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This month we are adding a new section to *Précis* featuring some of the more interesting country advice recently added to the MRT-RRT website. Country advice is prepared to assist Members of the Tribunals in conducting their reviews, and where possible is published on our website for the information of applicants, their advisers and the public.

The Tribunals have been publishing our country advice since early 2009, and the response has been very pleasing. At the suggestion of some website users, we have improved the way country advice is presented on the website, and enhanced the search function to deal with the larger numbers of documents on the website.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

0806538

22 February 2010, Sydney

Mr R Derewlany, Member

EMPLOYER NOMINATION (MIGRANT) (CLASS AN) – SUBCLASS 121 – (EMPLOYER NOMINATION SCHEME) – CL.121.211 – OVER 45 YEARS OF AGE – EXCEPTIONAL CIRCUMSTANCES

A delegate of the Minister refused to grant the applicant a Subclass 121 visa as he did not satisfy cl.121.211 of the Regulations because he was over 45 years of age at the time of application and the delegate was not satisfied that exceptional circumstances applied in which to waive the age requirement. The visa applicant was aged 50 at the time of application. On learning of the decision to refuse the applicant's permanent residence application the applicant's employer, Maccaferri Australia Pty Ltd, lodged an application for a Subclass 457 Long Stay Business visa for the applicant. This application was approved in October 2008 and the applicant arrived in Australia in March 2009 and commenced work as a Civil Engineering Technician with the company immediately. Following a "settling in" period and a review of Maccaferri Australia's direction and structure, the applicant's title was changed to National Technical Manager in April 2009. In support of the review application, the Tribunal received a supporting letter from the Chairman of Maccaferri Australia Pty Ltd stating that the applicant's position of National Technical Manager was a key role internally as it supported the drive to introduce the three technologies to the Maccaferri Australia Pty Ltd business and the broader Australian engineering community. He further claimed that, due to the applicant's significant experience in the company's specialised product range over a number of years and his success in his senior role with the group in South Africa, the 45 year age limit should be waived. It was further claimed that once the applicant's services as a senior technical expert were secured, this allowed the company to initiate other actions including opening two new sales branches in north Queensland, recruiting a mid-level technical resource in Sydney and committing to Officine Maccaferri, who own 15% of Maccaferri Australia, about their actions to ensure growth thereby giving Officine Maccaferri confidence to proceed with their investment in new manufacturing locations. Evidence of Maccaferri Australia's unsuccessful efforts to recruit civil engineers and civil engineering technicians with the appropriate expertise locally was also provided.

Held: Decision under review set aside.

The Tribunal took into account the policy guidelines on the issue of 'exceptional circumstances' in respect of age. The Tribunal also received substantial additional evidence regarding the highly specialized nature of the nominated position, the visa applicant's skills and experience, and the difficulty the company has had and continues to have in filling such a position (and other related positions) from the local and international market. The Tribunal found the additional evidence from the Chairman of the review applicant company, the Managing Director, and the visa applicant about the position and its place in the company's operations, to be comprehensive and very persuasive. Based on this evidence, the Tribunal found that the additional evidence established that there were exceptional circumstances in this case, due to the highly specialized nature of the position, combining technical, business and mentoring/training/development roles, and the high level skills and significant experience required to perform the roles of the position. The Tribunal was satisfied that the demands and requirements of the position were so specialized, unusual and extraordinary that the position would normally require a person with skills and experience acquired over a number of years, and that it would be extremely difficult, if not impossible, for Maccaferri Australia Pty Ltd to find a suitably qualified and experienced person of a younger age to fill the position. In reaching this conclusion, the Tribunal also had regard to factors such as the remuneration for the position and the evidence of the contribution the visa applicant had made to the company since his arrival in Australia as the holder of a Subclass 457 visa; although that had occurred after the date of application, the Tribunal considered the evidence further supported a finding that there were exceptional circumstances at the time of application relating to the age requirement. Accordingly, the Tribunal was satisfied that exceptional circumstances applied in this case with respect to the age requirement and the Tribunal therefore found that the visa applicant satisfied the requirements of cl.121.211(c)(i) of the Regulations.

0807020

19 February 2010, Sydney

Ms S Pinto, Member

SKILLED — AUSTRALIAN SPONSORED (MIGRANT) (CLASS BO) – SUBCLASS 138 – CL.138.216 — SKILLED OCCUPATION – A delegate of the Minister refused the applicant's Subclass 138 visa on the basis that the visa applicant did not satisfy cl.138.216 of the Regulations because the delegate found that the visa applicant had not been employed in a skilled occupation during the relevant period. The visa applicant was a citizen of Indonesia who was sponsored by the sister of the visa applicant's husband. The visa applicant nominated the skilled occupation of "accountant" and claimed that she had completed a Bachelor of Accounting in Indonesia in 2004, and that she had obtained a skills assessment from CPA Australia in 2007. She claimed that she had been employed with a firm in Jakarta since 2002 as "accounting staff"; and at another firm as "data analysis staff" from 2002 until 2006, and she also provided a skills assessment from VETASSESS as an "Internal Auditor". The applicant provided a reference from the Managing Director of her employer stating that she had been employed as an "Internal Auditor" since 2002, and included a detailed list of her job description and duties. The Tribunal requested that the Department of Foreign Affairs (DFAT) in Indonesia conduct an unannounced visit to the offices of the applicant's employer to ascertain further details of her employment, and they were advised that the applicant worked in a sub-branch, as did the Managing Director. Subsequently, DFAT contacted the company's Human Resources (HR) department by phone who advised that the applicant was employed as "accounting staff", and denied that the applicant was an "Internal Auditor" as this function was outsourced. At the hearing the visa applicant claimed that on a daily basis she would check the accounting system and financial reports and compare the debit and cash available to the company, and that she also prepared reports for the external auditor. The applicant provided a letter from the company President stating that the visa applicant performed the duties of an Internal Auditor, as well as a statement from a representative of their HR department, stating that they had provided "wrong information" to DFAT as the representative had been "busy" at the time of the call.

Held: Decision under review affirmed

The Tribunal found that the visa applicant's duties, as described to both the Department and DFAT, were consistent with low level accounting duties undertaken by a person such as a Bookkeeper or someone in a similar role. The Tribunal was not satisfied that such duties were undertaken by someone who was at the professional level of an Internal Auditor. The Tribunal found that the ASCO Guide indicated that an Internal Auditor was involved at a professional level to ensure that businesses complied with laws and regulations and ensured that financial reporting was reliable and that the business operations were effective and efficient. It found that by contrast, a Bookkeeper was described at a substantially lower level and the duties were essentially to maintain and evaluate records of financial transactions in books or computerised accounting systems. Although the Tribunal was prepared to accept that as part of her role as "accounting staff" the visa applicant may have undertaken some lower level auditing functions such as checking that the financial reports were correct, the Tribunal did not accept that the visa applicant's duties, as initially described to the Department and to DFAT, established that she undertook the range of duties commensurate with that of an Internal Auditor. The Tribunal found that the outline of duties provided by the company's HR Manager was at a much lower level than that of an Internal Auditor, and therefore it did not accept that it was credible that the later evidence in relation to the visa applicant's duties would differ so significantly from the duties as initially provided to the Department and those provided to DFAT during its inquiries. The Tribunal was satisfied that the DFAT site visit was properly conducted and considered that this evidence also established that the company did not employ Internal Auditors. Therefore, the Tribunal found that the visa applicant was not employed in a skilled occupation for at least 24 months in the 36 months preceding the date of application, and that accordingly she did not meet the requirements of cl.138.216 of the Regulations.

0909479

19 February 2010, Melbourne

Mr G Haddad, Member

TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 – BUSINESS (LONG STAY) – CANCELLATION S.116 – CONDITION 8107 – EMPLOYMENT CEASED – A delegate of the Minister cancelled the applicant's Subclass 457 visa on the basis that the applicant had ceased working for his sponsoring employer. The applicant claimed that from the outset he was given duties to perform that were different from the duties originally discussed for the position. He claimed that he was mistreated, humiliated and abused verbally by his direct manager who is his niece. He further claimed that at times he had no choice but to work very long hours. He was provided with accommodation on the work site but he preferred to live elsewhere however his employer did not help him to find other accommodation. He claimed he spoke with his wife and raised his concerns with the manager's husband which led to arguments and in June 2009, he decided to leave the job. The applicant stated that he filed a complaint with the Fair Work Ombudsman to seek compensation and that he sought assistance from a Filipino advocacy group. He claimed he had received an offer by his previous employer in the sum of \$14 000 to be paid in instalments and he continues to pursue the claim for compensation. He is concerned that he may not be able to continue the claim if he were to return to the Philippines and he continues to look for another employer to sponsor him. At the Tribunal hearing, the applicant indicated that he understood the circumstances which led to the cancellation of his visa and he confirmed that he understood that he had breached condition 8107. In relation to the hardship he and/or members of his family would suffer as a result of the visa cancellation, the applicant stated that he had accepted the offer of work in Australia because he saw it as a good opportunity to provide a better future for his family. If he were to return to the Philippines as a result of the decision to cancel his visa, he would return without any money. He claimed he had been trying to find another job in Australia but it had been very difficult to find a job; and it would be especially difficult to find one in the Philippines.

Held: Decision under review affirmed

On the basis of the applicant's statutory declaration and his confirmation that he had ceased to be employed by the employer in relation to which the visa was granted, the Tribunal was satisfied that the applicant had not complied with condition 8107 of his visa and, therefore, the ground for cancellation in s.116(1)(b) existed. The Tribunal next considered whether to exercise its discretion to cancel the applicant's visa. The Tribunal noted that the applicant had suffered an unfortunate experience of dashed hopes and unmet expectations and it was apparent from the Department's file that he had gained the sympathy of Departmental officers and also of the Tribunal. However, having regard to the purpose of the Subclass 457 visa, to assist Australian businesses to recruit skilled labour from overseas because of a shortage in the domestic labour market, taken together with the evidence that the applicant had been trying without success for longer than seven months to find a sponsor to employ him for his skills, the Tribunal was not satisfied that it was appropriate to exercise its discretion to set aside the decision. In the circumstances of this case, there appeared not to be a valid reason to re-instate a Subclass 457 Business Long Stay visa to the applicant only so the applicant could remain unemployed and search for an employer in Australia. Considering the circumstances as a whole, the Tribunal concluded that the visa should remain cancelled. Accordingly, the Tribunal affirmed the decision to cancel the applicant's Subclass 457 visa.

Family visas

0807652

10 February 2010, Brisbane

Ms R Johnston, Member

OTHER FAMILY (RESIDENCE) (CLASS BU) – SUBCLASS 835 – (REMAINING RELATIVE) – CL.835.223 – PIC 4005 – HEALTH –A delegate of the Minister refused the applicant's Subclass 835 visa application and found that the applicant did not satisfy the requirements of cl.835.223 because she failed to satisfy the health criteria (PIC 4005). The delegate made this finding on the basis of the opinion of the Medical Officer of the Commonwealth (MOC). The MOC found that the applicant was a person with

intellectual impairment, a condition which would be likely to result in significant cost to the Australian community in the areas of health care and community services or that this may prejudice the access of Australian citizens or permanent residents to health care and community services. The Tribunal determined that the applicant was a vulnerable person and considered it appropriate to permit her sponsor, who is the applicant's sister, to present oral evidence and arguments on behalf of the applicant. At the hearing, the Tribunal was told that the applicant had been intellectually impaired since birth, that her parents are deceased and that she resided with her mother in France until her mother's death in June 2005, when the sponsor became the applicant's legal guardian. The sponsor also submitted that the applicant had no close relatives living in Spain and that should the applicant be forced to depart Australia, it would have a detrimental effect on her, her husband and her children. It would mean that the sponsor's family would have to be split up as she would need to accompany and reside with the applicant in Spain. She also stated that the applicant would not undertake further examinations by a medical professional or health organisation in relation to her current health status, but would be seeking Ministerial Intervention. A submission referring to the UN Convention on the Rights of Persons with Disabilities, which Australia ratified in July 2008, was included with the application for review.

Held: Decision under review affirmed

The Tribunal was bound as per the Regulations, to accept the final assessment of the MOC to be correct for the purposes of deciding whether the applicant satisfied the relevant health criterion. The Tribunal noted that it had written to the sponsor inviting the applicant to advise whether she wished to obtain a further medical opinion from an MOC and that the sponsor stated, both in writing and orally at the hearing, that the applicant did not wish to do so. The Tribunal declared that it was sympathetic to the applicant's circumstances, given her intellectual disability and the fact that she had no living close relative other than the sponsor in Australia. The Tribunal noted that it is open to the Minister himself to substitute the Tribunal's decision for one more favourable to the applicant. Based on the opinion of the MOC, the Tribunal found that the applicant did not satisfy PIC 4005 and that the applicant did not meet the requirements of cl.835.223.

