



The MRT-RRT Monthly Bulletin

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This issue of Précis includes a range of interesting decisions including MRT decisions relating to an employer nomination for a trained medical practitioner working in an area of need, Ethiopian orphan relatives of an Australian sponsor, and a student who had failed to undertake studies in 13 years whilst living in Australia. Also featured are protection visa cases relating to Cambodian women who are second wives who have suffered domestic violence, an East Timorese applicant with access to a third country, the worship of fetish gods in Ghana and Mongolian people with disabilities.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

0809131

8 June 2010, Melbourne

Mr A Gregory, Member

BUSINESS SKILLS (RESIDENCE) (CLASS DF) – SUBCLASS 892 – STATE/TERRITORY SPONSORED BUSINESS OWNER – CL.892.211 – OWNERSHIP INTEREST IN A MAIN BUSINESS –

A delegate of the Minister refused the applicant's Subclass 892 visa application as the applicant did not provide evidence that he had an ownership interest in a 'main business' both at time of application and at time of decision, and that the definition of 'main business' included that a main business must be a 'qualifying business'. The main business nominated in the visa application was Jinze International Australia Pty Ltd (Jinze), of which the applicant claimed to be the major shareholder. He claimed that the main activity of the company was to produce recycled goods and export them, including waste clothes, waste fabric, waste tyres and waste plastics. The applicant claimed that in the first three years of the business that he also exported wool and that the annual turnover of the company was \$1 million. He claimed that he then set up a factory in Canberra and invested \$1.3 million on recycling equipment, and that he exported these products to the USA and Japan. The applicant claimed that he had two joint ventures with partners in Adelaide, and that they used waste to produce rubber powder, and also waste plastic to produce rail sleepers, which had attracted government funding of \$5 million. The applicant claimed that Charles Li Textile was the manufacturing arm of the business and that Jinze was the sales and investment company which also undertook research and development. He claimed that they had many patents including one for a mobile abattoir, and that he had spent five years promoting the export of white donkeys to China which had culminated in the signing of a trade agreement. The applicant claimed that he was in discussion with the Northern Territory and Queensland governments about the export of cane toads to China for use in Chinese medicine and that this would significantly benefit regional employment. He claimed that the business would export donkeys, camels and cane toads to China and that the contract would be worth \$100 million a year, with a future target of \$1 billion in sales, given that there were 5 million white donkeys, 1.7 million camels and 200 million cane toads in Australia. He also claimed to have developed a "grape muck" program in conjunction with the South Australian government, which involved separating the skin to feed cattle and the seed for export to China, which would be worth \$100 million a year. The applicant's representative claimed that the business was a manufacturing one, and that the Department had erred in comparing it to a trading company as the applicant had to undertake significant development and research which meant there were significant periods where there was little in the way of product or wages.

Held: Decision under review set aside.

The Tribunal considered the applicant to be an impressive witness and noted his ideas for export and product development, including an emphasis on using waste to good effect and in solving some of Australia's problems such as white donkeys, wild camels and cane toads. The Tribunal made further note of his work with grape waste and sending the seeds to China as an export and made the point that the role of research and development in bringing these products to fruition was clearly of great importance. The Tribunal accepted that the applicant was actively involved in the company undertaking research and development work, and while there were few sales in the relevant period, that being in the two years prior to when the application was made, the figures shown for the relevant quarters showed a turnover of \$3,800 for January to March 2003, \$1,344,331 for April 2003 to June 2003, and \$1,347,108 for the period April 2004 to June 2004. Given the nature of the business and the developmental aspect for the products, the Tribunal accepted the uneven pattern of the turnover and that the company was active throughout the two year period. The Tribunal was satisfied that the applicant was a shareholder in both nominated businesses and therefore that he had an ownership interest in each nominated business as required by Subclause 134(10). The Tribunal was also satisfied that the applicant had maintained direct and continuous involvement in the management of the day to day operations of his nominated businesses. Considered cumulatively, the Tribunal was satisfied that at the time of application, the applicant had and continues to have, an ownership interest in one or more actively operating main businesses in Australia for the two year period immediately preceding his visa application, and therefore he satisfied cl.892.211(1) of the Regulations.

0904989

29 June 2010, Melbourne

Mr J Atkins, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 – EMPLOYER NOMINATION – CL.856.213(c)(ii) – EXCEPTIONAL CIRCUMSTANCES – OVER 45 YEARS OF AGE

– A delegate of the Minister refused to grant the applicant an employer nomination visa on the basis that there were no exceptional circumstances in relation to the applicant being over 45 years of age at the time of application. The primary applicant, a qualified electrician with over 36 years post apprenticeship experience, was nominated to fill the position of General Electrician. He gave evidence at the Tribunal hearing in support of his claim for exceptional circumstances and submitted that the duties of the nominated position of a highly skilled and technically competent electrician were so specialised that few, if any, younger persons would have the required level of expertise. He further submitted that having regard to his acquired practical skills and experience in the field, his productive benefit to Australia would be greater than that of a person less than 45 years of age. The Tribunal received oral evidence in support of the applicant's claims from several witnesses who confirmed that the applicant possessed an unusual and highly specialised range of skills and experience which it would not be possible to find in a younger applicant. The Managing Director of the sponsoring company explained that the applicant's knowledge and experience in design and installation of electrical, data and communications infrastructure had been invaluable for the construction of its new premises in Western Australia and had indirectly led to an increase in employees by some 40 personnel. He also explained that the business had recently purchased new machinery to improve its production efficiency and as some of these machines were new to Australia, there were limited experienced technicians available for the servicing and maintenance of these machines. He stated that the applicant had become one of the most knowledgeable people in Western Australia for servicing and maintaining one machine in particular and he stressed that failure to have equipment running properly would have a disastrous effects upon his business. Another witness referred to the difficulty of finding electricians willing to undergo training on the relevant machinery in Western Australia due to the demands of the mining industry and said that his company proposed to send the applicant to Switzerland for training. Evidence of the applicant's qualifications, his salary and other material were also provided in support of the application.

Held: Decision under review set aside.

The Tribunal found that the applicant's employer had demonstrated that it was not possible to find in Australia or overseas, a suitably qualified person younger than the applicant. The Tribunal noted that the employer is a Western Australian business providing a range of meat and poultry products at a number of locations and found that the applicant, as a highly skilled and experienced electrician, was essential to the operation of the business, especially in light of the company's plans to expand. The Tribunal accepted that the applicant had been responsible for the installation and maintenance of a number of highly specialised machines integral to the employer's business and the continued employment of its staff. The Tribunal also concluded that evidence given by the employer and the other witnesses clearly demonstrated that the applicant had skills and experience that could only be acquired over many years and which would not be possessed by a younger applicant. Having taken into account all the circumstances and having considered the factors set out in the Department's Procedures Advice Manual, the Tribunal was satisfied that the applicant's circumstances were sufficiently unusual and out of the ordinary as to constitute exceptional circumstances for the purposes of clause 856.213 (c)(ii)(A). The Tribunal found that the applicant therefore met the requirements of clause 856.213(c)(ii) even though he had turned 56 at the time of application.

0909198

8 July 2010, Sydney

Mr D O'Brien, Principal Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 857 – REGIONAL SPONSORED MIGRATION SCHEME – CL.857.213(c) – SUPERVISED PRACTICE PLAN – AREA OF NEED

- A delegate of the Minister refused to grant the applicant a Subclass 857 visa on the basis that the visa applicant did not satisfy cl.857.213(c) of the Regulations because he is an overseas trained medical practitioner. The delegate also considered that the conditions which applied to his registration by the Medical Board of Queensland were not such as to allow him to work without requiring further training or on-the-job supervision. The applicant's representative claimed that the applicant's special purpose registration allowed him to work without the need for further training or on the job supervision, that he held an Area of Need

(AoN) conditional registration and that he was nominated for an AoN position. The representative claimed the visa applicant's supervised practice plan provided for a program of continuous learning and professional development. The visa applicant claimed he sat the Royal Australian College of General Practitioners (RACGP) final clinical exam but had not passed. He claimed he could sit the exam again and that this would enable him to obtain specialist accreditation as a general practitioner. He claimed he was in general practice in Australia for more than ten years, prior to that he had practiced overseas and had practiced for seven years in regional Australia. He claimed that when he first arrived, he practiced with two other doctors, but they had since retired and he now practiced alone. He claimed he conducted his practice like any other general practitioner and without supervision. He claimed he passed the first two components of the requirements for specialist general practitioner accreditation and the only remaining component was the clinical exam. He claimed his present status as a general practitioner qualified him to practice without restriction in an AoN, where he was located. He also claimed it was difficult to do his supervised practice plan as this involved supervision from another GP in the town who was very busy and they found it hard to get together. He claimed the other supervising doctor had been with the local hospital but had moved to the city some distance away. The visa applicant claimed he was most anxious to get the RACGP specialist GP exam completed and he had a further two years in which to pass the final clinical exam so he could obtain unconditional registration. The representative provided a letter from the town's Regional Council which confirmed the applicant's nomination and that he worked in an area defined by the Australian Health Practitioner Regulation Agency as an AoN. The Australian medical registration details for the applicant show that he held limited registration in an Area of Need.

Held: Decision under review set aside.

The Tribunal accepted the applicant's evidence that he practiced as a general practitioner in a regional area without supervision and that he was proceeding towards becoming a Fellow of the Royal Australian College of General Practitioners but had not yet successfully completed the final clinical exam. The Tribunal found that the terms of the supervised practice plan were consistent with the status of someone seeking to pass that exam, but did not limit him to supervised practice or require him to undertake further training. The Tribunal found that under Departmental policy AoN medical registration was conditional registration, normally issued when a person had yet to complete their medical fellowship requirements but had acquired the skills and experience to perform their work without the need for daily supervision by another medical practitioner. The Tribunal found this registration was acceptable if certain conditions were met and it found that they had been met since the town's Regional Council, as nominator, confirmed the position to be an AoN position. The Tribunal also found the applicant's medical registration showed that he held an AoN registration which did not specify any need for further training or daily supervision, or practice plans which required him to consult other medical practitioners or submit patient cases for evaluation. The Tribunal found that the requirement to consult other practitioners was for the limited purpose of exam preparations. Accordingly, the Tribunal found that the applicant met the requirements of cl.857.213(c) of the Regulations.

Family visas

0908910

1 June 2010, Sydney

Mr D Dobell, Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 – SPONSORED FAMILY VISITOR – CL.679.211-CL.679.214 – GENUINE VISIT – A delegate of the Minister refused to grant the applicant a Subclass 679 visa on the basis that the visa applicant did not satisfy cl.679.211 to cl.679.214 and cl.679.221 of the Regulations because the delegate did not accept she would be a genuine visitor to Australia. The visa applicant claimed she had two sons, siblings and her mother living in Sri Lanka. She claimed the reason for the visit was to attend her son's wedding reception which had been postponed awaiting her arrival. He was married in Sri Lanka in 1999. The visa applicant claimed she owned a medical centre, and was a self employed doctor and that another doctor would fill in during her proposed visit. The applicant claimed the planned visit was only for a month due to her work commitments and because her husband was remaining in Sri Lanka. She claimed her son would provide her airfare and all financial assistance during her proposed visit. The visa applicant had previously traveled to India, Singapore and Australia. The review applicant claimed that his father did not seek review of his visa refusal as they thought this would show added incentive for his mother to return. Also, as the review applicant's wife was expecting a baby, he thought it

was more useful that his mother came to visit. The review applicant also claimed that his parents had visited Australia in 2006 at the height of the civil war and had returned. He claimed that his mother would be idle if she remained in Australia whereas she earned a good income as a doctor in Sri Lanka. He further claimed his parents were not affected by the war since they did not live in that area. He claimed it would be of great help if his mother came to help when their baby was born as he had also suffered an injury. The applicants' representative claimed the review applicant was happy for a bond to be considered and that overstaying would jeopardize any further visits by family members. Evidence of the visa applicant's two properties and financial documents were also provided.

Held: Decision under review set aside.

The Tribunal found the applicants to be credible witnesses and it considered all of the documentary evidence provided to be genuine. The Tribunal found that the visa applicant and her husband had visited Australia previously when the war was active, and had returned home in compliance with their visitor visas. The Tribunal considered that care must be taken not to use the overall security situation in Sri Lanka as a basis for not accepting some applicants as genuine visitors. The Tribunal considered that it must avoid the view that because of the violence and unrest in Sri Lanka, all Tamils who apply for visitor visas were unlikely to want to return and may seek protection in Australia and overstay their visitor visas. The Tribunal considered that, while there was some unrest and danger in Sri Lanka at present for Tamils, it was satisfied that the visa applicant's personal and other circumstances would encourage her to leave Australia at the end of her proposed visit. Based on the oral and documentary evidence provided, the Tribunal's view was that the visa applicant's expressed intention to only visit Australia was genuine and accordingly, it found that she met the requirements of cl.679.211 to 679.214 and cl.679.221 and cl.679.224 of the Regulations.

