



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

0803453

26 August 2009, Melbourne

Mr J Atkins, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 (EMPLOYER NOMINATION SCHEME) – CL.856.213(C)(II) – APPLICANT OVER 45 YEARS OF AGE – A delegate of the Minister refused to grant the applicant a Subclass 856 visa on the basis that he did not meet cl.856.213(c)(ii) of the Regulations as he was over 45 years of age and the delegate was not satisfied that exceptional circumstances existed. The applicant has worked for Brunetti Cakes since 2007 and he was nominated to fill the position of Pastry Cook. The applicant claimed he had been employed as a Pastry Cook since the age of 16. Along with other achievements, he claimed he was a Gold, Silver and Bronze medallist in the fields of pastry and confectionary, both in the UK and France. He is a qualified lecturer in pastry, bakery and confectionary. For 5 years, he held the position of lecturer at the prestigious Westminster College in London. The applicant claimed that he was granted entry to the USA for achievement and outstanding performance in his field of work. He claimed to have worked in London, Paris, New York and Sydney in positions of authority, either as an Executive or Head of Department. He claimed to be currently writing a book and to have written articles for a number of industry publications.

The applicant claimed that he is involved in training staff at Brunetti's, which is his passion, and that his role was more of a pastry cook trainer than as a pastry chef. Over 40 pastry chefs work at Brunetti's three locations and as Brunetti's had recently sold its international franchise to a Singaporean business, he claimed he would be training staff for their outlets in Dubai and Singapore. He claimed there was a shortage of professional pastry cook trainers in Australia. The Brunetti Cakes Managing Director gave evidence that it is very difficult to find a pastry chef in Australia who understands European flavour, which the applicant does. He claimed that his company is planning to employ more apprentices and that the applicant would be involved in their training. The Managing Director of an educational institution confirmed at hearing that the applicant had completed a Certificate IV course which qualified him to be a trainer at TAFE, University and private education facilities. He claimed that the applicant has exceptional skills in hospitality and training, especially in pastry. The Executive Chef Patisier at the Windsor Hotel provided evidence that the applicant's knowledge and skill level exceeds that currently being taught to Australian apprentices. In a letter, the applicant's former employer, Executive Chef/Owner of The Bathers Pavilion, stated that the applicant had been in charge of 8 Pastry Chefs, training, production and quality control and that one of the applicant's highest qualities was his teaching ability.

Held: Decision under review set aside.

The Tribunal found that the position offered to the applicant was essential to the operation of the nominator's business, Brunetti Cakes, now and in the foreseeable future. It found that given the nominator's extensive plans to expand within Australia and overseas, there was a greater need for a pastry cook with teaching experience and qualifications. The Tribunal found the evidence given by the applicant's employer and other witnesses clearly demonstrated that the applicant has skills and experience that can only be acquired over many years. It accepted the witness' evidence that English and European Pastry Chefs reach the peak of their professional life in their late forties and early fifties. The Tribunal found that the applicant had acquired an unusual and highly specialised range of skills and experience that is not possible to find in a younger applicant. The Tribunal was satisfied that the applicant's circumstances were sufficiently unusual and out of the ordinary to constitute exceptional circumstances for the purposes of cl.856.213(c)(ii) even though he had turned 50 at the time of application. Accordingly, the Tribunal found that the applicant met cl.856.213 of the Regulations.

0805108
28 August 2009, Sydney
Mr R Derewlany, Member

SKILLED – (PROVISIONAL) (CLASS VC) VISA – SUBCLASS 485 (SKILLED – GRADUATE) VISA – CL.485.213 – RELEVANT EXPERIENCE – A delegate of the Minister refused to grant the applicant a Subclass 485 visa on the basis that she was not satisfied the applicant had met the required full time study load, on the basis that he had received credit for 2 of the required 16 units for the Master degree from another institution. The applicant nominated Marketing Specialist as his skilled occupation in the visa application. He provided evidence that he completed the requirements for award of a Master of Business Administration from the University of Technology, Sydney (UTS) as a result of a course he commenced on 1 August 2005 and completed on 18 July 2007. A letter from UTS dated 20 August 2007 confirmed the applicant had met the requirements for award of the degree, that all instruction was in English, that he was enrolled as a full time student and that the full-time duration of the course was 4 semesters. The applicant provided his academic record which indicated he had been granted credit for 2 subjects totalling 12 credit points. The applicant also provided evidence that he had completed a Bachelor of Business Management degree from Bangalore University in October 2004.

Held: Decision under review set aside.

In deciding whether the applicant met the 2 year study requirement in respect of his Master of Business Administration degree, the Tribunal was required to determine whether the requirements of r.1.15F were met. The Tribunal was satisfied from the evidence that the applicant completed his registered course at UTS in a period of 23 calendar months. The Tribunal considered the Department's guidelines on the issue, which indicated that the intention is that the applicant has successfully completed the equivalent of 2 years study at 100% of the full-time load, without benefit from credits, recognition of prior learning and/or recognition of work experience that would allow a reduction in the amount of study undertaken. The Tribunal considered, however, that these guidelines suggest an approach to the consideration of the 2 academic years study requirement (r.1.15F(c)) that is narrower and more prescriptive than the regulation itself. The Tribunal considered that whether an applicant has been given credits in a course is not determinative of whether an applicant has completed a relevant qualification as a result of at least 2 academic years study in a registered course. The Tribunal was satisfied on the basis of the evidence from UTS that the applicant undertook the course as a full-time student over 4 semesters, which equates to the course duration specified in the CRICOS registration. The Tribunal therefore was satisfied the applicant completed the course leading to the Master qualification as a result of 2 academic years of study. The Tribunal was satisfied this was within the period of 6 months ending immediately before the day the application was made. The Tribunal accordingly found the applicant satisfied cl.485.213(a). The Tribunal was satisfied that the applicant's Master of Business Administration qualification is closely related to his nominated skilled occupation of Marketing Specialist. The Tribunal therefore found the applicant satisfied cl.485.213(b), and thus met the requirements of cl.485.213 of the Regulations.

0901027
12 August 2009, Sydney
Mr S Roushan, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 (BUSINESS (LONG STAY)) – CL.457.221(a) – RELEVANT VISA HOLDER – A delegate of the Minister refused the applicant's Subclass 457 visa application as the visa applicant did not satisfy cl.457.221A, because he was not the holder of a relevant visa at the time of application and he was outside Australia at the time of application. The review applicant was approved as a Standard Business Sponsor and the visa applicant was subsequently nominated for the position of Floor Finisher. A short time later, the visa applicant arrived in Australia on a Subclass 976 Electronic Travel Authority (Visitor) (ETA) visa which was valid for three months. At the time of the delegate's decision, the visa applicant did not meet the requirements of cl.457.221A as he was not the holder of a visa that appeared in this subclause. The applicant submitted that a Bridging visa application was initially lodged with the Department during the validity of his visitor visa, and that it was subsequently followed up several times. He claimed that at no point were the parties advised that the visa applicant would cease to hold a valid visa on the cessation of the Visitor visa. The visa applicant subsequently became unlawful and remained so for almost three months until he was granted a Bridging visa E (BVE). A short time later, the visa applicant was granted the Bridging Visa A (BVA) which he had initially applied for and

which he continues to hold. The bridging visa could not be "pre-dated" and the parties were advised that the delegate's decision relating to the Subclass 457 visa remained in force. The review applicant's representative stated that it was the intention of the parties to seek Ministerial intervention.

Held: Decision under review affirmed.

The Tribunal accepted that the visa applicant applied for a Temporary Business Entry (Class UC) visa, and that a short time later he arrived in Australia on an ETA Subclass 976 visa and that he had remained in Australia since. The Tribunal found that at the time of the delegate's decision, the visa applicant was not the holder of any substantive visa, and that the visa applicant continued to hold a BVA. The Tribunal found that whilst it appreciated that the visa applicant's failure to meet the requirements of cl.457.221A may have been due to misunderstandings and genuine mistakes, the Tribunal did not have the discretion to waive the requirements in cl.457.221A. The Tribunal was satisfied that, at the time of lodging his application, the visa applicant was outside Australia. The Tribunal was also satisfied that the visa applicant entered Australia on an ETA visa and therefore he was not the holder of a visa mentioned in cl.457.211(a), (b), (c) or (ca). Accordingly, the Tribunal found that the applicant did not satisfy the requirements of cl.457.221A. The Tribunal accepted the review applicant's evidence that he ran a successful timber flooring business and that over the years he had found it extremely difficult to find skilled labour in Australia, which had stopped his business from growing and had caused him much anxiety. It further accepted that, on the basis of these circumstances, it was open to the review applicant to seek Ministerial intervention. The Tribunal affirmed the decision under review and found that the applicant did not satisfy the requirements of cl. 457.221A of the Regulations.

Family visas

0806559

26 August 2009, Sydney

Mr D Dobell, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 116 (CARER) – R.1.03 – DEPENDENT CHILD – R.1.12 – MEMBER OF FAMILY UNIT – A delegate of the Minister refused to grant the two secondary applicants Subclass 116 visas on the basis that they did not satisfy r.1.12 because they were not considered to be 'members of a family unit'. The primary visa applicant was the applicants' mother and her husband and three children applied as part of her family unit. The applicants' parents and younger sister were granted visas. The first named visa applicant is 25 years old. He finished high school in 2002, after which he claimed to have worked for 6 months before commencing 3 years army service. The applicant claimed that after his release from the service in early 2006, he spent several months revising for his university entrance exams; however he was not successful in the exams, so he studied mechanics. He left this course when he qualified as a truck driver and began working full time. He claimed that he undertook some evening study before returning to full time study in informatics in 2008. At the time of the review, the first named applicant claimed he had finished the IT course and was looking for full time employment. Departmental records stated that he was still working as a truck driver at the time of the visa application; however the applicant claimed he was just filling in for a friend on the day the Department phoned. He claimed that when his parents left Vietnam in 2008 they left money in a bank account for financial support and that the second named applicant was in charge of this account. She claimed to have left school in 2003, commenced full time university study and worked part time. She claimed that she failed a number of subjects and had to repeat these in addition to completing a 2 month full-time work placement. She completed the course at the end of 2008. Departmental records queried whether the second named applicant was studying full time at the time of the visa application. At the Tribunal hearing, the second named applicant claimed that the Department did not allow her to tell the whole story, and that the jobs listed on the application were only part time jobs while she undertook study. The second named applicant commenced further full time study in mid-2008 and claimed to be engaged in full time study at the time of review.

Held: Decision under review affirmed in respect of the first applicant; decision under review set aside in respect of the second applicant.

As both applicants were over the age of 18 at the time of application, the Tribunal was required to determine whether they were 'dependent' on their parents, and whether at the time of decision, they were wholly or substantially reliant on another person for financial support for basic needs, for a substantial period immediately before that time. The Tribunal found the first applicant's explanation to be unconvincing as to why he was working when interviewed by the Department when he claimed to be studying full time. The Tribunal found that irrespective of his employment on that particular day, on the first applicant's own evidence at hearing, he was working in full time paid employment from April 2007 to at least August 2008, a period of 1 year and 4 months. The Tribunal was not satisfied that during this period, the first named applicant's financial reliance on his parents was greater than his reliance on himself for financial support for his basic needs. As the Tribunal found that the first named applicant did not meet the requirements of 'dependent' under r.1.03, it found that he could not be considered a 'member of the family unit' under r.1.12 at the time of decision. The Tribunal was satisfied that the second named visa applicant was not working on a full time basis from August 2007 until at least September 2008 and that there was a 2 month full-time work placement for her course undertaken during that time. It was further satisfied that she was substantially reliant on her parents for a substantial period immediately before the date of decision. The Tribunal noted that while the second applicant may have had some part-time employment between August 2007 and at least September 2008, it was satisfied that this did not break her financial dependence on her parents. Thus, the Tribunal was of the view that the second named applicant met the requirements of 'dependent' under r.1.03, and therefore was considered a 'member of the family unit' under r.1.12.

