based on inconsistencies in his evidence. Prior to the hearing, a Tribunal officer recorded a file note of a telephone conversation with a representative from a local Falun Dafa organisation, who confirmed that the park identified by the respondent was a Falun Gong practice site. However, he was not aware of a Mr Li being the leader and stated that they do not have leaders, but have coordinators for various sites. The Tribunal did not make any findings in relation to the file note.

The Federal Magistrate held that the Tribunal made a jurisdictional error by failing to comply with s.424A of the *Migration Act 1958* (the Act) in relation to the file note. The Federal Magistrate considered that the file note could or might undermine the credibility of the respondent and found that no inference that the file note was not material to the decision should be drawn from the Tribunal's failure to mention it.

In the course of the appeal before the Full Federal Court, the respondent filed a Notice of Contention submitting that the Tribunal had committed a further error by failing to invite the representative from the Falun Dafa organisation to give additional information in accordance with ss.424(2), 424(3) and 424B of the Act. The Full Court held that the Notice of Contention should succeed because of the decision in *SZKTI v MIAC* [2008] FCAFC 83 (*SZKTI*) and found it unnecessary to express an opinion on the correctness of the Federal Magistrate's approach to s.424A.

The appeal to the High Court was heard together with the Minister's appeal from *SZKTI* as both raised the common issue of whether the Tribunal may telephone a person, for the purposes of obtaining information from that person, without following the procedures set out in ss.424(3) and 424B. A discrete issue, not arising in *SZKTI*, was the correctness of the Federal Magistrate's approach to the construction of s.424A.

Held: *per curiam* appeal allowed

- (iv) It follows from the Court's decision in *MIAC v SZKTI & Anor* [2009] HCA 30, that the Full Court erred in upholding the respondent's claims in respect of the construction of ss.424 and 424B of the Act.
- (v) The Federal Magistrate erred in finding that a breach of s.424A had occurred. As correctly pointed out in *SZKLG v MIAC* [2007] FCAFC 198, s.424A depends on the Tribunal's "consideration", that is, its opinion, that certain information would be the reason or part of the reason for affirming the decision under review. There was no evidence or necessary inference that the Tribunal "considered" or had any opinion about the file note.
- (vi) The Tribunal's reasons show that what counted against the respondent were internal inconsistencies in his evidence. It was clear from the reasons that adverse credibility findings arose from matters which were not subject to s.424A. The only inference available was that the Tribunal did not consider the file note to be the reason or a part of the reason for affirming the decision.

FEDERAL COURT JUDGMENTS

MIAC v Kamal

[2009] FCAFC 98

Federal Court of Australia, Finn, Emmett & Edmonds JJ, NSD 299 of 2009, 21 August 2009

This was an appeal by the Minister from a judgment of the Federal Magistrates Court which set aside a decision of the Migration Review Tribunal (the Tribunal) to affirm a decision to refuse to grant the respondent a Student (Class TU) Subclass 572 visa.

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

After lodging his application for review in the Tribunal, the respondent attempted an IELTS test and achieved a 5.5 overall band score. Evidence of that outcome was provided to the Tribunal. However, the Tribunal found that this was not evidence of a test falling within Item 5A404(a)(ii), because it was not taken within the period of two years before the date of the visa application.

Federal Magistrate Smith found the words of Item 5A404(a)(ii) to be ambiguous. Having regard to the language and statutory context, his Honour found a more benevolent construction, meaning an IELTS test that was taken on a date which is not earlier than the date which is 2 years before the date of the visa application, to be correct.

The only issue in the appeal was whether the construction of Item 5A404(a)(ii) adopted by the Federal Magistrate was correct. The Minister contended that the natural meaning of the word "before" is "prior in time to" and that the relevant phrase cannot embrace the period less than two years before the date of the application as well as after the date of the visa application. It was further submitted that the Explanatory Memorandum resolved any ambiguity in favour of the construction contended for by the Minister.

Held: *per curiam*, appeal dismissed

- (i) The Federal Magistrate made no error in concluding as he did. While the question of construction is not without doubt, the respondent's contention that the relevant language means an IELTS test that was taken **no earlier than** two years before the date of the application is correct.
- (ii) The language of Item 5A404(a)(ii) is directed to the recency or currency of a test result. The intent is to ensure that the test is sufficiently recent and current for the decision maker to be satisfied that it is a reliable indication of the proficiency of the applicant. As a matter of logic and syntax, the words in question are clearly capable of being interpreted as meaning that the test must have been taken no earlier than two years before the date of the application. The question of construction does not so much turn on the word "before" as on the phrase "less than two years before", which means a test taken less than two years before.