1000196

15 June 2010, Melbourne

Ms R Gagliardi, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 117 – ORPHAN RELATIVE – CL.117.211 AND CL.117.221 – ORPHAN RELATIVE OF AUSTRALIAN SPONSOR – A delegate of the Minister refused to grant the applicants orphan relative visas on the basis that there was uncertainty as to whether they were orphan relatives of the sponsor. The application was made on the basis that the five visa applicants were the children of the sponsor's deceased brother and were therefore, his orphan relatives. A court document provided the dates of birth for each child and stated that the visa applicants' parents had died in a car accident. Another document included the evidence of several witnesses confirming that the visa applicants' guardian in Ethiopia had transferred responsibility for the children to their uncle as "she faced a great problem in means of subsistence..." A further court document confirmed the sibling relationship between the review applicant and the visa applicants' father. Prior to the decision being made, negotiations were entered into between the Department and the review applicant and his representative in relation to whether it would be possible to have the applicants undertake DNA tests. The review applicant's representative submitted that the review applicant did not have the resources to afford the costs that would be involved in DNA tests and that there was no reason in this case to doubt that the children were siblings, or that the review applicant was their uncle. The representative also referred to evidence provided which demonstrated that the sponsor had sent a considerable amount of money to the visa applicants and suggested that it would be unlikely that he would have done so if he were not a close relative. The children and spouse of the review applicant submitted statutory declarations in which they stated that they had seen the visa applicants when they travelled to Ethiopia and that the review applicant had sent money with them to assist the visa applicants with rent, food and clothing. Other statements attesting to the support provided by the review applicant to the visa applicants were also provided.

Held: Decision under review set aside.

Overall, the Tribunal found the witnesses, including the review applicant, to be entirely credible and did not find cause to doubt their claim that the review applicant is the brother of the deceased father of the visa applicants. The Tribunal accepted that birth and death certificates in countries like Ethiopia were more or less the registration of events as stated by those applying for the certificates. The Tribunal noted, however, that in this case it did not have any evidence to suggest that the information contained in the certificates was not genuine. In reaching its conclusions, the Tribunal took into account the evidence of the review applicants' children that they had visited their cousins in Ethiopia to provide them with money and to check

on their safety, as well as other third party statements attesting to the relationship between the review applicant and the visa applicants. The Tribunal accepted that the review applicant and his family were willing to take on financial responsibility for the well-being of the five visa applicants and that he wanted to adequately provide for them in the future. The Tribunal recognised that the review applicant had a family of his own and that to have all five visa applicants undergo DNA tests would have represented a significant impost on a family of modest means. Given that the Tribunal relied on the birth certificates provided as evidence showing that the review applicant was the sibling of the visa applicants' deceased father, the Tribunal was also satisfied that the review applicant was an Australian relative of the visa applicants, being their uncle. The Tribunal was therefore satisfied that the visa applicants were all relatives of the review applicant and accordingly, it found that the visa applicants met the requirements of cl.117.211 and cl.117.221 of the Regulations.

Partner visas

071867393

8 June 2010, Sydney

Mr G Short, Senior Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – SPOUSE – CL.309.211 AND CL.309.221 – GENUINE AND CONTINUING RELATIONSHIP – CREDIBILITY – A delegate of the Minister refused to grant the applicant a spouse visa as the delegate was not satisfied that the visa applicant was the spouse of the sponsor (the review applicant), within the meaning of r.1.15A of the Regulations. In a statement accompanying the original application the visa applicant stated that he had been introduced to the review applicant by her sister at a dinner party in Guangzhou in October 2005. He said that he had been in Guangzhou on business and that he had known the review applicant's sister since 2004. The visa applicant said that after the review applicant had returned to Australia they had telephoned and written to each other and then in October 2006 they got married. In a separate statement the review applicant said that the visa applicant had known her sister because they worked in the same industry. She confirmed that she and the review applicant had remained in touch after she had returned to Australia and that they were married in October 2006. Both the visa and review applicants provided statements from their respective sisters and other parties in support of the application and they each gave evidence at a Departmental interview. The applicants also gave evidence at the Tribunal hearing and later provided submissions, including statutory declarations from friends of the visa applicant who claimed to have delivered money to Australia for the review applicant on the visa applicant's behalf.

Held: Decision under review affirmed.

The Tribunal accepted that the visa applicant had been introduced to the review applicant by her sister when she visited China in October 2005 and that the applicants were married in Fujian in October 2006. The Tribunal did not accept, however, that the visa applicant and the review applicant had a mutual commitment to a shared life as husband and wife or that they saw their relationship as a long-term one. The Tribunal found that inconsistencies in the applicants' evidence and the differing explanations given by each applicant for these inconsistencies, cast doubts on the veracity of their evidence about the development of the relationship. For instance, the Tribunal noted that the applicants had given inconsistent evidence in relation to the date, nature and location of their wedding banquet and it did not accept that, despite the explanations offered by the applicants, the review applicant would forget matters such as whether there was one table or two at the wedding banquet, or whether it finished around 7.00 pm or around 10.00 pm. The Tribunal also noted that although the visa applicant had denied he had ever previously been in Australia, a record existed of someone from Fujian with his name and date of birth having applied for refugee status in Australia in 1998. The Tribunal did not accept the visa applicant's explanation that his cousin may have used his ID to lodge a protection visa application, as a comparison of the photographs accompanying each application indicated that it was the visa applicant who had applied for refugee status in Australia in 1998. The Tribunal considered that this suggested the visa applicant had wanted to come to Australia for some time and that he saw his marriage to the review applicant as a means to that end rather than having a commitment to a long-term relationship with her. After careful consideration of all of the evidence, including the statements which indicated that the applicants' friends and relatives believed their relationship to be genuine and continuing, the Tribunal gave greater weight to the view it had formed of the credibility of the applicants and their commitment to the relationship, than to such supporting evidence. Accordingly, the

Tribunal found that the relationship was not genuine and continuing and that the applicant did not satisfy cl.309.211 or cl.309.221 of the Regulations.

0904914

17 June 2010, Perth

Mr T Caravella, Member

PARTNER (MIGRANT) (CLASS BC) – SUBCLASS 100 – SPOUSE – CL.100.221(4) – GENUINE RELATIONSHIP – CHILD OF THE RELATIONSHIP – A delegate of the Minister refused to grant the applicant a Spouse visa on the basis that a Departmental visit to the applicant's home had raised doubts regarding whether the parties shared a bedroom. At the Tribunal hearing, the applicant claimed that his wife (the sponsor), had left him and she was living with her mother in a rented house. He claimed that this was because she needed a baby-sitter, and that he worked very long hours at her father's farm which meant she was left alone with the children all day which she found boring. The visa applicant claimed that he married the sponsor in 2002 and they began trying to have a baby straight away. He said they were unhappy when they couldn't have children and that this led to their separation in 2006. The couple began living together again in 2008 however, during their separation, the sponsor had lived with another man and she had two children to him. The visa applicant advised that he and the sponsor now had a daughter together, and that daughter's surname was the same as the other two children's as they wanted her to have the same surname as his wife's other two children. The visa applicant claimed that his long working hours meant that he did not have a lot of time to spend with his wife. He advised the Tribunal that he would cut down his hours from that day on claiming that he could work fewer hours because the season had changed which would allow him to spend more time at home. The applicant claimed that the parties live in the sponsor's parent's house and that they share a bedroom with their children. He claimed that at the time when Departmental officers visited their home he, his wife and the two children were all sleeping in the one bed. He claimed he used to leave his things in the spare room next door because he would come home late at night after work having used chemicals at the farm and he did not want to expose the children to them. This was why officers had believed that he and the sponsor didn't share the bedroom. The visa applicant claimed that when Departmental officers visited, he had just finished work and he had not eaten and to make matters worse, there were very low prices for the vegetables they were growing at the time. When asked by the Tribunal to explain why he seemed to be able to recall the situation with prices of produce at that time of the visit by the Department but he could not recall the children's names or dates of birth, the visa applicant repeated that it was late and he was tired at the time of the Department's visit.

Held: Decision under review set aside.

The Tribunal found that the parties appeared to benefit financially from the pooling of the review applicant's financial resources into the family farm as they were provided with accommodation and other household needs in the sponsor's family home. The Tribunal did not regard the sponsor's claim that she had been unhappy over the insufficiency of money as fatal to the visa application as such disputes over financial stringency were not uncommon between couples. Although the Tribunal found the financial aspects of the relationship appeared not to support a spousal relationship, it placed less weight on this aspect of the relationship recognising the cultural elements that may have been in operation in this case. The Tribunal considered the Department's findings over whether the parties shared a bedroom and it considered it more likely than not that the visa applicant did occupy the other room however, the Tribunal found that this was not determinative of this review. The Tribunal was not convinced by the sponsor's father's evidence at the hearing that the relationship between the review applicant and the sponsor was a genuine spousal relationship and it concluded that, in all likelihood, he was influenced by the review applicant's key role as a worker on his farm. The Tribunal therefore gave less weight to the sponsor's father's evidence. The Tribunal found that the parties failed to provide evidence to satisfy the Tribunal that they were in a committed relationship or that they drew a degree of companionship or emotional support that would be expected in a genuine spousal relationship. In this case, the Tribunal was not satisfied that the period of cohabitation was strong evidence of a genuine and continuing relationship. For these reasons, the Tribunal found that the review applicant and the sponsor did not have a genuine mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal characterised the nature of their relationship to be more akin to a labour arrangement between the visa applicant and the sponsor's father. Therefore, the Tribunal was not satisfied that the applicant and sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship was genuine and continuing.

However, the Tribunal was satisfied that the visa applicant was the biological father of a child with the sponsor and that he had custody or joint custody, or access to, the child. Therefore, the Tribunal found that the applicant satisfied cl.100.221(4)(c)(ii) which required that he continued to meet the spouse relationship requirement except that the relationship between the applicant and the sponsoring partner had ceased, and the applicant had custody or joint custody of, or access to at least 1 child. The Tribunal therefore found that the applicant satisfied cl.100.221(4)(c)(ii) of the Regulations and the application for a Partner (Migrant) (Class BC) visa was remitted for reconsideration.

Student visas

1000912

4 June 2010, Sydney

Mr T Delofski, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – HIGHER EDUCATION SECTOR – CANCELLATION – S.116(1)(b)– CONDITION 8202(3)(b) – EXCEPTIONAL CIRCUMSTANCES – A

A delegate of the Minister cancelled the applicant's Subclass 572 visa under s.116(1)(b) on the basis that the applicant had not complied with condition 8202 in relation to attendance. The applicant claimed that his former college advised him by letter that his "overall attendance for this term is 0.00%". In an email to the applicant, the college further advised him that he was released from his Certificate III Hospitality course as requested by him, and his remaining semesters at the college had been cancelled. The Letter of Release verified that the college released the applicant from the Certificate III in Hospitality and Diploma of Hospitality Management before the start of the third semester. Two months later, the college sent the applicant a letter which certified him as not having achieved satisfactory attendance for Certificate III in Hospitality, and advised that he had failed to meet his course requirements by breaching condition 8202. The applicant claimed that up until his departure from the college, he believed his attendance was satisfactory. He claimed his lecturer had been abusive and vindictive towards him and other (mainly Indian) students, including marking them absent for the day if they were 5 or 10 minutes late. He claimed the students' raised their concerns with a Director of the College who discussed them with the lecturer. The applicant claimed the lecturer's response was to vindictively mark the students as absent simply for raising their concerns with the Director. The applicant claimed he left that college at the end of the second semester and continued the same course with a new college until his visa was cancelled. He claimed his attendance and course progress at the new college had been satisfactory.

Held: Decision under review set aside.

