



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; 'the department' refers to the Department of Immigration and Citizenship.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

0805418

10 December 2009, Sydney

Ms J Ciantar, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 – EMPLOYER NOMINATION SCHEME – CL.856.321 – A delegate of the Minister refused the applicant's Subclass 856 visa application because the visa applicant did not satisfy cl.856.321, as the delegate was not satisfied that the applicant was substantially financially dependent upon his parents both at the time of application and at the time of the Tribunal's decision. The applicant claimed that he was an only child who had lived in Australia for about ten years, and that he had been employed full time since March 2009 as the Manager of a McDonald's outlet. He claimed that he lived with his parents and earned about \$550 per week and that he paid at least in part the water bills, council rates, electricity bills and all the telephone bills including his parent's mobile phones. He claimed that prior to starting this job he did not contribute any money to household expenses as his parents were renting accommodation and he was only employed part-time. He stated that he had purchased a car from his parents for between \$3000 and \$4000 and he paid the car's running costs. The applicant's father advised the Tribunal that the applicant had given them \$8,000 towards the mortgage since May 2009 and that the applicant gave his mother all his wages except about \$150-\$200 which he kept as pocket money. He further stated that when his son was studying, he and his wife had paid all his expenses including his school fees. The applicant claimed that he did not give his mother his salary every week but he had given her about \$10,000 during the last year.

Held: Decision under review affirmed.

The Tribunal was satisfied that, at the time of application, the applicant was the dependent child of his parents and that for a substantial period immediately before the date of lodgement the applicant was substantially reliant on his parents for financial support to meet his basic needs for food, clothing and shelter. However, the Tribunal was not satisfied that at the time of decision the applicant was wholly or substantially reliant upon his parents for financial support to meet his basic needs. The Tribunal noted the applicant's evidence that he had been employed full time since March 2009; that he lived with his parents and earned about \$550 per week. It further noted that the applicant made a substantial contribution towards the household bills and that the applicant had also given his mother money towards their home loan. The Tribunal accepted that the applicant had started purchasing his own clothes from this year. The Tribunal was satisfied that the applicant worked full-time and that since commencing full-time employment he had used his salary to pay for his own clothes and living expenses and to contribute towards the cost of his food and accommodation. The Tribunal accepted that the applicant's parents continued to provide him with some assistance as they had purchased a house in which the applicant resided, and they bought food for the family. However, the Tribunal was of the view that the applicant made a substantial contribution to the cost of his accommodation and food, as his evidence was that he had given his mother \$10,000 in the last year. The Tribunal found that even if the \$10,000 given by the applicant included the money he gave towards accounts such as rates and phone bills, the Tribunal was satisfied that the applicant was substantially financially independent of his parents. The Tribunal had some sympathy for the applicant as he was only aged 21 and had lived in Australia since he was 12 years of age. However, it found that the applicant was not dependent upon his mother or father and, therefore, he did not satisfy the definition of a member of the family unit under r.1.12. As the Tribunal found that the applicant was not a member of the family unit of a visa holding parent at the time of decision, the applicant did not meet the requirements of cl.856.321 of the Regulations.

0807267

12 January 2010, Sydney

Mr J Duignan, Member

STANDARD BUSINESS SPONSOR – TRAINING BENCHMARKS – R.2.59D – The applicants operate a business trading as Garlic House, which is primarily involved in the packing and distribution of garlic within

Australia. They have sought approval of their business as a standard business sponsor for the purpose of sponsoring a person to assist the business in a sales and marketing role. The applicants provided financial records for the business to the Department, but did not respond to requests for additional information in respect of training activities. Accordingly, the delegate was not satisfied that r.1.20(2)(c) was met and as a result the delegate refused approval. At the Tribunal hearing, the proprietor of the business gave evidence that it had been operating as a family business for 13 years. The main business involved peeling and selling garlic and, in addition, they import products from Korea and China and sell these in Australia. The applicant initially claimed that the business had never employed any person other than himself, his wife and his sons. In respect of training, he explained that the business did training in starting a business and marketing. He claimed that one of his sons did this training and was taught through private lessons. The proprietor claimed he spent some money training people in China, but never in Australia. He explained that the business was small and they could not start training people without knowing an appropriate trainer and that the business needed the proposed sponsored employee because he needed people who were experienced in speaking Chinese, Korean and English. In addition to this, he needed someone who could "do sales well". The proprietor claimed that he came into contact with the proposed sponsored employee when the business employed him for three months in 2007. From this, he got to know that he spoke Chinese and Korean well and he was a reliable and credible man. The difficulty in considering training for the proposed sponsored employee was because he was not an Australian citizen or permanent resident. The proprietor claimed it was difficult to find an employee with the required skills and he hoped the application would be successful. Also provided was a copy of an agreement between the Australian College of Management, a registered training organisation, and the business for the training of the nominated existing employee.

Held: Decision under review affirmed.

At hearing, the Tribunal discussed the impact of the training benchmarks and that they exclude the training activities of principals of the business or their family members. The Tribunal found that the only expenditure which was identified and could be relied upon for the purpose of calculating whether the business met the training benchmark was specifically excluded from that calculation through the relevant instrument. The training agreement in respect of the nominated existing employee could not be counted as he was a family member of the two principals of the business. Furthermore, the Tribunal found that the only other ongoing employee was also a family member of the two principals. In the case of the proposed sponsored employee, the Tribunal noted that he was not an Australian citizen or permanent resident when any of his training occurred or at the present time, for otherwise, the application in relation to his employment would not be necessary. He was also only employed for a very short period some two years ago. Excluding that expenditure which could not be relied upon, the Tribunal found that there had been no other recent expenditure which was otherwise known which could be counted towards showing expenditure on training to the level required by the benchmark. The Tribunal noted that the business had been trading for well in excess of 12 months and had a payroll by virtue of payments to the principals and their family members. There was no identifiable expenditure which could be relied upon and therefore, the Tribunal did not believe that there had been recent expenditure, by the business, to the equivalent of at least 1% of the payroll of the business, in the provision of training. Neither had it been submitted to the Tribunal that the business had made any relevant contribution to any industry training fund. This being the case, it was the view of the Tribunal that approval under s.120E should not be granted. Accordingly, the Tribunal affirmed the decision not to approve the applicant as a standard business sponsor.

Family visas

0806654

31 December 2009, Melbourne

Ms W Boddison, Member

AGED PARENT (RESIDENCE) (CLASS BP) – SUBCLASS 804 (AGED PARENT) – CL.804.255 – PUBLIC INTEREST CRITERION 4005 – A delegate of the Minister refused to grant the applicant a Subclass 804 visa on the basis that the visa applicant did not satisfy the health criteria in Public Interest Criterion (PIC) 4005 of the Regulations. A Medical Officer of the Commonwealth (MOC) noted that the applicant was blind from advanced bilateral macular degeneration and was frail aged. The MOC's opinion was that the applicant's condition would require continued assisted health care and community services as he was incapable of independent living, and that the provision of community services and health care would

result in a significant cost to the community. The applicant's representative provided a submission which claimed that the applicant's son in Australia was the only person who could care for the applicant and that their home was modified to support the physical needs of the applicant, who was confined to a wheelchair. The submission claimed it was unlikely that health care or community services would be used as the applicant's family would provide the care and support needed. The submission also claimed that the applicant had a substantial amount of money in the bank, that he received a United States (US) government pension and was covered by private health insurance. The submission further claimed that the applicant was unable to travel alone as he was blind and confined to a wheelchair. The submission claimed that if the applicant left Australia he would be confined to a nursing home and would have no contact with family members. Supporting statements from the applicant's family were also provided. A letter from the applicant's treating doctor stated that to return the applicant to the US after living in a family environment in Australia would sentence him to an intolerably lonely nursing home existence which would shorten his life expectancy considerably.

Held: Decision under review affirmed.

The Tribunal was bound to accept the MOC's assessment that the applicant did not meet the requirements of PIC 4005 on which the visa refusal was based. The Tribunal contacted the applicant's representative to ascertain whether the applicant intended to obtain a further opinion from the MOC. No information or comments were received and no extension was sought within the prescribed period, and the applicant did not appear before the Tribunal. The Tribunal was satisfied that the MOC had applied the correct test in this matter to ascertain the form or level of the condition suffered by the applicant, and then applied the statutory criteria by reference to a hypothetical person who suffered from that form or level of the condition. Based on the opinion of the MOC, the Tribunal found that the applicant did not satisfy public interest criterion 4005. As there was no provision for the waiver of criterion 4005, cl.804.225 could not be satisfied. The Tribunal had regard to the applicant's circumstances, particularly his age and degree of infirmity, and noted that he could not live independently and that he had been cared for by his family in Australia. It also noted that his doctor had indicated that he would be unable to travel to the US. The Tribunal therefore referred this case to the Department for the Minister's attention. Accordingly, the Tribunal found the visa applicant did not meet criterion 4005 and therefore, the applicant did not satisfy cl.804.225 of the Regulations.

0905722

15 December 2009, Sydney

Ms P Pope, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 101 (CHILD) – R.1.04 – ADOPTIVE CHILD – A delegate of the Minister refused the applicant's Subclass 101 visa application on the basis that the visa applicant had been formally adopted by her paternal uncle, and that under Australian law a child could not be both a natural child and an adopted child. The delegate found that since the review applicant (the visa applicant's natural mother) did not have legal custody over the applicant, the applicant could not be considered as her dependent child or a member of her family unit. The review applicant claimed that she cared for her baby for the first nine months of her life and then she had to return to work, and that she returned to her village when her daughter was aged about five. She claimed that her brother adopted the visa applicant according to Hindu religious tradition in 1993 and that she was formally adopted in 1999. In connection with the formal adoption by the adoptive parents, the review applicant claimed that she and two witnesses attended the local District Court, after which a birth certificate was issued to the child showing her adoptive parents as her parents. The Tribunal heard that the visa applicant, along with her grandfather, visited the review applicant and her husband in Australia in 2008, and that a short time after she returned to Bali she rang them and told them that she wanted to come to live with them. The review applicant claimed that the visa applicant had instigated the visa application and process. She claimed that the visa applicant referred to her adoptive parents as her dad and mum but she knew that the review applicant was her biological mother. After the hearing the Tribunal received the English translation of the Order from the District Court in relation to the adoption of the visa applicant by her paternal uncle and his wife, as well as a copy of unsigned statements made by the adoptive father and his wife giving consent for the visa applicant to live permanently with her biological mother in Australia.

Held: Decision under review set aside.