Martinez v MIAC

[2009] FCA 781

Federal Court of Australia, Goldberg J, VID 1004 of 2008, 23 July 2009

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of a delegate of the Minister for Immigration and Citizenship refusing to grant a Skilled – Independent (Migrant) (Class BN) to the appellant.

The appellant applied for the visa in March 2006 and sought to satisfy cl.136.213(1)(a) of Schedule 2 to the Migration Regulations 1994 on the basis that he had been employed as a Cook since April 1998. The Department sought to verify the appellant's claims with his employer who indicated that the appellant had

been employed as a full-time Cook since February 2006 but prior to that date had been employed on a non-continuing basis. The delegate noted that no further third party or independently verifiable evidence was received and found the appellant did not satisfy cl.136.213(1) because she was not satisfied that he was employed in a skilled occupation and performing the duties of a Cook equivalent to the level of the Australian Standards as per ASCO. The delegate did not refer to any relevant periods to which her findings applied.

Amongst other things, the appellant argued that the delegate failed to take into account relevant material considerations, namely, the period or periods during which the appellant worked in a skilled occupation in the 18 month period immediately before applying for the visa.

Held: Appeal allowed. Minister's decision set aside and remitted for reconsideration.

- (i) The terms and structure of cl.136.213(1)(a) required a determination of the following matters: (a) the period or periods the appellant worked in a skilled occupation in the 18 months immediately before the visa application was made; (b) whether such period or periods totalled at least 12 months; and (c) the nature of the work or duties undertaken during the period or periods. The delegate made a jurisdictional error in not addressing the matters in (a) or (b).
- (ii) The obligation to address the nature of the work and duties undertaken and the period or periods during which the appellant claimed the work and duties were performed was intertwined and both had to be addressed to determine satisfaction against cl.136.213(1). The jurisdictional issue in relation to the period or periods employed in a skilled occupation was a critical issue.

**MZXTZ v MIAC
[2009] FCA 888**

Federal Court of Australia, Gray J, VID 18 of 2009, 17 August 2009

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

The appellant, a national of Malaysia, claimed to fear persecution on the basis of his race, religion and membership of a particular social group, as "a forcibly proselyte Muslim" who was prevented from marrying a non-Muslim in Malaysia. On the day the decision was to be handed down and before it was handed down, the appellant handed a Tribunal officer an untranslated document having an official appearance, which according to the appellant, stated that his family home had been raided. In a subsequent case note, the Tribunal concluded that, as the document was untranslated, it was not in a position to verify its contents and was satisfied that there was no need for it to alter its decision. The Federal Magistrate found that the Tribunal was not *functus officio* at the time the document was received and had failed to consider it at that time. However, the application was dismissed on the basis that, in light of the Tribunal's subsequent case note, there was no purpose in granting relief as the same outcome would flow even if the decision was set aside and remitted.

On appeal to the Federal Court, the appellant contended that the Federal Magistrate erred in refusing to grant relief in respect of the Tribunals' failure to consider information in the additional document. The appellant also raised an additional ground that the Tribunal failed to deal with the actual claim made by the appellant in relation to his conversion to Islam, namely that he was inveigled rather than forced to convert.

Held: Appeal allowed. RRT decision quashed and remitted for reconsideration

- (i) The Tribunal failed to take account of material it had received before the completion of its statutory function, as it was obliged to do. The federal magistrate correctly recognised that the Tribunal was obliged to consider any evidence the appellant provided before handing down. Having decided there was jurisdictional error, the federal magistrate should have acted upon that basis and granted the necessary relief. The Tribunal was not absolved from this jurisdictional error by the subsequent case note to the effect that there was no need to alter the decision. It could have obtained its own translation of the document or could have invited the applicant to provide a translation.