0808505

7 September 2009, Melbourne

Ms D Hubble, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 116 (CARER) – R.1.15AA – DEFINITION

OF CARER – A delegate of the Minister refused the applicant's Subclass 116 visa on the basis that the first named visa applicant did not satisfy cl.116.211 of the Regulations because she failed to meet the definition of "carer" set out in regulation 1.15AA. The delegate found that the required daily assistance could be reasonably obtained by the sponsor from relatives residing in Australia as well as from welfare, hospital, nursing or community services in Australia. It was submitted that the review applicant suffered from a number of ailments, including blindness. A number of submissions were received from family members stating that they were unable to care for the review applicant due to individual family and business commitments. A submission was also received from a GP setting out the review applicant's multiple ailments and medications and supported the visa applicant's application on the basis that she was able to provide the required ongoing daily care for her aunt. The visa applicant also provided a Health Services Australia (HSA) certificate in relation to a medical assessment of the review applicant.

Held: Decision under review set aside.

The Tribunal accepted that the visa applicant was the review applicant's niece, and found that a 'niece' was included in the definition of the term 'relative' provided by r. 1.03. The Tribunal found that, at the time of application, the visa applicant claimed to be the carer of an Australian relative and therefore satisfied the requirements of cl.116.211. The visa applicant provided a HSA certificate confirming that the review applicant had a medical condition that was causing her physical, intellectual or sensory impairment of her ability to attend to the practical aspects of daily life. The Tribunal accepted that the certificate indicated that the review applicant had an impairment rating of 40 and that because of her medical condition she had, and would continue for at least 2 years to have, a need for direct assistance in attending to the practical aspects of daily life. The Tribunal found that an impairment rating of 30 was specified in the Commonwealth of Australia Gazette, and accordingly, the Tribunal found that the HSA certificate satisfied the requirements of r.1.15AA(1)(c). Given the multiple medical conditions suffered by the review applicant, and the fact that she is blind, the Tribunal accepted that she requires constant monitoring and supervision. Although the review applicant resided with her son and daughter-in-law, given their full-time business commitments the Tribunal accepted that they were unable to provide the level of care required by the review applicant. Based on this and the other available evidence, the Tribunal considered that the review applicant's care needs were only partially being met under the current circumstances. Accordingly, the Tribunal found that the necessary assistance could not reasonably be obtained from any other relative of the review applicant in Australia. The Tribunal found that the review applicant did not receive any assistance from welfare, hospital, nursing or community services in Australia, and that even if such services were made available, the Tribunal considered that they would be inadequate to meet the review applicant's day to day care needs. Given her previous

history of caring for the review applicant, the Tribunal accepted that the visa applicant was knowledgeable about the review applicant's medical conditions, current treatment and day to day care needs, and that she was willing and committed to providing ongoing assistance to the review applicant. Accordingly, the Tribunal found that the visa applicant satisfied the requirements of cl.116.211 and cl. 116.221 of the Regulations for the grant of a Subclass 116 (Carer) visa.

0903308

18 September 2009, Sydney

Ms K Hartman, Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 (SPONSORED FAMILY VISITOR) – CL.679.224 – GENUINE VISIT – A delegate of the Minister refused the visa application on the basis that the visa applicant did not satisfy cl.679.224 as he was not satisfied that the visa applicant's expressed intention to only visit Australia was genuine. The visa applicant was sponsored by her niece. The visa applicant claimed that her husband and son would remain in China during her proposed visit to Australia. The delegate noted that the visa applicant had stated she was an accountant but she had told an immigration officer she was a clerk. Departmental records indicated the visa applicant's parents had travelled to Australia in mid 2007 and that they were currently still onshore. The review applicant claimed that they had re-entered China and had since died and she provided evidence of this to the Tribunal. The review applicant claimed that the visa applicant wanted to come to Australia to see her mother (the visa applicant's sister) as she is unable to travel to China due to inflammatory arthritis which restricts her mobility. They have not seen each other since 2001. A medical certificate was provided as evidence of this. The visa applicant claimed she has a good job in China as an accountant, she earns good money and has a regular income and that she owns property in China. She claimed that her family had a good visitor record and that, as she works at the airport, she was concerned about maintaining her good reputation. She further claimed she would ensure the visa applicant abided by her visa conditions as she would like other family members to also visit Australia. She claimed her previous agent told her to put down clerk as her occupation. She claimed that as an accountant her work also involved administration; so when she was asked her about her employment she just said clerk. She claimed her incentives to return to China were that she had a good job, she owned property, she would soon be entitled to retire, she would have access to her superannuation and her husband and son needed her to care for them.

Held: Decision under review set aside.

The Tribunal accepted that the visa applicant intended to visit Australia to see her sister who is unable to travel to China because of her arthritis. It also accepted that the visa applicant has close family members and stable employment in China; has a regular income, accumulated savings and owns property in China. The Tribunal further accepted that the presence of her close family members in China was a strong incentive for her to return. The Tribunal also accepted the visa applicant's explanation that she worked as an accountant and the tourism company who assisted her with a previous application told her to put down 'clerk' as her occupation. The Tribunal accepted the documentary evidence that her parents had returned to China and had since died. It accepted that one of the visa applicant's sisters visited her son who is studying in Australia and that she had returned to China. The Tribunal found the visa applicant had significant family ties in China which were a sufficient inducement for her to return at the end of her proposed visit. The Tribunal also found that it was in the interests of the review applicant to ensure the visa applicant complied with the visa conditions as any breach may jeopardise future visits of other family members to Australia. Accordingly the Tribunal was satisfied the visa applicant's intention only to visit Australia was genuine and found that the visa applicant satisfied the requirements of cl.679.224 of the Regulations.

0904757
1 September 2009, Sydney
Ms P Leehy

CHILD (RESIDENCE) (CLASS BT) – SUBCLASS 837 (ORPHAN RELATIVE) – CL.837.213 – R.1.14(B) – DEFINITION OF ORPHAN RELATIVE – A delegate of the Minister refused to grant the applicant a Subclass 837 visa as the applicant did not satisfy cl.837.214 of the Regulations. The delegate found that the applicant did not meet the definition of ‘orphan relative’ in r.1.14. The applicant is a 16 year old male born in South Korea who was sponsored by his aunt. The applicant claimed to have been adopted in Korea by the sponsor and her husband in May 2008. The applicant’s parents are divorced and reside in Korea. The sponsor indicated on the visa application that both the applicant’s parents are permanently incapacitated. In support of the application, a letter from the applicant’s biological father was submitted stating that he divorced the applicant’s mother because of his illness and that his ex-wife is hearing impaired and her whereabouts are unknown. He also claimed that he is not able to raise the applicant, so he entrusted him to the sponsor who adopted him and can provide him with a loving family environment. Also submitted was a letter from the sponsor stating that the applicant’s father lost all his assets through gambling, resulting in the applicant’s parents’ divorce. The mother left the marriage and her children without providing any contact details. The sponsor claimed that when the applicant’s mother deserted him, he was left alone in the house to fend for himself and that he ate raw rice for a period, resulting in a stomach condition. At interview with the Department the sponsor claimed that the applicant’s mother had taken possession of her house again. Medical information about the applicant’s biological parents was also submitted, referring to the father’s spinal pain and the mother’s hearing impediment.

Held: Decision under review affirmed.

The Tribunal accepted the evidence presented in support of the applicant’s claim to be the adopted son of his aunt, the sponsor, and her husband. It noted that while the effect of the legal adoption of the applicant would normally be to sever the ties between the applicant and his biological parents, the Tribunal found that in this case the applicant was cared for by his biological parents from his birth up to their divorce in March 2008, just prior to his arrival in Australia that month. The Tribunal further noted that the wording of the legislation is highly restrictive, in that it specifies that a person who is not an orphan relative is not so “only because the applicant has been adopted by an Australian relative”. The Tribunal found that the applicant is not an orphan as defined in r.1.14, not because he has been adopted by an Australian relative, but because his natural parents are alive, and are not permanently incapacitated, nor are they of unknown whereabouts. Furthermore, the Tribunal noted that the biological parents, or at least the father, had cared for the applicant all his life until March 2008, and in the Tribunal’s view, his parents were able to care for him at the time of decision. The Tribunal found that neither of the medical reports submitted for the applicant’s biological parents stated that either party was permanently incapacitated such that they are unable to care for the applicant. The Tribunal considered the evidence that the father had serious gambling debts, but found there was no evidence that this would preclude him from taking care of the applicant. The Tribunal noted that while, at the time of adoption, the whereabouts of the applicant’s mother was allegedly unknown, this was no longer the case at the time of decision. On the evidence before it, the Tribunal was not satisfied that the applicant could not be cared for by either or both of his parents, and therefore the applicant did not meet the requirements of r.1.14(b).

Partner visas

0903203
14 September 2009, Sydney
Ms S Leal, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – (SPOUSE (PROVISIONAL)) VISA – CL.309.211 – CL.309.221(1) – R.1.15A – GENUINE AND CONTINUING RELATIONSHIP – A delegate of the Minister refused to grant the visa applicant and his two children Subclass 309 visas on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 of Schedule 2 as the delegate was not satisfied that the couple had a mutual commitment to a shared life as husband and wife to the exclusion of all others or that the relationship between them was genuine and continuing. The visa applicant and his two children are currently living in Ghana and the review applicant is an Australian citizen who migrated in her

teens. The applicants claimed that they met in Ghana in 2004 and were married in Ghana in June 2008. The review applicant provided a marriage certificate to this effect. She also provided documentation stating that she had given birth to the visa applicant's child in 2009. The review applicant claimed that she was suffering from an ongoing medical condition which made caring for her child without the visa applicant's assistance difficult, and she provided supporting medical documentation to verify her claims. She claimed she had spoken with her husband about having the children migrate to Australia with him so that they could help her with the baby. The review applicant provided further documentation to the Tribunal, including various birth certificates, telephone statements, statutory declarations, funds transfers and emails, in support of the application.

Held: Decision under review set aside.

The Tribunal was satisfied that the applicants were in a marriage that was recognised as valid for the purposes of the Act. The Tribunal accepted that the applicants met in Accra in 2004 and the review applicant made two subsequent trips to Ghana, and that they married on the most recent trip in 2008. The Tribunal accepted that during this trip the review applicant fell pregnant and that, although the pregnancy was unexpected, it was welcomed by the couple. Despite the concerns of the delegate, the Tribunal was not satisfied that a DNA test was required. The Tribunal accepted the oral and written evidence of the applicants that they remained in a genuine and committed relationship, were in daily telephone contact, and were anxious to be reunited in order to live as a family. The Tribunal therefore found that at the time of the visa application, the visa applicant was the spouse of the review applicant within the meaning of r.1.15A, who is an Australian citizen and therefore met the requirements of cl.309.211(2) of the Regulations. Further, the Tribunal found that, at the time of the Tribunal's decision, the visa applicant continued to be the review applicant's spouse, and satisfied cl.309.221 of the Regulations.