Partner visas

0805075

8 February 2010, Melbourne

Mr P Murphy, Senior Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 (SPOUSE (PROVISIONAL)) – CL.309.211 – CL.309.221 – R.1.15A – GENUINE AND CONTINUING RELATIONSHIP – A delegate of the Minister refused to grant the applicant a Subclass 309 visa on the basis that the parties had “misrepresented themselves, (their) motives, (the) relationship and various aspects of their lives” and that the social aspects of their relationship were not that of a couple genuinely intending to live together in a spousal relationship. The review applicant was a 60 year old Vietnamese born male who had three children from a previous relationship. The visa applicant was a 44 year female who was living in Vietnam and had two children, the younger of whom was the second visa applicant. The visa applicant claimed that she met the review applicant in Australia at a BBQ organised by her sister and that following this, the review applicant often visited her and they went shopping, sight seeing and she cooked meals for him. She claimed that about one month after they met the review applicant proposed. He moved in with the visa applicant at her sister's house about two weeks later and they were married the following month. The review applicant claimed that he no longer had contact with his elder two children. He did have some contact with his youngest son but he had not told him about the marriage as he was concerned he would react badly given the circumstances under which the applicant had separated from his mother. The applicants claimed that they were Buddhists, however, they had a civil celebrant perform their wedding as they claimed they wanted a simple ceremony. The review applicant claimed that he financially supported the visa applicant by sending her \$100 a month. The parties provided supporting documents including marriage, citizenship and birth certificates, identity cards, passport extracts, and supporting statutory declarations. The review applicant provided photos of when he visited the visa applicant in Vietnam for four weeks and he provided evidence of money transfers to her. The Tribunal received oral evidence at the hearing from the visa applicant's sister and a long term family friend, both attesting to the genuineness of the relationship. The Tribunal also received an anonymous submission claiming that the relationship was not genuine.

Held: Decision under review set aside.

The Tribunal had some reservations as to the genuineness of the relationship, relating to inconsistencies between the evidence of the visa applicant and other evidence about the circumstances leading up to the marriage proposal, their activities following the wedding, and in particular whether the parties attended a Buddhist temple on their wedding day. It found that, to some extent, these concerns were explained by the adviser's submission relating to the health and mental state of the visa applicant and the evidence of the review applicant and the visa applicant's sister. Whilst the Tribunal had some reservations as to the reliability of the visa applicant's evidence on these aspects, its reservations were not sufficient to draw an adverse conclusion about the visa applicant's credibility. Similarly, whilst the Tribunal had some concerns about the manner in which documentary evidence relied on by the parties was created and it was prepared to accept the visa applicant's sister's explanation that, to some extent, the confusion over the documents may have been due to her attempts to assist her sister rather than any attempt to falsify or provide inaccurate information. The Tribunal noted that there was some divergence in the parties evidence as to whether they first cohabitated before or after they were married, however it was prepared to accept that the visa applicant may have been embarrassed to acknowledge co-habitation prior to marriage, which may explain her inconsistent evidence. The Tribunal accepted that it was plausible that the review applicant had not told his younger son of the marriage because he was fearful it would further damage their relationship. The Tribunal also had some concerns about the speed at which they decided to marry and whether this suggested that the marriage was entered into before they had any real depth of understanding about each other. However, it noted that they were each able to independently provide consistent evidence as to their knowledge of each other, their past and their stated future plans, which indicated a degree of understanding. The Tribunal noted that it was unable to test the merits of the anonymous assertions contained in the 'dob in' letter, and for this reason it disregarded its contents and placed no weight on it in reaching its decision. The Tribunal was therefore satisfied that the weight of material available to it supported the conclusion that the applicants had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship was genuine and continuing.

0807893

28 January 2010, Adelaide

Ms B Wells, Member

PARTNER – (TEMPORARY) (CLASS UK) – SUBCLASS 820 – (SPOUSE) – CL.820.211 – CL.820.223(1)(a) – PIC 4001 – CHARACTER TEST – A delegate of the Minister refused to grant the applicant a Subclass 820 visa as the applicant had provided a police certificate from Ghana which was found to be fraudulent. The delegate was therefore not satisfied that the visa applicant had passed the character test. The visa applicant and sponsor gave evidence at a hearing before the Tribunal that they met in October 2005, they spent a lot of time together, and started living together in mid February 2006. They did not live together between August 2006 and November 2007 however, because the sponsor was given a visa to come to Australia. In November 2007 the applicant was able to join the sponsor in Australia and they have lived together since that time. At the time of the hearing the sponsor was pregnant with the couple's second child. The applicant also gave evidence at hearing and provided a statutory declaration about the process by which he had obtained the police clearance document he had provided to the Department. He claimed that he and the sponsor asked a friend in Accra to obtain the police clearance. The friend spoke to a police officer at the police station about the issue and was told it would cost about US\$300. The applicant had then provided this money, along with fingerprints and passport sized photographs, and the clearance was produced. The review applicant said that he thinks his friend may have given the money required for the clearance to a Ghanaian police officer who may not have had the authority to produce an original document but may have made the police clearance document which was provided and pocketed the money himself. The applicant provided a second declaration describing the efforts he had since made to obtain a new police clearance.

Held: Decision under review set aside

The Tribunal found that the sponsor became an Australian permanent resident in 2006. The Tribunal found the review applicant and visa applicant convincing and credible witnesses and therefore gave their evidence considerable weight. The Tribunal noted that during the hearing both parties provided consistent accounts in relation to almost all aspects of their relationship, including the development of their relationship, the time

that they have lived together, the sharing of their finances and their social activities together. The Tribunal found that the review applicant is, and was at the time of application, the spouse of the sponsor within the meaning of r.1.15A of the Regulations. The Tribunal also found that the review applicant met PIC 4001 as it was satisfied, "after appropriate inquiries", "that there is nothing to indicate that the applicant would fail to satisfy the Minister that the person passes the character test". In making this finding the Tribunal referred to independent information which indicated that the Ghanaian police force may engage in corrupt practices when dealing with an application for a police clearance certificate. The Tribunal found that the review applicant's failure to obtain a valid Ghanaian clearance was not caused by any fault on his part and the Tribunal accepted his evidence that he had never committed, or been accused of committing, a criminal offence. Accordingly, the Tribunal found that the applicant met the criteria in cl.820.211 and cl.820.221 of the Regulations, as well as public interest criteria 4001, as specified in cl.820.223(1)(a) of the Regulations.

0809032

10 January 2010, Melbourne

Mr B Hely, Member

PARTNER (TEMPORARY) (CLASS UK) – SUBCLASS 826 (INTERDEPENDENCY) – R.1.09A – 12 MONTH REQUIREMENT – A delegate of the Minister refused the applicant's Subclass 826 visa application as the applicant did not satisfy cl.826.212 of the Regulations. The delegate was not satisfied that the applicant and her sponsor had been in an interdependent relationship for 12 months at the date of application and found that there were no compelling and compassionate grounds to warrant the waiver of the 12 month requirement. The applicant claimed that she met the sponsor's previous partner when she went to the USA to do volunteer work. She claimed that she then travelled to Australia and stayed for approximately one month with both the sponsor and the sponsor's previous partner, who were then living together. The applicant claimed that during the following year she returned to Australia and again stayed with the couple. She claimed that there was a strong attraction between her and the sponsor from those initial meetings and they kept in frequent contact whilst she was studying in the USA. The applicant claimed that after her second visit the sponsor separated from her partner and the following year the sponsor travelled to the USA to spend time with the applicant, although at this time the applicant was still in a relationship. The sponsor stayed with the applicant and her partner during this trip. The applicant claimed that the relationship with her partner ended soon after due to her partner's infidelity, and the relationship with the sponsor developed from this time, with the applicant moving to Australia in 2008 when she began living with the sponsor. The applicant claimed that she and the sponsor commenced an interdependency relationship in May 2007, four months after her previous relationship ended, during the period when she was completing her degree in the USA. She stated that she and the sponsor communicated frequently and became serious in their resolve to find a way to make their relationship work, which included exploring the different options for migration to either Australia or the USA. The applicant claimed that the relationship had taken on a physical element the previous December during the sponsor's stay with the applicant and her partner, and that they had lent money to each other from May 2007, although they had only formally combined their finances on her arrival in Australia. The applicant claimed that they did not wait to satisfy the 12 month relationship requirement as her visa did not entitle her to work and they did not have the finances to wait, nor were they aware that her tourist visa could be extended.

Held: Decision under review set aside

The Tribunal found the applicant and her sponsor to be highly credible and compelling witnesses. The Tribunal was left in no doubt as to the genuineness of their relationship, rather, it found that the critical issue for its consideration related to the requirement that an interdependent relationship existed for 12 months prior to the date of application. The Tribunal noted the documentary evidence which demonstrated that the applicant and sponsor combined their finances after the applicant's arrival in Australia in April 2008, which included joint bank account statements, as well as evidence that the sponsor nominated the applicant as the beneficiary under her superannuation policy. The Tribunal also accepted that the applicant and the sponsor began informally sharing their finances from approximately May 2007 onwards. The Tribunal found that the applicant and sponsor began to co-habit immediately after the applicant arrived in Australia and that they had co-habited since that time. The Tribunal accepted the chronology of the relationship given by the applicant in her evidence, that from approximately 2004 onwards they began openly discussing their mutual feelings, with them resolving by May 2007 to begin a life together notwithstanding that they lived in

separate countries. The Tribunal accepted that the applicant would have wished to migrate to Australia immediately after completing her university degree in 2007, however she was precluded from doing so primarily for financial reasons. Therefore, the Tribunal found that the applicant and sponsor were in an interdependency relationship from May 2007, which was more than 12 months prior to the date of application in July 2008. The Tribunal noted that this characterisation of their relationship was unusual in that they were living in separate countries, however, it found that the relationship should be viewed in its historical context which involved mutual expressions of feelings from 2004 onwards, and that when the applicant's previous relationship came to an end that things moved rapidly between the applicant and sponsor. For these reasons the Tribunal found that the applicant and sponsor were in an interdependent relationship within the meaning of r.1.09A(2) and that at the time of decision they continued to be in an interdependent relationship.

Student visas

0908309

27 January 2010, Sydney

Ms N Dougall, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – HIGHER EDUCATION SECTOR – CANCELLATION – S.116(1)(b) – BREACH OF CONDITION 8202 – A delegate of the Minister cancelled the applicant's Subclass 573 visa on the basis that his education provider, King's International College Ltd (KIC), had certified that the applicant did not achieve satisfactory course attendance and found that he had breached condition 8202 of his student visa. Evidence before the Tribunal indicated that KIC wrote warning letters to the applicant in relation to his non-attendance on 20 August 2009 and 3 September 2009 and that on 3 September 2009, KIC issued the applicant with a notice pursuant to Section 20 of the Education Services for Overseas Students (ESOS) Act 2000. On 11 September 2009, the applicant was issued with a Notice of Intention to Consider Cancellation and he responded to this notice on 16 September 2009. He claimed in his response that KIC's reporting of his unsatisfactory course attendance was incorrect as he had been enrolled at another education provider, Imagine Education Australia (Imagine), from 3 August 2009. He also claimed that discriminatory treatment at KIC had led him to transfer to another college and had made it difficult for him to obtain a letter of release from them. The applicant claimed that this constituted exceptional circumstances beyond his control. He provided evidence of having made a complaint to the Anti-Discrimination Commissioner in relation to the treatment he and other Indian students had received at KIC. The applicant also stated that he had changed colleges in accordance with Standard 7 of the ESOS Act which allowed him to do so after 6 months. He stated that he informed KIC of this change on 13 July 2009 and requested a release letter but was not provided with one. He claimed to have written to KIC again on 27 July 2009, as he had enrolled at Imagine and the course was to commence on 3 August 2009 but again, KIC refused his application for a release letter and did not provide him with a statement of attainment. He claimed that on that day he also went to a Departmental office to update his Confirmation of Enrolment and the officer at the counter stated that there was no problem as he had completed 6 months study at KIC. The applicant stated that he went to KIC again to obtain a statement of attainment but was refused once more. On 8 October 2009, the applicant's Subclass 573 visa was cancelled in accordance with of section 116(1)(b), 116(3) and regulation 2.43(2)(b).

Held: Decision under review set aside

The Tribunal found that the applicant had not complied with condition 8202(3)(b) as his education provider, KIC, had certified him for the Certificate III in Hospitality as not achieving satisfactory course progress on 3 September 2009. The Tribunal referred to the applicant's claim that his treatment at KIC caused him to transfer to another college to study and that this treatment constituted an exceptional circumstance beyond his control but noted that his evidence at hearing on this issue contained internal inconsistencies and did not accord with the evidence of two other students who studied at KIC whose circumstances were similar to the applicant's. The Tribunal referred to the second warning letter in relation to the applicant's attendance, issued by KIC on 20 August 2009, which advised that he had 20 working days from the date of the letter to make an appeal. The Tribunal calculated that 20 working days from the date of the letter would have been 17 September 2009, not 3 September 2009, when the Section 20 notice was issued. The Tribunal also found that 20 working days from the date of the first warning letter, dated 6 August 2009, would also have fallen after the date the Section 20 notice was issued. The Tribunal referred to the Full Federal Court decision

Maan v MIAC [2009] FCAFC 150 which confirmed that it is the certification by the education provider which constitutes non-conformity with the condition. It found that in this case the certification was issued prior to the appeal period concluding and emphasised that although an applicant may not lodge an appeal, it was important that an education provider abide by its own appeal policies and procedures as well as the code in relation to reporting students to the Department. Based on this information, the Tribunal found that the applicant's claimed circumstances were exceptional circumstances beyond his control and therefore the applicant's breach of condition 8202 was due to exceptional circumstances beyond his control. Accordingly, the Tribunal concluded that the visa should not be cancelled.