- (ii) There was jurisdictional error in the failure of the Tribunal to deal with the actual case put by the appellant as to the circumstances of his conversion to Islam. Although the material supplied to the Tribunal by and on behalf of the appellant contained the proposition that his conversion was forced, this was not the substance of the appellant's claims about what happened to him at the age of 14, but rather a reference to subsequent events such as his loss of job due to his relationship with a Hindu woman and being detained and assaulted. The Tribunal misconceived the nature of the appellant's claim about his conversion at the age of 14 and might have taken a more favourable view of the claims if it had understood their nature.

**AZAAR v MIAC
[2009] FCA 912**

Federal Court of Australia, Finn J, SAD 44 of 2009, 19 August 2009

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

The appellant, a citizen of Vanuatu, claimed that she was the subject of domestic violence at the hands of her husband and was not / would not be provided with reasonably effective state protection in Vanuatu because of systemic discrimination against women resulting from cultural norms and practices. The Tribunal accepted that the appellant had suffered and would face a real chance of suffering serious harm from her husband if she returned to Vanuatu. It found she belonged to a particular social group of either "Vanuatu women" or "married Vanuatu women". The Tribunal however concluded that the harm inflicted on the appellant was not because of her membership of a particular social group and it was not satisfied that there was a real chance of her being denied protection by the authorities in Vanuatu should she require it upon her return .

The appellant contended that the Tribunal misunderstood the questions properly to be considered when the issue before it was that of persecution resulting from the insufficiency of state protection against the acts of violence of non-state agents.

Held: RRT decision set aside and remitted for reconsideration

- (i) There was material before the Tribunal capable of supporting a conclusion that there was a lack of willingness on the part of the Vanuatu police to protect the appellant. It should be inferred from its reasons that the Tribunal failed to appreciate the significance of this evidence, to analyse what might have informed such lack of police willingness, and hence its bearing upon the issues of reasonably effective state protection. The Tribunal's failure to properly consider whether the police were unwilling or unable to afford state protection to the appellant constituted jurisdictional error.
- (ii) The Tribunal's treatment of country information diluted the potential significance of what the relevant reports were intending to convey. The Tribunal was concerned with institutional and organisational measures – with the laws, policies and mechanisms now in place – having a domestic violence focus. Its reasons do not reveal any explicit evaluation of the efficacy of those mechanisms or the traditional cultural norms and practices which, both on the appellant's case and in light of the country information, might bear on the police's willingness or ability "to take reasonable measures to protect the ... safety" of victims of domestic violence.
- (iii) If, in giving importance to the appellant's failure to seek police protection, the Tribunal was suggesting that actually seeking the protection of the authorities was a prerequisite for a finding of absence of adequate state protection, then it clearly was in error. If cultural norms, practices or widely held assumptions in a particular society engender a reasonable apprehension that such an approach would only exaggerate a victim's predicament, there is no conceivable reason why the law would require a victim to expose herself to likely future harm to substantiate that she was being persecuted for Convention purposes.

Talukder v MIAC

[2009] FCA 916

Federal Court of Australia, Edmonds J, NSD 427 of 2009, 20 August 2009

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal refusing to grant a Skilled – Independent Overseas Student (Resident) (Class DD) visa to the appellant.

The appellant sought to satisfy Item 1128CA(3)(k) of Schedule 1 to the Migration Regulations 1994 (Regulations) on the basis of an Australian Institute of Management skills assessment certifying that he met the criteria for recognition as a 'senior manager'. The skills assessment had been made on the basis of the appellant's claims to have been employed by 'Apex Sportswear Ltd' since 1991 and as a personnel director there between 1993 and 2000. It later came to light that the appellant had arrived in Australia in 1993 and had applied for a Protection Visa in 1999 through another migration agent in which application he stated that he had not worked in Bangladesh. The delegate made his decision on the basis that the appellant failed to satisfy cl.880.224, which requires that no evidence has become available since the time of application that the information given or used as part of the skills assessment is false or misleading in a material particular. The Tribunal affirmed the decision on the same basis as the delegate.

The appellant argued that cl.880.224 will result in rejection of the application where there is any evidence of falsity from any source no matter how slight, unpersuasive or even false or malicious. A regulation with this effect fails to satisfy the standards of reasonableness in the exercise of the regulation-making power conferred under the *Migration Act* 1958 (the Act) and therefore cl.880.224 is invalid.

