



## 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

0802387

25 August 2009, Sydney

Mr C Packer, Member

**EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 (EMPLOYER NOMINATION SCHEME) – CL.856.213(C) – VOCATIONAL ENGLISH** – A delegate of the Minister refused to grant the applicant a Subclass 856 visa as he did not satisfy cl.856.213(c) of the Regulations because he did not have vocational English. The applicant first entered Australia on a Subclass 457 visa in 2005 to work as a cook in an Indian restaurant. In support of his review application, the applicant provided an IELTS test showing an overall band score of 2, documents concerning enrolment at TAFE in 'General English for Overseas Visitors', declarations from restaurant staff stating that he is able to converse in English, awards won by the restaurant, certificates in Health, Safety & Security Procedures and in Hygiene and Food Safety procedures, and a TAFE assessment in spoken and written English. The applicant participated in the Tribunal hearing without an interpreter at his own request. He claimed that he attended English classes every week for 6 hours. He provided information about the content of the Hygiene and Food Safety course he attended. The Manager of the restaurant at which the applicant worked gave evidence and claimed that the applicant was crucial to the restaurant and that he was impossible to replace. He stated that overheads are tight and there is a lack of quality chefs. He claimed that without the applicant, the business may need to be wound back. He also claimed that the applicant had trained other staff and that he brought special skills to the restaurant, in particular his mixture of Chinese and Indian cooking styles to create unique tastes. The Manager also provided evidence that the applicant's position had been advertised in Australia and the sole applicant had been found to be unsuitable. He further argued that Indian chefs who speak English are more likely to be sous chefs and executive chefs in big hotels.

**Held:** Decision under review set aside

Based on the IELTS test submitted, the Tribunal found that the applicant did not have vocational English. The Tribunal then considered whether the applicant's appointment was exceptional. It found that the appointment was exceptional for a number of reasons. The Tribunal noted that the occupation of cook was on the Migration Occupations in Demand list and that locally trained cooks would be unlikely to have the required Indian cuisine cooking skills. The Tribunal accepted that the nominator had been unable to find a suitably qualified person in Australia with vocational English. The Tribunal accepted the nominator's argument that it would be reasonably difficult to locate and recruit vocational-English-speaking cooks in India to fill a position in a suburban restaurant in Brisbane. The Tribunal found that this conclusion was reinforced by the fact that the applicant had entered Australia to work in the position on a Subclass 457 visa, demonstrating that the nominator had unsuccessfully canvassed overseas for a suitable Indian cuisine cook previously. The Tribunal noted that there had been considerable delays in the processing of the case and thus found it reasonable to accord weight to the employment of the applicant in the actual position since he arrived in Australia in 2005. The Tribunal observed at the hearing that the applicant was able to converse in English, and gave great weight to his ability to discuss the content of the TAFE courses he had completed. The Tribunal found that the applicant had been undertaking English language tuition over a number of years, had demonstrated a commitment to improving his English language skills and found that he had made significant gains in that area. The Tribunal noted the statements of current and former employees indicating they had worked with the applicant and had not had problems understanding his instructions and directions, and determined that the applicant would be able to pass on his cooking skills to other cooks and apprentices in the future. Further, the Tribunal accepted the evidence of the restaurant's various awards and award nominations, and concluded that the applicant had enabled the restaurant to have a distinctive menu which was well regarded. Thus the Tribunal found that while the applicant did not possess vocational English, the appointment was exceptional both at the time of application and decision. Accordingly, the Tribunal found that the visa applicant satisfied the requirements of cl.856.213(c) of the Regulations.

0802774

21 August 2009, Melbourne

Ms N Burns, Member

**SKILLED (PROVISIONAL) (CLASS UZ) VISA – SUBCLASS 496 – DESIGNATED AREA SPONSORED – CL.496.215 – RELEVANT EXPERIENCE** – A delegate of the Minister refused to grant a Subclass 496 visa on the basis that the visa applicant did not satisfy cl.496.215 of the Regulations, and found that concerns raised by Australian High Commission (AHC) staff cast doubt on the applicant's work experience claims. The applicant claimed he completed an apprenticeship as a diesel engine mechanic in 2000 and that he had been assessed favourably in his nominated occupation through Mechanic and Trades Recognition Australia. He claimed he had been employed by his current employer as a diesel mechanic since September 2005. In 2007, Australian High Commission staff (AHC) in Sri Lanka telephoned the applicant and his employer to verify the applicant's work experience claims. This resulted in contradictory information being provided. The Department sought the applicant's comments on the results, and in an affidavit the applicant explained that when he received a call from the AHC he said he was not at work because he thought it was his girlfriend who had called. He claimed that when he heard that AHC had been on the line he had tried to call them back but he could not get through to them until the following day. He further claimed that he told his employer that he may need to go to the AHC the following day and this explained why his employer thought he had left work to attend the AHC. He also clarified that engines are used in cranes and top lift transfers, because AHC staff were concerned that the applicant told them that he mostly worked on cranes and top lift transfers, but his employer had told AHC staff that the applicant mostly worked on engines. The applicant provided affidavits in support of his claimed work experience and his responses to the Department's adverse information letter. He also submitted photographs of his worksite, timesheets indicating he was at work on the days in question, and copies of his ID cards.

**Held:** Decision under review set aside

The Tribunal found the applicant to be a credible witness. Based on his written and oral evidence, letters and affidavits from his employer, and various work related documents, the Tribunal accepted he had been employed as a diesel mechanic since September 2005 and that he performed duties commensurate with the occupation of Motor Mechanic. The applicant's description of his role and responsibilities were comprehensive and detailed, which demonstrated a level of familiarity and competence in the job which had been achieved over time. The Tribunal accepted why the applicant told AHC staff he was not at work when they called him and accepted that the information given by his employer and himself regarding the types of engines he worked on and tools he used was not necessarily conflicting. The Tribunal was satisfied the applicant was employed in a skilled occupation from September 2005 to date, totalling at least six months in the period of 12 months immediately before the date of application, as required by cl.496.215(1)(a). Accordingly the visa applicant satisfied the requirements of cl.496.215(1)(a) and met cl.496.215 of the Regulations.

0901754

26 August 2009, Melbourne

Ms N Burns, Member

**TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 (BUSINESS (LONG STAY)) – CANCELLATION S.116(1)(a) – CEASED TO BE EMPLOYED** – A delegate of the Minister cancelled the applicant's Subclass 457 visa under s.116(1) on the basis that the applicant's sponsor notified the Department that they had withdrawn their sponsorship as the applicant had left their employ as a cook without notification. Accordingly, the Department issued a notice of intention to consider cancelling the applicant's visa. The applicant then submitted that he was looking for another sponsor and requested more time to do so. The applicant subsequently claimed in a statutory declaration that the owner of the business, who was a distant relative, exploited him. He claimed that he used to work 80 hours per week and was paid only \$1,500 per month, nor did he receive any payslips. The applicant claimed that when he raised the issue about his salary his employer argued that he was already paying tax, work cover and superannuation for the applicant and he refused to pay him more. The applicant stated that due to problems with his knees resulting from overwork he went to India for a month for treatment and it was during this time that his employer withdrew his sponsorship. The applicant claimed that he made a complaint to the Workplace Ombudsman who informed him that they could not take any action due to a lack of evidence. The applicant subsequently submitted a letter to the Tribunal in which he stated that he had found a new employer that

was willing to sponsor him. He attached a letter from the Director of MKS International which stated that he was willing to employ the applicant as a cook in their retail shop and take away food business.

**Held:** Decision under review affirmed

The Tribunal was satisfied that the applicant's former sponsor withdrew their consent to sponsor the applicant in writing. The Tribunal was therefore not satisfied that the applicant was sponsored by an approved sponsor within the meaning of 1.40D, hence, the Tribunal found that the grounds for cancellation in s.116(1)(a) existed. The Tribunal then considered whether the power to cancel the visa should be exercised, having regard to all the circumstances. The Tribunal found that the fact that the applicant no longer worked for the sponsoring employer undermined the very purpose of the visa which had been granted, and that the applicant had not secured a new sponsor. The Tribunal noted that MKS International had indicated that they wished to employ the applicant, however, they had not made any effort to apply to sponsor the applicant. It found that although the Department and the Tribunal had provided ample time for the applicant to find a new sponsor, to date there had been no sponsorship application or related visa application supporting such an agreement; that is, a period over nine months. Although the applicant argued that his circumstances were made difficult because his previous sponsor was not likely to be supportive of him finding new employment and was not providing positive references on his behalf, the Tribunal found that given the applicant had made efforts to find a new sponsor over a long period to no avail, it was reasonable for it to assume that the applicant was not likely to find employment in the near future. The Tribunal stated that it had some sympathy for the way the applicant was unfairly treated by his employer, however, it found that it was not within its remit to investigate or make findings as to whether the applicant's former employer was exploitative or not. Nor was it for the Tribunal to rectify any perceived unfairness by the sponsor to the applicant. It found that these circumstances did not outweigh the grounds for cancelling his visa.

**0904595**

**24 August 2009, Sydney**

**Ms L Mojsin, Member**

**TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 (BUSINESS (LONG STAY)) – CANCELLATION – S.116(1)(g) – APPROVED BUSINESS SPONSOR** – A delegate of the Minister cancelled the applicant's Subclass 457 visa under s.116(1) on the basis that the applicant's sponsorship had been cancelled. The applicant's subclass 457 visa was granted on the basis that he worked for Pari Australia Pty Ltd, the business sponsor, as a welder. Pari Australia Pty Ltd was an approved business sponsor. The applicant claimed that he did not know that his visa had been cancelled until his friend telephoned him and informed him that he had received notification of cancellation of his own visa. The applicant had provided an email address to the Department to receive documents. The applicant claimed that he did not receive an email or any letters or telephone calls from the Department about his visa cancellation. As he did not have access to a computer, he claimed that he did not check his email until his friend telephoned him. The Tribunal was informed that the sponsor became insolvent and closed his business in early 2009, leaving the applicant and other workers being owed wages. The applicant claimed that he was given no notice of the company's closure. The applicant subsequently found a new sponsor and provided documents to the Tribunal in relation to his intended sponsor, Wunda Projects Australia Pty Ltd.

**Held:** Decision under review set aside

The Tribunal accepted that the approved business sponsor, Pari Australia Pty Ltd, became insolvent and as a consequence the Department cancelled its sponsorship approval. It found that there was no information on the file to suggest that the delegate had followed the procedures set out in subdivision E of the Act for the cancellation of visas under section 116 (General power to cancel), other than a copy of the delegate's decision, showing an email address and a mailing address for the applicant. The Tribunal noted that the procedure set out in Subdivision E of the Act requires that a Notice of Intention to Consider Cancellation of the visa provided to the applicant should clearly set out the grounds of the alleged breaches. The Tribunal noted that there was no copy of a Notice of Intention to Cancel the visa provided on the Departmental file, nor was there any information on the file to indicate the mode of service of the Notice of Cancellation of the visa pursuant to s.116(1). The Tribunal also noted that the Notice had an email address written on it without any other information, such as information indicating that an email was sent to the applicant. The Notice provided a street address for the applicant; however, there was no information as to whether the document

had been sent by post. The Tribunal was not satisfied that the applicant had been served with a notice of the grounds on which the cancellation was being considered. Therefore, it found that the power to cancel the applicant's visa did not arise. The Tribunal went on to state that the applicant had no responsibility for the breach as his sponsor became insolvent and closed the business without notice, and that these circumstances were beyond the applicant's control. Accordingly, the Tribunal set aside the decision under review and substituted a decision not to cancel the applicant's Subclass 457 visa.

## Family visas

0807698

10 June 2009, Sydney

Mr G Short, Senior Member

**OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 115 (REMAINING RELATIVE) – CONTACT WITH AN OVERSEAS NEAR RELATIVE – REASONABLE PERIOD** – A delegate of the Minister refused to grant the applicant a Subclass 115 visa because they could not be satisfied that the visa applicant was a remaining relative of the review applicant, who is the visa applicant's mother. Also included in the application was the visa applicant's infant son. Following the Tribunal's previous finding to affirm the Department's decision, the applicant applied to the Federal Magistrates Court and the matter was remitted to the Tribunal for reconsideration. The applicant claimed that, at the time of the visa application in August 2005, she was living separately and apart from her former spouse on a permanent basis, having returned to China in 2004 while her former husband remained in Australia. The applicant's representative conceded at hearing that the visa applicant had two 'overseas near relatives' being her two younger daughters who were citizens of the People's Republic of China, although they were residing in Australia illegally at the time of the visa application. The visa applicant claimed that her former husband took the two younger daughters to dinner one night shortly before her departure to China and he did not return them to her. She claimed that although she had done everything to locate them, she had been unable to do so and none of her family or friends in Australia has had contact with them since. She believed that they were currently with their father somewhere in Australia.