The Tribunal noted that under Australian law, blood and formal adoptive relationships were mutually exclusive; so that the person who was formally adopted became the legal child of the adopting parents and a legal member of the adopting family. The Tribunal further noted that the adopted child ceased to be regarded in law as the child of the birth parents and the birth parents ceased to be regarded in law as the parents of the adopted child. The issue in this case was whether this position was the same for migration purposes, and, additionally, where the adoption was made under foreign adoption laws. The Tribunal found that there was some judicial support for the position that an adoption may not sever the biological relationships between relatives for the purposes of the Migration Act. The Tribunal noted that in *Liang v MIAC*, in the context of determining whether two people were “first cousins” for the purposes of item 1128BA(3)(1)(iii)(E) of the Regulations, the Court found that a biological relationship between two relatives existed despite the adoption of the applicant’s mother as a child, and that read in context, the Court found this provision was to be given a broad construction such that it included first cousins whether by biology, adoption or marriage. The Tribunal found that, having regard to the reasoning in *Liang*, it was open, depending on its factual findings, for the Tribunal to find that the applicant was the natural child of the sponsor, notwithstanding the adoption. The Tribunal noted that r.1.14A now provides that if a child has been adopted under formal adoption arrangements mentioned in r.1.04(1)(a) or (b), the child was taken to be the child of the adoptive parents and not of any other person, but that this only applied to applications made on or after 1 July 2009. The Tribunal stated that it was mindful that Departmental Procedural Advice, as it stood at the time the visa application was made in March 2009, stated that blood and formal adoptive relationships were mutually exclusive, and that this position was reinforced from 1 July 2009 in the provisions of r.1.14A. However, having regard to the reasoning in *Liang*, the Tribunal formed the view that it was open to it, based on the evidence, to find that the visa applicant was the natural child of the sponsor, notwithstanding the adoption. Therefore, the Tribunal found that the visa applicant satisfied cl.101.211 of the Regulations.

0908915

18 December 2009, Melbourne

Ms M Urquhart, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 116 (CARER) – A delegate of the Minister refused the applicant’s Subclass 116 visa on the basis that the visa applicant did not satisfy cl.116.211 and cl.116.221 of the Regulations, as the delegate found that the review applicant’s care needs were already being met by other family members. The delegate also had concerns about the visa applicant’s willingness to be a carer. The visa applicant is the daughter of the review applicant who is of Vietnamese ethnicity. The review applicant claimed to have a permanent or long-term need for assistance and provided a number of documents in support of the application. These included a Certificate of Carer Visa Assessment indicating the review applicant had an impairment rating of 30; a Medical Advisor’s report indicating multiple medical conditions, including hypertension and diabetes complicated by strokes, osteoarthritis and severe asthma; a letter from a hospital social worker indicating the review applicant’s needs after a recent stroke, making specific reference to the need to care for the review applicant outside of an institution as it would not be culturally appropriate to care for her in such a facility given that she did not speak English. Also provided was a statutory declaration and written statements by the review applicant and other family members indicating their unwillingness and inability to care for her; a statement by the visa applicant indicating her understanding of the review applicant’s needs and her willingness to perform the duties of a carer as she has done in the past; and a letter from a Health Care Centre indicating that the review applicant requires 24 hour care.

Held: Decision under review set aside.

The Tribunal made a decision on the information before it, along with the evidence on the Department’s file, without the need for a hearing. The Tribunal accepted that the visa applicant was the daughter of the review applicant and accordingly found that the visa applicant was a ‘relative’ within the meaning of r.1.03. The Tribunal found that the rating of 30 as stated in the Certificate of Carer visa assessment exceeded the impairment rating specified by the Gazette Notice and therefore met the requirements of r.1.15AA(1)(c). The Tribunal noted that it must consider whether the assistance the review applicant required could not reasonably be obtained from the review applicant’s relatives who are resident in Australia. The Tribunal accepted that these relatives were occupied with their own lives and needs and that the requisite care could not reasonably be obtained from them and that this was affirmed by the relatives themselves in written statements provided to the Tribunal. The Tribunal noted the correspondence from the hospital social worker in relation to whether assistance could reasonably be obtained from welfare, hospital, nursing or community

services in Australia, and found that the review applicant required round the clock care which could not be given in aged care facilities as to do so would be culturally inappropriate. The Tribunal stated that the main issue in this case was whether the visa applicant was willing and able to provide the review applicant with substantial and continuing assistance of the kind outlined in the Carer's Assessment Certificate. It found that the visa applicant had previously cared for the review applicant and had a good knowledge about the review applicant's medical conditions and of the level of care required, and noted that the visa applicant had stated that she was willing and able to meet those needs. The Tribunal concluded that, at the time of decision, the visa applicant met the requirements of a carer for the review applicant and therefore satisfied cl.116.221 of the Regulations.

Partner visas

0803078

12 January 2010, Melbourne

Ms L Kirk, Senior Member

PROSPECTIVE MARRIAGE (TEMPORARY) (CLASS TO) – SUBCLASS 300 (PROSPECTIVE MARRIAGE) – R.1.15A – GENUINE AND CONTINUING RELATIONSHIP – A delegate of the Minister refused the applicant's Subclass 300 visa on the basis that the visa applicant did not satisfy cl.300.216 and cl.300.221 of the Regulations, as the delegate was not satisfied that the visa applicant and the review applicant genuinely intended to live together as spouses. The visa applicant was a 38 year old male Moroccan national who was sponsored by the review applicant, a 62 year old female Australian citizen. The review applicant claimed she met the visa applicant in 2005 in an international chat room. They became engaged and the applicant sent her a pair of traditional Moroccan shoes to mark their engagement. After chatting on the internet for six months, the review applicant travelled to Morocco where they spent five weeks travelling around whilst also staying with the visa applicant's family for two weeks. The review applicant claimed that the visa applicant's English was good enough for him to translate for his family. She also claimed they did not have a formal engagement ceremony in Morocco but that she met all of his family and they gave her many gifts and welcomed her. The review applicant claimed that the visa applicant had to leave his job in order to travel with her, and she paid for everything because the visa applicant had very little money. At the hearing, the visa applicant claimed that he used to be a plumber and that he now works at a market stall selling clothes. The review applicant claimed she is taking courses in Islam and she is in the process of converting. They agreed that they would have to live in Australia because of the review applicant's children and that she would support the visa applicant to become a plumber in Australia. She said that if the visa applicant was not able to come to Australia she would go to Morocco to marry him and that the connection between them was very strong. Several Statutory Declarations were provided as evidence in support of the application.

Held: Decision under review set aside.

The Tribunal considered the material provided, including numerous documents which were not before the delegate, and also the oral evidence of both parties at the hearing which the Tribunal found to be persuasive. In reaching its conclusion, the Tribunal accepted the evidence that each party was able to provide a generally consistent explanation of their future intentions as to financial, living and personal lives which, in the Tribunal's assessment, would be consistent with a genuine commitment to live together as spouses in what they anticipated to be a long term relationship. The Tribunal found that the parties provided evidence that they presented together socially as a couple. This was supported by photographic evidence showing them together in Morocco and in other social activities. The Tribunal found that the attendance of the visa applicant's relatives at the henna party to mark the couples' engagement was consistent with the assertion that other people recognised and accepted the existence of a relationship between them. The Tribunal also found that the parties provided consistent explanations as to how they believed their household would operate, and the Tribunal had no reason to doubt that explanation. Based on the oral and written evidence, the Tribunal was satisfied the parties have a genuine intention to marry and that the marriage was intended to take place within the visa period. Accordingly, the Tribunal found that the requirements of cl.300.215 of the Regulations were satisfied at the time of the application and continued to be satisfied at the time of decision.

0902739

14 December 2009, Melbourne

Mr N Pullen, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 (SPOUSE (PROVISIONAL)) VISA – CL.309.211 – CL.309.221 – DEFINITION OF SPOUSE – A delegate of the Minister refused to grant a Subclass 309 visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 of the Regulations as she did not meet the definition of 'spouse'. The review applicant claimed he owned his home and lived alone. He claimed he had received an invalid pension for some time and could only support the visa applicant with limited funds. He claimed he was previously married and after he had a very bad accident his wife began to see other men and the marriage ended. The visa applicant claimed she lived in Vietnam with her brother and that she did not work as she had sold her share in a vegetable shop. She claimed she was previously married but the relationship ended in 1993 as her husband was a heavy drinker and he hit her. The visa applicant claimed she lived on money she had earned from the vegetable shop and that her siblings also supported her. Both applicants claimed they were introduced in 2000 by the visa applicant's brother who lived next door to the review applicant. They claimed they exchanged photos and communicated regularly over the telephone and he proposed to her in 2002. The review applicant claimed he loved her because she was like a magnet and that she was "very very good". He claimed the 15 year age difference between them made no difference. The visa applicant claimed she fell in love as soon as she saw the review applicant's photos and their age difference was no barrier. She claimed she came to Australia and stayed at his house. They became engaged and married soon after and a group of sixty family and friends attended. The review applicant claimed he then returned to Vietnam with the visa applicant and stayed for three months. A number of documents and witness statements were provided as evidence in support of the application.

Held: Decision under review set aside.

The Tribunal found the applicants were validly married to each other. The Tribunal had regard to all the circumstances of the relationship including evidence of the financial and social aspects, the nature of the applicants' household and their commitment to each other. The Tribunal accepted the review applicant was on a disability pension and unable to regularly send money to the visa applicant. The Tribunal also accepted the visa applicant was able to sustain herself financially as she recently sold her share of the family business and the review applicant supported her financially from his limited income. The Tribunal found that the applicants lived in separate countries and did not have the opportunity to live together or share domestic responsibilities. The Tribunal found that when they had cohabitated in the same country they did live together. The Tribunal was satisfied that documentary, photographic and DVD evidence confirmed the social aspects of the relationship. The Tribunal accepted that both parties loved each other as this was very clear at the hearing. The Tribunal was satisfied the applicants had a mutual commitment to a shared life as husband and wife to the exclusion of all others and the relationship was genuine and continuing. Accordingly, the Tribunal found the visa applicant satisfied the requirements of cl.309.211 and cl.309.221 for a Subclass 309 (Spouse (Provisional)) visa.