0909341

25 January 2010, Sydney

Mr A Jacovides, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – (HIGHER EDUCATION SECTOR) – CANCELLATION – S.116 – CONDITION 8202 – A delegate of the Minister cancelled the applicant's student visa in accordance with s.116(1)(b) after finding that the applicant did not comply with the requirements of condition 8202 of his student visa. The delegate was satisfied that the non-compliance was not due to exceptional circumstances beyond the applicant's control. The applicant's adviser provided a submission to the Tribunal claiming that the applicant diligently attended classes but he was often late because he lived in the city and he had to travel a long distance to get to the Sydney Institute of Business and Technology Pty Ltd (SIBT) campus at Macquarie University. The adviser stated that he had to get up early to get to class and when he was late, even 15 to 20 minutes, he was marked as not attending. The adviser stated that in July 2009 the applicant decided to transfer to Insearch at the University of Technology (UTS) and that on 1 September 2009 he was offered a place in a course. The adviser stated that he "mistakenly believed" that he did not have to attend his SIBT course because he was intending to attend the UTS course. He further claimed that the applicant was not told by Insearch that he needed a release letter from SIBT however when SIBT was approached by the applicant to obtain a release letter he was instead reported to the Department for non-attendance. The adviser further claimed that the applicant was an 18 year old boy who was unfamiliar with conditions and requirements of his student visa. A 'student attendance report' dated 24 January 2010 was provided to the Tribunal stating that the applicant had attended 76.19% of classes this semester while he attended 44.05% of last semester. The applicant claimed that there were exceptional circumstances beyond his control which led to his breach of condition 8202. He claimed that it took 90 minutes to reach the SIBT campus. He further claimed that he was intending to transfer to another course and SIBT did not provide him with the release letter he required.

Held: Decision under review affirmed.

The Tribunal found that the applicant's education provider had certified that the applicant had not achieved satisfactory course attendance. The Tribunal also found that the certificate was of a kind that engaged condition 8202(3) and found that the applicant had not complied with condition 8202(3)(b). The Tribunal accepted that the applicant found it difficult to commute from his home to the SIBT campus however, the Tribunal was not satisfied that these difficulties constituted exceptional circumstances beyond the applicant's control. The Tribunal found that the location of the applicant's residence was a matter within his control. The Tribunal also considered the applicant's claim that SIBT did not provide him with the release letter he required to transfer to another course. After considering all the evidence provided by the applicant and his adviser relating to this issue, the Tribunal formed the view that the applicant's education provider observed the necessary procedures and it was the applicant who did not take the necessary action to prevent the certification. The Tribunal found that the applicant's immigration predicament was the result of his own actions and that he did not attend the course as he was required to do, despite a warning from his education provider giving him an opportunity to rectify the situation. Therefore, the Tribunal found that the applicant failed to meet the requirements of condition 8202 of his student visa due to his own negligence. Accordingly, the Tribunal was satisfied that the non-compliance was not due to exceptional circumstances beyond the applicant's control and the Tribunal affirmed the decision to cancel the applicant's visa.

Other visas

N05/00729

19 February 2010, Sydney

Mr D O'Brien, Principal Member

GENERAL (RESIDENCE) (CLASS AS) – SUBCLASS 805 (SKILLED) – CL.805.224 – PIC 4002 – ASIO ASSESSMENT – A delegate of the Minister refused the applicant's Subclass 805 visa application as the visa applicant did not satisfy cl.805.224 of the Regulations. The primary applicant's family were included in the application as dependants, however, subsequently the third, fourth and sixth named applicants obtained Australian citizenship. The delegate refused to grant the remaining visas on the basis that the applicant failed to meet public interest criterion 4002 (PIC 4002) which related to assessments made by the Australian Security Intelligence Organisation (ASIO). The applicant was sponsored by an Islamic association as an imam. The Tribunal had previously ceased a review of the delegate's decision as the Minister had issued a conclusive certificate under section 339 of the Act in relation to that decision. The applicant subsequently filed for judicial review in the Federal Court, seeking review of ASIO's security assessment and the Minister's decision to issue the conclusive certificate, which was set aside. ASIO then made a fresh assessment that the applicant was a risk to Australian national security, and the applicant brought fresh proceedings in the Federal Court seeking, amongst other things, an injunction restraining ASIO from furnishing their assessment to the Department and declarations that the assessment was void and inoperative. This application was dismissed, and the applicant then applied to the Full Federal Court which also dismissed the application. Subsequently, the applicant made an application for special leave to appeal to the High Court which was refused, and this refusal had the effect that the Tribunal could proceed with its review. At the Tribunal hearing, the applicant claimed that he had resided in Australia with his family for 16 years and that, if he was a real threat to the national security of Australia, he would have been deported. He further claimed that he had promoted unity and harmony in the local community, noting that he was the chairperson of a multi-faith roundtable, and that he and his family members were law abiding members of the community. The applicant claimed that he was last interviewed by ASIO 11 years ago and that ASIO had had no further contact with him since then. The applicant stated that as a Sheikh it was his responsibility to lead the daily prayers for his congregation, that the focus of his centre was on educating youth, and that he provided a range of services such as youth orientated seminars, including multi-faith gatherings designed to promote harmony and minimise racial tension. The primary applicant claimed that he also solemnised marriages, for which there was a big demand as there was a shortage of Persian speaking scholars in Australia. The applicant submitted two DVD's which contained footage of him with members of his congregation, youth camp participants, various community leaders, associates and multi-faith roundtable members. The Tribunal also received various oral and written testimonies on behalf of the applicant.

Held: Decision under review affirmed

The Tribunal noted that, although it did not have the ASIO adverse security assessment before it, the existence of that assessment was not in doubt and was the subject of the proceedings before the Federal Court and the Full Federal Court. It also noted that its existence was advised to the primary applicant by letter in 2004. The Tribunal found that based on the evidence, ASIO had assessed in 2004 that the applicant was a risk to Australian national security. The Tribunal further found that the assessment made by ASIO in relation to the applicant was an assessment that fell within PIC 4002 and that the primary applicant did not satisfy PIC 4002. The Tribunal noted that whilst it was sympathetic to the applicant's predicament, it did not have the power to examine the validity of the ASIO assessment. As a consequence, the Tribunal found that the applicant did not satisfy a key criterion for the grant of a Subclass 805 visa. Accordingly, the Tribunal affirmed the decision not to grant a Subclass 805 (Skilled) visa.

0804793

7 February 2010, Melbourne

Ms R Gagliardi, Member

RESIDENT RETURN (RESIDENCE) (CLASS BB) – SUBCLASS 155 – (FIVE YEAR RESIDENT RETURN) – CL.155.212(3) – TIES WITH AUSTRALIA – COMPELLING CIRCUMSTANCES – A

delegate of the Minister refused to grant the applicant a Subclass 155 visa on the basis that in the five years prior to lodging his Resident Return Visa application, the visa applicant spent only 94 days in Australia having last departed on 8 March 2008. The visa applicant claimed at the time of application that he had substantial personal ties with Australia as his sister was an Australian citizen and resides in Australia and that he has worked on projects in Sydney where he was involved in designing computer programmes for banks. He claimed he also managed a project for a telecommunications company. The applicant submitted a written statement and emails from his employer in Sydney offering him a position in Australia. The visa applicant stated that he could not accept the offer due to his mother's medical condition of solaris arthritis with limited mobility accentuated by her age. He claimed that he would arrange for his brother to take over the care of his mother in several years' time when his children had finished primary schooling in Malaysia. The review applicant's son submitted information about the business plans he and the visa applicant had afoot in Australia. He claimed that the business plans had advanced to a considerable degree and the visa applicant had sent him money to establish the business and that they had agreed on a company name and had purchased a website name. They had also put together a business plan showing how profitable the business would be. They planned to start off by employing 5 consultants and it would be a joint partnership, looking to employ up to 30 persons. The review applicant's son also stated that the applicant was currently "on leave" from an Australian company and that, in fact, he was working with his Australian colleagues from Malaysia. The review applicant claimed that the position in Australia was still open to him

Held: Decision under review set aside.

The Tribunal found that the applicant was not lawfully present in Australia for a period of, or periods that total, not less than 2 years in the period of 5 years immediately before the application for the visa. Therefore, the applicant could not meet sub-criterion 155.212(2). The Tribunal then considered whether the applicant had substantial business, cultural, employment or personal ties with Australia which were of benefit to Australia, and the applicant. The Tribunal found that the visa applicant's business/employment interests were still ongoing, despite his departure from Australia and that the applicant continued to work for the same company and that he can be transferred to Australia, as the visa applicant's brother is now able to look after their unwell mother. The Tribunal also accepted evidence in relation to the visa applicant's base salary in Australia and evidence of the joint venture that the visa applicant intends to enter into with his nephew. The Tribunal accepted evidence that substantial funds were deposited for the purposes of establishing a business together. The Tribunal also accepted that a Business Plan and an account for a domain name for the proposed business, was evidence that the visa applicant's business ties to Australia were concrete and had been in train for some time now. The Tribunal was satisfied, therefore, that the visa applicant's business links to Australia, both as an employee and an employer, were significant. Having found that the visa applicant did have substantial ties, by way of personal, employment and business ties in Australia, the Tribunal then determined whether there were compelling circumstances for the departure of the visa applicant on 8 March 2008. From the evidence at hearing and medical documentation showing that the visa applicant's mother's chronic illness of solaris arthritis which made her dependent for assistance with every day tasks and mobility, the Tribunal was satisfied that the absence of the visa applicant from Australia, and that the reason he could not take up the position offered to him here, was solely due to his strong family responsibility, which he had to bear at the cost of progressing his professional development here in Australia. The Tribunal considered that, in this case, the circumstances for the absence by the visa applicant from Australia were compelling. Accordingly, the Tribunal found that the applicant met cl.155.212(3) for the grant of the visa.

0908819

2 February 2010, Melbourne

Mr J Atkins, Member

MEDICAL TREATMENT (CLASS UB) – SUBCLASS 685 (MEDICAL TREATMENT (LONG STAY)) – CL.685.212 – FORMAL MEDICAL TREATMENT PLAN – ARRANGEMENTS CONCLUDED – A delegate of the Minister refused to grant a Subclass 685 visa on the basis that the visa applicant did not satisfy cl.685.212 of the Regulations because the delegate was not satisfied there was a formal medical treatment plan in place in Australia. The applicant claimed she was well on arrival in Australia and was considering returning home when she became ill. She claimed her daughter took her to a general practitioner (GP) because she was suffering from various symptoms, and that she had developed a clot in her heart and could not fly until it was cleared. Her GP sent a letter to the Department which stated her condition, the treatment

she had received, and that she had been referred to a specialist, specifying the applicant's inability to travel because of her condition. A specialist's letter stated that he performed tests upon the applicant and found she suffered from atrial fibrillation. An updated letter provided to the Tribunal from the GP advised the applicant's medication had changed but did not indicate follow up medical treatment or how long the treatment would take. Two specialist's reports stated that the applicant could not travel home to Albania because of her medical condition, and that facilities in Albania were not sufficient to treat her condition. One report further stated it could take three months to control the medical problem for the applicant to be able to fly and that her current medications were continuing. The applicant claimed that she saw her GP fortnightly who checked her condition, took blood samples which were regularly tested, and was responsible for managing her medical treatment. She claimed that she had not been offered any surgical treatment by her specialist. The applicant's daughter claimed that she and her husband paid for the applicant's medical treatment, and that her mother was willing to return home when she was well enough. The review applicant further claimed her brother came to Australia to take the applicant and her husband home but was advised by medical practitioners the trip could kill her. She claimed her brother returned to Albania without the applicant as he was told by the doctors she was not well enough to travel by air.

Held: Decision under review set aside.

The Tribunal accepted that the applicant's consultations with her GP constituted medical treatment. The Tribunal found that the applicant consulted her GP for symptomatic relief and that the treatment was expected to continue. The Tribunal also found the applicant consulted a specialist and her GP among other relevant professionals at the time of application and that the applicant followed the course of treatment prescribed for her by her doctors and that she had continued to do so, and that she would need to do so until she was reviewed by the specialist. The Tribunal accepted that the applicant's daughter and son-in-law paid for her medical expenses and that the applicant was not well enough to travel by air to Albania. Accordingly, the Tribunal was therefore satisfied that arrangements were concluded to carry out the treatment at the time of application and the applicant satisfied the requirements of cl.685.212 of the Regulations.