**Held:** Decision under review affirmed

The Tribunal initially pointed out that the focus of this hearing was on a different issue from that relied on by the delegate and by the first Tribunal. The Tribunal accepted that the visa applicant was divorced from her husband and that they were living separately and apart on a permanent basis at the time of the visa application. It also accepted that the visa applicant's former husband took her two younger daughters to dinner and did not return them. It found that her two younger daughters fell within the definition of 'overseas near relative' since they had not turned 18 at the time of application and they were not wholly or substantially in her daily care and control. The Tribunal found that the issue to consider was whether the visa applicant had had 'contact' with her two younger daughters 'within a reasonable period before making the application'. The Tribunal accepted that the visa applicant was typically close to her daughters prior to her return to China and for one week after her return. However, it found that there was a period of 10 months preceding the making of the application where the visa applicant was not in contact with her two younger daughters. The Tribunal noted that, were it not for the intervention of the visa applicant's former husband, the visa applicant would obviously have had a close relationship with her two daughters throughout the relevant period. It did not consider it irrational in the context of the relevant provisions to have regard to the closeness of the relationship between the visa applicant and the overseas near relatives in determining what is a reasonable period in the context of this particular case. Conversely where, as in this case, the relationship is a very close one – that of a mother and her two younger daughters – and where it is submitted that the relationship would have continued to be close but for the circumstances that the visa applicant was forced to return to China, and that the children's father did not return her two younger daughters, the Tribunal considered that it was appropriate to regard a longer period as a 'reasonable period' in determining whether the visa applicant met the definition of a 'remaining relative'. The Tribunal reasoned that if a relationship which would ordinarily be very close was interrupted, for example, by a family quarrel, the very closeness of the relationship would suggest that one should wait for some time before concluding that the relationship had been irreparably severed. In the context of such a relationship, one would not immediately conclude, on the basis of an absence of 'contact' in the relevant sense for a week or a month, that such contact would not resume very shortly. Conversely, if a relationship which had never been close

were interrupted in the same way there would be no natural expectation that the breach would heal within the reasonably foreseeable future and one could be satisfied after a somewhat shorter period that 'contact' in the relevant sense would not resume. The Tribunal considered that there were cogent arguments to depart from the relevant Departmental policy in the circumstances of the present case. It concluded that a period of three years was a 'reasonable period' for the purposes of cl.1.15(1)(c)(ii) in the circumstances of the present case. It found on the evidence that the visa applicant had had 'contact' in the relevant sense with her two younger daughters within a reasonable period before making the application, that is, within the period of three years beginning on 15 August 2002. The Tribunal accepted that the applicant's relationship with her two younger daughters was close until she returned to China in 2004. It found, therefore, that the visa applicant was unable to satisfy r.1.15(1)(c)(ii) of the Regulations and that she was not a 'remaining relative' as defined for the purposes of the Regulations. Accordingly, the visa applicant did not satisfy cl.115.211 of Schedule 2 to the Regulations.

**0903539**

**21 August 2009, Melbourne**

**Mr D Lennon, Member**

**CHILD (MIGRANT) (CLASS AH) – SUBCLASS 102 (ADOPTION) – CL.102.211 – FORMAL ADOPTION** – A delegate of the Minister refused to grant the applicant a Subclass 102 visa as she did not satisfy the requirements of cl.102.221 of the Regulations because her adoption did not accord with Bangladeshi law. The visa applicant was born in Bangladesh and is the daughter of the review applicant's younger sister. The review applicant claimed that his sister's family was very poor. He claimed that in 1997 he, his wife and two children moved to Croatia where he went to work. He claimed that he visited his family, including the visa applicant, in Bangladesh one to three times per year. The review applicant claimed that during one such visit in 2006 he discussed his desire to adopt a child with his sister, who suggested he adopt her daughter, the visa applicant. The review applicant took the view that charity begins at home and he decided to adopt the visa applicant. In January 2007, the visa applicant went to live with a 'guardian' – the review applicant's wife's brother. The review applicant also stayed there for a few weeks before returning to Croatia. A month or two later the visa applicant joined him in Croatia for a few months. She stayed at home in his apartment while he worked. After he resigned from his job in Croatia, the review applicant claimed to have attempted, unsuccessfully, to obtain a bridging visa for the visa applicant to enable her to accompany him to Australia. The visa applicant returned to Bangladesh and the review applicant came to Australia. The visa applicant went to live with the 'guardian' and occasionally stayed with the review applicant's siblings and with her parents. In July 2008, the review applicant placed her in a boarding school near her parent's home. He claimed to have visited her twice since coming to Australia. The review applicant claimed that, at the time of application, the visa applicant was closer to him than to anyone else. The visa applicant gave evidence at the Tribunal hearing that she telephoned the review applicant's house on weekends but she normally spoke to her aunt as the review applicant was usually busy. She claimed that she telephoned her parents once a week and visited them about once a month for a day. The review applicant, in a submission to the Tribunal, claimed that an application to formalise the Adoption/Guardianship process through the relevant Family Court in Bangladesh had been made, and that this process was a formality.

**Held:** Decision under review affirmed

The Tribunal found that there was no evidence of formal adoption in accordance with the law of an Australian State or Territory or in accordance with the law of another country. The Tribunal found there was evidence of an application for guardianship having been lodged with the authorities in Bangladesh, but that formal adoption arrangements had not been made. It was noted that since 1982 adoption arrangements have not been available for Muslims under Bangladeshi law and that the parties are Muslims. The Tribunal considered Regulation 1.04(1)(c), sub regulation 2, and whether other arrangements entered into outside Australia were in the nature of adoption and could be taken as constituting 'adoption' and specifically whether the child-parent relationship between the adoptee and the adopter was significantly closer than any such relationship between the adoptee and any other person. The Tribunal was not satisfied that, at the time of application or decision, this was the case. The Tribunal noted that even if it accepted that a child-parent relationship had evolved between the visa and review applicants given the limited time they had spent together, it would not have been satisfied that the relationship was significantly closer than any such relationship between the visa applicant and any other person or persons, in particular her natural parents. The Tribunal noted that while the review applicant regarded the approval of his application for guardianship

as a fait accompli and used the terms 'adoption' and 'guardianship' interchangeably, his acquisition of 'full and permanent parental right' by the Guardianship had not been formalised at the time of application or decision. Accordingly, the Tribunal affirmed the decision not to grant the applicant a Child (Migrant) visa.

**0905158**

**20 August 2009, Sydney**

**Ms K Raif, Member**

**CHILD (RESIDENCE) (CLASS BT) – SUBCLASS 802 (CHILD) – CL.802.214 – DEFINITION OF DEPENDANT** - A delegate of the Minister refused to grant the applicant a Subclass 802 visa on the basis that she did not meet cl.802.214(1)(b), as she was employed on a full-time basis. The delegate also found that the applicant did not meet cl.802.214(1)(c) which states that, since turning 18 or within 6 months or a reasonable time after completing the equivalent of year 12 in the Australian school system, the applicant is required to have been undertaking a full-time course of study at an educational institution, leading to the award of a professional, trade or vocational qualification. The applicant was sponsored by her mother, who is an Australian permanent resident. She arrived on a working holiday visa in order to visit her mother after completing her university studies in June 2008. She had been enrolled to begin a Masters degree in the United Kingdom but deferred this for twelve months in order to come to Australia. After arriving in Australia she decided to apply for a Subclass 802 visa, and she subsequently enrolled in a university course commencing in 2010. The applicant claimed that she had worked full time in a backpacker's accommodation for three weeks in return for accommodation only. She claimed she had also worked as a sales assistant between October 2008 and February 2009 and as an administration assistant from February 2006 to August 2008. She stated that the sponsor provided her with money, food, clothing and general spending money, as well as accommodation, tuition fees and other expenses and that such support amounted to \$200 per week. The sponsor stated that her daughter had always been dependent on her. She argued that three weeks of employment could not reasonably be said to meet the applicant's basic needs for any substantial length of time and that having a casual job during breaks in study should not be considered full-time employment in terms of an ongoing occupation.

**Held:** Decision under review affirmed

The Tribunal found that while the applicant had been enrolled in a Masters degree and had deferred the course, it did not accept that the mere acceptance in a course, or enrolment in one, constituted study contemplated by cl.802.214. In the Tribunal's view, this provision referred to active participation in a course of study, including attendance at study sessions and participation in assessments and examinations. Further, it found that an enrolment without any other activity by the student did not amount to study. As the applicant had not undertaken any other study, the Tribunal found that the applicant had not been undertaking a full-time course of study since July 2008 when she completed her university degree. Although the applicant claimed that during the period of her residence in Australia she was prevented from pursuing any studies earlier than 2010, the Tribunal found that she had made no inquiries with educational institutions about commencing the course earlier. Also, with regard to financial or visa restrictions, the Tribunal noted that the same restrictions would apply at the time of her subsequent enrolment and that despite these, the applicant had been able to enrol in a course to commence in 2010. The Tribunal found the period in which the applicant did not pursue full-time study, a period exceeding one year, to be a significant one. Further, in relation to the issue of full time work, the Tribunal found that the legislation did not distinguish between work that reflected an ongoing occupation and commitment to future employment, and merely brief periods of employment for a particular purpose. Rather, the legislation simply referred to full-time employment. Whether or not such employment was during a study break, it was, nevertheless, employment. The Tribunal was of the view that it was unable to consider the nature or duration of such employment or the visa applicant's perceptions about it. It held that it must make a finding of fact as to whether or not the visa applicant was employed at the time of the application. Accordingly, the Tribunal found that the applicant was employed on a full-time basis at the time when the application was made, albeit on a short-term basis. Therefore, the Tribunal was not satisfied that the applicant met cl.802.214(1)(b) of the Regulations.

## Partner visas

0801381

14 August 2009, Sydney

Ms J Ciantar, Member

**PARTNER (TEMPORARY) (CLASS UK) – SUBCLASS 820 – VISA REFUSAL – CL.820.211 – CL.820.221(1) – R.1.15A – GENUINE AND CONTINUING RELATIONSHIP** – A delegate of the Minister refused to grant the applicant a Subclass 820 visa on the basis that he did not satisfy r.1.15A(1A)(b) and 1.15A(2)(c), requiring that the applicant and sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship is genuine and continuing, and that the couple live together, or do not live separately and apart on a permanent basis. The applicant entered Australia as the holder of a Subclass 300 (Prospective Spouse) visa for which he had a different sponsor to his current spouse. About two and a half months after arriving in Australia, the applicant married his current sponsor. He claimed that his original sponsor had ended their relationship shortly after he arrived in Australia. The applicant claimed that he met the sponsor at a nightclub and they started going out the next day. He claimed that he was honest with her and told her how he had arrived in Australia and the circumstances regarding his visa. He told the Tribunal that after they were married he moved in with his current sponsor. The applicant claimed that he paid an equal share of the rent and utilities, and he provided to the Tribunal statutory declarations from friends, receipts for furniture, a copy of his licence giving his address, bank statements and telephone accounts in joint names, copies of photographs, and various other documents. The applicant claimed that the sponsor's family live in Melbourne and they did not come to the wedding, nor has he met them, although he claimed the sponsor has a good relationship with them.

**Held:** Decision under review affirmed.

The Tribunal was not satisfied on the basis of the material before it that the applicant was the spouse of the sponsor within the meaning of r.1.15A of the Regulations. The Tribunal found that the applicant and the sponsor were not witnesses of credit. Despite holding a joint bank account at the time of application, the sponsor's wages were now paid into an account in her name only. The applicant claimed that this money was being saved in order to purchase a house, whilst the sponsor claimed that it was for her personal use. The Tribunal found that conflicting evidence had also been provided in relation to how they had sourced the rental property where they claimed to live. The applicant claimed that it was a granny flat at the back of a house, whilst the sponsor claimed that it was a two bedroom unit. The Tribunal noted that mail sent to the sponsor had been posted care of a separate address. Further, the applicant claimed that a proposed holiday to Queensland was postponed due to work commitments, whilst the sponsor claimed that it was due to social engagements. Documents provided to the Tribunal indicated that the applicant had travelled to Queensland on two separate occasions, both times with people other than the sponsor. Financial records indicated that the applicant had also visited Victoria. He told the Tribunal that this had been for work and that he had not had time to visit the sponsor's family. The Tribunal found that if the marriage was indeed genuine, the sponsor would have introduced the applicant to her family given that they were married for more than three and a half years. The Tribunal was not satisfied that, at the time of application and time of decision, the applicants had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship was genuine and continuing. The Tribunal also found that the applicants were not living together at the time of the visa application and were not living together at the time of decision. Accordingly, it held that the applicants were not in a spousal relationship within the meaning of r.1.15A of the Regulations and, as such, the visa applicant did not meet cl.820.211 and 820.221(1) of the Regulations for the grant of the visa.

