



The MRT-RRT Monthly Bulletin

11/2011

5
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This month's edition includes a number of interesting MRT and RRT decisions including an MRT decision relating to a Chinese seal cutter claiming distinguished talent in his field; and protection visa cases involving Rohingyas in Burma and Sunni militant groups in Pakistan. Country Advice is highlighted this month including the selling of Western goods in Afghanistan, Solomon Island descendants in Fiji, and Hazaras in Quetta.

Feedback is always welcome on the content and format of *Précis*, and I encourage you to contact me if you have any comments.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

[0906605](#)

23 September 2011, Sydney

Mr R Derewlany, Member

SKILLED (PROVISIONAL) (CLASS VC) – SUBCLASS 487 - cl.487.216 – NO POLICE CHECK – The delegate of the Minister refused to grant the applicant a Skilled (Provisional) (Class VC) visa on the basis that the applicant did not satisfy cl.487.216 of Schedule 2 to the Migration Regulations, because he had not provided evidence that he had applied for an Australian Federal Police (AFP) check within the 12 months prior to lodging the visa application. The applicant had lodged his visa application electronically on 9 March 2009, and no information was provided under the section headed 'Australian Federal Police check'. The Department wrote to the applicant on 10 June 2009 to request additional information and documents, and to inform the applicant that he must provide evidence that he had applied for an AFP check before he lodged the visa application. The applicant's migration agent responded to the letter via email on 9 July 2009, and stated that the AFP check was "still awaited".

After the delegate refused to grant the visa, the applicant's migration agent claimed in an email to the department on 5 August 2009 that the applicant had sent the original of his AFP clearance to the department on 29 June 2009, that he had written a cheque to the AFP for the processing fee on 27 February 2009, and that the cheque had been "taken" on 11 March 2009. The department responded on 7 August 2009, to state that it had no record of receiving the applicant's AFP check, and to request evidence that the AFP check had been sent on 29 June as claimed. The applicant provided a statutory declaration to the department, dated 11 August 2009, which outlined the steps he took to mail the AFP certificate by normal post on 29 June 2009.

At the tribunal hearing, the tribunal indicated that it was prepared to accept that the applicant had applied for the AFP check prior to lodging the visa application, but that the issue was whether the application was accompanied by evidence that the applicant had applied for the AFP check within the relevant period. The applicant stated that before lodging the visa application he had contacted the AFP to get a reference number to provide in the visa application, but the AFP advised they did not issue a reference number until the actual clearance certificate was issued, or at least until the payment had been processed. The Tribunal indicated that it understood the AFP might have advised this, but it could not see that the applicant had provided any other evidence with his visa application in relation to his AFP check application.

Held: Decision under review affirmed

The tribunal found that the applicant did apply for an AFP check before lodging the visa application, and within the 12 months immediately before lodging the application. However, the tribunal was not satisfied that at the time of application the visa application was accompanied by evidence that the applicant had applied for the AFP check, and found that the applicant answered 'no' to the question of whether he had applied for such a check in the preceding 12 months. The tribunal accepted the applicant's evidence that he had had problems with the online visa application form, in that he did not have an AFP clearance reference number when he filled out the application, and so had to answer 'no' to this question at that time. However, the tribunal found that the requirement of the regulation is that the visa application must be accompanied by the relevant evidence of application for the AFP check. The tribunal accepted that the applicant did not seek to evade the requirements of the visa in relation to the AFP check, but found no provision to waive the criterion in question. Accordingly, the tribunal affirmed the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

[0909885](#)

26 September 2011, Melbourne

Ms D Buljan, Member

SKILLED (RESIDENCE) (CLASS VB) – SUBCLASS 885 – CL.885.212 – A delegate of the Minister refused the applicant's Subclass 885 visa application as the applicant did not satisfy cl.885.212 of the

Regulations, because he had not provided evidence that he had applied for his skills assessment at the time he lodged his application. On 5 June 2009, the visa applicant lodged an application for a subclass 885 visa, nominating his occupation as 'Secondary School Teacher'. In relation to his skills assessment, the visa applicant stated at that time that he had not applied for an assessment from the relevant assessing authority. The applicant provided to the Department a copy of his academic transcript from RMIT University, issued on 18 January 2008, for his 'Bachelor of Arts (Games Graphic Design)'; a copy of his academic transcript from the University of Melbourne, issued on 18 December 2008, for his 'Master of Teaching (Secondary)'; a certified copy of the 'Postgraduate Diploma in Teaching (Secondary)' issued by the University of Melbourne on 11 March 2009; a letter of completion, dated 20 October 2009, from the University of Melbourne stating that the visa applicant had successfully completed all the requirements of his 'Master of Teaching (Secondary)' course; a letter dated 22 October 2009 from Teaching Australia confirming that the visa applicant had lodged an application for a skills assessment at that time, and a 'Skills Assessment Certificate' dated 16 December 2009 from Teaching Australia stating that the visa applicant's qualifications had been assessed as suitable for his nominated occupation of Secondary School Teacher.