0909841

17 February 2010, Sydney

Mr A Jacovides, Member

TOURIST (CLASS TR) – SUBCLASS 676 (TOURIST (SHORT STAY)) – CL.676.211 – CL.676.221(2)(a) – GENUINE VISIT – A delegate of the Minister refused to grant a Subclass 676 (Tourist) visa on the basis that the visa applicant did not satisfy cl.676.211 of the Regulations. The delegate was not satisfied that, at the time of application, the applicant's expressed intention to only visit Australia was genuine. The visa applicant claimed to be a citizen of Sri Lanka and wanted to visit his Australian citizen daughter. He claimed he had five children, two were living in Sri Lanka, one was in Bahrain, another in Germany and the review applicant daughter lived in Australia. He claimed he had previously visited his daughter in Australia as well as visiting his son in Bahrain and his son in Germany. He submitted details regarding his identity, citizenship, family composition, financial situation, property ownership in Sri Lanka, and documents relating to his health and insurance coverage for his visit to Australia. He provided letters of support from the review applicant and details regarding her circumstances in Australia.

Held: Decision under review set aside.

The Tribunal was satisfied from the information provided that the visa applicant had sufficient reason to return to Sri Lanka after visiting his daughter in Australia, including his two children, other family members, community activities and his home. The Tribunal accepted and considered significant his claim that he abided by the conditions of his previous visitor visa to Australia and that he would do so again in the future. The Tribunal also considered it significant that he visited his other children in Germany and Bahrain without seeking to overstay those visits. The Tribunal accepted the visa applicant's claim that a similar visit was intended in relation to his current application and was satisfied the applicant intended to visit Australia temporarily. The Tribunal found no compelling evidence which indicated the visa applicant would not abide by the conditions of his visa and was satisfied that the visa applicant's stated purpose for the visit was the real purpose of the visit. Accordingly, the Tribunal was satisfied the visa applicant's intention only to visit Australia was genuine and found he satisfied the requirements of cl.676.211 and cl.676.221(2)(a) of the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

Albania

0908213

18 February 2010, Sydney

Ms L Mojsin, Member

ALBANIA – IMPUTED POLITICAL OPINION – COMMUNIST PARTY – PARTICULAR SOCIAL GROUP – ALBANIAN MIGRANTS IN GREECE

The applicant claimed that his parents were both active members of the Communist Party who became hated in their local community after the fall of communism in Albania. The applicant claimed that he and his siblings were called names, had rubbish thrown at them and slogans written on their home, and were beaten up on a number of occasions. He claimed that once the Democratic Party came to power the former communists were slandered, persecuted and imprisoned. He claimed that his father was questioned and detained many times by the new secret police; and that he was humiliated and insulted due to his father being an activist during the communist regime. The applicant claimed that he could not continue his education due to harassment against him at school and that for five years he could not find employment because of his parents' past. He stated that he decided to leave Albania for Greece as he thought he would have a better life and be treated equally. However, he claimed that in Greece the Albanian migrants were seen as "thieves and criminals who should be sent back to Albania". He claimed that despite being given a work permit with a temporary residence visa, his salary was 20% of the normal Greek salary and he had to work double the hours. He further claimed that the Greek authorities had a policy of expelling Albanians without cause and that just before he left Greece he lost his job for no reason and because of this his visa would not have been renewed. The applicant claimed that one night he was stopped by police in the street and because he did not have an identity card with him he was taken to a police station where he was beaten. He claimed that he called a friend who brought his passport at which time he was released, however the police stole his money. He claimed that a protest march had been organised after another Albanian had been attacked and that demonstrators clashed with police, resulting in the applicant being fearful of leaving his home. The applicant further claimed that he could not return to Albania as his mother was Christian and the Muslim Albanians were fanatics and extremists who were re-emerging after being suppressed under communism.

Held: Decision under review affirmed

The Tribunal accepted the applicant's evidence that he had lost his job in Greece and was unable to obtain another work permit. It further accepted that he was unable to return to Greece for this reason, however, it noted that the applicant was a citizen of Albania and for the purposes of the Convention it was required to assess his claims against Albania as his country of nationality. The Tribunal noted that the applicant had not been arrested and harmed in Albania and that he had returned to Albania on a number of occasions whilst working in Greece to visit his mother who was ill. The Tribunal found this indicated a lack of a subjective fear of persecution. The Tribunal also found that in relation to his claimed bullying at school that the applicant had not made any attempt to complain to the authorities at the time, and that the difficulties he had faced in relation to employment after he left school was a symptom of the difficulties in finding employment generally in Albania rather than due to his father's political profile. The Tribunal noted in relation to the applicant's claims about his mother's Christianity that independent evidence indicated that the Constitution provided for freedom of religion, and that there was no official religion in Albania. The Tribunal found that there was a generally amicable relationship among religions and that Albanian society was largely secular. The Tribunal accepted that the Albanian government arrested and sentenced high profile Communist party activists in the first few years post 1991, but that there was no evidence to suggest that the Albanian government continued to harass and watch them. The Tribunal found it was implausible that the applicant's father had been arrested during the time that the Socialists were in government in 2002 and it did not accept that his family suffered discrimination because of his father's claimed political profile. Based on the evidence, the Tribunal was satisfied that the applicant did not have a well-founded fear of persecution for a Convention reason.

Algeria

0908083

6 January 2010, Sydney

Ms P Wearne, Member

ALGERIA – RELIGION – KORANI/KORANIST – PARTICULAR SOCIAL GROUP – NON MAINSTREAM ISLAMIC BELIEFS – FAILED ASYLUM SEEKERS – The applicant claimed that his family was very religious and that Islam was taught in his family by force, almost like brainwashing. He claimed that while he was at school he realised that there were many different opinions in Islam and he began to question aspects of Islam that were not in the Koran. He stated that on one occasion an uncle slapped him after he queried a prayer practice. The applicant claimed he made friends at university who had different opinions about Islam and he began questioning Islamic ideals and the way Islam was interpreted. He claimed he began to realise that no book, other than the Koran, was necessary in Islam. The applicant became reluctant to practice with his family and the rest of the community which caused a strain between him and his family. At the Tribunal hearing, the applicant claimed that he left Algeria because it got to the stage that he could not live there as a Koranist. The applicant claimed that in Australia he met an Egyptian man who openly claimed to be Korani and who outlined why he believed that the Koran was the only basis of Islamic belief. The applicant claimed that he became a Koranist after meeting this person and he now considers that God and the Koran are the basis of his faith, without the Hadith and the Sunna. He claimed he would be persecuted on his return to Algeria because, as a Koranist, he would be viewed as anti-Sunni or anti-government. He also claimed that he would be persecuted as a failed asylum seeker if he were to return to Algeria. The applicant's representative provided to the Tribunal submissions including an Egyptian article in which Koranis are referred to as apostates, and information about the Algerians treatment of failed asylum seekers. She also submitted that the applicant's claims need to be assessed with respect to the chance of persecution due to his non mainstream beliefs of Islam. In practising his beliefs in Algeria, the applicant's representative claimed he would be seen as proselytising, which is illegal.

Held: Decision under review affirmed

The Tribunal had some concerns regarding inconsistencies in the applicant's evidence, noting that he claimed at the hearing to have left Algeria because, as a Koranist, he could not stay there any longer whereas in his written statement he claimed to have become a Koranist after meeting an Egyptian Koranist in Australia. Nonetheless, the Tribunal accepted that the applicant's beliefs and his questioning of his family's beliefs could cause a strain on his family relationships, particularly those with his father and uncles. It also accepted that he could be ostracised by members of his family and that there may be a further incident such as the slap from his uncle. The Tribunal found however, that this would not amount to persecution, as it would not involve serious harm. Further, the Tribunal noted that during the hearing the applicant had stated that he would not expect any problems from his family members if he were to return to Algeria, even if they were against his views. The Tribunal also noted that, although the representative suggested it should have regard to the situation in Egypt in considering the applicant's claims, it was not persuaded that it should do so, finding that Algeria and Egypt are different countries with different histories and cultures, different constitutions and legal systems. The Tribunal found that to assess the applicant's claims against any country other than Algeria would introduce irrelevant considerations. Nor did the Tribunal accept the representative's argument that the applicant would be considered an apostate on the basis that a Sunni Muslim converting to a Shi'a Muslim would be considered an apostate in Algeria. The Tribunal relied on independent information which indicated that Algerian citizens who practiced non-mainstream forms of Islam generally experienced minimum discrimination. In relation to the applicant's fear of persecution in Algeria as a failed asylum seeker, the Tribunal indicated that it had considered independent information that suggested returnees who had been considered terrorism suspects could face difficulties in Algeria but noted that this was not so in the applicant's case. Accordingly, the Tribunal found that the applicant did not have a well-founded fear of persecution for a Convention related reason in the reasonably foreseeable future.

Bangladesh

0908436

21 January 2010, Melbourne

Ms D Buljan, Member

BANGLADESH – POLITICAL OPINION – BANGLADESHI NATIONALIST PARTY (BNP) – PARTICULAR SOCIAL GROUP – BUSINESSMEN IN BANGLADESH – ACADEMIC AT A STATE – OWNED UNIVERSITY WHO IS A MEMBER OF THE GOVERNMENT’S POLITICAL OPPOSITION –

The applicant claimed to be a prominent activist in the Bangladesh National Party (BNP) and therefore a target for political violence perpetrated by the governing Awami League. He claimed to have been employed as a lecturer and assistant professor at a university in Bangladesh as well as running his own consultancy business. He further claimed that his home and office were destroyed by supporters of the current government as a result of his activities within the BNP to expose Government corruption. The applicant claimed that he enrolled in a PhD course in Fiji, hoping that the Awami League would no longer be in power when he completed it, only to find his placement withdrawn after he clashed with his supervisor. When this occurred, he claimed he had no choice but to apply for a Protection visa in Australia. He claimed to fear returning to Bangladesh because he would be targeted for imprisonment, physical mistreatment and perhaps murder as a result of his political activities against the current Government in support of the BNP. The applicant provided a number of submissions in support of his claims including Human Rights reports and letters of support from prominent BNP officials. At the Tribunal hearing, the applicant gave evidence in relation to his political activities, stating that he joined the Jatiotabada Chatra Dal (JCD) as a student and later he became a member of the BNP. He claimed that he had actively campaigned and made political speeches in support of the BNP during the 2001 election campaign. He also claimed that when the Awami League last came to power, he had commenced a project disputing the official version of the death toll in the 1972 war of independence but he ceased his pursuit of this project when his seniors at the university suggested that he should not continue. He also claimed at the Tribunal hearing that in early 2009 he began to experience problems with Awami League student leaders. He claimed to have paid several bribes to them and to have been attacked at his business premises after refusing to pay another bribe. He then received threatening phone calls the following day and was stopped by a stranger and stabbed in the back.

Held: Decision under review affirmed

The Tribunal did not find the applicant to be a credible witness and it did not accept his claims in relation to harm he suffered at the hands of Awami League student leaders, noting that such claims had not been raised in his Protection visa application or at his Departmental interview. It also noted that despite his claim to be a BNP activist who would be targeted upon his return by the Awami League, the Tribunal's enquiries had revealed that office bearers within the BNP did not recognise him. The Tribunal also noted that he had not known the identity of the joint convenor of the BNP office at the district level. The Tribunal found that these factors detracted from the applicant's claimed political profile and whilst the Tribunal accepted that the applicant may have been a member of the BNP, it did not accept that the applicant was as active in the BNP as claimed. The Tribunal noted also that no evidence had been provided to substantiate his claims to have campaigned as a member of the JCD, nor that he had actively campaigned during the 2001 election campaign such that he had acquired a political profile that might expose him to a real chance of persecution approximately 8-9 years later. The Tribunal found therefore, that the applicant's political profile was not the kind that would result in him facing a real chance of persecution now, or in the reasonably foreseeable future, due to his political opinion, practices and activities as an ordinary, low-level member of the BNP, or a former student member of the JCD in Bangladesh. The Tribunal also considered whether the applicant had suffered persecution as a member of a particular social group as a businessman, or as an academic in a state-owned university who was a member of the government's political opposition. The Tribunal accepted that such groups might constitute particular social groups but found that there was little independent country information that would support the claim that these particular social groups had been targeted in the recent past in Bangladesh. Accordingly, the Tribunal did not accept that the applicant faced a real chance of persecution for reasons of his membership of these particular social groups, now or in the reasonably foreseeable future. Overall, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution in Bangladesh for a Convention related ground.

