



The MRT-RRT Monthly Bulletin

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This month, Précis includes a selection of published 2010 Country Advice on China, Egypt, Fiji, Indonesia and South Korea. China advice relates to the treatment of single mothers, and children born out of wedlock; Han Chinese who convert to Islam; and the Falun Gong ban in Shandong province. Egypt advice relates to, amongst other topics, the treatment of homosexuals; Coptic Christians and military service; and Internet regulation. Fiji advice relates to passport scams; the Peoples Charter and extrajudicial killings; and the current relationship between the Interim Government and the Methodist Church.

As Tribunal cases are finalised, the country advice which relates to a particular case is published. In coming months we will be publishing more recent country advice on our website, relating to both MRT and RRT cases.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

0807011

1 July 2010, Melbourne

Ms J Ellis, Member

SKILLED (RESIDENCE) (CLASS VB) – SUBCLASS 886 – SPONSORED – CL.886.211(2) – COURSES CLOSELY RELATED TO NOMINATED SKILLED OCCUPATION – A delegate of the Minister refused to grant the applicant a Subclass 886 visa on the basis that the courses he had undertaken in Australia were not closely related to his nominated skilled occupation. The delegate noted the applicant's nominated skilled occupation was "pastry cook" and found that the Diploma of Business he had completed and relied upon in meeting the two-year study requirement for the grant of the visa was not relevant to his assessed position. The applicant, who had completed a Certificate III in Food Processing (Retail Baking) and a Diploma of Business (Management) in Australia, provided a detailed submission in relation to the relevance of his Diploma of Business to the profession of a Pastry Cook. He claimed that "his main goal was to open his own excellent Pastry & Cake Shop" and that to do so successfully he would need good business skills. He listed some of the units that he had studied during the Diploma of Business and elaborated on how these courses would assist him in running a bakery business. The applicant gave similar evidence at the Tribunal hearing and stated that being a pastry cook was not just about producing a product; he needed to be able to sell the product as well. Additional evidence in support of the application was provided by the applicant's representative. This evidence included documents confirming the applicant's Australian qualifications and references to other cases whereby holders of similar qualifications had been successful in their visa applications. The evidence submitted on behalf of the applicant included reference to Departmental advice on the significance of "closely related" and an extract from the Departmental Procedures Advice Manual (PAM3).

Held: Decision under review set aside.

The Tribunal considered all the material before it and found the applicant to be a credible witness. The Tribunal accepted the applicant's evidence that he intended to be employed as a pastry cook and that he wished to be self employed in that industry. The Tribunal referred to the relevant Departmental policy contained in PAM3 and found that the Diploma of Business that the applicant had undertaken was "sufficiently compatible" with the nominated skilled occupation of pastry cook, and that it did assist the applicant to be "job ready" for employment in the Australian labour market. The Tribunal also accepted that the skill set underpinning the Diploma of Business Management was complimentary to, and could be used in, the nominated occupation of pastry cook. In light of the above, the Tribunal found that both courses of study undertaken by the applicant in Australia (the Certificate III in Food Processing and the Diploma of Business Management) were "closely related" as required by cl.886.211(2)(b) to the applicant's nominated skilled occupation of "pastry cook". Accordingly, the Tribunal found that the applicant met the requirements of cl.886.211(2) of the Regulations.

0900641

29 July 2010, Sydney

Ms K Raif, Member

SKILLED (PROVISIONAL) (CLASS VF) – SUBCLASS 475 – REGIONAL SPONSORED – PUBLIC INTEREST CRITERION 4005 – HEALTH – The delegate refused to grant the visa applicants Skilled (Provisional) visas as the second named applicant did not satisfy the health criteria in Public Interest Criterion (PIC) 4005. The visa applicants were sponsored by the visa applicant's aunt (the review applicant).

The first named visa applicant was born in Ireland where she currently resides. She applied for a Skilled (Provisional) visa on 18 September 2007. Included in the application was the visa applicant's defacto partner, the second named applicant. In order to be granted the visa, the applicants were required to undertake medical examinations. However, a Medical Officer of the Commonwealth (MOC) formed an opinion that the second named applicant did not meet the health requirements in PIC 4005. The MOC found

that the second named applicant was a person diagnosed with Multiple Sclerosis in 2004 and that he immediately began preventive treatment and had been relapse-free since. His neurological examination was normal and he was fully independent. The MOC noted that the applicant's prognosis appeared to be favourable with the use of Betaferon and that he would likely require this ongoing treatment, which represented a significant cost to the Australian community. The MOC also noted that this was consistent with the likely requirement for health care of a hypothetical person with the form and level of the condition suffered by the second named applicant. Based on the opinion of the MOC, the delegate found that the second named applicant did not meet PIC 4005 and the visa application was refused.

The Tribunal offered the applicant the opportunity to seek a review of his health by the Review Medical Officer of the Commonwealth (RMOC) and additional medical evidence was provided for the RMOC's consideration. The Tribunal received an opinion from the RMOC indicating that the second named applicant did not meet the health requirement. The review applicant submitted to the Tribunal that the visa applicants do satisfy the health criteria as they would not subject the Australian community to any cost for the duration of their stay in Australia. She referred to the secondary visa applicant's current condition and prognosis and to a number of reports which indicated that the second named applicant's condition was in remission and not progressing. The review applicant noted that the visa applicants had arranged health cover and would also receive support from their relatives in Australia, noting that any cost to the Australian community would be minimal. The review applicant suggested that PIC 4005 had been met by the applicants and the application should be remitted because the cost to the Australian community would not arise due to the applicant not being eligible to make a claim for assistance, and that his medical condition was well managed. The applicants also informed the Tribunal that since their application was lodged, they had since married.

Held: Decision under review affirmed.

The Tribunal had regard to the Federal Court decisions in *Robinson v MIMIA* [2005] FCA 1626 and *Ramlu v MIMIA* [2005] FMCA 1735 and was of the view that there was no evidence that the RMOC had applied the wrong test in this matter. Specifically, the Tribunal was satisfied that the RMOC opinion identified the second named applicant's condition to which the public interest criteria had been applied, had ascertained the form or level of the condition suffered by the visa applicant and had applied the statutory criteria by reference to a hypothetical person who suffered from that form or level of the condition. Accordingly, the Tribunal found that the secondary visa applicant had undertaken medical examinations and that a MOC found that he did not meet the health requirements in PIC 4005. Also, the RMOC had found that the secondary visa applicant did not meet PIC 4005.

As the Tribunal was bound to accept the final assessment of the RMOC to be correct for the purposes of deciding whether the second named applicant satisfied the relevant health criterion, the Tribunal found that the second named visa applicant did not satisfy public interest criterion 4005. Accordingly, the Tribunal found that the second named visa applicant was a member of the family unit of the visa applicant. He was also an applicant for a Subclass 475 visa. As he did not satisfy PIC 4005, the visa applicant did not meet cl.475.226. Accordingly, the Tribunal affirmed the decision not to grant the visa applicants Skilled (Provisional) (Class VF) visas.

0907281

16 July 2010, Melbourne

Mr D Lennon, Member

EMPLOYER NOMINATION (RESIDENCE) (CLASS BW) – SUBCLASS 856 – CL.213(c)(ii) – IELTS – VOCATIONAL ENGLISH – A delegate of the Minister refused to grant the applicant a Subclass 856 visa on the basis that the visa applicant did not satisfy cl.213(c)(ii) of the Regulations. The visa applicant claimed that he was an education officer in a school comprising mainly of Chinese students, and that he was irreplaceable as he knew the characteristics and mindset of the Chinese students better than someone of Australian background. He claimed that he had sufficient English to conduct his work and communicate in simple English as needed with students, parents and teachers. He claimed he undertook occupational health and safety (OH&S) training in China and was the responsible officer in his workplace. He claimed that he received some informal instruction from his Australian sponsoring company and participated in monthly fire drills and first aid. The applicant claimed that he attended night classes in English and obtained Certificates II and III and completed courses tailored for the IELTS test. The sponsor claimed that the visa applicant advised on new ideas and on how to deal with problems, he provided feedback on assessment issues, and

was the “social welfare officer”. The sponsor claimed that the visa applicant had passed the OH&S course without an interpreter and had almost achieved a score of 5 for his English tests. He claimed that attempts were made to recruit locally, however, applications to the Department had been refused, and other applicants were unsuitable as they had worked for a short period of time and then left. The sponsor claimed that there were exceptional circumstances because the school was highly specialised and catered for students with ethnic Chinese backgrounds, and that the visa applicant had specific duties such as communication with parents and teachers, mostly in Chinese.

Held: Decision under review affirmed.

The Tribunal found that the visa applicant did not have ‘vocational English’, and he, therefore, had to establish exceptional circumstances to justify a waiver of the English language requirement. The Tribunal also considered the ASCO descriptors and determined that the applicant should demonstrate proficiency in a number of those tasks since there was some complexity in the communication needed. The Tribunal found that a significant reason the applicant provided a valuable service to the school was because he currently communicated in Chinese, since a significant proportion of students and teachers were currently Chinese or of Chinese descent. The Tribunal found that if the linguistic composition of the school changed in the future, the applicant’s lack of vocational English would impede his performance of the job. The Tribunal found it difficult to accept that the visa applicant could provide the same level of counseling and assistance to Chinese students as he could to those who were not Chinese, and it concluded that the applicant was able to work fluently without vocational English because of the proportion of Chinese students, and that this did not amount to an exceptional circumstance. The Tribunal noted that the applicant did not transfer his skills as an Education Officer to other employees and, without vocational English, he did not have the capacity to do so. The Tribunal was concerned about the applicant’s ability to comply with OH&S issues and, in the event of an emergency, he and others could be at risk, and it was not clear how, without vocational English, the applicant would communicate with non-Chinese students and staff to ensure their safety. In relation to his employment obligations and entitlements, the Tribunal found that these were technical matters and considered the applicant would need some assistance to maintain his awareness of these obligations and entitlements. The Tribunal noted the sponsor’s attempts to recruit an Education Officer locally and accepted it may be difficult to recruit but it did not consider that significant effort was expended to find someone with vocational English. The Tribunal accepted that the visa applicant made efforts to improve his English but it found that this effort was not exceptional. The Tribunal was sympathetic to the applicant; however, it found that there were no exceptional circumstances which justified the waiver of the requirement for vocational English. Accordingly, the Tribunal found that the applicant did not meet the requirements of cl.856.213(ii) of the Regulations.

Family visas

0901603

21 July 2010, Melbourne

Ms D Hubble, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 115 – REMAINING RELATIVE – CL.115.211 – NEAR RELATIVES – A delegate of the Minister refused the visa application on the basis that the visa applicant did not satisfy cl.115.211 because he was not a ‘remaining relative’ of an Australian. The delegate noted that the visa applicant had five minor children to two wives, the children being residents of Somalia, and that the information provided indicated that the children were not under the applicant’s care, which meant that they were considered to be the applicant’s ‘near relatives’ for the purposes of the Regulations. The review applicant, who was the visa applicant’s mother, claimed that they did not know the whereabouts of the applicant’s first wife and their two children. There had been a civil war in Somalia at the time of their divorce and, despite searching, they had not succeeded in locating them. She claimed that the visa applicant’s second wife had died in 2007, although she did not know the cause of death. She also stated that the three children from this marriage were living with their grandmother in the country after they had moved to escape the civil war. The review applicant claimed that the grandmother had now gone into hiding, as she was fearful that the children would be taken away after learning that the review applicant had been looking for her in Somalia. Despite their best efforts, they had been unable to make contact. The review applicant claimed that the visa applicant had been living in South Africa since 2003 and that he did not have any documents with which to travel back to Somalia. It was claimed that the visa applicant was sending money

whenever he could to the children through an intermediary but he had not seen them for seven years. The review applicant further submitted to the Tribunal that it was their intention to appeal to the Minister for intervention if their application was not successful.

Held: Decision under review affirmed.

The Tribunal accepted that, after the visa applicant's divorce from his first wife, he had only limited contact with his two children from this marriage, and that he had had no contact with them for several years. The Tribunal further accepted the evidence that the grandmother had run away with the children after learning that the review applicant was in Somalia looking for them. The Tribunal, therefore, noted it would need to consider whether those children were wholly or substantially in the daily care and control of the visa applicant at the time that the visa application was lodged. The Tribunal accepted the evidence that the visa applicant provided some financial support for the children whenever he was able; however, there was no evidence to suggest that the grandmother consulted the visa applicant in relation to day-to-day issues concerning the children, or longer term issues such as their education. Given that the visa applicant and his children had been living in different countries since 2003, the Tribunal was of the view that the visa applicant had not had any input into such matters since that time. The Tribunal found that, at the time of application in 2008, the visa applicant had 5 children who had not turned 18 and who were not wholly or substantially in his daily care and control. Accordingly, at the time of application, the Tribunal found that these children were 'near relatives' of the visa applicant. Therefore, the Tribunal was not satisfied that, at the time of application, the visa applicant was the remaining relative of the review applicant. Therefore, the visa applicant did not satisfy cl.115.211. The Tribunal further considered the applicant's case and the ministerial guidelines but decided not to refer the matter to the Minister.