**0802167**  
**21 July 2009, Sydney**  
**Ms C Carney, Member**

**PARTNER (RESIDENCE) (CLASS BS) – SUBCLASS 801 (SPOUSE) – CL.801.221(1) – CL.801.221(6) – JOINT CUSTODY** – A delegate of the Minister refused to grant the visa applicants Subclass 801 (Spouse) visas on the basis that the primary applicant did not meet the criterion contained in cl.801.221(2) of the Regulations, as the sponsor had withdrawn her sponsorship due to their relationship ending. The applicant claimed that he met the sponsor when she visited Senegal to continue her musical interests and her career. He claimed that they formed a relationship based on a mutual love of music and that she wanted him to return to Australia with her. The applicant traveled to Australia on a prospective marriage visa in 2006 with his son, the secondary applicant, and he married the sponsor in March 2006. He claimed that in May 2006 the sponsor asked him to leave the house in which they resided together. The sponsor wrote to the Department in December 2006 stating that her relationship with the applicant had ended. She stated that she was supportive of the applicant gaining permanent residency and indicated that she had instigated the separation. She stated that the relationship had ended due to cultural differences, especially in relation to her understanding of Islam. In February 2008 the sponsor wrote again to the Department stating that she withdrew her sponsorship of the applicant. She also stated that she was sending the secondary applicant back to his father in Perth. The applicant claimed that soon after he arrived with his son in Australia the sponsor began demanding that he live in accordance with a more strict form of Islam. He claimed that she demanded he give up his music, that she would not allow a female teacher to teach him English and that she punished his son if he showed any musical aptitude. The applicant claimed that his son had a strong bond with the sponsor and he considered her to be his mother. The applicant submitted Family Court Orders dated in February 2007 that were still in force. The orders provide for the applicant and sponsor to have joint responsibility for the long term care, welfare and development of the secondary applicant. The orders further provide that responsibility for decisions concerning day to day care rests with the parent who has the child in their care.

**Held:** Decision under review set aside

The Tribunal was not satisfied that the applicant was the spouse of the sponsor within the meaning of r.1.15A of the Regulations. The evidence of both the applicant and the sponsor was that the relationship had ended and the sponsor had withdrawn her sponsorship. Consequently, the Tribunal found that the applicant did not meet the criterion contained in cl.801.221(2) for the grant of a subclass 801 (Spouse) visa. The Tribunal then considered the Family Court Orders that provided for the sponsor and the applicant to share joint responsibility for the long term care, welfare and development of the secondary applicant. The Tribunal noted that the orders were still in force and that they appeared to have anticipated that day-to-day care of the child may change and that the orders made provisions for such a change. The Tribunal consequently found that the alternative provisions contained in cl.801.221(6) applied and therefore that the applicant met the prescribed criterion contained in cl.801.221(1) of the Regulations.

## Student visas

**0804191**  
**24 August 2009, Sydney**  
**Mr L Hardy, Member**

**STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 – CL.572.211(3)(c) – FAILURE TO APPLY WITHIN TIME LIMIT** – A delegate of the Minister refused to grant a Subclass 572 visa on the basis that the applicant did not satisfy the requirements of cl.572.211 of the Regulations, because he lodged his visa application more than 28 days after his previous substantive visa ceased to be in effect. The applicant's last substantive visa was a student visa granted in February 2007 which included his partner as a secondary applicant. This visa expired in March 2008. The applicant claimed he was aware of the impending expiry of his visa and when he applied to renew it he made an incomplete application. He claimed his father signed all the remittances for his funds but he passed away in January 2008, the money for his tuition ran out, and new signing arrangements took some months to implement. He claimed that he could not secure ongoing tuition fees, he could not formally enrol in the next stage of his studies or obtain a Confirmation of Enrolment (CoE) from his education provider, and consequently, he could not complete his application for a

further substantive visa. DIAC records indicated the applicant lodged his visa application on a date outside the 28 day period and he still had not raised funds for enrolment by then, so his late application was also incomplete. He claimed he was unable to provide DIAC with evidence of enrolment or an offer of study when he applied for renewal of his visa before the deadline or within the 28 days which followed. He claimed that by the time he had an offer to study, the next semester had already started and his education provider only offered a place in the following semester. He further claimed he did not have funds for a new CoE until he received the DIAC decision after May 2008, which suggested his visa application was out of time and incomplete. He claimed the lack of funds affected his ability to lodge a correct and completed application which prevented him obtaining a CoE until after the 28 period had already elapsed. He claimed he was no longer interested in studying in Australia but hoped his partner would not be prevented from returning to Australia as a student with him as her dependent.

**Held:** Decision under review affirmed.

The Tribunal found that, at the time of the visa application, the applicant's last held substantive visa was a student visa which had since expired. The Tribunal then considered whether the applicant met the other requirements of cl.572.211(3), which required that he lodge a visa application within 28 days either of the date the last visa ceased to be in effect; or if the visa was cancelled, the date the applicant was notified of a decision that the visa cancellation was set aside or the cancellation was not revoked. The Tribunal found that the current visa application was made in May 2008 and the applicant's last substantive visa ceased in March 2008. Accordingly, the Tribunal found that the application was not made within 28 days after the last substantive visa ceased to be effect. Therefore, the applicant did not meet cl.572.211(3)(c) of the Regulations.

**0805558**

**25 August 2009, Melbourne**

**Mr G Ledson, Member**

**STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 VOCATIONAL EDUCATION AND TRAINING SECTOR VISA – CL.572.223(2)(a)(i)(A) – CL.5A404 – ENGLISH LANGUAGE REQUIREMENTS** – A delegate of the Minister refused to grant a Subclass 572 visa on the basis that he failed to provide an IELTS test that was taken less than 2 years before the date of the application with an Overall Band Score of at least 5.5. The applicant had previously been subject to two visa cancellations which had both been set aside, the first one because it was *Uddin* affected and the second because of *Dai*. The applicant claimed that he understood the reason why his visa was refused and that he claimed he had sat an IELTS test in 2003 with an overall score of 7, and in 2005 with an overall score of 7.5. Further, he claimed he attended the Department in June 2008 and was told that everything would be okay and that he was given every indication that proof of his English could be submitted after his visa application had been lodged. He claimed that following this, he immediately booked to sit an IELTS test with Macquarie University in July 2008. In order to do this, a friend drove him from Victoria to NSW to take the test. He attended on two other occasions as he was unable to sit all components of IELTS on the first day. He submitted his new IELTS results to the Department. He claimed that the delegate told him to come in and withdraw his student visa application, apply for a tourist visa, sit the IELTS exam and lodge his student visa application when he got those results. He reiterated that he was told to sit the exam and that the delegate told him all would be okay. He claimed he had never told any lies or submitted false documents concerning any visa related matters and that if he had to return to India without any qualifications it would be unlikely that he would be able to get employment. At hearing, his witness stated that the applicant had tried very hard to do the right thing in trying to resolve his visa status.

**Held:** Decision under review set aside.

The Tribunal found the applicant to be highly credible but noted that he had been caught up by evolving judicial consideration around the Student visa stream. The Tribunal considered that the central issues were whether the applicant had English language proficiency which enabled him to successfully engage in his nominated course, and whether evidence of his language proficiency could be submitted after the lodgement of the visa application. The Tribunal accepted the applicant's belief that evidence of his English language proficiency would be accepted by the Department after he had lodged his visa application. The Tribunal also accepted evidence that his level of English language proficiency exceeded the requirement for the visa application. The Tribunal had regard to the Full Court decision in *DIAC v Kamal* [2009] FCAFC 98 which held

that the language of Item 5A404(a)(ii) was directed to the recency or currency of a test result and that its intention was to ensure it satisfied the decision maker that it was a reliable indication of the proficiency of the applicant. Accordingly, the Tribunal was satisfied the applicant's IELTS result from July 2008 was valid evidence that his English language proficiency was sufficiently recent and current as required in Item 5A404. Accordingly, the Tribunal found the visa applicant satisfied the requirements of cl.572.223(2)(a)(i)(A) of the Regulations.

## Visitor visas

**0904457**

**18 August 2009, Sydney**

**Ms B Connolly, Member**

**SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 (SPONSORED FAMILY VISITOR) – CL.679.224 – GENUINE VISIT** – A delegate of the Minister refused to grant the applicant a Subclass 679 visa on the basis that she did not meet cl.679.224 of Schedule 2 to the Regulations. The delegate was not satisfied that the visa applicant intended a genuine visit to Australia to see her daughter and grandchildren as she was a widow with no dependent family members in Iran, was not employed, and had provided no evidence of previous employment or any fixed assets. Therefore, the delegate found that the visa applicant did not have sufficient incentives to return to Iran within the validity of her visa. The review applicant submitted to the Tribunal that her mother had not visited Australia in eleven years and that she hadn't seen her grandchildren since they were young. She claimed that the visa applicant was now quite old and may not get another chance to see them. The review applicant claimed that the visa applicant lives in Tehran with her adult daughter who was divorced, and that the visa applicant would return to Iran as it was not socially acceptable for her unmarried daughter to live on her own. She also has another married daughter who lived nearby. She claimed that the visa applicant would pay for the airfare to come to Australia, and that she had complied with all of her visa requirements when she last visited eleven years ago. The Tribunal also received copies of a number of personal documents, including passports, ID cards and bank details.

**Held:** Decision under review set aside

The Tribunal found that whilst the visa applicant was unemployed and had no property, it accepted that she had security of tenure over her property and that she had income from a pension fund. The Tribunal accepted the evidence that the absence of the visa applicant from Tehran would pose significant problems for her divorced daughter, who would face adverse societal and cultural reactions if she were to live alone without her mother. The Tribunal noted that there were personal circumstances in the form of familial links which might have encouraged the visa applicant to remain in Australia however, the Tribunal accepted the evidence before it that there were strong incentives to return to her daughters in Iran which outweighed any desire to stay in Australia. The Tribunal accepted that the visa applicant wished to visit and spend time with the review applicant and her family as they have not seen her for many years. The Tribunal found that the proposed duration of her stay of three months was consistent with the purpose of her proposed visit. The review applicant confirmed her intention to provide the visa applicant with accommodation and any financial needs she may have in relation to the visit, and the Tribunal was satisfied that she was in a financial position to do so. The Tribunal also accepted that there was no evidence of any security or political problems in the area where the visa applicant lived. Accordingly, the Tribunal was satisfied that the visa applicant's intention only to visit Australia was genuine and found that the visa applicant satisfied the requirements of cl.679.224.

# REFUGEE REVIEW TRIBUNAL DECISIONS

## Burma

0905235

27 August 2009, Sydney

Mr A Jacovides, Member

**BURMA (MYANMAR) – POLITICAL OPINION – ANTI-GOVERNMENT** – The applicant claimed to fear persecution on the basis of her anti-government opinion and activities. She claimed that she worshipped and assisted a senior Buddhist monk ("X") who was active in helping both the poor and the families of political prisoners. The applicant claimed that when visiting her daughter in Australia in 1996 and 2006, she participated in fundraising activities within the Arakanese community and she received donations for "X"'s work in Burma. Subsequent to both visits, the applicant claimed to have been visited at home and questioned by military intelligence officers. She claimed that she participated with "X" in protest activities during the August 2007 campaign against the military government. She claimed that she was harassed by the military and her house was searched. After this incident she hid in a small village for a month for fear of arrest. On her return to Rangoon, the applicant claimed to have been asked by "X" to deliver documents of a political nature to other monasteries and monks. She claimed that in September 2007 "X" was detained and accused of being a leader in the political movement against the government; she continued to undertake the work he had left for her to complete. The applicant claimed that in March 2008 military officers came to her house and took her to a police station. She claimed that later she was taken to a place where political activists were held and she was interrogated for three days regarding her association with "X". She was also tortured and threatened. She claimed that she was released after her son paid a bribe. In October 2008, the applicant claimed to have been harassed by military officers in her home. They demanded she give them an undertaking to not get involved in "X"'s work, but she refused to cooperate. She was told that her attitude would be reported to a higher authority. The applicant claimed that she was afraid of further harassment so she came to Australia. She claimed that two weeks after arriving, her neighbour in Rangoon phoned and told her that the military had come looking for her, searched her house, took some items and sealed the residence. The applicant assumed that the items taken were documents left in her care by "X". She claimed that if she returned to Burma she would be detained and tortured by the authorities as an anti-government activist. In support of her application, the applicant submitted photos taken during various activities with monks in Burma and while participating in political meetings in Australia. She also submitted letters of support from a range of Burmese organizations in Australia. A witness at the Tribunal hearing gave evidence that he had known the applicant since his detention by authorities in Burma in 1988 and that she had actively supported the pro-democracy movement there.