China

0905355

31 January 2010, Sydney

Ms N Dougall, Member

CHINA/STATELESS – RELIGION – FALUN GONG – FAMILY PLANNING – CREDIBILITY – The applicant's parents, both Chinese citizens, entered Australia in 2007 on business visas and lodged a protection visa application. A delegate of the Minister refused to grant the applicant's parents protection visas and the Tribunal, differently constituted, affirmed that decision. In 2009 the applicant was born and an application, the subject of this review, was lodged in her name. The Federal Magistrates Court subsequently set aside and remitted the Tribunal's decision in relation to the parents' application and thus the parents' application for review came before the Tribunal a second time. The applicant's parents gave evidence at a joint hearing on behalf of the applicant and themselves in relation to both applications. The applicant's parents also provided to the Tribunal a number of submissions outlining the applicant's claims for protection. The applicant's parents claimed that she could not return to China as she does not have any proof of identity from the Chinese government and therefore she was stateless. They also claimed that because she was born in Australia and they were in an illegal de facto relationship it would be impossible to get a household registration for her. Further, the applicant's parents claimed that if the applicant returned to China she would be persecuted because her father was a Falun Gong practitioner. The applicant's father claimed that the applicant would be taken away from him and that they would be sentenced and fined. The applicant's mother contacted the Tribunal by telephone on two occasions and referred to advice from the Chinese Embassy that her daughter would never get a Chinese passport because she and her husband had applied for protection visas which meant they had gone against the Chinese government.

Held: Decision under review affirmed

In considering the applicant's claims the Tribunal relied on the evidence and information set out in the Tribunal's decision in relation to the parents' application for review. In that decision, the Tribunal found that the applicant's parents were not credible witnesses and that the applicant's father was not a Falun Gong practitioner. In light of these findings, the Tribunal found that the applicant would not be persecuted if she were to return to China, either now or in the reasonably foreseeable future, for reasons of her father's Falun Gong practice or her mother's association with a Falun Gong practitioner. For similar reasons, the Tribunal found that the applicant would not be taken away from her parents if they returned to China. In relation to the applicants' claims that their daughter was stateless, the Tribunal referred to Article 5 of the Nationality Law of China which stated that a person born abroad, one or both of whose parents are Chinese nationals, shall also be a Chinese national. Since the Tribunal had found, on the applicant's parents' own claims and the evidence of their passports that they were Chinese citizens, the Tribunal also found that the applicant was a citizen of China. Further, in light of the Tribunal's finding that the applicant's parents were not credible witnesses, the Tribunal was not satisfied that they went to the Chinese Embassy in relation to their daughter's passport. Nor was the Tribunal satisfied, in light of independent country information that the applicant would not be issued with a Chinese passport or travel document. The Tribunal also found that the applicant would not suffer serious harm in the reasonably foreseeable future due to her birth being in breach of family planning laws. The Tribunal noted in making this finding that, although the applicant's father gave evidence that they would not have financial resources to pay any fine levied, earlier evidence provided to the Department and the Tribunal showed that the applicant's parents did have, or would be able to obtain, the financial resources to pay such a fine. The Tribunal was therefore satisfied that if the applicant's parents were to return to China and were required to pay a social compensation fine, they would be able to do so and would do so when required by family planning laws. The Tribunal was satisfied, particularly having had regard to relevant country information, that once the applicant's parents had paid any applicable fine, that the applicant would be able to obtain household registration. The Tribunal was satisfied that once the applicant had obtained household registration she would have access to public education, health and welfare services. Accordingly, the Tribunal found that the applicant did not have a well founded fear of persecution for a Convention reason.

0906451

17 February 2010, Melbourne

Mr B Hely, Member

CHINA – PARTICULAR SOCIAL GROUP – DISGRUNTLED PIG FARMERS – The applicant claimed that he became the owner of a pig farm in Fujian province after borrowing RMB500,000 in response to government incentives. He claimed that due to a lack of government planning, waste from pig farms in the area had to be dumped near a local reservoir which caused pollution. The applicant claimed that the government made plans to build bio-gas pools to reduce this pollution, and that he spent a further RMB200,000 in building a bio-gas pool. A subsequent government environmental report was issued which revealed that, despite some improvements, the river was still heavily polluted and the government therefore decided to dismantle hundreds of pig farms within a small radius of the river, including the applicant's. He claimed that the government prepared a formula for the payment of compensation according to which the applicant would receive RMB50,000 in compensation for his land, however, he did not consider the proposed compensation to be reasonable given that he still owed over RMB300,000 to the bank, so he refused to have his farm dismantled. The applicant claimed that a government official came to the farm with a group of people requesting that he dismantle the farm himself and he refused. He claimed that the official responded angrily which resulted in an argument and the applicant being taken to the Public Security Bureau, where he was interrogated and beaten before being charged and detained for seven days. He claimed that whilst in detention he did not get sufficient food and the officers often beat him, causing him to suffer serious physical and mental injuries. The applicant claimed that while he was detained, the government official had brought some people with an excavator and trucks to take his pigs and dismantle his farm, and that the official gave his wife RMB40,000, saying that he had deducted RMB10,000 for the cost of hiring the excavator and trucks to dismantle the farm. He claimed that he made appeals to the government for justice but he did not receive a reply, which resulted in him organising a number of pig farmers to travel to the local government to petition and carry banners. The applicant claimed that they were arrested and that he was detained for 30 days. He claimed that when his daughter came to Australia to study, he travelled to accompany her, and that after he had arrived he learned that he could apply for a protection visa in respect of the persecution he had suffered in China. The applicant provided four photographs to the Tribunal showing what were claimed to be the ruins of his pig farm in China after it had been dismantled.

Held: Decision under review affirmed

The Tribunal found that the applicant was not a credible witness in relation to his claims of mistreatment by the authorities, and that the applicant was evasive and at times inconsistent in his evidence when asked about matters not detailed in his statement. The Tribunal accepted that the applicant was a pig farmer who had entered pig farming in response to government incentives and that he had invested in bio-gas pools to minimise the environmental impact of his farm. The Tribunal also accepted that the Chinese government confiscated and demolished numerous pig farms, including the applicant's, within close proximity to the reservoir due to harmful pollution caused by waste from pig farms, and that many pig farmers affected by this program, including the applicant, were dissatisfied with the level of compensation that they received. The Tribunal noted that it had some concerns with the applicant's evidence in relation to the demolition of his farm and the compensation he received, and that he had changed the timeline of events on a number of occasions. Whilst the Tribunal accepted that the applicant may have argued with a government official in relation to the adequacy of compensation, the Tribunal did not accept that this resulted in the applicant being detained for seven days as claimed, nor did it accept that the applicant arranged or participated in any protest in relation to the demolition of his pig farm, the compensation he received, or for any other reason, therefore it did not accept that he was detained for 30 days in connection with any such protest. The Tribunal noted that the photographs provided by the applicant were undated, non-descript and contained no readily confirmable identifiers to verify his claims. The Tribunal did not accept that the applicant was of any adverse interest to the authorities in China in connection with his pig farm demolition, his alleged protest or otherwise. Therefore, the Tribunal did not accept that the applicant had a well-founded fear of persecution for a Convention reason as claimed.

0909312

22 February 2010, Sydney

Ms S Durvasula, Member

CHINA – RELIGION – CHRISTIAN – UNDERGROUND CHURCH – CREDIBILITY – The applicant claimed to have been introduced to Christianity through a friend and that, under her influence, the applicant and her husband started to believe in Christianity. She claimed they went to other church members' homes to participate in church activities where they would read the Bible, pray, 'worship singing and idea exchange'. In January 2007 the applicant, her husband and 8 other church members were at a member's house for church activities when 4 or 5 policemen raided the house stating that someone had reported an illegal religious activity. The police confiscated religious materials. Everyone was taken to the police station where the applicant claimed she was assaulted, slapped in the face, beaten and kicked by a police officer who accused her of believing in an evil cult. Other church members were also assaulted and they were all sentenced to 7 days detention. After her release, the police came to harass her from time to time and they took items from her shop without paying. When the applicant's daughter decided to study in Australia in December 2007 the applicant decided to accompany her. The applicant claimed she started attending a Chinese church weekly and she sent some materials about Christianity to her husband in China. The applicant then received a call from her sister saying her husband had been arrested in June 2009 when 10 church members had come to his home for church activities. The police searched the home and found the religious materials. Everyone was taken to the police station for investigation and her husband was sentenced to 6 months re-education through labour for providing a place for an illegal gathering and distributing illegal religious materials. Her husband confessed to the police (under torture) that the applicant had sent the materials. The applicant claimed her friends and family members persuaded her not to go back to China as she would have to report to the police when she returns. Her visa is about to expire and she is scared to go back to China as she will be put into prison.

Held: Decision under review affirmed

The Tribunal found that the applicant's evidence at the hearing and the Departmental interview demonstrated a superficial and limited knowledge of Christianity and Christian religious practice. The Tribunal accepted that the applicant could explain some aspects of Christianity. She mentioned the crucifixion and the resurrection, that Mary is the mother of Jesus, the significance of Easter and Christmas and one of Jesus' miracles. The Tribunal did not accept that this evidence in itself demonstrated that the applicant was a genuine and committed Christian who had practised Christianity for at least 5 to 6 years and attended church at least once a week. The applicant's responses at the hearing appeared to be rehearsed and demonstrated that she did not have a genuine conviction and commitment to Christianity. The Tribunal also had concerns that the applicant had not yet been baptised despite the fact that she claimed to have been a practising Christian for at least 5 to 6 years. The Tribunal was not satisfied that she was speaking from her actual personal experience when she spoke of her claimed religion at the hearing. Given the significance of the arrest in the applicant's protection visa claims, the Tribunal considered that the applicant would have remembered the date it occurred. As she was unable to do so, this led the Tribunal to doubt that the applicant was actually arrested. The Tribunal did not accept that the applicant sent religious material back to her husband in China or that her husband was arrested and sentenced to 6 months re-education through labour. The Tribunal did not accept that the police searched the applicant's home, found the materials the applicant had sent or that her husband eventually confessed that the applicant had sent the materials. It followed that the Tribunal did not accept that the applicant had given a credible account of her claims and it did not accept that she was telling the truth about why she could not return to China. The Tribunal founds she was not a credible witness. The Tribunal found that the applicant had attended church, attended a baptism ceremony and taken photographs at that ceremony, for the purpose of strengthening her claim to be a refugee. The applicant did not satisfy the Tribunal that she had engaged in her conduct in Australia in attending church, otherwise than for the purpose of strengthening her refugee claims. Therefore, the Tribunal was required to disregard this conduct. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution for reasons of her religion or any other Convention reason, now or in the reasonably foreseeable future, if she returned to China. Therefore, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

Democratic Republic of Congo

0907445

25 February 2010, Melbourne

Ms S Muling, Member

DEMOCRATIC REPUBLIC OF CONGO (DRC) – POLITICAL OPINION – MOVEMENT FOR THE LIBERATION OF CONGO MEMBER – FORMER SECURITY GUARD OF JEAN-PIERRE BEMBA – PRISON ESCAPEE – The applicant claimed to be an ethnic Bantu male of the Christian faith born in Equator province. He claimed he was a member of the Movement for the Liberation of Congo (MLC) and that he had been employed as one of many security guards of the opposition leader, Mr Jean-Pierre Bemba. He claimed that in 2007 there was a conflict between Jean-Pierre Bemba's guards and government forces in Kinshasa and that during this conflict many of his colleagues were arrested and killed. The applicant claimed that he was put in prison and tortured daily for information about the whereabouts of other soldiers and workers of Jean-Pierre Bemba. The applicant claimed that one night he escaped with another prisoner and he fled by crossing a river full of crocodiles. They then went to see a friend who advised him to escape into Angola. The applicant claimed he went to a border town and paid money to an Angolan soldier who told him the way through the forest to a town. He claimed that when he arrived at the town, he found a friend of his aunt with whom he stayed for nine or ten months. He claimed that his aunt's friend told him she would arrange for documents to be sent to Luanda to procure an Angolan passport for him. He claimed that a man came and took his photo, his date of birth and his finger print. He claimed he had no idea what was happening but his aunt's friend told him the man was going to get a passport for him and that she knew a businessman with whom she was going to organise his escape from Angola. The applicant claimed that his aunt's friend organised with a container truck driver for him to be put into a container and taken to Luanda. He claimed that there he met a businessman who sheltered him and arranged for him to travel to Australia as a student. The applicant provided to the Tribunal a number of documents in support of his claims including a wanted list, an identity card and an MLC membership card. The Tribunal made enquiries with the Department's Document Examination Unit as to the authenticity of the applicant's DRC identity card and the wanted list. However, the Tribunal was advised that the examination was inconclusive.

