



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

0807974

20 January 2010, Sydney

Dr S Crosdale, Member

SKILLED (RESIDENCE) (CLASS VB) – SUBCLASS 885 – SKILLED – INDEPENDENT – CL.885.212 –

A delegate of the Minister refused to grant the applicant a Subclass 885 visa on the basis that she did not satisfy cl.885.212 as she had not provided evidence that she had applied for an assessment of her skills for her nominated occupation by a relevant assessing authority. The applicant identified her nominated occupation as a Registered Nurse and the assessing authority as the Australian Nursing and Midwifery Council. She subsequently provided to the Tribunal a positive assessment from the Australian Nursing and Midwifery Council for migration purposes. At the Tribunal hearing, the applicant claimed she did not think she had to provide an assessment of her skills because she was registered in NSW and she had a degree that was recognised in NSW. She said that it was because of this misunderstanding that she did not submit the assessment when lodging her application. The applicant also submitted that she believed Australia was very short of nurses and she was a very good nurse. She provided a large number of documents relating to her ongoing employment as a Registered Nurse, including several references which spoke highly of her nursing ability and also an offer of full-time employment from St George Public Hospital.

Held: Decision under review affirmed.

The Tribunal found that the applicant, at the time of application, had not applied to the Australian Nursing and Midwifery Council for an assessment of her skills for her nominated skilled occupation of Registered Nurse. Accordingly, the Tribunal was not satisfied that the applicant met cl.885.212. The Tribunal acknowledged however, that there is a shortage of Registered Nurses in Australia and noted that since the completion of her Bachelor of Nursing the applicant had worked full-time as a Registered Nurse in NSW. The Tribunal also referred to the references provided by the applicant and her evidence that she was an experienced nurse who loved her job and her patients. In light of this evidence, the Tribunal accepted that it would be of benefit to the public if the applicant remained in Australia and continued her nursing career and it referred the matter to the Department for the Minister's attention.

0806108

9 February 2010, Sydney

Mr T Delofski, Member

BUSINESS SKILLS (RESIDENCE) (CLASS BH) – SUBCLASS 845 – ESTABLISHED BUSINESS – CL.845.214 – DIVISION 1.4 OF SCHEDULE 7 –

A delegate of the Minister refused the applicant's Subclass 845 visa application on the basis that the visa applicant did not satisfy cl.845.222 as the applicant's score on the business skills points test was not less than the number of points that is specified by Gazette Notice. The applicant's sole main business is Ozpak Enterprises Pty Ltd. The applicant submitted that he genuinely believed when he employed Nisha Ahmad that she was an Australian citizen and that Nisha Ahmad should be included in the Tribunal's assessment of Division 1.4 since the applicant did not knowingly hire her as an 'ineligible person'. At the time of his visa application when he saw her passport, the applicant agreed that it had been tampered with and it was not Nisha Ahmad's true passport. Evidence of wages records and residence status for the company's employees were also provided for the relevant period.

Held: Decision under review affirmed.

The Tribunal considered whether the applicant's score on the business skills points test was not less than the number of points specified by the relevant Gazette Notice. The Tribunal found that the applicant's sole main business is Ozpak Enterprises Pty Ltd and the period of 12 months immediately preceding the making of the visa application was from 14 February 2007 to 14 February 2008. Based on wages records and evidence of employees' immigration status for this period, the Tribunal was satisfied that six employees were either Australian citizens, Australian permanent residents or eligible New Zealand citizens and were therefore

eligible for inclusion in the Tribunal's assessment of the applicant's points entitlement under Division 1.4 of Schedule 7. Another employee named Nisha Ahmad, who was also an employee over the relevant 12 month period, provided a copy of an Australian passport which had clearly been tampered with. The Tribunal found that the name of Nisha Ahmad had clearly been written by hand over the (illegible) name of the passport's true owner. Because of the clear tampering, the Tribunal did not accept that Nisha Ahmad was the true owner of the passport. In the absence of any additional supporting evidence, the Tribunal was not satisfied that Nisha Ahmad was an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen. While the Tribunal acknowledged that the applicant may have genuinely believed that Nisha Ahmad was an Australian citizen when he employed her, the Tribunal did not accept that Nisha Ahmad should be included in the Tribunal's assessment of Division 1.4. Accordingly, the Tribunal was obliged not to include her in its assessment. In order to determine whether the applicant was entitled to 60 points under Division 1.4, the Tribunal assessed whether the aggregate number of hours worked by these employees over the relevant period was equivalent to 3 full-time employees. The Tribunal found that the aggregate hours actually worked, plus leave entitlements by the applicant's employees (namely 4,501.25 hours) is less than the 4,680 hours that represents the total minimum number of hours 3 (notional) full-time employees would be expected to work over a 12 month period. It followed that the applicant was not entitled to any points under Division 1.4 of Schedule 7. Since the maximum aggregate entitlement under Parts 2, 3 and 4 of Schedule 7 is 75 points, the Tribunal found that the applicant's score on the business skills points test is less than the 105 points that is specified for the purposes of this subclause by Gazette Notice. It followed that the primary visa applicant did not meet cl.845.222 of the Regulations.

0804506

22 January 2010, Melbourne

Mr George Haddad, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 – EMPLOYER

NOMINATION SCHEME – CL.856.213 -- A delegate of the Minister refused the visa application on the basis that the applicant did not satisfy cl.856.213. The delegate found that the applicant did not have vocational English and was not satisfied that exceptional circumstances applied. The applicant's migration agent provided submissions requesting that the English language requirement be waived and the application be considered under exceptional circumstances. These submissions addressed the regulatory requirements, noting that the applicant had already been employed with the nominator as a cook for two years; the nominator had previously advertised unsuccessfully locally, and the applicant was very well able to train and transfer his skills to colleagues by means of practical demonstration. The applicant's agent also submitted that the nominator had faced great difficulties in recruiting and retaining a suitably qualified Indian cook as the market demand was very high. Also provided to the Tribunal were three Statutory Declarations from people who had dealt with the applicant on a professional basis, vouching for his level of English. At the Tribunal hearing the applicant submitted that he had some difficulty speaking English but he knew the work that was required of him and he had managed to communicate with people in the workplace. The applicant subsequently supplied IELTS test results indicating an overall band score of 3.0 to the Tribunal.

Held: Decision under review affirmed.

The Tribunal referred to the definition of vocational English in regulation 1.15B and, having regard to the IELTS test results provided with an overall band score of 3.0, found that the applicant did not meet the requirement. The Tribunal then went on to consider whether exceptional circumstances existed that would warrant the waiver of the English language requirements, referring to both the relevant policy in the departmental Procedures Advice Manual and the submissions of the applicant's migration agent. Having regard to the requirement to perform the range of duties listed for this position by his sponsor, including complying with occupational health and safety issues, the Tribunal did not accept that the position of cook was one for which vocational English was not essential. Nor did it accept that the applicant would be able to transfer his skills to Australian employees who did not speak his first language. The Tribunal also had regard to the submission by the migration agent and the oral submissions by the sponsor that efforts had been made to recruit a cook locally but that it was not practical to advertise overseas. As the Tribunal noted that such efforts comprised only three photocopies of advertisements, it did not accept that significant effort had been made to recruit a suitably qualified person who had vocational English to fill the position, notwithstanding the high market demand for specialised cooks. Thus, having considered all of the evidence and arguments submitted, the Tribunal was not satisfied that exceptional circumstances applied in this case.

Further, as the applicant did not have vocational English within the meaning of the Regulations, the Tribunal found that he did not meet the requirement of cl.856.213(c)(ii)(B) and could not therefore meet cl.856.213.

Family visas

0806271

25 January 2010, Sydney

Ms C Carney-Orsborn, Member

NEW ZEALAND CITIZEN FAMILY RELATIONSHIP (TEMPORARY) (CLASS UP) – SUBCLASS 461 –

CL.461.212 & 461.221 – R.1.12 – A delegate of the Minister refused the applicant's Subclass 461 visa application as she was not satisfied that the applicant's relationship with his partner was genuine or that a mutual commitment existed between them. The applicant was granted a five-year New Zealand Citizen Family Relationship (Temporary) Class UP visa in 2003 on the basis of being a member of the family unit of Ms Joanne Casci, his partner, and in 2008 the applicant lodged his application for the visa currently under review. The delegate wrote to the applicant requesting him to provide additional documents, including evidence of his relationship with Ms Casci, however, he failed to do so. Accordingly, the delegate refused to grant the visa to the applicant as she was not satisfied that he was a member of the family unit of Ms Casci. Subsequently, the applicant presented his payslip, a copy of the Rental Bond Lodgement in joint names and rent review advice, a certificate of registration of motor vehicle in Ms Casci's name, his Income Tax Assessment and various documents in joint names showing accounts and receipts for services to them at the same addresses. Also included were copies of passports of the two children of the relationship and a copy of Ms Casci's passport. The applicant claimed before the Tribunal that they first met overseas in 1998 and that they had been together from that time. Also provided was evidence of their children's births in Australia in 2003 and 2004. The applicant and Ms Casci also gave evidence to the Tribunal that was independent and corroborated by each other in relation to their living arrangements, financial circumstances, their joint business and they described their daily activities as well as the plans they have made for their and their children's future.