**Held:** Decision under review set aside

On the basis of independent information, the Tribunal accepted that the applicant held a well-founded fear of being at risk of serious harm by the authorities in Burma because of her involvement in anti-government activities. It found this information supported the applicant's claim that her political activities and commitment to continue with such activities would attract the adverse interest of the military in Burma. The Tribunal found that the applicant could not avoid the harm she anticipated by relocating within Burma, as the military maintains an extensive intelligence network which it uses to suppress dissidents throughout the country. It was satisfied that she would be targeted by the authorities in Burma because of her political opinion and the political opinion attributed to her by the authorities due to her close association with monks who were implicated in protest activities against the government. Accordingly, the Tribunal found the applicant had a well-founded fear of persecution by the military government in Burma for reason of her political opinion.

## China

0903167

4 August 2009, Melbourne

Mr N Pullen, Member

**CHINA – ETHNICITY – UIGHUR** –The applicant claimed to fear persecution for reason of her ethnicity as a Uighur. She claimed she attended university political rallies against the government between 1984 and 1986 as Uighurs were not treated as equals. The applicant's representative referred to numerous media and analytical reports describing persecution of Uighurs by the Chinese government. He argued that the applicant's fear of persecution was due to multiple Convention grounds – i.e. nationality (East Turkistan), political opinion, religious beliefs (Islam) and membership of a particular social group. The applicant claimed that her parents had been abused, tortured and imprisoned during the Cultural Revolution and that her mother was detained for eight months. She claimed her father paid a bribe of 10,000 Yuan for her to work as a doctor in a hospital and that she was not permitted to speak Uighur there. She claimed that the authorities kept a record of everything she did at work and when she wrongly diagnosed a person, she was detained for seven days. She claimed she was forced to carry out abortions and make women infertile, which is against her religion.<sup>1</sup> She claimed she also assisted a Uighur person who was shot in the leg during an anti Chinese government event and was subsequently detained for seven days. She was then forced to do two years of cleaning at low pay. The applicant claimed that she grew up in a family in which the Muslim religion and cultural traditions were strong. She said that many Uighurs teach their children religion in secret and when a well known doctor was invited to the hospital, the applicant invited her friends over to learn about their religion from him. The hospital found out and she was penalised for three months and had to work in a factory as a labourer on reduced salary, and her annual award of 2000 Yuan was not paid to her. The applicant claimed she feared returning to China as she believes that she would be arrested on arrival and imprisoned, tortured or killed because the Chinese authorities had recently searched her house and confiscated personal property that could cause her to be classed as an enemy of the state. Furthermore, while in Australia the applicant has attended Uyghur events (photographic evidence was provided). Also included in the application were the applicant's spouse and children.

**Held:** Decision under review set aside.

The Tribunal accepted that the applicant's obtained their passports by paying a bribe and they were questioned at the airport when leaving for Australia. It further accepted that the applicant worked in a hospital in 1988 as a doctor, due to her father paying a bribe, and that the authorities kept a record of everything she did at work. It accepted that she was detained on occasions and was forced to carry out operations that were against her religion, and that she was forced to clean as part of her punishment. The Tribunal also accepted that the applicant's house had been raided by the police and that her younger siblings had been questioned about the applicant's activities. Given the evidence, the Tribunal considered that the applicant had not engaged in activities with the Uighur community in Australia for the *sole* purpose of obtaining protection and enhancing her visa application. The Tribunal found that the persecution which the applicant fears clearly involves 'serious harm' in that it involves a threat to her life or liberty or significant physical harassment or ill-treatment. The Tribunal found that the applicant's religion, race, and her imputed political opinion regarding the rights of Uighurs are the essential and significant reasons for the persecution she fears, and that this involves systematic and discriminatory conduct in that it is deliberate or intentional and involves selective harassment for convention reasons, namely her religion, imputed political opinion, as well as race. DFAT advice indicates that it is likely that Chinese authorities monitor Uighur groups in Australia and obtain information about their membership and supporters. It indicates that individuals perceived to have been involved with such groups would be subject to surveillance and possibly detention if they return to China. Country information indicates that the Chinese authorities do not appear to make any significant distinction between non-violent political action and advocacy or violence, but rather, they treat all advocates of East Turkistan independence as criminals or members of terrorist organisations. Based on this information, the Tribunal found that the applicant, as a person who has participated in activities related broadly to the Uyghur community in Australia, would face a real chance of being imputed with a political opinion as a supporter of the East Turkistan separatist cause if she returned to China now or in the reasonably foreseeable future and that she would face a real chance of being detained and questioned by the Chinese authorities for her activities in Australia. The Tribunal found that such detention, being a deprivation of liberty, amounts to serious harm that would constitute persecution for the purposes of the Convention. The Tribunal accepted that it is unlikely that the applicant could freely practice Islam in China to

the extent that she has in Australia without attracting the attention of the Chinese authorities. If the applicant continued to practice Islam this way, the Tribunal found that there was a real chance that she would face persecution for reasons of her religious practice. In this case, the necessity to conceal the applicant's religious and ethnic identity to avoid actual or threatened harm actually suggests that the applicant's fear is well-founded. In terms of protection by the authorities, the country information indicates a lack of commitment or willingness by any state authority to protect Uighurs against persecution, given that the authorities are the perpetrators of the harm feared. Accordingly, the Tribunal was satisfied that the applicant had a well founded fear of persecution for a Convention reason.

**0903569**

**13 July 2009, Sydney**

**Mr D O'Brien, Principal Member**

**CHINA – RELIGION – ROMAN CATHOLIC** – The applicant claimed to fear persecution on the basis of her religion, specifically her involvement in an underground Catholic church loyal to the Vatican, which is considered illegal by the Chinese authorities. The applicant claimed that her mother is a Roman Catholic who had her baptised without telling the applicant's Buddhist father. The applicant claimed that she and her mother attended the underground church without her father's knowledge. When they were discovered, her father would lock the applicant in her room, abuse her verbally, and beat her mother. The applicant claimed that in 2005, police raided a catechesis class she was attending with her mother. Twenty church members, including her mother, were taken to the police station. The applicant and two other students weren't taken as they were under 18; however, the police recorded their personal information. The applicant claimed that when she arrived home her father kicked and punched her and tore her hymn book apart. After three days her father paid a fee to the police to release her mother. Upon her return he beat her and the applicant for an hour. The applicant claimed that her mother wanted to spare the applicant this abuse so she sent her to study in Australia, where she claimed she was involved in church activities. The applicant traveled to China in early 2009 to spend Chinese New Year with her mother and her sick grandmother. During her stay the priest of her underground church asked her to help organize a spiritual retreat, where she shared her experience of World Youth Day. On the second day about 10 police officers raided the gathering. The applicant panicked and provided the police with a false identity and claimed to be only 16. She was let off with a warning; however, her mother and other church members were taken away. She then hid at her friend's house and arranged to fly back to Sydney the following day. The applicant claimed that after arriving in Australia, her uncle advised her that her mother had not been released by the police. The applicant claimed that she had been unable to contact her mother, which is why she had been unable to pay her tuition fees following her return to Australia. She claimed that her father has no interest in her and that he never supported her studies financially. The applicant claimed that the police had identified her from religious materials seized during the raid and that they would arrest her if she returns for having connections with the Catholic Church overseas, for providing a false identity and for having spread illegal religion in China.

**Held:** Decision under review set aside

On the basis of the detailed and knowledgeable answers the applicant gave to questions the Tribunal asked about the Catholic faith, the Tribunal found that she was a devout Catholic and that she had practiced in an underground Catholic church in China. The Tribunal further accepted that the applicant is an active member of a Catholic community in Sydney and that she engaged in this conduct because of her commitment to her religion. The Tribunal accepted the applicant's evidence regarding the Church gathering in 2005 that was disrupted by police. It found the applicant's evidence that she and other juveniles were allowed to go home while adults were detained is consistent with independent information that Chinese authorities tend to be more concerned about underground churches in Fujian province when proselytising to the young is involved. The Tribunal accepted the applicant's evidence that her mother had remained in detention since the raid. It found that the applicant's inability to pay her tuition fees since her return to Australia lent support to this story. The Tribunal considered that, given the circumstances in which the applicant escaped from the police on her last visit to China and what the police know about her identity, there was a real chance that she would be detained for practicing her religion if she returns to China. The Tribunal was satisfied that the applicant was a person to whom Australia has protection obligations under the Convention.

## Ghana

0903016

28 July 2009, Melbourne

Mr P Tyler, Member

**GHANA – SOCIAL GROUP – HOMELESS PEOPLE – ETHNICITY – GA** – The applicant claimed to fear persecution on the basis of his homelessness and Ga ethnicity. Although he had originally arrived in Australia to compete in a sporting event, the applicant claimed that he feared going back to Ghana because he had no place to sleep and it would be easy for armed robbers and drug addicts to attack him. He claimed that he had been beaten and attacked with a knife in the past and he was scared that he would be killed. The applicant claimed that due to the current economic and political situation, it would be impossible for the government and authorities to assist or protect him. The applicant told the Tribunal that he had no future in Ghana and that he slept in doorways, where on one occasion he was beaten by drunks and drug users. He claimed that the reason they attacked him was because they wanted his spot. The applicant claimed that as he had no money he was unable to seek medical treatment. He claimed that he did not report the attack to the police as he believed they did not take homeless people seriously. The applicant also claimed that he would be persecuted due to his race, as he was not a member of the local tribe in Accra.

**Held:** Decision under review affirmed

The Tribunal accepted that the applicant lived in poverty without food, shelter, clothing or employment. It accepted that he feared going back to Ghana because he believed he had no place to sleep and it would be easy for armed robbers and drug addicts to attack him, and that he has already been beaten and attacked on one occasion and he is scared he will be killed. The Tribunal also accepted that the applicant feared persecution because of his race in its own right, and as part of the cumulative effect of both it and his homelessness. However, the Tribunal found that the applicant's poverty and his lack of food, shelter and clothing, in the past or into the reasonably foreseeable future, were not for Convention related reasons. The Tribunal was satisfied that the applicant was a member of the Ga ethnic group, however, it did not accept that the reason the applicant was attacked was related to his race, religion, nationality, political opinion or membership of a social group, but rather, that he refused to leave his sleeping location when his attackers told him to. The Tribunal found that the attack on him was a criminal act and not for a convention related reason. The Tribunal found that the evidence before it did not support the applicant's claim that he would not obtain state protection in Ghana or that such protection would be denied or withheld because of his ethnicity as a Ga or his membership of a particular social group, being homeless, or his homelessness as a member of the Ga ethnic group. Accordingly, the Tribunal found that there was no real chance that the applicant would face persecution for any Convention reason if he were to return to Ghana now or in the reasonably foreseeable future.

## India

0902659

6 July 2009, Sydney

Ms S Pinto, Member

**INDIA – POLITICAL OPINION – COMMUNIST PARTY OF INDIA (MARXIST) – RELIGION – CHRISTIANITY** – The applicant claimed to fear persecution from members of the CPI (M), who had demanded that the applicant give them money and employ CPI(M) workers for his business. The applicant claimed he refused these demands and that as a result, he and his family were threatened, his office was ransacked and he was manhandled by party members. The applicant claimed that although he initially reported the CPI(M)'s attempts to obtain money, after they ransacked his office and demanded a large sum of money he and his family were threatened with harm and he was too frightened to report the matter to the police. He claimed that an attempt was made to kidnap his daughter whilst she was travelling in a motor vehicle; however, with the help of witnesses, the attempt was foiled. The applicant submitted a medical certificate and an insurance report in relation to this incident. Subsequently, the applicant claimed that he was threatened by telephone not to report the matter to police otherwise his daughter would be killed. The applicant further submitted that he was a Catholic, and claimed that there had been an increase in the number of attacks against Christians in Kerala, with thousands of Christians being forced to leave their

homes due to racist and politically motivated attacks, including assaults, rape, arson, robbery and intimidation. The applicant claimed that the Kerala police hesitated to take action against CPI(M) members and those who commit human rights abuses and rape, torture and the killing of Christians. The applicant feared for his own and his family's safety if he returned to India, claiming that the CPI(M) will try to kidnap his daughter and try to kill the applicant.