The Tribunal noted that the college did not specify the period when the applicant was alleged not to have achieved satisfactory attendance, and concluded that this had occurred during the third semester as he had discontinued his course at the end of the second semester. The Tribunal further found that as the college had formally advised the applicant that it had agreed to release him prior to the start of his third semester, it was not surprising that his attendance for that semester was 0.00%. The Tribunal also found it understandable that the applicant thought he had no obligation to attend his course for the third semester. The Tribunal found the college's advice to the applicant explained his non-attendance from the start of the third semester and constituted exceptional circumstances beyond his control. The Tribunal was therefore not satisfied that the applicant's non-compliance with condition 8202 was not due to exceptional circumstances beyond his control. The Tribunal was satisfied the applicant had not complied with condition 8202 and that the ground for cancellation under s.116(1)(b) existed. However, the Tribunal was not satisfied that the non-compliance was not due to exceptional circumstances beyond the visa holder's control and therefore, it found that circumstances for the mandatory cancellation of the visa did not exist. Although it was not mandatory, the Tribunal found that a ground for cancellation did exist which did require it to consider whether the power to cancel the visa should be exercised. The Tribunal had regard to the applicant's evidence as to why the visa should not be cancelled in accordance with policy guidelines. The Tribunal concluded that the visa should not be cancelled. The Tribunal attached most weight to the College's misleading, and in the Tribunal's view, improper behaviour towards the applicant, notably when it advised him that he was released from his course from the start of the third semester and then certified that his attendance was unsatisfactory during the third semester. The Tribunal also noted that evidence from the applicant and his representative suggested the college's treatment of the applicant (and other students) while he was undertaking his course left something to be desired. Accordingly, the Tribunal was satisfied

such circumstances were not prescribed circumstances in which the visa must be cancelled in accordance with s116(3) of the Regulations and the Tribunal set aside the decision under review and substituted a decision not to cancel the applicant's Subclass 573 Higher Education Sector visa.

1001921

2 June 2010, Melbourne

Ms N Burns, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – VOCATIONAL EDUCATION AND TRAINING SECTOR – CANCELLATION – S116(1)(b) – CONDITION 8202 – EXCEPTIONAL CIRCUMSTANCES – A delegate of the Minister cancelled the applicant's Subclass 572 visa on the basis that he was not enrolled in a registered course and his non-compliance with condition 8202 of his student visa was not due to exceptional circumstances beyond his control. The second-named applicant's visa (the applicant's partner) was cancelled as a 'consequential cancellation' under s.140 of the Act, being a member of the family unit of the person whose visa was cancelled. On 3 March 2010, the Department sent the applicant a notice of intention to consider cancellation of his student visa stating that the applicant had not been enrolled and studying in a CRICOS registered course since August 2009. The applicant confirmed that he had withdrawn from his course in July 2009 and had not studied since. His partner however, had enrolled to study in July 2009, and she had been studying since then. The applicant claimed that he spoke with his education provider and transferred the money from his course to his partner's. They then considered that she was the main applicant, and the applicant to be the 'dependent'. He confirmed that they had not spoken to DIAC about this situation. The applicant stated that it was a genuine mistake caused by a lack of knowledge and that they never intended to mislead the Department and that they had acted in good faith. The delegate did not, however, consider that this constituted exceptional circumstances beyond the visa holder's control.

The Tribunal confirmed with the applicant at hearing that he had received the letter from DIAC informing him that his student visa was granted on 12 June 2009, in which the conditions of the student visa for himself, as the primary visa applicant, and his partner, as the secondary visa applicant, were clearly laid out. The applicant claimed that they never received that letter and they found out that they were successful when his partner contacted the Department in June 2009 when she was going overseas. She reiterated that they had not received this letter however; she confirmed that they were living at the address written on the letter. The applicant advised the Tribunal that since he had withdrawn from his course in June 2009, he had been working and he had travelled to Brazil for two months. When asked if he intended to study again (if his visa were to be reinstated), the applicant claimed that he needed to improve his English further however, they had decided that his partner was the one to continue studying because she is more qualified and her English was better. The second-named applicant claimed that because they were on a partner visa, their understanding was that one of them had to be studying.

Held: Decision under review affirmed.

The Tribunal found that the applicant had not complied with condition 8202 of his visa as he was not enrolled in a registered course from 6 August 2009. The Tribunal then considered whether exceptional circumstances existed; whether they were beyond the visa holder's control; and whether the non-compliance was due to those exceptional circumstances. The Tribunal found the applicants to be credible witnesses at hearing. It accepted that their mistake in this regard was genuine. However the Tribunal found that, whilst education providers had some responsibility in informing applicants about their responsibilities, it was also incumbent on students to be aware of the conditions of their student visas. Whilst a mistake of this nature may be understandable, the Tribunal did not consider that it amounted to exceptional circumstances beyond the applicant's control. The Tribunal was therefore satisfied that the education provider had fulfilled its responsibilities of reporting the applicant's change of status as required under the National Code. Accordingly, the Tribunal affirmed the decision to cancel the first-named applicant's Subclass 572 Vocational Education and Training Sector visa.

1002799
6 July 2010, Sydney
Ms K Raif, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 560 – CL.560.222 – NOT ENROLLED IN A REGISTERED COURSE – The applicant was refused a student visa in 1997 as he had failed to provide evidence of his enrolment in a registered course. He was subsequently re-notified of that decision and sought review in 2008 and the matter was subsequently remitted by the Tribunal after the applicant provided evidence of his enrolment in an English course. The applicant's enrolment was subsequently cancelled as he did not commence the course and he had no further contact with the college. The delegate again refused to grant the applicant this visa as they were not satisfied that he met the requirement of cl.560.222. The applicant's representative advised the Tribunal that the applicant had believed he could not commence his course until he was granted a student visa and he was not informed by his college that the enrolment was being cancelled, nor was he given any warnings by the college. The representative stated that the applicant had obtained a further Confirmation of Enrolment (CoE), and the applicant provided a CoE for a course which was due to commence in July 2010. The applicant claimed that he completed Year 11 in 1997 before his family's business had failed. He claimed that he could not extend his visa and, at the time, he did not know what to do as he did not want to return home and undertake national service, so he commenced working in Australia. The applicant claimed that he had not studied since 1997 as he could not pay the tuition fees and he did not realise that he could study before his student visa was granted. The applicant claimed that he had about \$5000, that he would be living with his sister rent free, and that she would give him money for tuition fees so he would not need to work. The representative submitted that there were humanitarian issues involved as the applicant had spent all of his adult life in Australia and would have been eligible for a close ties visa if this type of visa were still available. He claimed that the applicant would also have a problem in Taiwan as he had avoided national service. The applicant subsequently provided evidence relating to his sister's willingness and ability to provide him with financial support.

Held: Decision under review affirmed.

The Tribunal noted that the applicant's tuition fees were likely to be substantial, and having regard to the limited savings held by him and his sister, it was not satisfied on the evidence that the applicant had the financial ability to undertake the course without contravening the visa condition relating to work. The Tribunal found that the applicant had engaged in employment whilst taking no steps to ensure that he was allowed to do so, which showed a disregard and indifference to his obligations to comply with the visa conditions, and subsequently it was not satisfied that the applicant intended to comply with these conditions in the future. The Tribunal was of the view that the applicant's failure to undertake studies in the past 13 years reflected his lack of intention to study, and noted that the applicant had informed the Tribunal that he was granted a Bridging visa on the basis of his intention to undertake a course of study and to enable him to gather the tuition fees, which should then have made it obvious to the applicant that undertaking a course of studies was relevant to the grant of a Student visa. The Tribunal did not accept that the applicant did not realise that he was required to start his course before the visa was granted given that the applicant had been represented by an experienced migration agent who would have informed him about his capacity to commence a course of study. The fact that the applicant informed the Tribunal that he did not seek advice from his agent indicated that the applicant had no intention of engaging in a course of study. Having considered the applicant's financial ability to undertake the course without contravening work conditions, the applicant's comprehension of English, his intention to comply with visa conditions, and other relevant matters, the Tribunal was not satisfied that the applicant was a genuine applicant for entry and stay as a student. Accordingly, the Tribunal found that the applicant did not satisfy the requirements for a Student (Subclass 560) visa.

Other visas

0900323

4 June 2010, Sydney

Ms A Cranston, Member

RETURN (RESIDENCE) (CLASS BB) – SUBCLASS 155 – FIVE YEAR RESIDENT RETURN – CL.155.211 – FORMER AUSTRALIAN PERMANENT RESIDENT – A delegate of the Minister refused to grant the applicant a resident return visa as the delegate was not satisfied that the applicant was a former Australian permanent resident. The applicant claimed she had lived in Australia for 28 years and that she had never worked or lived as a resident in any other country since she was 21. The applicant's adviser provided a submission to the Department which explained that, despite having lived in Australia as a New Zealand citizen for some twenty years from 1979 to 1999 and from 2004 until the present, the applicant was not entitled to make an application for Australian Citizenship because she was absent from Australia on 26 February 2001 and was not, therefore, a permanent resident as defined by s.5 of the Australian Citizenship Act 2007. The applicant's adviser also provided a summary of the applicant's immigration history and submitted that the applicant should be eligible for a Subclass 155 visa as she met clause 155.211(1)(c) because she was a former Australian permanent resident. The adviser argued that the term 'former Australian permanent resident' should be read to include any person who can demonstrate that he or she was an Australian permanent resident at any time, whether or not the person actually held a permanent visa under the law as it was at that time. The advisor contended that the applicant was a permanent resident under the law as it was during the period 1979 to 1993 and so was a former Australia permanent resident as that term should be interpreted. He contended that the term 'former Australian permanent resident' cannot simply mean a person who was, at some time in the past, an Australian permanent resident as defined in regulation 1.03.

Held: Decision under review affirmed.

The Tribunal did not agree with the adviser's arguments and found that 'former permanent resident' did not mean a person who, at some time in the past, was an Australian permanent resident and held a permanent visa. Further, the Tribunal did not accept the adviser's submission that the applicant should be treated as having held such a permanent visa simply because she had permission to remain in Australia indefinitely during the period 1979 to 1993 when, in fact, she never had a permanent visa issued to her. Accordingly, although the Tribunal accepted that the applicant may have been an Australian permanent resident for the purposes of the Act as it was from December 1989 to February 1993, and she may have also been treated as an Australian permanent resident for the purposes of the Act as at October 1984 to December 1989, it found that the applicant was not given a permanent visa when they were first introduced on 1 September 1994. Therefore, she had never held a permanent visa and thus did not meet the definition of 'former Australian permanent resident' at the time of application. Accordingly, the Tribunal found that as the applicant had never held a permanent visa, she did not meet cl.155.211 of the Regulations. Nonetheless, the Tribunal expressed sympathy for the applicant and noted that, as Australia had been her home and residence since 1979, this may be a case where the application of relevant legislation has led to an unfair or unreasonable result and where the Minister may wish to exercise his discretion. Accordingly, although the Tribunal found that the applicant did not satisfy cl.115.211 for the grant of a Class BB visa, the matter was referred to the Department for the Minister's attention.

1002644

3 June 2010, Sydney

Ms K Raif, Member

TOURIST (CLASS TR) – SUBCLASS 676 – TOURIST – CL.676.211 – GENUINE VISIT – A delegate of the Minister refused to grant the applicant a Subclass 676 visa on the basis that he was not satisfied the applicant's expressed intention to only visit Australia was genuine. The visa applicant claimed she was a widow and that she had funds to support herself financially while in Australia along with her daughter and son-in-law's support. The visa applicant's son in Sri Lanka claimed that the visa applicant lived with him and his wife and she cared for their daughter as they both worked. He claimed she was very religious, attending temple regularly and she participated in religious activities, charity work and she was involved with the Preschool Education Council. The visa applicant claimed she wanted to spend time with her daughter and

her family in Australia and that she was very attached to her granddaughter, who often asked when she could visit. She claimed she had been a tutor for 40 years, a lifelong member of a school council and a teachers' adviser. She also claimed she received a pension and rent from a house and that she was happy in her native place where she wished to spend the latter part of her life.

The review applicant claimed her mother wanted to visit her family in Australia, to be involved in activities and to get acquainted with the culture and visit tourist destinations. She claimed her mother wanted to see how studies were conducted in Australia and to be here for her granddaughter's birthday. She claimed her mother had never traveled to Australia nor had an opportunity to see other family members and grandchildren. The review applicant claimed that the visa applicant could have migrated under a widow visa but she did not. She claimed the visa applicant was not affected by the political situation in Sri Lanka, that she had not been subject to persecution, threats or intimidation, and she was never approached by armed groups, nor had she been arrested or adversely affected at any time. The review applicant further claimed her mother lived peacefully, and she had three siblings who she sees each day. She claimed there was no need for her to live in Australia and that, as her brother wished to visit Australia in the future, the visa applicant did not want to jeopardize any future visits.

Held: Decision under review set aside.