Held: Decision under review set aside

The Tribunal found the applicant to be a consistent and credible witness. It accepted that he had been a member of the MLC, noting that he displayed a level of knowledge of the party consistent with being an active member. The Tribunal also found that the applicant had been employed as a security guard for opposition leader Jean-Pierre Bemba from 2006 and that his description of Jean-Pierre Bemba's security service was entirely plausible and consistent with independent information consulted. The Tribunal found that his account of the conflict between government forces and Jean-Pierre Bemba's guards, including the reasons for the clash and subsequent events which led to Jean-Pierre Bemba's departure from the country, were also consistent with independent information. The Tribunal accepted that the applicant was detained during the conflict between Jean-Pierre Bemba's guards and government forces and that whilst in detention the applicant was tortured. The Tribunal found that the applicant's account of his arrest and detention was also consistent with independent information consulted. For similar reasons, the Tribunal found the applicant's account of his departure from the DRC to Angola to be plausible. The Tribunal therefore accepted that the applicant was a member of MLC, as well as a former security guard of Jean-Pierre Bemba, who had escaped from prison and was on a wanted list. As such, the Tribunal found that there was more than a remote chance the applicant would come to the attention of the authorities and that he could face serious harm in the form of interrogation, detention and physical assault for reason of his political opinion if he were to return to the DRC. The Tribunal therefore found that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

Guinea (Republic of)

0908399

18 February 2010, Perth

Mr T Caravella, Member

GUINEA – ETHNICITY – FOULAH – POLITICAL OPINION – UNION OF DEMOCRATIC FORCES OF GUINEA (UDFG) SUPPORTER – PARTICULAR SOCIAL GROUP – HARM FEARED FROM MONEY LENDERS – NO CONVENTION REASON – The applicant claimed he could not return to Guinea as money lenders from whom he had borrowed US\$10,000 threatened to kill him if he returned without their money. He claimed that his Guinean employer sponsored him to come to Australia for a training course and that although the sponsorship was subsequently withdrawn, this visa remained valid. He claimed he then borrowed US\$10,000, bought his air ticket and travelled to Australia. He claimed that he and his family were starving and ate only one meal a day. He also claimed that the government would not be able to protect him from the harm he feared in Guinea because, since December 2008, all of the country's institutions had been suspended. He claimed there was corruption and a breakdown of law and order in Guinea and that it was common to see dead people in the street. The delegate refused to grant the applicant a protection visa, finding that there was not a Convention reason for the claimed persecution and that the applicant's feared persecution was not for reasons of membership of a particular social group. The applicant discussed his claims at two hearings before the Tribunal and added to them in stating that he had a fear he would be harmed in Guinea because of his particular ethnic group. He claimed that he was a member of the Foulah ethnic group and that this group was the most persecuted in Guinea. Also, because of his ethnicity he was regarded as politically in favour of the opposition party, the UDFG. The applicant also claimed that his brother, who used to be very active politically, was shot and killed in September 2009 whilst involved in a strike at a stadium in Conakry. The applicant claimed that the police in Guinea do not have the resources to investigate offences or to protect citizens. He claimed also that any person who struggles for food must be considered a refugee. The applicant provided documents in support of his claims to the Tribunal, including evidence of his brother's death and photos purporting to depict others slain at the stadium. The applicant's representative claimed that the applicant's family was politically inclined.

Held: Decision under review affirmed.

The Tribunal found the applicant was genuine and candid in his evidence regarding his fear of returning to Guinea and that this fear was genuine. The Tribunal did not, however, find a nexus between the harm feared from the moneylenders and Convention grounds. The Tribunal found specifically that the harm the applicant feared was due to a personal loan transaction and not because of his membership of any particular social group. The Tribunal accepted the applicant's claims relating to the poverty and desperation he and his family had experienced in Guinea and noted that the applicant was genuinely distressed by the shooting of his brother. The Tribunal then considered, in light of the possibility that the applicant faced serious harm from moneylenders, whether there might be a withholding of state protection from the applicant in Guinea because of a Convention ground. The Tribunal accepted that failure of state protection can, in some circumstances, constitute persecution within the meaning of the Convention, noting that as per *MIMA v Khawar* (2002), if an applicant showed state tolerance or condonation and systematic discriminatory implementation of the law, then persecution may be made out. After considering these principles however, the Tribunal was not satisfied that the applicant would be denied state protection for a Convention reason. The Tribunal found the applicant's claim that he also feared persecution from the governing regime because of his political opinion unconvincing. It noted that there was no reference to this claim in the primary application and it referred to his evidence that he had not been politically active in recent times. Accordingly, the Tribunal found that there was not a real chance that the applicant would face serious harm for reasons of his actual or imputed political opinion. The Tribunal found the applicant's fear of harm as a member of the Foulah ethnic group similarly unconvincing and noted that he had been able to obtain a professional qualification in a highly competitive field despite his ethnicity and poverty. The Tribunal concluded that evidence in the country information consulted did not point to the existence of a systematic or discriminatory implementation of the law in Guinea against people of the applicant's ethnicity. Accordingly, The Tribunal found that the applicant would not be denied state protection for a convention reason and that the applicant was not a person to whom Australia had protection obligations under the Refugees Convention.

India

0909270

25 February 2010, Sydney

Ms G Cullen, Member

INDIA – POLITICAL OPINION – INDIAN NATIONAL CONGRESS – The applicant claimed that he was a member of the Indian Congress Party and that he held meetings in his home around election time. He claimed that he had problems with a member of the Communist Party of India (CPI(M)) who was a neighbour and was also an officeholder in his local area. He claimed that this person had taken out various court proceedings against him in his wife's name. The applicant also claimed he had problems with people from the union who would refuse to deliver goods to the applicant's business unless he paid them increasing sums of money, and that this only occurred when the CPI(M) were in power. The applicant claimed that, on one occasion, he was hit and hospitalised which resulted in a police case but he did not recognise the people involved. He claimed that he was riding his bike when they stopped him and hit him with an iron rod about his head. The applicant claimed that over a twenty year period phone threats were made against him threatening that he would be killed, which he believed came from the CPI(M) officeholder and his people. He claimed that he also did election work which involved promoting the local candidate for his district. The applicant submitted a number of court documents to the Tribunal regarding various actions which he claimed had been taken against him under the name of the CPI(M) officeholder's wife.

Held: Decision under review affirmed

The Tribunal accepted, on the basis of court documentation, that the applicant had been involved in a long running court action by the CPI(M) officeholder's wife, and noted that the final court judgment was made in 2003 in favour of the applicant. The Tribunal also noted that the applicant was unable to name who had attacked him with an iron bar. The Tribunal had concerns about the truthfulness of the applicant's claims that he was threatened with his life over a period of twenty years, as he had never moved from his home or made attempts to relocate during that time. The Tribunal disputed his evidence that he was a member and was actively involved in the Indian National Congress with a family tradition of being involved in the manner claimed due to his evidence being inconsistent with independent country information. While he claimed he was involved in promoting the local candidate for the 2006 elections, he incorrectly named both the Indian National Congress and CPI(M) candidates for his district, despite claiming his election work involved promoting the local candidate for the district at election time. The Tribunal further noted that the applicant had claimed that he was involved in electioneering work for the Lok Sabha elections and that the last elections had occurred in 2006, however, independent country information indicated that the last Lok Sabha elections held in his district were in 2009, which was before he left India. The Tribunal found that if he was actively involved in the party as he claimed he would have been aware of these elections. The Tribunal further found that any difficulties that the applicant had faced in relation to the CPI(M) officeholder were of a personal nature rather than for political reasons, and that if the officeholder was using his political position to effect personal harm, the harm was for personal reasons. The Tribunal therefore did not accept that there was a real chance that the applicant would be persecuted if he returned to India on the basis of his claims considered individually and cumulatively for a Convention reason.

Malaysia

0903346

5 February 2010, Melbourne

Ms R Gagliardi, Member

MALAYSIA – PARTICULAR SOCIAL GROUP – TRANSGENDER WOMEN IN MALAYSIA WITHOUT FAMILIAL OR FINANCIAL SUPPORT OR PROTECTION – The applicant claimed that she was a transgender female from Malaysia who was looked down upon because of her transgender status and that because of this she was unable to obtain employment. The visa applicant submitted a birth certificate demonstrating that she was born as a male, along with hospital notes stating that she had a sex change operation and was now "fenotypically female". The medical examination undertaken by the applicant for an

Australian visa also referred to her change in gender. The applicant provided a statutory declaration claiming that she started taking hormones unbeknown to her family, although it became evident that she was appearing more feminine. She claimed that her father was supportive of her but her mother and siblings rejected her choice completely, and she was forced to leave home. The applicant claimed that her brothers and uncle lured her back where she was beaten and had prayer rituals performed on her. She claimed that she then fled and with the help of a friend organised a gender reassignment operation in Thailand. The applicant claimed that she attempted to obtain a new identity card, however, she was told she could change her name but not her gender. She claimed that she was required to attend a government doctor for a gynaecological examination to be certified that she was a woman, but was told that she would not be accepted in Malaysia and that she should leave. The applicant claimed that she commenced a relationship with a man and that on one occasion she and her partner were arrested because authorities assumed that she was working as a prostitute. The applicant was also arrested during a beauty pageant after the police stormed the hall telling them that they were men and that according to the Muslim faith they could not wear dresses. The applicant also claimed to have been arrested a third time under the charge of 'cross-dressing'. She claimed that she wanted to work but as soon as potential employers saw her identity card they refused to employ her, and that since her father passed away she had no-one to support her. The applicant lodged a submission containing independent information outlining the treatment of homosexual and transgender people in Malaysia along with a psychological report claiming that the applicant had twice attempted suicide, and that the applicant would meet the diagnostic criteria for a chronic Gender Identity Disorder.

Held: Decision under review set aside

The Tribunal noted that it had wished to conduct a hearing to set out more clearly what the applicant's subjective and objective fears were, however, with the provision of a psychological report and statements by the visa applicant, the Tribunal was prepared to accept that she was a witness of truth. The Tribunal found that her description of her feelings on first becoming aware that she identified with women more than men was realistic, and also accepted her account of her family's attempts to accept the visa applicant's life changing decision. The Tribunal relied significantly on the documentation submitted in relation to her gender reassignment in Thailand, and also referred to the medical examination held for the purposes of obtaining the visa which confirmed the applicant's statements concerning her transgender status. The Tribunal found that after assessing various independent country information that transsexuality generally, and particularly that of male to female transsexuals, was perceived as deviant behaviour in Malaysia. It found that it was clear that a person in the applicant's circumstances, where she was unable to work to meet her basic needs and was marginalised in society to the extent that she would not be able to subsist, would be vulnerable to serious harm from both individuals and the State at large. The Tribunal found, therefore, that the visa applicant would face a real chance of serious harm in Malaysia were she to return now or in the reasonably foreseeable future.

Tunisia

0907217

16 February 2010, Melbourne

Ms K Synon, Member

TUNISIA – POLITICAL OPINION – MOVEMENT OF SOCIAL DEMOCRATS – MEMBER OF A PARTICULAR SOCIAL GROUP – SHOP/BUSINESS OWNERS IN TUNISIA – The applicant claimed to fear harm from the secret police "as they have in the past demanded funds for their corrupted acts". He claimed that the authorities in Tunisia would not protect him because they are a tool of the dictatorship of the Tunisian regime "who for years have oppressed and intimidated any opposition". The applicant claimed to fear persecution as a shop/business owner and/or his political opinion. Specifically, the applicant claimed he was arrested, detained and tortured for refusing to continue paying donations or bribes to government officials and/or for being politically active as a member of the Tunisian Democratic Socialist Party (DSP). Also, the applicant claimed there was a Criminal Court Order which had been issued sentencing him to prison. The applicant claimed he became involved in the Democratic Socialist Party through his friend who was a prominent human rights activist in Tunisia and was the leader of two parties. The applicant claimed that from the end of 2003 until he left in late 2004, he participated in secret political activity with the DSP. He would go with friends to town to distribute pamphlets and leave them at houses and the university once

or twice a week. The applicant claimed he joined the party because of the unfairness of the government demanding bribes from shop owners so he wanted to protest against them. The applicant claimed that when he first refused to pay the donations, the police took him to the police station and physically assaulted him. He explained that his business was not doing well and he couldn't afford to feed his family. He claimed they accused him of being a member of the DSP which he denied as he was afraid of being sent to gaol for being part of a forbidden organisation. He claimed he was punched and kicked for about four hours and was held in police custody for 3 nights. He was also told he would be prosecuted for distributing pamphlets which were critical of the Government. The applicant claimed that he thought the Government was corrupt to insist on donations from shop owners and that they were doing a bad job so he became involved in political activity to get more support for the opposition party by letting people know how bad the government was and to encourage change.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was a member of the particular social group 'shop and/or business owners in Tunisia' and that he was asked or even harassed and pressured to provide donations to this fund which appear, relying on the applicant's evidence, to be widespread with almost five million donations reported in 2007 from a population of 10 million people. The Tribunal therefore did not accept that such requests or pressure/harassment for donations were made for the essential and significant reason of the applicant's membership of the particular social group 'shop and/or business owners in Tunisia'. The Tribunal relied on information that such donations were made by "Tunisian individuals and enterprises", "Tunisians living inside the country and abroad" and "sisterly and friendly countries". Further, the Tribunal did not accept that such requests, pressure or harassment for donations was made for any other Convention ground but rather were requested of individuals and enterprises in Tunisia. Based on the applicant's inconsistent and contradictory evidence, the Tribunal did not accept that the applicant was arrested and tortured for ceasing to pay these donations as claimed and it did not accept that the applicant was ever arrested or tortured. The Tribunal then considered the applicant's claimed persecution due to his political opinion and found that, despite extensive searching, it could find no reference to the DSP, however it was prepared to accept that this is the same party as the Movement of Socialist Democrats (MSD). The Tribunal did not accept that the applicant was a member of these parties, that he distributed any political pamphlets or brochures, that he did not have a membership card because the Party was secret and illegal, that he undertook any political activity on behalf of an opposition party or that he had any political involvement at all in Tunisia. The Tribunal found that the applicant did not have a political opinion imputed to him because his evidence of political involvement was confused and contradictory and he was not able to demonstrate even a limited degree of knowledge relating to opposition politics in Tunisia. Accordingly, the Tribunal did not accept that the applicant was arrested or charged due to his political activities and the Tribunal did not accept that the 'certificate concerning a criminal court order' document was genuine. The Tribunal therefore found that if the applicant was to return to Tunisia now or in the reasonably foreseeable future there was no real chance that he would suffer serious harm amounting to persecution for reason of his membership of a particular social group, political opinion, imputed political opinion or for any other Convention reason. Therefore, the Tribunal affirmed the decision not to grant the applicant a Protection visa.