**Held:** Decision under review affirmed

The Tribunal did not accept that the applicant's claims of threats and harm from the CPI(M) to either himself or his family had occurred, and considered that the applicant had embellished particular incidents in an attempt to create an adverse political profile for himself and his family. The Tribunal was not satisfied that the applicant or his family had ever suffered serious harm for reasons of their political opinion or imputed political opinion in India. The Tribunal considered independent evidence indicating that Christians in Kerala were able to practise their religion without adverse interference from other religious groups or the authorities and, in fact, it noted that the applicant had told the Tribunal that the area in which he resided was generally safe for Christians. The Tribunal accepted that the applicant was a successful businessman who may have been encouraged to employ CPI(M) workers. The Tribunal also accepted that he considered it disadvantageous to his business to do so, which had caused friction between the applicant and those businesses with CPI(M) links. However, the Tribunal found that the applicant's evidence at the hearing was that he had a profitable business in Kerala, and was therefore not satisfied that the applicant's business suffered unduly as a result of this. The Tribunal found that the applicant's claims that he was threatened, manhandled, his office ransacked, and that an attempt was made to kidnap his daughter, did not occur, and considered that the applicant had manufactured these incidents. The applicant claimed to the Department that his office was ransacked in 2008, whilst to the Tribunal he indicated that it was around the elections in 2006. The Tribunal did not accept that the applicant would not recall when the incident relating to his office being ransacked and he being manhandled by CPI(M) persons occurred. The Tribunal found that there was no evidence supporting his claim that persons who do not provide large amounts of money to the CPI(M) or employ CPI(M) workers are subject to threats, extortion or violence. The Tribunal also did not accept that an attack took place upon his daughter. The Tribunal found that the applicant had provided conflicting statements regarding this incident to both the Department and the Tribunal. Thus, although the Tribunal accepted on the basis of the medical certificate and the insurance report that the applicant's daughter was involved in an accident requiring hospitalisation, the Tribunal found that the applicant had attempted to create a political dimension to an accident suffered by his daughter. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a convention reason.

## Malaysia

**0901487**

**23 July 2009, Melbourne**

**Dr A Gregory, Member**

**MALAYSIA – PARTICULAR SOCIAL GROUP – DE FACTO FEMALE PARTNER OF A PERSON WHO HAS CONVERTED TO ISLAM** – The applicant claimed to fear persecution on the basis of her membership of the particular social group 'de facto female partner of a person who has converted to Islam'. The applicant, a Tamil Hindu, claimed that she had a de facto relationship with a man she had known for five years, but about 5 months previously he secretly converted to Islam. She claimed that a group from the Islam Association came to her house and asked her to convert. When she refused, the men said she had to go to their office to record her objection. She claimed she was kept there against her will for 5 days and that she was told about Islam, taught how to pray, was made to wear a scarf and was forced to eat beef. The applicant claimed that as her de facto relationship had been consummated, the Islam Association regarded the relationship as a marriage, and as such, viewed her as being subject to Shariah Law (under which a Muslim man cannot live with any woman before marriage, and non-Muslims who marry Muslims must convert). She claimed that her ex-de facto was still attempting to find her. The applicant claimed that he had once confined her to the house and then threw hot water over her legs. She claimed that her ex-de facto was a police informer and consequently, he was very friendly with the police. She claimed to have gone to the police for help on 4 occasions. They agreed to take her complaints but took no action. In support of the review, the applicant submitted a letter from a former neighbour confirming the applicant's claims and stating that her de facto had assaulted her physically. The neighbour claimed that, on one occasion, he

disrupted an attempt by Islamic elders to torture her. The applicant also submitted a translated letter from the Malaysian Indian Congress stating that a complaint from the applicant had been received, that her partner had perpetrated a number of acts of cruelty on her and that he was trying to force her to convert to Islam. The letter states that the Congress investigated and accepted her complaint.

**Held:** Decision under review set aside

The Tribunal found that de facto female partners of a person who had converted to Islam could be considered to be a group set apart from the rest of society, and so constitute a particular social group in a Convention sense. The Tribunal found that the applicant was a member of this particular social group and that her membership of this group was the essential and significant reason for the harm feared. The Tribunal found there was some confusion in this case as to whether Shariah law applied. Independent information states that Shariah law does not apply to a person who is not a Muslim. However, the Tribunal accepted that the Islam Association regarded the applicant as married to her partner in an Islamic sense and therefore regarded her as being subject to Shariah law. The Tribunal further noted that, based on past history in Malaysia, where there is contention as to whether Shariah or civil law applies in a given situation, the civil jurisdiction is wary of interfering in areas claimed by Shariah law. The Tribunal equated the applicant's situation to one in which there was domestic violence. The Tribunal found that the domestic violence the applicant had been subjected to was attributable to her de facto partner's desire for her to convert to Islam. The Tribunal further found that the applicant's lack of standing as a de facto, and the uncertainty as to whether civil or Shariah law applied, meant that state protection was unlikely to be forthcoming. This was compounded by the de facto's close links with the police, which the Tribunal found may influence them not to act. The Tribunal noted independent information that there are still elements of police corruption in Malaysia. The Tribunal found that the applicant's former partner, as a person with police connections, would have access to information as to her whereabouts. This, and the applicant's lack of education, work experience, financial capital and ability to access an independent income, led the Tribunal to find that it would not be reasonable for the applicant to relocate within Malaysia. The Tribunal found that the applicant had a well founded fear and that there was a real chance that she would face persecution for a Convention reason if she were to return to Malaysia.

## Samoa

**0900871**

**30 June 2009, Sydney**

**Mr R Wilson, Member**

**SAMOA – RELIGION – CATHOLIC** – The applicant claimed to fear persecution on the basis of his Catholic religion. He claimed to be a Church Administrator and Senior Altar Boy at his village's Catholic Church, and a Sports Committee Member of the Catholic Church in Samoa. He claimed that he organised church activities for Catholics. In his original application, the applicant claimed he had organised a Mass for the Church and made a speech on the acceleration of Catholic activities in which he made a statement about helping "Catholics only", which angered members of the Methodist Church. He claimed that Methodists constitute the majority in his village and that there are few Catholics. The applicant claimed that on one occasion he narrowly escaped a bullet. He claimed that one of the Catholic Church members had been killed but the cause of the killing was unknown. He submitted a letter of support from a village member stating that Methodist activists attacked the applicant, and that members of the Methodist Church had been enquiring as to his whereabouts since he left Samoa. At interview with the delegate, the applicant claimed that he had been threatened with personal harm and that he was hit and punched by Methodist youths. He submitted a letter of support from a Reverend outlining a dispute in the applicant's village between Roman Catholic and Methodist youths which originated from a dispute in a sports competition, but resulted in a brawl that injured some young men. The Reverend claimed that the applicant was involved because he was the head of the committee that organised the competition, and he was wrongly accused of bias in decisions, resulting in a loss for a Methodist youth sports team. At the Tribunal hearing the applicant confirmed the Reverend's claims about the dispute over a football match. He claimed that subsequent to the dispute, Methodist and Catholics alike hunted each other out. He claimed that he could no longer move around the island for fear of being beaten or killed. At the second Tribunal hearing, the applicant claimed that the Methodists imposed a ban on anyone preaching as they wanted their church to dominate the village. He claimed that the police in Samoa belonged to the Methodist group, so they favour their view over that of the Catholics.

**Held:** Decision under review affirmed

The Tribunal accepted that the applicant is of the Catholic faith and that there was a dispute in his village arising from a sports event which resulted in a brawl. It also accepted that the applicant was involved because of his role in organizing the competition and that he was wrongly accused of bias in decisions resulting in the loss of the Methodist youth sports team. The Tribunal noted that the applicant did not refer to a gunshot at the hearing, even though he was asked directly about this incident. It consequently found that the applicant's evidence was unreliable on this point and it did not accept this claim. The Tribunal found the applicant's credibility to be in issue. The Tribunal also noted that the applicant did not refer at hearing to the claimed speech where he referred to helping Catholics only. The Tribunal rejected the claim because he did not raise this issue, even though it was his central claim in his application. The Tribunal found that the applicant provided inconsistent evidence as to whether the Police Force was made up of Methodists only, or of many different religions. It found that officers in the Police Force belong to many different religions. The Tribunal was unable to locate any independent references to tensions between Methodists and Catholics in Samoa. It further attached little weight to the two letters of support submitted, as neither was clear as to what happened when the applicant claimed to be attacked. The Tribunal found that, of the claims it did accept, none gave rise to a well-founded fear of persecution for a Convention reason, but rather related to what could be considered private matters. The Tribunal further found, on the basis of independent information, that the applicant could take his grievances to the Samoan Supreme Court and to the Police. Accordingly, the Tribunal was not satisfied the applicant faced a real chance of persecution should he return to Samoa, now or in the foreseeable future.

## Sri Lanka

**0803883**

**17 August 2009, Melbourne**

**Mr P Fisher, Member**

**SRI LANKA – POLITICAL OPINION – UNITED NATIONAL PARTY** – The applicant claimed that his mother had been involved in the local Women's Front of the United National Party (UNP) many years ago and that she was approached by a local UNP politician to assist in an election campaign. Due to her age and poor health, she asked that the applicant become involved instead. The applicant claimed that he did a large amount of work for the UNP and, as a result, he was elected into an executive position. He claimed that as a result of his work, the People's Alliance (PA) was losing support in his area and people started leaving the PA for the UNP. He claimed that he and his family became a target for verbal and physical harassment from PA members. On one occasion, he claimed he was hanging posters when he was badly beaten by PA supporters. He reported the incident to police but they did not help. Some time after the election, PA supporters burnt his vehicle and then shot in his general direction where he was running. He claimed that he also reported this incident to the police but they did nothing. The applicant claimed that after the 2001 elections, he did not have any serious problems, however when the UNP lost power in 2004 his house was attacked by PA supporters. Some time later, four men entered his house, including one with a pistol. He claimed that he and his brother were rendered unconscious and taken away by the men and that after they came to, he and his brother untied themselves and ran away. He claimed calls were made to his family to find out where he was hiding and they were told that if they did not tell them where the applicant was, they would be killed. He claimed that in 2005 while campaigning at a UNP rally, his path was blocked by a van carrying PA supporters, including a PA Minister. He claimed that grenades were thrown at the applicant's vehicle and he suffered an injury from the blast. He claimed that after the 2005 election, things continued to get worse and he decided that he had to leave the country. The applicant claimed that he undertook a course and was eventually able to find a job, which was how he travelled to Australia. The applicant submitted a number of police extracts relating to various incidents that he had reported to the police. On a date after the Tribunal hearing, the applicant submitted a statutory declaration stating that his brother had been killed after an attack on their home by four men who were looking for the applicant. The applicant subsequently submitted a death certificate outlining the cause of death.

**Held:** Decision under review set aside

The Tribunal found that the applicant had provided detailed claims describing much of the history of his involvement with the UNP in Sri Lanka, and that these claims were supported by documentary evidence. It found that many aspects of the applicant's claims were supported, and to some extent in specific terms, by the documentary evidence and independent country information. The Tribunal found that although various police reports that were submitted clearly contained mistakes, omissions and alterations, it did not necessarily follow that the reports were not genuine, or that the alterations were made with any intent to mislead. The Tribunal accepted the applicant's claims in relation to the incidents of threatened or actual harm which he claimed he had been subjected to in the past by PA supporters, and also as to the motivations attributed to those incidents. The Tribunal also accepted that the applicant's brother was killed as claimed, an incident which, in the Tribunal's view, underscored the seriousness of the risks faced by the applicant. The Tribunal found that the applicant had provided documentary evidence of his repeated complaints to the Sri Lankan authorities, that the attacks on him were politically motivated, and that the Sri Lankan police were not prepared to respond where the complainant was from the opposition. The Tribunal found that the applicant faced a real chance of persecution if he returned to Sri Lanka in the reasonably foreseeable future for the Convention reasons of his political opinion, as a result of the combination of the existence of a Convention-motivated risk of serious harm and a failure of state protection.