0902186

19 July 2010, Sydney

Mr B MacCarthy, Member

OTHER FAMILY (MIGRANT) (CLASS BO) – SUBCLASS 115 – REMAINING RELATIVE – CL.115.211 AND CL.115.221 – NEAR RELATIVES – A delegate of the Minister refused the visa applications on the basis that the first-named visa applicant did not satisfy cl.115.211 or cl.115.221, because the delegate was not satisfied that the first-named visa applicant was a 'remaining relative' as defined in the Regulations. The applicant claimed she was divorced and, apart from her two children who were parties to the application, all of her other family members were residents of Australia, including her parents, brother, and three sisters. The applicant submitted a number of documents, including a copy of court documents relating to her divorce from her former husband. She also submitted evidence that a court had awarded custody of her two children to her and had formally stated that she was "at liberty to take them out of Fiji". In an interview with the Department, the applicant claimed that her husband had started spending time away from the family home and that when she enquired about his whereabouts he became abusive, which led to her deciding to live alone with her two children on a property owned by her parents. A subsequent site visit led to Departmental officers surmising that, based on information provided by her neighbours, it was clear that the applicant was still living with her divorced spouse. The applicant claimed that her former husband did not reside at the property after the separation, though he had gone there to see his children from time to time, and that the neighbours had seen him visiting the premises and wrongly concluded that he was residing there. She provided a number of statutory declarations and letters attesting to the circumstances of the marriage breakdown, as well as to the fact that they no longer lived together.

Held: Decision under review set aside.

The Tribunal did not consider it unreasonable that a woman separated from her husband might wait some two years before instituting divorce proceedings given that she was prepared to contemplate that there may be a reconciliation, and it drew no negative inference from this fact. The Tribunal accepted the documents which were submitted in support of her claims and, although it noted that those which specifically referred to the marital relationship came from relatives in Australia who might be said to have a vested interest in the outcome of the case, it also noted two letters from schools at which the applicant taught, and that the writers of these letters would have no such interest. The Tribunal further noted that none of the three neighbours mentioned in the Departmental report were named, and that it was plausible that these neighbours merely assumed that the applicant's husband resided with her because they had seen him on occasions when he had visited the house to see his children. In the circumstances, the Tribunal decided not

to give greater weight to the report quoting three unnamed neighbours as opposed to the written evidence submitted to the Tribunal and the oral evidence of the applicant. The Tribunal found that the applicant was not living with her former husband and, therefore, it found that she did not have a 'spouse' within the meaning of the term given in the regulations at the time of application, and that she did not have a 'spouse' now at the time of decision. The Tribunal accepted the evidence which indicated that all of the applicant's siblings and both of her parents were Australian citizens who were usually resident in Australia; and that her only other close relatives were her two children who were both dependent upon her, and wholly or substantially in her daily care and control. For these reasons, the Tribunal found that the applicant had no 'near relatives' other than 'near relatives' who were usually resident in Australia and Australian citizens, and that the provisions for the granting of the visa were satisfied.

0910232

19 July 2010, Sydney

Mr J Duignan, Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 – SPONSORED FAMILY VISITOR – CL.679.224 – GENUINE VISIT – A delegate of the Minister refused to grant the visa applicants Sponsored Visitor visas on the basis that the delegate was not satisfied that the visa applicant's intention to visit Australia was genuine. The review applicant was sponsoring his mother and her four children to visit him in Australia. The delegate was concerned that, as the visa applicant and her children were Sudanese refugees who grew vegetables in a refugee settlement in Uganda for a living, they may not intend a genuine visit. The applicant, who had travelled to Australia on a Refugee and Humanitarian visa as a child, had previously proposed his mother for reunification with him in Australia on two occasions, both of which had been refused because the review applicant's father had told the Department that the review applicant's mother had died in child birth. On review, the Tribunal requested information on the visa applicants rights to enter and reside in Uganda and Sudan as well as evidence of their intention to return at the expiration of their intended visit. A representative's submission advised that the review applicant could not provide this information because his mother and siblings were Sudanese refugees residing in a refugee camp in Uganda. The submission also stated that the review applicant proposed seeking the intervention of the Minister for Immigration and he waived his right to a Tribunal hearing. It was further submitted that the applicant had been unable to be reunited with his mother through no fault of his own.

Held: Decision under review affirmed.

The Tribunal obtained and reviewed the relevant Departmental files and determined that the review applicants' migration history was essentially as claimed. As such, the Tribunal did not believe that the visa applicants' expressed intention to visit Australia was genuine. It noted that each of the applicants lived in a refugee camp in Uganda and had not been able to provide any evidence of their right to return there, or indeed of any right or desire to return to Sudan at the conclusion of their proposed visit. In light of this information, the Tribunal did not believe they intended to return to either Uganda or Sudan if granted Class UL visas. The Tribunal found that their previous applications for permanent migration to Australia, together with their current living circumstances, indicated they probably wished to travel to Australia in order to try to remain here permanently. Accordingly, the Tribunal found that the visa applicants were not able to satisfy the criterion specified at cl.679.224 for the grant of a Class UL visa.

With reference to the applicant's request that the Tribunal refer the matter to the Minister for Immigration for consideration of the exercise of his discretion, the Tribunal determined that this was not the appropriate course of action. In so doing, the Tribunal noted that the truth of the applicants' circumstances, which had been related in the second of the two prior applications, had already been considered. The Tribunal did, however, express some sympathy with the review applicant's situation when younger and it noted that the review applicant may nevertheless choose to approach the Minister directly.

1000335
7 July 2010, Sydney
Ms P Pope, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 117 – ORPHAN RELATIVE – CL.117.211 – UNLOCATABLE FATHER – A delegate of the Minister refused the applicant's Subclass 117 visa application on the basis that the first named visa applicant did not satisfy cl.117.211 of the Regulations, as the delegate was not satisfied that attempts had been made to locate his father. The delegate was also not satisfied that the whereabouts of the visa applicant's father were unknown. The visa applicant was a 17 year-old boy from the Philippines whose mother had passed away from cancer four years ago. He had been living with his maternal uncle and his wife who had been made his legal guardians by order of the Family Court. The review applicant was the visa applicant's maternal aunt, and she claimed that the visa applicant's father had abandoned him and his mother when the child was about three years of age. She claimed that the visa applicant's father was a married man with a family and had entered into a relationship with the applicant's mother, although he never left the family home, and that he did not contribute financially to the visa applicant, nor did he attend the visa applicant's birth. The review applicant claimed that, to the best of her knowledge, the visa applicant's father had visited him intermittently until he was aged about three. From that time there had been no contact. She claimed that efforts had been made by her family to locate the visa applicant's father, including approaches to local officials and to the National Bureau of Investigation. The review applicant claimed that, after such a long time without contact, the family members had no wish to locate the applicant's father. In any case, they were of the view that he had made the decision to continue his marriage and life with his family, which effectively meant he had no time for the review applicant's sister and her child, and he had no spare money to assist them.

Held: Decision under review set aside.

The Tribunal accepted that the visa applicant had not turned 18 and, based on the evidence of the review applicant and the documentary evidence provided with the visa application, it accepted that the visa applicant was the nephew of the review applicant as claimed. The Tribunal was satisfied that the applicant's mother had passed away and that she had never been married to the applicant's father as he was already in a married relationship with seven children. The Tribunal accepted the review applicant's evidence that the visa applicant's father had not had contact with him since he was around three years of age, and that the review applicant and her siblings had been responsible for providing financial support, food, shelter and an education for the visa applicant for most of his life. The Tribunal sighted evidence of attempts made by the visa applicant's family in the Philippines to locate the whereabouts of his father, including approaches to several local authorities in the area from whence he is believed to have come. Also, enquiries were undertaken through the National Bureau of Investigation in Manila. Based on the evidence, the Tribunal accepted that the whereabouts of the visa applicant's father remains unknown. The Tribunal accepted that the visa applicant lived with his maternal uncle and aunt and that he was supported financially by the review applicant, despite her modest income. The Tribunal noted the evidence that the visa applicant was a good student who hoped to continue on to tertiary education, and it found that there was no compelling reason to believe that the grant of the visa would not be in his best interests. The Tribunal found that the visa applicant satisfied the requirement of cl.117.211 and that he was the orphan relative of the review applicant.

Partner visas

0900521
7 July 2010, Sydney
Ms L Symons, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 – SPOUSE – CL.309.211 AND CL.309.221 – GENUINE AND CONTINUING RELATIONSHIP – A delegate of the Minister refused to grant the applicant a Partner visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 of the Regulations because the delegate was not satisfied that the applicants were in a genuine and continuing spouse relationship. The review applicant claimed that when he and his late wife were holidaying in Hong Kong, they met the visa applicant's niece. He claimed that when his wife died, he sent a letter to her niece informing her of what had happened. He claimed she informed him that her aunt had

recently lost her husband in similar circumstances. When he indicated he was interested in seeing her aunt, she put him in touch with her. He claimed he contacted the visa applicant by email soon after and he went to China to meet her. They stayed together in a hotel and then in her hometown, where he met her family. They married the following month because he claimed he wanted to finalise everything as he had no one in Australia. He lived alone and he wanted a partner. He claimed the applicant was a person with good qualities who cared and had a good family who were respectable people with the same family values as him. He claimed he gave the visa applicant jewellery and they visited tourist attractions and spent time with her family. Since his return to Australia, he claimed they communicated by email and telephone. He had since returned to China for a month for their honeymoon when they visited various places and traveled to other cities. He claimed he financially supported the visa applicant and, although they did not have joint assets, she is in his will and he has bought an apartment in both names. The visa applicant claimed she was retired and supported herself with her savings and money from her sons. She claimed she and the review applicant communicate by emails, letters and telephone and that she could speak basic English. She claimed that when they first met, she had a good impression of him. It was like falling in love at first sight and he was very nice and her family liked him. She claimed they did not have a large ceremony when they married, all her family members were present and there was no marriage banquet after the registration. She claimed they did not do much on their trip, just stayed together with her son, and they did not visit places of interest. She claimed that on his second visit to China, they stayed at her son's home for a month and did not visit anyone. She claimed they were not young but wished to spend the rest of their lives together. She claimed they would buy a property together and she wanted to come to Australia to look after the review applicant who was old and lonely.

Held: Decision under review set aside.

The Tribunal found the review applicant to be credible, open and straightforward, and that he did not attempt to obscure anything potentially detrimental to his case such as problems communicating with the visa applicant by telephone. The Tribunal found he appeared genuinely committed to the visa applicant and demonstrated good knowledge of her life. The Tribunal generally found the visa applicant to be a credible witness apart from three inconsistencies in her evidence about when the review applicant first began to financially support her, what they did together when the review applicant came to China, and who was present at their wedding. The Tribunal accepted that the visa applicant may have been confused or nervous when giving evidence at the hearing and that the inconsistencies were a result of confusion and not an attempt to mislead the Tribunal. The Tribunal found the visa applicant demonstrated a good knowledge of the review applicant's life and his circumstances. The Tribunal accepted the evidence in relation to the circumstances in which the couple met and decided to marry. The Tribunal found that the financial aspects, nature of the household, social aspects and the long term commitment to each other was evidence that the applicants had a mutual commitment to each other. The Tribunal found that the review applicant and the visa applicant had a mutual commitment to a shared life as husband and wife to the exclusion of all others at the time of application and at the time of decision. Accordingly, the Tribunal found that the applicants met the requirements of cl.309.211 and cl.309.221 of the Regulations.

0903593

5 August 2010, Melbourne

Mr B Hely, Member

PARTNER (MIGRANT) (CLASS BC) – SUBCLASS 100 – SPOUSE – CL.100.221 – DEATH OF SPONSOR

– A delegate of the Minister refused to grant the applicant a Subclass 100 visa on the basis that the applicant's sponsoring spouse had died in June 2008, which was prior to her entry into Australia as the holder of a Subclass 309 visa in July 2008. The applicant claimed that she was a simple Chinese woman with one daughter (the secondary applicant) who had been studying in Australia to become a nurse for almost 6 years. Her daughter's ambition was to work and marry an Australian man and raise her family in Australia. The applicant claimed that when they received approval to come to Australia, she and her daughter went to Shanghai Immigration to pick up their visas. However, they encountered numerous delays and requests for more documents which required them to return to their home town, obtain the documents and return to Shanghai. This took 7 days while the documents and visas were processed. During this time, the applicant became very anxious as her daughter needed to get home to Australia to return to University and her study commitments. Their visas were granted on 10 July 2008 and they departed China on 14 July 2008.