Held: Appeal dismissed

- (iii) As the word 'evidence' is used in cl.880.224 in contradistinction to the word 'information', which is also used in the clause, any evidence relied upon to find the information given or used as part of the skills assessment is false or misleading in a material particular must be sufficiently probative of that fact.
- (iv) As the construction of the word 'evidence' in cl.880.224 as meaning 'sufficiently probative evidence' is open, it is unnecessary to address whether or not cl.880.224 is nevertheless valid as being within regulation-making power under the Act.

FEDERAL MAGISTRATES COURT JUDGMENTS

SZIPL v MIAC & Anor

[2009] FMCA 585

Federal Magistrates Court of Australia, Driver FM, SYG 1432 of 2008, 24 July 2009

This was a matter remitted to the Federal Magistrates Court for reconsideration of a judgment setting aside a decision of the Refugee Review Tribunal (the Tribunal) that the applicant was not a person to whom Australia had protection obligations.

The applicant had claimed in her protection visa application to be a national of Syria, like her father and siblings, but that her mother was Iraqi. She claimed at hearing to be a citizen of Iraq and denied being Syrian. The Tribunal found that the applicant was a national of Syria, did not accept that she was a national of Iraq and assessed her claims against Syria. The Tribunal found that she had not suffered persecution in Syria and, although the applicant may have initially been perceived as Iraqi given that she had lived there for 20 years, had an Iraqi mother and spoke with a different accent, it was not satisfied that she faced a real chance of serious harm for a Convention reason in Syria.

At first instance, the Federal Magistrate found that the Tribunal was confronted with two questions concerning nationality – the claim that the applicant was Iraqi and that she was not Syrian – but had effectively answered only one: *SZIPL v MIAC* [2008] FMCA 1501. Following a Minister's appeal the matter was remitted for submissions on the dual nationality claim: *MIAC v SZIPL* [2009] FCA 143.

The applicant again contended that she had not been properly invited to a hearing pursuant to ss.425 and 441A(5) of the *Migration Act* 1958 because the invitation sent by facsimile was not received by the authorised recipient. She also contended that the Tribunal failed to consider all integers of her claims because they raised the possibility of dual citizenship and, if she was a dual citizen, the Tribunal was required to consider whether she would be refouled to Iraq by Syria and suffer harm amounting to persecution in Syria as a person with Iraqi citizenship.

Held: Application dismissed

(i) Although the Tribunal made no express finding that the applicant was not an Iraqi national, it was not satisfied that the applicant was an Iraqi national as claimed. The Tribunal did not require controverting evidence to support its lack of satisfaction.

(ii) The Tribunal dealt adequately with the applicant's claim of being at risk in Syria because of her connection to Iraq, whether based on citizenship or otherwise, in its reasons. While it would have been better if the Tribunal had more clearly addressed the issue of Iraqi nationality, the risk of harm in Syria that would have flowed from it was subsumed in considering the risk of harm that she feared in Syria by reason of her connection with Iraq.

(iii) For the reasons given in *SZIPL v MIAC* [2008] FMCA 1501, [21]-[30], the Tribunal complied with ss.425, 441A(5) and 441G as the hearing invitation had been 'transmitted' if not received.

SZNOX v MIAC & Anor

[2009] FMCA 708

Federal Magistrates Court of Australia, Nicholls FM, SYG 1132 of 2009, 31 July 2009

The applicant, a national of India, 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 fear persecution arising out of his involvement with various political and guerrilla organisations.

On 6 February 2009, the Tribunal wrote to the applicant acknowledging his application for review. The applicant was invited to and attended a hearing at which he was orally invited to comment on or respond to particulars of adverse information. In making its decision, the Tribunal accepted some basic facts put

forward by the applicant but found it had “comprehensive, unresolved concerns about the applicant’s claims and evidence” which led it to reject the basis on which he claimed to fear persecution.

The applicant contended that the Tribunal decision was affected by jurisdictional error because the Tribunal had sent an “invitation” under s.424 of the *Migration Act* 1958 (the Act) which did not comply with s.424(3)(a) and s.424B because it did not specify the way in which additional information may be given or the period in which the information was to be given. The applicant was unable to identify the “invitation” referred to in his application to the Court. Counsel for the Minister submitted that there was no evidence before the Court to show that an invitation pursuant to s.424 had been given. The Court considered whether the Tribunal’s acknowledgement of application letter engaged s.424 and s.424B in light of *SZNAV & Ors v MIAC & Anor* [2009] FMCA 693 (*SZNAV*).