## Vietnam

0903707

18 August 2009, Melbourne

Ms M Hodgkinson, Member

### **VIETNAM – PARTICULAR SOCIAL GROUP – PEOPLE WITH HIV/AIDS AND HEPATITIS B IN**

**VIETNAM** – The applicant claimed to fear persecution on the basis of his HIV/AIDS and Hepatitis B positive status and the discrimination he would face in Vietnam because of this. He claimed that he had travelled to Australia with his wife and family to visit a relative, but that after feeling unwell he undertook medical tests which showed that he had contracted HIV/AIDS and Hepatitis B. He claimed that after informing his wife she left him and that his family in Vietnam had disowned him. The applicant claimed that he would have nowhere to live if he returned to Vietnam, nor would he be able to find a job, due to his medical condition. He claimed that he would not have access to the medical treatment that he needs due to the fact that he lived in an area away from the major cities in Vietnam, and he could not move to one of these areas as he would not be able to obtain a household registration. Doctors have told him that without the medication the virus would develop and he would die within three to five years. He claimed that if he had to live on the streets the police would assume that he was a drug addict and he would be imprisoned. The applicant's representative submitted a number of reports from various medical professionals outlining the applicant's condition and his prognosis, as well as outlining the medical care he would require in the future.

**Held:** Decision under review set aside

The Tribunal accepted that the applicant was diagnosed with HIV/AIDS and Hepatitis B and that he was taking daily medication for his condition. The Tribunal also accepted that the applicant's co-infection with Hepatitis B and C had led to his treatment options being reduced and that the antiretroviral medication that he required was not available in Vietnam. The Tribunal accepted that the support and care required was unlikely to be provided in Vietnam except in the major cities, at great financial cost, and that the applicant was from a remote rural province with limited services. Although the applicant indicated in his evidence that he would attempt to hide his status if he were to return to Vietnam, the Tribunal found that it would be difficult to do so because, on the basis of the medical evidence, his health would decline rapidly without treatment. The Tribunal found that the applicant's claim that his wife had left him and his parents had disowned him was consistent with the country information in relation to the treatment of people with HIV in Vietnam, particularly in regional areas. The Tribunal therefore accepted that it was probable that they would not allow him to stay with them or care for him if he was required to return to Vietnam. The Tribunal accepted that he would not be employed in the family business, and accepted the country information which indicated that persons with HIV/AIDS in Vietnam lost jobs or suffered from discrimination in the workplace or in finding housing. The Tribunal found that if the applicant's status as being infected with both HIV and Hepatitis B became known, there was a chance that he would be considered to be an injecting drug user. The Tribunal found that despite the Vietnamese government's efforts to overcome the HIV/AIDS epidemic in the country and reduce the stigma and discrimination associated with HIV/AIDS, on the basis of the

independent evidence, including the country information and expert evidence submitted by the applicant, that discrimination against HIV/AIDS carriers continued to pose a significant dilemma in Vietnam. The Tribunal found that there would be a real chance the applicant would face discrimination and stigmatisation which would deny him access to basic services and the capacity to earn a livelihood of any kind, and that there was not effective State protection from this harm. The Tribunal found that the essential and significant reason for that persecution would be the applicant's membership of a particular social group of "people with HIV/AIDS and Hepatitis B in Vietnam" and that it was not reasonable for the applicant to relocate within Vietnam in order to avoid such persecution. Therefore, the Tribunal found that the applicant's fear of persecution for reasons of his membership of a particular social group was well-founded.

## Zimbabwe

0903034

6 August 2009, Melbourne

Ms D Jordan, Member

**ZIMBABWE – POLITICAL OPINION – MOVEMENT FOR DEMOCRATIC CHANGE** – The applicant claimed that he was a member of the youth wing of the Movement for Democratic Change (MDC). He claimed that he had attended rallies, put up flyers and handed out MDC merchandise. The applicant claimed that he was arrested and beaten by police on three occasions for his participation in MDC activities, and on other occasions he and others were beaten on the street while participating in demonstrations. He claimed that in late 2005 or early 2006, his cousin, who is an MDC member, was arrested and tortured. The applicant claimed that he was a musician and had written songs with a political message which appeared on an album he had recorded. The applicant claimed that he would be forced to undertake compulsory national service if he returned to Zimbabwe, and that if he did not comply he would be unable to get a job. He also claimed that he would be discriminated against on the basis of his ethnicity as he is from the Ndebele tribe, and the area where his family live is mostly made up of Shona people.

**Held:** Decision under review set aside

The Tribunal found the applicant to be a credible witness at the hearing. It found that his evidence was consistent with his written claims and the independent country information. The Tribunal accepted that he was an active member of the MDC and that he was arrested and beaten. The Tribunal also accepted that the applicant was a musician who had recorded political songs which were critical of the authorities in Zimbabwe. The Tribunal was satisfied that he did so because of his political beliefs and his experiences in Zimbabwe and not for the purpose of strengthening his claim to be a refugee. The Tribunal accepted that the applicant feared arrest and physical harm from the police and other ZANU-PF supporters if he returned to Zimbabwe. The Tribunal found that, based on the relevant country information, politically motivated violence against MDC members and supporters remained a serious risk in Zimbabwe. Given the continuing risk of persecution of MDC supporters, the Tribunal found that the applicant would face a real chance of serious harm amounting to persecution for reason of his political opinion if he were to return to Zimbabwe. As the perpetrators of such harm are the State itself, the Tribunal found that the applicant would not be able to avoid the harm he feared by relocating elsewhere in Zimbabwe. Therefore, the Tribunal found that the applicant had a well-founded fear of persecution for a Convention reason in Zimbabwe should he return now or in the reasonably foreseeable future.

## HIGH COURT JUDGMENTS

### **MIAC v SZIZO**

**[2009] HCA 37**

**High Court of Australia, French CJ, Gummow, Hayne, Crennan & Bell JJ, S568/2008, 23 September 2009**

This was an appeal by the Minister from an order of a Full Court of the Federal Court quashing a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision to refuse to grant the respondents protection visas.

The respondents were a husband and wife and their children. The husband had made substantive claims to be a refugee and his wife and children had applied as his spouse and dependents respectively. Neither of the parents were literate in English, and the husband had named his eldest daughter (SZIZO) as his authorised recipient for the purposes of s.441G of Part 7 Division 7A of the *Migration Act 1958* (the Act). Each member of his family signed the application thereby authorising the Tribunal to communicate with him or his authorised recipient about the application. Pursuant to ss.425 and 425A of Part 7 Division 4 of the Act, the Tribunal sent a notice addressed to the husband inviting each of the applicants to attend a hearing, and instructing him to inform each of the other applicants of its contents. The completed response form was expressed to be signed on behalf of and with the consent of all family members included in the application, and each of the applicants attended the hearing, as did three witnesses.

The Full Federal Court found that, by sending the invitation to the husband, and not the authorised recipient, the Tribunal had failed to comply with s.441G of the Act. The Full Federal Court found that no unfairness or prejudice had occurred by reason of the Tribunal's failure, but nevertheless held that its failure was a jurisdictional error. Although it characterised the result as rather absurd in the circumstances, it proceeded on the footing that each procedural step in Divisions 4 and 7A of the Act imposed an imperative duty on the Tribunal forming part of the statutory statement of the natural justice hearing rule.

The issue that arose in the High Court was whether it was a purpose of the legislation that, although the invitation came to the attention of all the applicants for review, including their authorised recipient, in due time, and despite holding a hearing at which all of the applicants attended the hearing, the failure to give the invitation to the authorised recipient meant that the Tribunal could not validly decide the review.

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

- (i) Notwithstanding the detailed prescription of the regime under Divisions 4 and 7A and the use of imperative language it was an error to conclude that the provisions of ss.441G and 441A are inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review. They are procedural steps that are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing; a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice. There was no denial of natural justice in this case.

### **MIAC v SZIAI & Anor**

**[2009] HCA 39**

**High Court of Australia, French CJ, Hayne, Heydon, Crennan, Kiefel & Bell JJ, S37/2009, 23 September 2009**

This judgment concerned a Minister's appeal from an order of the Federal Court on appeal from the Federal Magistrates Court that set aside and remitted for reconsideration 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 claimed to fear persecution should he return to Bangladesh due to his conversion to the Ahmadiyya Muslim religion. The respondent provided the Tribunal with two certificates in support of his claim to have converted. Each certificate included an address and a mobile telephone number for its author. The Tribunal made an inquiry of the Ahmadiyya Muslim Association of Australia (the Association) as to

whether the respondent was known to the Ahmadiyya Muslim Jamaat in Bangladesh (AMJ Bangladesh). The Association replied that the AMJ Bangladesh had informed it that the respondent's name could not be found in their records and that both certificates were "fake & forged". The Tribunal invited the respondent to comment on that information pursuant to s.424A of the *Migration Act* 1958. In reply, the respondent's solicitors advised the Tribunal that the respondent maintained that he was an Ahmadi, however, he could not otherwise prove that to be so. The Tribunal concluded that the respondent was not a witness of truth and that there was no truth in his protection claims.

Justice Flick in the Federal Court was satisfied that the authenticity of the certificates had been placed in issue by the information obtained from the Association and that the issue to which the certificates were directed was "centrally relevant to the decision". His Honour held that the Tribunal unreasonably failed to make further inquiries of the authors of the certificates or the Association.

The questions raised before the High Court were: whether the Tribunal committed jurisdictional error by not making its own inquiries in relation to the allegation that the certificates were forgeries; and whether the Tribunal erred in failing to invite the respondent to a further hearing following its receipt of the Association's letter.

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

*per curiam:*

- (i) There was no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review or that it was otherwise so unreasonable as to support a finding that the Tribunal's decision was infected by jurisdictional error.
- (ii) There was no obligation to invite the respondent to a further hearing. The Association's letter did not raise a new issue in the sense that that term is used in s.425. The authenticity of the certificates and the status of the respondent with the AMJ Bangladesh were live issues at the hearing.

*per French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ:*

- (iii) There was nothing to indicate that any further inquiry by the Tribunal, directed to the authenticity of the certificates could have yielded a useful result. If in response to a telephone call, the authors admitted the certificates contained false statements, the grounds for a decision adverse to the respondent would have been strengthened. If they confirmed the contents were true, it would have added nothing to the statements effectively conveyed by the certificates themselves. Further, the respondent's response to the Tribunal's s.424A letter itself indicated the futility of further inquiry. There was nothing he or his solicitors could add, beyond a bare denial of what appeared in the Association's letter.
- (iv) *Obiter:* The term "duty to inquire" is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction or affect the decision in some other way that manifests itself as jurisdictional error.

*per Heydon J:*

- (v) The Tribunal was not obliged to make any more inquiries than it did. It was for the respondent to demonstrate that his claims were genuine; it was not for the Tribunal to try to achieve a demonstration that he had failed to achieve. The respondent produced the certificates in the first place and was in at least as good a position as the Tribunal to contact the authors. He did not ask the Tribunal to contact them. It was not unreasonable for the Tribunal to proceed on the basis that if any further evidence was to be provided in support of the certificates, it would come from the respondent.

- (vi) *Obiter*: Difficulties can arise in distinguishing between sub-questions or sub-controversies within an issue and controversies about separate issues. The question whether the certificates were "fake & forged" was not a new issue which arose in a distinct way after the hearing. It was arguably only a sub-issue of the general question: was the respondent converted to the Ahmadi faith as claimed? But it is not necessary to examine that proposition, because if it is assumed that a wholly unforeseen claim that the certificates were forged might raise a new issue triggering s.425, such an issue was not unforeseen at the Tribunal hearing.

## FEDERAL COURT JUDGMENTS

### MIAC v SZNAV

[2009] FCAFC 109

Federal Court of Australia, Stone, Jacobson & Jagot JJ, NSD 826 of 2009, 27 August 2009

This was an appeal by the Minister from a judgment of the Federal Magistrates Court setting aside a Refugee Review Tribunal (the Tribunal) decision that the respondent husband and wife and their two children, nationals of Bangladesh, were not persons to whom Australia had protection obligations.

A letter sent to the respondents acknowledging receipt of their application for review (the acknowledgment letter) stated, "you should ... immediately send us any documents, information or other evidence you want the Tribunal to consider." The respondents alleged that the Tribunal had breached s.424B(2) of the *Migration Act* 1958 (the Act) because the acknowledgment letter was an invitation to them to provide additional information and therefore enlivened s.424(2) of the Act. Consequently, it was submitted that it was necessary for the letter to comply with the requirements for written invitations set out in s.424B that the response to such an invitation is "to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period".

The Minister contended that the Federal Magistrate had erred in concluding that the Tribunal committed jurisdictional error by failing to specify the prescribed period in the acknowledgment letter which caused a breach of s.424B(2).