Student visas

0903434

22 December 2009, Melbourne

Ms M Cameron, Member

STUDENT GUARDIAN – SUBCLASS 580 – S.116(1)(B) – CANCELLATION – NO WORK – The applicant's Subclass 580 visa was cancelled as she had been observed by a Departmental officer to be working in her shop on more than one occasion between December 2008 and February 2009, and had admitted on six occasions during her Departmental interview that she had worked despite knowing that she did not have permission. She had also been served previously with an Illegal Worker Warning Notice following her being discovered working in April 2008. The applicant claimed that she had not admitted to working at the interview and that she had great difficulty expressing herself in English. The applicant acknowledged that she was present in her shop when she was seen there by Departmental officers, but denied that she served customers or otherwise worked in the shop. The applicant claimed that when she was told that she had been seen serving two customers, she had in fact been giving a gift to some parents

who had assisted her sons during the year with transport to soccer practice. She claimed that she had been attempting to sell her shop, and because she had spread the word through the Korean community that the business was for sale, she had felt it necessary to be in the shop to speak with potential buyers. The applicant claimed that she employed a sales assistant who worked in the shop between its opening and 3.40pm daily, from which time the applicant's eldest son worked until closing time. She claimed that she was often in the shop whilst the sales assistant handled sales and store activity. The Tribunal received oral evidence from the applicant's employee, who claimed that the applicant had never undertaken any tasks in the shop such as serving customers, stocking shelves or anything else that could be considered to be work, and that the Departmental officers were mistaken in their assumptions that the review applicant had been seen working.

Held: Decision under review set aside.

The Tribunal noted that a critical issue in this case was the nature of the applicant's role in the business and whether her activities constituted 'work' within the meaning of r.1.03. It found that, in this regard, it was necessary to consider what the applicant's role in the business was, and whether she had undertaken any 'work' having regard to the surrounding circumstances, including her submissions that she was the owner of the business but had not 'worked' in it. The Tribunal gave significant weight to the evidence of the witness, who stated that the applicant did not at any time work in her shop. It noted that the witness had provided detailed and consistent evidence that she herself undertook all of the necessary tasks in running the business, and that when she finished work in the late afternoon she was replaced by the applicant's eldest son. The Tribunal found that the witness provided detailed oral evidence at the Tribunal hearing which was consistent with her written submissions and with the evidence of the applicant, and found the witness to be both forthright and credible. The Tribunal noted that it did not doubt the Departmental compliance officers considered that they saw the applicant 'working' in her shop, however, the Tribunal was unable to place greater weight on the observations of the compliance officers than it did upon the accounts of the applicant and the witness in their submissions and at the Tribunal hearing. The Tribunal found that while the involvement in the managerial oversight of the shop might be found to be activity which would "normally" attract remuneration, it could not be satisfied that this was the case in the applicant's situation given her motivations for her presence and interest in the operations of her shop. The Tribunal accepted the applicant's evidence that she knew other shop owners in the vicinity of her shop with whom she interacted socially and that she often spent time sitting outside or visiting other shopkeepers. The Tribunal accepted that the visa applicant did not engage in work, in breach of condition 8101 of her visa, and therefore the grounds for cancellation of her visa did not arise.

0908940

7 January 2010, Sydney

Ms A MacDonald, Senior Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – HIGHER EDUCATION SECTOR – NON-REVOCAION – BREACH OF CONDITION 8202(3) – EXCEPTIONAL CIRCUMSTANCES – A delegate of the Minister decided not to revoke the applicant's visa cancellation because he had not demonstrated that the breach was due to exceptional circumstances beyond his control. The applicant's university issued him with a notice under s.20 of the *Education Services for Overseas Students Act 2000* (ESOS Act) for not achieving satisfactory course progress. The applicant did not comply with the notice or attend an Immigration office within the prescribed timeframe and, therefore, his visa was automatically cancelled. The applicant claimed he did not breach condition 8202 and, if he had, it was due to the lack of provision of necessary information and assistance from his university. He claimed he misunderstood the university system in Australia and that there were exceptional circumstances beyond his control for failing his Information Technology course. He claimed he had to adapt to a totally new teaching method and a new area of study at the same time and that he did not receive a warning or exclusion letter or the s.20 notice from the university. He claimed he failed 2 out of 3 subjects in the first semester because a dust storm worsened his grandmother's lung condition. He claimed he did not attend the exam in Information Technology because he had changed courses. He claimed he was unaware he had failed all his subjects and the university did not inform him that he should attend the exams. He claimed he was concerned for his mother's safety due to an outbreak of swine flu where she worked. He claimed the dust storm and swine flu were exceptional circumstances and that they contributed to the negative impact on his study.

Held: Decision under review affirmed.

The Tribunal found the applicant breached condition 8202(3) when his university issued him a written notice under s.20 of the ESOS Act certifying that he had not achieved satisfactory course progress in his Masters of Information Technology. The Tribunal invited the applicant to appear before it to give evidence and present arguments, however, he failed to appear, or contact the Tribunal to seek a postponement of the hearing. Based on the available information, the Tribunal was not satisfied that the breach was due to exceptional circumstances beyond the applicant's control, given the lack of details in his claims and the lack of opportunity to explore the claims or their veracity at a hearing. Accordingly, the Tribunal affirmed the decision not to revoke the automatic cancellation of the Subclass 573 Higher Education Sector visa formerly held by the applicant.

Other visas

0908568

8 January 2010, Sydney

Ms K Raif, Member

WORKING HOLIDAY (TEMPORARY) (CLASS TZ) – SUBLCLASS 417 – CANCELLATION – S.109 – INCORRECT INFORMATION – A delegate of the Minister cancelled the applicant's Subclass 417 visa under s.109 as the applicant had given incorrect answers on the application form for a further Working Holiday visa. In her application, the applicant provided an ABN number and stated she had undertaken work in regional Australia for this company for 3 months between May and June 2008 and January and March 2009. A Departmental officer contacted the owner of the company who advised that all grapes/vines had been pulled out three years earlier and the company had not employed anyone since then. The delegate found that the applicant had provided incorrect answers on the application. In a statement to the Department, the applicant apologised and admitted she had provided incorrect information and that she had not undertaken the specified work in regional Australia. She claimed she came to Australia with no intention of staying more than a year but she had begun a relationship with her partner, an Australian permanent resident, and that she wanted to stay with him even though her visa was due to expire soon. She claimed she did not have time for the three months of regional work, so she obtained the ABN number and applied for the visa. The applicant claimed she was usually an honest person and that she regretted her actions. However, she was willing to do regional work for three months or anything else to make up for her non-compliance. She claimed she understood that her visa may not have been granted if she had given the correct information and that she had been short of funds for the flight home when she was given a job a few months before her visa expired. She also claimed that she had contributed to the community through her work; that she had made a lot of friends and that the main reason she wanted to remain in Australia was because of her relationship.

Held: Decision under review affirmed.

The Tribunal found the applicant had provided incorrect answers on the application form and, accordingly, there was non-compliance under s.101 of the Act. The Tribunal accepted that the applicant was in a de-facto relationship, that she had been gainfully employed in Australia and that she had performed well in her job. The Tribunal accepted that the applicant's departure may cause inconvenience to her and her partner. The Tribunal considered it significant that the Working Holiday visa was a temporary visa and the applicant would not be permitted to remain in Australia indefinitely, and that she would be required to return to her own country, leaving her partner, employment, family and any other ties that she may have formed in Australia. The Tribunal did not accept that employment or friendships were a contribution to the community and there was little other evidence provided of contributions which the applicant had made to the community. The Tribunal found the applicant had not complied with s.101 and that the non-compliance was significant as the applicant was unlikely to have been granted the visa if the correct information had been provided on the application. Accordingly, the Tribunal found there was non-compliance under s.109 of the Regulations by the applicant and that the Subclass 417 Working Holiday visa should remain cancelled.

REFUGEE REVIEW TRIBUNAL DECISIONS

China

0908857

18 December 2009, Sydney

Ms L Symons, Member

CHINA – NO CONVENTION GROUND – HIDING A PERSON ILLEGALLY – UNDERAGE PREGNANCY – CREDIBILITY – The applicant claimed that she operated a shop and one day she heard many people outside. She claimed that she saw a few people with blood on their faces and that there were shops, buses and a police car on fire. The applicant claimed that as the situation became worse some of the shop owners decided to close their shops and that she went back inside. She claimed that she found a person hiding in the shop, and when she asked him why he was there he said it was unsafe to be outside and requested to stay in her shop overnight. The applicant claimed that she thought that if she forced him to go outside he could be injured so she agreed. She claimed she went to the shop the next day and found that the person, who she did not know, had disappeared and that someone had reported to the police that they saw a person walk out of her shop. She claimed that when they came to see her, the police did not believe her story and told her to consider it further, and that if she did not give them information in relation to the man that she may be committing an offence of illegally hiding a person. The applicant stated that the police visited her parents-in-law asking further questions, and that she felt that she had to leave China as she was afraid that she would be put in prison. She claimed that she also feared that the Chinese authorities would arrest her and put her in prison for giving birth to her first daughter when she was under the legal age. She stated that, at the time her daughter was born, she was fined 8,000 RMB and that she was not able to have a second child for eight years. She claimed that even though this incident happened a long time ago she was still scared.

Held: Decision under review affirmed.

The Tribunal found that the applicant's claims lacked credibility and that there were a number of inconsistencies between her oral and written evidence to both the Department and the Tribunal. The Tribunal noted that in her statement to the Department the applicant claimed that she feared the Chinese authorities would arrest and imprison her for giving birth to her daughter while she was below the legal age. However, when questioned about this issue by the Tribunal, the applicant stated that she had been fined and that the police would not arrest or imprison her now for this reason. In view of this, the Tribunal found that the applicant had abandoned this claim and that she did not fear any future harm based on this. Further, in relation to the applicant's claim that there were riots near her shop and that she allowed a man to hide and stay in her shop overnight, which was subsequently investigated by the police, the Tribunal found that the applicant did not claim that she feared persecution because of any Convention reason and therefore there was no direct nexus between her claim and the Refugees Convention. The Tribunal was of the view that it was highly improbable that a young woman from a rural village in Fujian Province with very limited education, no financial resources and no experience in business would relocate to a city very far from Fujian Province, away from her two children, her family and her friends to set up a business she knew very little about. The Tribunal also noted that the applicant spent two days in Fiji on her way to Australia, and found that if the applicant's intention in leaving China was to seek protection, she would have done so at the first available opportunity. The Tribunal found that this raised concerns in relation to the applicant's credibility and the genuineness of her claims. When considering the evidence as a whole, the Tribunal found that there were a number of inconsistencies and that the applicant was not a witness of truth and was prepared to fabricate her claims to give herself the profile of a refugee. Accordingly, the Tribunal found that the applicant did not have a well founded fear of persecution for a convention reason and that there was no real chance that she would be at risk of persecution if she returned to China now or in the reasonably foreseeable future.