Held: Decision under review set aside.

The Tribunal considered whether the applicant was a member of the family unit of Ms Casci. The Tribunal noted that little evidence had been provided to the delegate with respect to the applicant's relationship with Ms Casci, however, considerably more evidence had been provided to the Tribunal. The Tribunal found that the parties' evidence at hearing regarding the nature of their relationship and their living arrangements was consistent and that they were credible witnesses whose evidence the Tribunal accepted. The Tribunal also accepted that the parties had resided together since 1998 and that they re-located to Australia soon after this and that they had established a commitment to a spousal relationship. The Tribunal further accepted on the basis of their oral evidence and the photographic evidence before it that they socialised together as a couple and that their relationship was known to others. The Tribunal found that they viewed the relationship as a long term one and it was satisfied that, at the time of the application, the couple were in a de facto relationship. Therefore, the Tribunal was satisfied that the applicant was the spouse of Ms Casci and therefore, he was a member of her family unit within the meaning of r. 1.12(1)(a). Further, the Tribunal was satisfied that the applicant continued to be the spouse of Ms Casci at the time of decision and that she continued to be the holder of a Subclass 444 visa. Therefore, the Tribunal was satisfied that at the time of decision, the applicant met cl.461.221 of the Regulations.

0906128

6 January 2010, Sydney

Mr D O'Brien, Principal Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 117 (ORPHAN RELATIVE) – CL.117.211 – A delegate of the Minister refused the applicant's Subclass 117 visa application on the basis that the visa applicant did not satisfy cl.117.211 of the Regulations. The review applicant is the grandmother of the visa applicant, who is a citizen of the Philippines and was 15 years old at the time of the visa application. The review applicant stated that her daughter, the visa applicant's mother, died from cancer in 1997 and that after her mother's death, the visa applicant was cared for initially by the review applicant when she was living in the

Philippines. The visa applicant now lives with her uncle. The Tribunal was told that the visa applicant is an only child, and that a statutory declaration from her father had been provided to the Department stating that he had given full authority to the review applicant to take care of the visa applicant, and that he had since remarried and had five children with his second wife. The review applicant stated that the visa applicant's father had an addiction to drugs and alcohol which had started before her daughter died. The review applicant claimed that before her daughter died, she had asked her to look after the visa applicant. She stated that she supplied all of the visa applicant's material needs and that, in hindsight, she might have applied to adopt the visa applicant but this tended not to be done in the Philippines. The review applicant provided a number of submissions to the Tribunal, including a statutory declaration from the mother of the visa applicant's father which stated that her son was bipolar, was addicted to drugs and alcohol before his wife's death, and that he had physically abused her. Also supplied to the Tribunal was a doctor's report relating to the visa applicant's father which stated that he was addicted to methamphetamines and alcohol, that he was irritable and aggressive and at times physically violent when his needs were not met. It further stated that his children with his current partner were now being cared for by his in-laws. The visa applicant's father also stated that he did not want anything to do with his daughter.

Held: Decision under review set aside.

The Tribunal found that the review applicant was the visa applicant's grandmother and was a settled Australian citizen, and that the visa applicant had not turned 18 at the time of application, was under 18 at the time of the Tribunal's decision and did not have a spouse. The Tribunal was satisfied, on the basis of the death certificate supplied in relation to the visa applicant's mother and other evidence before the Tribunal, that the visa applicant's mother was deceased and that the visa applicant could not therefore be cared for by her. The Tribunal also reached the view that the visa applicant could not be cared for by her father because he was permanently incapacitated. While the Tribunal accepted that the abandonment of care for his daughter by the visa applicant's father did not amount to permanent incapacity, the doctor's report which stated that he was psychologically incapacitated indicated that his mental faculties were impaired such that he could not care for the visa applicant. The Tribunal was satisfied that the incapacity was permanent because the evidence of the review applicant and that of the visa applicant's paternal grandmother was that his incapacity had continued for many years. The Tribunal found that his impairment amounted to permanent incapacity such that he could not care for the visa applicant. The Tribunal accepted that, under the circumstances where the visa applicant's father had abandoned care of her, the best interests of the visa applicant would be served by the grant of the visa. The Tribunal therefore found that the visa applicant was an orphan relative of the review applicant within the meaning of r.1.14 and, therefore, she met cl.117.211

Partner visas

0904513

2 February 2010, Melbourne

Ms D Jordan, Member

PARTNER (TEMPORARY) (CLASS UK) – SUBCLASS 820 – CL.820.211(2) – SCHEDULE 3 CRITERION 3004 – COMPELLING REASONS – A delegate of the Minister refused the visa application as the visa applicant did not satisfy cl.820.211 as he did not satisfy the Schedule 3 criteria and the delegate was not satisfied that there were compelling reasons for waiving this criteria. The applicant claimed that he and his sponsor met in Mexico in March 2007 and began a relationship and that in September 2007 they decided to commit to a long-term relationship. The applicant claimed that he sought immigration advice around August 2008 regarding lodging a partner visa application but was advised that his current living circumstances (travelling and living in a mobile home) would count against his application. The applicant claimed it was suggested that he instead find a business sponsor and lodge a Subclass 457 visa application, which he did in November 2009. When this application was refused, the applicant then lodged a spouse application, however, this application was lodged more than 28 days after he held his last substantive visa thereby not meeting the Schedule 3 criteria. The applicant claimed that he had been given incorrect migration advice and that if he had lodged his spouse visa application on the day he lodged the Subclass 457 application, the spouse visa application would have been lodged within 28 days of him holding a substantive visa and he would have satisfied the relevant criteria.

Held: Decision under review set aside.

On the basis of the evidence before it, the Tribunal was satisfied that, for the period of 12 months immediately preceding the date of the visa application, the applicant and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship was genuine and continuing and that they had been living together or not been living separately and apart on a permanent basis. Accordingly, the Tribunal was satisfied that the applicant was in a de facto relationship with the sponsor and therefore was the 'spouse' of the sponsor within the meaning of r.1.15A. The Tribunal found that it was not in dispute that the applicant did not have a substantive visa at the time of application. The issue in this case was whether the applicant satisfied the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. As the Tribunal found that the application for the visa was not made within 28 days of the relevant day, the applicant did not satisfy criterion 3001. The Tribunal was then required to consider whether there were compelling reasons for not applying the criteria. The Tribunal found that the applicant and his sponsor had been in a relationship since March 2007 and that they have lived together at various locations since that time, first travelling overseas together and then in Australia since December 2007. The Tribunal considered that this was a long standing relationship and, given the length of time they had lived together as a couple, they would suffer considerable hardship if the applicant was required to depart Australia in order to submit a new visa application offshore. The Tribunal was satisfied that there were compelling reasons to waive the Schedule 3 criteria. Accordingly, the Tribunal found that the applicant met cl.820.211 of the Regulations.

Student visas

0806602

29 January 2010, Sydney

Mr R Derewlany, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – CL.572.224(a) – PUBLIC INTEREST CRITERION 4013(1)(b) – CONDITION 8202 – COMPASSIONATE AND COMPELLING – A delegate of the Minister refused to grant a Subclass 572 visa on the basis that the delegate was not satisfied the visa applicant satisfied cl.572.224 of the Regulations, as the visa applicant did not satisfy Public Interest Criterion (PIC) 4013. The applicant claimed a notice was sent to him which advised he had breached condition 8202 and his visa would be automatically cancelled. The applicant claimed he did not know why his visa was cancelled or the basis for it. He claimed his circumstances in Egypt were difficult as his mother had died and this significantly impacted upon him. He claimed his father remarried soon after and treated him negatively and that while he was in Australia a cousin died and this impacted on him and created psychological problems. He claimed because of these issues he did not attend college for 4 months. He claimed that he completed 6 months of an IT course but no certificate was provided and, when he asked for one, he discovered that the college had closed. The applicant also claimed that he studied for 6 months in a business course but did not receive any statement or certificate. He claimed he was aware of the cancellation when he applied for a further student visa and the application was refused. He claimed the Department should have sent letters about his status and that he should have an opportunity to know what he had done wrong, and it was unfair the visa was cancelled. He claimed not to know about his right to seek a revocation of the cancellation and only found out when he applied for a further visa. He claimed he was currently studying and if the visa were not granted he would be unable to apply for residence under the general skilled migration program. The applicant claimed his further intended studies in a Masters degree would inject funds into the Australian economy and that he wanted to apply for migration as a teacher, and that this would contribute skills to the Australian society. He also claimed he had provided carer assistance to a person whose interests would be adversely affected if his visa were not granted.

Held: Decision under review affirmed.

The Tribunal found the applicant was affected by the risk factor in PIC 4013 and that the previously held student visa was cancelled and the cancellation not revoked. The Tribunal found the visa application needed to be made more than 3 years after cancellation, as stated in PIC 4013, unless there were compassionate or compelling circumstances to justify a grant of the visa within 3 years. The Tribunal found the visa application was less than 3 years after cancellation of the previous student visa. The Tribunal was satisfied that the applicant's studies at the Masters degree level would inject funds into the Australian economy through fees, taxes, living expenses and employment, however, the Tribunal was not satisfied that the applicant's future

plans of applying for skilled migration in teaching were compelling circumstances. The Tribunal accepted that the applicant may have provided carer assistance to an Australian citizen, but was not satisfied that this constituted compassionate or compelling circumstances. The Tribunal was not satisfied that this person would not have been able to obtain assistance from another person or the community, or that the circumstances were so powerful or of such a compassionate nature to justify the grant of the visa. The Tribunal accepted the applicant may have faced difficulties in respect of his personal situation in Egypt, however, the Tribunal was not satisfied that there were compelling or compassionate circumstances to justify the grant of a visa within 3 years of the cancellation of the previous visa. Accordingly, the Tribunal found the applicant did not meet the requirements of PIC 4013 for the purposes of cl.572.224(a).