The Tribunal accepted the visa applicant had substantial family ties that may encourage her to return to Sri Lanka however, the Tribunal also considered her family ties to Australia to be equally significant. The Tribunal's view was that the visa applicant's links with Australia, including with her granddaughter, could equally encourage her to remain. The Tribunal accepted the visa applicant's assets may encourage her to return and although it did consider her property to be transferable, the review applicant was uncertain whether her mother could access her pension from Australia. The Tribunal acknowledged the review applicant's evidence that her mother was elderly and that she may not be able to engage in activities she enjoyed whilst in Australia. The Tribunal also acknowledged the visa applicant may not wish, at her age, to change her lifestyle, her surroundings and her country of residence since she has never previously sought to travel to other countries where her children reside. The Tribunal's view was that such matters may constitute a very significant incentive for her to return to her country. The Tribunal accepted the primary purpose of the visit was to visit her family and for tourism. The Tribunal found the duration of her proposed visit was consistent with the purpose of the visit and also with her commitments in Sri Lanka. The Tribunal accepted the political situation was less likely to affect the visa applicant and while the Tribunal had some concerns about the effect of the situation in Sri Lanka, such concerns did not override other considerations. The Tribunal was satisfied the visa applicant's expressed intention only to visit was genuine and placed significant weight on the visa applicant's social and familial commitment in Sri Lanka, as well as property ownership. Accordingly, the Tribunal found that the visa applicant met the requirements of cl.676.211 of the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

Cambodia

1002606

16 June 2010, Melbourne

Ms M Urquhart, Member

CAMBODIA – PARTICULAR SOCIAL GROUP – CAMBODIAN WOMEN WHO ARE SECOND WIVES – DOMESTIC VIOLENCE

– The applicant claimed to fear persecution and domestic violence from her former partner (her 'husband'), and his first wife. She claimed that in Cambodia, if you live together, you are called "husband and wife". Although they were not married, she was known as "a second wife". She claimed that her husband was a powerful man who lured her into a relationship; he imprisoned her and used her as a sex slave. She claimed that she received threats from his first wife and she was fearful of having acid thrown in her face or being killed so she travelled to Australia to escape danger. The applicant claimed she is fearful that she would be harmed or possibly killed should she return to Cambodia. She also claimed that as her husband was a powerful man in Cambodia, the authorities were unwilling and/or unable to protect her. The applicant claimed she now lived with her defacto partner in Australia and she was expecting their child.

Held: Decision under review set aside.

The Tribunal found that the applicant's 'husband', had abused her on a number of occasions and that the applicant was the victim of domestic violence at the hands of her 'husband' and that the abuse she endured included sexual abuse which, on one such occasion, happened at gunpoint. The Tribunal also accepted that physical violence; slaps, hits and beatings had been inflicted upon her by her husband. The Tribunal accepted that in the relationship the applicant entered into as a second wife, she was deprived of freedom and liberty. The Tribunal accepted that the applicant was also threatened by her husband's first wife and that she was warned to cease her relationship with her husband or she would be killed. The Tribunal accepted that as the violence continued and as she was threatened by the jealous first wife, the applicant asked her husband to stay away from her however he would not do this. The Tribunal accepted that the applicant's husband then became concerned for her safety because of threats to her from his first wife and that for this reason, he organised her trip to Australia. The Tribunal also accepted that his first wife had threatened to throw acid at the applicant and to otherwise harm her, because she did not wish to share her husband with the applicant. Based on country information, the Tribunal accepted that second wives were at risk from jealous first wives and that a form of harm which occurred not infrequently was 'acid throwing'. The Tribunal noted that country information indicated that acid being thrown was not categorised as a weapon under Cambodian law. Further, country information indicated that female victims of acid attacks were often viewed in their communities as being at fault and in Cambodian society women were traditionally considered as inferior to men. The Tribunal also accepted country information indicating that women in Cambodia, including second wives, experienced some discrimination. The Tribunal noted a Human Rights Watch report stating that violence against women goes largely unpunished. Accordingly, the Tribunal found that there was a real chance that the applicant would be denied adequate state protection to the expected international standard, from her "husband" and/or his first wife if she were to return to Cambodia, now or in the reasonably foreseeable future. And, it accepted the applicant's claimed reason for not contacting the police was that her husband was a powerful man and she believed the police would not assist her. Additionally, in view of the applicant's pregnancy, her lack of financial capital and support from family, the Tribunal found that it would not be reasonable for the applicant to relocate within Cambodia. Accordingly, the Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention as it found there was a real chance that the applicant would be at risk of serious harm at the hands of her 'husband' and his first wife, for reasons of her membership of a particular social group of "Cambodian women who are second wives", if she were to return to Cambodia now or in the reasonably foreseeable future.

China

1000150

8 June 2010, Sydney

Ms M Foster, Member

CHINA – RELIGION – UNDERGROUND CATHOLIC CHURCH – CREDIBILITY – The applicant claimed that his family had been “heretics” for several generations and that his father was the President of their village temple. He claimed that he was invited by a group of Catholics to attend a meeting at their church where they explained Catholicism to him, that he began attending church and was subsequently baptised. He claimed that his boss at work was an Executive Manager of the church, and that when he learned of the applicant’s faith he was asked to see a cancer patient. They prayed, sprinkled holy water on the patient, and he assisted at a Mass held for this person. The applicant claimed that over one hundred police forced them to stop the Mass, and that the police arrested, detained and beat him and a number of others. He claimed that he was released only after his mother paid a fine. Some time later he claimed he befriended a group of workers who gambled, drank and quarrelled. He claimed that he preached the Gospel to them, taught them to sing holy songs and showed them Christian books. He claimed that the police found these books and that the workers told them about the applicant; he was subpoenaed, held for three days and mistreated. The applicant stated that after his release, he continued to spread the Gospel and bring various people to the church. Although the police became aware of this, they did not arrest him as he had a friend who worked in the police station. He claimed that he later obtained a student visa to travel to Australia, and that some time after he had arrived, his friend at the station retired, and the “new police” reviewed his file and subsequently issued a subpoena for his return. The applicant claimed that if he returned to China he would be arrested and persecuted. He provided the Tribunal with a certified translated copy of the subpoena and a copy of his Baptism Certificate. A witness also gave evidence that he knew the applicant and had worshipped with him in China.

Held: Decision under review set aside.

The Tribunal found that the applicant had demonstrated a knowledge of Catholicism which led it to accept that he was a Catholic. However, inconsistencies in his evidence led the Tribunal to have concerns, for example, the number of people who had attended the Mass varied significantly between his written statement and his interview with the delegate. The Tribunal found that the applicant had submitted fake documents to the Tribunal, and noted that the Baptism Certificate stated that the applicant was baptised by a priest at his church and bore its seal, yet the applicant had given evidence that he was baptised at his neighbour’s home. The Tribunal also found it difficult to believe that the applicant would not have applied for protection on arrival in Australia rather than after his student visa had expired. The Tribunal did not accept that the applicant attended mass for a sick man or that he had preached to a group of workers, or any other people, about Catholicism. Nor did the Tribunal accept that the applicant was arrested, detained or mistreated by Chinese authorities, or that he had been subpoenaed by the Fuqing PSB. Whilst the Tribunal found that the applicant’s credibility had been undermined by him being untruthful about these matters and that he had submitted fake documents, it found that it could not exclude the possibility that the applicant had practised in an underground Catholic Church. The Tribunal noted that the delegate had found that the witness was a Catholic who had participated in religious activities in the underground Catholic Church in China for many years, which included preaching in the applicant’s area, and that this finding was supported by extensive documentary, photographic and audiovisual evidence which gave weight to his claims. Having accepted that the applicant was a Catholic who attended gatherings and mass at an underground Catholic Church in China, the Tribunal accepted the applicant’s testimony, which was corroborated by the witness, that he had been regularly attending church in Australia, and it was satisfied that he had done so other than for the purpose of strengthening his claims to be a refugee. The Tribunal found that if the applicant returned to China, he would wish to worship in such a church in the future. It noted that whilst independent evidence indicated a relatively high degree of religious tolerance in Fujian province, it also indicated that the attitude of the authorities varied at the local level to a great extent, and that Catholics who worshipped in the underground Catholic Church had been arrested and detained for doing so. The Tribunal therefore found that whilst the chance that the applicant would be harmed for practising in the underground Catholic Church in China was not high, there was a real chance that he would be subjected to serious harm amounting to persecution in the reasonably foreseeable future if he were to do so. Given these findings, the Tribunal

found that the applicant had a well-founded fear of persecution for reason of his religion if he were to return to China.

1000864

25 June 2010, Melbourne

Ms D Jordan, Member

CHINA – PARTICULAR SOCIAL GROUP – FALUN GONG PRACTITIONERS – The applicant claimed to be a Falun Gong practitioner who had suffered persecution in China. She claimed she ran her own business but when she began to have headaches, she was told to change her lifestyle to reduce her stress levels so she began practicing Falun Gong. She claimed her health started to improve, she became more relaxed and the frequency of her headaches decreased. She claimed she practiced at a park with others at 6am every day and that these two years were the most wonderful years of her life. The applicant claimed she was detained by local police twice for practicing Falun Gong and that she was treated inhumanely during these times. She was made to watch anti-Falun Gong propaganda and was asked to write “confession and repentance letters”. When she refused to write anything, her hair was pulled violently and her head was struck against a wall. She claimed that she was questioned “non-stop, day and night” and not allowed to sleep during that time. She claimed she was released after about three weeks when her mother and brother paid a large fine and they agreed to sign a guarantee that the applicant would not be involved in Falun Gong in the future. The applicant claimed that when she was detained the second time, she was again tortured and beaten. When she refused to sign a statement that she would no longer practice Falun Gong, her hair was pulled and someone stood on her back. She was eventually released but could not open her business again. She left her home town but could not find work and could not openly practice Falun Gong. She claimed her brother suggested that she go overseas so she obtained a working visa and went to Singapore where she practiced Falun Gong in public. She claimed Singapore’s government was close to the Chinese government and while it did not persecute Falun Gong practitioners, it did not support Falun Gong either. She understood that it was not a place in which she could stay forever. The applicant claimed she wanted to live in Australia until the ban on Falun Gong in China was removed.

Held: Decision under review set aside.

The Tribunal found that the applicant was a Falun Gong practitioner as she provided evidence about the teachings of Falun Gong and also demonstrated exercises. The Tribunal accepted her claims that she began practising Falun Gong in China in 1997 and that she practiced in secret after it was banned in China in 1999. The Tribunal accepted that the applicant was detained twice for her involvement with Falun Gong and that she was mistreated during both periods of detention. The Tribunal accepted that, after she was released from detention the second time, she stayed away from her home for a period of about 18 months because she was afraid she would be harassed by the police. The Tribunal accepted that she had difficulty supporting herself so she travelled to Singapore on a working visa however this did not give her the right to remain in Singapore indefinitely or to return to Singapore once she departed. The Tribunal noted that country information supported the applicant’s submission that Singapore would not have granted her asylum on the basis of religious persecution in China. Based on the evidence, the Tribunal accepted that if the applicant were to return to China and continued to practise and promote Falun Gong, there was a real chance that she would be persecuted for doing so and that this persecution would amount to serious harm. The Tribunal was satisfied that the applicant’s membership of a particular social group (Falun Gong practitioners) was the essential and significant reason for the persecution which she feared. The Tribunal further considered that this persecution involved systematic and discriminatory conduct, in that it was deliberate or intentional and involved selective harm for a convention reason. Given that the Tribunal accepted that the applicant was a Falun Gong practitioner who had practised in China and Singapore, the Tribunal also accepted that the applicant had engaged in Falun Gong activities in Australia for reasons otherwise than for the purpose of strengthening her claim to be a refugee. The Tribunal was of the view that the applicant could not relocate to another part of China in order to avoid persecution because Falun Gong was banned in all of China and was considered an “evil cult”. As the authorities had banned the religion and the authorities had subjected the applicant to persecution because of her practice of Falun Gong, the Tribunal found that the applicant would be unable to access protection anywhere in China. For these reasons, the Tribunal found that the applicant had a well-founded fear of persecution, by reason of her membership of a particular social group, if she were to return to China now or in the reasonably foreseeable future. Therefore, the Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

1002787

3 June 2010, Sydney

Ms A McDonald, Deputy Principal Member

CHINA – PARTICULAR SOCIAL GROUP – FALUN GONG PRACTITIONERS – The applicant claimed that he began practising Falun Gong two years ago, after he had become curious following the arrest of his father for distributing propaganda material about Falun Gong. He claimed that his father was a Falun Gong practitioner who had been arrested on three occasions, firstly a number of years ago, the second time within the last year and the third time just after the applicant departed for Australia. The applicant claimed that his classmates looked down on him and isolated him following his father's arrest for being a Falun Gong practitioner and that this affected his study. He claimed that the police visited their house once a week and that his mother was concerned about him and arranged for him to leave China. He claimed that just after he had left for Australia, his mother told him the police were angry he had left the country and that they had smashed furniture in their house and threatened they would give him a "big lesson" on his return. The applicant also provided photographs of himself in Australia, showing him at a Falun Gong celebration, handing out pamphlets and holding a banner at a demonstration.