Student visas

0903307

31 August 2009, Melbourne

Ms B Cremean, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – HIGHER EDUCATION SECTOR – CANCELLATION – S116(1)(b) – CONDITION 8202(3)(a) – EXCEPTIONAL CIRCUMSTANCES –

The applicant's Subclass 573 visa was cancelled due to his failure to meet the requirements of Condition 8202 relating to unsatisfactory academic progress. The applicant was enrolled in a Bachelor of Business (International Business) which commenced in August 2007 and ended by 1 July 2008. In August 2008 the applicant commenced a Diploma in Multimedia at another educational institute. On 13 October 2008 the applicant's former education provider issued a written notice pursuant to section 20 of the ESOS Act certifying that the applicant had not achieved satisfactory course progress for the Bachelor of Business course. At a Departmental interview, the applicant agreed with the breach; however he stated he had difficulties adjusting to studies and friends as well as concerns with his home stay and guardianship arrangements. He stated that he did not appeal to the education provider about their decision as he planned to transfer to another education provider. The delegate proceeded to cancel the applicant's student visa as he found the review applicant had breached condition 8202 and that the breach was not due to exceptional circumstances beyond his control.

At the Tribunal hearing the applicant stated that when he arrived in Australia he was young, he knew no one and he had trouble adjusting to cultural differences and the isolation from family and friends. He claimed he also had difficulties with his course and despite attending all his classes in 2007 he failed 4 out of 4 units. After having spoken to a student advisor it was agreed that he only do 2 units in the next semester. Despite this, he failed both units. Realising that he was not managing, the applicant transferred to a Diploma in Multimedia at another education provider in July 2008. The applicant also claimed he had spoken to the Department in August 2008 about his change of course and he had been advised that he was not required to complete a notice of withdrawal or notify his former education provider any further. He claimed he had shown the Confirmation of Enrolment to the Department at the August meeting and was assured that was all that was required. The applicant stated he was enjoying his new course which he had chosen in preference to the business course which had been chosen for him by a consultant in India.

Held: Decision under review affirmed.

The Tribunal found that the applicant's former education provider had certified the applicant as not achieving satisfactory course progress and therefore it found that he had not complied with condition 8202(3)(a). The Tribunal then considered whether the breach was due to exceptional circumstances beyond the applicant's control. The Tribunal noted that the applicant conceded that he failed 4 out of 4 units in 2007 and failed 2 out of 2 units in 2008. The Tribunal then considered the applicant's claimed reasons for this failure to achieve satisfactory course progress. The Tribunal accepted that the applicant had difficulty adjusting to life in Australia, that he was having difficulties with his business course as indicated by the university's agreement to a lighter course load in 2008, that family problems may have affected his ability to concentrate and that his agent chose the course in which he was enrolled. The issue for the Tribunal to determine was whether these factors constituted exceptional circumstances beyond the applicant's control. Based on the evidence, the Tribunal was not persuaded that these circumstances were necessarily out of the ordinary nor ultimately beyond the control of the applicant. Accordingly, the Tribunal found that the applicant's claims did not constitute exceptional circumstances beyond his control. Therefore, the Tribunal affirmed the decision to cancel the applicant's Subclass 573 visa.

0904579

5 August 2009, Sydney
Ms A Cranston, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – VOCATIONAL EDUCATION AND TRAINING SECTOR – CANCELLATION – S137L – CONDITION 8202(3) – UNSATISFACTORY ATTENDANCE – The applicant's Subclass 572 visa was automatically cancelled due to her failure to meet the requirements of Condition 8202 relating to satisfactory course attendance. A delegate of the Minister decided to refuse to revoke the automatic cancellation. The education provider had documented on a number of occasions throughout 2008 that the applicant had failed to attend 80% of the scheduled contact hours for the course as required under Condition 8202. It subsequently wrote to the applicant stating that it had certified that she was not achieving satisfactory course progress. The applicant failed to respond to the notification within 28 days of the date of the notice, and her visa was therefore automatically cancelled under s.137J. The applicant argued to the Department that she changed schools and moved to Brisbane and stopped attending on 20 August 2008 and although she claimed she advised the academy of this and requested a letter of release, the education provider did not give it to her. The Academy disputed this saying she did not withdraw from class or advise them she was changing schools until an email dated October 2008. The applicant subsequently wrote to the Minister seeking revocation of the automatic cancellation of her Subclass 572 visa. The applicant claimed that she had requested a letter of release from her course provider, which was not given, as she was moving interstate with her partner, and had shortly after enrolled in another course. The applicant also claimed that she had been involved in a car accident earlier that year which had affected her attendance, and she submitted three separate medical certificates to the Tribunal in support of this claim.

Held: Decision under review set aside.

The Tribunal accepted the information from the education provider in relation to the applicant's course attendance and found that the applicant had breached condition 8202(3). The Tribunal then considered whether the breach was due to exceptional circumstances beyond the applicant's control as set out in s.137L(1)(b). The Tribunal found that it was unable to determine whether the applicant verbally notified the education provider that she was transferring to another course; however, it decided to give her the benefit of the doubt. It found that as she was enrolled in a new college from shortly after she claimed that she had requested the letter of release. Accordingly, the Tribunal was satisfied that the applicant's breach of condition 8202 was due to exceptional circumstances beyond her control, that is, her attendance at another college. Therefore, the Tribunal found that the cancellation should be revoked.

Other visas

0803068

1 September, 2009, Melbourne

Ms M Cameron, Member

WORKING HOLIDAY (TEMPORARY) VISA – (CLASS TZ) – SUBCLASS 417 – CL.417.211 – SEASONAL WORK – REGIONAL AUSTRALIA – A delegate of the Minister refused to grant the applicant a Subclass 417 visa because she was not satisfied that the applicant had carried out seasonal work in regional Australia within the meaning of cl. 417.211(5) of the Regulations. The applicant claimed he worked as a driver/exploration worker in the mining industry in Western Australia after he was given multiple assurances from Departmental officers that this work was classified as 'seasonal work' within the Regulations. He claimed that at the time he had sought advice from the Department on lodging the visa application; mining had been included as a relevant occupation. The applicant's partner confirmed that she had been present at the Department's offices in Perth on two occasions when the applicant had been assured that work in the mining industry would meet the work requirement for the visa sought. Although they had explored other visa options such as a partner visa, they had found that because the applicant did not hold a substantive visa, he could not be granted a Partner visa while he is in Australia. The applicant claimed that his close family members live in Australia and he has no strong ties to the United Kingdom now. He also claimed that he considered it unfair that he had been refused the visa after he had received multiple assurances from the Department that the work he undertook would meet the requirements for this type of visa.

Held: Decision under review affirmed.

The Tribunal found the applicant to be a credible witness who undertook mining work because he believed it enabled him to meet the criteria for a Working Holiday visa. The Tribunal was satisfied that the applicant had worked in a mining position for more than 3 months while he was the holder of a Working Holiday visa. However, the Tribunal found that, at the time of the visa application, mining was not included in the specification of seasonal work as set out in the relevant instrument. The Tribunal also found that the relevant postcode was not a postcode considered to be in 'regional Australia' as stated in the relevant Gazette Notice. The Tribunal therefore found that the applicant had not carried out seasonal work in regional Australia while he was the holder of his first Working Holiday visa. Accordingly, the Tribunal found that the applicant did not meet the requirements of cl. 417.211(5) of the Regulations and the Tribunal affirmed the decision under review.

0901999

21 August 2009, Sydney

Mr D O'Brien, Principal Member

CULTURAL/SOCIAL (TEMPORARY) (CLASS TE) – SUBCLASS 421 (SPORT) VISA – CL. 421.222 & CL.421.224 – A delegate of the Minister refused the visa application as the delegate found the applicant did not satisfy cl.421.224 as his sponsorship had been withdrawn. The applicant previously held a Subclass 421 visa which ceased and he then applied for a further Subclass 421 visa. His written submission asserted that sponsorship of him by Elouera Tony Mundine Gym (the Gym), was still in force. The applicant claimed he is a professional boxer in the Bantamweight Division and that he is presently ranked 5th in Australia. He claimed he has another 3 or 4 years left in him as a boxer and that he still boxes out of the Gym where he is managed and coached by the Gym Manager. The applicant claimed that his next bout was a supporting bout planned for October and would feature Tony Mundine. The applicant claimed he trained and helped at the Gym which includes training young boxers. He claimed he receives a modest payment for his assistance, that his earnings from competitive boxing are enough to support him, and that a family provides his accommodation. The applicant claimed that he had recently gained accreditation from the Australian Institute of Sport as a Level 1 Boxing Coach. He attended a course run by the AIS, passed a test and is seeking to gain higher level qualifications as a coach. He claimed he enjoys working in the Gym with the young kids in the Redfern area, and that this helps to keep them out of trouble. He confirmed to the Tribunal that he still has the return ticket which he used to travel to Australia. Evidence of the previous sponsorship agreement between the Gym and the applicant were such that it was not abundantly clear the

agreement was still in force but a fresh sponsorship agreement was supplied by the applicant after the Tribunal hearing.

Held: Decision under review set aside.

The Tribunal found the applicant satisfied cl.421.222(2)(a) because he entered as an individual in professional boxing bouts in Australia. It also found he satisfied cl.421.222(2)(b) as he had sufficient money from his professional bouts and his earnings as an assistant at the Gym to support himself. It also found that he received support from the family who accommodated him and he has a return ticket enabling his return to Papua New Guinea. The Tribunal found it was unnecessary to make a finding on whether the applicant might also satisfy cl.421.222(3) on the basis of his appointment through the Gym to assist with training other members of the Gym Manager's team. On the basis of the sponsorship agreement supplied to the Tribunal by the Gym in which the sponsorship obligations are set out, the Tribunal found that the sponsorship requirement in relation to the applicant had been met for the purposes of paragraph (c) of cl.421.224. Accordingly, the Tribunal found the visa applicant satisfied the requirements of cl.421.224 of the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

Albania

0903290

4 August 2009, Melbourne

Ms G Hamilton, Member

ALBANIA – PARTICULAR SOCIAL GROUP – WOMEN IN ALBANIA – PEOPLE TRAFFICKING – The applicant claimed that she was at risk from organised gangs who kidnap women for body parts and prostitution. She claimed that she would have no protection from such gangs as she was not a virgin and she had no male relatives to protect her. She claimed that she had previously been a target for a kidnapping when a car pulled up beside her and her mother and a man jumped out and tried to drag them into the car, but they struggled free. Despite the fact her father then escorted her to work every day, she still saw the men watching her. She claimed that she went to the police but when they went to the route she took to work the kidnappers were not seen. The applicant claimed that many of her friends had suffered similar attempted kidnappings, and that girls disappeared and later reappeared without a kidney, if they were ever heard from again. She claimed that girls are often drugged and sent to other countries to be used as prostitutes in organised brothels. The applicant claimed that she came to Australia on a prospective spouse visa to marry the cousin of her brother in law. She claimed that they had a wedding celebration but no civil marriage took place, which was contrary to her expectations. She lived with her sponsor but they did not marry properly, therefore she claims that she now has no value in the eyes of the community in Albania. The applicant's representative submitted that divorced or rejected women constitute a particular social group in Albania's male-dominated society where marriage is the norm and women are traditionally discriminated against. He claimed that the applicant would be ostracised and refused protection if she were to return. The Tribunal also received a written statement from a former high-ranking policeman in Albania, now living in Australia, commenting on the difficulties Albania faces in providing adequate state protection to potential trafficking victims.

Held: Decision under review set aside.