The applicant advised the Tribunal that since arriving in Australia, she had married and had a new sponsor. The applicant and her daughter explained that they were anxious to remain together and it would cause them great hardship to be separated. The applicant advised that she and her current husband had lodged a spouse visa application which was currently under review by the Department.

Following the Tribunal hearing, a statement was received from the applicant's husband stating that the applicant had had a difficult life in China and that she is a decent, honest woman who had made many sacrifices for her daughter. He submitted that he and the applicant were hopeful that the Tribunal would make a favourable decision on compassionate grounds.

Held: Decision under review affirmed.

The Tribunal explained at the hearing, that it was its understanding that the applicant's second marriage did not alter matters for the purposes of the application which was currently under review as the requirements relating to her relationship with her sponsor, related to her sponsor at the time of application. The Tribunal explained that a new spouse could not "stand in the shoes" of her previous sponsor who had now died. The Tribunal therefore found that the applicant was unable to comply with the requirements of Subclause 100.221(2) or 100.221(2A) because her relationship with her sponsoring spouse was not continuing given that he was deceased. She was therefore unable to meet the requirements of r.1.15A(1A)(b)(ii) for a married relationship. The Tribunal also found that the applicant was unable to comply with the requirements of Subclause 100.221(3) or 100.221(4) because she had not entered Australia as the holder of a Subclass 309 visa until after her sponsoring spouse had died. Therefore, the applicant did not satisfy cl.100.221 of the Regulations for the grant of a Partner (Class BC) visa.

Student visas

1002840

14 July 2010, Melbourne

Mr T Connellan, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 – HIGHER EDUCATION SECTOR – CANCELLATION – S.116(1)(b) – CONDITION 8202(3)(b) – EXCEPTIONAL CIRCUMSTANCES – A delegate of the Minister cancelled the applicant's Subclass 573 visa under s.116(1)(b) on the basis that he had breached condition 8202 of his visa and there were no exceptional circumstances leading to the breach. The applicant claimed he successfully passed all subjects in the first two semesters of his Bachelor degree course. He claimed that in Semester 3, he failed two units out of four. In the following year, in Semester 1, he failed three out of five subjects and in Semester 2, he failed four out of five subjects. He claimed he received a termination letter from the University and that he lodged a number of appeals, but none of them were successful. A week before the exams, he received notification that his grandparents were ill. He claimed this had distracted him from studying and had adversely affected his exam performance which was reflected in his failing four of the five subjects. He claimed that one week before his exams, his mother told him of his grandparents' ill-health. He also claimed that his work schedule made studying difficult as he worked three or four times a week, mostly in the evenings and at night. He claimed he often worked till the early hours of the morning which made travel difficult and he often got home very late when he needed to get up to study in the morning. He claimed the workload caused him stomach pains, but he had not consulted a doctor because the University doctors were fully booked and he went to a chemist who gave him medicine which settled his stomach. He claimed he had not approached the lecturers or counsellors about his study difficulties because their availability clashed with his classes or work schedule. He claimed that, at the time, he thought work was more important than resolving his academic problems. A Faculty Co-ordinator from the University where the applicant was currently studying, claimed that since the applicant had commenced studies there, he was achieving satisfactory course progress. He also claimed that, in the circumstances surrounding the applicant's academic failure and particularly with the news about his grandparents, the previous University would have provided him with counselling and not terminated his enrolment.

Held: Decision under review affirmed.

The Tribunal found that the applicant was certified as not achieving satisfactory course progress and not complying with condition 8202(3)(a). The Tribunal considered whether such non-compliance was due to exceptional circumstances beyond the applicant's control. The Tribunal accepted that deteriorating health of elderly grandparents was likely to be a cause of great concern. However, the Tribunal found this was not an unusual or exceptional circumstance, but a common difficulty faced by many international students as in the applicant's case where his grandfather was in his 80's when the applicant first came to Australia. The Tribunal further accepted that the news of his grandparents' ill-health may have caused the applicant concern that impacted his capacity to study, but his pattern of poor academic results was established before the news arrived. The Tribunal did not accept that the applicant's own ill-health, which was not sufficiently severe to require a doctor's visit, constituted an exceptional circumstance which contributed to his failure to achieve satisfactory academic progress. The Tribunal did not accept that a workload of up to 20 hours in evening or night shifts three or four times per week was unusual for a tertiary student and found the applicant's priorities were towards work rather than study. The Tribunal found the applicant's employment was not an exceptional circumstance which contributed to his failure to achieve satisfactory academic progress. Accordingly, the Tribunal was satisfied such circumstances were prescribed circumstances in which the visa must be cancelled in accordance with s116(1)(b) of the Regulations.

1001365

13 July, Melbourne

Mr G Ledson, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – VOCATIONAL EDUCATION AND TRAINING – CANCELLATION – S.116(1)(b) – EXCEPTIONAL CIRCUMSTANCES – A delegate of the Minister cancelled the applicant's Subclass 572 visa under s.116(1)(b) on the basis that he failed to maintain satisfactory course progress for the Certificate III in Tourism at Education International & Training (EIT). The applicant advised that he was required to attend classes for between 15 and 20 hours per week. He had no classes on Fridays. He claimed that, at the start of his course, he attended all classes but as they became more difficult, he lost interest and started missing classes. He had also become homesick and confused and avoided attending class. The applicant confirmed that he was involved with alcohol and drugs in 2008 and 2009 and that he lived in a share house where there was partying all the time. This was why he had not attended classes on Mondays. He claimed that when his visa was cancelled, he was going through a lot and he began drinking. He had now stopped drinking because it did not help his situation and he had learnt about life and himself.

At the Tribunal hearing, the applicant agreed that EIT had provided him with significant support and that choosing this course had been a mistake. He had spoken to a counsellor at TAFE about the difficulties adapting to a new country and his father's illness and he acknowledged that he did not know how to deal with these problems. However, the delegate did not accept that these circumstances were exceptional and the applicant's visa was cancelled. He then lodged an internal appeal against EIT's intention to report him to the Department, which was unsuccessful. He said that he had discussed transferring to another course but was told that it was too late to change. The applicant claimed he was also now receiving help from someone he had met since his release from prison. He claimed that in the past 12 months, he had done a short course to train as an aged carer and he had worked stacking shelves in a supermarket. He was not working at the moment because he did not have any work rights.

Held: Decision under review set aside.

The Tribunal considered that the applicant had suffered a roller coaster of emotions over the past eighteen months; however, it did not consider that these circumstances gave rise to the applicant's breach of a condition of his student visa in the 2008 academic year. The Tribunal found that the applicant had not complied with condition 8202(3)(a) as EIT certified that he had failed to maintain satisfactory course progress for the Diploma in Tourism course. The Tribunal considered the applicant's evidence that his life had spun out of control on his arrival in Australia and that, for the first time, he was without the support and guidance of his family and friends. Also, he was concerned about the health of his father and he was sharing a house with other students where there were no limitations on his behaviour. He stated that weekends were non-stop partying and that was why he had not attended classes on Mondays. He admitted that he made life choices without considering the consequences which led to him being imprisoned for 42 days.

The Tribunal had a great deal of empathy for the circumstances in which the applicant had now found himself. He presented as a contrite and humble person who acknowledged his past behaviour and was attempting to rehabilitate himself. It found he had addressed past issues and was focused on completing his education. The Tribunal considered that the unrestrained freedom experienced by international students, who in many instances were living without the protective umbrella of family and friends for the first time, was not an unusual or out of the ordinary experience and was therefore unexceptional. The Tribunal considered that it was unexceptional that the applicant found it difficult to adjust to his new life in Australia and that he lived with and associated with other international students who, it appeared, had forgotten the reason why they had travelled to Australia.

However, the Tribunal did consider it exceptional that a person would undertake risky behaviour, including drinking alcohol and taking drugs, to cope with their personal circumstances to the extent described by the applicant. This ultimately led to the applicant facing criminal charges leading to imprisonment. The lack of family support or other positive social networks at the time would appear, to the Tribunal, to have compounded the applicant's situation. The applicant's evidence was that, because of his addictive behaviour in an unrestrained social environment, his attendance deteriorated and he was quickly unable to cope with the demands of his course. He quickly lost motivation and found himself in an ever increasing downward spiral. The Tribunal was satisfied that this addictive behaviour contributed substantially towards the applicant being unable to meet the conditions of his student visa.

Based on this, the Tribunal was satisfied that the applicant found himself in a situation where his response to his personal circumstances during the period of the breach was exceptional. Additionally, the Tribunal was satisfied that the applicant's addictive behaviour in an unrestrained social setting, led to his breach of a condition of his visa. Finally, the Tribunal considered that, as a consequence of this addictive behaviour combined with negligible social support, the applicant lacked the necessary skills or ability to correct his situation. The Tribunal considered that the circumstances that led to the applicant's breach of a condition of his visa, at the time, were beyond his control.

The Tribunal was satisfied that the applicant had not complied with condition 8202 and that the ground for cancellation existed. However, as it found that the non-compliance was due to exceptional circumstances beyond the visa holder's control, prescribed circumstances requiring mandatory cancellation of the visa did not exist. Nevertheless, as the Tribunal had decided that a ground for cancellation existed, it proceeded to consider whether the power to cancel the visa under s.116(1) should be exercised, having regard to all the circumstances.

The Tribunal found the applicant to be highly credible and remorseful and that he accepted responsibility for his behaviour. The Tribunal found the evidence confirmed the applicant's circumstances and his commencement of rehabilitation leading to him achieving his goal to complete his education in Australia. The Tribunal considered the applicant's behaviour before it to be exemplary and considered his statement to be remorseful, compelling and optimistic. The applicant stated that if he were to return to Kenya without a qualification, he would find it difficult to complete his studies as he would be required to undertake a foundation course to undertake tertiary studies. He felt he had already brought shame on himself and his family and this would be amplified if he were to return home due to his visa cancellation.

In view of all the circumstances of this case, including the circumstances in which the applicant breached condition 8202 of his visa and the exceptional circumstances beyond his control, the Tribunal was satisfied that the applicant's visa should not be cancelled. Accordingly, the Tribunal set aside the decision under review and substituted a decision not to cancel the applicant's Subclass 572 Vocational Education and Training Sector visa.

1001908
6 August 2010, Sydney
Ms K Raif, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 572 – VOCATIONAL EDUCATION AND TRAINING SECTOR – CL.572.322 – GENUINE DE FACTO RELATIONSHIP – A delegate of the Minister refused to grant the applicant a Subclass 572 visa on the basis that she did not satisfy cl.572.322 of the Regulations. The delegate found that the applicant, who was the partner of the first named applicant, had not provided sufficient supporting evidence that she was in a genuine de facto relationship with her

partner, who was the holder of the Student visa. The applicant gave evidence at the Tribunal hearing and referred to documented evidence of her de facto relationship that had already been provided. She noted that evidence had been provided from her siblings and also from her partner's father and she advised that their families had known about their relationship for over ten years. The applicant spoke about her relationship with her partner and explained that they met in 1999 and fell in love about a year later. She said that they obtained permission from their parents and started living together in a student hostel. She advised the Tribunal that she and her partner had both cared for her mother when she was ill. The applicant also spoke about her commitment to the relationship. She described the nature of the household and the couple's financial arrangements and explained they had lived in a de facto relationship since 2002 or 2003. The Tribunal received oral evidence from the applicant's partner (the primary visa holder) who spoke about her relationship with the applicant.

Held: Decision under review set aside

The Tribunal accepted the applicant's evidence and found her to be a credible and truthful witness. The Tribunal noted that the applicant had provided evidence of cohabitation with her partner, as well as a number of statements from third parties confirming that she and her partner were in a genuine relationship which had existed for a number of years. The Tribunal also noted that the applicant and her partner had given detailed and consistent oral evidence about the nature of their relationship. The Tribunal accepted that they had established a joint household and socialised together as a couple. The Tribunal also accepted, on the basis of statements from third parties as well as the applicant's oral evidence, that the relationship was socially recognised among friends and family members. The Tribunal found, further, that the applicant's partner was the 'primary person' for the purpose of cl.572.322 and noted that she had satisfied the primary criteria and been granted a Subclass 572 Student visa. Accordingly, the Tribunal found that the applicant met the requirements of cl.572.322 of the Regulations.