India

0907562

18 December 2009, Melbourne

Ms W Boddison, Member

INDIA – RELIGION – HINDU – LAND DISPUTE – CREDIBILITY – In his protection visa application, the applicant claimed to fear persecution because of a land dispute with his Muslim neighbour, Person A. The applicant claimed he lived in a village where there were only a few Hindu families and that the village was dominated by Muslims who interrupted Hindu cultural activities and who were supported by the authorities. The applicant claimed Person A was planning to build a factory in the village, which was close to the applicant's land. Due to a water problem at his site he wanted the applicant's land by offering a cheap price, but the applicant's family refused to sell. The applicant claimed that Person A then produced false documents and used his influence to force them to leave. The applicant claimed that one day Person A came to the applicant's home and asked the family to vacate the land, claiming that it belonged to his wife. The applicant's family had a fight with him and he attacked their home on two occasions with his gang. The applicant claimed that his family made a complaint to the police, but no action was taken. Finally, the applicant's family managed to sell part of their land to a third party, which he claimed made Person A very upset. The applicant claimed that since then, Person A had tried to kill the applicant and his wife on two occasions. The applicant claimed that he feared returning to India as his and his wife's lives would be in danger.

Held: Decision under review affirmed.

The Tribunal found there were significant inconsistencies between the applicant's evidence at hearing and the claims made in his Protection visa application. At the hearing, The Tribunal put to the applicant his claims made in the protection visa application and the applicant stated that he did not know anything about a factory and he did not believe he said this in the application. He denied that Person A had interfered with their cultural activities and he did not know this claim was in the application. He stated he had not complained to the police and he had not sold any of his land. The applicant also stated that he had provided incorrect information in his visitor visa application and that the supporting documents were fraudulent and he had paid 10,000 rupees in order to obtain them. The Tribunal found that there were significant inconsistencies between the information provided to the Tribunal and what was contained in the Protection visa application. The Tribunal did not accept that the detailed and extensive supporting documentation relating to the applicant's business was fraudulent or that it had been obtained as a result of paying a bribe as was claimed by the applicant. The Tribunal also found that country information was at odds with the applicant's claims and it did not accept that the police would fail to protect the applicant in the circumstances as explained. Accordingly, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations and the decision under review was affirmed.

Iraq

0906065

15 December 2009, Melbourne

Ms G Hamilton, Member

IRAQ – POLITICAL OPINION – SECULAR – PARTICULAR SOCIAL GROUP – EDUCATED MIDDLE-CLASS IN IRAQ – RELIGION – AKHBARI SHI'ITES – The applicant and his family originally came to Australia on a visitor visa. The applicant claimed that he was a member of a well educated middle-class family and had attended university before taking over his father's business. He claimed that he opened a separate business in Basra that was frequented by British soldiers and that this caused him problems. He claimed that members of the Mahdi Army would demand that he put a picture of their leader, Moqtada al Sadr, in his shop, and that if he refused he would have been accused of supporting British and American invaders and would have had to pay a bribe. Alternatively, he was accused by members of other groups of supporting Moqtada and would then have to pay them bribes, and the militia would accuse him of serving infidels and make serious threats such as accusing him of being a collaborator with the coalition forces. The applicant claimed that his sister, a doctor and political candidate, was targeted and killed and that his father, a retired teacher, was attacked and killed a few months later. He claimed that they were targeted because

their positions were perceived to represent opposition to the aims of the fundamentalists and that as a member of the same family he was at risk, as were his spouse and children, because it was a common strategy of terrorists in Iraq to attack family members of their opponents. The applicant claimed that he was a religious follower of the non-aligned Akhbari Shi'ites and had progressive views about followers of other faiths, and that he was at risk of being attacked by ideological enemies in the Mahdi Army and Fadhila Party. He also claimed that he was at risk of being attacked by the opponents of a leading Akhbari cleric because he was related to him by marriage. He claimed that he had no interest in joining or supporting any of the groups that were seeking power and influence in Iraq, and that Iraq should have a secular government. He claimed that he viewed the coalition forces as liberators, not invaders or occupiers of Iraq, and he believed they should stay until Iraq became peaceful. The applicant also feared for the safety of his wife and children. He claimed that women were vulnerable to attack and sexual abuse for not conforming to a stringent dress code demanded by fundamentalists, and that his teenage daughter was particularly vulnerable. He claimed that his children's school was bombed last year by fundamentalists who detested co-education and that he had received notes under his door threatening to abduct his son. The applicant provided a number of statements to the Tribunal, including from an ex-Iraqi army officer and contact for coalition forces based in Basra who regularly met coalition forces in the applicant's shop, and from an Iraqi journalist who assisted foreign media and acted as a contact for coalition forces in Basra. The journalist claimed that his name and another journalist, who were contacts of a murdered overseas correspondent, were on a hit list along with the applicant for having contact with foreign journalists.

Held: Decision under review set aside

The Tribunal found that the issue of the applicant's credibility had to be considered, given that he made a visitor visa application and pursued it at the MRT on the basis that he had no particular fears in Iraq and had strong interests in returning there. The Tribunal also had concerns that the applicant's claims had evolved over time with the addition of claims that he was on a hit list and that he received threatening letters and phone calls, of which no concrete evidence was submitted. The Tribunal did not accept these claims as it found that they would have been included in his initial statement if they were true. However, the Tribunal found that there were certain consistent elements in the applicants' circumstances which created a real chance of serious harm for Convention reasons. The Tribunal accepted that the applicant's sister was killed and that although there was some doubt as to whether his father was deliberately or accidentally killed, given the state of violence in Basra at the time and the fact that one member of the family had already been deliberately killed, the Tribunal gave the applicant the benefit of the doubt. The Tribunal found that professionals, the highly educated, and the elite political and commercial class, especially if female, were targeted to augment the power of one political faction over another, and that the political opinion of the victims was the motive in this instance. The Tribunal further found that Iraq is a very tribal society and that if the applicants were not safe in Basra they would not be safe anywhere else in the country, especially with elections coming up. The Tribunal found that the Iraqi authorities were unable to protect the applicant and his family from such harm and was therefore satisfied that the applicants had a well-founded fear of persecution within the meaning of the Convention.

Kiribati

0907346

10 December 2009, Sydney

Mr J Duignan, Member

KIRIBATI – PARTICULAR SOCIAL GROUP – CLIMATE CHANGE REFUGEES – The applicant claimed to fear persecution on the basis of belonging to the particular social group comprising people from Kiribati who have lost the capacity to earn a livelihood as a result of climate change. The applicant claimed that his village had been badly affected by rising sea water and regular wild storms. He claimed that the rising sea water and salinity had polluted fresh drinking water supplies and ruined the fruit trees which are their main source of livelihood besides fish. He claimed that the future of Kiribati is frightening as it sinks further into the sea every year due to climate change. He claimed that he could not work or support his family and that he would eventually have nowhere to go. The applicant's adviser submitted that it is anticipated that all the people of the applicant's village will need to relocate as they are rapidly running out of food, water, energy and shelter and that relocation within Kiribati was difficult, as it was a matter of time before other areas are affected by rising sea levels. The applicant's adviser noted that under existing laws, people affected by

climate change are not recognised as a cognisable group of people in need of protection. However, the adviser argued that existing protection visa laws can, and should, be creatively interpreted to accommodate climate change refugees in the absence of specific provisions in the Migration Act. The adviser submitted that climate change should be seen as a form of persecution involving serious harm, and noted that those affected by the phenomenon will suffer significant economic hardship, be denied the capacity to earn a livelihood, and that such hardship threatens their capacity to subsist. The adviser further submitted that the government of Kiribati was unable to protect people from this persecution and that in light of scientific knowledge of the impact of carbon dioxide emissions, Australia's continued production of high levels of such pollution, in disregard of people on low-lying islands, constituted the relevant motivation to characterise climate change as persecution.

Held: Decision under review affirmed.

The Tribunal did not believe the applicant feared persecution for reason of race, religion, nationality, membership of a particular social group or political opinion as required by the Refugees Convention. The Tribunal noted that it is well established that persecution within the meaning of the Convention must involve a discriminatory element. The Tribunal did not believe that an attitude or motivation could be identified, such that the conduct feared by the applicant could be properly considered as persecution for a Convention reason. The Tribunal found that there was no basis for concluding that countries which have been historically high emitters of greenhouse gases have any element of motivation to have any impact on residents of low-lying countries such as Kiribati. It noted that those who continue to contribute to global warming, while being aware of the consequences of their actions, may be accused of having an indifference to the plight of those affected. However, the Tribunal found that this did not overcome the problem that there exists no evidence that any harm flowing from such behaviour is motivated by a Convention ground. The Tribunal found that the submissions regarding the applicant's membership of a range of social groups were not helpful, as it did not believe it was possible to identify any agent of persecution who could be said to be undertaking actions which harmed the applicant for a Convention reason. Thus, the Tribunal found that, while there may be many potential social groups of which the applicant was a member, the absence of the element of motivation meant that persecution could not be said to be occurring for reasons of membership of any such group. The Tribunal noted the applicant's adviser's submission that other jurisdictions have in place mechanisms which allow for the identification of elements of natural disaster or environment problems which give rise to people seeking protection in a country other than that of which they hold nationality. However, the Tribunal was bound to apply the law as it currently stood in Australia and it did not believe that the law allowed for protection under the Convention for those in the applicant's situation. The Tribunal noted that the applicant's circumstances, and those of others living in Kiribati, are serious and deserving of significant Government consideration and attention. However, it found that they were not matters against which the Convention, as it applies in Australia, is able to provide protection. Accordingly, the Tribunal affirmed the decision under review.

Nigeria

0904954

23 November 2009, Melbourne

Mr P Tyler, Member

NIGERIA – RELIGION – CHRISTIANITY – PARTICULAR SOCIAL GROUP – ROYAL FAMILY – CANNIBALISM AND VODOO – The applicant claimed that he was a member of the royal family of his local village and that his father was the King of this village up until the time of his death. He claimed that according to the customary tradition of his village, as the only son, he was the next in line to be King. He stated that the elders of the village contacted him after his father's death to inform him that to become King of the village he would be required to eat the heart of his father as a sacrifice. He informed them that, as a Christian, it was contrary to his religion to engage in cannibalistic practices. He claimed that he was told that it was a taboo to reject the custom and tradition of the land and that the elders were angry that he would not engage in the practice. The applicant claimed that three or four days later, the king-makers sent a parcel to his house with the feather of a chicken which constituted a threat indicating that they would put a death sentence on his lineage if he did not eat his father's heart. He stated that, a few weeks later, his house was bombed with an egg of the local hen which contained a medicine that resulted in the house burning down, signifying the commencement of a war against his lineage. He claimed that a short time later he was asleep

when he heard his twin sons screaming, and that they subsequently died within a few minutes for reasons which were unknown. After consulting with his elders in Lagos, they indicated that his children had died because he came from a royal family and had refused to take up the position of King and that because of this, these disasters would continue to occur. He claimed that he had to leave Nigeria because he would be killed due to his religious beliefs that prevented him from partaking in the customary traditions of his village. He claimed that the government authorities could not provide him with protection because they recognised the supremacy of customary laws and traditions and they would not interfere.