Turkey

0905517

25 February 2010, Sydney

Ms P McIntosh, Member

TURKEY – POLITICAL OPINION – DEMOCRATIC SOCIETY PARTY – PEOPLE'S DEMOCRACY PARTY – ETHNICITY – KURDISH – The applicant claimed to fear persecution for reasons of his political opinion and his Kurdish ethnicity. He claimed he supported the Democratic Society Party (DTP) and the People's Democracy Party (HADEP), and that due to his Kurdish background, he was discriminated against at school by staff who supported the Nationalist Movement Party (MDP). He also claimed he was beaten up by students and was suspended when he attended New Year celebrations. He claimed he visited the local HADEP office on several occasions, and he was questioned after the office was raided by police. He claimed a relative who supported HADEP also had his house raided while he was staying there and that they were assaulted in a police van. He claimed that his relative was subsequently arrested and beaten on several occasions. The applicant claimed that at university he discussed politics with other Kurdish students in a cafe

and that he assisted HADEP in the general elections. He claimed the police raided the café and that he and other students were beaten, interrogated, and released the next day. Following this, he received threats from unknown people and he decided to leave school early because he was scared. The applicant claimed that during his military service he was under close supervision and was unfairly treated and insulted. He claimed he was beaten by police in the street and he was sworn at in public and provoked. He claimed that his home was raided by the police, he was questioned about suspicious activities and his house was closely watched. The applicant claimed he was told by people to leave as they knew he was involved with HADEP/DTP, and that his father then organised a police contact to issue him a passport on which he came to Australia to study English. However, he met and married an Australian woman which was why he did not lodge a protection visa immediately. His wife left him soon afterwards. He claimed he learned Kurdish when he was young, but spoke Turkish at home because his father was a public servant, and that he would be identified as a Kurd by his appearance and the way he spoke. The applicant submitted a letter from the Australian Kurdish Association which confirmed the applicant as a Kurd, and a letter from his university which stated the applicant was deregistered for not paying his education fee.

Held: Decision under review set aside.

The Tribunal accepted the applicant's father was a government employee and inferred that while the family had Kurdish ancestry, they had become absorbed into the Turkish culture. The Tribunal relied upon country information that Kurds who publicly or politically asserted their Kurdish identity or publicly espoused using Kurdish in the public domain risked censure, harassment or prosecution. The Tribunal considered the applicant's inability to name the Kurdish dialect he learned as a child reflected a lack of interest in Kurdish culture, inconsistent with his claim that he was motivated for many years to participate in pro-Kurdish activities and that he mixed with self identified Kurds. The Tribunal accepted he left his university course prematurely but noted that the university letter indicated he left because he did not pay the fees. However, the Tribunal found his claim to have feared harm by Turkish nationalists was consistent with evidence of Turkish nationalist activity, and that his claim of discrimination during military service was consistent with country information that Kurdish conscripts faced discrimination, and possibly more serious harm, in the army. The Tribunal found the applicant showed a reasonable level of familiarity with pro-Kurdish political parties in Turkey which was consistent with his claim that he supported HADEP, and the DTP. The Tribunal found it consistent with country information and plausible that his home was raided by police, he was questioned by them about his political activities, and that he subsequently felt he was being watched by them. The Tribunal found the delay between his arrival in Australia and the lodgement of his protection visa application cast doubt on his claim to have feared serious harm, however, the Tribunal found he had a valid visa and was under the impression he could gain sponsorship via his wife. The Tribunal found that despite his lack of political activity in Australia he had kept abreast of political developments relating to the DTP, and did not infer by his limited activism in Australia that he was not a supporter of pro Kurdish political groups while in Turkey. The Tribunal accepted that the author of the letter from the Australian Kurdish Association regarded the applicant as a Kurd and confirmed that he had some contact with the Association. The Tribunal doubted the plausibility of his claims of harassment to the extent claimed, but was satisfied he was involved in pro Kurdish political activities in Turkey, and was harassed by security forces and nationalist Turks because he was a Kurd who publicly or politically asserted his Kurdish identity and thus risked harassment. The Tribunal was satisfied that repeated instances of low level harassment, motivated by a perception the applicant was a supporter of the pro Kurdish political parties, amounted to persecution. Accordingly, the Tribunal was satisfied that the applicant had a well founded fear of persecution for a Convention reason.

COUNTRY ADVICE

China

China – Falun Gong – Fujian – Olympic Games – Australia – CHN34502 – 26 February 2009

Provides information on the situation of Falun Gong members leading up to the 2008 Olympics, particularly in Fujian. This response also includes information on the surveillance of Falun Gong practitioners in Australia by the Chinese authorities.

China – Chinese Communist Party – Membership – CHN34865 – 28 May 2009

Provides information on the repercussions in China for withdrawing from the Chinese Communist Party. The response also provides information on the role and function of the village level Chinese Communist Party offices.

Fiji

Fiji – Jehovah's Witnesses – State protection – FJI34335 – 6 February 2009

Provides information on the treatment of Jehovah's Witnesses in Fiji.

Fiji – State of Emergency – SDL – Freedom of expression – Media censorship – Seventh-Day Adventists – FJI35081 – 22 June 2009

Provides information on the current state of emergency in Fiji and the subsequent crack-down on dissent as well as information on the treatment of Seventh-Day Adventists in Fiji.

INDIA

India – Kerala – Christians – Muslims – Religious violence – Latin Catholics – CPI-M – Communal violence – IND34585 – 3 April 2009

Provides information on communal violence in Kerala state with regard to relations between Muslim and Christian communities. The response also provides information on the relationship between Kerala state's Communist Party of India-Marxist (CPI-M) and the Muslim and Christian electoral blocs.

India – Women – Domestic Violence – Domestic Violence Act 2006 – IND34638 – 20 March 2009

Provides information on domestic violence in India and the implementation and effectiveness of the Protection of Women from Domestic Violence Act, 2005 (PWDVA).

INDONESIA

Indonesia – Yemen – People with disabilities – Female Genital Mutilation (FGM) – Police – State protection – IDN34558 – 31 March 2009

Provides information on discrimination against and/or difficulties faced by disabled persons in Indonesia. This response provides information on female genital mutilation (FGM) in Indonesia and Yemen. This response also provides information on state protection in domestic disputes in Indonesia.

IRAN

Iran – Zoroastrianism – Conversion – Practices – Apostasy law – IRN34267 – 9 February 2009

Provides information on Zoroastrianism, including its basic beliefs and key texts, and how it is practised in Iran. It focuses especially on the contested issue of conversion and whether conversion is allowed within Iran. This response also provides information on the reasons for the current interest shown toward Zoroastrianism within in Iran and the existence of converts within the country, as well as treatment by the authorities.

Iran - Women – Islamic dress code – Enforcement – Employment – IRN35006 – 24 June 2009

Provides information on the enforcement of regulations relating to “Islamic” dress, and whether women must wear the chador in order to access employment opportunities.

NEPAL

Nepal – Nepali Congress Party – Maoists – Internal relocation – NPL34233 – 14 January 2009

Provides background information on the Nepali Congress party (NC) and on their relationship with the Maoists. The response provides updated information on the activities of the Maoists since the April 2008 elections and the subsequent negotiations in June 2008. This response also addresses the issue of internal relocation within Nepal.

NIGERIA

Nigeria – Enugu State – Ritualised killings – Christians – Black magic / “juju” – Police – Communal violence – NGA34830 – 4 May 2009

Provides information on ritualised killings in Enugu State, whether Christians are discriminated against or otherwise targeted by practitioners of ‘juju’, and the extent to which the police investigate violence associated with traditional practices in Nigeria.

SOUTH AFRICA

South Africa – White South Africans – Employment – Women – State protection – Violence against women – ZAF34753 – 24 April 2009

Provides information on discrimination of white people in South Africa, including in employment as well as violence against white South Africans. This response also provides information on the situation for women including the availability of protection for victims of violence.

SOUTH KOREA

South Korea – State protection – Police – Judiciary – KOR34382 – 23 February 2009

Provides information on the police and judiciary in South Korea and their effectiveness.

SRI LANKA

Sri Lanka – Muslims – Tamils – Business people – UNP – Abductions – LKA34938 – 27 May 2009

Provides information on the situation for Muslim businesspeople in Sri Lanka, with particular reference to abductions and extortion.

UGANDA

Uganda – Sudan People’s Liberation Army (SPLA) – Kidnappings – State protection – Government-SPLA collaboration – UGA34368 – 23 February 2009

Provides information on whether the Sudan People's Liberation Army (SPLA) operates in Uganda and if it kidnaps Ugandan citizens and whether such kidnaps are investigated and followed through. This response also provides information on whether the Ugandan government or the security forces collaborate with the SPLA.

ZIMBABWE

Zimbabwe – Mental illness – Social attitudes – Treatment programs – Support groups – Legal provisions – ZWE34835 – 7 May 2009

Provides information on the discrimination faced by mentally-ill people in Zimbabwe, traditional views and societal attitudes towards mental illness, and the availability of health care treatment and support for mentally-ill patients.

HIGH COURT JUDGMENTS

Berenguel v MIAC

[2010] HCATrans 041

High Court of Australia, French CJ, Gummow and Crennan JJ, M66 of 2009, 5 March 2010

The plaintiff sought judicial review of a decision of a delegate of the respondent to refuse to grant him a Skilled (Residence) (Class VB) Subclass 885 visa. The plaintiff applied for the visa on 21 April 2008. On his application form he indicated that he had booked an International English Language Testing System (IELTS) test for 10 May 2008. The plaintiff subsequently sat the test and achieved a score of 6 for each of the 4 test components (competent English standard).

In December 2008, a delegate of the respondent refused to grant the visa on the basis that the plaintiff did not meet cl.885.213 which came under the heading 'Criteria to be satisfied at time of application' and required a visa applicant to have 'competent English' as defined in r.1.15C, or in limited circumstances, the lesser standard of 'vocational English' as defined in r.1.15B. Those definitions were satisfied if the person had achieved a specified score, in a test conducted not more than 2 years before the day on which the application was lodged. The delegate found that as the applicant had not provided the result of an IELTS test conducted not more than 2 years before the day on which the application was lodged, he did not meet the requirement of having vocational English at time of application.

The plaintiff commenced proceedings in the High Court's original jurisdiction seeking writs against the Minister. It was common ground that the definitions in r.1.15B and 1.15C could be satisfied by a test taken after the time of application was lodged; at issue was whether criteria specified as time of application criteria could only be satisfied at that time. The matter was subsequently referred to a Full Court for determination of the following substantive questions:

1. Did the delegate misconstrue r.1.15B(5) in finding the plaintiff had not achieved the requisite test score in a test conducted 2 years before the date of application?
2. In the circumstances of the present case, could the plaintiff satisfy cl.885.213 by lodging an IELTS test report with the respondent after the date of visa application?

Held: per curiam, answering the questions in favour of the plaintiff.

- (i) In contrast to cl.885.214 and 885.215 which require the application to be accompanied by specified evidence, cl.885.213 can be satisfied by evidence provided to the Minister after application has been made.
- (ii) The evident purpose of cl.885.213 is to ensure that when the visa application is decided the applicant will have demonstrated recent competency in the English language. The construction contended for by the plaintiff did not compromise such purpose. The Minister's construction led to such plain unfairness and absurdity that it was not to be preferred.
- (iii) The heading 'Criteria to be satisfied at time of application' may inform the construction of the criteria thereunder, but those criteria do not speak exclusively to satisfaction at the time of application.

FEDERAL COURT JUDGMENTS

Hossain v MIAC

[2010] FCA 161

Mo v MIAC

[2010] FCA 162

Federal Court of Australia, Buchanan J, NSD 1276 and NSD 1288 of 2009, 2 March 2010

Each of these cases was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision not to revoke the automatic cancellation of the appellant's Student visa.

Section 137J of the *Migration Act 1958* (the Migration Act) provides for automatic cancellation of a student visa if a notice is sent under s.20 of the *Education Services for Overseas Students Act 2000* (the ESOS Act). Sections 19(1) and 20(1) of the ESOS Act impose obligations on registered education providers to notify the Secretary and the student respectively, if the student has breached a prescribed condition of a student visa. At the relevant time, r.3.03A of the ESOS Regulations 2001 expressly prescribed student visa condition 8202 for s.19(1), but not s.20(1).