Other visas

1002885

8 July 2010, Sydney

Ms S Pinto, Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 – SPONSORED FAMILY VISITOR – CL.679.224 – GENUINE VISIT – A delegate of the Minister refused to grant the applicant a Sponsored Family Visitor visa on the basis that the review applicant (her son) had an adverse immigration history. Therefore, the delegate was not satisfied that the visa applicant's expressed intention only to visit Australia was genuine. In her application, the visa applicant claimed she wished to visit Australia for the birth of the review applicant's third child. The visa applicant indicated that her parents and three siblings reside in Australia and her remaining four siblings reside in Lebanon. The visa applicant's eldest son resides in Brazil, the review applicant resides in Australia and her other two sons reside in Lebanon. The visa applicant indicated that she is not employed and that she had always been a housewife. She had been refused visitor visas to Australia in January 2007 and in 2006.

The review applicant and his wife provided statutory declarations to the Department, stating that they would provide the visa applicant with financial support and accommodation during her proposed stay and that the purpose of the visa applicant's visit was to see their child who was to be born in February 2010. The review applicant also stated that the visa applicant had visited her son in Brazil twice previously and that she had returned to Lebanon after those visits.

The review applicant confirmed that he had applied for a protection visa in Australia several years ago but stated that it had been the "biggest mistake" he had ever made. He claimed he had been in a relationship with a woman and a friend told him that he could make an application to stay in Australia. The review applicant's English was poor at that time and he signed a form. When he found out that he had been refused the application and his friend had lodged an application for review to the Tribunal, he withdrew the application and made plans to return to Lebanon. The review applicant stated that he told Departmental officers at that time that he would return to Lebanon.

The review applicant confirmed that he was sponsored to Australia by his current wife, with whom he has three children. He stated that the visa applicant had visited her son in Brazil twice but she had returned to her home, her family and friends in Lebanon. The review applicant claimed the visa applicant only wishes to see her family in Australia as it was impossible for her elderly parents to travel to Lebanon and it is very expensive for himself and all his family to travel to Lebanon. The review applicant also stated that no other family members had ever overstayed their visas or breached visa conditions and he was extremely concerned that his mother had been punished as a result of his actions over 10 years ago.

Held: Decision under review set aside.

The Tribunal considered the delegate's concerns regarding the review applicant's immigration history and agreed that the review applicant's this matter was relevant in considering whether the visa applicant would overstay or attempt to change her status upon her arrival in Australia. Whilst the review applicant's immigration history indicated that he sought to change his status following his arrival, the Tribunal found the review applicant to be a credible witness and accepted that he considered that the lodgement of his application for a protection visa several years ago was a significant mistake on his part and a poor lapse of judgement. The Tribunal also accepted that the review applicant may not have been aware, as evidenced by the fact that he subsequently withdrew the review application, that he had made an application for refugee status in Australia. The Tribunal also considered that the review applicant's circumstances differed considerably from his mother's as he was a young man at that time and his mother is in her late 50s. The Tribunal accepted that the visa applicant would not seek to engage in employment in Australia or remain in Australia for this purpose. Accordingly, the Tribunal was satisfied, having regard to family commitments and the visa applicant's previous travel, as well as the good immigration history of other family members, that the review applicant's previous application for protection was an aberration and that the visa applicant's intention only to visit Australia was genuine. Therefore, the Tribunal found that the visa applicant satisfied the requirements of cl.679.224 of the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

Afghanistan

1002233

19 July 2010, Sydney

Dr I O'Connell, Senior Member

AFGHANISTAN – ETHNICITY – HAZARA – RELIGION – SHIA – POLITICAL OPINION – PRO-GOVERNMENT – The applicant entered Australia on a false Indonesian passport he had obtained through a people smuggler. He declared himself to the Australian authorities on arrival, and claimed that it was not safe in Afghanistan for him or his family. In his application for a protection visa, the applicant claimed to be a citizen of Afghanistan, a Hazara, and a Shia Muslim. He claimed that he had been contracted as a truck driver to deliver goods for the Afghan government and that the Taliban had sought to harm him for this reason and had placed him on a black list. He also claimed that a local mullah would seek to harm him on his return.

At the Tribunal hearing, the applicant explained that he decided to leave Afghanistan when a truck driver he knew was killed by the Taliban. He claimed that after this event he went back to Jaghouri and prepared to sell his land. He said that after it was sold, he went to Kabul and made contact with people smugglers who helped him to leave the country. The applicant also claimed that, on one occasion in 2007, he was forced off the road by the Taliban and accused of carrying a government load to Ghazni. He said that he was tied up and bashed but he never confessed to carrying a government load. He provided a medical certificate which referred to injuries he claimed to have sustained as a result of this incident. The applicant's adviser provided a submission which included photographs and news coverage about the destruction of trucks by the Taliban along the Ghazni - Khandahar highway, and information (dated 2007) stating that the general upsurge in violence in Afghanistan had spilled into Jaghouri District.

Held: Decision under review set aside.

The Tribunal accepted the applicant's account of his travel to Australia and his identity as a citizen of Afghanistan. It also accepted the applicant's evidence that he was Hazara and a Shia, and that he came from Jaghouri district in Ghazni Province. The Tribunal did not, however, accept that the applicant faced harm from the Taliban in Jaghouri or that he would face harm if he returned there in the reasonably foreseeable future because of his ethnicity or his religion. In reaching this conclusion, the Tribunal referred to country information which described Jaghouri as a Hazara enclave, largely free of the presence of the Taliban; and a DFAT report indicating that although there had been a resurgence of the Taliban, Hazaras were not currently targeted by the Taliban as was the case in the past.

The Tribunal accepted that the applicant was a truck driver from 2002 to 2008 and that some of his work involved the transportation of goods associated with the government. The Tribunal also accepted that he ceased working as a truck driver in 2008 because he feared for his safety. The Tribunal found that this aspect of the applicant's evidence was detailed, unhesitant, and accorded with the available country information. However, it did not accept that the applicant had experienced serious harm as a truck driver, and it specifically did not accept that he had ever been kidnapped and beaten by the Taliban. The Tribunal considered that if the applicant had actually had such an experience, he would have raised this claim prior to the Tribunal hearing.

The Tribunal also had reservations about the applicant's claim to be a person of ongoing adverse interest to the Taliban and the local mullah, by reason of an imputed political opinion. Nonetheless, in light of country information indicating that the Taliban do target persons who work for the government, and in light of the fact that outside the district of Jaghouri the Taliban were active, the Tribunal could not discount the real possibility that the local Mullah with ties to the Taliban may seek to seriously harm the applicant by reason of an imputed political opinion on his return to Afghanistan in the reasonably foreseeable future. Accordingly, the Tribunal found that the applicant had a well founded fear of persecution for a Convention reason.

Bangladesh

1003995

7 July 2010, Melbourne

Ms W Boddison, Member

BANGLADESH – PARTICULAR SOCIAL GROUP – HOMOSEXUAL MEN – POLITICAL OPINION – BANGLADESH NATIONAL PARTY

The applicant claimed that he left Bangladesh due to his social status as a gay person and because of his involvement in politics. He feared that he would be stoned to death for being gay, and that the religious leaders (mullahs), with the tacit support of the Government authorities, would harm him. The applicant claimed that he had become acquainted with a male work colleague and, after discovering their mutual attraction, they formed a relationship. He later married and, subsequently, his wife started having doubts about his sexual preference. He claimed that on one occasion, his work colleague was visiting the applicant at his house, and that the applicant's wife had walked in on them whilst they were engaged in a sexual act. The applicant claimed that his wife was devastated and subsequently informed her relatives and the authorities. He claimed that he was summoned by the mullahs to appear before them, and that he was told that the punishment for engaging in homosexual conduct was "death by stoning after being placed in a ditch". The applicant claimed that he became "mortally scared" and fled to live with his sister before coming to Australia.

The applicant also claimed that he was active in politics from his student days when he was a member and local office holder in the Bangladesh National Party (BNP). He claimed that he participated in a protest rally organised against the change of name of the international airport, and that he had since become aware that the authorities were searching for him, and that other participants in the rally had been arrested and were in jail. The applicant's wife and his brother provided evidence to the Tribunal attesting to the applicant's relationship with his work colleague. The applicant also submitted a number of letters from various bodies in Bangladesh as well as his BNP membership card.

Held: Decision under review set aside.

The Tribunal noted that the applicant had made his claims regarding his homosexual relationship at the first opportunity when he was initially questioned at the airport, and he had continued to provide a consistent and coherent account of this relationship. It also noted that the applicant's wife and brother were compelling witnesses who gave evidence that was consistent with the applicant's account. The Tribunal found that the applicant's evidence in relation to the Mullahs in his local area applying their version of Sharia law was consistent with the independent information before the Tribunal. The Tribunal also accepted the applicant's wife's evidence that even if the applicant was not killed, he would be subjected to other harsh treatment. The applicant's brother provided evidence regarding the shame the applicant had brought on their family. The Tribunal found the applicant to be knowledgeable regarding politics in Bangladesh and accepted that he was a member and office holder in the BNP. It also accepted that the applicant's political opponents would use the discovery of his homosexual relationship against him and that this would lead to it being more widely known.

The Tribunal had concerns regarding photographs provided to the Department however, the Tribunal found that as the applicant had claimed that his work colleague was often at his home, a photograph including the applicant's wife did not contradict his claims, and the applicant's untruthfulness regarding this matter related to a minor issue which was not sufficiently grave for it to impact on his general credibility.

The Tribunal noted the applicant's evidence that he did not intend to continue his relationship with his work colleague and that he "had not considered his sexual orientation", and it found that this was consistent with independent information regarding identification as a gay person in Bangladesh. The Tribunal regarded, based on the applicant's past relationship, that it was not a far fetched or a remote possibility that the applicant would engage in homosexual activities in the future, and that these activities could be discovered. The Tribunal accepted that homosexuals were at risk of harm throughout Bangladesh, and that it would not be reasonable for the applicant to relocate. The Tribunal therefore found that the applicant had a well-founded fear that he would be persecuted in the reasonably foreseeable future for reasons of his membership of the particular social group, 'homosexuals in Bangladesh', and that he was a refugee within the meaning of the Convention.

China

1002472

12 July 2010, Sydney

Ms L Nicholls, Member

CHINA – ETHNICITY – UIGHUR – The applicant, a Chinese citizen of Uighur ethnicity, travelled to Australia on a student visa and applied for a protection visa shortly thereafter. She claimed that she had been discriminated against and verbally abused at school due to her Uighur ethnicity, and that she and other Uighurs were forced to go to University in inner China in order to assist the cultural assimilation of the Uighur people. The applicant said that her house was raided and that she was abused and also accused of possessing separatist material, such as CD's and books, and that subsequently she was detained for two weeks. The applicant claimed that there was widespread discrimination against Uighurs, and that many Uighurs were killed during the major protests in Urumqi in July 2009, including the son of one of her neighbours. She claimed that a few days after the protests she was physically assaulted by a group of Han Chinese men who hit her. The applicant claimed that she had to pay a bribe to obtain her passport to come to Australia, and that she was only allowed to leave China because she was not listed as a political criminal. She claimed that if she was forced to return to China she would be questioned and detained, and that she had been "subject to longstanding and far-reaching discrimination and abuse in China" because of her Uighur ethnicity.

Held: Decision under review set aside.

The Tribunal accepted the various claims made by the applicant, but found that the incidents involving discrimination, in themselves, did not constitute persecution and it noted that the applicant had been able to undertake secondary and tertiary education in China. However, the Tribunal found that the arrest, abusive questioning and detention of the applicant amounted to serious harm involving systematic and discriminatory conduct by state authorities, and that the attack on her by a group of Han Chinese men was a targeted discriminatory act of harm. The Tribunal did not accept that if the applicant returned to China she would face immediate and targeted harm from the Chinese authorities or the Han Chinese community, however, it found that the independent information on the current treatment of Uighurs in China indicated that if she returned she would continue to suffer significant discrimination in a number of areas, including employment, cultural and religious observances, and accommodation outside her family home. It also found that there was a greater than remote chance that she would face mistreatment for reasons of her Uighur ethnicity from members of the Han Chinese community and from Chinese authorities, despite the fact that she did not have a high profile as a pro-separatist activist. The Tribunal therefore found that the various incidents of mistreatment cumulatively amounted to persecution for reasons of her Uighur ethnicity. Therefore, the Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

1005140

21 July 2010, Melbourne

Mr B Hely, Member

CHINA – POLITICAL OPINION – CAPITALIST – NO CONVENTION REASON – CREDIBILITY – The applicant claimed to be a Chinese citizen of Han ethnicity who initially came to Australia in 1997 on a Subclass 457 visa to better himself and to improve his prospects. He set up an import/export company, trading in products to and from China, including selling products to the Chinese company where he had previously been employed. The applicant advised that he had travelled to China in 1998 for approximately six weeks in connection with his import/export business and then he returned to Australia. He confirmed that he did not experience any problems with the Chinese authorities on that trip and he was not arrested. When his Subclass 457 visa expired, the applicant applied for another visa in Australia but was refused. He claimed that he met his Australian wife in 1999 and they married in 2000; however, she left him six months later and they had not yet lodged a spouse visa application. He remained in Australia until he was located by departmental officers in 2010 and was subsequently detained. In his decision, the delegate noted that the applicant stated that he had not suffered any harm or discrimination in China prior to coming to Australia and that he was unable to state who would harm or mistreat him if he were to return.