Held: Decision under review affirmed.

The Tribunal found that the applicant was a witness who lacked credibility, and that he provided evidence that was inconsistent and lacked plausibility in significant respects. The Tribunal noted that the main event on which the applicant's claim was based was his father's death, which the applicant claimed to have been in 2008. However, in support of a previous visa application, the applicant provided the Department with a copy of his marriage certificate from 2000 which indicated that his father was deceased at that time. The Tribunal further noted that when this inconsistency was pointed out, the applicant said that his father did not approve of his marriage and did not therefore attend his wedding. However, the applicant's wife told the Tribunal that his father did attend the wedding. The Tribunal found that the applicant provided no supporting evidence as to the death of his father whom he claimed was a significant figure in his community. Whilst the Tribunal accepted that many people in Africa, including Christians, believed in the powers of voodoo, it did not accept that the applicant's house was burnt down when an egg was thrown at it or that the claimed death of his sons was caused by voodoo. It accepted that the applicant may have believed these events were caused by voodoo but that he was unable to explain the practical aspects of the events. Accordingly, the Tribunal did not accept that the applicant's father died in 2008; that the applicant was required to eat his father's heart to take the position of King of his tribe, or that the king-makers had been pursuing him to take on the role of King. It also did not accept that his house was burnt down because an egg was thrown at it or that the applicant's sons died due to voodoo. The Tribunal did not accept that the applicant's evidence was plausible and therefore it found that he had not suffered serious harm in the past or that there was a real chance that he would suffer serious harm in the future. Accordingly, it found that the applicant did not have a well-founded fear of persecution for a Convention reason.

Philippines

0907276

4 December 2009, Sydney

Ms K Hartman, Member

PHILIPPINES – PARTICULAR SOCIAL GROUP – PEOPLE WHO BORROW MONEY FROM LOAN SHARKS – NO CONVENTION GROUND – The applicant claimed that he had applied for a protection visa on the basis he had a "well founded fear" of being persecuted because he was a "member of a particular social group". He claimed it was a "group of people who owed loan sharks money". He claimed that he was threatened because he was a member of that group. The applicant claimed to have borrowed money from a loan shark to buy a business and that, when the business went bankrupt, he was unable to repay the loan. The applicant claimed that the loan shark hired gangsters to threaten him and that the loan shark started asking for payments, however, he couldn't even pay them interest. The applicant claimed that they called his mobile 2-3 times a day and they came to his house. He claimed that when they rang he told them that if he got some money he would pay them. He claimed that he was threatened for about one month and that when he reported the threats to the police they told him that, as he didn't have anything in writing, there was nothing they could do and that it was a personal matter. The applicant claimed that he was forced to flee the Philippines as he feared he would be harmed. The applicant claimed that he had not applied for a protection visa for several years after he arrived in Australia as he was looking for job opportunities. He claimed he was trying to find someone to sponsor him but he couldn't find anyone and then his visa ran out and he didn't know he could apply for a protection visa until a friend told him. The applicant advised the Tribunal that he came to Australia to "try his luck and start a new life". He claimed that the situation in the Philippines was hard and that there had been three typhoons and unemployment is high. He claimed he was well educated and wouldn't be a burden to the taxpayer. Along with the visitor visa application on which he entered Australia, the applicant submitted a statement from his bank indicating he had a large amount in his

savings account. The applicant also claimed that his mother was a professional who had paid for his post graduate degree and was supporting his wife and children in the Philippines.

Held: Decision under review affirmed.

The Tribunal found that the applicant's claims were vague and that the applicant changed his evidence numerous times during the hearing. When the Tribunal asked the applicant why he had left the Philippines he picked up a piece of paper and asked the Tribunal if he could read the reason why he had left. The Tribunal was of the view that if the applicant had left the Philippines in fear of his life he would have been able to tell the Tribunal in his own words what had happened to him especially as he had completed 19 years of education; he has a Master's degree and he spoke perfect English. The Tribunal found that the applicant's claims and the delay in applying for protection had led it to find he was not a witness of truth and that his claims had been fabricated. The Tribunal found that country information before the Tribunal did not indicate that he would be unable to obtain police protection if he had been threatened by gangsters. At the hearing, the applicant stated that the money in his savings account was his mother's, which she had put the money into his account to convince the Australian authorities he had the funds to travel and support himself. The Tribunal found that the applicant had misled the Department in relation to his financial situation in order to obtain his visitor visa. This led the Tribunal to find that the applicant had also fabricated claims in order to strengthen his claim for a protection visa. The Tribunal found that there was no real chance that the applicant would face persecution if he returned to the Philippines now or in the reasonably foreseeable future for any Convention reason. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for any Convention reason.

Russia

0907299

10 December 2009, Sydney

Mr G Short, Senior Member

RUSSIA – PARTICULAR SOCIAL GROUP – PEOPLE WITH DISABILITIES – The applicant entered Australia in 2000 and married in 2004. She claimed she came to study English and hospitality and that in 2003 she suffered a stroke. She claimed she had improved a lot but her prognosis was uncertain. Her parents' health was also not good and her brother had been killed. She claimed that around eight years previously, when her parents had tried to find out the truth about her brother's killing, they had received threats that their daughters would be kidnapped. She said that, as a result, her parents had decided to send her and her sister overseas. She claimed that because of her problems, she had become addicted to heroin. She claimed she had tried to give it up many times but she had failed. She had been on methadone for six years and she had been told that methadone helped to stop epileptic fits which could lead to another stroke. She claimed that in Russia methadone was illegal and she would not be able to continue with this medication if she were to return. The applicant claimed that she and her husband were still together but that he was against methadone. She said that she had also been told that she was not fit to travel by air as this could cause another stroke. The applicant claimed that if she returned to Russia it would be very difficult for her, without an education and suffering from a disability, as there were no facilities to care for a young person like her and that she would be at home with her parents and have no future. She said that she wanted at least to be able to finish her studies here. Medical evidence was also provided in support of the application.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness and accepted that she had suffered a stroke in 2003 which had affected her gait although she is mobile and able to perform activities of daily living without assistance. The Tribunal accepted that the stroke had also affected her memory and that she was subject to poorly controlled seizures or fits, for which she has tried anticonvulsants with little effect. The Tribunal also accepted that the use of methadone is prohibited by law in Russia. The Tribunal accepted the applicant's evidence relating to her history of drug use and that when she attempted to stop using methadone on one occasion, she had fits, lost consciousness and she ended up in a psychiatric unit. The Tribunal first considered whether there was a real chance that the applicant would be persecuted for reasons of her membership of the particular social group defined as 'people with disabilities' or 'women with disabilities' if

she returned to Russia now or in the reasonably foreseeable future. Independent evidence indicated that 'people with disabilities' are distinguished from society at large by virtue of the shared attribute of their disability despite the fact that they may have different disabilities or that they may suffer from varying degrees of disability. Apart from the issue regarding methadone the applicant had not suggested that she would not have access to appropriate medical care in Russia. The Tribunal found that independent evidence confirmed that many people with disabilities are effectively confined to their homes, both because of poor job prospects and problems of physical access to buildings and public transport. Independent evidence indicates that disabled persons in Russia are entitled to a pension, however according to a UN Report the level of such pensions remained inadequate. The Tribunal therefore found that there is a real chance that the applicant would be discriminated against for reasons of her membership of the particular social group of 'people with disabilities' or 'women with disabilities' in Russia to such an extent that she would be denied the capacity to earn a livelihood of any kind. The Tribunal considered that the independent evidence referred to clearly demonstrated that people with disabilities do not merely face problems in obtaining employment because of their disabilities but rather that people with disabilities are discriminated against in obtaining employment for reasons of their membership of the particular social group of 'people with disabilities' and that 'women with disabilities' are doubly disadvantaged because employers give preference to disabled men. The Tribunal did not consider that it would be reasonable, in the sense of practicable in her particular circumstances, for the applicant to relocate to another part of Russia. Accordingly, the Tribunal remitted the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention

Sri Lanka

0908313

2 December 2009, Melbourne

Mr A Gentile, Member

SRI LANKA – IMPUTED POLITICAL OPINION – LTTE SUPPORTER – ETHNICITY – SRI LANKAN MOORS – PARTICULAR SOCIAL GROUP – FAMILY MEMBERSHIP – The applicant claimed that he cannot return to Sri Lanka as the authorities suspected he was a Liberation Tigers of Tamil Eelam (LTTE) supporter. The applicant claimed he resided in Jaffna up until 1990 when he and his family were forced to leave as the LTTE took control of northern Sri Lanka. In 2003, the applicant entered Canada on a student visa where he applied for refugee status. This was refused and, after losing an appeal, he was subject to a deportation order. The applicant indicated that he resided unlawfully in Canada from 2007 to 2009 before departing for Australia with the assistance of a people smuggler. The applicant claimed that he feared returning to Sri Lanka because he had attended a protest march in support of the Tamils in Toronto. He claimed that several months later two former Sinhalese friends had beaten him up for his support of the Tamils and that they were informants for the Sri Lanka government and had passed on this information. The applicant claimed that he had been told he appeared on a video shot at the protest and that the government was looking for him as a Tamil from Jaffna whom they believed was supporting the LTTE. The applicant claimed that his father told him that they had gone to his house a number of times. He claimed that he would be detained upon his return to Sri Lanka and that he would be killed by Sinhalese military forces. He claimed that he had never belonged to any political party and that he had never attended a demonstration in Sri Lanka. The applicant claimed that his father was taken by the LTTE in June 2003 due to his repeated refusal to pay increased 'tax' to them when he was moving from Colombo to the north. His father was released in 2008 after having been held in different areas of the north, the exact location of which not even his father knew as he was transferred from one place to another while blindfolded.