Other visas

0905801

25 January 2010, Melbourne

Ms K Kirmos, Member

MEDICAL TREATMENT (VISITOR) (CLASS UB) – SUBCLASS 675 – MEDICAL TREATMENT (SHORT STAY) – CL.675.216 – CONDITION 8503 WAIVER – INVALID APPLICATION – The delegate refused the visa application as the applicant did not satisfy cl.675.216. On 28 September 2007, the Department received a request to waive condition 8503 on the applicant's then Medical Treatment Visa, which expired on 11 October 2007. Condition 8503, which provides that "the holder will not, after entering Australia, be entitled to be granted a substantive visa, other than a protection visa, while the holder remains in Australia", was waived on 20 December 2007 and the new Medical Treatment application was lodged on the same day. The delegate refused this application as they found that the applicant did not satisfy cl.675.216 because she did not hold a substantive visa at the time the application was made and that it was made in excess of 28 days after her substantive visa had expired. It was submitted by the applicant's representative that the applicant lodged her waiver request in September 2007 and a Departmental officer had then called the applicant to advise her to lodge her Subclass 675 visa application, which she did prior to 11 October 2007. It was submitted that the visa application was made when it was received by the Department on 11 October 2007, not when the Department processed the fee on 20 December 2007 after the waiver decision was made, and that the waiver was implicitly granted when the applicant's family was contacted and encouraged to lodge the visa application, some time before 11 October 2007. The applicant's representative submitted that if the condition had not been waived then the visa application should have been returned. The applicant's son-in-law gave evidence to the Tribunal at hearing that he believed he was told by a Departmental officer to lodge the visa application on the day it was sent, although he could not recall clearly. He and the applicant's daughter also gave evidence that the applicant is elderly and unwell. They submitted that in the past they met the cost of providing her with the medical and general care she requires and they are happy to do so in the future.

Held: Decision under review set aside and substituted that the visa application was invalid.

The Tribunal found that where the previous visa was granted subject to condition 8503, the waiver of this condition must occur before the visa application can be validly made. The Tribunal found that in this case, as condition 8503 had not been waived when the visa application was lodged on 11 October 2007, it was an invalid application. In making this finding the Tribunal noted that Departmental Procedures Advice Manual 3 instructs officers not to accept a visa application until the waiver is granted and that such an application is invalid. The Tribunal also referred to the Full Federal Court finding in *Mon Tat Chan v MIAC* that an application cannot become valid prior to the applicant complying with the provisions of the Act and Regulations that make the application valid. Applying this reasoning, the Tribunal found that the visa application could not be validly made before 20 December 2007 when the waiver was granted in writing. Accordingly, the Tribunal set aside the decision under review and substituted a new decision that the visa application was invalid. The Tribunal also noted its sympathy with the applicant in this case and directed that, given that the waiver was ultimately approved and that the process was initiated by the applicant in a timely manner, the case be referred to the Minister.

0908799

27 January 2010, Sydney

Ms D Dimitriadis, Member

WORKING HOLIDAY (TEMPORARY) (CLASS TZ) – SUBCLASS 417.211 – CANCELLATION – S.109 – INCORRECT INFORMATION PROVIDED – S.101(b) – A delegate of the Minister cancelled the applicant's Subclass 417 visa under s.109 as they found that the applicant did not comply with s.101 of the Act. In her visa application, the applicant stated she had undertaken work in regional Australia for 3 months and when the Department contacted the claimed employer to confirm her employment from September to December 2008, the employer advised it had never employed the applicant and that they had not employed Working Holiday personnel in 12 years as they had an ample supply of local labour when required. The delegate found that the applicant had provided incorrect answers on her application and he proceeded to cancel the applicant's visa. In her Statutory Declaration, the applicant claimed she did not know she had done anything wrong. She claimed she found a farmer on a website to whom she paid \$500 to provide her with details to include in her application and he told her that was all she needed and everything would be fine. She claimed she was a model citizen who would never deliberately lie to the Department. She claimed she did not want to return to Ireland where there is no work and that she sends money she earns in Australia to her struggling parents in Ireland. She claimed she hoped that the Department would be compassionate and not allow a "scam artist to cost her the visa". She provided letters of support from her current and previous employers. At the Tribunal hearing, the applicant agreed she had provided incorrect answers on her application and that she had not worked in regional Australia for the three months period. She claimed she currently worked and she did not want to be sent home for being so naive. She claimed that if she had given the correct information, she would not have been granted the visa. She claimed she had not made any contributions to the community and she understood it was wrong to lie on the application. In a letter, her parents requested that the applicant be allowed to stay in Australia as there were no opportunities in Ireland and they appreciated the money she sent to them.

Held: Decision under review affirmed.

The Tribunal found the applicant was in breach for non compliance with s.101 of the Act as she had provided answers and information she knew were incorrect to the Department and that she had paid money for the information. The Tribunal found the provision of such incorrect information was significant and serious and that she may not have been granted the visa if the correct information had been given. The Tribunal accepted the applicant was in a relationship, that she was employed and that she had support from her previous and current employers. The Tribunal accepted that the applicant's departure from Australia may cause inconvenience to her and her boyfriend and that she may not find a job in Ireland. However, the Tribunal considered that the Subclass 417 Working Holiday visa the applicant had held was a temporary visa and that it did not permit her to remain in Australia indefinitely, thereby requiring her to return to her country leaving her employment, friends and any other ties she may have formed in Australia. The Tribunal did not accept the applicant was merely naive in paying for and providing incorrect information in her application as she knew the information she had provided was untrue. Accordingly, the Tribunal found the applicant had breached s.101 of the Act and that the breach was significant as she was unlikely to have been granted the visa if the correct information had been provided. Accordingly, the Tribunal was satisfied the applicant's Subclass 417 visa should remain cancelled.

0909452

25 January 2010, Melbourne

Mr D Lennon, Member

CULTURAL/SOCIAL (TEMPORARY) (CLASS TE) – SUBCLASS 416 (SPECIAL PROGRAM) – CL.416.214 – A delegate of the Minister refused the applicant's Subclass 416 visa on the basis that the visa applicant did not satisfy cl.416.214, as the delegate was not satisfied that the visa applicant would comply with all of the conditions that would be attached to the visa. The visa applicant was a 21 year old citizen of Vietnam who, it was proposed, would be employed as a dressmaker for the Lifestart Foundation program in Melbourne. The Lifestart Foundation was a non-profit community based charitable organisation which had a Vietnamese charity partner, the Quang Nam Union of Friendship Organisation. The Foundation supported orphans, street children and disadvantaged families in Hoi An by providing guidance, support, financial assistance and training in areas such as schooling, scholarships, apprenticeships, practical work experience, building, medical assistance and sanitation. The Foundation had a number of ties with Australian

organisations that regularly sent students to Vietnam to broaden their skills base and foster long term relationships with the Hoi An community. The delegate claimed that the applicant had shown little awareness of how she was selected or what skills she would develop during her period with Lifestart. However, it was submitted by the applicant's representative, that this was not to be unexpected given the fact that the applicant had been daunted by the unexpected phone interview, the kind of which she had not experienced before and that it was unreasonable to refuse the visa on this basis. The Tribunal heard evidence from the founder of Lifestart who claimed that the applicant would be required to undergo a two-stage training process which would be comprised of a 12 month Subclass 416 visa, followed by the applicant's return to Vietnam and then an application for an "occupational training visa". This explained why the applicant had claimed in her interview that she would be in Australia for two years. The applicant claimed that she wanted to come to Australia to learn how to sew bridal dresses and that she did not want to settle in Australia permanently. She claimed that she wanted to learn the language and culture of another country but she wanted to return to her family in Vietnam to open her own shop.

Held: Decision under review set aside

The Tribunal noted that the telephone interview was conducted by an unscheduled telephone call to the applicant at work, which although was more spontaneous, this did not give applicants time to prepare their answers and could easily be tainted by other problems such as the interviewee being distracted or not being inclined to reveal to their current employer that they were applying to travel to Australia. The Tribunal further noted that the visa applicant did not have a detailed knowledge of some of the matters raised by the Department, but also found that she was able to demonstrate an awareness of the fundamental features of the program such as the hours of her work, her living arrangements and the fact that she would be learning dressmaking. In the circumstances, the Tribunal did not draw any adverse inference from her failure to mention the rate of pay that she would receive. The Tribunal found that, whilst the visa applicant was recorded as having stated that she expected to stay in Australia for two years, at another point in the interview she stated that the program was for about a year and that she would apply for another visa if she wanted to do further study and work in Australia, and that this reflected the schedule outlined in the evidence given by the other witnesses. The Tribunal was concerned that the visa applicant might seek to explore other opportunities in Australia and overstay her visa and noted that the various parties accepted that their sponsorship involved a "leap of faith" in the visa applicant's commitment to the program. That said, the Tribunal found that there was no basis upon which to find that the visa applicant would not comply with the visa conditions and that, considering the important philanthropic and the community development by Lifestart, the Tribunal was of the view that there was a substantial disincentive on the visa applicant's part to bring Lifestart into disfavour with the Department and jeopardise its further works in the community. Accordingly, the Tribunal found that the applicant satisfied cl.416.214 of the Regulations and set aside the decision to refuse the visa application.