Held: Decision under review affirmed.

The Tribunal found the applicant's knowledge of Falun Gong to be limited and that it was not consistent with his claimed period of practice. It noted that whilst the applicant was aware that there were five Falun Gong exercises, he could only name four of them, and he declined to demonstrate any of the exercises on the basis that he was nervous. Whilst the Tribunal accepted that it might be difficult in a hearing situation to demonstrate the exercises, it expected a genuine Falun Gong practitioner who claimed to practise publicly every week and to practise on most days would be proficient in all five Falun Gong exercises. In the Tribunal's opinion, it found the applicant's overall knowledge of Falun Gong was limited for someone who claimed to have practised for over two years. The Tribunal stated that it would expect a Falun Gong practitioner with the applicant's claimed period of practice to be able to tell it about his beliefs and to provide more and correct detail about the history, principles and meaning of Falun Gong, in particular knowing when it started, knowing the names of the exercises, being able to practise them, and to display a detailed understanding of the practice of Falun Gong. The Tribunal also found that the applicant did not give a truthful account of his or his family's past experiences in China, and that there were significant inconsistencies in his evidence in relation to his father's detention. In light of the serious deficiencies in the applicant's evidence, the Tribunal did not accept that either the applicant or his father was a Falun Gong practitioner in China. The Tribunal also did not accept that the applicant's father was arrested and detained in China for practising Falun Gong or for distributing propaganda material about Falun Gong, or for secretly attending Falun Gong study classes. It therefore followed that the Tribunal did not accept that the police visited their house once a week or that they smashed furniture in the home and threatened they would give the applicant a "big lesson" on his return. The Tribunal also considered the applicant's evidence as to his practise of Falun Gong in Australia, and found that, although the applicant claimed to have been practising Falun Gong two to three times a week, the evidence provided in support of his claims was limited to four photographs of the applicant. Accordingly, the Tribunal did not accept that the applicant practised publicly or attended the activities depicted in the photos or the performance other than for the purposes of strengthening his claim to be a refugee. After considering the evidence, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason if he were to return to China.

East Timor

1003698

2 June 2010, Sydney

Mr D O'Brien, Principal Member

EAST TIMOR/PORTUGAL – INVALID APPLICATION – NON-CITIZEN WITH ACCESS TO PROTECTION FROM A THIRD COUNTRY – In her protection visa application the first named applicant indicated that she and her children were citizens of both East Timor and Portugal. Her application was accompanied by certified copies of her current East Timorese and Portuguese passport pages. Evidence of

the secondary visa applicants' dual nationality was also provided. The applicant essentially claimed that she did not wish to return to East Timor as she feared for the safety and well-being of her children, one of whom suffers from a chronic medical condition. She claimed that her children would be targeted for abuse should they return to East Timor, as her husband was an Indonesian national who left East Timor in 1999 and therefore, he was suspected of militia activities. She further claimed that she would be scared to relocate to Portugal as she would have no support network and her children would not have the language skills to successfully adapt. The applicants' migration agent notified the Department that her client wished her claims to be assessed on the written application alone and the delegate refused the visa application on the basis that the applicants were not persons to whom Australia had protection obligations under the Refugees Convention because they did not have a well-founded fear of persecution in Portugal.

Held: Decision under review set aside and a decision was substituted that the application was not valid.

The Tribunal found, based on the evidence before it, that the applicants had both East Timorese and Portuguese nationality. The Tribunal referred to Subdivision AK of the Act which sets out conditions for applicants in such circumstances and precludes a person who holds dual nationality from making an application unless the Minister has exercised his discretion pursuant to s.91Q to allow the person to apply. The Tribunal found that the threshold question, therefore, was whether the application that was lodged with the Department was a valid application for the purposes of the Act. The Tribunal confirmed with the Department that an assessment under s.91Q had not been undertaken in this case. The Tribunal further noted that Departmental databases did not contain any records of the applicants seeking Ministerial discretion to lodge their protection visa applications or any written notice that the relevant restrictions did not apply to the applicants. As there had been no exercise of the Minister's discretion under s.91Q, the Tribunal found that the visa application was not valid and could not be considered. The Tribunal also noted that a positive exercise of the Minister's discretion in such matters must occur prior to the lodgement of any protection visa application. The Tribunal noted that, although the delegate had purported to make a decision to refuse to grant the first named applicant a protection visa, it appeared that the delegate had overlooked certain requirements of Subdivision AK as they were not addressed in the decision record. The Tribunal found that the applicants' protection visa application was not valid and therefore the Tribunal had no power to consider it. Accordingly, the Tribunal set aside the delegate's decision refusing to grant a protection visa and substituted a decision that the protection visa application was not valid and could not be considered.

Ghana

1002062

10 June 2010, Sydney

Ms J Marquard, Member

GHANA – RELIGION – CHRISTIANITY – KONTIHENE – WORSHIP OF FETISH GODS – The applicant claimed to be a member of the Brong ethnic group and that he was a Christian. He claimed that his family, along with four others, rotated the position of 'Kontihene' within his village, the Kontihene being an important chief, second only to the 'Omanhene' (paramount chief). He stated that the Kontihene was responsible for various traditional duties within the community, such as pouring libations (liquid offerings) to the ancestors and settling disputes in the traditional court. The applicant claimed that amongst the five families, the first son of each family became the Kontihene unless a son was left-handed, in which case the stool passed to the second son, and if there were no son, the family was passed over. He also claimed that the stool stayed in the family until the holder died, when it was passed to the next family. He claimed that the Kontihene of his village died and the stool became vacant, and as tradition demanded, it was his turn to occupy the position. He stated that he went to the village to meet the elders and that he immediately accepted the role as it was a sign of respect and an honour for his family. He claimed that one of the elders performed some initiation rites at the shrine; pouring powder and oil on him and chanting to the gods. After the initiation he was told that from that day he was to stop going to church as his duty was to devote himself entirely to the worship of the gods. The applicant claimed that he told the elder that he had been a Christian his whole life and the elder told him that this was no longer acceptable. He claimed that despite the protestations of his family, the elders refused to allow him to continue with his Christianity. He went to the capital and started his business but a week later, he was visited by representatives of the village who demanded he return or he would be killed. When he resisted, he was beaten with sticks and lost consciousness. He woke up in hospital and claimed that when he was discharged several days later, he went

to the police station to make a report but they said that it was a family and tribal matter and that they could not help him. The applicant claimed that he ran away to Accra where he met a businessman who helped him leave the country and get a plane ticket and passport. He claimed that if he returned the elders would have to kill him because according to tradition, they could not appoint another Kontihene while one was alive, and he had already been accepted by the fetish gods during the initiation rites.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible and honest witness who told his story simply and without embellishment. The Tribunal accepted that the applicant was a devoted Christian who had continued to practice his Christianity in Australia, and was persuaded by the fact that he had clearly given careful consideration to the issue of the inherent conflict between traditional laws and Christianity. The Tribunal accepted the applicant's evidence that he was next in line for the Kontihene in his village after considering extensive country information about the traditions of the Akan people, of which the Brong are a part, and given his extensive knowledge of its traditions and the fact that he knew the name of the chief in the village. The Tribunal considered a number of reports which suggested that when a person declined the offer of a stool there were not serious consequences beyond social stigma and banishment from the community, and that forced enstoolment was rare, and punishments included social ostracism or banishment. However, the Tribunal accepted that the applicant's case was distinguishable from the 'banishment' cases where a person had refused the stool, as the applicant had already been accepted by gods that had protected his village for centuries. The Tribunal accepted that the applicant feared harm because he had already taken up the position of Kontihene and been accepted by the gods, and for that reason, the elders could not appoint a different Kontihene until the applicant's death. The Tribunal accepted that when the applicant refused to stop worshipping at church to perform his duties as Kontihene, he was attacked, resulting in hospitalisation, and that were he to return to Ghana there was a real chance that the elders would seek to kill him so that the position of Kontihene could become vacant. The Tribunal accepted that the applicant reported the attack to the police and was told that the police could not help as the assault arose from a stool or kinship matter, and it therefore accepted that there was not adequate and effective state protection available to him. The Tribunal further accepted that in these specific circumstances, the village elders were of the belief that they were unable to appoint a new Kontihene until the death of the appointed Kontihene, the applicant, and that there was a real chance that no matter where the applicant relocated in Ghana, the elders would seek to kill him. Accordingly, the Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

Israel

1001683

23 June 2010, Melbourne

Ms N Burns, Member

ISRAEL – IMPUTED POLITICAL OPINION – CONSCIENTIOUS OBJECTORS – The applicant claimed that he had undertaken compulsory military service, and that he had been forced to serve more than the three years that were required because he had escaped a number of times due to his desire not to serve in the army. He claimed that his best friend had been killed by Arabs about six months into their training, and he was scared that the same thing would happen to him. He claimed that he did not like violence and that he never wanted to go and fight, however, the army would not let him refuse to serve. The applicant claimed that he "ran away" on many occasions for various periods, and that he was imprisoned because of this. He claimed that he was sent a letter asking him to undertake army reserve service in Gaza, and that he only managed to avoid this by claiming that he was taking drugs. He claimed that Israeli men were required to undertake about two months of reserve training per year, and that he had done so from the time he finished his training until he made the drugs claims. As a consequence, the military reported him to the civilian authorities and he lost his driver's license and had to undertake a psychological test. He claimed that he admitted to the psychologist that he had fabricated the claims and that the military had subsequently tried to call him up for service again. The applicant claimed that his brother had served in Gaza and his experience had been 'horrific'. He claimed that he was afraid of the army calling him up to serve again in the event of war given that he was still young, healthy and fit, and that if they did so, he feared he would suffer persecution. The applicant provided a translated letter from the Israeli Defence Force (IDF) to the applicant

dated in 2000 entitled "Declaration of AWOL due to non-reporting to active reserve service", which encouraged the applicant to report for duty to minimise penalties.

Held: Decision under review set aside.

The Tribunal found the applicant to be a credible witness who had given a consistent and plausible explanation of the reasons he did not wish to perform any further military service for Israel, and the consequences of his refusal to do so in the past. Based on the newspaper report of the applicant's friend's murder and letters from the IDF, as well as the applicant's written and oral evidence, the Tribunal accepted that the applicant was a conscientious objector, both in ideology and in practice. It accepted that he ran away from compulsory military service on numerous occasions which resulted in his imprisonment and a lengthening of his compulsory military service by eight months, and that his close friend was kidnapped, tortured and killed. The Tribunal accepted that he lied about taking drugs to avoid having to fight as a reservist in Gaza because he genuinely feared for his life and objected to what was required of military service. The Tribunal considered whether there was a real chance that the applicant, who was 43 years old and had a record of going 'AWOL', would be called up for military service if he were to return to Israel, and noted the independent country information which indicated that reserve military service was mandatory for men such as the applicant until the age of 51, for a period of 39 days a year. The Tribunal also accepted the applicant's assertion that he might be called up for duty if a war broke out given that he was still healthy and fit. The Tribunal considered whether the applicant's opposition to military service had a political or religious basis, or whether conscientious objectors, or a particular class of them, could constitute a particular social group. It found that in this case, the applicant clearly stated at the hearing that his objection to military service was because he did not condone violence and he feared for his own life, and that he had not argued that the reasons for his objection were political. Nonetheless, the Tribunal found that the way the IDF and Israeli government characterised conscientious objection indicated that they viewed it as inherently 'political' and having a 'protest nature' to it. It also took into account the views which the applicant had expressed about his opposition to the Arab-Israeli conflict and his history of deserting and avoiding military service, and found that the applicant's objection to military service could be considered political in this context. The Tribunal was therefore satisfied that the applicant was a conscientious objector for reasons that could easily be imputed as being political, and for these reasons the Tribunal found that if the applicant returned to Israel in the reasonably foreseeable future, there was a real chance that he would face persecution within the meaning of the Convention.

Lebanon

1001089

22 June 2010, Melbourne

Ms J Ellis, Member

LEBANON – RELIGION – BAHAI – IMPLIED POLITICAL BELIEF – The applicant claimed to fear persecution on the grounds of his religion and 'Implied Political Beliefs'. He claimed in a statement submitted with his application for a protection visa that whilst working in Beirut he met a girl who was of the Baha'i faith and entered into a long term relationship with her. He stated that although he was not seriously interested in the Baha'i religion at first, as she preached to him and he got to know other members of her family who were also members of the Baha'i faith, his interest in this religion grew. He said his partner and her family, who were formerly Shi'ite Muslims, had been adherents of the Baha'i faith for over twenty years and that they had practiced their faith covertly because like Sunni Muslims, Shi'ites do not accept Baha'ism. He claimed his family in Lebanon would not accept his conversion as it would bring dishonour to them and they would not hesitate to seriously harm him. He suggested that they would also be very hostile to his partner for taking him away from the Sunni faith. The applicant claimed that the ability of Baha'i to worship remained limited and that there was a growing threat to them from Hizbollah and from Sunni radicalism. He also claimed that the Lebanese authorities would not offer him any protection because they were loath to intervene in religious matters or matters concerning family honour.