At the Tribunal hearing, the applicant claimed that his grandfather was an anti-communist member before the founding of the Chinese State in 1949. In approximately 1950-51, his grandfather was arrested but escaped to the mountains. He was in hiding for a year before he was arrested and then publicly sentenced and shot. He claimed that his grandfather was also an influential capitalist who established a significant textile factory in China; however, he was unable to provide his grandfather's name to the Tribunal. He also stated that the government in China was communist and that they do not accept capitalists. The applicant claimed he had been settled in Australia for over ten years and he considered it his home. If he were to return to China, he claimed the government would not assist him and he was no longer in contact with his family members. He claimed that he has no money and he is too old to get work. He also claimed that he now has "no idea with the Chinese environment".

Held: Decision under review affirmed.

The Tribunal considered that the applicant had exaggerated his claims to fear destitution due to his lack of work prospects in China because of the long period of time he had lived in Australia, although it accepted that he was genuinely apprehensive about his future prospects in China. However, the Tribunal did not accept that the applicant met the definition of a refugee under the Convention. In particular, the Tribunal considered that the harm he feared did not amount to 'serious harm' and, moreover, would not otherwise amount to persecution for a Convention reason.

The Tribunal did not accept that the applicant had experienced problems in the past due to his family's political background or class. In particular, the Tribunal did not accept that the applicant's grandfather was executed by the Chinese Communist Party (CCP) or that the applicant's father was arrested, detained or mistreated by the CCP. The Tribunal also did not accept that the applicant was discriminated against in his employment in connection with his family background or class, nor did it accept any of the applicant's claims relating to religion or that he had been subject to any form of harm or administrative penalty in connection with his religious beliefs (actual or imputed) or his possession of religious items. The Tribunal also did not accept the applicant's claims relating to political opinion (actual or imputed). The Tribunal also did not accept that he would be imputed with any such political opinions on account of his family background, class or activities in Australia generally. In particular, the Tribunal did not accept that there was a real chance that the authorities (or anyone else) would seek to harm him or any member of his family in relation to his political opinions (real or perceived) or activities. The Tribunal also did not accept that he would seek to engage in any anti-CCP, pro-capitalist or pro-democratic activities if he were to return to China or that he had any genuine desire to do so.

The Tribunal assessed all of the applicant's claims, both singularly and cumulatively and found that there was no real chance that the applicant would face persecution if he were to return to China now or in the reasonably foreseeable future because of his religion, political opinion, family background or class, or for any other Convention reason. The Tribunal therefore found that the applicant's claim that he would be persecuted if he returned to China, now or in the reasonably foreseeable future, were not well-founded. Accordingly, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

Fiji

1002641

7 July 2010, Sydney

Mr D O'Brien, Principal Member

FIJI – POLITICAL OPINION – SOQOSOQO DUAVATA NI LEWENIVANUA PARTY – PARTICULAR SOCIAL GROUP – INDIGENOUS FIJIANS – The applicant claimed that she was a supporter and member of the Soqosoqo Duavata ni Lewenivanua (SDL) Party of former Prime Minister Qarase. She claimed that as an SDL supporter, she would be victimised by the military government and forced into poverty. She claimed that after an email blog site from Fijians overseas was circulated in the office of her former employer, members of the military came and took three staff away to the military barracks where they were forced to march, do "duck walks" and run, as well as being locked up for half a day. The applicant claimed that the relationship between indigenous and Indo-Fijians was like a "marriage of convenience", and that the greatest threat facing the country was a very real chance of a racial conflict resulting in bloodshed, which

she needed to keep away from at any cost. She claimed that she held grave fears because there was no freedom of expression in Fiji, and the very fact that it would be known that she had applied for refugee status in Australia would cause her to be victimised.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant was a supporter of the SDL Party, however, it did not accept that she had a well-founded fear of persecution for reasons of her political opinion. On the basis of independent information, the Tribunal accepted that high profile leaders of the SDL, along with people associated with the former Qarase Government, may be targeted by the authorities, as may members of the party if they gathered in party meetings. However, there was no evidence before the Tribunal to suggest that people such as the applicant, who were merely supporters of the SDL, faced a real chance of persecution. The Tribunal accepted that the applicant's workplace was visited by the military following the circulation of an email critical of the Bainimarama regime. The Tribunal also accepted that three of the applicant's workmates were detained and ill-treated by the military as a result of this. However, it noted that the incident occurred in 2007 and that the particular workplace no longer existed as the company had wound up. It further noted that no harm had been caused to the applicant at the time, and the Tribunal was satisfied that there was not a real chance of the military causing harm to her in the future arising out of the incident.

The Tribunal did not accept the applicant's claim that she faced a real chance of persecution because of her race. It noted the independent information which indicated that indigenous Fijians made up over 50% of the population, and that the military was overwhelmingly dominated by indigenous Fijians. It found that there was no evidence to suggest that any harm that the authorities in Fiji were causing to indigenous Fijians, was being caused because of their race, and that the applicant's argument that the current position in Fiji would lead to racial violence was entirely speculative. The Tribunal also did not accept that the authorities would have any knowledge of the applicant's protection claim, given that information about the identity of protection visa claimants was protected. The Tribunal, therefore, was not satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

India

1003470

28 July 2010, Melbourne

Mr P Tyler, Member

INDIA – POLITICAL OPINION – CONGRESS PARTY – CREDIBILITY – The applicant claimed that he came from a family that was involved in the Congress Party, and that he had been engaged in politics since his school days, claiming that he opposed the Bharatiya Janata Party (BJP) because of its extreme religious views. The applicant claimed that he was attacked and beaten by members of the BJP after he had attended a local Congress Party rally, and that he sustained injuries for which he required medical treatment. He claimed that a local BJP Member of Parliament had reported the incident to the police, and that they subsequently arrested the applicant and detained him for two days as they falsely believed he was the instigator of the incident. He claimed that if he returned to India, members of the BJP would humiliate him and he would be persecuted by the police. He stated that he believed this would happen because he was a member of the Congress Party, given that the BJP was in power. The applicant also claimed that he had received up to 40 threatening phone calls from unknown callers which had forced him to change his phone number on two occasions, although he claimed he had received a further six or seven calls since he last changed his number.

The applicant provided the Tribunal with a copy of a letter on Punjab State letterhead, purporting to be from a local Member of Parliament, which stated that the applicant and his father were involved in the Congress Party, and that they had been attacked by members of the BJP, resulting in the police looking for the applicant to arrest him. A copy of a medical report stating that the applicant had injuries to both legs and had been prescribed pain-killers was also provided.

Held: Decision under review affirmed.

The Tribunal found the applicant to be a witness who lacked credibility, and that his evidence was inconsistent and lacked plausibility in significant respects. The Tribunal noted that, despite having changed his phone number on two occasions, he claimed his enemies in India had still been able to phone him. It also noted that, despite the applicant having claimed to be a member of the Congress Party and to be active in politics, he did not know which of the parties in the coalition government was the senior partner, nor did he know the name of the state parliament in Punjab. The Tribunal found the applicant's evidence to be inconsistent in regards to the day on which he was arrested; having initially said that it was on the day of the rally, he subsequently claimed it was two or three days later after it had been pointed out that he had said he was in hospital on that day. The Tribunal further noted that the applicant had claimed that he had been charged with assault and was gaoled after the rally, despite the fact that his father had given evidence that he had not been charged and had spent no time in gaol.

The Tribunal did not accept that the applicant was involved in politics in India; that he was beaten and injured after a rally; that he was hospitalised for reasons of an attack on him, or that he was arrested, gaoled or charged by police because of his involvement in a fight with supporters of the BJP. The Tribunal did not accept that the applicant's evidence was plausible and, therefore, it found that he had not suffered serious harm. Accordingly, the Tribunal was satisfied that the applicant did not have a well founded fear of persecution within the meaning of the Convention if he returned to India, both now or in the reasonably foreseeable future.

Philippines

1002507

15 July 2010, Sydney

Ms J Ciantar, Member

PHILIPPINES – NO CONVENTION REASON – BUSINESS OWNER – MONEY LENDERS – CREDIBILITY – The applicant claimed to fear for her life from a money lender to whom she had outstanding loans. She claimed that in 1987, she decided to start her own business as it was difficult to obtain work in the Philippines. The business initially traded well but things started to go bad when cheaper imports from China and Vietnam became available. The applicant claimed that she met a man in 1988 who was a politician and was in the finance business. She borrowed 400,000 pesos from him in order to run her business for a few years. With the new capital, she claimed she was able to stock new items and also to pay some overdue rent. However, in 1990 the economy was severely affected by a powerful earthquake and her shop and stock were all destroyed. It took several months for the area to be restored. The applicant claimed she was threatened by the money lender to keep up with the payments but she could not do so. She claimed she reported the money lender's threats to the local police but they did not seem to care. To make matters worse, just as the business was returning to normal, Typhoon Gloria hit the province in 1996 and destroyed many houses and shops, and also killed many people. The applicant claimed her business was again disrupted and she had no money to repay the lender who made constant threats to the applicant and her family. The applicant claimed she was beaten up several times and told to repay the money as she had now borrowed close to 750,000 pesos. In 2006, the applicant decided to leave the Philippines to escape the constant harassment and death threats. She claimed that she feared for her life if she were to return to the Philippines without having sufficient money to repay the money lender. The applicant stated that she did not believe the authorities in the Philippines would protect her if she returned without settling the loan. She claimed she wanted to remain in Australia and to be allowed to work so that she could save enough money to pay back her debts.

Held: Decision under review affirmed.

The Tribunal was of the view that the applicant had fabricated many aspects of her claims including the sale and supply of bakery products by a person whom she alleged was a politician and a drug lord. In addition to finding that the applicant had given inconsistent evidence regarding her business, the Tribunal also found that the applicant had given evidence about the person who lent her money that was not credible and it did not accept the applicant's claims that she owed money to a person who was a politician or a drug lord.

In summary, the Tribunal accepted that the applicant operated a general merchandise business and that she had a loan which she had been repaying when she worked as an insurance agent from 2004 to 2006. However, the Tribunal did not accept that the loan was owed to a politician who was a drug lord or that this

person made threats to the applicant and her family. The Tribunal did not accept that the applicant had given truthful evidence about her claims or that she or her family had been threatened or targeted or that she feared for her life.

Accordingly, the Tribunal did not accept that the applicant had a well-founded fear of being persecuted in the Philippines for the reasons that she claimed. The Tribunal did not accept that the applicant had suffered persecution or feared persecution in her country because of her race, religion, political opinion, or imputed political opinion, membership of a particular social group or for any other Convention reason. Therefore, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

Romania

1002353

18 July 2010, Melbourne

Mr P Fisher, Member

ROMANIA – ETHNICITY – ROMA – PARTICULAR SOCIAL GROUP – ROMA/GYPSY – RESIDE IN A THIRD COUNTRY – The applicant claimed that he came from a family of gypsies and that his grandfather had been persecuted during the Antonescu regime. He claimed that gypsies in Romania were still persecuted, mistreated and discriminated against. Because of this, his father had moved their family to another region of the country to start a new life and leave behind the gypsy culture. However, due to the colour of his skin, the applicant claimed he continued to be discriminated against and that at school, he was verbally and physically abused by children and teachers. He also claimed that when he left school it was almost impossible to find a job and, when he did, he was paid less for doing the same work. He claimed that he had been picked up by police on numerous occasions and “taken in for a beating and questioning”.

The applicant claimed that the situation for Roma people was worsening in Romania. They were not allowed inside shops and, if they did go in, they were treated in a demeaning way. He claimed that he had attempted to take his family to live in Spain to escape this discrimination; however, as soon as they found out that he was Romanian, he was immediately labelled as a gypsy and refused work. He claimed he was also unable to secure accommodation. The applicant and his representative submitted independent country information to the Tribunal relating to the treatment of Roma in Romania.

Held: Decision under review affirmed.

The Tribunal found the applicant to be a credible witness whose claims were entirely consistent with independent information about the persecutory treatment of Roma in Romania, and also with the independent information about the problems Roma experienced in other parts of Europe, such as Spain. The Tribunal therefore accepted that the applicant's claims were true, and found that he had been persecuted in the past. It found that he faced a real chance of persecution in the reasonably foreseeable future if he were to return to Romania, for the Convention reason of his race and/or membership of a particular social group.