REFUGEE REVIEW TRIBUNAL DECISIONS

Burma

0903555

15 January 2010, Melbourne

Mr P Tyler, Member

BURMA – ETHNICITY – KAREN – PARTICULAR SOCIAL GROUP – BUSINESS PEOPLE IN BURMA

– The applicant claimed to be a practising Buddhist who was of Karen ethnic origin. She claimed that in 2008 Cyclone Nargis had affected many of her friends and relatives and a number of Karen people had stayed with the applicant and her husband. She claimed that the government was unhappy with this and that officials attended her house to send the people back to their local area and that they had to pay bribes to the authorities so that the people could remain in their house. The applicant claimed that this, along with the fact that they had donated items such as timber to assist with the reconstruction, had upset the authorities. She stated that during the monks uprising in 2007, she participated by giving them water. She claimed that on one occasion they hid a monk in their house, but the monk had left before the military had conducted a search. The applicant claimed that she and her husband were not members of the National League for Democracy (NLD) but as she worked with others, including members of the NLD to assist AIDS

victims, she believed that the government knew she was involved in the project and therefore with the NLD. She claimed that they often had visits from government officers and that on one occasion they were attacked in their home by four people who were military investigators. She said that they were attacked because they were from the Karen ethnic group; they communicated with the Karen rebels and were involved with the monks uprising. She also claimed that they were attacked because her husband refused to give the attackers any money. They did not report the incident because she believed that nobody would protect them. Neither the applicant nor her husband sought medical treatment for the injuries they sustained. The applicant claimed that demands for money were made on them so that they could keep their business functioning. The applicant told the Tribunal that they travelled to Australia in order to settle their son into a new home with a Chinese family who had adopted him in 2008 and that she had not intended to apply for asylum. She claimed that after her husband returned to Burma, he contacted her by phone and told her that their problems were unsolvable and that the authorities knew they supported the Karen rebellion. The applicant said she feared returning to Burma because of what her husband told her and that life in Burma was very difficult and they lived in constant danger.

Held: Decision under review set aside.

The Tribunal accepted the applicant's evidence and found it plausible that the reason for the attack on her and her husband was because the applicant's husband had resisted the authorities demands for a bribe. The Tribunal considered the applicant's claim as a member of a particular social group, being a member of the business community, and noted independent information indicating that there was a wide spread pattern of conduct by the authorities in demanding money from business owners. On the basis of the evidence, the Tribunal accepted that the applicant and her husband were business people and could be categorised as members of the particular social group known as 'business people in Burma'. The Tribunal also found that the applicant would have a higher than normal profile within the community because of her ethnicity and her support of the Karen people, especially during the Nargis crisis. The Tribunal accepted that the applicant and her husband had been pressured into paying bribes to the authorities from time to time because they were business owners. It further accepted that the applicant's husband was subjected to demands for money when he returned to Burma and that such demands were likely to be made in the future. The Tribunal took into account independent information concerning the bribes demanded of business people and the applicant's evidence that this was the essential reason for the bribes. The Tribunal was satisfied that the applicant would not have effective protection afforded to her by the Burmese regime which was, in this case, in itself the perpetrator. Accordingly, the Tribunal found that the applicant faced a real chance of persecution, now or in the reasonably foreseeable future should she return to Burma and that her fear of persecution for a Convention reason was well-founded.

China

0906880

4 December 2009, Melbourne

Ms M Urquhart, Member

CHINA – POLITICAL OPINION– ETHNICITY – UIGHUR – RELIGION – ISLAM – PARTICULAR SOCIAL GROUP – FAMILY – The applicant claimed to fear persecution for reasons of her political opinion, her membership of a particular social group and because of her relatives' high profile. She claimed that she and her son suffered discrimination and were constantly put down or held back because of their Uighur ethnicity. She claimed her parents paid money to secure her employment and that she was discriminated against by being made to work in a lowly job which did not reflect her educational qualifications. She claimed her son was forced to attend a Chinese child care centre where he was discriminated against in cultural, linguistic and religious matters, and that his future would entail a lifetime of discrimination. The applicant claimed she was denied her cultural Uighur name and her language. She claimed that Uighur passports were collected by Chinese authorities prior to the Olympic Games and that Uighurs were harassed, forced to pay bribes and reapply for return of their passports. She claimed she was punished on two occasions for fasting during Ramadan; firstly by being made to pay a fine and write a promise not to do it again and secondly, when she claimed she was handcuffed. She claimed various accounts of ill treatment to family members. The applicant stated that she had not participated in demonstrations in East Turkistan due to fear of reprisals by the authorities, but had joined in various protests whilst in Australia as she stood against the treatment of Uighurs who are denied and/or restricted in the area of human rights. She claimed

that an Australian relative was an official of the World Uighur Congress and that she had organised rallies and events during the visit of prominent Uighur activist, Rebiya Kadeer. A letter from Ms Kadeer was supplied in support of the applicant.

Held: Decision under review set aside.

The Tribunal took into account the profile of Rebiya Kadeer and noted that independent information indicated she was regarded with great animosity by the Chinese State. The Tribunal found the applicant to be a credible witness, however, further noted that she tended to exaggerate and embellish at times. The Tribunal accepted the applicant's claims that she and her son suffered discrimination in education, employment and for their culture. The Tribunal accepted her claims regarding Uighur passports during the Olympics and of punishment for fasting during Ramadan, but it did not accept that the applicant was handcuffed on the second occasion and found this to be an embellishment. The Tribunal accepted that a relative of the applicant was an official of the World Uighur Congress with a high profile and who would be viewed as a separatist and terrorist by the PRC. The Tribunal accepted the applicant was involved in Uighur associated activities, that she was photographed at these events and that these could be seen by the Chinese authorities. The Tribunal found that there was a real chance she would be persecuted for her political opinion and further accepted she was likely to be regarded as a separatist opposed to the Chinese authorities' control of East Turkistan as a result of her activities. The Tribunal found the harm she feared was for reasons of her particular social group (her family), political opinion, Uighur ethnicity and Islamic religion. The Tribunal was satisfied that no protection would be offered to the applicants by the Chinese authorities if they relocated elsewhere in China as the Chinese government was the persecutor. Accordingly, the Tribunal was satisfied that the applicant had a well founded fear of persecution for a Convention reason.

0909497

4 January 2010, Sydney

Ms A MacDonald, Senior Member

CHINA – RELIGION – CHRISTIAN – CREDIBILITY – The applicant claimed to fear persecution for reasons of his religion. In a statement accompanying his protection visa application, the applicant claimed to fear returning to China because he is a Roman Catholic. He claimed that his wife, who he married in an underground Church, is also a Roman Catholic and that she went to Church once or twice a week and he went whenever he had the opportunity. He claimed his wife was involved in organising mass and other activities such as group Bible study and inviting priests from outside their local area to speak at services. He claimed that the birth of his child helped him to make the decision to become a Catholic and to start attending Church services more often. The applicant also claimed to have been baptised. He claimed that on one occasion, the police raided the Church and he and his wife were arrested and detained for several days. The applicant claimed the police told them they had been detained because they were Roman Catholics conducting an illegal gathering. He claimed he and his wife were badly beaten and after he was released he was charged with organizing an illegal gathering and had to appear in Court. He claimed he stayed in hiding until he left China. At the Tribunal hearing, however, the applicant claimed he feared returning to China because he is a member of an underground family Church and that he and his wife are Christians and are not Catholics as claimed in the statutory declaration attached to the protection visa application. He claimed he first joined the Church in the mid 2000's and he had been arrested at a church service. He also claimed that he had not been baptized and that he had been attending church regularly whilst in Australia.

Held: Decision under review affirmed.