The Tribunal did not accept that young, single, divorced or separated Albanian women in general faced a real chance of being abducted for the purpose of prostitution. The Tribunal found that although the problem of human trafficking from Albania had been extensively studied, there was an absence of reliable statistics about the incidence of such events in Albania to support the claim that women in general or any particular subset of them face a real chance of being the victim of this crime. The Tribunal had reservations about the claim that the applicant was particularly at risk because she had already been identified and targeted by a criminal gang, and suggested that it seemed a coincidence that the incident occurred just before the applicant was due to come to Australia for the purpose of marriage. However, the Tribunal gave the applicant the benefit of the doubt as she had been able to describe the incident consistently and in detail and because kidnapping was known to be one of the most common methods used by traffickers to move women out of Albania. That being the case, the Tribunal accepted that there was a real chance that the applicant would be targeted for abduction by the same people. The Tribunal found that all available research about trafficking victims from Albania indicated that they very often experienced violence at the hands of their captors or other middle-men. The Tribunal considered that it was not necessary to go further into the applicant's claimed fear of having her organs removed, and found that the country information submitted did not support a claim that the applicant faced a real chance of this happening to her. The Tribunal was therefore satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

China

0903222

5 August 2009, Brisbane

Ms R Johnston, Member

CHINA – PARTICULAR SOCIAL GROUP – FALUN GONG – The applicant claimed to fear persecution in China because of her practice of Falun Gong. She claimed that during 2002 her son, who had encouraged her to practice Falun Gong, was arrested. She claimed that her family home was ransacked, her passport was confiscated and that she was reported to the authorities. The applicant claimed that the police searched her family home a second time and that she was taken to a police station where she was questioned, detained and later released. She claimed that she was seen as a key practitioner and that she was closely monitored and harassed. The applicant claimed that since arriving in Australia she had continued to practice Falun Gong and that she had participated publicly in activities promoting Falun Gong and in calling for an end to the persecution of Falun Gong practitioners. The Tribunal received submissions from the applicant's son outlining their problems with the authorities in China along with submissions from three other people attesting that the applicant is a Falun Gong practitioner in Australia. Two photos of the applicant handing out flyers were also provided.

Held: Decision under review set aside.

The Tribunal accepted that the applicant had engaged in the practice of Falun Gong since 1999 and that she had participated in various Falun Gong related activities, especially in Australia. The Tribunal had reservations about the applicant's ability to obtain a passport given her claim that she was monitored and harassed by the police and local neighbourhood committees because she was suspected and known to practise Falun Gong. The Tribunal noted that independent information indicated that passengers departing China are checked against an alert list, and the fact that the applicant was able to depart China on a passport in her own name suggested that she was not on any alert list or under formal investigation at the time of her departure. However, the Tribunal was satisfied that the applicant's conduct as a long standing Falun Gong practitioner and that her participation in Falun Gong activities in Australia had been engaged in for a purpose other than the purpose of strengthening her claims to be a refugee. The Tribunal accepted that if she were to return to China, the applicant would continue to practise Falun Gong and it noted departmental advice that it was likely that activists who had participated in protest activities against the Chinese government, including Falun Gong, would be monitored and questioned or detained on their return to China. Accordingly, given the applicant's activities in Australia, the Tribunal accepted that it was likely that she may be known to the Chinese government as a Falun Gong practitioner. The Tribunal accepted that the applicant may be imprisoned, tortured or be required to undertake re-education. Accordingly, the Tribunal found that the persecution that the applicant feared involved 'serious harm' and that the applicant's religion or membership of a particular social group, Falun Gong, was an essential and significant reason for the persecution which she feared. Therefore, the Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

0903266

18 September 2009, Sydney

Mr R Derewlany, Member

CHINA – PARTICULAR SOCIAL GROUP – PEOPLE WHO HAD BREACHED THE ONE CHILD POLICY – The applicant claimed to fear persecution by the Chinese government for breaching the country's one child policy. The applicant has 3 daughters and they reside with the applicant's wife in China. The applicant claimed he had been mistreated by the Chinese government for breaching the country's one-child policy and he was fined RMB 10,000 after his second daughter was born, and RMB 50,000 after his third daughter was born. He claimed he had to pay a fine of RMB 50,000 to get his daughter included in the household registration. He had to ask friends and relatives for money and it took him 3 years to pay the fine by instalments and a further 5 years to repay the money to his friends and relatives. This left him in poverty. The applicant claimed his financial situation was further worsened when his land was confiscated by the local government approximately 5 years ago and he lost an important source of income. He claimed there were arguments with officials about the amount of compensation he received. He claimed he was

persecuted for reason of membership of a particular social group, being people who had breached the one-child policy in China.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant has three daughters who reside with his wife in China. The Tribunal considered that the applicant's claim that he was fined RMB 10,000 in respect of the birth of his second child and RMB 50,000 in respect of his third is not consistent with the independent evidence regarding family planning laws in Guangdong province in the early 1990's which indicate that the regulations were administered flexibly and enforced with a very lax approach at the local authority level. Given the evidence, the Tribunal considered the applicant had inflated the amounts he was fined. The Tribunal considered the applicant's problematic evidence at the DIAC interview and to the Tribunal was an indication that he and his wife had minimal dealings with officials in relation to the breach of the family planning regulations, and that they were of no real interest to the authorities beyond the issue of the payment of the financial penalty. The Tribunal found that the applicant appeared not to have experienced any problems with the authorities after paying the fines in full in 1995. The Tribunal concluded that the applicant had made these claims in an attempt to strengthen his profile as someone who had ongoing problems with the authorities in respect of his breach of family planning regulations, and who came to the adverse attention of the authorities as a result. The Tribunal considered the applicant's evidence on this issue reflected adversely on his credibility. The Tribunal also considered the applicant had given inconsistent evidence about paying off the debts he incurred in a further attempt to strengthen his claims. The Tribunal did not accept that the authorities targeted the applicant and imposed the fines in an unduly harsh or discriminatory manner whether for a Convention reason, including membership of a particular social group, or otherwise. Accordingly, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

Ethiopia

0905227

8 September 2009, Melbourne

M Urquhart, Member

ETHIOPIA – IMPUTED POLITICAL OPINION – PARTICULAR SOCIAL GROUP – SINGLE WOMEN IN ETHIOPIA – The applicant claimed that she would be persecuted because of her political activities and beliefs if she were to return to Ethiopia. The applicant claimed that around 1980 her parents arranged for her to marry; she and her husband had a daughter and they divorced after about two years. She claimed that in about 1987 she decided she needed to make a new start so her father arranged to help her to find employment in Saudi Arabia through his business contacts. Her daughter remained in Ethiopia with her father. The applicant moved to Saudi Arabia to work as a maid where she remained for 22 years. During this time, she claimed to have suffered continual physical, verbal and sexual abuse at the hands of her employers. Also, she claimed that she was not always paid, that she was made to sleep on the floor and that her employers forced her to have sex with them which resulted in her having many abortions and one daughter who she took to Ethiopia to live with her friend. She claimed that her family was not aware of this child. During her time in Saudi Arabia, she visited Ethiopia regularly. The applicant claimed that if she is forced to return to Saudi Arabia she would continue to be subjected to this treatment because she is a foreigner and a single woman. The applicant claimed to fear returning to Ethiopia as it would mean facing severe human rights abuses as a single woman in Ethiopia. She feared being forced to return to work in Saudi Arabia. The applicant further claimed that she was a strong supporter of the Ethiopian opposition party, Kinijit. She feared persecution in Ethiopia on the basis of her political opinion or imputed political opinion, because of the political activities of her family. In relation to her political profile, the applicant claimed that in 2005, shortly before elections were held, her brothers, who were members of the Kinijit party, protested in support of the opposition parties and were arrested and imprisoned for two and a half years. The applicant told the Tribunal they were released in 2007 because of an amnesty celebrating the Ethiopian millennium.

Held: Decision under review set aside.

The Tribunal found that although the applicant had a work visa in Saudi Arabia with one year remaining before expiry, independent country information indicated that domestic workers lack proper legal protection and supported a finding that the applicant could not avail herself of any protection in that third country. Furthermore, the right she had to enter Saudi Arabia was entirely dependent on her employer and was limited in time. For these reasons the Tribunal found that the applicant did not have effective protection in a safe third country. The Tribunal found that the applicant had originally claimed to be a member of the Kinijit party; however she later changed this claim stating that she was a strong supporter and she had attended one protest rally with her brothers and sisters where she had been arrested. She claimed she was enraged by the sufferings her brothers had endured in prison some two and a half years earlier. For these reasons and on the applicant's own evidence, the Tribunal found that the applicant was not a member of the Kinijit party. The Tribunal found that the applicant was not arrested and interrogated by the authorities as claimed. It followed that the Tribunal found she was not sexually abused during her claimed incarceration. The Tribunal also found no evidence of any political activity on the part of her siblings or other family members that would impute the applicant with a similar profile particularly as the applicant had spent very little time in Ethiopia since working in Saudi Arabia.

The applicant claimed that she feared returning to Ethiopia because her family may discover she has a daughter living in Ethiopia which they were not aware of and that they would disown her if they found out. She claimed she would not be accepted by her family or society because of this. The Tribunal accepted that a particular social group exists which could be described as "Ethiopian single women". Country information supported the view that Ethiopian single women are exploited. The Tribunal accepted the applicant's explanation that she felt she had no other choice and that she "was trapped in this world with no escape". The Tribunal considered the applicant's likely future conduct should she return to Ethiopia. It found that her work outside Ethiopia was relevant and that she has, in the past, been exploited or suffered serious harm. The applicant has no other means of support other than to work for a living. The Tribunal accepted the applicant's evidence that if she returned to Ethiopia she would again be forced to seek work and would then be subject to the human rights abuses in Ethiopia as previously outlined. The Tribunal was satisfied that the applicant faces a real chance of persecution and serious harm in the reasonably foreseeable future if she were to return to Ethiopia for reasons of being a member of a particular social group "single women in Ethiopia". Accordingly, the Tribunal was satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

India

0808830

8 September 2009, Sydney

Ms M Ford, Member

INDIA – PARTICULAR SOCIAL GROUP – FORMER ASHRAM MEMBERS – The applicant claimed that he and his wife were former members of the core group of the guru known as Asa Ram Bapu. He claimed that after the guru was publicly linked with the murder of two children who were involved in the group, he and his wife became disillusioned and decided to leave. He claimed that on two separate occasions he was assaulted in his shop by groups of men who were angry that he had left the group, and that these people were fearful that the applicant would reveal information about the murders and other harmful acts being perpetrated on children involved with the Ashram, including hypnotisation, cult activities and the use of drugs. The applicant claimed that a short time later a bomb went off directly opposite his business and that, as a result, they fled their home for a period of weeks before coming to Australia.

Held: Decision under review affirmed.