Held: Decision under review affirmed

Although the applicant insisted that he was Tamil, the Tribunal found that the evidence did not support this. The Tribunal found that the applicant's birth certificate indicated that both of his parents were Ceylon Moors. Independent information indicated Sri Lankan Moors were Muslims and this, together with the applicant's name, led the Tribunal to conclude that the applicant was a Sri Lankan Moor who speaks, reads and writes Tamil by virtue of his place of birth. The Tribunal found that as his family moved to Colombo when the applicant was ten, this also explained why the applicant spoke Sinhalese. The Tribunal accepted that the applicant's religion was Islam and relied upon recent information reporting the total absence of any examples of abuses or harm to any Muslim by any other religious group for reason of religion. Accordingly,

the Tribunal found that the applicant did not, now or in the reasonably foreseeable future, face a real chance of persecution because of his religion. The Tribunal accepted that the applicant attended a rally in Toronto and that he may have been videoed. However, it found it implausible and did not accept that two of his ex-friends beat the applicant some seven months after his participation in the rally, even if the rally was, by implication, critical of the armed forces of Sri Lanka who were mostly Sinhalese. The Tribunal did not consider that his attendance at a rally with 50,000 people in another country would be considered such an overtly hostile act which would impute the applicant with support for the LTTE. The Tribunal did not accept that he would be sought by the police who were trying to find his whereabouts because he travelled out of Sri Lanka to Canada with a valid Sri Lankan passport. The Tribunal found that the applicant would not be at risk of being imputed as an LTTE supporter because of his father's past contacts with the LTTE, including the fact that he paid taxes to them. The Tribunal thus found that there was not a real chance that authorities would impute the applicant with a pro-LTTE political opinion or seriously harm him because of his membership of a particular social group, that being his family. Therefore, the Tribunal found that the applicant did not face a real chance of persecution for reasons of his real or imputed political opinion, his race or ethnicity and his religion, now or in the reasonably foreseeable future should he return to Sri Lanka. Thus, it found that his fear of persecution for any Convention reason was not well-founded.

Turkey

0908130

23 December 2009, Melbourne

Ms M Cameron, Member

TURKEY – ETHNICITY – KURDISH – PARTICULAR SOCIAL GROUP – MARRIED TURKISH KURDISH WOMEN – HONOUR KILLINGS – The applicant claimed she came to Australia after her arranged marriage to an Australian man. A counsellor's letter claimed that the applicant is from a Kurdish family who are very traditional in their views about marriage. The applicant claimed she was subjected to terrible violence at the hands of her husband and then he withdrew his sponsorship of her. The applicant then became 'unlawful' and was unaware of this fact until she sought legal advice. Although members of her husband's family had witnessed the violence against her, the applicant claimed that nobody helped her and she was embarrassed about it. Her husband opened a shop where she worked, as well as keeping house. She received no money and his family criticised her. According to the counsellor's letter, the applicant's husband abused her when he was drunk by punching her, kicking her and holding her by the hair while he berated her. On one occasion, the neighbours called the police but as there was no interpreter present, the police left without obtaining appropriate help for the applicant. The applicant also claimed that her husband had sexual liaisons with other women and that he forced the applicant to have sex with him. When he did not want to have sex, she was made to sleep on the bedroom floor. On the occasion that the applicant left her husband she had been beaten more severely than usual, and her injuries have been documented by a doctor. She still suffers hearing loss as a result of the beatings. The applicant claimed that her family knows little of the violence she has suffered; however, she claimed they would expect her to stay with her husband regardless of the circumstances. If she were to return to Turkey, the applicant claimed that her family would punish her and possibly kill her for bringing dishonour on the family. The applicant's statement claimed she would not be afforded police protection in Turkey and, if she were to seek the help of the police, they would return her to her family. Evidence was also provided relating to the applicant's brother who had spent time in jail for participating in an honour killing of a family member. A witness gave evidence of her own experiences consequent to defying her family's wishes regarding her personal knowledge of the applicant's family, and their past violence and abuse of the applicant.

Held: Decision under review set aside.

The Tribunal found the applicant to be a forthright and credible witness. The Tribunal relied on independent country information to find that Turkish Kurdish women, and particularly married Turkish Kurdish women, constitute particular social groups within the meaning of the Convention and found that the applicant is a member of these groups. The Tribunal accepted that the applicant had suffered physical abuse and confinement by her family for resisting their arrangements for an earlier marriage. However, the Tribunal found that the harm the applicant feared, principally from her family members and possibly her husband's family members, is not for a Convention reason but rather because of her actions in separating from her abusive husband. The Tribunal noted independent sources which indicate that separation and divorce

initiated by women in Turkey is considered to bring dishonour and shame to families. The Tribunal relied on several documented cases where a divorce initiated by a woman in Turkey had led to the woman being killed by her relatives. Country information suggested that separated or divorced women can be at risk of harm from their own families. On this basis, the Tribunal was satisfied that honour killings remain prevalent in Turkey, particularly in Kurdish communities, including where the applicant's family resides. Independent country information before the Tribunal indicated that human rights groups remain critical of the level of state protection provided to woman at risk of being harmed in the name of honour. Police inaction, judicial sympathy with the perpetrator, and the paucity of shelters are all cited as indicative of inadequate state protection. Accordingly, the Tribunal was satisfied that the applicant would face a real chance of being persecuted if she returned to Turkey now or in the reasonably foreseeable future. The Tribunal found that the applicant's fear of persecution was well founded and for a Convention reason and she was therefore a refugee within the meaning of the Convention.

Zimbabwe

0904439

18 December 2009, Melbourne

Mr P Murphy, Senior Member

ZIMBABWE – PARTICULAR SOCIAL GROUP – OVERSEAS STUDENTS – IMPUTED POLITICAL OPINION – ANTI-GOVERNMENT – The applicant claimed that she was a Christian and a member of the Shona ethnic group, who had been a student in Australia since 2003. She claimed that she did not want to return to Zimbabwe as it was very dangerous due to the current political climate. The applicant claimed that her father was a small town pastor and that the church rules were that he was not allowed to be politically active. She claimed that the town was in a Zimbabwe African National Union – Patriotic Front (ZANU-PF) dominated area and that, as her father had not taken part in any campaigning, they had assumed he supported the opposition. She claimed that ZANU-PF members had become angry with him and on one occasion they threw stones at his house. Her father also received threats, but although he tried to get help there was nothing they could do as ZANU-PF controlled the police. She claimed that because she was studying in Australia there had been allegations her father was misusing church funds to send her abroad and that, as ZANU-PF supporters do not like western countries, they thought that studying in Australia was treacherous to Zimbabwe. She claimed that she was afraid to return as it would bring attention to her family who may then be considered supporters of 'the west' and the opposition Movement for Democratic Change (MDC). The applicant stated that, although she had been back to Zimbabwe in late 2007 for a period of weeks, she had kept a low profile and spent the majority of her time in Bulawayo. She claimed that her mother had been assaulted by ZANU-PF supporters whilst at work, and provided a letter from her mother's employer verifying the attack. She also provided a submission by a friend from her town who went to South Africa to study and was beaten by ZANU-PF supporters on his return as he "had run away when his country needed him". He required medical attention which was only available in South Africa and now lives in Namibia as he was too scared to return to Zimbabwe.

Held: Decision under review set aside.

The Tribunal noted that the applicant was prepared to voluntarily return to Zimbabwe, however, it accepted her claims that she wished to reconnect with her family having been away for a lengthy period. The Tribunal accepted that she and her family did not promote the fact she had returned for fear of adverse reaction, and because of concerns for her safety she spent a significant proportion of her time in Bulawayo. The Tribunal therefore did not consider her visit to Zimbabwe as a factor that was inconsistent with her claimed fear of persecution. The Tribunal found that there was no objective evidence to show that there was any perception in her local community that her father was opposed to the government, or that he had misused church funds for her benefit. It found that whilst an incident occurred where stones were thrown at their home, it did not accept it was as a consequence of his apparent neutrality in his church role. The Tribunal noted that the applicant had never claimed to be a supporter or member of the MDC, nor had she claimed her parents were MDC members. As such, the Tribunal did not accept the applicant had a political profile that would lead to her being perceived to be an MDC supporter or a person with anti government views, or that she had ever experienced personal harm or been targeted because of her actual or imputed political opinion. The Tribunal rejected the claim that lawfully leaving Zimbabwe as a student and residing in Australia would result in the applicant being perceived as being opposed to the Government. It found that many Zimbabwean

citizens visit Australia for various reasons, including study, and there was no indication they face harm on return to Zimbabwe. However, the Tribunal found that the applicant had given credible evidence which suggested that her mother was assaulted and threatened by ZANU-PF supporters, ostensibly because of her daughter's presence overseas. It also found that her witness had experienced similar levels of questioning and had been assaulted on his return to Zimbabwe last year by local youth militia or ZANU-PF supporters because of his time overseas and a perception by those supporters that he did not actively demonstrate loyalty to the ZANU-PF cause. As such, whilst the Tribunal did not accept there was a general risk to returnees for having been in Australia, in this particular case it could not dismiss as fanciful or remote the possibility that the applicant could attract such attention from local ZANU-PF or youth militia members in her area. The Tribunal found that such risks clearly amounted to 'serious harm', and that the reason the applicant would face such persecution was due to an imputed political opinion which fell within the scope of the Convention. The Tribunal was therefore satisfied that the applicant did face a real chance of persecution if she returned to Zimbabwe now or in the reasonably foreseeable future, and found she had a well founded fear of persecution for that reason.

FEDERAL COURT JUDGMENTS

MIAC v SZMTR

[2009] FCAFC 186

Federal Court of Australia, Moore, Rares and Flick JJ, NSD 1106 of 2009, 23 December 2009

This was an appeal from a judgment of the Federal Magistrates Court allowing an application for judicial review of a Refugee Review Tribunal (the Tribunal) decision that it did not have jurisdiction.

The respondent arrived in Australia on a claimed false passport in the name of HZ and applied for a protection visa in her claimed real name ML. The delegate refused to grant the visa and sent an envelope containing the notification to HZ at the address given in the application. The respondent received the envelope four days after it was despatched. She applied to the Tribunal for review more than 28 days after she was deemed to have received the letter. The Tribunal treated the letter addressed to HZ as a sufficient notification to ML under s.66 of the Migration Act (the Act) and found it did not have jurisdiction.

The respondent contended successfully before the Federal Magistrates Court that she had not been notified in accordance with s.66(1) of the Act because the envelope was not addressed to ML. Smith FM held it was a mandatory requirement of the scheme in s.494B that the document notifying an applicant for a visa of its refusal had to be to a "correct addressee name." The Minister appealed the decision of Smith FM. The question was whether by addressing the envelope to HZ and not ML the delegate complied with the requirement of s.66 of the Act "... to notify the applicant of the decision in the prescribed way."

Held: Appeal allowed.

- (i) The Federal Magistrate erred in concluding that the use of HZ's name as part of the address failed to comply with a mandatory requirement of the Act. The Minister sufficiently addressed the envelope for the purposes of ss.66(1) and 494B(4) to ensure that it would come to the attention of the intended recipient, namely the person who had applied for the visa. The requirements of s.494B(4)(b) and (c)(i) were satisfied as the envelope was addressed to the residential address provided by the applicant for the visa and used one of the names that that person had used in connection with her application, being the name on the passport that she asserted was false. That was a sufficient means of identifying to the recipient of the envelope, that the envelope was intended for the person who had applied for the visa. The fact that she sought to disclaim that HZ was in fact her name did not preclude the Minister from using it to address the envelope.
- (ii) Section 66(1) of the Act requires the Minister to notify "the applicant" of a decision to refuse a visa, that is, the *person* who made the application identified in s.45 as the non-citizen who wants a visa. The respondent, by whatever name she used, was such a person.