The Tribunal found that the applicant had not provided a truthful account of his experiences or beliefs in China and that he had given inconsistent evidence about his claims and that he had either not explained these inconsistencies or he had given explanations that were not credible. The Tribunal noted that in the statement accompanying his protection visa application, the applicant claimed that he and his wife had suffered serious harm as Roman Catholics and that he had been baptised. However, in evidence before the Tribunal the applicant denied he was a Catholic and that he had been baptised. He claimed that he and his wife were Christians and had suffered serious harm because they were members of an underground family church. The applicant could not explain the inconsistency in his evidence about being baptised and said that maybe when he said he was a "Christian", they wrote down "Catholic". The Tribunal did not accept this explanation. In the Tribunal's view these inconsistencies were of such significance as to lead it to doubt that the applicant was a witness of truth. The Tribunal also found that the applicant displayed minimal knowledge

of Christianity at the hearing as it would have expected someone involved with Christianity for a significant period of time to be able to articulate details in relation to the practice of Christianity. The Tribunal did not accept that the applicant or his wife had ever had any involvement with an underground Catholic Church or an underground family church while in China, nor that such involvement brought him to the attention of the Chinese authorities and caused him to leave the country. Furthermore, the Tribunal was not satisfied that the applicant attended church services in Australia, otherwise than for the sole purpose of strengthening his claims to be a refugee. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Colombia

0906906

19 January 2010, Sydney

Ms P McIntosh, Member

COLOMBIA – POLITICAL OPINION – PATRIOTIC UNION PARTY – The applicant claimed that he had been a sympathiser and supporter of the Patriotic Union Party (UP) and had attended many of their meetings and rallies. He stated that the Party was the target of assassinations and killings by drug lords, proto-paramilitary groups and members of the government's armed forces and that the Party eventually declined and virtually disappeared. He claimed that while working at a hotel in 1992, a bomb blast occurred and he was subsequently interviewed by police on several occasions. The applicant claimed that he told the police that he had seen a person who used to attend UP meetings and suggested the police contact the UP office for more information and, as a result, it was established that the perpetrator was from a paramilitary group and that he had infiltrated the UP. The applicant claimed that he then received threatening telephone calls from people he believed were members of the paramilitary group and that, despite reporting these threats to the police, they were disregarded. He claimed that about two months later he was abducted and asked to prepare a list of members and sympathisers known to him and he was then beaten up and abandoned. He claimed that three years later he was involved in a motor cycle accident and was hospitalised for two weeks. The applicant stated that witnesses to the accident told him that the people in the other vehicle were carrying guns and had checked to see whether he was still alive. He claimed that they assumed he had died so they left in a hurry without taking any further action. The applicant claimed that despite the fact that many years had passed, he was still haunted by fear. He claimed that he would be "hit, kicked and killed" if he returned to Colombia.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was working in a hotel in Bogotá which had been the target of a bombing, as independent information confirmed that there had been a spate of hotel bombings in the city during that period. The Tribunal further accepted that the applicant was questioned by police investigating the incident and that information given by the applicant contributed to the eventual apprehension of those responsible. The Tribunal also accepted that the applicant had received a threatening telephone call and that, some two months after the bombing, he was abducted and threatened, although not assaulted. Nevertheless, the Tribunal found it significant that the applicant was able to continue working at the same hotel for a further two years without any further incident or threat of harm either from the bombers or from their paramilitary associates; that he continued to live in Bogotá at the address at which he had been living at the time of the bombing, for a period of years. Given that the independent evidence confirmed the paramilitaries' willingness to use violence as a first resort and the fact that the applicant was easily located, the Tribunal inferred that he was of no interest to them after the initial incident. In relation to the motor cycle accident, the Tribunal accepted that witnesses to the incident told him the vehicle's occupants were armed; however, it also noted independent evidence which indicated that many private citizens in Colombia were gun-owners. The Tribunal found that there was nothing about the incident that might reasonably indicate that paramilitaries were involved. The Tribunal considered that the applicant was at considerable risk of serious harm in the early 1990's when the initial incident occurred, however, it noted that this was some five years before he left Colombia during which time paramilitaries wanting to locate and harm him could have done so without difficulty. The Tribunal noted that the applicant did not claim that anyone identifiable as a member of the paramilitary or connected in any way with the bombers had ever threatened him during those five years. The Tribunal found that the chance was, therefore, remote that he would be persecuted on return to Colombia because of a political opinion imputed to him arising from a perception

that he once supported the UP. Accordingly, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Ethiopia

0902046

11 November 2009, Melbourne

Ms M Cameron, Member

ETHIOPIA – ETHNICITY – OROMO – IMPUTED POLITICAL OPINION – OROMO LIBERATION FRONT – The applicant is an Ethiopian national of Oromo ethnicity who claimed that in 1999 the police came to his family home to arrest and detain his father for supporting the Oromo Liberation Front (OLF) politically and financially. The applicant claimed that, because of his father's political involvement and his own involvement in student politics, his family had come under the ongoing surveillance of the Ethiopian police. He claimed that the Ethiopian government had spread rumours that his father worked against the government, that his family were seen as traitors and that the applicant suffered abuse as a young student from teachers and students. He claimed that some of his siblings had moved to other areas to escape the intimidation. One sister moved to live with their aunt who played a significant role in assisting the OLF. While living with her aunt, his sister also became involved in political activities supporting the OLF. He claimed the authorities began searching for his sister because of her link to their aunt and her involvement in OLF activities. His sister eventually escaped to Cyprus and sought asylum but after four years waiting for a decision, she married and was granted permanent residence. Another sister also moved to Cyprus and continues to live there. The applicant claimed that his mother's activities and her home are monitored by the Ethiopian authorities. The applicant did not claim to have personally experienced serious harm for a Convention reason in the past in Ethiopia, but claimed to fear serious harm should he return there. The applicant's two sisters also provided evidence in support of the his claims.

Held: Decision under review set aside.

The Tribunal accepted the applicant's evidence that, because of his father's political involvement and his own involvement in student politics, his family had come under the ongoing surveillance of the Ethiopian police. The Tribunal further accepted that the applicant and his sister had been politically motivated and active in promoting the rights of Oromos for several years and would continue that involvement should he return to Ethiopia. The Tribunal was satisfied that the applicant, in involving himself with pro-Oromo activities in Australia, was engaging in conduct otherwise than for the purposes of strengthening his claim to be a refugee. The Tribunal also accepted independent country information regarding the treatment of Oromo people in Ethiopia who are suspected of political sympathy for the OLF and other groups opposed to the Ethiopian government. The Tribunal was also satisfied that the applicant's two sisters provided detailed and credible evidence which was consistent with the applicant's claims. The Tribunal accepted that the applicant feared persecution in Ethiopia for a Convention reason, being his ethnicity and his actual and imputed political opinion in support of Oromo rights in Ethiopia. As the Tribunal found that the Ethiopian government was responsible for the persecution which the applicant feared, it followed that the applicant could not seek state protection in Ethiopia. Because the persecution was not localised, the Tribunal considered that there was no part of Ethiopia to which the applicant could reasonably be expected to relocate where he would be safe from persecution. The Tribunal found that there was no evidence to suggest that the applicant has a legally enforceable right to enter and reside in any other country apart from his country of nationality. It found that the applicant is, therefore, not excluded from Australia's protection by s.36(3) of the Act. Thus, the Tribunal was satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

India

0908575

25 January 2010, Sydney

Ms A O'Toole, Member

INDIA – POLITICAL OPINION – BHARATIA JANATA PARTY – CREDIBILITY – The applicant claimed that he was a legal advisor for the Bharatia Janata Party (BJP) and had been a member since 1993. He claimed to fear a notorious criminal in his area, Person A, who he had opposed in his role as a legal professional and who blamed the applicant for the loss by an associate in the 2004 state elections due to his work for the BJP. The applicant claimed that Person A was involved in a property deal and that the applicant was responsible for the cancellation of that deal after he complained to the Subdivisional Magistrate. He claimed that when Person A found out about the cancellation and realised it was due to the applicant's actions, he attacked him. The applicant claimed that he was in a crowded marketplace when Person A struck him with a hockey stick 3-4 times on his legs and shoulders and that he thought that the attack was an attempt to kill him rather than just harm him as Person A had lost a lot of money. He claimed that he had immediately reported the attack to the police; however, they had told him that there were no witnesses and that he had not been seriously harmed. He stated that Person A obtained his phone number and had made calls to him, and had also gone to his home. He claimed that he had changed his mobile phone number but that Person A still knew where he was. The applicant claimed that he was told by the President of the BJP in his area that, because their party was not in power, he could not do anything. The applicant claimed that Person A had been imprisoned in 2006 in relation to other matters for a period of three years but had now been released. The applicant provided to the Tribunal an undated letter purportedly from the President of the BJP in his area which stated that the applicant was appointed to a BJP Party Working Committee in 2002 and that the applicant had "done very good work" for the BJP and its Working Committee. He had subsequently been appointed as President of the Legal Cell in his area in 2003.

Held: Decision under review affirmed.

The Tribunal found that the applicant lacked credibility on some key aspects of his claims. The Tribunal accepted that the applicant was involved with the BJP and that he had lodged a successful complaint in relation to the purchase of property by Person A. The Tribunal accepted that Person A became angry and that he assaulted the applicant. The Tribunal was also satisfied that the police investigated the matter. The Tribunal noted that after the assault took place, the applicant continued to live in the same place for a period of about two years and further noted that, whilst on the one hand the applicant claimed that Person A intended to kill him and had assaulted him, when asked by the Tribunal why he remained in the same place, he stated that Person A would not seek to harm him because the BJP was in power. The Tribunal found that Person A had assaulted the applicant in an angry moment on one occasion and did not seek to do so again. The Tribunal did not accept that Person A was a threat to the applicant after the alleged assault took place or that he harassed the applicant, as claimed, after the BJP lost the election or that he intended to harm the applicant in any way, given the applicant's delay in leaving India. The Tribunal was satisfied that the police had taken action against Person A on many occasions and that the police would offer protection to the applicant if required. The Tribunal did not accept that the applicant was in fear of serious harm, nor was it satisfied that there was any credible evidence upon which it could find that the applicant was at risk of suffering serious harm in the reasonably foreseeable future if he returned to India.