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

- (i) The Federal Magistrate erred in characterising the acknowledgment letter as an invitation under s.424(2) and in concluding that s.424B applied. The Tribunal had power to say what it did in the acknowledgment letter (ss.415(1) and 424(1)) and the exercise of that power did not contravene any provision of the Act as there was no question of the Tribunal proceeding to make a decision on the respondents' application if they did not provide any "documents, information or other evidence" in response to the letter.
- (ii) It cannot be said that s.424 is the only source of the Tribunal's power to obtain information. It has that power by dint of s.415(1) and the powers of the primary decision in s.56 which the Tribunal thereby attracts. Further, the difference between s.424(1) and s.424(2) is to be found in the consequences of the non-compliance. Section 424(1) is facultative and failure to comply with such a request has no consequence adverse to the applicant for review. Section 424(2) is a formal request which must be given in a particular manner (s.424(3)) and satisfy certain requirements (s.424B). Failure to comply with such a formal invitation has adverse consequences as the Tribunal may make a decision on the review without inviting the applicant for review to appear at a hearing (s.424C(1) and s.425(2)(c)).

*Obiter:*

- (iii) The acknowledgment letter was not, in the words of s.424(2) at the relevant time, an invitation to a person to give additional information. The relevant part of the acknowledgment letter is nothing more than advice to the respondents about how to ensure that their application is complete.
- (iv) The acknowledgment letter did not fall within s.424(1) because it was not the Tribunal (as constituted under s.421) "getting" information in the conduct of the review. Rather it was an administrative exercise preliminary to the review. Its purpose was to provide the respondents with information about the review process and advise them of their rights. The exercise of power involved in sending the acknowledgment letter was purely administrative, engaging the power attracted to the Tribunal by s.415(1). The power in s.424(1) is expressed to be one "in conducting the review".

**MIAC v Hart  
[2009] FCAFC 112**

**Federal Court of Australia, Spender, Greenwood & Logan JJ, QUD 258 of 2008, 31 August 2009**

This was an appeal by the Minister from a judgment of the Federal Magistrate's Court dismissing the Minister's application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) remitting the application for an Established Business (Residence) (Class BH) subclass 845 visa for reconsideration with the direction that the respondent met cl.845.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations).

The respondent claimed to own 20% of the issued shares in Northside Cabinets Pty Ltd which carried on a cabinet-making business under the trading name "Northside Cabinets". Northside Cabinets Pty Ltd was also the trustee of the Yates Family Trust (a discretionary trust), and it conducted the cabinet-making business as trustee of the Trust. Under the terms of the trust deed, the trustee retained an absolute discretion as to the distribution of income and trust assets both in terms of who might receive those distributions and in what sum. The respondent claimed to play a part in the management of the business but was not a director or other officeholder of Northside Cabinets Pty Ltd.

The Tribunal found that the respondent owned 20% of the shares in Northside Cabinets Pty Ltd; implicitly, Northside Cabinets Pty Ltd carried on business as Northside Cabinets; the respondent therefore had an ownership interest in the business Northside Cabinets; and thereby she was able to satisfy the provisions of cl.845.213.

The Minister contended that the Federal Magistrate erred by failing to find that no "ownership interest" arose in relation to the respondent, as she exercised no "proprietary involvement" over the trust assets either by way of control over those assets or by reason of any beneficial interest in them. The Minister further contended that there was a failure to consider and apply the Department's Procedural Advice Manual 3 (PAM3).

**Held: *per Spender & Greenwood JJ (Logan J dissenting), appeal dismissed.***

*per Spender & Greenwood JJ:*

- (i) The definition of "ownership interest" in s.134(10) of the *Migration Act* 1958 (the Act) represents a deliberate modification by Parliament of the orthodox position that mere ownership of shares in a company does not give any legal or equitable interest in the assets of the company.
- (ii) The definition of "ownership interest" in s.134(10) of the Act, inelegant and not in conformity with the ordinary understanding of the general law as it may be, makes plain that a shareholder in a company that carries on the business has an interest in the business, and that interest is an ownership interest. Further, if a shareholder in a company that carries on the business holds more than 10% of the shares in the company, the value of the ownership interest is more than 10% of the value of the business for the purposes of r.1.11(1)(c). Since the respondent is a 20% shareholder in a company that carries on the business, she has an ownership interest in the business, and the value of her ownership interest is 20% of the total value of the business.
- (iii) To find that a business operated by a corporate trustee under the terms of a discretionary trust by virtue of which there is nothing more than a mere expectancy of a benefit does not satisfy the definition of "ownership interest" in s.134(1) of the Act impermissibly requires that the definition be read as if the words "other than in the capacity of trustee" were inserted after the words "a company that carries on the business". The Act does not disqualify the respondent from an ownership interest in a business as shareholder in a company that carries on that business, if the company does so in the capacity of a trustee of a discretionary trust or, in a particular trustee capacity.

*per Greenwood J:*

- (iv) If the PAM3 seeks to bring about a result that an applicant does not have an ownership interest in a business as a shareholder in a company that carries on that business by deploying assets used in the business and engaging in the field of transactions necessary to undertake the business, because the company is a trustee of a discretionary trust, PAM3, to that extent, is inconsistent with the Act and Regulations.

*per Logan J (dissenting):*

- (v) It is clear enough from both the context and employment of the adjective “ownership” in the term that “interest” is being used in a proprietary sense in the definition of “ownership interest”.
- (vi) The definition of “ownership interest” omits from items (a), (b) and (c) any qualification relative to the carrying on of the business in a trustee capacity. That is not a licence though to ignore the existence or terms of any relevant trust in ascertaining what “interest” in a given business a visa applicant has. Artificial construct though it may be, the definition materially requires one to look at the interest in the “business” operated by Northside, not in that company.
- (vii) All of the assets necessary for the carrying on of the business form part of the trust fund of the Yates Family Trust. Having regard to the terms of the trust deed, and *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 and *Buckly v Commissioner of Stamp Duties* (1998) 192 CLR 226, that does not mean that Northside’s technical holding of the legal and beneficial interest in the business assets gives its shareholders an interest in that business, even having regard to item (a) in the definition “ownership interest” in s.134(10). Having found that the business was operated by a corporate trustee under the terms of a discretionary trust by virtue of which the respondent could have nothing more than a mere expectancy of benefit, the Tribunal was obliged to find that she had no “ownership interest”.
- (viii) The notion in PAM3 that demonstrating “complete and effective control over the trust income and assets” of a discretionary trust can be sufficient to confer an “ownership interest” is a considerable an unwarranted extension of the language employed in the definition.
- (ix) The valuation requirement of the interest in the ‘main business’ found in r.1.11(1)(c) necessarily require the taking into account the fact that the business was operated in a trustee capacity. The equitable obligations inherent in Northside’s operation of the business in a trustee capacity cannot be ignored in a valuation of the worth of a share in that company in respect of the business it operated. The nature of those obligations means that none of the assets employed in operating the business form any part of the asset backing for a share in Northside. The result is that it was erroneous to regard the respondent’s shares as worth 20% of the value of the business and thus that she met the criterion specified in r.1.11(1)(c).

### **Khanam v MIAC**

**[2009] FCA 966**

**Federal Court of Australia, Collier J, QUD 105 of 2009, 27 August 2009**

The appellant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister’s delegate to refuse to grant the visa applicant a Sponsored (Visitor) (Class UL) subclass 679 visa.

On his visa application, the visa applicant indicated he wanted to visit his mother, the appellant. The Tribunal was not satisfied the visa applicant’s visit to Australia was genuine for the purposes of cl.679.224. It was not satisfied the family, business and religious reasons for the visa applicant to return to Pakistan were sufficiently strong to outweigh the likelihood that he would seek to permanently remain in Australia because of the risk he faced as an Ahmadi in Pakistan and the fact that his parents resided in Australia.

The Federal Magistrates Court found the Tribunal’s decision to be free from jurisdictional error and dismissed the application. Before the Federal Court (the Court) the appellant made contentions which were held to be unsustainable. However as the appellant was unrepresented, the Court identified other grounds of appeal, namely whether the Tribunal had considered the specific circumstances of the visa applicant, as distinct from the position of visa applicant simply as a member of the Ahmadi faith.

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

- (i) The Tribunal did not properly determine the application before it because in considering the application it asked itself the wrong question, namely “Is the visa applicant an Ahmadi Muslim from Pakistan?” The answer to that question while relevant in the circumstances could not alone

determine the application. The Tribunal's finding that the intention of the visa applicant to visit Australia was not genuine was based exclusively on the conclusion reached by the Tribunal that the visa applicant could claim asylum in Australia because of his religion. The Tribunal formed this opinion based on its view of likely intentions of Ahmadi Muslims as a group in applying for subclass 679 visas rather than based on the circumstances of the visa applicant in this particular case.

- (ii) The Tribunal failed to take into account a relevant consideration, namely the reasons given by the visa applicant and the appellant for the visa applicant to visit Australia and the visa applicant's motive for doing so. Nowhere, in the reasons for finding that the proposed visit to Australia was not genuine, did the Tribunal directly address and consider the stated reasons for the visit. In considering whether a claimed visit to Australia is genuine the Tribunal is obliged to give genuine consideration to a claimed reason to visit. A simple statement of an issue is not automatically tantamount to consideration of that issue. In order to weigh the merit of an issue or of evidence, the issue or evidence must be actually addressed.

*Obiter:*

- (iii) It is questionable whether the Tribunal gave genuine consideration to the fact that the visa applicant had travelled to another country, which is a relevant consideration for the purposes of this application. The Tribunal's approach to the issue of the visa applicant's immigration history was premised on a wrong question, namely – what is the visa applicant's immigration history with respect to Australia or other free developed countries. Paragraph 8(c) of Ministerial Direction No 36 of 2005 is not so limited.
- (iv) The language of cl.679.211 does not appear to require anything more than a statement of purpose by the visa applicant (which may or may not be genuine).

**SZBQS v MIAC  
[2009] FCA 1031**

**Federal Court of Australia, Cowdroy J, NSD 1421 of 2008, 16 September 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 Bangladeshi national, claimed to fear persecution as an Ahmadi. In 2004 the Tribunal sought general information from the Ahmadiyya Muslim Association Australia (the Association) and a copy of its response (the 2004 letter) was placed on the Tribunal's file. The appellant submitted letters to the Tribunal purportedly from the National Amir in Bangladesh and the Tribunal wrote to the Association (the September 2007 letter) requesting the National Amir verify those letters. The Association forwarded a letter from the National Amir stating that the letters were false. That information was disclosed to the appellant in a letter sent pursuant to s.424A of the Act to which the appellant did not respond. The Tribunal considered the appellant to be untruthful and found there was no real chance of him being persecuted in Bangladesh.

The Federal Magistrate, applying the Federal Court decision in *SZKTI v MIAC* (2008) 168 FCR 256, found the September 2007 letter was a request falling within s.424 of the *Migration Act* 1958 (the Act) enlivening the requirements of s.424B. However, he found that s.424B(1) was not breached as the manner of response was obvious from the invitation for additional information. His Honour also observed that s.441A of the Act was not followed as the Association had not confirmed its address for the purposes of the particular review. Accordingly, s.441C did not apply, however such a breach did not involve jurisdictional error.

**Held: Appeal dismissed**

- (i) The Federal Magistrate erred in concluding that the September 2007 letter was a request falling within the purview of s.424, enlivening the requirements of s.424B of the Act.
- (ii) The information supplied in the 2004 letter was not supplied in connection with any relevant review, but was information sought generally relating to persons who claimed to be of the Ahmadiyya faith. The September 2007 letter was not therefore a request for "additional information" within s.424(2) of the Act. The mere placing of the 2004 letter on the Tribunal's file did not render such letter "information" for the purpose of the specific review in question.

- (iii) The false letters purportedly from the National Amir provided by the appellant were not addressed to the Tribunal, nor were they provided to the Tribunal as the result of an invitation from the Tribunal. Furthermore the two letters were fabricated. The letters were not information provided by the National Amir. Any subsequent request by the Tribunal of the National Amir could not therefore have been a request for "additional information".

**MIAC v Grant**

**[2009] FCA 1059**

**Federal Court of Australia, Jagot J, NSD 485 of 2009, 21 September 2009**

This was an appeal from a judgment of the Federal Magistrates Court quashing and remitting for reconsideration a decision of the Migration Review Tribunal (the Tribunal) that the respondents were not entitled to the grant of Skilled (Provisional) (Class VC) Subclass 485 visas.