Obiter:

- (iii) It is difficult to conceive how a person can be notified for the purpose of s.66(1) by a letter posted to his or her address if his or her name is not on the envelope. The words of s 494B(4) refer to a particular recipient. Common sense suggests that the name of that recipient be on the envelope. Identifying an addressee on an article sent by post is an ordinary if not universal incident of "posting".

SZMAR v MIAC & Anor

[2009] FCA 1530

Federal Court of Australia, Barker J, NSD 761 of 2009, 18 December 2009

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

The appellant claimed to fear persecution from the Tehreek-e-Nafaz-e-Shariat-Mohammadi group (TNSM) and his wife's former husband's family. He claimed that a religious scholar connected to the TNSM had placed a fatwa on him because his wife's divorce from her former husband was invalid and the current

marriage was against Sharia Law. After the hearing the Tribunal wrote to the Australian Embassy in Islamabad seeking further information. The response did not specifically answer the Tribunal's question as to whether fatwas issued by the religious scholar or the TNSM were generally honoured, and indicated that recent attempts to contact the source to follow up on questions relating to the fatwa had proved unsuccessful. The Tribunal accepted the appellant's claims that the religious scholar had placed a fatwa on him and that he and his wife had been attacked by his wife's former husband and his family. However, it affirmed the delegate's decision for reason that it would be reasonable for the appellant and his wife to relocate to another part of Pakistan; and it was not satisfied that the authorities would fail to provide him with protection if he were to return to Pakistan.

Amongst other things, the appellant submitted that the information obtained after the hearing, or at least the fact that attempts to obtain further information were unsuccessful, should have been provided to him under s.424A of the *Migration Act 1958*. He also alleged that the Tribunal had applied incorrect tests regarding the 'real chance' of persecution and the reasonableness of relocation.

Held: RRT decision set aside and remitted for reconsideration.

- (i) The Tribunal breached its obligation under s.424A(2) and thereby committed jurisdictional error. The information obtained by the Tribunal regarding the Post's unsuccessful inquiries was, in the circumstances, "information that the Tribunal considers would be reason, or a part of the reason, for affirming the decision that is under review" for the purposes of s.424A(1). The Tribunal should have particularised this information and invited comment and response as required by s.424A(2). If the information had been provided to the appellant with the advice that the information to hand supported a view that the fatwa should not be accorded a high level of seriousness, he may well have been in a position to respond by making further inquiries himself and, if necessary, by adducing further information or making submissions on the point.
- (ii) The Tribunal's findings concerning the likelihood of persecution, relocation and state protection were made by the Tribunal as a consequence of its reasoning that the fatwa against the appellant and his wife should not be accorded a high level of seriousness. As the Tribunal failed to comply with s.424A in relation to information regarding this issue, its findings as to these issues were also attended by jurisdictional error.

MIAC v Kamruzzaman

[2009] FCA 1562

Federal Court of Australia, Greenwood J, QUD 414 of 2008, 23 December 2009

This was an appeal from a judgment of the Federal Magistrates Court allowing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision not to grant the applicant a Skilled (Australian sponsor) (Migrant) (Class BQ) Subclass 138 visa.

In his visa application, the respondent listed his nominated occupation as "Business and Information Professional" which had the Australian Standard Classification of Occupations (ASCO) classification code 2299-79 and was specified by the Minister in an instrument in writing as a "skilled occupation" for r.1.03 of the *Migration Regulations 1994* (the Regulations). Clause 138.216 of Schedule 2 to the Regulations required that at the time of application an applicant had to have been employed in a skilled occupation for a period of 24 months of the 36 months immediately before the application. The respondent stated that at the time of application he had been employed by a bank as an assistant officer for a period of about 4 years. The Tribunal accepted that he had been employed by the bank but was not satisfied that he was employed as a Business and Information Professional. The Tribunal concluded that the respondent was employed as a "Bank Worker" or "Credit and Loans Officer" which were not skilled occupations.

The Federal Magistrates Court held that the Tribunal committed jurisdictional error by focusing on the respondent's tasks rather than his skills, and that it asked itself the wrong question by asking whether he was a Bank Worker or Credit and Loans Officer rather than whether he was a Business and Information Professional. On appeal, the Minister submitted that the Tribunal undertook the required task which was to consider whether the respondent was employed as a Business and Information Professional, not whether he was utilising some of his skills arising out of his qualifications.

Held: Appeal allowed.

- (i) The Tribunal did not commit jurisdictional error by failing to consider whether the respondent's tasks required him to exercise his tertiary-level skills. Nor did it ask itself the wrong question.
- (ii) A skilled occupation is not an occupation in which higher-order skills are utilised. Rather, it is an occupation specified by the Minister in an instrument in writing as a skilled occupation. It was proper for the Tribunal to examine the tasks the visa applicant actually performed against ASCO classifications to determine which of those classifications most closely described the visa applicant's actual employment, and to conclude that he had not been employed in a skilled occupation. Whether he was utilising his tertiary-level skills in undertaking the tasks of a non-skilled occupation was not relevant to that determination.
- (iii) The Tribunal did emphasise the comparison between the visa applicant's duties and those of a Bank Worker and Credit and Loans Officer. However, the Tribunal considered the description of a Business and Information Professional sufficiently to engage a comparison between the visa applicant's tasks, the tasks of a Business and Information Professional, and the tasks of a Bank Worker or Credit and Loans Officer, in order to determine the question before it.

FEDERAL MAGISTRATES COURT JUDGMENTS

Lam v MIAC & Anor

[2009] FMCA 1231

Federal Magistrates Court of Australia, Lindsay FM, ADG 75 of 2009, 11 December 2009

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate to refuse a Partner (Provisional) (Class UF) visa.

The applicants claimed they had had no contact between 1998 and June 2006 when they commenced their relationship. In December 2005 the Department had received a call from an anonymous informant alleging that in 2003 the review applicant had become engaged in Vietnam to a woman he was at that time sponsoring but had split up with that person, and that in 2003 he had married a girl in Vietnam, identified as the visa applicant in the present proceedings, while not divorced from his sponsoring wife in Australia. The informant stated the review applicant was entering into contrived relationships for migration purposes.

Pursuant to s.359A of the *Migration Act 1958* (the Act) the Tribunal informed the review applicant that information had been received that he had been in a relationship with the visa applicant since 2003. It stated the information was relevant because it contradicted the claim the relationship commenced in 2006, and may indicate that the visa applicant and review applicant had not been truthful about their relationship. It also informed the review applicant that the information suggested he had been engaged in a number of relationships since 2003, apart from his relationship with the visa applicant, which may indicate he was not committed to an exclusive life with her. The striking coincidence of the caller in 2005 naming the visa applicant as a person with whom the review applicant was in a relationship when he/she could not have known she would turn out to be a subsequent visa applicant was essentially what determined the application adversely to the applicant.

The applicant alleged, among other things, that the Tribunal had failed to comply with s.359A of the Act in that it did not give the applicant clear full or fair particulars of the information provided.

Held: Application allowed.

- (i) The way the Tribunal discharged its obligations under s.359A amounted to jurisdictional error. The applicant should have been provided with clear particulars of the information that the anonymous informant was alleging that the parties were married in 2003. The fact of the marriage was highly significant and easily cross checked.
- (ii) Section 359A should be understood as being directed to the process of the conduct of the review and ensure procedural integrity. It should not be understood only from the perspective of the final outcome. The fact that a particular part of the information did not find its way into the Tribunal's reasons should not be regarded as determinative of whether procedural fairness was accorded. The fact of the marriage was not per se a matter that the Tribunal relied upon in coming to its conclusion but it was a part of the information that served to utterly undermine, in the Tribunal's eyes, the credibility of the applicant's case.
- (iii) Provision of information on a confidential basis is a significant part of the administrative process. In all of the circumstances, the nature of the obligations imposed by s.359A did not require the Tribunal to release to the applicant any fact or circumstance relating to the informant's identity. Nor did it require the Tribunal to release to the applicant the balance of the information contained in the file note which was not provided in the s.359A letter, except for the specific allegation that the review applicant and visa applicant had married in 2003.

SZNYA v MIAC & Anor

[2009] FMCA 1283

Federal Magistrates Court of Australia, Scarlett FM, SYG 2320 of 2009, 24 November 2009

The applicant, a citizen of the People's Republic of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations.

The applicant claimed to fear persecution because he was an underground Catholic, and that he would be forced to go into the army and thereby not be allowed to practise his religion in doing his military service. The Tribunal was satisfied that the conscription law in China, including penalties for not undertaking military service, was a law of general application, and that the law would not be enforced selectively against the applicant for a Convention reason. It considered that enforcement of a generally applicable order does not ordinarily constitute persecution for the purposes of the Convention, and doubted that he would be conscripted. It found that the applicant was not a Catholic in China, and therefore, did not accept that conscription would prevent him from practising his religion.

Before the Court, Counsel for the Minister raised the question of the way the Tribunal dealt with the applicant's conscription claim, submitting that at no time did he claim that his reticence to undertake military service was based on a political or religious belief; and the basis upon which he did not wish to undertake military service was a concern that it would interfere with his ability to practise Catholicism. It was submitted that the Tribunal had dealt with the applicant's claims as they were articulated before it, and there was no requirement on the part of the Tribunal to undertake the multi-stage assessment expanded in *Erduran v MIAC* [2002] FCA 814 or *SZMFJ v MIAC (No.2)* [2009] FCA 95.

Held: Application dismissed.

- (i) The decision was not affected by jurisdictional error. The Tribunal considered the applicant's claim to fear persecution on the basis of his religious belief, and his claim that if he were conscripted into the armed forces on his return to China, he would not be able to practise his Catholic faith. This was not a case where the applicant claimed to be a conscientious objector to military service.

SZNVW v MIAC & Anor

[2009] FMCA 1299

Federal Magistrates Court of Australia, Smith FM, SYG 2018 of 2009, 22 December 2009

The applicant, a national of Pakistan, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution from radical Islamic groups and the government on the basis of his secular opinion.

During the Tribunal hearing, the applicant, who was in immigration detention at all relevant times, provided a document indicating a professional opinion supportive of his claim that he was suffering a depressive condition. The Tribunal indicated it had a number of problems with the document including that the author had not provided her qualifications and no independent testing had been conducted. The Tribunal went on to identify various inconsistencies and changes to the applicant's story which indicated he was not truthful. In response, the applicant referred to his mental state to explain the difficulties perceived by the Tribunal. The Tribunal did not receive or seek further medical evidence and ultimately gave the document no weight. It did not accept the applicant's explanation for his inconsistent recall and assessed his evidence as a person not suffering any impairment. It found the applicant not to be a witness of truth.