Iran

0908471

17 December 2009, Sydney

Ms J Marquard, Member

IRAN – POLITICAL OPINION – MOJAHEDIN-E-KHALQ – The applicant claimed to fear persecution for reasons of her political opinion. She claimed that her family supported the Mojahedin-e-Khalq (MKO) and that a relative who was an active member of MKO was executed by the regime. She claimed the authorities attacked the family home and arrested her father. The applicant claimed that she became involved in political activities at university and that she secretly distributed CDs and took photographs and movies of torture and arrests and sent these to an MKO news channel. She claimed that she was involved in a

women's protest at university and was arrested and detained for her participation. She claimed that her work manager supported the ruling regime and on one occasion he took a CD from her work locker and showed her a photograph of her giving CD's to someone. She claimed that he said he would only keep it secret and not reveal her political activities if she accepted his regular sexual advances, which he continued until she departed Iran. The applicant stated that she became more involved with the MKO and distributed anti-government and human rights material to the public and provided the MKO with information and pictures of human rights abuses. She claimed that her work manager in Iran had informed the authorities that the applicant had travelled to Australia and that, as a result, her family's homes had been raided. As a result of these visits, she claimed that her aunt died and that her uncle was in hiding. The applicant claimed that her distribution and possession of highly political and sensitive material was regarded as being against national security, that she had spread propaganda and that she sympathized with an outlawed group. Letters of support were provided from various professionals who confirmed her claims of sexual assault and she also provided a letter of support from an Iranian human rights organisation in Australia stating that the applicant had attended protests relating to treatment of Iranian political activists. A petition was provided from Iranian-Australian opponents of the regime declaring that the applicant was a supporter of the national resistance movement and was a human rights and freedom activist. A political representative of MKO in Australia stated that the applicant was involved in demonstrations, had a genuine commitment to human rights change in Iran and was very active in Iran and Australia.

Held: Decision under review set aside

The Tribunal found the applicant's evidence to be "credible, honest, brave and consistent". The Tribunal accepted the applicant's evidence about her political activism, her family's involvement and the sexual assaults which took place when her activism was discovered. The Tribunal accepted that her family had been harassed by the Iranian authorities since she left and it was persuaded by the fact that she applied for her visa immediately upon arrival, which was consistent with a person in genuine fear for her life. The Tribunal gave weight to the applicant seeking assistance for the sexual assaults shortly after arriving in Australia and accepted her evidence about forced sexual favours in return for not being turned in to the authorities. The Tribunal was satisfied the applicant was active in Iranian human rights activism in Australia, that she continued her work for the MKO and human rights and that she was involved in protests and demonstrations in Australia. The Tribunal found the applicant's evidence was consistent with independent country information. The Tribunal considered relocation, however, accepted it was possible the applicant would be harassed no matter where she lived in Iran as the persecution was nation-wide and, therefore, relocation would not be an option. Accordingly, the Tribunal was satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Iraq

0907427

21 December 2009, Melbourne

Mr P Fisher, Member

IRAQ – EFFECTIVE PROTECTION IN A THIRD COUNTRY – The applicant is a 27 year old Iraqi woman of Assyrian or Chaldean ethnicity and Christian religion. She claimed that she and her family fled Iraq fearing for their lives because of Islamic extremist terrorist groups. Based on evidence provided with the application, the delegate concluded that the applicant had effective protection in a third country, being The Netherlands. The applicant claimed that her father's store in Iraq was burned down by a terrorist group and that he received death threats. She claimed that this is why her family were forced to leave Iraq for Syria. In Syria, the applicant claimed she was introduced to an Iraqi man and they fell in love and agreed to marry when they were able to settle in a safe country. Some months later, she separated from her family and headed to The Netherlands with people smugglers. After arriving in The Netherlands, the applicant claimed that she sought refugee status from the Dutch authorities. During this time, the applicant's fiancé was living in Australia and she was granted a prospective marriage visa on which she entered Australia. However two months after her arrival, her fiancé ended the relationship and withdrew his sponsorship. The applicant then lodged a protection visa application and attached a travel document issued to her by the government of The Netherlands which is valid until January 2011. Immediately prior to a scheduled hearing, the Tribunal received a document claiming that when the applicant left Syria with people smugglers, she thought she was being brought to Australia but instead, she arrived in The Netherlands. She claimed she then turned herself

in to authorities and she was granted asylum in The Netherlands. The applicant claimed that her family members are in Australia and that, if she returned to Iraq, she would have no one to protect her and that she would be returning from a foreign country. She claimed that the authorities could not protect her because the government had failed to keep law and order in Iraq. The applicant claimed that she wished to remain in Australia with her family.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was misled by the people smuggler, who took her from Syria to The Netherlands, and that she was devastated upon learning that she had landed in a different country to the rest of her family. The Tribunal considered that the fact the applicant had been granted asylum in The Netherlands relieved Australia of any protection obligations it might otherwise have had towards the applicant. Based on a copy of the applicant's current Dutch passport and information obtained by the Department from the Consulate General of The Netherlands in Australia, the Tribunal found that the applicant had a legally enforceable right to enter and reside in The Netherlands and that she could receive social security benefits upon her return to The Netherlands. This suggested to the Tribunal that the applicant's legally enforceable right to enter and reside in The Netherlands "is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally".

The Tribunal found that, although the applicant may have acquired a legally enforceable right to enter and reside in The Netherlands, it is a right which she did not seek to acquire voluntarily and which she acquired under duress as she had no choice but to make the application or be sent back to Iraq to face persecution. Although the applicant argued that her acquisition of the right to enter and reside in The Netherlands should be vitiated for fraud, mistake or duress, the Tribunal found that s.36(3) did apply to the applicant despite the uncertainty surrounding the manner in which she acquired her Dutch residency status. There was no evidence before the Tribunal to suggest that the applicant had a well founded fear of being persecuted in The Netherlands, whether for a Convention or any other reason. The Tribunal found that the applicant had a right to enter and reside in The Netherlands and that she had not taken all possible steps to avail herself of that right. Furthermore, it found that the applicant did not have a well-founded fear of being persecuted for a Convention reason in The Netherlands, or of being returned from The Netherlands to Iraq. Accordingly, the Tribunal found that Australia did not owe protection obligations to the applicant. It was, therefore, unnecessary for the Tribunal to undertake an assessment of the applicant's claim for refugee status with respect to Iraq.

Latvia

0908370

18 January 2010, Sydney

Mr G Short, Senior Member

LATVIA/STATELESS – PARTICULAR SOCIAL GROUP – RUSSIANS IN LATVIA – The applicant claimed that she had moved to Latvia from Russia in 1988 after finishing her tertiary education. She claimed that she was fired from her first job at the time of the collapse of the Soviet Union because she was Russian, and that no other company had wanted to hire Russian people. The applicant claimed that eventually she was forced to leave as she was no longer able to tolerate the conditions under which Russians were forced to live in Latvia. She claimed that she had been attacked and bashed and that "they" had kicked her baby in her pram which had then turned upside down. She claimed that when her daughter was born they had refused to give her daughter to her because she had not been a citizen and that she had only been able to visit her to wash some clothes. She claimed that it had only been five years later that they had been able to obtain a court decision and to reunite and live together. The applicant claimed that after Latvia had become a member of the European Union in 2004 things had improved, however, finding a job had still not been easy. She claimed that persecution from people on the street had deteriorated and that a Russian person would be kicked out of a bus and shop staff would refuse to sell things to a Russian-speaking person. The applicant claimed that she and her daughter had been attacked on a number of occasions and had the front door of their apartment set on fire, however, despite lodging statements with the police they had taken no action.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was stateless and that she had travelled to Australia on an 'Alien's Passport', which entitled her to return to Latvia. The Tribunal found that her 'country of former habitual residence' for the purpose of the Refugees Convention was Latvia and that the fact she was stateless did not in itself bring her within the definition of a refugee. The Tribunal accepted that problems remained with the integration of the ethnic Russian community in Latvia, but it found that independent information suggested that concerns raised by the Russian community related to things like the denial of political rights to non-citizens and issues in relation to the language law. The Tribunal found that independent information did not support the applicant's claims about attacks on her, being refused service in shops and being thrown off buses, and that if non-citizen Latvians of Russian origin or Russian-speakers like the applicant were being treated in this way, it would be highlighted in these reports. Therefore, the Tribunal did not accept that the applicant was attacked or otherwise persecuted in the way she had claimed for reasons of her race or her membership of any particular social group for the purpose of the Refugees Convention such as non-citizen Latvians, non-citizen Latvians of Russian origin or Russian-speakers. Whilst the Tribunal could not rule out the possibility that the applicant was attacked in the street as she described, it found that no country could guarantee that people would at all times, and in all circumstances, be safe from violence. The Tribunal found that there was nothing to suggest that the Latvian authorities, in particular the police, discriminated against non-citizen Latvians of Russian origin by failing to protect them from criminal acts by Latvian citizens as the applicant claims occurred in her case. The Tribunal also found that the Russian language continued to play a significant role in the private sector in Latvia and that Russian-speakers were a majority in several of Latvia's large cities. Therefore, the Tribunal did not accept that the applicant had a well-founded fear of being persecuted in her country of former habitual residence, that being, Latvia.