The first respondent sought to satisfy cl.485.215(c) of Schedule 2 to the Migration Regulations 1994 (the Regulations) on the basis that he had arranged and undergone a relevant English language test before he applied for the visa despite obtaining a test result showing that he did not satisfy the 'competent English' requirement at that time. The first respondent undertook a further test after he applied for the visa, in which he obtained a score sufficient to satisfy the 'competent English' definition in r.1.15C of the Regulations at the time of the Tribunal's decision. The Tribunal found that the first respondent did not satisfy paragraphs (a), (b) or (c) of cl.485.215.

The Federal Magistrates Court accepted the first respondent's argument that cl.485.215(c) does not exclude a case where an applicant has arranged and undergone a language test before making the visa application (meaning 1).

The Minister contended that the words "has made arrangements to undergo" a language test in cl.485.215(c) should be construed as excluding a case where an applicant has arranged and undergone a test before the making of the application as, in such a case, there would be nothing left to "undergo" (meaning 2). The Court identified a third possible meaning during the course of argument, being that the words do not exclude a case where an applicant has arranged and undergone a language test before the making of the application, provided the test results have not also been obtained by that time (meaning 3).

**Held: Appeal allowed.**

- (i) The first respondent did not satisfy cl.485.215(c) because he had not "made arrangements to undergo" a relevant language test. Rather he had taken the language test but not achieved the result of competent English as required by cl.485.215(b). The fact that he subsequently proved that he had competent English by the taking of a test at a later time was insufficient.
- (ii) The construction adopted by the Federal Magistrate (meaning 1) cannot stand as a matter of language or by reference to an inferred legislative intention to avoid consequences that appear irrational or unjust.
- (iii) The ordinary meaning of the phrase, "has made arrangement to undergo" involves two key aspects. Firstly, the arrangements must have been made, in the sense of being in place or in existence, when the visa application is made. Secondly, the arrangements must be to undergo, in the sense of to take or to sit for, a test. The natural and ordinary meaning of the phrase denotes a future requirement. An arrangement to undergo something involves a thing yet to be done. In the first respondent's situation, there was no arrangement to undergo anything in the future. The arrangements had already been completed.
- (iv) *Obiter*: Whilst unnecessary to decide in this case, the meaning advanced by the Minister (meaning 2) is to be preferred. The potential anomaly created by this construction (that an applicant would be better off taking a test after the time of application than before if there was a risk of not obtaining the required result before that time) is answered by the fact that demonstrating the making of the arrangement is not onerous and is largely within the applicant's control.

- (v) *Obiter*: There is no reason to read the provisions as requiring the result of 'competent English' for the purpose of cl.485.222 to be the result of the same test in respect of which the first respondent had made an arrangement for the purpose of cl.485.215(c).

## FEDERAL MAGISTRATES COURT JUDGMENTS

### **SZNLS v MIAC & Anor**

**[2009] FMCA 908**

**Federal Magistrates Court of Australia, Nicholls FM, SYG 877 of 2009, 15 September 2009**

The applicant, a national of China, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution from Chinese authorities arising from his involvement with the Local Church.

The Tribunal rejected the applicant's claim to have been a member of the Local Church in China, finding that he was not a witness of truth and that he had fabricated his claims. The Tribunal accepted that the applicant had had some involvement in the Local Church while in Australia, but was not satisfied that this was done other than for the reason of strengthening his claims to protection. It therefore disregarded this conduct pursuant to s.91R(3) of the *Migration Act* 1958 (the Act). The Tribunal recorded in its decision that it had put to the applicant that it had extensive concerns about his evidence and, amongst other things, had put to him pursuant to s.424AA that he had given confused and uncertain evidence about his baptism at the Department interview.

The applicant challenged the rationality and logicity of the Tribunal's reasoning and claimed that the Tribunal had breached its obligations under s.424A(1) and s.425. In addition to the grounds advanced by the applicant, the Court identified the possibility of an error pursuant to s.91R(3) of the Act following the Full Federal Court judgment in *SZJGV v MIAC* (2008) 247 ALR 451, in that the Tribunal may have subsequently taken conduct, which was required to be disregarded, into account.

#### **Held: Application dismissed.**

- (i) The Tribunal did not breach s.91R(3) of the Act. The conduct relied on by the Tribunal related to the applicant's responses to questions about his relationship with various people in Australia, and not to conduct the Tribunal said it would disregard, namely his actual attendance at church activities.
- (ii) A plain reading of the Tribunal's decision record reveals that the issue dispositive of the review was the Tribunal's rejection (as being a fabrication) of the applicant's account of what had happened in China in relation to his being an adherent of the Local Church. Squarely putting to the applicant that it had "extensive concerns about his evidence" was sufficient to alert the applicant to the Tribunal's view that his entire account was at issue.
- (iii) It was not in error of the Tribunal to say that it used s.424AA even if it was not obliged to employ that section.

## LEGISLATION UPDATE

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

### Legislation Passed

#### ACTS

##### **Migration Amendment (Abolishing Detention Debt) Act 2009**

This Act amends the *Migration Act* 1958 to remove the liability for immigration detention and related costs for certain persons and liable third parties and extinguish all outstanding immigration detention debts.

#### INSTRUMENTS

##### **Migration Regulations 1994 - Specification under subregulations 2.61(4), 2.61(5), 2.61(6), 2.66A(2), 2.66A(6), 2.73A(5), 2.73B(6), 2.73C(6) and paragraphs 1205(3)(c), 1220B(3)(b) - Addresses - September 2009 (IMMI 09/091)**

This instrument specifies the relevant addresses for posted applications and applications delivered by courier, by hand or by facsimile. It commenced on 14 September 2009.

##### **Migration Regulations 1994 - Specification under subparagraphs 2.72(10)(a) and 2.72I(5)(b) - Occupations for the Temporary Business Long Stay and Occupational Trainee Visas - September 2009 (IMMI 09/094)**

This Specification provides the occupations for the Temporary Business Long Stay Visa (Subclass 457) and the Occupational Trainee Visa (Subclass 442). This instrument commenced on 14 September 2009.

##### **Migration Regulations 1994 - Specification under paragraph 406.111(d) - Specifying agreements or arrangements which are not relevant agreements for the purposes of Government Agreement visa – September 2009 (IMMI 09/103)**

This instrument specifies the agreements or arrangements, or types of agreements or arrangements, that are not relevant agreements for the purposes of granting a Subclass 406 (Government Agreement) visa. This Instrument, commenced on 14 September 2009.

##### **Migration Regulations 1994 - Specification under subparagraph 2.84(2)(b)(i) - Address - September 2009 (IMMI 09/104)**

This instrument specifies the relevant addresses to which details of a specified event must be provided. A registered post and electronic mail address is specified for each State and Territory. This Instrument commenced on 14 September 2009.

##### **Migration Regulations 1994 - Revocation of instruments under regulation 1.20B, 1.20G(2), 1.20N(4), paragraph 1.20CB(1)(i), 1.20GA(1)(a)(i), 1.20UC(4)(a) & (b), 1205(3)(c)(i), (ii), & (iii), 1205(2)(a)(ii)(B), 1220B(3)(b) – September 2009 (IMMI 09/105)**

This instrument revokes a number of instruments made under the Migration Regulations 1994. This instrument commenced on 13 September 2009.

##### **Migration Regulations 1994 - Specification under sub-subparagraphs 2.72(10)(d)(ii)(B) and 2.72(10)(d)(iii)(B) and paragraph 2.86(2B) and subparagraph 457.223(4)(ba)(iv) - Occupations – September 2009 (IMMI 09/106)**

This instrument specifies the occupations which are exempt from the requirement prescribed by subparagraphs 2.72(10)(d)(ii) and 2.72(10)(d)(iii). This Instrument commences on 14 September 2009.

##### **Migration Regulations 1994 - Specification under subregulations 2.59(d) and 2.68(e) - Training Benchmarks - September 2009 (IMMI 09/107)**

This instrument specifies the training benchmarks for the purposes of subregulations 2.59(d) and 2.68(e) of the Migration Regulations 1994. This Instrument commenced on 14 September 2009.

**Migration Regulations 1994 - Specification under subparagraph 2.79(2A)(c)(ii) and 2.82(2)(aa) and subregulation 2.79(3A) - Minimum salary levels for the subclass 457 - Temporary Business (Long Stay) Visa - September 2009 (IMMI 09/109)**

This Specification provides the method for working out minimum salary levels for the Subclass 457 - Temporary Business (Long Stay) Visa. This Instrument commenced on 14 September 2009.

**Migration Regulations 1994 - Specification under paragraph 2.72(10)(cc) and 2.79(1A)(b) and subregulation 2.72(10AB) - The temporary skilled migration income threshold and the salary above which paragraphs 2.72(10)(c) and 2.72(10)(cc) and regulation 2.79 do not apply – September 2009 (IMMI 09/112)**

This instrument specifies that the temporary skilled migration income threshold is \$45,220 and specifies annual earnings of \$180,000. This Instrument commenced on 14 September 2009.

**Migration Regulations 1994 - Specification under subregulation 2.72(10AA) - Method to determine terms and conditions of employment that would be provided to an Australian citizen of an Australian permanent resident to perform equivalent work in the same workplace at the same location - September 2009 (IMMI 09/113)**

This Specification provides the method to determine terms and conditions of employment that would be provided to an Australian citizen or an Australian permanent resident to perform equivalent work in the same workplace at the same location. This Instrument commenced on 14 September 2009.

## **REGULATIONS**

**Migration Amendment Regulations 2009 (No. 5) Amendment Regulations 2009 (No. 2)**

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* including transitional arrangements commence on the same date and as one coherent sponsorship regime. These Regulations commence on 9 September 2009, but as they amend the Migration Amendment Regulations 2009 (No.5), the transitional arrangements that apply to those regulations, apply to these amendments to specify to which applications the changes apply.

**Migration Amendment Regulations 2009 (No. 10)**

These Regulations amend the Migration Regulations 1994 to allow certain partners of Australian citizens, permanent residents, and eligible New Zealand citizens, who are otherwise not authorised to make a further application under section 48 of the Migration Act 1958 because they have had a visa cancelled or visa application refused, to apply for a partner visa, provided they meet specified objective criteria. This would allow these partners of Australian citizens, permanent residents, and eligible New Zealand citizens to remain in Australia while making an application for a partner visa. These Regulations commence on 14 September 2009.

**Migration Amendment Regulations 2009 (No. 11)**

These Regulations amend the Migration Regulations 1994 to amend the definition of 'migration occupation in demand'. These Regulations commenced on 22 September 2009.

## CASELOAD OVERVIEW

### MRT Decisions – September 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	0	5	2	1	8
Visitor refusal	34	12	3	6	55
Student refusal	65	21	7	10	103
Temporary business refusal	21	17	11	7	56
Permanent business refusal	8	2	4	4	18
Skill linked refusal	77	41	16	12	146
Partner refusal	88	22	12	5	127
Family refusal	17	25	0	1	43
Student cancellation	32	28	4	4	68
Sponsor approval refusal	1	11	4	1	17
Other	21	15	6	5	47
<b>Total</b>	<b>364</b>	<b>199</b>	<b>69</b>	<b>56</b>	<b>688</b>

### RRT Decisions – September 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bangladesh	0	3	0	0	3
Bulgaria	0	1	0	0	1
China (PRC)	21	45	0	1	67
Egypt	2	3	0	0	5
Ethiopia	1	1	0	0	2
Fiji	1	1	0	0	2
Ghana	1	1	0	0	2
Guinea-Bissau	1	0	0	0	1
India	0	16	0	1	17
Indonesia	1	5	0	0	6
Iran	1	1	0	0	2
Iraq	0	1	0	0	1
Israel	1	0	0	0	1
Jordan	3	1	0	0	4
Kenya	0	2	0	0	2
Korea, Republic Of	0	5	0	0	5

Lebanon	1	2	0	0	3
Liberia	0	1	0	0	1
Malaysia	0	13	0	0	13
Mongolia	1	0	0	0	1
Morocco	1	0	0	0	1
Nigeria	1	0	0	0	1
Pakistan	0	1	1	0	2
Palestinian Terr. (W.Bank/Gaza)	1	0	0	0	1
Papua New Guinea	0	1	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	2	1	0	0	3
Togo	1	0	0	0	1
Tonga	0	1	0	0	1
Turkey	0	1	0	0	1
Uganda	1	0	0	0	1
Vietnam	0	1	0	0	1
Zimbabwe	5	1	0	0	6
<b>Total</b>	<b>47</b>	<b>110</b>	<b>1</b>	<b>2</b>	<b>160</b>

## 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 for applicants to be notified of the Tribunal's decision. RRT decisions are also selected daily and are allocated to Publications Officers for editing. Once edited, the decisions are quality checked by a Senior Publications Officer and 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.

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