The Tribunal then considered whether the applicant had a legally enforceable right to enter and reside in a third country, either temporarily or permanently, and whether he had taken all possible steps to avail himself of that right. The Tribunal found that the applicant had the right to enter and reside, at least temporarily, in all other European Union (EU) countries. The Tribunal noted, however, that the applicant's apprehension about the risks he might face elsewhere in the EU was largely borne out by independent information which suggested that the persecution of the Roma in many European countries persisted both at the hands of private individuals or, in some case, at the hands of state agencies themselves. The Tribunal found that the laws of the EU did not provide unrestricted access by all EU citizens to all EU countries, and that many Western European countries had imposed limitations on the citizens of some EU countries accessing work rights. Therefore, the Tribunal considered that s.36(3) did not apply to those countries imposing labour market access limitations on the basis of a person's nationality, because of a well-founded fear of persecution for reason of nationality as provided for in s.36(4).

The Tribunal further considered independent information with respect to countries where there was no such legal limitation, namely Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden. It found that there was

a real chance that the applicant would encounter serious harm capable of amounting to persecution in the form of serious physical harassment or ill-treatment; as well as significant economic hardship, the denial of access to basic services, and the denial of his capacity to earn a livelihood. However, it found that there remained a number of EU states where the applicant had the right to enter and reside, at least temporarily. In particular, information relating to Denmark, Estonia, Portugal and Sweden contained no suggestion that the applicant would face a real chance of experiencing serious harm in the reasonably foreseeable future in those countries. The Tribunal found that, unlike Italy, which had in recent years expelled Romanians (including Roma) and sent them back to their country of nationality, the evidence before the Tribunal did not suggest that there was a real chance that the aforementioned four countries would "arbitrarily *refouler* the applicant to Romania should he enter their jurisdiction". Consequently, the Tribunal found that the applicant was a person who had not taken all possible steps to avail himself of the right to enter and reside in a country other than Australia, and that Australia therefore did not owe protection obligations to the applicant. Given the circumstances in this case, the Tribunal felt it appropriate to refer the matter to the Minister for further consideration on public interest grounds pursuant to s.417 of the Act.

Serbia

1003232

1 July 2010, Sydney

Ms J Marquard, Member

SERBIA – NO CONVENTION REASON – FAMILY VIOLENCE – The applicant claimed that her husband had been murdered by his father after an argument in 1992, and that this had led to her son becoming depressed and drinking heavily. The applicant claimed to fear harm from her son, who she claimed suffered from manic depression, hallucinations and alcoholism. She claimed that he had threatened to kill her by throwing her in a well and, on one occasion, he had put his hands around her neck. The applicant claimed to fear that her son would kill her if she did not provide him money for alcohol as he was not working. She did not think the authorities would be able to protect her. She claimed that she was suffering from high blood pressure, diabetes, loss of hearing, tension and anxiety and that she had nowhere to live in Serbia. The applicant also claimed that her daughter was supporting her in Australia.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant feared harm from her son because he was mentally ill and an alcoholic, and that he wished to harm her because of her refusal to give him money, along with his alcohol-induced propensity for violence. It found that there was nothing in the evidence to indicate that the harm she feared was for any of the reasons enumerated in the Refugees Convention. The Tribunal was satisfied that the applicant was being targeted as an individual and because of her son's alcoholism and propensity for violence, and not for any Convention reason. It was not satisfied, therefore, that the applicant was a person to whom Australia had protection obligations under the Refugees Convention. The Tribunal noted that the case warranted being brought to the Minister's attention given the unique and exceptional circumstances involved.

Sri Lanka

1002652

15 July 2010, Sydney

Ms A Cranston, Member

SRI LANKA – ETHNICITY – TAMIL – POLITICAL OPINION – SUSPECTED LIBERATION TIGERS OF TAMIL EELAM SUPPORTER – The applicant claimed to fear serious harm in Sri Lanka because she was suspected of involvement with the Liberation Tigers of Tamil Eelam (LTTE). In her application for a protection visa, she explained that she was originally a 'Jaffna Tamil' and that after her marriage in 1989, she moved to Colombo with her husband and worked as a school teacher. She also claimed that she was leading a normal life in Colombo while her siblings left Sri Lanka, one after the other, in fear of persecution. The applicant claimed that she had volunteered as a teacher in Vanni on several occasions, and that after the Tsunami she volunteered at the behest of various NGO and human rights organisations for a period of

two months. She claimed that she ceased volunteering after this as paramilitary groups threatened her and demanded money. She said they refused to believe she was genuinely teaching displaced and orphaned children, and accused her of collecting funds for the LTTE from her siblings living abroad.

The applicant stated that she obtained employment at a newspaper through the influence of NGO officers and journalists she knew and that she worked there from 2005 until 2009. She explained that in 2008, she had travelled overseas to visit her siblings and, on her return, was detained at the airport and questioned about her involvement in collecting funds for the LTTE from abroad. The applicant claimed that after this arrest, her co-workers at the newspaper also started to suspect her of having LTTE involvement. She said that some months later, one co-worker was detained and interrogated severely. She claimed this co-worker then warned her to leave the country permanently, telling her that the authorities suspected her of having LTTE involvement through her siblings overseas.

The applicant also claimed that she and her sister were detained at the airport in 2009 when her sister visited from the UK. She said that on that occasion, the paramilitaries accused her sister of helping the LTTE and they had been forced to give them money in order to be released.

Held: Decision under review affirmed.

The Tribunal did not accept the applicant's account of her experiences in Sri Lanka and it referred to several problematic aspects of the applicant's evidence that it found significant and which led it to conclude that the applicant was not a "witness of truth". The Tribunal noted, for instance, that the applicant's evidence at the Tribunal hearing about being threatened on her return from Vanni, was markedly different to the account contained in her original statement.

The Tribunal also had doubts about the applicant's claim to have worked at a newspaper. The Tribunal noted that, when asked to talk about the newspaper, the applicant had described it as a normal newspaper that published news, poems, essays and articles, whereas the country reports before the Tribunal indicated that the paper in question reported the social and political concerns of the Tamil community. The Tribunal also pointed out that the applicant was unable to provide details about the NGO that allegedly secured the job at the newspaper for her, and that the applicant was unable to state the name of a journalist who had been arrested, who was reported to have worked at the same newspaper.

Further, the Tribunal noted that although the applicant had claimed her co-worker had warned her to leave Sri Lanka permanently in approximately mid 2008, she had not applied for the visa to come to Australia until almost a year later. This led the Tribunal to conclude that the applicant had not acted in a way that was consistent with the alleged detention or warnings of her co-worker.

As such, the Tribunal did not accept the applicant's claims regarding her problems in the past. The Tribunal, therefore, did not accept that there was a real chance that her name would be on an alert list at the airport. Therefore, it was not satisfied that there was a real chance that she would be harmed for any imputed political opinion in the future. Accordingly, the Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention

Uzbekistan

0910028

26 July 2010, Melbourne

Mr P Fisher, Member

UZBEKISTAN – RELIGION – MUSLIM – POLITICAL OPINION – ASSOCIATE OF UZBEK REFUGEES/ACTIVISTS – FOLLOWER OF AKROM – The applicant claimed that his problems in Uzbekistan commenced at the time of the Andijan demonstration, held on 13 May 2005, which degenerated into a massacre when Uzbek troops began firing on protesters. He claimed that his brother and many of his workmates were involved in the demonstration that led to the massacre, and that he was subsequently directed to attend a police station to be interviewed in connection with the demonstration. He stated that he was interviewed on two occasions by police, who showed him photos of suspects and pressured him to

become an informant. The applicant also claimed that his brother was detained at the time of the protests and accused of releasing information to journalists.

The applicant further claimed that from 2006 to 2007 he left Uzbekistan for the purpose of study, and that in 2008 he travelled to Australia to work. He explained that after several months in Australia, he made contact with Uzbek refugees who had fled from Uzbekistan because of their involvement in the Andijan uprising. He noted that members of this Uzbek community followed the outlawed Muslim leader Akrom, and belonged to the Uzbek Association of Australia (UAA) which disseminates information on the internet about persecution by the Karimov government in Uzbekistan. The applicant gave evidence that he became engaged to a young woman from this community and he said that, when informing his family of this, he spoke with his parents over the phone about his fiancée's family. He stated that he believed the Uzbek government came to know about the people he was associating with because they listened to his phone calls.

The applicant explained that since informing his parents of his intended marriage, "bad things" had been happening to him and his family. He said that his brother was arrested for a second time and his parents were forbidden travel visas. Additionally, his family informed him that he (the applicant) had twice been summonsed to the Andijan City Criminal Court in relation to the confiscation of his apartment. He said that he was sure the confiscation of his property was not the real reason he was summonsed to attend court. He suggested that the real reason was that he had been in touch with Uzbek refugees in Australia "who also follow Akrom". The applicant's representative submitted that before the Andijan protest, the applicant had been regularly praying with Akrom at a prayer room at his workplace and stated that, although he was not a member, he was a follower.

Held: Decision under review set aside.

The Tribunal acknowledged that many aspects of the applicant's claims were supported by independent country information. The Tribunal noted, for instance, that the applicant's claims of being repeatedly interrogated and pressured by the Uzbek authorities into becoming an informant against his co-workers, was consistent with country information confirming that the Uzbek authorities relied on such sources as a means of keeping tabs on the citizenry, and that they required people to report on their relatives. Significantly, the Tribunal also found that the applicant's claim that his house was confiscated on the pretext of trying to induce him to return to Uzbekistan, was supported by descriptions of such incidents in a recent Human Rights Watch report.

The Tribunal accepted that the applicant's claim that his involvement with a group of Uzbek expatriates was likely to be viewed as suspect by the Uzbek authorities and was supported by the statements and evidence of the witnesses, including recognised refugees. The Tribunal also remarked that, although the applicant's claims of having had his telephone conversations monitored and property seized on spurious grounds might sound like something out of a cold war spy story, such claims were sadly borne out by the country information illuminating the manner in which Uzbekistan continues to be governed some two decades after the iron curtain was lifted elsewhere.

The Tribunal noted that although the applicant had claimed to fear persecution because of his religion, and denied having been involved in any overt political activity, the country information clearly demonstrated that certain pious Muslim groups, including followers of Akrom, had been demonised by the Uzbek government as extremist separatist groups.

Having carefully considered the applicant's claims and evidence, the Tribunal accepted that the applicant had come to the adverse attention of the Uzbek authorities as claimed, most likely through his association with Uzbek refugees in Australia. The Tribunal accepted that, as evidenced by copies of Uzbek court documents submitted by the applicant, those authorities had initiated politically motivated court proceedings against the applicant and had, furthermore, confiscated his house as punishment when he failed to respond to the court's summons. Accordingly, the Tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention.

Zimbabwe

1002650

14 July 2010, Sydney

Ms S Leal, Member

ZIMBABWE – POLITICAL OPINION – MOVEMENT FOR DEMOCRATIC CHANGE YOUTH LEADER –

The primary applicant (the applicant) claimed that she had been a Movement for Democratic Change (MDC) youth leader in Zimbabwe, and that she had been harassed and abused by ZANU-PF youth as a result of her political activities. She claimed that a close relative, who had become her legal guardian after the death of her mother, had also been an MDC member, and she stated that she had not felt safe in Zimbabwe since this relative had fled to Australia. The applicant submitted that there was no state protection in Zimbabwe because the authorities sponsored the ZANU-PF youth and Border Gezi to terrorise people.

The applicant gave evidence at the Tribunal hearing and spoke about her involvement with the MDC. She also explained that after the 2000 elections, her relative had sent her to Harare to avoid being forced to attend training at the Border Gezi site. She claimed that around this time, she had been kidnapped by the ZANU-PF. She said that she had been detained for over two weeks in a location “where the ZANU-PF torture people”, and that she was later released, still wearing the same clothes she had been detained in. She became upset when describing this episode. The applicant also expressed concern for her sister who remained in Zimbabwe. She explained that without a ZANU-PF card it was difficult to access water, medication and medical treatment.

The Tribunal heard evidence from the secondary visa applicant, the applicant’s husband, and the aforementioned relative of the applicant. The applicant’s husband stated that if he were to return to Zimbabwe he would face persecution from members of ZANU-PF because he is a member of the MDC, especially in light of the next presidential elections, and because the country’s security was in the hands of the ZANU-PF. The applicant’s relative confirmed that the applicant had been active within the MDC.

Held: Decision under review set aside.