Held: Decision under review affirmed.

Having considered all of the evidence before it, the Tribunal did not accept that the applicant had converted to the Baha'i faith or that his family in Lebanon would seek to harm him on his return as he had claimed.

The Tribunal noted that there was very limited evidence available to it in relation to the applicant's claims and that it was not able to question the applicant about his relationship with his Baha'i girlfriend, his family in Lebanon or his involvement and claimed conversion to the Baha'i faith, as he failed to attend the scheduled hearing. The Tribunal accepted that the applicant may have had a relationship with a Baha'i woman and an interest in the Baha'i faith. However, having had regard to the limited evidence before it, the Tribunal did not accept that the applicant's family in Lebanon would seek to inflict serious harm on him if he were to return to Lebanon as a result of his relationship with a Baha'i woman in Lebanon or for the reason of his religion or imputed religion. The Tribunal found that although the applicant had claimed to fear persecution on the Convention grounds of implied political beliefs, there was nothing in his statutory declaration that gave rise to such a claim. Accordingly, the Tribunal found that the applicant did not face a real chance of persecution in Lebanon, either on the ground of religion or imputed religion. Therefore, the Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Iraq

1002091

7 June 2010, Sydney

Ms P Leehy, Member

IRAQ – RELIGION – SUNNI – PARTICULAR SOCIAL GROUP – IRAQI WOMEN – HONOUR KILLINGS – The primary applicant claimed to fear persecution and serious harm as a Sunni and because she would be without male protection if she were to return to Iraq as a single woman with children. The applicant arrived in Australia on a spouse visa and was sponsored by her second husband, from whom she had now separated, and his sponsorship had been withdrawn. Also included in the application were her children from her first marriage. Information on the Department's file indicated that Miss A (the applicant's other child) initially obtained Australian citizenship by descent through the applicant's second husband, but this was revoked when she was found not to be his child. Miss A had not been included in this visa application as, at that time, she was thought to have acquired Australian citizenship. When their relationship ceased, the applicant's husband left Australia and told her family in Iraq about the child who was born outside of their marriage. The applicant claimed that her mother told her not to return to Iraq because of the shame she had brought on her family, and that she had been threatened by her brothers for dishonouring them. The applicant claimed that if she were to return to Iraq she would also be persecuted for being Sunni and because she was a woman without male protection and, as a Sunni, she would be targeted by Shiite militia who controlled southern Iraq. She claimed that the Iraqi authorities could not protect her because the violence there continued.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a Sunni woman who had lived in a Shia-dominated area until she and her children joined her second husband who was working overseas. The Tribunal noted the independent country information indicated that Sunnis were a minority in Iraq and were blamed by the Shia majority for the former regime of Saddam Hussein. In these circumstances, the Tribunal found that it was highly likely that the applicant was harassed by her neighbours as claimed, and that the fact that she did not dress in what was considered an appropriate manner for women was likely to have exacerbated her situation. The Tribunal accepted that the applicant had suffered harassment in Iraq in the past because of her religion as a Sunni, and her membership of a particular social group, namely "Iraqi women". It did not accept that this harassment was sufficiently serious as to amount to persecution in a Convention sense. The Tribunal was satisfied on the evidence before it that "women in Iraq" were cognisable as a particular social group, since women were recognised not only as a distinguishable group in Iraqi society, for whom certain dress and behaviour were prescribed, but they were also recognised in official government institutions such as the Iraqi Ministry of State for Women's Affairs. The applicant claimed that she would be persecuted as a woman in Iraq for reason of her dress and manner as a woman who had lived relatively free of conservative norms outside Iraq. The Tribunal accepted that there was a real chance that the applicant would experience harassment by Islamic extremists because of her dress and demeanour. The Tribunal considered that such harassment may be more serious because the applicant was without protection as a single woman who had been told by her family that, at the very least, they did not wish her to return to Iraq. However, the Tribunal did not accept that any such harassment would be sufficiently serious as to amount to persecution in a Convention sense. Of much greater concern to the Tribunal was the applicant's claim that she was at risk of

serious harm from her family because she had brought dishonour on them by giving birth to a child by a man who was not her husband. The documentary evidence indicated that she had given birth to a child outside her marriage, that she had therefore been in a relationship considered to be "adulterous", and that the applicant's husband was aware that he was not the child's father. The Tribunal accepted that the applicant's family had been made aware of the child's paternity, and that she had been threatened by her family for bringing dishonour on it. The Tribunal found that independent country information indicated that honour killings remained prevalent in Iraq, and that legislation permitted honour considerations to mitigate sentences, giving rise in the Tribunal's view to a climate of near impunity for the perpetrators. On the evidence before it, the Tribunal was satisfied that there was a real chance that the applicant would be subjected to harm, serious enough to amount to persecution, in a Convention sense by family members if she returned to Iraq. The Tribunal noted the independent country information which indicated that police were amongst those responsible for inflicting violence against women and girls, that there had been a rise in the number of honour killings, and that there had been a failure by the authorities to deter Islamic extremists from targeting women thought to deviate from expected codes of dress and behaviour. The Tribunal was satisfied on the evidence before it that state protection would not be available to the applicant against serious harm and that such protection would be withheld for the Convention reason of membership of a particular social group, namely "women in Iraq", or "Iraqi women". Accordingly, the Tribunal was satisfied that the applicant had a well founded fear of persecution in Iraq within the meaning of the Convention.

Malaysia

1000978

18 June 2010, Melbourne

Mr G Haddad, Member

MALAYSIA – PARTICULAR SOCIAL GROUP – HOMOSEXUALS IN MALAYSIA – According to the statement in support of his protection visa application, the applicant, a Malaysian national of Chinese ethnicity, developed a secret homosexual relationship with a fellow businessman in 2005. He claimed that the relationship was not known to anyone as such relationships caused major scandals in his country, particularly if they involve reputable businessmen and professionals. He explained that prior to this relationship he used to have sex with male prostitutes which was illegal in Malaysia. He claimed that when his wife discovered his homosexual relationship she immediately left him and informed her family. He claimed that his wife's family then threatened to inform the police of his homosexual relationship and therefore he could not return to Malaysia as he feared he would be arrested and imprisoned on charges of sodomy. He claimed that even if his wife's family had not carried out their threat to inform the police, he could not return to Malaysia and maintain a homosexual relationship without the risk of being detained or harmed. The applicant gave oral evidence at the Tribunal hearing including evidence about a business he had run in conjunction with his homosexual partner in Malaysia. He also gave evidence in relation to the history of his homosexual relationship and the circumstances under which his wife had followed him to a hotel and discovered him meeting with his homosexual partner. The applicant spoke at hearing about his experiences in Australia in the months since his arrival and the circumstances leading to his application for a protection visa. The applicant's migration agent subsequently provided the Tribunal with a submission which contended that although certain aspects of the applicant's claims may have come across to the Tribunal as being implausible or inconsistent, this was largely due to 'cultural sensitivities and inhibitions'. The agent asked the Tribunal to consider the applicant's claims in light of his cultural background as a Malaysian/Chinese person for whom sex remained a deeply private topic.

Held: Decision under review affirmed.

The Tribunal doubted the credibility of the applicant's oral evidence and did not accept that the applicant was a homosexual man or that the applicant was perceived to be a homosexual man in Malaysia. The Tribunal found the applicant's oral evidence relating to his business to be inconsistent and, in some respects, difficult to accept as credible. Similarly, the Tribunal did not accept the applicant's account of the events at the hotel where the applicant's wife discovered him with another man, finding the entire account to be implausible and lacking in credibility. The Tribunal referred to the implausibility of the applicant having failed to detect his wife following him for two hours on the way to the hotel, and his account of the events which then occurred. The Tribunal also noted that the applicant had indicated he intended to keep secret his

homosexuality in Australia as he “wanted a clean start”. The Tribunal found this highly inconsistent with his claim that he had chosen to come to Australia on the basis that it was an open society which accepted or tolerated homosexuality. The Tribunal did not accept that the applicant had been in a homosexual relationship or that he had sexual relations with other men in Malaysia or in Australia. The Tribunal did not accept the applicant’s claim that he believed his wife had filed for divorce on the basis of his homosexuality or that she perceived him to be a homosexual man. The Tribunal was of the view that the applicant had fabricated his evidence for the purpose of obtaining a visa to remain in Australia. Accordingly, the Tribunal found that the applicant did not face a real chance of persecution now or in the reasonably foreseeable future because of his membership of the particular social group ‘homosexuals in Malaysia’, or for any other Convention related reason, if he were to return to Malaysia.

Mongolia

1002307

5 July 2010, Sydney

Mr G Short, Senior Member

MONGOLIA – NO CONVENTION REASON – FAMILY DISPUTE – PARTICULAR SOCIAL GROUP – PEOPLE WITH DISABILITIES – The applicant claimed to fear persecution at the hands of members of the family of his former de facto partner in Mongolia, who did not like him, and as a member of the particular social group of ‘people with disabilities’. He claimed that before he left Mongolia in 2002, members of his former partner’s family had attacked him on two occasions. He explained that on the second occasion they had attacked him as they blamed him because his uncle had raped his former partner’s sister while she had been staying with him in Australia. The applicant also claimed that his former partner’s cousin, who had earlier been deported from Australia, had threatened to kill him if he returned to Mongolia because he blamed the applicant for having caused his removal from Australia. The applicant referred to having suffered a serious injury in early 2009 from which he had still not fully recovered and described himself as being ‘disabled’ as a result of this injury. He claimed that if he went back to Mongolia his life would be at stake as he would face the same abuse as he had faced from her family before and in his current condition he would not survive. He also claimed that the Mongolian Government would not protect him or help him with his disabilities and he referred to the prevalence of corruption in Mongolia. The applicant provided various medical reports in relation to the ongoing impact of the injury he had suffered as well as a report referring to further serious medical treatment he was undergoing. A letter from the applicant’s General Practitioner (GP) stated that the applicant feared being sent back to Mongolia where he would not be able to afford treatment for either his injury or his other medical condition. The applicant’s GP stated that she did not believe that the applicant could access the necessary treatment in Mongolia.

Held: Decision under review affirmed.

The Tribunal found that members of the applicant’s former de facto partner’s family did not wish to harm the applicant for reasons of race, religion, nationality, membership of a particular social group or his political opinion. Therefore, the Tribunal did not accept that one or more of the five Convention reasons was the essential and significant reason for the persecution which the applicant feared from the family of his former de facto partner. In relation to the applicant’s suggestion that he would face difficulties in accessing adequate medical care in Mongolia, the Tribunal found that this, in itself, was not sufficient to bring him within the terms of the definition of a refugee, noting that there were many countries in the world where medical services of the sort which are available in Australia are simply not available. Whilst the Tribunal did find that ‘people with disabilities’ constituted a ‘particular social group’ in Mongolia for the purposes of the Refugees Convention, it did not accept that there was a real chance that the applicant would be persecuted for reasons of his membership of that particular social group if he returned to Mongolia presently or in the reasonably foreseeable future. In making this finding the Tribunal referred to material in the US State Department *Country Reports on Human Rights Practices for 2009* which indicated that, although in practice people with disabilities faced significant barriers to employment, education and participation in public life in Mongolia, the law prohibited discrimination in employment and education against people with disabilities. In light of such advice, the Tribunal found that the problems which people with disabilities faced in Mongolia for reasons of their membership of that particular social group were not so serious or so significant as to amount to persecution involving serious harm. Accordingly, the Tribunal was not satisfied on the evidence before it that the applicant had a well founded fear of persecution for a Convention reason. The Tribunal

accepted nonetheless that the applicant had serious medical problems for which he would be unable to access adequate medical care in Mongolia and therefore referred this matter for the Minister's attention.