Held: Application dismissed

- (i) The acknowledgement letter in this case was in very different terms to that in *SZNAV*. Neither its language, nor the circumstances surrounding it, engaged the operation of s.424.
- (ii) There were invitations pursuant to s.425 and s.424AA. The s.425 invitation complied with all the relevant statutory requirements for the provision of the invitation, the giving of notice and relevant notice periods. It may be drawn from the Tribunal’s description of the hearing that it complied with the requirements of s.424AA(b).
- (iii) If the assertion is that the Tribunal should have made further enquiries, it may be noted that while s.424 confers power on the Tribunal to seek additional information, the exercise of such power is discretionary.

**SZNTJ v MIAC & Anor
[2009] FMCA 730**

Federal Magistrates Court of Australia, Smith FM, SYG 743 of 2009, 27 July 2009

The applicants, citizens of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations. The primary applicant claimed to fear persecution on the basis of his political opinion arising out of his involvement with the Bangladesh Nationalist Party (BNP).

On 23 September 2008, the Tribunal sent the applicants a letter acknowledging receipt of their application for review and explaining the review process (‘the acknowledgement letter’). The acknowledgement letter stated, amongst other things, that the applicants should “immediately send us any documents, information or other evidence you want the Tribunal to consider.” Ten days later, the Tribunal sent the applicants an invitation to appear for hearing, which advised them that the Tribunal had determined that it could not make a favourable decision on the information before it alone. Prior to the hearing, the applicant made three written submissions to the Tribunal. The primary applicant attended the hearing at which he gave evidence and arguments on the issues arising in the review with the assistance of an interpreter. The Tribunal affirmed the delegate’s decision finding that the applicant was not a reliable or credible witness and that there was no other evidence supporting his claims.

The applicants contended that the Tribunal decision was affected by jurisdictional error because the Tribunal breached s.425 by not indicating that his membership of the BNP was in issue and because the acknowledgement letter contained an invitation to provide additional information under s.424(2) of the *Migration Act* 1958 (the Act) which failed to specify that the information was to be provided within the prescribed period in accordance with s.424B(2) of the Act.

Held: Application dismissed

- (iv) The acknowledgement letter was not an invitation intended by s.424 to come within s.424(2). The invitation letter was purely informational as to the Tribunal’s expectations of an applicant, and did not amount to the Tribunal ‘getting’ information from the applicant. It was therefore not an ‘invitation’ that he ‘give information’ to the Tribunal. Accordingly, there was no procedural irregularity, whether jurisdictional or otherwise, arising from the Tribunal’s advice that the applicant should present his evidence ‘immediately’ rather than within 14 days.

- (v) Alternatively, the acknowledgement letter could not have enlivened s.424(2) in this case because it cannot be construed as inviting the giving of any 'additional' information. As the applicant had submitted only an application form with his contact details without other evidentiary support, at the time that the acknowledgement letter was sent the applicant had given to the Tribunal nothing capable of amounting to 'information' on these matters. If in *SZNAV & Ors v MIAC & Anor* [2009] FMCA 693 (*SZNAV*), the applicant had given the Tribunal information about his case when lodging his application, *SZNAV* would be distinguishable on this point from the present case.
- (vi) Even if a procedural error occurred, it either had no jurisdictional consequences because no detriment reasonably conceivable flowed to the applicant or the error was of such insignificance to the proceedings and decision of the Tribunal that the Court should not exercise its power to quash the decision.
- (vii) Without further evidence, no inference should be drawn that the acknowledgement letter was not sent while the Tribunal was 'conducting the review' within s.424(1), because no member had been appointed at that time to constitute the Tribunal "*for the purpose of [the] particular review*" under a direction by the Principal Member under s.421 of the Act. Federal Magistrate Raphael's opinion on this issue in *SZNAV* is not clearly wrong.
- (viii) The Tribunal did not breach s.425 of the Act. The applicant's membership of the BNP was not a matter which 'played a part in the Tribunal's decision', or, if it did, it was of such an 'insubstantial nature' as not to require any warning that it might be covered by the Tribunal's adverse findings of fact. In any event, the Tribunal sufficiently canvassed at the hearing the possibility that it might not accept the whole of his evidence as to his involvement in the BNP party.