The Tribunal found the primary visa applicant’s evidence to be open and credible. The Tribunal accepted that the applicant and her sister were raised by a relative who was an activist in the MDC, and that the applicant’s political activism was prompted by her relative’s involvement. The Tribunal also noted that the applicant was able to describe the background to the MDC party and that she gave detailed evidence as to her role in the party in the lead up to the 2000 referendum and subsequent elections. The Tribunal, therefore, accepted the applicant’s evidence that she had had a leadership role within the youth wing of the MDC from 1998 to 2000.

The Tribunal noted that the Global Political Agreement between the ZANU-PF and the MDC remained in place in Zimbabwe but acknowledged that this agreement had not put an end to the targeting of MDC members by members of the ZANU-PF. The Tribunal accepted the applicants’ evidence that their families had been subjected to harassment and to the denial of food and services when they had been unable to show evidence of their membership of the ZANU-PF. The Tribunal also referred to country information indicating that Zimbabweans returning from abroad had been victimised and harassed once back in Zimbabwe merely for having lived abroad.

Based on the evidence before it, the Tribunal was satisfied that in light of the applicant’s prior activism in the MDC, her continued membership in the MDC and her lengthy absence from Zimbabwe, she would be at risk on her return of harassment, discrimination and the denial of basic services, including medical treatment, such as may threaten her capacity to subsist. The Tribunal was satisfied that such treatment would constitute persecution involving serious harm. Accordingly, the Tribunal found the first named applicant was a person to whom Australia had protection obligations under the Refugees Convention.

RRT COUNTRY ADVICE

China

CHN36060 – Fujian – Illegitimate children – De facto relationships – Societal attitudes – Social compensation fee – Household registration – State protection – 18 February 2010

External advice provided by Dr Alice de Jonge on the treatment of children born out of wedlock in China. Advice is also provided on the situation for mothers who have children out of wedlock.

CHN36199 – Hangzhou – Han Muslims – Converts to Islam – Mosques – Saudi Arabia – 5 March 2010

Provides advice in relation to the treatment of Han Chinese who have converted to Islam. Specific research covers Islam in Hangzhou, Zhejiang province.

CHN36572 – Fuzhou – Fuzhou-Xiamen railway – Gongnong village, Haikou – 29 April 2010

Provides information on the construction and route of the Fuzhou-Xiamen railway.

CHN36608 – Shandong Province – Falun Gong – 7 May 2010

Provides advice on Falun Gong ban in Shandong province.

Egypt

EGY36002 – Homosexuals – Legal provisions – 22 January 2010

Provides advice on the treatment of Homosexuals in Egypt from 2007 until January 2010.

EGY36097 – Coptic Christians – Conscientious objection – Military service

Provides information regarding the treatment of Coptic Christians undertaking compulsory military service.

EGY36256 – Coptic Christians – Muslim Brotherhood – Islamists – State protection – 26 February 2010

Provides information on the attitude and treatment towards Coptic Christians, particularly those engaged in proselytisation, by the Muslim Brotherhood and other Islamists. State protection towards Coptic Christians, particularly those engaged in proselytisation.

EGY36295 – Internet regulation – Homosexuals – Gay movies – 2 March 2010

Provides information on Internet regulation in Egypt up and until 2007, Arabic websites showing gay films, and a list of western mainstream gay films and Egyptian films that also explore sexual diversity.

Fiji

FJI36197 – Passport scams – Indian nationals – Legal proceedings – 11 March 2010

Provides advice on a 2007 passport scam in Fiji, and reports of immigration and passport scams taking place in Fiji involving Indian or other foreign nationals during the period 2000-2010.

FJI36357 – Mokani – Sitiveni Raturala – Peoples Charter – Extra-judicial killings – 25 March 2010

Information is provided on the location of Mokani village and whether two of its villagers were killed for refusing to sign the Peoples Charter. Advice is included on people signing the Charter.

FJI36386 – Methodist Church – Methodists – Interim government – Church officials – 31 March 2010

Information on the current relationship between the Interim Government and the Methodist Church.

Indonesia

IDN35985 – SPSI – GAPENSI – Corruption – KPK – Police – State protection – 20 January 2010

Provides information on the evidence of corruption within Indonesian unions and employer associations. The response also examines the powers, manpower and procedures of the Corruption Eradication Commission (KPK). Finally, the response examines witness protection for corruption whistleblowers in Indonesia.

IDN36200 – Children – Exit procedures – Parental consent – 9 February 2010

Provides advice from the Indonesian Embassy in Canberra on exit procedures for an Indonesian parent departing with a child.

IDN36243 – Women – Domestic violence – State protection – Support services – Legal provisions – Divorce – 18 February 2010

Provides information with regard to the availability of state protection and non-government aid for women affected by domestic violence. Information on divorce for Muslim couples is also provided.

IDN36421 – Ethnic Chinese –Citizenship – Legal provisions – 23 March 2010

This response examines recent legal reforms in Indonesia affecting the ethnic Chinese population, with particular emphasis on the 2006 citizenship law reform.

South Korea

KOR36225 – Reunification – One Nation Group – North Korea linked groups – 15 March 2010

Provides information on Government policies regarding reunification, and on groups that support reunification and their treatment by the Government.

KOR36367 – Korean peninsula – Territorial sovereignty – Asylum seekers – 15 March 2010

Information on whether the Republic of Korea claims sovereignty over all of the Korean peninsula.

FEDERAL COURT JUDGMENTS

SZMWO v MIAC
[2010] FCAFC 97

Full Federal Court of Australia, Rares, Besanko and Flick JJ, NSD 1465 of 2009, 6 August 2010

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) affirming the delegate's decision to refuse to grant a Protection visa.

The appellant, a national of the Czech Republic, claimed to fear persecution on the basis of his Roma ethnicity. The Tribunal considered whether as a European Union (EU) citizen the appellant had a right to enter and reside in Spain but had not taken all possible steps to avail himself of that right under s.36(3) of the *Migration Act 1958* (the Act). The appellant claimed that his inability to access the welfare system in Spain meant there was no right to "reside" within s.36(3). The Tribunal found it did not need to decide if the appellant had a well-founded fear in relation to the Czech Republic as it concluded that as an EU citizen he had a right to enter and reside in Spain but had not taken all possible steps to avail himself of that right. It found that there was no real chance that the appellant would experience harm in Spain amounting to Convention-related persecution and that there was no real chance that Spain would return him to the Czech Republic such that s.36(4) and (5) did not apply.

At first instance the Federal Magistrate held that the Tribunal did not err in its consideration of s.36(3), that s.36(3) did not require that the right of residence be of a settled character or at a particular standard of living and that the Tribunal's conclusions were open on the evidence.

The appellant contended, among other things, that: the Tribunal erred in applying s.36(3) to the effect that a person's right to "reside" in another country would only be "negated" in circumstances of "extreme hardship"; the Federal Magistrate's construction of s.36(3) was incorrect, and the concept of "right to reside" included the right to participate in the country's system of social security and/or the capacity, as a matter of practical reality, to establish a residence in the country.

Held: *per curiam*, appeal dismissed.

per curiam

The Tribunal decision was not affected by jurisdictional error. There was no jurisdictional error in the Tribunal's construction of s.36(3). Properly construed, s.36(3) addresses the right to "enter and reside" in a third country and does not incorporate any requirement to examine such matters as a person's ability to obtain employment or access social welfare benefits.

per Rares J:

The right to enter and reside described in s.36(3) is merely a right to enter and reside in the other country; it is not a right equivalent to recognition of the non-citizen as entitled to all the attributes of citizenship or even refugee status in the other country.

per Flick J (Besanko J agreeing)

The Tribunal did not make any finding either that the right to reside would only be "negated" if an applicant was exposed to "extreme hardship" or that the appellant would face "extreme hardship". Its conclusion was that the difficulties confronting the appellant were "not such as to negate the existence of his right to reside" in Spain. That was a finding of fact open to it on the evidence and not dependent on the construction of s.36(3) advanced by the appellant.

**SZNYF v MIAC
[2010] FCA 839**

Federal Court of Australia, Collier J, NSD 586 of 2010, 10 August 2010

This was an appeal from a judgment of the Federal Magistrate's Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") affirming the delegate's decision to refuse to grant a protection visa.

The appellant claimed that she feared persecution in China by reason of being a member of an unregistered Catholic church. She claimed that the police had raided her home and provided, among other documents, a summons purportedly issued to her by the Chinese Public Security Bureau ("the PSB"), apparently bearing the official seal of the relevant PSB, and requiring her to attend an office of the PSB as she had been suspected of "spreading superstition". The Tribunal did not accept that the alleged police raid had occurred or that the appellant was a genuinely practising Catholic in an unregistered Church in China for reasons it gave, and did not place weight on the document as evidence that the authorities were pursuing the appellant, because of information referring to the prevalence of document fraud in China, and its adverse view of her credibility. It did not determine whether the document itself had been manufactured, or was a genuine pro forma document that had been filled out on request, but found in either case that its contents were unreliable.

Before the Federal Court, the appellant contended that the Tribunal did not give proper consideration to the summons issued by the PSB.

Held: Appeal allowed. *Tribunal decision quashed and remitted for reconsideration.*

- (i) The Tribunal committed jurisdictional error by failing to consider the question whether, in fact, the appellant had been the subject of a valid summons to appear before the PSB in relation to her claimed activities, and the extent to which that this would impact upon her claims to be entitled to protection under the Refugees Convention.
- (ii) The Tribunal did not explain why, in the particular matter before it, it had decided not to place weight on the document or how document fraud in China extended to the type of summons in question. Furthermore, it did not explain why apparent inconsistencies in the evidence of the appellant should lead it to give no weight to a document bearing the seal of the relevant PSB. It may be possible for evidence of an applicant to result in adverse credit findings by the Tribunal, but nonetheless the applicant be the genuine recipient of a valid summons from a PSB in China.

FEDERAL MAGISTRATES COURT JUDGMENTS

**Diba & Anor v MIAC & Anor
[2010] FMCA 354**

Federal Magistrates Court of Australia, Cameron FM, SYG 185 of 2010, 27 May 2010

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

The applicant had initially sought a subclass 570 Independent ELICOS Sector visa but by the time of the Tribunal hearing had enrolled in a Certificate IV in Marketing course and was seeking to satisfy the criteria for a subclass 572 Vocational Education and Training Sector visa. The issue before the Tribunal was whether the applicant had satisfied cl.570.229 or 572.234 of Schedule 2 to the *Migration Regulations 1994* ("the Regulations") which were identical in terms and provided that the aggregate period or periods of ELICOS (English Language Intensive Course for Overseas Students) that the applicant is seeking to undertake, together with the period or periods of any previous ELICOS undertaken, does not exceed a specified number of weeks.

The Tribunal found that the applicant's total period of ELICOS study had exceeded the specified amount and on that basis concluded that she did not satisfy cl.570.229. Additionally, the Tribunal found that the applicant could not be granted a subclass 572 visa as she failed to satisfy cl.572.234. In reaching that

conclusion, the Tribunal did not accept the applicant's submission that cl.572.234 was not applicable because the applicant was not "seeking to undertake" any further ELICOS studies. It found that the provision was both prospective and retrospective in nature and required the Tribunal to take into account, when assessing the relevant "aggregate" period, any past period of ELICOS studies together with any future ELICOS studies contemplated by the visa applicant.

The applicant contended that the Tribunal committed jurisdictional error by misconstruing or otherwise misapplying cl.572.234. It was submitted that the clause was premised upon the assumption that an applicant "is seeking to undertake" an ELICOS and has no application where the applicant is not "seeking to undertake" an ELICOS. .

Held: Application dismissed.

- (i) The Tribunal did not err in its interpretation or application of cl.572.234.
- (ii) The purpose underlying cl.572.234 is to make subclass 572 visas unavailable to applicants who, in the aggregate, have undertaken or seek to undertake what is deemed excessive ELICOS training. If an applicant has undertaken more than the prescribed period of ELICOS tuition and has not commenced his or her principal course, whether or not he or she proposes further ELICOS study, then that applicant has undertaken excessive periods of ELICOS without commencing studies in a principal course and cannot satisfy cl.572.234.

**Khan & Ors v MIAC & Anor
[2010] FMCA 546**

Federal Magistrates Court of Australia, Driver FM, SYG819 of 2010, 16 August 2010

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the delegate not to grant him a Skilled Independent Overseas Student (Class DD) Subclass 880 visa.

The Tribunal found that the applicant did not meet cl.880.230(1) of Schedule 2 to the Migration Regulations 1994 as information given as part of the skills assessment was false or misleading in a material particular. The applicant's skills were assessed by Trade Recognition Australia (TRA), the relevant skills assessing authority, as suitable for the occupation of Cook. The assessment was based on a work reference stating that the applicant had completed 900 hours work experience (the requisite amount) at the China Town restaurant. Based on the applicant's admission, the Tribunal found that the restaurant work reference was false and that it was misleading as it indicated the applicant had work experience at the China Town Restaurant which he did not. It further found that as the reference was material to TRA when it assessed the applicant's nominated skilled occupation, it was a 'material particular'. The Tribunal also considered whether the information was false or misleading in a material particular in light of claimed work experience at another restaurant up to the date of lodgement of the TRA application but found that the applicant had not worked the requisite amount at that restaurant.