Sri Lanka

0909898

31 May 2010, Melbourne

Ms S Muling, Member

SRI LANKA – ETHNICITY – TAMIL – CREDIBILITY – The applicant claimed he had a well founded fear of returning to Sri Lanka on the basis of his ethnic and racial background and the political conflict and stresses in that country. He claimed he was the elder of two sons born to Sri Lankan parents of Tamil ethnic origin who resided in a largely Tamil suburb of Colombo. He claimed that his father received fairly regular demands or threats, usually by anonymous phone calls, as he was perceived to be a successful business man who should support the Liberation Tigers of Tamil Eelam (LTTE) with money and contribute his eldest son to the movement. The applicant claimed that his father reported these demands to various police stations without any success and encountered indifference or racism when his reports were made to the official Sinhalese authorities. The applicant stated that his father had first started receiving threats in 2005 and the callers would ask where he and his brother were then threaten that his father would never see his sons again unless he paid money. The applicant further claimed that his family was certain that his brother had been kidnapped, captured or otherwise dealt with by LTTE agitators and activists in Colombo in 2006. The applicant explained that he had worked overseas from 2003 to 2005 and returned to Sri Lanka only once during that period to attend his parents' wedding anniversary celebration. He stated that he departed Sri Lanka for Australia in 2005 and that his brother disappeared in June the following year while shopping for groceries. The applicant provided documentary material in support of his application including a statement made by his father, two letters from religious leaders referring to his brother's disappearance, and two photographs of the applicant with his brother and parents. The applicant also gave evidence at the Tribunal hearing where he confirmed his brother's full name and that he did not know anyone else with the same name. The Tribunal then put to him that it had found a person by the same name as his brother on Facebook and that he (the applicant) was listed as a friend on this person's Facebook page and vice versa. The Tribunal also noted that the Facebook photograph looked similar to the photograph of his brother taken at his parent's wedding anniversary, which he had submitted to the Department. The Tribunal noted that it appeared his brother had recently attended a barbeque. In a subsequent submission provided to the Tribunal the applicant confessed that he had provided false information regarding the disappearance of his brother and explained that, in fact, his brother had been sent away by his parents.

Held: Decision under review affirmed.

The Tribunal found the applicant was not a credible witness and that he intentionally and blatantly provided false information in an effort to establish a claim for refugee status. In making this finding the Tribunal took into consideration the information it located from the internet site 'Facebook', namely the Facebook page of a person with the exact same name as the applicant's brother. On the basis of the applicant's confirmation in the hearing that he did not know anyone else with the same name as his brother and the fact the accompanying photograph bore a striking resemblance to a photograph of the applicant's brother taken at his parents' 25th wedding anniversary in 2004, the Tribunal found that the Facebook page it had located was, in fact, the applicant's brother's Facebook page. The Tribunal noted that the applicant subsequently confessed that he had provided false information regarding the disappearance of his brother and therefore the Tribunal did not accept that the applicant's brother had been missing, feared abducted since 2006, as the applicant had claimed. As a result of the applicant's admission, the Tribunal placed no weight on the documentary evidence the applicant submitted in support of his claim. Further, given numerous discrepancies between the applicant's oral evidence to the Tribunal and the written evidence from his father, the Tribunal did not accept that the applicant's father had received regular and routine threats and demands for money as claimed. The Tribunal was satisfied that the applicant had never experienced any problems in Sri Lanka in the past because of his Tamil ethnicity. Based on the country information before it, the Tribunal did not accept that if the applicant returned to Sri Lanka he would face any difficulties, let alone a real chance of serious harm amounting to persecution, either from the authorities, the LTTE or anyone else, because of his Tamil ethnicity or any other Convention reason. The Tribunal therefore found that the applicant's fear of persecution was not well-founded.

MRT COUNTRY ADVICE

Bangladesh

BGD35303 – Muslim – Divorce Procedures – 24 September 2009

Provides procedures for Muslim divorce (tala) under Bangladesh Family Law re notification of intent to divorce and the granting of a divorce certificate.

BGD35458 – Death Certificates – Death Registration– 25 September 2009

Provides information on the issuance of death certificates in Bangladesh.

Cameroon

CMR34380 – Adoption– Nso– Family Structure – 11 February 2009

Brief information concerning adoption in Cameroon and family structure in Nso culture.

China

CHN34877 – Acquisition of Butchery Skills in China – Registration and Licensing Requirements for Meat Premises in Australia – 11 June 2009

Provides information on how butchery skills are acquired in China and requirements for registration of butchers in Australia and licensing of retail meat premises in Australia.

Congo (Democratic Republic of)

COD35554 – Caring for Siblings – Legal Rights of Married Women – Head of Family – 13 October 2009

This response examines the legal rights of married women and widows in the Democratic Republic of Congo; the responsibilities of young girls within the family; and the possibility that a younger daughter within a large family can be considered both the head of the family and the primary carer of the youngest siblings.

Egypt

EGY36406 – Valid Marriage – 22 March 2010

This provides information on what constitutes a valid marriage in Egypt

Ghana

GHA35634 – Ghana Police Service – Police Clearance Certificate – Corruption – 4 November 2009

Brief information on whether there are reports of difficulties in obtaining police clearance certificates from Ghana Police; whether this is more difficult for non-residents and whether bribes are requested.

Iraq

IRQ35194 – Women – Living Conditions – Human Rights – Security Situation – 14 July 2009

Provides information on the current human rights and security situations in Iraq, and the situation for women in particular.

Liberia

LBR35277 – Returnee – Employment – 13 August 2009

Information on the current employment prospects in Liberia and the possible resumption of a University course.

Sierra Leone

SLE34340 – Customary Adoption – 24 February 2009

Provides information regarding customary adoption in Sierra Leone.

South Africa

ZAF35454 – Unemployment – White unemployment – White poverty – IT Salary – Unrest – Violence – Crime – 30 September 2009

Information on the unemployment level and the average wage of I.T. professionals in South Africa. Also, provides information on the situation of civil unrest and the issue of white poverty.

Zimbabwe

ZWE35371 – Medical Care – Insulin Availability – Employment Prospects for White Farmers – 3 September 2009

Examines the availability of insulin and the quality of care for Type 1 Diabetes sufferers in Zimbabwe, as well as the current general condition of the health care system. The response also examines the level of unemployment in Zimbabwe, the ongoing seizure of white-owned farms and the future prospects for employment in Zimbabwe for agricultural workers of a European background.

FEDERAL COURT JUDGMENTS

SZOFE v MIAC

[2010] FCAFC 79

Federal Court of Australia, Emmett, Buchanan & Nicholas JJ, NSD 616 of 2010, 23 June 2010

The applicant sought judicial review of a Refugee Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate refusing to grant a Protection visa. The application was transferred to a Full Court of the Federal Court for determination.

Pursuant to s.66 of the *Migration Act 1958* (the Act) the applicant was notified of the delegate's decision by letter sent to her address in Sydney. Relevantly, the notice informed the applicant of the addresses of the Tribunal's NSW and Victorian registries where an application for review could be lodged, but did not inform her the Brisbane, Adelaide and Perth registries of the Administrative Review Tribunal (AAT) where applications would also be accepted. Section 66(2)(d)(iv) of the Act specifies that notifications of decisions to refuse a visa must state where an application for review can be made. Section 412(1)(b) states that a review application must be given to the Tribunal within the prescribed period and r.4.31 provides that the prescribed period commences on the day on which an applicant is notified of the decision and ends at the end of 28 days. The applicant lodged an application for review within the time specified and the Tribunal conducted a review.

In reliance on the decision in *Hasan v MIAC* [2010] FCA 375, the applicant contended that the Tribunal did not have jurisdiction to conduct the review. It was contended that because the notification letter did not list all places where an application for review could be made it did not comply with s.66(2)(d)(iv); and that the Tribunal only has jurisdiction if an application is lodged within the 28 day period that commences when the applicant is validly notified. In the alternative, she contended that the Tribunal failed to address one of her claims, and that it asked itself the wrong question.

Held: per curiam, application dismissed

per curiam

- (i) The jurisdiction of the Tribunal was properly enlivened.
- (ii) The Tribunal did not fail to deal with the applicant's claims or misunderstand the law.
- (iii) Section 66(2)(d)(iv) does not require notification of all possible places of lodgement to all potential applicants for review regardless of where they reside. The applicant resided in Sydney and there was nothing unfair or inconvenient in telling the applicant that she could lodge an application for review in Sydney or Melbourne.

per Emmett J

Section 66(d)(iv) only requires that a notification can state where an application can be made where in all the circumstances of the case, it would be convenient or adequate for the particular purposes of the applicant. Even if s.66(2)(d)(iv) required a statement of every place where an application for review could be made, any failure to comply strictly with that requirement was not of a nature that would render the review application a nullity. While compliance with the requirements of s.66(2) would discharge the Minister's obligation with respect to the giving of notice of a decision, it does not follow that any departure from those steps would result in invalidity, without consideration of the extent and consequences of the departure.

per Buchanan & Nicholas JJ:

Whether or not a potential applicant was denied an effective or adequate opportunity to make an application for review because they were not told their application might be accepted at a particular place would depend on all the circumstances. There cannot be an adequate assessment of whether the requirements of s.66 have been breached, or of whether the jurisdiction of the Tribunal was not engaged, without some examination of the consequences of the alleged non-compliance.

per Emmett J

- (iv) Assuming that on its proper construction, r.431 refers to a period that does not commence before an applicant has been notified of a decision, it does not follow that the jurisdiction of the Tribunal is conditional upon a valid application being lodged only during that period. The making of an application for review before being notified in accordance with s.66(2) does not have the consequence that the Tribunal has no jurisdiction to entertain the application for review.

per Buchanan & Nicholas JJ (obiter dicta)

- (v) The language of r.4.31 establishes an envelope of time within which an application must be made. However, lodging an application before the time of deemed receipt of the notification would not necessarily be ineffective. On the facts of the present case the application made to the Tribunal would not have been ineffective to initiate a review even if it had been lodged before the date of deemed receipt of the notification because no adverse consequence of any kind would be visited upon the applicant from early receipt of the application by the Tribunal.

MIAC v MZYCE

[2010] FCA 767

Federal Court of Australia, Gray J, VID 96 of 2010, 22 July 2010

This was an appeal by the Minister from a judgment of the Federal Magistrates Court allowing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision to refuse to grant the respondents protection visas.

The first respondent (the respondent), a citizen of India, claimed to fear persecution for his activities in support of lower caste people, and as a journalist for campaigning against government corruption. In support of his claims he provided a number of press clippings with translations. At the hearing, and in a letter sent to him after the hearing, the Tribunal indicated that it may find that there is a level of document fraud in India and may not accept the clippings as evidence of the events in them, and invited him to respond or comment. The Tribunal found that the respondent was not a credible witness. Given its concerns about his testimony and the information about the prevalence of document fraud in India, it did not accept that the newspaper clippings were evidence of the alleged events contained in them.

At first instance, the Federal Magistrate held that the Tribunal should not have assessed the respondent's credibility without first considering the authenticity of the documents, and that where the question of the respondent's credibility was determinant of the outcome and was so reliant upon the documentary evidence presented, its failure to make relatively simple inquiries as suggested by the respondent was so unreasonable that no Tribunal could have not made the inquiry.

On appeal, the Minister contended among other things that the Tribunal did not have a duty to inquire in this case and that it was a matter for the Tribunal to determine what weight should be given to the information before it.

Held: Appeal allowed. Application to Federal Magistrates Court dismissed.

- (i) The Tribunal did not fail to discharge its statutory review function by failing to make inquiries that might have revealed information about the genuineness of the newspaper articles. The Tribunal had given to the respondent clear notice that it might not accept the truth of the allegations contained in the newspaper articles and the respondent had every opportunity to provide further information to the Tribunal to persuade it otherwise. Having expressed to the respondent its concerns, the Tribunal was not then obliged to do what the respondent did not do, and seek further information about the authenticity of the newspaper articles.
- (ii) The question whether the newspaper articles were reliable was a question of fact for the Tribunal. It was not one that the Federal Magistrates Court could usurp to itself. The fact that the reasoning about the question could have been better and that, if it had been, the Tribunal might have reached the opposite conclusion, did not lead to the result that the decision was so unreasonable that no reasonable Tribunal member could arrive at it.

FEDERAL MAGISTRATES COURT JUDGMENTS

SZOZI v MIAC & Anor

[2010] FMCA 390

Federal Magistrates Court of Australia, Driver FM, SYG 605 of 2010, 30 June 2010

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

On the day of the Tribunal hearing the applicant attended the Tribunal premises with two witnesses who were asked to wait outside the hearing room while he was taken inside. The applicant did not separately draw the presiding Member's attention to the presence of his witnesses and the Member closed the hearing without taking evidence from the witnesses. The Tribunal found the applicant was not a credible witness and while accepting some of his claims ultimately found that he would receive effective state protection.

It was apparent that during the hearing the presiding Member was of the belief that the hearing invitation had been returned unclaimed, as reflected in a file checklist. The applicant however advised the Tribunal that he had received the invitation.