**Wong v MIAC & Anor
[2009] FMCA 747**

Federal Magistrates Court of Australia, Scarlett FM, SYG 1611 of 2009, 13 August 2009

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate that he was not entitled to the grant of a Student (Temporary) (Class TU) (Subclass 573) visa.

The Tribunal found that cl.573.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) required the applicant to satisfy criterion 3005 of Schedule 3 to the Regulations. The Tribunal went on to find that the applicant did not satisfy criterion 3005 because "*the applicant was granted his last held student visa...on the basis of the satisfaction of Schedule 3 criterion 4014*".

The applicant filed his application for judicial review 78 days after of the prescribed time period and applied to the Court for an extension of time to commence proceedings. The applicant claimed that as there is no criterion 4014 in Schedule 3 to the Regulations, the Tribunal misinterpreted and misapplied the applicable law in relation to cl.573.211 of Schedule 2 and criterion 3005 of Schedule 3 to the Regulations. The applicant also argued that his application for an extension of time should be allowed as: the Tribunal's error was such a manifest jurisdictional error that it should not be allowed to stand; the consequences on him are severe; he has been denied a refund of his review application fee that he was otherwise entitled to have received; he had nevertheless acted in a timely manner and there was no real prejudice to the Minister in the application being permitted to proceed. The Minister conceded that there was a jurisdictional error committed by the Tribunal but opposed the extension of time to commence proceedings.

Held: MRT decision quashed and remitted for reconsideration

- (iv) The Tribunal fell into jurisdictional error by misinterpreting and misapplying the applicable law by finding that the applicant did not satisfy cl.573.211 of Schedule 2 and criterion 3005 of Schedule 3 because "*the applicant was granted his last held visa...on the basis of the satisfaction of Schedule 3 criterion 4014*" where there is no Schedule 3 criterion 4014 in the Regulations.
- (v) The Minister's concession that there is a clear jurisdictional error by the Tribunal is a significant factor in favour of granting the extension of time. The delay of 78 days is not so lengthy that an extension of time to apply for relief in a strong case should not be granted. It is necessary in the

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

INSTRUMENTS

Migration Act 1958 – Revocation of Section 499 Direction No. 32 (IMMI 09/076)

This Direction revokes *Migration Act* 1958 – Direction under section 499 – Order of Consideration and Disposal of Applications for Visas in the Family Stream under subsection 51(1) of the Migration Act 1958 (Direction No. 32 of 2003). This Instrument commenced on 15 August 2009.

Migration Regulations 1994 – Specification under paragraph 1222(3)(aa) – Class of Persons – July 2009 (IMMI 09/082)

This instrument specifies the classes of persons that must lodge a Student (Class TU) visa application to the AOSPC. This notice commenced on 1 August 2009.

Migration Regulations 1994 – Specification under subparagraph 1218(1)(b)(iii) – Travel Agents for PRC Citizens Applying for Tourist Visas – July 2009 (IMMI 09/085)

This instrument specifies approved travel agents for the purposes of subparagraph 1218(1)(b)(iii) of Schedule 1 to the Migration Regulations 1994. It commenced on 15 August 2009.

Migration Regulations 1994 – Specification under subparagraph 1218(1)(b)(iii) – Travel Agents for PRC Citizens Applying for Tourist Visas – August 2009 (IMMI 09/096)

This instrument specifies the travel agents listed in the Schedules for the purpose of subparagraph 1218(1)(b)(iii) of schedule 1 to the Migration Regulations 1994. This Instrument commenced on 15 August 2009.

Migration Regulations 1994 – Specification under regulations 846.111, 855.111, 856.111 and 857.111 – Health Waiver – Participating States and Territories – August 2009 (IMMI 09/102)

This Specification provides that the Australian Capital Territory, Victoria, Western Australia, Northern Territory, Queensland and Tasmania are participating States and Territories for the purpose of clauses 846.111, 855.111, 856.111 and 857.111 of schedule 2 of the Migration Regulations 1994. This Instrument commences on 14 September 2009.

Migration Amendment (Protection of Identifying Information) Act 2009 – Proclamation

This Proclamation provides for the commencement of Schedule 1 of the *Migration Amendment (Protection of Identifying Information) Act* 2009, fixing 14 September 2009 as the day on which Schedule 1 to that Act commences.