The Tribunal accepted the applicant's claims that he and his wife worked at one of Guru Bapu's ashrams and that he believed the ashram leader Guru Bapu, his son and others were engaged in experiments on children, including the administration of opium to children; mesmerizing and hypnotizing children and engaging in evil cult activities. Based on his evidence at the hearing and independent information from other sources, the Tribunal accepted the applicant's claims that two children from the ashram had been found dead and their organs were missing from their bodies. The Tribunal accepted that the applicant left the ashram because of the death of the two children and the associated activities. It also accepted his claim that after he and his wife left the ashram, followers of the ashram came to his shop on two separate occasions and assaulted him

and threatened that he and his wife would be killed if he did not return to the ashram. The Tribunal accepted the applicant's claim that he was frightened by the reports of the bomb blasts near his business, but it found that while it was possible the applicant could suffer serious harm in any future terrorist attack, such attacks would be directed indiscriminately at the general public. They would not be directed at a particular group to which the applicant belongs or because of an attribute or opinion that the applicants had or that may be attributed to them. The Tribunal accepted that the applicant had a well founded fear of persecution for a Convention reason, his political opinions. It accepted that the applicant opposed the activities of Guru Bapu, his son and the ashram. It also found that Guru Bapu and his son have political connections capable of providing them with protection. However, the Tribunal found that the persecution to which the applicants had been subjected was localised to the region where they lived and worked in India. The Tribunal did not accept the applicant's claims that if he goes back to India he will be killed; "the followers of the ashram accessed the applicant twice and they did not kill him". The Tribunal found that it was reasonable for the visa applicant and his wife to relocate within India and that there was no real chance that they would experience harm in the future on relocation. Accordingly, the Tribunal was not satisfied that the applicant had a genuine fear of persecution for a Convention reason.

0900173

17 August 2009, Melbourne

Ms L Kirk, Senior Member

INDIA – RELIGION – CHRISTIAN – The applicant claimed to fear persecution for reason of his conversion to Christianity, his involvement with church activities and his welfare work with the St Vincent de Paul Society (SVDPS). He claimed to have been threatened by people connected with militant Hindu groups, particularly Shiv Sena and Bajrang Dal, and to have attracted their attention when working with the SVDPS in 2003 as they considered him an enemy because of his conversion to Christianity and his spreading what they considered to be, false propaganda. The applicant claimed that he was verbally threatened by members of these groups on two occasions, and that he was physically assaulted once. The applicant claimed that he was stopped on his scooter on his way home from a Good Friday procession, he was beaten with steel rods and hockey sticks, and that his scooter was set on fire. He reported the attack to the police but his complaint was dismissed. He claimed that the police do not intervene in incidents involving the Bajrang Dal and Shiv Sena as these groups are powerful. The next day, the applicant moved to Chandigarh, and then to Calcutta. He claimed that his family continued to receive threats from Shiv Sena and Bajrang Dal while he was away. The applicant visited Australia for World Youth Day and, on his return, his father advised that it was not safe for him to stay in India. The applicant subsequently returned to Australia. He claimed that although he could relocate to a predominantly Christian area of India and start a business, Hindu groups would find and threaten him again.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant is Christian, that he had been involved in Church activities and that he was an active member of the SVDPS. The Tribunal accepted the applicant's claim that he was subjected to threats and physical attack by members of Shiv Sena and Bajrang Dal, and that his family had received threats from these groups. It found that his claims were consistent with independent information about the situation for Christians in the Punjab, and it therefore accepted that the applicant had been subject to serious harm by non-state actors for reason of his religion in the past. The Tribunal was thus satisfied that the applicant faced a real chance of serious harm from extremist Hindu groups in the Punjab. The Tribunal further found that the applicant's claim of police inaction was supported by independent information that Christian victims of sectarian violence do not necessarily receive any assistance or protection from police or authorities, and it accepted that if the applicant were to return to the Punjab and encounter further persecution, state protection would not be available to him there. However, the Tribunal did not accept that the persecution of Christians was endemic throughout India. It found that independent information indicated that the applicant could safely live in India by relocating to another area. This information was supported by the applicant's own evidence about when he moved away from the Punjab. The Tribunal did not accept that members of the Bajrang Dal or Shiv Sena would pursue the applicant outside the Punjab in the future, and found that the serious harm to which he was subjected was localised in his home region. The Tribunal found that the applicant could safely relocate to an area of India where there are sizeable Christian communities without being subjected to serious harm. The Tribunal noted further independent information indicating that police inaction over religiously motivated attacks is most prevalent in states where the BJP holds power. It did not accept that the applicant could not seek and receive police protection if he were to re-locate to

another part of India where the BJP were not in power. The Tribunal was thus not satisfied on the evidence before it that the applicant held a well-founded fear of persecution for the Convention reason of his religion, or for any other Convention reason.

Indonesia

0903273

4 August 2009, Sydney

Mr R Inder, Member

INDONESIA – ARRANGED MARRIAGE – MUSLIM – CHRISTIAN FEMALE – The applicant claimed to fear persecution because there was a tradition of arranged marriages in her family and if she returned to Indonesia, she claimed her family would force her to marry and no consideration would be given to her feelings. She claimed she did not want to marry the man who was chosen by her parents. The applicant claimed that she was raised by her father, who was a Christian, but her mother was a Muslim, which was a faith she had not followed as she believed it “devalues” women generally. She advised that she was currently obtaining a divorce from her Australian husband and she would then become engaged to another Australian whom she loves. If she was forced to return to Indonesia, she claimed that her family may harm or mistreat her as they were extremely disappointed in her and embarrassed by her “freedom” in Australia. She claimed she would have no rights whatsoever as a female in Indonesia as she would be forced into an arranged marriage and this would be an abuse of her basic human rights. She claimed her health and safety would be at risk and that the authorities would not assist her, as arranged marriages are common in Indonesia and women’s rights are generally diminished. The applicant claimed she had no money to support herself or pay rent, and it would be hard for a single woman of her age to find a job. She claimed she wanted a future with her fiancé who had an illness and required her care, and that they were in a genuine and loving relationship.

Held: Decision under review affirmed.

The Tribunal did not accept that the applicant, who was a well educated person with a good career and who lived independently, could be forced to marry someone chosen by her mother, or be forced to give up her religion and comply with Islamic rules which may impinge on her safety and freedom. The Tribunal accepted that the applicant’s mother may want her to marry a Muslim and that she would like to continue receiving support from the applicant; however, it did not accept that the applicant could be forced to marry someone or that she would be subjected to domestic violence, rape, or a polygamous relationship. The Tribunal did not accept that the applicant had a well founded fear of persecution on the basis that she believed that the Muslim religion “devalues” women generally and that her security, lifestyle, and liberty would be put at risk and she would be forced to change her religion, lose her rights, and be exposed to grievous bodily harm. The Tribunal found that, in the event that at some stage in the future she freely chose to marry a Muslim man, the fact that he may or may not have another wife did not mean that the applicant had a well founded fear of serious harm amounting to persecution for a Convention reason. Having accepted that the applicant had lived away from her mother for 10 years prior to coming to Australia, the Tribunal was satisfied that, if for any reason she did not wish to return to stay with or near her mother, it would be reasonable for the applicant to return to Jakarta or elsewhere in Indonesia without there being a real chance that she would be subject to serious harm amounting to persecution for a Convention reason. Accordingly, the Tribunal was not satisfied that the applicant was a person to whom Australia has protection obligations under the Refugees Convention.

Iran

0903537

31 July 2009, Brisbane

Mr D Smyth, Member

IRAN – PARTICULAR SOCIAL GROUP – IRANIAN MUSLIM WOMEN – POLITICAL OPINION – OPPOSITION TO IRANIAN GOVERNMENT – The applicant claimed to fear harm from state authorities and religious police on the basis that she belongs to the particular social group “Iranian Muslim women”. She

claimed to be Muslim by religion, but not devout. She claimed to find living in Iran as a woman to be intolerable as it is a society that actively oppresses women. The applicant claimed to have faced discrimination in employment and that she waited 13 months to obtain an internship because others in line behind her who had lost fathers or brothers in the Iraq/Iran war were given preference. After the internship there were full time vacancies; however she claimed she was informed they would only be available to women who had lost family in the Iraq/Iran war or to women who wore fuller cover than the applicant. The applicant and her husband claimed that they had been targeted by the religious police on two occasions because of the laws against unmarried members of the opposite sex socialising. The applicant claimed that the policemen were very aggressive, swore at her and hit her hand in order to search her handbag. She claimed that, on both occasions, they paid bribes in order to be released. The applicant also claimed to have been asked by the religious police to adjust her scarf or to remove makeup on several occasions. The applicant referred to a number of sections of the Iranian law and Penal Code as evidence of women lacking civil and human rights. The applicant stated that she had wanted to be involved in women's rights at university but found that it was dangerous. She claimed a friend disappeared after becoming involved in women's rights. The applicant claimed that she and her husband were deeply disturbed by the problems in Iran in the wake of the presidential elections. She claimed that they had attended protests in Australia and photos and videos of them were on the internet. The applicant claimed to be involved in community groups addressing women's issues and rights. The applicant stated that if she wanted to oppose the authorities, there would be trouble for her and her family. If she could not say something, she would have to leave; she could not tolerate it. The applicant submitted a CD containing video footage and photographs of protest marches showing her and her husband.

Held: Decision under review set aside.

The Tribunal acknowledged independent information indicating that in Iran job-seekers' abilities are often ignored in favour of a test of loyalty to the regime. It accepted that the applicant had suffered discrimination in this regard; however it did not accept that this was for the reason of her gender. The Tribunal was not satisfied that the discrimination suffered by the applicant for not wearing the chador constituted persecution. While it might be considered harm based on a perception of lack of adherence to Islam, the Tribunal found that the applicant was supported by her husband while she waited for her internship and that she did not suffer significant economic hardship that threatened her capacity to subsist. The Tribunal accepted that there were two occasions when the applicant and her husband were questioned about being together in public; however they were never physically mistreated, fined or imprisoned. The Tribunal further found that the applicant had not been directly affected by the discriminatory legal provisions to which she had referred. However, regardless of whether the applicant had suffered harm amounting to persecution in the *past*, the Tribunal accepted that the applicant *now* has a well-founded fear of suffering Convention-related persecution in Iran. The Tribunal accepted that the applicant feels strongly about women's rights issues in Iran. The Tribunal also accepted that the applicant and her husband had been affected by the Iranian regime's treatment of protestors in the wake of recent elections. It accepted that they had participated in protest activities opposing the Iranian government and that coverage of the protests is publicly available. The Tribunal found a number of relevant film clips on the internet in which the applicant and her husband were clearly identifiable. The Tribunal accepted independent information that Iranian authorities take some interest in the activities of their citizens abroad. The Tribunal considered that the likelihood that the applicant would be subjected to scrutiny if she were to return to Iran was greatly increased in the context of heightened tensions post-elections. The Tribunal could not dismiss as remote the chance that Iranian authorities would take an interest in the applicant and her involvement in anti-government protests in Australia. Noting the harsh response to recent protest activity in Iran and to women's rights activities, the Tribunal found that there was a real chance the applicant would suffer serious harm amounting to persecution for reason of her political opinion. The Tribunal further found that even if the applicant did not become known to the Iranian authorities, there was a real chance she would suffer Convention related persecution for reason of her views in relation to women's rights in Iran. Thus, the Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Convention.

Korea, Republic of

0903995

26 August 2009, Sydney

Ms G Cullen, Member

REPUBLIC OF KOREA – RELIGION – CHRISTIAN – SHINCHUNJI SECT – The applicant claimed to fear persecution from members of the Shinchunji Christian sect after he left the religion, which has 45,000 members in Korea. He then criticised it on the internet and to media reporters. In the visa application, the applicant claimed that he faced difficulties in Korea because he had worked for a seminary school of Shinchunji for seven years and he had witnessed many incidents of injustice, pseudo-religion and immoral activities. He claimed that most members knew of him because of his work which brought him into contact with the group's leader whom, he claimed, has connections with the government and politicians. He claimed his family were tortured by Shinchunji believers after it became known he was interviewed by a newspaper. At the Tribunal hearing the applicant claimed that he had worked at a different occupation over the previous 6 years. He also stated that his family members had not been attacked and confined by Shinchunji members as was stated in the visa application. At the Tribunal hearing, the applicant claimed that followers came to his house three or four times a week and he was subject to verbal abuse and a bit of pushing and shoving. He claimed that Shinchunji followers said his whole household and family was possessed by Satan and that only Shinchunji could offer salvation. He claimed that he had been harassed mentally, which was just as important as physical ill-treatment. He claimed the article he wrote was deleted from the internet after 15 days because it criticised religion. The applicant failed to provide a copy of the article to either the Department or the Tribunal. He claimed that the Korean authorities did not protect him and his family and that they failed to enforce the witness protection program.