Pakistan

0907686

23 December 2009, Sydney

Ms G Cullen, Member

PAKISTAN -- ETHNICITY – PUNJABI PATHAN AND MOHAJIR – MIXED MARRIAGE – HONOUR KILLING – PARTICULAR SOCIAL GROUP – PEOPLE WHO MARRY OUTSIDE THEIR ETHNIC GROUP – The primary applicant arrived in Australia in 2007 on a student visa with her dependent husband. She claimed that they married in 1997 and it was a love marriage. He is from an Urdu-speaking group and she is from a Punjabi Pakhtoun family. She claimed that she is a modern Muslim woman who does not wear a hijab, or pray or fast. She claimed she lived in a very tribal area of Pakistan and that her actions are very shameful to her family and her community. The applicant also claimed that her husband is not Punjabi and that when her family found out about her marriage in 1995, they brought a proposal from a male in the village. As her father had passed away, this became the responsibility of her village uncles, who are Wahabi and who follow the influence of the Taliban. She claimed that when she told them she was already married, they beat her and would not accept the marriage. They said that if she did not get a divorce they would kill her due to the shame brought about from the marriage and because her husband is not from the same village or caste. She claimed that her uncles attacked her husband with a small knife and that he received eighty stitches and was in hospital for three days after the attack. She claimed that her family only supported her to come to Australia so she would not be with her husband and she had to tell them they had separated. Her family has since found out that he is in Australia with her and they have stopped sending her money so she was unable to continue with her studies. This has meant they are living in hardship and she fears that if they return to Pakistan she will be beaten and/or forced to marry another person, or they both may be killed.

Held: Decision under review set aside.

The Tribunal found that, although the primary applicant was prone to exaggeration, her evidence was generally consistent and she provided much detail when the Tribunal's concerns were put to her. Based on the oral evidence of both applicants and independent evidence, the Tribunal accepted that the applicants were married secretly for love in 1997 and that they were of different ethnicities; she is Punjabi Pathan and he is Urdu-speaking Mohajir. It also accepted that they did not tell her father and either of their families. It accepted that she secretly advised her employer of her marriage but also gave them her single Certificate of

Domicile. It accepted that the primary applicant's uncles, who are from the North of Pakistan and are from the conservative Wahabi sect of Islam, moved to Karachi and that they imposed increasing restrictions as to her dress and movement. It accepted that, in 2005, the applicant's uncles discovered she was married to the second named applicant and that because he was from a different ethnicity and it was a love match, she was beaten. It accepted she fled to live with her husband, that he was attacked and she was forced to return to her home. It accepted that when she returned, *pardah* was forced upon her and she left her employment. It accepted that her family wanted their divorce so that she could marry a man from her traditional village and that due to the stress she tried to commit suicide. It accepted she fled secretly with her husband to Australia on a student visa in 2007 with money secretly provided by her mother. It also accepted that since her family has heard of this, the honour of her family has been questioned and if she returns to Pakistan she will be severely beaten, seriously harmed or even killed. On the basis of this, the Tribunal was satisfied that the harm the primary applicant would be subjected to at the hands of her family involves 'serious harm'. The Tribunal was also satisfied that this situation may fall into a number of particular social groups, including "people who marry outside their ethnic group". The Tribunal was satisfied that both applicants possess characteristics and attributes that make them distinguishable from the rest of society and that they are members of a particular social group within the Convention meaning. Accordingly, the Tribunal was satisfied that the essential and significant reason for the persecution feared by the applicant was her membership of a particular social group. The Tribunal also was satisfied that the primary applicant would not have adequate and effective state protection available to her in Pakistan. Based on this information, the Tribunal was satisfied that both applicants were persons to whom Australia had protection obligations under the Refugees Convention.

FEDERAL COURT JUDGMENTS

SZJSS v MIAC

[2009] FCA 1577

Federal Court of Australia, Rares J, NSD 1085 5 of 2009, 24 November 2009

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) decision refusing to grant protection visas. The first appellant claimed to fear persecution from Maoists for his political beliefs.

This was the third Tribunal review of the delegate's decision, two previous Tribunal decisions having been set aside. The first appellant provided to the first Tribunal documentary evidence that included three letters: two from his former employer (a school); and one from his daughters' school. Broadly, they advised the appellant not to return to his village because the Maoists were looking for him. The letters had previously been investigated at the Tribunal's request by the Australian Embassy in Nepal and found to be genuine. The Tribunal gave them no weight for reason that they were 'solicited' by the appellant and, consequently, were not 'bona fide'. In addition, the Tribunal described the appellant's reference to being a school teacher at a certain point in the hearing as 'a baseless tactic' to help him address the potentially adverse impression that it had disclosed to him.

The grounds for appeal were essentially that the Tribunal had failed to give weight to corroborative letters that had been found to be genuine; it failed to properly take into account the effects of the delay in dealing with their application and the consequences of having to repeat evidence; there was an apprehension of bias; and the decision was one that no rational decision-maker would have made.

Held: Appeal allowed.

- (i) The Tribunal made jurisdictional errors in its constructive failure to exercise its jurisdiction and in its apparent bias in the way in which it dealt with the letters and the evidence of the husband in relation to his claims, calling it a baseless tactic.
- (ii) When the Tribunal member said that he gave no weight to the three letters, he simply recited that he had considered them only to discard them. This was not a proper, genuine or realistic evaluation of this material. It could not be a rational decision that gave proper, genuine or realistic consideration to the appellant's claims, or to the evidence supporting them, to give the evidence no weight merely because it had been 'solicited'. Any person who seeks to get evidence from their home country will always 'solicit' the material; that is of its nature.
- (iii) The Tribunal's reasons did not expressly recognise the effects of the delay that had been occasioned in the determination of the appellants' claims through no fault of their own and the consequential need for the first appellant to repeat his evidence to three differently constituted tribunals. Witnesses cannot be expected to give their evidence some time apart in exactly the same terms or to remember events verbatim.
- (iv) A fair-minded lay observer or properly informed lay person would find the use of the language 'baseless tactic' disturbing in the context of the Tribunal's reasoning. Coupled with the Tribunal using the 'no weight' formulation to shut out powerfully corroborative independent evidence, verified by the Australian Embassy in Nepal, a fair-minded lay observer or properly informed lay person would regard the Tribunal member as having an apparent bias against the appellant's account.

**SZNPS v MIAC
[2010] FCA 101**

Federal Court of Australia, Logan J, NSD 1408 of 2009, 15 February 2010

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

The appellant, a national of Bangladesh, claimed to have been active with the Bangladesh Nationalist Party (BNP) through its youth wing, the Jatiatabadi Jubo Dal (JJD). He claimed to fear persecution by the BNP's opposition, the Awami League (AL) and other sources. The appellant provided a number of documents in support of his claims, including police and court documents and medical certificates. The Tribunal found that the documents provided by the appellant were not genuine and, accordingly, rejected his claims to have any political profile in Bangladesh.

On appeal to the Federal Court, the appellant contended, among other things, that the Tribunal failed to make any, or at least any adequate, investigation of particular corroborative documents which he lodged in support of his review application. The Court also considered whether the way in which the Tribunal approached the authenticity question, in respect of documents submitted, might be regarded as unreasonable in the administrative law conception of that term.

Held: Appeal dismissed.

- (i) The Tribunal was not obliged to carry out its own inquiries either generally or in the particular circumstances of this case. While there are cases where an obligation on the part of the Tribunal to conduct an inquiry might arise, this was not such a case. Rather, it was incumbent upon the appellant to support his case with such material as he could. The Tribunal was not obliged to accept, at face value, the appellant's oral evidence, documents submitted, or the contents of the claim, as originally made.
- (ii) Viewed alone, the Tribunal's reference to what one might, or might not, expect a doctor employed in a Bangladesh hospital to put in a medical certificate might be regarded as illogical, in the sense of making an assumption about assimilation of Australian medical practice in hospitals with practice in hospitals in Bangladesh, without any reasonable evidentiary foundation. However there were reasonable bases, quite apart from the idiosyncratic reasoning in relation to hospital certificate practice, upon which one might fail to be persuaded that the medical certificate was original.
- (iii) The Tribunal's reasoning in respect of the police and court documents was logical and reasonably open to it.

FEDERAL MAGISTRATES COURT JUDGMENTS

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.

MZYCF and Anor v MIAC and Anor

[2010] FMCA 11

Federal Magistrates Court, O'Dwyer FM, MLG 1224 of 2008, 27 January 2010

The applicants, husband and wife citizens of India, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the applicant husband was not a person to whom Australia had protection obligations.

The applicant husband (the applicant) claimed to fear persecution for his political activities working for untouchables. He claimed he had been attacked by fanatical Brahmans and had been threatened as a result of published articles in which he was critical of corruption of political figures and government officials. He produced original copies and translations of claimed published articles. The Tribunal found the applicant was not a witness of truth. It found his claim of having been attacked was implausible, it found inconsistencies in his evidence and his return to India from Singapore and Australia when he claimed he feared serious harm. It found the newspaper reports could not be given credit because of widespread document fraud in India.

The applicants claimed, among other things, breach of procedural fairness based upon the Tribunal finding the newspaper clippings to be fraudulent in circumstances where the applicant had invited the Tribunal to confirm the documents by searching the newspapers' internet sites.