REGULATIONS

Migration Amendment Regulations 2009 (No. 5) Amendment Regulations 2009 (No. 1)

These Regulations amend the Migration Amendment Regulations 2009 (No. 5) to ensure that all the regulations supporting the Migration Legislation Amendment (Worker Protection) Act 2008 commence on the same date and add the temporary work visas listed to the enforceable sponsorship framework. These Regulations commenced on 14 August 2009.

Migration Amendment Regulations 2009 (No. 8)

These Regulations amend the Migration Regulations 1994 relating to subclass 050 Bridging (General) visas. These Regulations commenced, or are taken to have commenced, on 1 July 2009 (Schedule 1) and 14 September 2009 (Schedule 2).

Migration Amendment Regulations 2009 (No. 9)

These Regulations amend the Migration Regulations 1994 (the Regulations) to align Subclass 457 (Business (Long Stay)) visas with the new sponsorship framework at Division 3A of Part 2 of the *Migration Act 1958* (the Act) and new Part 2A of the Regulations. These amendments complement amendments to the Act made by the *Migration Legislation Amendment (Worker Protection) Act 2008* and amendments to the Regulations made by the Migration Amendment Regulations 2009 (No. 5). These Regulations also create the new Subclass 406 (Government Agreement) visa which will allow non-citizens to enter Australia in two circumstances: in accordance with the terms of an agreement between a government in Australia and the government of a foreign country, or to direct the national operations of prescribed organisations in Australia. These Regulations commence on 14 September 2009.

CASELOAD OVERVIEW

MRT Decisions – August 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	1	11	0	3	15
Visitor refusal	33	16	0	9	58
Student refusal	30	19	12	9	70
Temporary business refusal	21	10	10	15	56
Permanent business refusal	8	2	5	0	15
Skill linked refusal	63	20	10	20	113
Partner refusal	49	18	10	5	82
Family refusal	19	31	3	2	55
Student cancellation	20	30	1	11	62
Sponsor approval refusal	2	4	5	2	13
Other	11	11	3	10	54
Total	257	172	59	86	574

RRT Decisions – August 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	1	0	0	0	1
Angola	0	1	0	0	1
Australia	0	0	0	1	1
Bangladesh	0	5	0	0	5
Burma (Myanmar)	3	0	0	0	3
Cambodia	0	1	0	0	1
China (PRC)	19	43	0	3	65
Colombia	0	1	0	0	1
Ethiopia	5	0	0	0	5
Fiji	0	4	0	2	6
Ghana	1	0	0	0	1
India	2	18	1	0	21

Indonesia	1	4	1	3	9
Iran	2	0	0	0	2
Iraq	0	1	0	0	1
Jordan	3	0	0	0	3
Kenya	0	2	0	0	2
Korea, Dem Peoples Rep of	0	2	0	0	2
Korea, Republic Of	0	4	0	1	5
Laos, Peoples Democratic Rep	0	1	0	0	1
Lebanon	0	2	0	0	2
Liberia	0	1	0	0	1
Macedonia, Fmr Yugo Rep of	0	3	0	0	3
Malaysia	1	4	0	0	5
Nepal	0	2	0	0	2
Nigeria	0	1	0	0	1
Pakistan	2	1	0	0	3
Papua New Guinea	0	1	0	0	1
Philippines	0	1	0	1	2
Sierra Leone	0	1	0	0	1
Sri Lanka	3	3	1	0	7
Turkey	3	0	0	0	3
United Kingdom	0	1	0	0	1
United States of America	0	1	0	0	1
Vietnam	1	0	0	0	1
Zimbabwe	2	4	0	1	7
Total	49	113	3	12	177

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.

Between 1 January and 30 June 2009, 47% of all substantive decisions made have been published (46.9% of MRT and 48.3% of RRT). This does not include 'Withdrawn' or 'No Jurisdiction' cases. MRT decisions are selected and vetted for publication each day, with publication delayed by approximately seven days to allow time for applicants to be notified of the Tribunal's decision. RRT decisions are also selected daily and are edited in accordance with the requirements of the Migration Act. Edited decisions are sent to AustLII for publishing on their website.

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.

The Tribunal's Email address is: enquiries@mrt-rrt.gov.au

Editor: Tracey Macmillan

Contributors:

Rachael Chadwick
Lynne Sonter
Anna Stephens

Please note that any enquiries regarding this publication may be directed to the Editor at enquiries@mrt-rrt.gov.au

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