Held: Decision under review affirmed

The Tribunal did not accept that the applicant's claim that he had suffered harm in Korea as it found his testimony to be internally inconsistent, amounting to fabrication. On the basis of the inconsistencies between his initial protection visa application and the evidence given at the Tribunal hearing, the Tribunal did not find the applicant to be credible or a witness of truth. It did not accept that he or his family were targeted by Shinchunji followers in the manner claimed because he left the religion or because he criticised it in the media. It also did not accept that he or his family were threatened, tortured physically or mentally, confined, kidnapped, or harassed. Further, the Tribunal did not accept that the authorities in Korea refused to provide assistance to the applicant, including failing to enforce the witness protection program. The Tribunal accepted that some former members of Shinchunji with a certain profile may face difficulties when they leave the religion; however, based on the internal inconsistencies of the applicant's evidence, the Tribunal did not accept that the applicant ever faced any difficulties from Shinchunji followers or that he was a person of interest to Shinchunji before he left Korea. Consequently, it did not accept that he would be targeted in the reasonably foreseeable future by Shinchunji followers. The Tribunal did not accept there was a real chance of the applicant being persecuted if he returned to Korea, or that he held a well-founded fear of persecution within the meaning of the Convention. Accordingly, the Tribunal affirmed the decision under review.

Morocco

0904472

24 September 2009, Sydney

Ms D Barnetson, Member

MOROCCO – POLITICAL OPINION — JAMMAAT AL-ADL WAL-ISHAN – STATE PROTECTION – The applicant claimed that while at school he was influenced by a teacher to become involved in Jammaat Al-Adl Wal-Ishan, a movement formed in 1981 with reformist ideas based on Islamic thought, and by the time he finished school he had become a prominent member. He claimed that after starting his own business he used to talk to his clients about the ideas and concepts of the movement and he was able to recruit a high number of members. He stated that he used to distribute flyers at various protests and events.

The applicant claimed that he was watched and then detained for six days by the authorities who then closed his business down. After the declaration by the movement that Morocco should become a republic, he claimed that members came under heavy surveillance and that he was detained on numerous occasions for several days at a time for interrogation. He claimed that whenever the King visited his region or held events, he would be detained, beaten or interrogated so that he could not plot against him. The applicant claimed that he was afraid he would be arrested when the King visited his region, so he left town and stayed in the countryside with an aunt before leaving for Australia. He claimed that a relative knew a high ranking official at the airport who gave his departure date so he could leave without problems. He said that he had become known and wanted by the authorities and he believed he had to get out of the country or he would spend the rest of his life in and out of prison and unable to settle down or establish a career and own a business.

Held: Decision under review set aside.

The Tribunal considered that the applicant's role was limited to distributing pamphlets and recruiting members through his business. It found this involvement had continued for 14 years before his departure to Australia, although given his claims, the applicant's apparent knowledge of Jammaat Al-Adl Wal-Ishan, its ideals, philosophy and activities did not appear to reflect the degree of knowledge which a person with this lengthy active involvement would be expected to have. The Tribunal had concerns in relation to the applicant's evidence; however, it was satisfied that the applicant's evidence about the movement had been consistent, and it had no reason to question the credibility of the applicant. The Tribunal was of the view that the applicant's relative's involvement in his departure without problems was speculative; however, it was possible that this intervention took place, and this would explain the applicant's ability to leave Morocco without hindrance by the authorities. The Tribunal found that it could not be satisfied that the applicant was not a member of Jammaat Al-Adl Wal-Ishan, and that the applicant's evidence was consistent with the independent information before it in relation to the group. This information indicated that members of the movement suffer serious harm because of political opinion, and this harm is systematic and discriminatory, which amounts to persecution for Convention purposes. The Tribunal then considered whether the applicant could be given adequate state protection by relocating to another part of Morocco. However, independent information indicated that the harm to members of Jammaat Al-Adl Wal-Ishan occurred throughout Morocco and that it was not reasonable or safe for him to relocate. Accordingly, the Tribunal found that the applicant had a well founded fear of persecution by the authorities in Morocco for reasons of political opinion.

Pakistan

0902754

31 July 2009, Melbourne

G Haddad, Member

PAKISTAN – POLITICAL OPINION – PARTICULAR SOCIAL GROUP – HONOUR KILLINGS – The applicant claimed to have held a position in a branch of the Pakistan Muslim League (Q) (PML-Q) and, as a result of his political activities, he claimed that the police have issued a warrant for his arrest. The applicant claimed he went into hiding during an election and he departed from Lahore rather than Islamabad. He also claimed that in late 2008, while he was in Australia, members of the Pakistan People's Party (PPP) went to his family home and intimidated and assaulted his brother causing him injury. He claimed they demanded that his family ask him to return to Pakistan. His family left the family home and relocated. He further claimed the PPP found the applicant's family and shot his brother in the foot. His brother reported the incident to the police but the police took no action.

The applicant further claimed that he was married in 2006 without their parents' consent as he is a Sunni and his wife belonged to a different Muslim Sect (Al Hadiiths). He claimed that in their parents' eyes the marriage would not be acceptable due to religious differences, honour, reputation and wealth. He claimed that his estranged wife's family would kill him if he returned to Pakistan as families arrange marriages in a way to ensure the inheritance and any property stays within the family. He claimed that he left Pakistan because he wished to join his wife in Australia. He claimed that on his arrival she denied that they were married and she withdrew her support of his visa application. The applicant claims that he is unable to return to Pakistan because his wife took all his savings and he left Pakistan on the assumption that he had a happy marriage and plans to settle in another country. He sold his business and converted all of his assets into cash which he gave to his wife. He claimed that he has effectively burnt his bridges and he would not

be able to re-establish himself economically. The applicant stated that he understood that he would receive an unfavourable decision and that the purpose of the application was to obtain Ministerial discretion at the later stage.

Held: Decision under review affirmed.

The Tribunal noted that the applicant's political claim had developed significantly from the time of the visa application to the time of review. He originally claimed that he "used to be a member" of the PML-Q and referred to it as a factor which "will increase the chance of" being persecuted. At review, his claim developed to being the holder of a "prominent leadership position" of a branch of the PML-Q, having organized a political rally, being of interest to the police, hiding and traveling only at night and a warrant having been issued for his arrest. Having considered all of the evidence, the Tribunal found that the applicant had fabricated his claim for the purpose of the visa application. The Tribunal accepted that the applicant was a member of the PML-Q however it did not accept that he had suffered any harm in the past for reasons of his political opinion and/or activities. Based on the evidence and on independent information, the Tribunal was satisfied that the applicant does not face a real chance of persecution in the reasonably foreseeable future for political reasons or for membership of the PML-Q if he were to return to Pakistan.

The next question for the Tribunal was whether the applicant was a member of a particular social group and whether he would suffer persecution as a member of this group. The Tribunal found that it was implausible that the applicant's wife, being a young female Muslim from a family belonging to the strict sect of *Ahle Hadith*, would be able to leave her home to a foreign country without any involvement or oversight from her family if they were of the belief that she was unmarried and living at home with her family. The Tribunal did not accept as credible or plausible that the applicant's wife's family was unaware or did not agree to the marriage and that his wife was able to leave her family to travel abroad without involvement from her father or brother. The Tribunal was satisfied that the applicant did not face a real chance of persecution or harm from his wife's family because of the honour killing system and therefore it found he is not a member of the particular social group relating to 'honour killings' and that he does not face a real chance of persecution in the reasonably foreseeable future. The Tribunal considered the applicant's claims individually and cumulatively and was satisfied that the applicant did not have a well-founded fear of persecution for a Convention reason.

Sri Lanka

0905553

16 September 2009

Ms M Cameron, Melbourne

SRI LANKA – IMPUTED POLITICAL OPINION – The applicant claimed that her niece, who was in her care, was recruited by the Liberation Tigers of Tamil Eelam (LTTE) during the 1980's. She was subsequently injured in the war and returned home. When she refused to rejoin the LTTE she was murdered by them. Subsequently, the applicant spoke out in opposition to the LTTE and she became fearful for her own life. She moved to Colombo and later rented a room in her house to two Tamil boys. In August 2005 Minister Lakshaman Kathirgamar was assassinated and the applicant's two tenants did not return home. The LTTE was suspected and Colombo was under tight security. The applicant claimed her home was searched by Sri Lankan security forces and she was questioned about the boys because they were suspected LTTE members. The police regularly returned to the applicant's home and on several occasions took her to the police station to identify the boys. They accused her of providing shelter to LTTE members and of lying to the police. She claimed she was detained overnight and was threatened that she could be killed. She was thrown against a wall and repeatedly hit with a rifle butt which caused ongoing shoulder pain and immobility. The applicant claimed to fear returning to Sri Lanka because she may be harmed by the Sri Lankan security forces due to imputed sympathy for the LTTE, and that she may be harmed or killed by the LTTE if she does not comply with their demands. The applicant also claimed that her children had been repeatedly questioned by the Sri Lankan authorities and in late 2006 her son-in-law was arrested, interrogated and beaten.

Held: Decision under review set aside.

Although the Tribunal noted some inconsistencies in the applicant's evidence, the Tribunal gave limited weight to this when assessing the evidence in its entirety. Overall, it found the applicant's evidence was credible and consistent with the country information available to it. The Tribunal accepted evidence that three members of the applicant's family had been targeted because the security forces suspected the applicant of being an LTTE supporter. The Tribunal considered these attacks against the applicant and her family were politically motivated and involved the imputation of a political opinion as an LTTE supporter to the applicant. The Tribunal therefore found that the applicant was targeted by the authorities in the past for the essential and significant reason of her imputed political opinion. On the basis of country information, the Tribunal found that Tamils are at risk of persecution by government and non-government groups in Sri Lanka. The UNHCR Eligibility Guidelines of April 2009 unequivocally indicate that Tamils in Sri Lanka are at serious risk of harm because of their ethnicity and because of political opinions imputed to them. The Tribunal found that the applicant's fears about what might happen to her in the future are well-founded. As the applicant fears persecution from government security forces, the Tribunal found that the applicant would not be afforded adequate state protection from the harm she fears. She would also be unable to relocate elsewhere in Sri Lanka. On this basis, the Tribunal was satisfied that the applicant's ethnicity and imputed political opinion are the essential and significant reasons for the applicant's claim of fear of persecution and that the persecution feared, including arrest, detention and physical abuse by the Sri Lankan security forces, would involve serious harm to the applicant and would amount to systematic and discriminatory conduct. Accordingly, the Tribunal was satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

HIGH COURT JUDGMENTS

MIAC v SZJGV

MIAC v SZJXO

[2009] HCA 40

High Court of Australia, French CJ, Hayne, Crennan, Kiefel & Bell JJ, S577/2008 & S578/2008, 30 September 2009

This judgment concerned a Minister's appeal from a judgment of the Full Federal Court that upheld an appeal from two Federal Magistrates Court judgments dismissing applications for judicial review of decisions of the Refugee Review Tribunal (the Tribunal) that the respondents were not persons to whom Australia had protection obligations. The matters were considered together as they involved the proper construction of s.91R(3) of the *Migration Act* 1958 (the Act).