Held: Application dismissed.

- (i) The Tribunal did not misconstrue or misapply c.880.230(1).
- (ii) The Tribunal was correct to focus on the information provided to TRA. The "requirement" to have 900 hours work experience is not a visa requirement. It was a requirement of TRA for the purposes of its skills assessment. The relevant visa requirement was to have a skills assessment not based on false or misleading information. Therefore the issue of relevance was whether TRA was misled.
- (iii) The applicant's concession that the work reference was false was material because it bore on the question of whether he had acquired the work experience.
- (iv) Work experience gained after the TRA assessment is not material because the issue is one of materiality to the TRA assessment.
- (v) The Tribunal is not a "relevant assessing authority" and cannot do the job of TRA for it.

Obiter

- (vi) It is arguable that the falsity of the work reference was not material if up to the time of the TRA assessment there was other evidence that he had acquired the necessary work experience.

**SZOIW v MIAC & Anor
[2010] FMCA 568**

Federal Magistrates Court of Australia, Raphael FM, SYG722 of 2010, 2 August 2010

The applicant, a national of the People's Republic of China, sought judicial review of a Refugee Review Tribunal decision affirming a decision not to grant him a Protection visa.

The applicant claimed persecution on the ground of his Catholic religion. The applicant claimed he regularly attended a church in Sydney for about 15 months. Upon request from the Tribunal he provided details of 4 members of the church who could verify his attendance. The Tribunal placed very little weight on the first witness's evidence for reasons it gave. The second witness was the applicant's cousin and gave evidence that they were both Catholics from birth and regularly attended services at the Flemington church. The Tribunal asked the second witness his favourite bible story but did not accept his account as a true story of the Bible. It asked him the story of how Jesus was born and said his account appeared very vague for someone who claimed to be a practising Catholic. It did not accept the witness was a Catholic. This, together with its concerns about the applicant's credibility, caused the Tribunal to place little weight on the second witness's evidence. Given its credibility concerns with the applicant and the little weight it gave to the evidence of the first two witnesses, it did not contact the remaining 2 witnesses. It disregarded the applicant's church attendance in Australia pursuant to s.91R(3) of the *Migration Act 1958*.

The applicant argued that the Tribunal exceeded its jurisdiction by taking upon itself the role of arbiter of minimum religious knowledge to be a Catholic. He also argued that the Tribunal wrongfully disregarded his church activities in Australia in reliance upon s.91R(3) as s.91R(3) had no application to the conduct because the Tribunal was not engaged in a chain of reasoning leading to a determination in his favour taking into account any evidence of conduct in Australia.

Held: RRT decision quashed and remitted for reconsideration.

- (i) The Tribunal fell into jurisdictional error in the manner in which it dealt with the questioning of the second witness. It set itself up as an arbiter of religious knowledge so far as the witness was concerned because it used the failure to come up to its standards as reason to reject other evidence that it had not even heard. Although not required to take evidence from particular witnesses, the Tribunal's reason for not calling these witnesses was directly related to its views about the second witness which were in error.
- (ii) The Tribunal did not err in its application of s.91R(3). Section 91R(3) requires the Tribunal to first consider whether it will grant a protection visa taking into account any evidence given in relation to an applicant's activities in Australia. If so, the second step is to consider the motivation of the applicant and the third step, if the Tribunal is satisfied that the motivation was otherwise than for the purposes of enhancing the applicant's claim, is to grant the visa. If not so satisfied, then evidence of what occurred in Australia must be excluded.

**Banala v MIAC & Anor
[2010] FMCA 570**

Federal Magistrates Court of Australia, Raphael FM, SYG 525 of 2010, 26 July 2010

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate refusing to grant him a Skilled (Provisional) (Class VC) Subclass 458 visa.

The Tribunal found that the applicant did not meet the pre October 2008 version of cl.485.215 of Schedule 2 to the Migration Regulations 1994. The Tribunal concluded that while the applicant had made arrangements to undergo a language test on 2 October 2007, as this was after lodging his visa application on 25 September 2007, his visa application was not accompanied by evidence that he had made arrangements to

undergo a language test for the purposes of the then cl.485.215(c). As the applicant did not satisfy cl.485.215(a), (b) or (c), the Tribunal found he did not satisfy cl.485.215.

The applicant contended that the Tribunal had erred in not considering evidence of arrangements to undergo an IELTS test he had provided after the date of his application, but before the Tribunal's decision. The Minister argued that the High Court decision in *Berenguel v MIAC* [2010] HCA 8 was distinguishable because the provision considered in that case did not have the alternative (c). For the applicant it was argued that either cl.485.215(c) only had the work suggested by Smith FM in *Habib v MIAC* [2010] FMCA 450 or it was redundant.

Held: MRT decision quashed and remitted for reconsideration.

- (i) The decision of the Tribunal was affected by jurisdictional error. Either *Habib* was correctly decided for the reasons given by Smith FM; or, even if Smith FM was wrong in his construction of sub-clause 485.215(c) that sub-clause should be disregarded as being redundant.

Gill v MIAC

[2010] FMCA 587

Federal Magistrates Court of Australia, Lloyd-Jones FM, SYG 2984 of 2009, 4 August 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 him a Skilled (Residence) (Class VB) Subclass 885 visa.

The applicant applied for the visa on 14 January 2008. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.885.215 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because that the application was not accompanied by evidence that the applicant had made arrangements to undergo a medical examination. Before the Tribunal, the applicant sought to rely on an earlier medical examination lodged with his student visa application. The applicant also provided evidence that he had made arrangements to undergo a medical examination in October 2008, which examination was undertaken before the Tribunal's decision. The Tribunal, relying on the authority in *MIAC v Grant* [2009] FCA 1059, found that the medical examination which the applicant had undertaken earlier for the purposes of his student visa application was not relevant to the Subclass 885 visa application. It also found that the applicant's arrangements to undergo a medical examination in October 2008 were not sufficient evidence that the applicant had made arrangements to undergo a medical examination for the purposes of cl.885.215.

The applicant contended that the Tribunal's construction of cl.885.215 was wrong in finding that the earlier medical examination was for the purpose of the student visa application and not for the purpose of the Subclass 885 visa application.

Held: Application dismissed.

- (i) The Tribunal correctly found, as a fact, that the applicant had not made any arrangements to undergo a medical examination for the purposes of the Subclass 885 Visa until after the application was lodged.
- (ii) Clause 885.215 imposes a substantive requirement, being that arrangements are in place to undergo a medical examination and the criterion is to ensure that when a decision is made, the decision maker will have before them, an up-to-date medical report. That purpose can only be achieved if cl.885.215 is understood to apply at the time of application. The criterion thus differs from that considered in *Berenguel v MIAC* [2010] HCA 8 and the decision in *Berenguel* itself distinguishes the situation required in cl.885.213.

Khandakar v MIAC & Anor

[2010] FMCA 611

Federal Magistrates Court of Australia, Smith FM, SYG 1372 of 2010, 9 August 2010

The applicant sought judicial review of a decision of the Migration Review Tribunal ('MRT') affirming a decision of a delegate of the respondent to refuse to grant him a Bridging E (Class WE) Subclass 050 (Bridging (General)) visa.

The applicant applied for a Bridging visa on 24 May 2010. At that time, he had also commenced a proceeding in the High Court under s.75(v) of the Constitution in relation to a decision to refuse to accept a Student visa application. His initiating process was accepted in the High Court on 30 April 2010, which was outside the time limit in s.486A(1) of the *Migration Act 1958*. Accordingly, it also sought orders enlarging time, to the extent necessary, to permit the applicant to commence proceedings for substantive relief. In reaching its decision, the Tribunal took the view that as the application to the High Court was seeking orders to permit him to commence proceedings, it was only if the Court granted those orders that he could be said to 'have applied for judicial review' for the purposes of the criterion in cl.050.212(4)(a) in Schedule 2 to the Migration Regulations 1994.

The applicant contended that the Tribunal had erroneously characterised the application filed in the High Court as not seeking 'judicial review' when it pointed to the absence of an order by the High Court exercising the statutory power to extend time.

Held: MRT decision quashed and remitted for reconsideration.

- (i) The Tribunal made a jurisdictional error by applying an erroneous construction of the bridging visa criteria which should be construed as intending to encompass the applicant's presently pending application to the High Court, regardless of the facts that he had not obtained an extension of time prior to commencing that application nor prior to the decision on the bridging visa application.
- (ii) The bridging visa criteria do not require or permit the administrative decision-maker to go further than the characterisation of the terms of the relief sought in an application filed and accepted by the High Court, to determine whether it included prayers under s.75(v) of the Constitution. They did not contemplate, and it would not be open as a matter of law, for the Tribunal to characterise a pending application in the High Court seeking that relief, as not applying for 'judicial review' merely because an extension of time might be required to be ordered by the High Court to render competent the originally filed application. The intended characterisation is essentially a characterisation of the terms of the documents filed, and it is irrelevant to take into account the decision-maker's opinions whether the High Court might or might not extend time, whether under the High Court Rules or under s.486A(1) so as to render the application competent.

LEGISLATION UPDATE

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

Legislation Passed

INSTRUMENTS

Specification of United Nations Security Council Resolutions under Regulation 4 of the Migration (United Nations Security Council Resolutions) Regulations 2007 – August 2010

This instrument specifies, for the purposes of Regulation 5 of the Migration (United Nations Security Council Resolutions) Regulations 2007, relevant United Nations Security Council Resolutions to add United Nations Security Council Resolutions 1737 (2006), 1747 (2007) and 1929 (2010) concerning Iran, and to ensure every person named within each resolution is a 'UNSC-designated person'.

CASELOAD OVERVIEW

MRT Decisions – August 2010

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total	% Total
Bridging refusal	4	18	0	3	25	5.0%
Visitor refusal	22	18	1	4	45	8.9%
Student refusal	15	6	12	19	52	10.3%
Temporary business refusal	8	7	6	2	23	4.6%
Permanent business refusal	12	6	4	0	22	4.4%
Skill linked refusal	78	19	11	3	111	22.1%
Partner refusal	40	16	10	5	71	14.1%
Family refusal	17	19	6	1	43	8.5%
Student cancellation	11	46	2	4	63	12.5%
Sponsor approval refusal	1	3	5	1	10	2.0%
Other	22	7	6	3	38	7.6%
Total	230	165	63	45	503	100%

RRT Decisions – August 2010

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total	% Total
China (PRC)	19	46	1	7	73	35.3%
Fiji	7	29	0	0	36	17.4%
Malaysia	0	15	0	1	16	7.7%
India	0	12	0	0	12	5.8%
Egypt	2	6	0	0	8	3.9%
Korea, Republic Of	1	5	0	0	6	2.9%
Lebanon	2	3	0	1	6	2.9%
Albania	1	3	0	0	4	1.9%
Indonesia	0	4	0	0	4	1.9%
Turkey	3	1	0	0	4	1.9%
Bangladesh	1	1	0	1	3	1.4%
Iraq	3	0	0	0	3	1.4%
Nepal	1	2	0	0	3	1.4%
New Zealand	1	1	1	0	3	1.4%
Pakistan	2	1	0	0	3	1.4%
Sri Lanka	2	1	0	0	3	1.4%
Iran	2	0	0	0	2	1.0%
Jordan	0	2	0	0	2	1.0%

Thailand	0	1	0	1	2	1.0%
Uzbekistan	1	0	1	0	2	1.0%
Zimbabwe	0	2	0	0	2	1.0%
Burma (Myanmar)	0	1	0	0	1	0.5%
Cambodia	0	1	0	0	1	0.5%
Ethiopia	1	0	0	0	1	0.5%
Mongolia	0	1	0	0	1	0.5%
Nigeria	0	1	0	0	1	0.5%
Solomon Islands	0	1	0	0	1	0.5%
Stateless	0	1	0	0	1	0.5%
Tonga	0	1	0	0	1	0.5%
United Kingdom	0	0	0	1	1	0.5%
Vietnam	1	0	0	0	1	0.5%
Total	50	142	3	12	207	100%

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 31 July 2010, 48% of all substantive decisions made have been published (46.3% of MRT and 52.5% of RRT). This does not include 'Withdrawn' or 'No Jurisdiction' cases.

MRT decisions are selected and vetted for publication each day, with publication delayed by approximately seven days to allow for applicants to be notified of the Tribunal's decision. RRT decisions are also selected daily 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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