Before the Court, the applicant gave evidence that he completed the 'Response to Hearing Invitation' form (the response) and returned it to the Tribunal within about a week of receiving it, although there was no evidence of actual receipt by the Tribunal of the form, or of the form itself on the copy of the Tribunal file before the Court. The applicant contended, amongst other things, that the Tribunal committed jurisdictional error by failing to take evidence from his two nominated witnesses.

Held: RRT decision quashed and remitted for reconsideration.

- (i) The Tribunal committed jurisdictional error by failing to have proper regard to the applicant's request in accordance with s.426(2) and (3) of the *Migration Act 1958* (the Act).
- (ii) Even if the duty under s.426(2) was not enlivened, a refusal or failure by the Tribunal to consider a request by an applicant to take evidence from witnesses who are conveniently available and who may be able to assist in corroborating the applicant's claims would subvert the review process and constitute a breach of s.425.
- (iii) Section 426(2) requires *dispatch* of a response by an applicant within 7 days of being notified pursuant to s.426(1), not that notice be *received* by the Tribunal within that period. On the applicant's evidence, the response in the present case was dispatched within the 7 day period.
- (iv) While clear that the presiding Member was unaware of the response (due an apparent clerical error), it does not follow that the Tribunal as a whole was unaware of it. A 'returned unclaimed' envelope for an unrelated piece of correspondence was misfiled alongside a copy of the hearing invitation in the mistaken belief that the hearing invitation had been returned unclaimed. It is more likely than not, that mistake having been made, that an officer of the Tribunal did not link the response with the applicant's file because the file appeared to show the hearing invitation had been returned unclaimed. The Minister failed to rebut the presumption of deemed receipt available under s.160 of the *Evidence Act 1995 (Cth)* and therefore the Tribunal was taken to have received the response.

Hossain v MIAC & Anor

[2010] FMCA 436

Federal Magistrates Court of Australia, Smith FM, SYG 102 of 2010, 10 June 2010

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate to refuse to grant a Skilled Independent Overseas Student (Residence) (Class DD) Subclass 880 visa.

The delegate refused the visa because the applicant lacked the required qualifying score when assessed under Subdivision B of Division 3 of Part 2 of the *Migration Act 1958* (the Act). The applicant had failed to meet cl.880.222 of the Migration Regulations 1994 (the Regulations) because he had failed to satisfy the points test for English language proficiency as specified under Part 3 of Schedule 6A to the Regulations. At the time of visa application the applicant referred to r.2.26A(5) of the Regulations, which provides that the

Minister may determine that the applicant is proficient in English to a level equivalent to that specified in Part 3 of Schedule 6A, if the Minister determines that it is not reasonably practicable, or not necessary, for the applicant to be tested using the IELTS test. The applicant referred to university qualifications in India where the medium of instruction was English and a period of study in Australia. During review before the Tribunal, the applicant claimed to suffer from dyslexia, received extensions of time and provided the results from five unsuccessful IELTS tests. In affirming the decision, the Tribunal considered these results, the fact that the applicant had resided and studied in Australia, found that it was reasonably practicable and necessary to be IELTS tested and concluded that he had not achieved the qualifying score to meet cl.880.222.

The applicant contended that the Tribunal had committed jurisdictional error in that it failed to consider the applicant's study in English in India when considering whether an IELTS test was not necessary under r.2.26A(5), and breached s.360 of the Act in failing to give the applicant the opportunity to give evidence and present arguments on whether that discretion should be exercised.

Held: Application dismissed.

- (i) The Tribunal had not failed to consider the applicant's claim and there was no breach of s.360.
- (ii) The asserted fact that the applicant had studied in India using the English language was not a relevant consideration which the Tribunal was bound at law to take into account, and the evidence of that study was of such dubious relevance and weight that it could not be inferred that it had been entirely overlooked.
- (iii) The object of the waiving discretion is to allow a decision maker to be satisfied, other than by IELTS results, that an applicant has the same language proficiencies as are reflected by the IELTS results described in Schedule 6A. Only with satisfaction that comparable evidence had been or would be offered, could a decision maker conclude that IELTS testing was not 'necessary' even though it was manifestly 'practicable'. It was very difficult to conceive how the Tribunal could be satisfied that r.2.26A(5) should be exercised in the circumstances.
- (iv) There was no procedural unfairness attending the Tribunal's consideration of the discretion under r.2.26A(5) without reminding the applicant that it would be doing so. The applicant had ample opportunity to make submissions and put forward evidence addressing that issue if it remained part of his case.

Habib v MIAC

[2010] FMCA 450

Federal Magistrates Court of Australia, Smith FM, SYG 546 of 2010, 5 July 2010

The applicant sought judicial review of a decision of a delegate of the respondent to refuse to grant him a Skilled (Provisional) (Class VC) Subclass 485 visa.

The applicant applied for the visa on 25 March 2008. The delegate refused the visa on the grounds that the applicant was required to have 'competent English', and there was no evidence of his achieving the necessary International English Language Testing System (IELTS) test results either before or after making the visa application.

During the course of the Tribunal review, the applicant re-sat the test, and presented evidence to the Tribunal that he had achieved the required score. Despite this, the Tribunal affirmed the decision, on the basis that the applicant did not satisfy (relevantly) cl.485.215(b) or (c) of Schedule 2 to the Migration Regulations 1994, as he had not provided evidence of competent English at the time of application (cl.485.215(b)), and his application was not accompanied by evidence that he had made arrangements to undergo a language test as required by cl.485.215(c). There was no evidence before the Court as to when the IELTS test was booked.

The applicant contended that the Tribunal committed jurisdictional error in construing cl.485.215 so as to preclude the applicant's IELTS test result demonstrating competent English after the visa application but before the Tribunal made its decision. The Minister submitted that the presence of cl.485.215(c) supported

the adoption of a construction of the other paragraphs of cl.485.215 which was opposite to that taken in *Berenguel v MIAC* [2010] HCA 8 in relation to cl.885.213. He submitted that adoption of the *Berenguel* construction of cl.485.215(b) would give the cl.485.215(c) option no work to do.

Held: MRT decision quashed and remitted for reconsideration.

(i) The Tribunal made a jurisdictional error by refusing to take into account the applicant's November 2009 test results when applying cl.485.215(b). The language test criterion found in cl.485.215(b) should be given the same effect as was given by the High Court in *Berenguel* to cl.885.213(b).

Rai v MIAC

[2010] FMCA 472

Federal Magistrates Court of Australia, Cameron FM, SYG 642 of 2010, 1 July 2010

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

The applicant applied for the visa on the basis of her nominated occupation of chemist but did not at any time give any evidence that she had applied for a relevant skills assessment, or that she had been assessed by the relevant assessing authority as suitable for that occupation.

The Tribunal found that the applicant did not satisfy cl.485.214 or cl.487.214 of the Migration Regulations 1994 because at the time of visa application she had not applied for an assessment of her skills for her nominated skilled occupation by a relevant assessing authority. The Tribunal also found that the applicant did not satisfy cl.485.221 or cl.487.223 because at the time of decision there was no evidence before it that the applicant's skills for her nominated skilled occupation had been assessed by the relevant assessing authority as suitable for that occupation.

The applicant claimed that the Tribunal ignored her Australian skills and erred in requesting assessment of her qualifications.

Held: Application dismissed.

- (i) While the Tribunal erred in its consideration of clauses 485.214 and 487.214, its decision was properly based on a finding which was not affected by jurisdictional error.
- (ii) The Tribunal erred by concluding that, by not having applied for an assessment of her skills at the time of application, the applicant had not satisfied the criterion in clauses 485.214 and 487.214. As the discussion of a very similarly worded provision in *Berenguel v MIAC* (2010) 264 ALR 417 demonstrates, the applicant could have met that criterion at any time up to the decision on her application; it did not need to be met when the application was lodged.
- (iii) The Tribunal did not err by finding that the applicant failed to meet cl.485.221 or cl.487.223 and by basing its decision, at least in part, on that finding. Without evidence of an actual assessment of her skills, the Tribunal could not be satisfied that the applicant met those requirements.
- (iv) The Tribunal was not required to consider whether the applicant's skills were sufficient to justify the grant of the visa sought. That task was delegated to the relevant assessing authority.
- (v) The Tribunal did not err by requesting or requiring an assessment of the applicant's qualification because that is what the regulations required it to do.

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

REGULATIONS

Migration Amendment Regulations 2010 (No. 7)

These Regulations amend the Migration Regulations 1994 to, among other things:

- prevent a person who has previously been in Australia as the holder of a Subclass 462 (Work and Holiday) visa from applying for a Subclass 417 (Working Holiday) visa (Schedule 1 to the Regulations refers); and
- provide that Subclass 462 (Work and Holiday) visa applicants cannot be accompanied by dependent children (except applicants who are members of a class of persons specified by the Minister in an instrument in writing) (Schedule 1 to the Regulations refers).

INSTRUMENTS

IMMI 10/028: Specification under subparagraphs 5.19(2)(h)(i) and (ii), 121.211(b)(ii), 856.213(b)(ii), paragraph 5.19(2)(i), sub-subparagraphs 121.211(b)(i)(A) and 856.213(b)(i)(A) - Employer Nomination Scheme - Occupations, Locations, Salaries and Relevant Assessing Authorities - June 2010

This Instrument revokes the previous Instrument and specifies new occupations, locations, salaries, and Relevant Assessing Authorities for the purpose of the above provisions in the Migration Regulations 1994.

IMMI 10/020 - Specification under paragraph 5.36(1A)(a) in Part 5 of the Migration Regulations 1994 - Payment of Visa Application Charges and Fees in Foreign Currencies – June 2010

This Instrument revokes the previous Instrument and specifies new amounts in local currency that should be paid in respect of a visa application charge when applying for a visa to enter Australia.

Revocation of Ministerial Direction No. 34 made under s.499 of the Migration Act 1958

This Instrument revokes the instrument *Direction No. 34 – Early Health Assessment*, signed on 25 March 2004.

CASELOAD OVERVIEW

MRT Decisions – June 2010

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total	% Total
Bridging refusal	4	9	2	2	17	3.1%
Visitor refusal	21	20	0	7	48	8.9%
Student refusal	20	15	10	17	62	11.5%
Temporary business refusal	12	21	7	7	47	8.7%
Permanent business refusal	25	12	3	0	40	7.4%
Skill linked refusal	27	25	5	6	63	11.6%
Partner refusal	70	25	6	4	105	19.4%
Family refusal	18	24	1	2	45	8.3%
Student cancellation	17	37	2	6	62	11.5%
Sponsor approval refusal	4	5	0	2	11	2.0%
Other	15	19	2	5	41	7.6%
Total	233	212	38	58	541	100.0%

RRT Decisions – June 2010

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total	% Total
China (PRC)	15	40	0	0	55	32.2%
Fiji	4	15	0	0	19	11.1%
Malaysia	0	19	0	0	19	11.1%
Indonesia	2	7	0	0	9	5.3%
Egypt	1	6	0	0	7	4.1%
Pakistan	1	6	0	0	7	4.1%
Philippines	0	7	0	0	7	4.1%
Lebanon	3	3	0	0	6	3.5%
Nepal	1	5	0	0	6	3.5%
Zimbabwe	3	1	0	0	4	2.3%
India	0	3	0	0	3	1.8%
South Africa	2	1	0	0	3	1.8%
Sri Lanka	0	3	0	0	3	1.8%
Ghana	1	1	0	0	2	1.2%
Kenya	0	2	0	0	2	1.2%
Korea, Republic Of	0	2	0	0	2	1.2%
Nigeria	1	1	0	0	2	1.2%
Cambodia	1	0	0	0	1	0.6%

Cameroon	1	0	0	0	1	0.6%
Colombia	1	0	0	0	1	0.6%
East Timor	1	0	0	0	1	0.6%
Hungary	0	0	1	0	1	0.6%
Iran	1	0	0	0	1	0.6%
Iraq	1	0	0	0	1	0.6%
Israel	1	0	0	0	1	0.6%
Jordan	0	1	0	0	1	0.6%
Macedonia	0	1	0	0	1	0.6%
Peru	0	1	0	0	1	0.6%
Syria	1	0	0	0	1	0.6%
Turkey	0	1	0	0	1	0.6%
Ukraine	0	1	0	0	1	0.6%
Vietnam	0	1	0	0	1	0.6%
Total	42	128	1	0	171	100.0%

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.

Between 1 January 2010 and 30 June 2010, 47% of all substantive decisions made have been published (46% of MRT and 51% 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 for editing. Once edited, the decisions are quality checked 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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