In each case, a notice had been sent to the appellant under s.20 of the ESOS Act informing the appellant that they had been certified as not achieving satisfactory course progress/attendance for condition 8202(3) of the Migration Regulations 1994. In each case, as the appellant did not respond to the notice, their visa was purportedly automatically cancelled by operation of s.137J of the Migration Act.

The issue in each case concerned the conditions necessary for the operation of s.20 of the ESOS Act and in particular whether visa condition 8202 was a prescribed condition for the purposes of that provision.

Held: appeals allowed

- (i) The ESOS Regulations did not prescribe a student visa condition for s.20(1) of the ESOS Act at the relevant time.
- (ii) The notices sent to the appellants were ineffective for the purpose of s.20 of the ESOS Act and s.137J of the Migration Act. It followed that s.137J did not operate to automatically cancel the appellants' visas.

SZLPN v MIAC

[2010] FCA 202

Federal Court of Australia, Flick J, NSD 1259 of 2009, 9 March 2010

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) affirming a decision not to grant the appellant, an Indian national, a protection visa.

The Tribunal did not regard the appellant as a witness of truth. It concluded that he had created his claims in order to obtain the visa sought, based on a number of inconsistencies and implausibilities to which it referred.

The appellant contended that in circumstances where it was open to the Tribunal to find that he was a refugee, the Tribunal had "failed to properly apply the consideration that applicants for refugee status ought to be given the benefit of the doubt in circumstances where the Tribunal entertained the possibility that the applicant's claims are plausible".

Held: Appeal dismissed.

- (i) The findings made by the Tribunal were findings of fact open to it upon the evidence. No jurisdictional error is exposed simply by reason of a claimant contending that it was open to the Tribunal to have reached a different conclusion.
- (ii) Whatever the scope may be as to any "benefit of the doubt", it has little (if any) role to play where claims have been rejected upon the basis of an assessment of a claimant's credibility. If the Tribunal is not satisfied that claims to refugee status have been established, a claimant is not entitled to have his claims accepted simply by reason of the fact that there is a "*possibility*" that the "*claims are plausible*" or because he should be given a "*benefit of the doubt*".

**Muliyana v MIAC
[2010] FCAFC 24**

Federal Court of Australia, Moore, Siopis & Edmonds JJ, NSD 921 of 2009, 15 March 2010

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision not to grant the appellant a Partner (Migrant)(Class BC) subclass 100 visa.

The appellant entered Australia on a temporary spouse visa. Unknown to her, within days after her arrival her sponsoring husband informed the Department of Immigration that their relationship was not continuing and that he neither wanted her to come to Australia nor to support her in Australia. Shortly thereafter, the parties travelled to India and the appellant was abandoned by the sponsor at her parents' home. She returned to Australia and on 15 February 2007 went to her husband's residence which she regarded as her home. Her husband refused to let her in, verbally abused her, pushed her out of the house, threw her belongings into the street, and threatened to kill her and to destroy her property. The applicant obtained an intervention order against him on 6 March 2007.

The Tribunal was satisfied that the evidence established, in terms of cl.100.221(4)(c)(i)(A) of Schedule 2 to the Migration Regulations 1994 (the Regulations) and the 'domestic violence' provisions in r.1.23, that the appellant had suffered domestic violence at the hands of her husband on 15 February 2007, that the spousal relationship had previously existed but had ceased, and that the domestic violence had occurred after the cessation of the relationship. The Tribunal stated that whilst the express wording of cl.100.221(4)(c) did not state that the domestic violence needed to have caused or contributed to the cessation of the spousal relationship, it was of the view that it was appropriate to read the provision as requiring the violence to have occurred during the currency of the relationship. Accordingly, it found that the appellant did not meet the criteria for the grant of the visa.

The issue on appeal was whether cl.100.221(4)(c) of Schedule 2 to the Regulations is to be read as requiring the 'domestic violence' to which it refers to have occurred before the relationship between the applicant and the sponsoring spouse ceased, the cessation of that relationship being the immediately preceding requirement in cl.100.221(4)(b).

Held: *per Siopis and Edmonds JJ (Moore J agreeing)*, appeal upheld

per Siopis and Edmonds JJ (Moore J agreeing)

- (i) For the domestic violence provisions in cl. 100.221(4)(c) it matters not when the violence occurred, before or after cessation of the spousal relationship, provided it was 'domestic violence' as defined.
- (ii) The policy behind the provisions is intended not to force a person to stay in an abusive relationship; and not to force a person to go back into an abusive relationship, in either case without compromising his or her immigration status.

FEDERAL MAGISTRATES COURT JUDGMENTS

WZANF v MIAC & Anor

[2010] FMCA 110

Federal Magistrates Court of Australia, Lucev FM, PEG 130 of 2008, 24 February 2010

The applicant, a national of Turkey, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision affirming a decision not to grant a protection visa.

The applicant claimed to fear persecution as a person of Armenian ethnicity who had been researching the genocide of Armenians in Turkey and had set up an organization for this purpose. He claims to have been questioned by the police and to have been detained and mistreated after organizing a 'Genocide Conference' and to have been charged after his release. He then applied to come to Australia to continue his research. He claims an active member of the organization was murdered in his absence and that he returned to Turkey for a hearing in relation to the charges against him which was adjourned. He claimed not to have returned for his final hearing, but that his brother informed him he had been convicted and sentenced to two and a half years prison.

The Tribunal rejected the claims that the applicant and other members of the organization were attacked at the conference or arrested and tortured by the police. Nor did it accept that he had been charged, convicted and sentenced. The Tribunal was not satisfied as to the authenticity of the documents submitted by the applicant and did not accept his explanation as to why he did not have certain court documents in relation to his conviction and sentencing.

On appeal, the applicant submitted that, among other things, the Tribunal had failed to properly undertake a review in breach of s.414 of the *Migration Act 1958* (the Act), and failed to invite him to give evidence and present arguments in relation to the reliability and potential probative value of the documents provided, in breach of s.425.

Held: RRT decision quashed and remitted for reconsideration.

- (i) The Tribunal failed to take into account relevant material, namely evidence of the confiscation of the applicant's research, the newspaper article, the dead person's mother's letter, and the content of the police summonses and authority to capture. As the information was central to the applicant's claims and its propensity to corroborate the applicant's account of events made it relevant material it was incumbent upon the Tribunal to consider it.
- (ii) The Tribunal drew a conclusion about the authenticity of the newspaper article and the dead person's mother's letter without there being anything on the face of the documents to indicate they were not authentic or to cast doubt on the authorship and without giving the applicant an opportunity to comment to the Tribunal on those matters. Asking for the original of the newspaper article did not put its authenticity in issue and there was no cogent material suggesting that the applicant had lied about his account of events
- (iii) The Tribunal failed to require the Secretary of the Department to arrange for the making of inquiries as to the existence of the newspaper, the publication of the newspaper article, and the possibility of obtaining a copy, and not necessarily the original of the newspaper article; and the existence and veracity of the content of the Authority to Capture. Because the documents were critical to the applicant's case, and an obvious enquiry might have easily ascertained their existence of the newspaper article or the veracity of the content of the Authority, the Tribunal's failure to require the making of inquiries was a jurisdictional error.
- (iv) Where it was not evident that there was any avenue of obvious inquiry leading to easily ascertainable and relevant facts, it was not necessary for further inquiries to be requested.
- (v) The Tribunal failed to comply with s.425 of the Act because it did not allow the applicant to make submissions or raise arguments in relation to the genuineness of the Newspaper article and the authorship of the dead person's mother's letter.

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

Determination under section 85 of the Migration Act 1958 – Granting of Business Skills Visas in 2009/2010 Financial Year

This Determination imposes a cap of 6530 on the number of Business Skills visas (classes EA and UR) for the 2009/2010 financial year.

Migration Regulations 1994 – Specification for the purposes of subregulations 2.61(4), 2.61(5), 2.61(6), 2.66A(2), 2.66A(6), 2.73A(5), 2.73B(6) and 2.73C(6) – Specification of Addresses – February 2010

This instrument specifies addresses for lodgement of applications to be a temporary work sponsor and for temporary work nominations.

Migration Regulations 1994 – Specification under paragraphs 1205(3)(ba), 1205(3)(ca) and 1220B(3)(b) – Addresses – March 2010

This instrument specifies addresses for lodgement of visa applications for subclass 416, 420 and 470 visas.

Migration Regulations 1994 – Specification under subparagraphs 1136(3)(bb)(ii) and 1229(3)(ab)(ii) of sch 1, subclauses 175.211(1), 176.211(1) and 475.211(1) of sch 2 – Skilled Occupations for Skills Assessments – March 2010

This Specification specifies occupations required to provide a skills assessment dated on or after 1 January 2010 to support amendments to the Migration Regulations 1994 made to ensure the job readiness of onshore applicants nominating trade occupations.

Specification under regulation 1.41 – Student Visa Assessment Levels

This instrument specifies student visa assessment levels for eligible passports.

Specification under regulation 3.10A – Access to Movement Records

This Specification revokes the Migration Regulations 1994 Specification under regulation 3.10A (Access to Movement Records – October 2009) and specifies new Commonwealth, State or Territory Legislation, Agencies and Purposes.

Specification under subparagraph 1222(1)(a)(ii) and 1222(1)(aa)(i) – Classes of Persons – March 2010

This instrument specifies classes of persons applying outside Australia for a Student (Temporary) (Class TU) visa, who can use form 157A or 157E, and classes of persons applying in Australia for a Student visa, who can use form 157A or 157A (Internet).

REGULATIONS

Migration Amendment Regulations 2010 (No. 1)

These Regulations amend the Migration Regulations 1994 to make changes to worker protection, child visas, parent visas, occupations trainee nomination, cultural/social visa and partner visas.

Migration Amendment Regulations 2010 (No. 2)

These Regulations amend the Migration Regulations 1994 to ensure that a person who has been convicted of a child sex offence, or other serious offence indicating that the person might pose a significant risk to a child, cannot sponsor a child for a partner or child visa, and to clarify certain provisions relating to student visas.

CASELOAD OVERVIEW

MRT Decisions – February 2010

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	1	12	2	1	16
Visitor refusal	29	14	1	4	48
Student refusal	17	15	10	11	53
Temporary business refusal	16	13	13	11	53
Permanent business refusal	22	15	5	2	44
Skill linked refusal	34	94	21	8	157
Partner refusal	61	23	10	4	98
Family refusal	21	16	8	0	45
Student cancellation	20	26	2	3	51
Sponsor approval refusal	4	3	6	2	15
Other	15	17	6	4	42
Total	240	248	84	50	622

RRT Decisions – February 2010

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Afghanistan	0	1	0	0	1
Albania	0	2	0	0	2
Angola	0	1	0	0	1
Argentina	0	0	0	1	1
Australia	0	1	0	0	1
Bangladesh	1	6	0	2	9
Burma (Myanmar)	1	0	0	0	1
Cameroon	0	1	0	0	1
China (PRC)	19	55	0	1	75
Colombia	0	3	0	0	3
Congo, Democratic Republic of	1	1	0	0	2
Egypt	2	1	0	0	3
Fiji	0	7	0	1	8
Guinea	0	1	0	0	1
India	1	9	0	0	10

Indonesia	0	6	0	0	6
Iran	1	0	0	0	1
Korea, Republic of	0	2	0	0	2
Lebanon	0	3	0	0	3
Malaysia	1	21	0	0	22
Nepal	1	1	0	0	2
New Zealand	0	1	0	0	1
Nigeria	0	1	0	0	1
Pakistan	4	2	0	1	7
Philippines	0	4	0	0	4
Serbia	0	1	0	0	1
Sri Lanka	1	1	0	0	2
Thailand	0	1	0	0	1
Tonga	0	5	0	0	5
Tunisia	0	1	0	0	1
Turkey	2	1	0	0	3
United Kingdom	0	0	0	1	1
Vietnam	0	1	0	0	1
Zambia	0	0	1	0	1
Zimbabwe	0	3	0	0	3
Total	35	144	1	7	187

PUBLICATION OF TRIBUNAL DECISIONS

The Tribunals publish decisions on AustLii that are considered to be of 'particular interest'. If you would like published decisions of a particular kind, or a particular decision, please let us know by contacting enquiries@mrt-rrt.gov.au.

Decisions which are regarded by the Tribunals 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 by each Tribunal. This issue of *Précis* contains a range of interesting cases dealing with the question of a genuine and continuing relationship for a spouse visa, the issue of genuine visit for a visitor visa as well as a number of protection visa cases including disgruntled pig farmers in China, Albanian migrants in Greece and shop/business owners in Tunisia.

Between 1 January 2009 and 31 March 2010, 48.2% of all substantive decisions made have been published (47.3% of MRT and 50.5% 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. The Migration Review Tribunal is not similarly restricted but may direct that certain information in a decision not be published in the public interest.

If a published decision of the MRT or RRT causes concern to a person with a close interest or involvement in the decision, a request for deletion of portions of the decision or its withdrawal from AustLii may be made by request to enquiries@mrt-rrt.gov.au.

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 is not 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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