Held: Tribunal decision set aside and remitted for determination according to law.

- (i) The failure by the Tribunal to make reasonable inquiry in a manner readily open to it to ascertain the authenticity of the newspaper clippings was a constructive failure to exercise jurisdiction and was unreasonable in a *Wednesbury* sense.
- (ii) Where the applicant's credibility was determinant of the outcome and where that credibility was so reliant upon the documentary evidence presented by the applicant, and where it was readily open to the Tribunal to determine the authenticity of such documentary evidence, not to make relatively simple inquiries as suggested by the applicant, who had otherwise provided all the authentication reasonably available to him, was so unreasonable that no Tribunal could have not made the inquiry.
- (iii) The Tribunal should have asked itself, what if the newspaper clippings were true. The claims were not so implausible to lead to a conclusion the newspaper clippings should be disregarded if proved to be authentic.

**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.

Hasran v MIAC & Anor

[2010] FMCA 31

Federal Magistrates Court of Australia, Nicholls FM, SYG 2213 of 2009, 22 January 2010

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate to cancel a Student (Temporary) (Class TU) Subclass 573 visa.

The Tribunal wrote to the applicant pursuant to s.359A of the *Migration Act* 1958 (the "Act") inviting him to comment on adverse information by 3 August 2009. On 4 August 2009, the Tribunal received a request from the applicant seeking an extension of time. By letter dated 4 August 2009, the Tribunal notified the applicant that as his request fell outside the time for making such a request, it was unable to grant the extension of time. It further notified the applicant that he had lost his entitlement to appear before it and accordingly, the Tribunal "will now make a decision based on the material before it". The Tribunal, pursuant to ss.359C(2), 360(2) and (3), and 363A of the Act, proceeded to a decision without inviting the applicant to a hearing.

The applicant contended that the Tribunal misapplied the provisions of ss.359C, 360 and 363A and therefore failed to carry out its statutory duty. The applicant relied on *Uddin v MIMIA* (2005) 149 FCR 1 to argue that the Tribunal had the discretion to provide the applicant with a hearing. He further contended that the Tribunal, by the terms of its letter of 4 August 2009, denied the applicant the opportunity pursuant to s.358 of the Act to provide further documents to the Tribunal, and failed to understand that it did have the power to grant an extension of time.

Held: Application dismissed.

- (i) The Tribunal correctly decided that it had no discretion to provide the applicant with a hearing in the circumstances.
- (ii) There was no discretion to extend the time to respond to a s.359A letter in circumstances where the request for the extension was made after the expiry of the prescribed period as stated in the letter of invitation.
- (iii) There was nothing in the language of the Tribunal's letter of 4 August 2009, particularly when read in context with the invitation letter itself, to suggest that the Tribunal was seeking to exclude any opportunity that the applicant may otherwise have had pursuant to s.358 to provide further written material.

Ngo v MIAC & Anor

[2010] FMCA 32

Federal Magistrates Court of Australia, Burchardt FM, MLG 996 of 2009, 2 February 2010

The applicant sought review of a decision of a Registrar of the Federal Magistrates Court (FMC) dismissing by consent an application for review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the delegate of the first respondent not to grant the applicant a spouse visa.

The applicant had sought a continuation of her provisional spouse visa on the footing that she had been a victim of domestic violence at the hands of her spouse. In light of pending proceedings in *Sok v MIAC & Anor* [2008] HCA 50 she had, on advice, abandoned the FMC application and instead pursued an application to the Minister under s.351 of the *Migration Act 1958*. When this was refused she sought to have the Registrar's consent orders set aside.

Held: MRT decision quashed; application remitted for reconsideration.

- (i) The proper interests of the administration of justice required that time be extended to enable the application for review to be brought. The applicant would, had she proceeded with her application (in the light of the way that the events transpired) have been able to rely upon the High Court's decision in *Sok* in her favour. This would have meant more probably than otherwise that the decision of the Tribunal would have been set aside. The Tribunal did not give the applicant an opportunity to address it and this would have constituted jurisdictional error.

LEGISLATION UPDATE

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

Legislation Passed

INSTRUMENTS

Migration Regulations 1994 – Specification under regulation 1.03 – Migration Occupations in Demand – February 2010

This instrument revokes *Migration Regulations 1994 – Specification under regulation 1.03 – Migration Occupations in Demand – May 2008* and specifies skilled occupations as migration occupations in demand. This instrument applies on and from 8 February 2010 to all new visa applications.

Migration Regulations 1994 – Specification under regulation 2.40(1)(n) – Transit Passengers who are eligible for a Special Purpose Visa – February 2010

This instrument specifies the list of countries whose citizens are “transit passengers” for the purposes of paragraph 2.40(1)(n) in Part 2 of the Migration Regulations 1994, specifically to include citizens of the United Arab Emirates in the class of persons specified.

Legal Services Amendment Directions 2009 (No. 1)

These Directions amended the *Legal Services Directions 2005*, effective on and from 29 January 2010 to establish clear circumstances in which the Commonwealth and its agencies should not seek suppression orders from the Court.

Legislation Pending

Anti-People Smuggling and Other Measures Bill 2010

This Bill amends the *Migration Act 1958* and other Commonwealth legislation to, among other things, target criminal groups who organise, participate and benefit from people smuggling activities. This Bill was introduced in the House of Representatives on 24 February 2010.

CASELOAD OVERVIEW

MRT Decisions – January 2010

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	1	4	1	2	8
Visitor refusal	31	15	2	3	51
Student refusal	22	13	11	11	57
Temporary business refusal	9	12	7	4	32
Permanent business refusal	2	2	6	0	10
Skill linked refusal	38	90	13	10	151
Partner refusal	63	14	12	3	92
Family refusal	11	14	3	3	31
Student cancellation	13	20	0	4	37
Sponsor approval refusal	4	11	5	0	20
Other	16	9	4	6	35
Total	210	224	64	46	524

RRT Decisions – January 2010

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Algeria	0	1	0	0	1
Bahrain	0	1	0	0	1
Bangladesh	0	4	0	0	4
Burma (Myanmar)	2	0	0	0	2
China (PRC)	12	30	1	1	44
Colombia	0	1	0	0	1
Egypt	1	2	0	0	3
Ethiopia	1	0	0	0	1
Fiji	3	4	0	0	7
India	1	13	0	0	14
Indonesia	3	9	0	2	14
Iran	0	1	0	0	1
Iraq	1	0	0	0	1
Korea, Republic Of	1	3	0	0	4
Lebanon	3	6	0	0	9
Macedonia, Fmr Yugo Rep	0	1	0	0	1

of					
Malaysia	0	9	0	0	9
Mongolia	0	2	0	0	2
New Zealand	0	1	0	0	1
Nigeria	1	2	0	0	3
Pakistan	3	4	0	0	7
Palestinian Terr. (W.Bank/Gaza)	0	1	0	0	1
Philippines	0	3	0	0	3
Rwanda	2	0	0	0	2
Somalia	2	0	0	0	2
Sri Lanka	4	2	0	0	6
Stateless	0	1	0	0	1
Sudan	1	0	0	0	1
Turkey	1	0	0	0	1
Uganda	0	1	0	0	1
Ukraine	0	1	0	0	1
United Kingdom	0	1	0	0	1
Vietnam	0	1	0	1	2
Zimbabwe	1	1	0	0	2
Total	43	106	1	4	154

PUBLICATION OF TRIBUNAL DECISIONS

The Migration Review Tribunal and Refugee Review Tribunal are required to publish decisions that are considered to be of 'particular interest'.

Decisions which are regarded as of particular interest are decisions: identified as representing a broad cross-section of decisions having regard to factors such as the visa subclass and the outcome of the review; or where there is detailed consideration of legal arguments or policy issues; or where the factual circumstances are complex or unusual or where there is or is likely to be significant external interest; or where there is clear precedential value. The Tribunals aim to publish at least 40% of decisions made.

Between 1 January and 30 June 2009, 47% of all substantive decisions made have been published (46.9% of MRT and 48.3% of RRT). This does not include 'Withdrawn' or 'No Jurisdiction' cases. MRT decisions are selected and vetted for publication each day, with publication delayed by approximately seven days to allow for applicants to be notified of the Tribunal's decision. RRT decisions are also selected daily and are allocated to Publications Officers for editing. Once edited, the decisions are quality checked by a Senior Publications Officer and sent to AustLII for publishing on their website.

The Refugee Review Tribunal has a statutory obligation to ensure that the published version of a decision statement must not contain any information which may identify the applicant or any relative or other dependent of the applicant. Decisions that require extensive editing to meet this obligation may not be published.

A selection of Tribunal decisions are available on the Migration Review Tribunal and Refugee Review Tribunal's website located at <http://www.mrt-rrt.gov.au/>.

The website also contains information about how to apply to the Tribunals, how the Tribunals are organised, the function of the Tribunals, caseload statistics, as well as copies of this and previous Bulletins.

The website is updated on a regular basis.

The Migration Review Tribunal and the Refugee Review Tribunal shall not be liable for any reliance by any person on the summaries contained in this Bulletin. Each summary provides a guide only to each decision and should not, under any circumstance, be used as a substitute for the full text of a decision.

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