Before the Court, the applicant provided further evidence which indicated that the author of the document was a qualified clinical psychologist and that the applicant had been suffering from mental impairment at the time of the Tribunal's hearing. The applicant contended that the Tribunal fell into jurisdictional error in disregarding the psychologist's report.

Held: RRT decision quashed and remitted for reconsideration.

- (i) The Tribunal's decision was affected by jurisdictional error in that the Tribunal was deprived of the opportunity to assess the evidence given by the applicant in light of his diagnosed mental impairments, and the applicant was denied a "*real and meaningful*" opportunity to participate in the hearing and to have his evidence fairly assessed in the light of his impairments.

- (ii) It was open to the Tribunal on the evidence before it not to be persuaded that the applicant suffered from any relevant medical condition and to assess his evidence on that basis. However its assumption as to the applicant's mental health was wrong. A significant impairment to communication arising from mental state should be taken into account by the Tribunal when assessing the person's evidence and the Tribunal should not make its decision based upon a false assumption that the impairment did not exist.
- (iii) The evidence did not indicate that the applicant was entirely unfit to attend the Tribunal's hearing and answer its questions. However, *MIMIA v SCAR* (2003) 128 FCR 553 should be understood as pointing to a principle of jurisdictional error broader than the principal of total unfitness, and as encompassing a variety of circumstances, including transient and remediable circumstances affecting the validity of a decision made after a purported, but defective, hearing held under s.425. These impediments may readily be remediable by the Tribunal and not prevent it completing its review, if it is aware of the relevant circumstance before it makes a decision and responds appropriately, or if it conducts a second hearing either on its own initiative or after judicial review.

Reynolds v MIAC & Anor

[2010] FMCA 6

Federal Magistrates Court of Australia, Lucev FM, PEG 131 of 2008, 15 January 2010

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 an Other Family (Class BU) Subclass 835 (Remaining Relative) visa.

The delegate refused the visa on the basis that a Medical Officer of the Commonwealth (MOC) had determined that the applicant, who had moderate cerebral palsy, did not meet the health requirement in cl.4005(c)(ii)(A) of Schedule 4 to the Migration Regulations 1994 (Cth) which the delegate was bound to accept as correct under r.2.25A(3) of the Regulations. Following a hearing the Tribunal, which had been reconstituted, requested a new MOC opinion, addressing the letter to the "Review Medical Officer of the Commonwealth" at the relevant address. The MOC concluded that the applicant did not meet PIC 4005, notwithstanding contrary medical opinions submitted by the applicant. Following a further hearing, the Tribunal was satisfied after legal advice that the MOC opinion was valid, that it was bound to accept it as correct and affirmed the decision.

The applicant contended that the Tribunal's decision contained jurisdictional error in several respects, including that the MOC was improperly appointed and the opinion misinterpreted the relevant test.

Held: Application dismissed.

- (i) No jurisdictional error was established. The MOC opinion had been arrived at in compliance with the relevant statutory criterion and the Tribunal was bound to take it to be correct under r.2.25A(3). The MOC applied the terms of the applicant's particular condition to a hypothetical person and disregarded whether providing care or services to the applicant himself would result in cost to the Australian community, as the MOC was required to do.
- (ii) Regulation 2.25A(1) only requires that the Minister "seek the opinion" of a MOC. How the opinion sought is requested or obtained is not the subject of any specification. There is no requirement for the Tribunal to specify an individual MOC when seeking the opinion. There could be no doubt from the form and content of the letter that the Tribunal was seeking a medical opinion in respect of the prescribed health requirement for the visa.
- (iii) The Tribunal was entitled to presume, on the basis of the presumption of regularity, that the MOC was a MOC without referring to any evidence.
- (iv) The Tribunal was properly reconstituted. A Senior Member is not required to act in accordance with written guidelines from the Principal Member since the power to reconstitute is not qualified or fettered and the power to give written guidelines is permissive not mandatory.

- (v) The voluntary disclosure of the legal advice by the Tribunal that the MOC opinion was valid was sufficient to constitute waiver of any legal professional privilege therein. However, as a comment upon an existing factual situation, it was not new information for s.359A purposes.

**MIAC v Wainwright & Anor
[2010] FMCA 29**

Federal Magistrates Court of Australia, Wilson FM, BRG 275 of 2009, 22 January 2010

The Minister for Immigration and Citizenship (the Minister) sought judicial review of a Migration Review Tribunal (the Tribunal) decision that the primary applicant for a Temporary Business Entry (Class UC) Subclass 457 visa met Public Interest Criterion (PIC) 4006A for the purposes of clauses 457.224 and 457.224(b) of Schedule 2 to the Migration Regulations (1994) (the Regulations). The primary visa applicant had sought to satisfy the requirements of cl.457.223(7) and (7A) of Schedule 2 to the Regulations, pertaining to 'independent executives'.

The Tribunal had before it Medical Officer of the Commonwealth's (MOC) opinions that the primary visa applicant satisfied PIC 4006A(1)(a) and (b) of Schedule 4 to the Regulations, but did not satisfy PIC 4006A(1)(c), a requirement for the purposes of cl.457.224 of Schedule 2.

The requirements in PIC 4006A(1)(c) may be waived under cl.4006A(2) if the relevant employer of the visa applicant gives the Minister (or Tribunal on review) a written undertaking that the employer will meet all costs related to the disease or condition that caused the visa applicant to fail to meet the requirements. In PIC 4006A(3), 'relevant employer' is relevantly defined to mean "the proposed employer (within the meaning of the relevant part of Schedule 2) of the applicant". The Tribunal found that SpartaMatrix Australia was the relevant employer, that the applicant, in his capacity as the principal of SpartaMatrix, had given the Minister such an undertaking. Accordingly, the Tribunal waived the requirements in PIC 4006A(1)(c).

The Minister alleged that the Tribunal misapplied and incorrectly interpreted PIC 4006A by finding that the undertaking given by SpartaMatrix was validly given for that purpose, and that the primary visa applicant's business fulfilled the definition of a "proposed employer" within the meaning of PIC 4006A.

Held: MRT decision set aside and remitted for reconsideration.

- (i) The Tribunal erred in its interpretation of PIC 4006A(2) and (3) to the extent that it decided effectively that the visa applicant himself could give the undertaking; and in deciding that SpartaMatrix could also be an employer of him.
- (ii) For cl.457.223(7) and (7A) no employment relationship is envisaged. The 'independent executive' category presupposes that the visa applicant will carry on business as the principal. If an applicant is not seeking a visa where an employment relationship will come into existence, there can be no 'relevant employer' because there will be no proposed employer involved. Thus, the availability of the waiver would not arise.
- (iii) While there is no definition of "proposed employer" in subclass 457, 'relevant employer' needs to be a legal person other than the visa applicant. The business had no separate legal personality, and the respondent could not be his own employer. For there to be an employment relationship, there would need to be two contracting parties, an employer and an employee. The respondent could not contract with himself.

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 – Revocation of instruments under paragraph 3.10(5)(a) (IMMI 06/079).

This instrument revokes Migration Regulations 1994 – Agreement under regulation 3.10(5)(a) with Qantas Airways Limited (IMMI 06/068). This instrument also revokes Migration Regulations 1994 – Agreement under regulation 3.10(5)(a) with Jetstar Airways Pty Limited. This instrument commenced on 22 January 2010.

Migration Regulations 1994 – Specification under paragraphs 134.222C(2)(a), 139.226(b), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and subparagraphs 6B103(g)(ii) and (iii) – English Language Training Arrangements – December 2009

This instrument specifies states and territories in which arrangements are established for suitable English-language training for visa applicants for specified provisions in the Migration Regulations 1994.

Migration Regulations 1994 – Specification under subparagraphs 1136(3)(bb)(ii) and 1229(3)(ab)(ii) and subclauses 175.211(1), 176.211(1) and 475.211(1) – Skilled Occupations for Skills Assessments – December 2009

This Instrument specified those occupations required to provide a skills assessment dated on or after 1 January 2010 to support amendments to the Migration Regulations 1994 made to ensure the job readiness of onshore applicants nominating trade occupations and that offshore applicants applying for the specified occupations be excluded from meeting the Australian study requirement.

REGULATIONS

Education Services For Overseas Students Amendment Regulations 2009 (No. 1)

These Regulations amend the Education Services for Overseas Students Regulations 2001 to clarify that student visa condition 8202 is a “prescribed condition” and to expand categories of providers exempt under paragraph 24(2)(c) of the *Education Services for Overseas Students Act 2000* from the requirement to pay annual Education Services. These amending regulations commenced on 17 December 2009.

CASELOAD OVERVIEW

MRT Decisions – December 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	3	9	1	1	14
Visitor refusal	29	19	2	7	57
Student refusal	23	17	9	11	60
Temporary business refusal	7	17	10	6	40
Permanent business refusal	6	5	5	2	18
Skill linked refusal	69	165	26	12	272
Partner refusal	84	23	14	4	125
Family refusal	22	20	2	4	48
Student cancellation	26	47	1	5	79
Sponsor approval refusal	3	3	4	3	13
Other	11	14	4	3	32
Total	283	339	78	58	758

RRT Decisions – December 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Albania	1	2	0	0	3
Bangladesh	1	3	0	0	4
Burma (Myanmar)	2	0	0	0	2
Cameroon	1	2	0	0	3
China (PRC)	17	33	2	1	53
Egypt	3	0	0	0	3
Fiji	0	7	1	1	9
India	0	10	0	0	10
Indonesia	1	11	0	1	13
Iran	4	0	0	0	4
Iraq	1	1	0	0	2
Israel	0	1	0	0	1
Jordan	1	0	0	0	1
Kiribati	0	1	0	0	1
Korea, Dem Peoples Rep of	0	1	0	0	1
Lebanon	7	5	0	0	12

Macedonia, Fmr Yugo Rep of	0	1	0	0	1
Malaysia	0	10	0	0	10
Nigeria	1	1	0	0	2
Pakistan	3	1	0	0	4
Papua New Guinea	0	1	0	0	1
Philippines	1	1	0	0	2
Russian Federation	1	0	0	0	1
Rwanda	3	0	0	0	3
Somalia	1	0	0	0	1
South Africa	0	1	0	0	1
Sri Lanka	0	7	0	0	7
Turkey	1	0	0	0	1
Ukraine	0	1	0	0	1
United States of America	0	1	0	0	1
Zimbabwe	2	0	0	0	2
Total	52	102	3	3	160

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.

In 2009, 49.5% of all substantive decisions made have been published (47.8% of MRT and 53.6% 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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