In *SZJGV*, the Tribunal determined that under s.91R(3) it should disregard the respondent's Falun Gong related activities in Australia. It went on to list additional reasons it had had regard to in rejecting his claim that he was a Falun Gong practitioner in China, including "his recent attempts to construct a profile of a Falun Gong practitioner for himself".

In *SZJXO*, the Tribunal determined that under s.91R(3) it was required to disregard the respondent's involvement with Falun Gong in Australia. It went on to state that, given its findings about the nature and motives for his contacts with Falun Gong in Australia, it was not satisfied that there was any reason to believe he would become a Falun Gong practitioner if he returned to China.

The respondents had contended before the Full Federal Court that, in each case, the Tribunal had taken the respondent's conduct in Australia into account in determining that the respondent was not a refugee, notwithstanding the failure of the respondent to satisfy it that the conduct was engaged in for a purpose other than enhancing the respondent's claim to be a refugee. The Full Federal Court held that the Tribunal had erred by taking into account, adversely to them, and contrary to s.91R(3) of the Act, conduct in which they had engaged in Australia.

The question posed by the appeals was whether s.91R(3) operates to prevent a decision-maker drawing upon evidence about conduct engaged in by an applicant for a protection visa, since their arrival in Australia, and views formed by the decision-maker about the reason why that person engaged in the conduct, to make findings adverse to that person's claims to refugee status.

Held: *per French CJ, Bell, Crennan & Kiefel JJ (Hayne J dissenting)*, appeal allowed.

per French CJ, Bell, Crennan & Kiefel JJ (Hayne J dissenting):

- (i) On its proper construction, s.91R(3) does not require a person's engagement in the relevant conduct, and the reason for it, to be disregarded by a decision-maker for all purposes in connection with the determination of an application for a protection visa.

per curiam:

- (ii) The evident intent of s.91R(3) is to ensure that an applicant for a protection visa in seeking to demonstrate a well-founded fear of persecution within the meaning of Art 1A(2) cannot place any reliance upon, nor gain any advantage from conduct engaged in within Australia for the purpose of strengthening his or her claim to meet the criteria for classification as a refugee.
- (iii) Section 91R(3) requires that conduct, which has as its *sole* purpose the creation of a claim to a well-founded fear of persecution, should not be taken into account. Where it is accepted that a person had more than one reason for engaging in the conduct they will satisfy the requirement of s.91R(3)(b).

per French CJ, Bell J:

- (iv) A construction of s.91R(3) which reads the term "whether" as "that": indicating only processes of reasoning leading to a favourable determination, corrects what would be an obvious drafting error were "whether" to be construed according to its ordinary and natural meaning. On this construction, s.91R(3)(a) hypothesises the existence of a chain of reasoning leading to a determination in favour of the applicant where that determination is based in whole or in part upon inferences drawn from conduct engaged in by the person in Australia. The command in s.91R(3) therefore requires that the decision-maker not apply any such chain of reasoning unless the condition in s.91R(3)(b) is satisfied with respect to the relevant conduct. That is the correct construction. It meets the purpose of the sub-section and avoids absurd results.
- (v) Neither the purpose of s.91R(3) nor Australia's obligations under the Refugees Convention require that such conduct be disregarded where it is adverse to an applicant's credibility. Such a result would be irrational. A construction of s.91R(3) to avoid that result may properly encompass a departure from the literal or natural and ordinary meaning of the text. If the language be so intractable that it requires a word or words to be given a meaning necessary to serve the evident purpose of the provision, then such a course may be permissible as a realistic solution to the difficulty.

per Crennan & Kiefel JJ:

- (vi) It is necessary to the proper operation of s.91R(3) that when a decision-maker has found that the sole motive of the person in engaging in the conduct was to strengthen the claim, another question, concerning its evidentiary effect, be addressed. If it is determined that evidence of the conduct would strengthen the person's claim, it is to be disregarded, consistent with the objective of s.91R(3); if it would not strengthen the claim, it may be taken into account.
- (vii) It is essential that the object of s.91R(3) and the mischief it was intended to remedy be taken into account in construing it. The Full Court referred to that object but did not take it into account, with the result that its operation is wider than can be seen as necessary or intended. The object of s.91R(3) requires that the section be read more narrowly. It should not be read as requiring evidence of a person's conduct in Australia, or that person's motive for that conduct, to be disregarded for any purpose in connection with the determination of their application for a protection visa. Evidence of that conduct and findings about motive may be applied to discredit the applicant's claim.

per Hayne J (dissenting):

- (viii) The language of s.91R(3) is intractable. It is not possible to read the language as permitting regard to be had to conduct in Australia, engaged in for the sole purpose of strengthening a claim to a protection visa, if, or to the extent that, it is conduct that shows or tends to show the claim should not be accepted. It is neither capricious nor irrational to disregard certain matters whether they would work for or against the visa applicant. It is neither absurd nor irrational to direct the mind of the decision-maker principally to what the visa applicant did outside Australia. Absent demonstration

that reading the sub-section as it is written leads to capricious or irrational results there can be no basis for a submission that the words of the sub-section should be recast.

FEDERAL COURT JUDGMENTS

Lafu v MIAC

[2009] FCAFC 140

Federal Court of Australia, Lindgren, Rares and Foster JJ, NSD 765 of 2009, 9 October 2009

The applicant, a New Zealand citizen, sought judicial review of a decision by the Administrative Appeals Tribunal (the Tribunal) to affirm a decision of a delegate to cancel his Subclass 444 (Special Category) visa under s.501 of the *Migration Act* 1958 (the Act).

The delegate cancelled the applicant's visa under s.501(2) after finding that he did not pass the character test because he had a substantial criminal record by reason of having been sentenced to a term of imprisonment of twelve months or more.

The issue in question before the primary judge was whether the Tribunal failed to genuinely take into account the question of general deterrence as required by Ministerial Direction No.21 (entitled "Visa refusal and cancellation under section 501 of the *Migration Act* 1958"), made under s.499 of the Act, in deciding whether the Tribunal should exercise its discretion to set aside or affirm the decision to cancel the applicant's visa. The Tribunal referred to the making of the Ministerial Direction and under the heading, "Application of the Law and Findings of Fact", identified the considerations made relevant by the Ministerial Direction, including general deterrence. The Tribunal then made a number of general statements of principle about deterrence and how it is to be taken into account. The same form of words had been used by the same Tribunal member in a different decision, with one addition. The primary judge found that the Tribunal's observations on general deterrence had to be read in light of its preceding findings of fact, concluding that the issue of general deterrence was evidently in the Tribunal's mind throughout the assessment. The same issue was considered by the Full Court.

Held: AAT decision be set aside and remitted for reconsideration.

- (i) The Tribunal did not give real consideration to the factor of general deterrence as it related to the individual circumstances of the applicant's case, as required under the s.499 direction.
- (ii) The Tribunal deliberately turned its mind to the requirement that it consider a question of general deterrence, however, those paragraphs in the statement of reasons show no engagement with the question of general deterrence as it relates to the facts of the applicant's case.

Maan v MIAC

[2009] FCAFC 150

Federal Court of Australia, Dowsett, Greenwood and Collier JJ, QUD5 of 2009, 23 October 2009

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to cancel the appellant's Student (Temporary) (Class TU) Subclass 573 (Higher Education Sector) visa under s.116 of the *Migration Act* 1958 (the Act).

The appellant was granted a Subclass 573 visa on 29 March 2007. His educational institution wrote to the appellant in relation to low attendance on 17 May 2007 and a notice of intention to report the appellant to the Department of Immigration and Citizenship (the Department) was sent to the appellant on 8 August 2007. In the notice, the appellant was alerted to appeal processes but did not pursue them. On 24 September 2007, the educational institution, pursuant to condition 8202(3) of Schedule 8 of the Migration Regulations 1994 (the Regulations), certified that the appellant had not achieved satisfactory course attendance.

Before the Tribunal, the appellant accepted that he had not attended 80% of the classes in the course but claimed that he had not been made aware of the review process at the educational institution and that he had been depressed and stressed by his family circumstances. The Tribunal found that the non-conformity with the post-1 July 2007 version of condition 8202 was the receipt by the Department of the educational institution's certification as to the appellant's unsatisfactory course attendance and not the actual non-attendance by the appellant. The Tribunal was satisfied that there were no exceptional circumstances in the appellant's case.

The issues arising in the appeal were whether the post-1 July 2007 version of condition 8202 was applicable; the manner in which the condition operated in relation to the appellant's visa; whether the certification was valid in the absence of reference to a specific period of non-attendance and whether the Tribunal and the Federal Magistrates Court gave proper consideration to the claimed exceptional circumstances.

Held: Appeal dismissed.

- (i) The relevant version of condition 8202 was that in operation after 1 July 2007. After 1 July 2007 a breach of condition 8202 is established by certification by the educational institution that the visa holder had failed to achieve satisfactory course attendance for the purposes of s.19 of the *Education Services for Overseas Students (ESOS) Act 2000* and Standard 11 of the National Code of Practice. Although the appellant failed to attend classes both prior to and after 1 July 2007, the educational institution's notice to the Department related to the failure of the appellant to regularly attend classes between 11 July 2007 and 14 September 2007 and thus the certification did not relate to events prior to 1 July 2007.
- (ii) From an ordinary reading of condition 8202(3) the Tribunal was correct in finding that the certification by the educational institution constituted non-compliance by the appellant with his visa conditions. The absence of reference to a specific period of time in the certification does not impact on the validity of the certification.
- (iii) Any factual errors made by the educational institution in relation to preparing the appellant's attendance record could have been remedied by the appellant pursuing appeal processes which had been alerted to the appellant in the notice letter. Even if the Tribunal had made a factual error in respect of this issue, it is not an issue which goes to jurisdiction of the Tribunal.
- (iv) It is perhaps surprising that the Tribunal would find that a male student, aged 18 years, and alone for the first time in a foreign country, would naturally seek medical help for depression-related symptoms. However, the findings of the Tribunal in respect of exceptional circumstances were findings of fact clearly open to the Tribunal and do not reveal jurisdictional error.

FEDERAL MAGISTRATES COURT JUDGMENTS

Li Tian & Ors v MIAC & Anor

[2009] FMCA 930

Federal Magistrates Court of Australia, Emmett FM, SYG 1194 of 2009, 9 September 2009

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate to refuse to grant the applicant a Employer Nomination (Residence) (Class BW) Subclass 856 visa.

Revetec applied for approval of a nominated position as an approved appointment. The nominated position and the application were approved and the applicant applied for a visa on the basis that she was nominated by Revetec in respect of an appointment in the business of Revetec. The Tribunal found that although Revetec was the employer which had nominated the applicant, at the time of the decision the applicant could not be employed in Revetec's business as it was deregistered by ASIC and no longer existed. The applicant therefore could not be employed by Revetec in relation to an approved appointment and accordingly could not satisfy cl.856.221.

The applicant contended she was the subject of an approved appointment which had been submitted by a company (Revetec) which had subsequently been taken over by another company (Revetec Holdings) that had acquired 100% of its business, including the approved appointment. It was contended the Tribunal did not take into account that Revetec Holdings was a successor to Revetec, and interpreted the legislation narrowly and literally.

Held: Application dismissed.

- (i) The Tribunal's finding that the applicant was not employed by Revetec in relation to an approved appointment at the time of its decision was open to it on the evidence and material before it. The criterion in cl.856.221 to be satisfied at the time of decision makes clear, that it is the appointment referred to in cl.856.213(a) that is the *"approved appointment"*. Clause 856.222 refers to *"the employer referred to in the relevant employer nomination"*. Those words make clear that the reference is specific to the employer in respect of whom approval to nominate was granted, namely Revetec and not Revetec Holdings.
- (ii) Revetec's approval for its nominated position in respect of the applicant, as an approved appointment obtained under r.5.19, was not capable of being transferred to another employer. Revetec Holdings was a different entity to Revetec. Revetec Holdings would, in any legal sense, be a different employer to the specific employer, Revetec, in respect of whom approval was granted for the nominated position. Clause 856.213(a) makes clear that the appointment in the business is of *"that employer"*, being the specific employer nominated in accordance with r.5.19(2), namely Revetec.

Le v MIAC & Anor

[2009] FMCA 948

Federal Magistrates Court of Australia, Turner FM, MLG 1161 of 2008, 25 September 2009

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate that he was not entitled to the grant of a Partner (Residence)(Class BS) subclass 801 visa

The delegate found that the applicant was not, at the time of decision, the 'spouse' of the sponsoring spouse, nor did he satisfy any of the alternative subclauses in cl.801.221 of Schedule 2 to the Migration Regulations 1994.

The issue before the Tribunal was whether the applicant's relationship with the sponsoring spouse's three children satisfied cl.801.221(6)(c)(ii). The Tribunal was not satisfied that the applicant was a natural parent of any of the children. The Tribunal held that to meet cl.801.221(6)(c)(ii), the applicant must have an order

made under the *Family Law Act 1975* relating to at least one child in respect of whom the sponsoring spouse has been granted joint custody or access by a court; or have an order made under that same Act. The applicant had advised the Tribunal that there were no such orders. The Tribunal found that the applicant did not satisfy cl.801.221(6) or any of the alternative provisions in cl.801.221. He therefore did not meet a prescribed criterion for the grant of the visa

In seeking judicial review, the applicant contended that the Tribunal misinterpreted and misapplied cl.801.221(6), in that it failed to take into account a relevant consideration being the applicant's custody, joint custody or access to the sponsor's children as required by cl.801.221(6)(c)(ii)(A). The applicant submitted on the basis of the decisions in *Srouf v MIMA* [2006] FCA 1228 and *Fitch v MRT* [2004] FCA 1673, that there is no requirement for custody or access to a child or children to be by court order. The applicant also contended that the Tribunal took into account an irrelevant consideration when it considered whether the applicant was the biological parent of the child of the marriage.

Held: Application dismissed.

- (i) The Tribunal's decision was not affected by jurisdictional error.
- (ii) The Court should follow *Yazbeck v MIMA* (2002) 124 FCR 458 and find that the omission from cl.801.221(6)(c)(ii)(A) of any reference to orders, and the inclusion of such a reference in cl.801.221(6)(c)(ii)(B), is just bad drafting. The provision should be read as "...*the applicant; (A) has custody or joint custody of, or access to; or (B) has a residence order or contact order made; under the Family Law Act 1975...*". Having reached the conclusion that the applicant had not proved that he is a biological parent of the child, the MRT did not err in law in concluding that to meet cl.801.221(6)(c)(ii) the applicant must have an order made under the Family Law Act.
- (iii) Subject to the power of a relevant court to regulate access, or with whom a child lives, no court order is necessary where there is a biological child because custody is assumed by operation of the Family Law Act. Accordingly, the Tribunal did not have regard to an irrelevant consideration being "whether the applicant was a biological parent of the child".

Hadchity v MIAC & Anor

[2009] FMCA 958

Federal Magistrates Court of Australia, Scarlett FM, SYG 907 of 2009, 8 October 2009

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate that he was not entitled to the grant of a Partner (Migrant)(Class BC) subclass 100 visa.

The applicant attended a hearing before the Tribunal at which he claimed for the first time that his sponsor had been violent to him. He subsequently provided statutory declarations in response to a request for additional information from the Tribunal and the Tribunal wrote to Centrelink seeking an opinion from an independent expert as to whether the applicant had suffered relevant domestic violence. The Tribunal ultimately affirmed the delegate's decision applying the authority of the Full Court of the Federal Court in *MIAC v Sok* [2008] FCAFC 18, that a non-judicially determined claim of family violence could only be considered if it had been made before the delegate.

On 3 November 2008, the Federal Magistrates Court made orders by consent, issuing writs of certiorari and mandamus, on the basis that the Tribunal fell into jurisdictional error following the High Court's decision in *Sie Sok v MIAC and Anor* [2008] HCA 50.

The Tribunal then wrote to the applicant advising, *inter alia*, that the case would be allocated to a new Member. A further hearing was held and in its second decision, the Tribunal (constituted by the same Member) noted that under r.1.23(1C) it was required to take as correct the independent expert's opinion obtained during the first review, that the alleged victim did not suffer relevant domestic violence. On this basis, the Tribunal found that the applicant did not meet the essential criteria for the grant of the visa.

In seeking judicial review, the applicant contended that the Tribunal erred in its consideration of the applicant's domestic violence claims, in that it was first required to determine whether it could be satisfied

that the applicant suffered relevant domestic violence and, only if it was not so satisfied, was it empowered to obtain a report from an independent expert: r.1.23(1B). The applicant also raised concerns that the Tribunal was not reconstituted after the first decision was set aside, despite indicating to the contrary.

Held: Application dismissed.

- (i) The Tribunal's reliance on the independent expert's opinion did not give rise to jurisdictional error. While the process for considering the non-judicially determined claim of domestic violence had been carried out in reverse, there was nothing to indicate the independent expert's report was obtained invalidly or should not be considered. The Tribunal was therefore required to take that independent expert's opinion as correct: r.1.23(1C).
- (ii) There was no error in the Tribunal being constituted by the same Member.

Hossain v MIAC & Anor

[2009] FMCA 1008

Federal Magistrates Court of Australia, Scarlett FM, SYG 1327 of 2009, 20 October 2009

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate not to revoke the automatic cancellation of the applicant's Student visa.

In making its decision, the Tribunal considered the applicant's arguments that s.137J of the *Migration Act* 1958 (the Act) did not apply because there were no prescribed conditions for the purpose of s.20 of the *Education Services for Overseas Students Act* 2000 (the ESOS Act). The Tribunal considered the preferable construction was to read sections 19 and 20 of the ESOS Act together, so that the reference to a "prescribed condition" in s.20(1) was taken to be a reference to a condition prescribed for the purposes of s.19, which under r.3.03A of the Education Services for Overseas Students Regulations 2001 was condition 8202 in Schedule 8 to the Migration Regulations 1994. The Tribunal also rejected the applicant's argument that, on the reasoning in *Dai v MIAC* [2007] FCAFC 199, condition 8202(3)(b) was invalid. The Tribunal found that the applicant did breach condition 8202 and that the breach was not due to exceptional circumstances beyond his control.

In seeking judicial review, the applicant contended that, in basing its decision on an alleged breach of condition 8202 as the trigger for the issue of a s.20 notice, the Tribunal relied on an irrelevant consideration as condition 8202 is not a 'prescribed condition' of s.20 of the ESOS Act and so a 'breach' of that condition cannot trigger the issue of a notice under that section. It was further argued that condition 8202 is not capable of being breached.

Held: Application dismissed.

- (i) The Tribunal did not fall into jurisdictional error by relying on an irrelevant consideration. Condition 8202 is a prescribed condition of s.20 of the ESOS Act.
- (ii) The reference to a prescribed condition in s.20(1) of the ESOS Act refers to a condition prescribed for the purposes of s.19(2) of that Act. If it were otherwise, no s.20 notice would be valid. Sections 19 and 20 of the ESOS Act are meant to be read together. The prescribed condition in s.20(1) can only be the prescribed condition in s.19(2) as it would be absurd if the breach of a prescribed condition which must be reported to the Secretary under s.19(2) was not the breach of the same condition that must be the subject of a written notice to the student under s.20(1). Section 20 would have no work to do if there were no prescribed conditions which is also an absurd situation. The contention that no valid s.20 notice was issued must fail.
- (iii) The decision in *Maan v MRT* [2008] FMCA 1738 is not wrongly decided and should be followed. Condition 8202 is capable of breach. If a negative certificate is issued that the student is not achieving satisfactory course progress or satisfactory course attendance, then it follows that the student is not meeting the requirements of subclause (3) and will therefore be in breach of subclause (1).

LEGISLATION UPDATE

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

Legislation Passed

INSTRUMENTS

Migration Regulations 1994 – Specification under regulation 1218(3)(d) – Classes of Persons – September 2009 (IMMI 09/115)

This instrument revokes the Migration Regulations 1994 – Specification under paragraph 1218(3)(d) – Classes of persons who may make an Internet Application for a Tourist Visa – 26 March 2007 and specifies classes of persons who may make internet applications for Tourist visas. This Instrument commences on 9 November 2009.

REGULATIONS

Migration Amendment Regulations 2009 (No. 12)

These Regulations amend the Migration Regulations 1994 relating to condition 8201, public interest criterion 4001, Occupational Trainee visas, family violence, de facto relationships and 400 series visas. These Regulations commence on 9 November 2009.

CASELOAD OVERVIEW

MRT Decisions – October 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	2	10	2	1	15
Visitor refusal	28	6	1	5	40
Student refusal	32	19	4	13	68
Temporary business refusal	15	22	9	8	54
Permanent business refusal	9	1	5	2	17
Skill linked refusal	154	55	34	13	256
Partner refusal	81	28	9	2	120
Family refusal	19	17	2	0	38
Student cancellation	30	31	2	4	67
Sponsor approval refusal	0	1	4	2	7
Other	13	17	0	9	39
Total	383	207	72	59	721

RRT Decisions – October 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bangladesh	0	4	0	0	4
Bulgaria	0	1	0	0	1
Burma (Myanmar)	0	1	0	0	1
Cameroon	1	0	0	0	1
China (PRC)	22	31	0	1	54
Congo, Democratic Republic of	1	0	0	0	1
Egypt	1	0	0	0	1
Ethiopia	2	1	0	0	3
Fiji	2	2	0	0	4
Ghana	0	1	0	0	1
India	1	14	0	0	15
Indonesia	0	3	0	0	3
Iran	1	0	0	0	1
Jordan	1	0	0	0	1
Kenya	0	2	0	0	2

Korea, Dem Peoples Rep of	0	1	0	0	1
Korea, Republic Of	0	3	0	0	3
Lebanon	3	2	0	0	5
Macedonia, Fmr Yugo Rep of	0	1	0	0	1
Malaysia	1	21	1	0	23
Mongolia	0	1	0	0	1
Nepal	0	2	0	0	2
New Zealand	0	1	0	0	1
Pakistan	0	2	0	0	2
Philippines	0	1	0	0	1
Poland	0	1	0	0	1
Russian Federation	0	1	0	0	1
Rwanda	0	1	0	0	1
Senegal	0	1	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	2	2	0	0	4
Stateless	0	3	0	0	3
Taiwan	0	1	0	0	1
Thailand	0	0	1	0	1
Turkey	1	1	0	0	2
United States of America	0	1	0	0	1
Vietnam	0	2	0	0	2
Zimbabwe	8	5	1	0	14
Total	47	115	3	1	166

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 September 2009, 49% of all substantive decisions made have been published (48.3% of MRT and 50.9% 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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