Held: Decision under review set aside.

The Tribunal accepted that the visa applicant nominated the occupation of 'Secondary School Teacher' in his application of 5 June 2009, and that in November 2009 he provided evidence to the Department that he had applied for an assessment from Teaching Australia on 22 October 2009. The Tribunal noted that the High Court in *Berenguel* identified clause 885.212 as an example of a criterion that "does not speak exclusively to satisfaction at the time of application". Although the High Court did not go on to elaborate any further in respect of clause 885.212, the Tribunal found that these comments appeared to indicate that the High Court took the view that the application for a skills assessment did not need to be satisfied strictly at the time of application. Further, the Tribunal noted that in the recent decision of *Raj v Minister for Immigration and Citizenship*, the Court followed the approach of the High Court in *Berenguel* to its consideration of clause 485.214, which was drafted in identical terms to clause 885.212. The Court held that the Tribunal (differently constituted) had erred by concluding that, because the applicant had not applied for a skill assessment at the time of application, clause 485.214 was not met.

Accordingly, the Tribunal noted that in this case the visa applicant provided to the Department evidence of a positive skills assessment from Teaching Australia dated 16 December 2009 and, as a result, there was evidence before it that the visa applicant had applied for an assessment of his skills by the relevant assessing authority for his nominated skilled occupation. Based on this evidence, the decision of the High Court in *Berenguel*, and the judgement in *Raj*, the Tribunal found that the visa applicant met the requirements of clause 885.212 at the time of application. The Tribunal observed that a 'Secondary School Teacher' appeared in the relevant legislative instrument as a "skilled occupation", and it noted that the letter from Teaching Australia dated 16 December 2009 confirmed that the visa applicant's skills had been assessed as suitable for his nominated skilled occupation. The Tribunal therefore remitted the application to the Department for reconsideration with the direction that the visa applicant met the criteria for the grant of the visa.

Family visas

[1101815](#)

7 September 2011, Perth

Mr P Murphy, Senior Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 (SPONSORED FAMILY VISITOR) – CL.679.224 – GENUINE VISIT – A delegate of the Minister refused to grant a Subclass 679 visa, on the basis that the visa applicant did not satisfy cl.679.224 of the Regulations. The delegate was not satisfied the visa applicant had a genuine intention to travel to Australia only as a visitor. The visa applicant, a Sri Lankan national of Burgher ethnicity, claimed she wished to visit family members in Australia for a period of two months. These family members comprised her daughter (the review applicant), her son in law, and two grandchildren. The visa applicant originally claimed that she wished to attend a Buddhist ceremony, but by the time of the Tribunal hearing this event had passed. The visa applicant had no prior travel history, having had a previous application for a sponsored visitor visa declined in 2010.

The visa applicant put forward a number of claims to assure the Tribunal she would return to Sri Lanka in accordance with any imposed visa conditions. She claimed she was only able to visit Australia for a short time due to a need to care for her husband, who suffered from a heart condition, and drew attention to her close involvement with her two children and four grandchildren in Sri Lanka. The visa applicant claimed her visit was not motivated by a need to flee political or social unrest in Sri Lanka, as her family had no involvement in politics and lived in an area where such problems were of little significance. She also denied she had any intention to work in Australia.

The review applicant claimed the purpose of the visa applicant's visit was to see how her family were living and to develop a closer relationship with her four grandchildren in Australia. She claimed the visit would be for a maximum of two months, due to the visa applicant's need to return to Sri Lanka to care for her sick husband and continue her active relationship with her grandchildren. The review applicant stated that due to her mother being 68 years of age, it was unlikely she would remain in an unfamiliar country, nor would she be expected to seek to work in Australia. The review applicant claimed she and her husband had been sending money to Sri Lanka to assist her parents on a regular basis, and that they would meet all costs associated with the visa applicant's visit.

Held: Decision under review set aside.

The Tribunal found both the visa and review applicants to be credible witnesses and was satisfied that the intention of the visa applicant to travel to Australia as a visitor was genuine. The Tribunal found no material which called into question the credibility, character or conduct of the visa applicant. The Tribunal accepted the presence of her daughter and family in Australia may create some incentive for the visa applicant to remain in Australia, but noted that this was countered by her ties to family in Sri Lanka. The Tribunal further noted that the visa applicant's husband resided in Sri Lanka, and medical evidence was provided to support the claims made by the applicants regarding his illness. The Tribunal also considered that the visa applicant had two children and four grandchildren based in Sri Lanka, and accepted that these familial ties provided incentive for the visa applicant to return to Sri Lanka.

The Tribunal considered the significant political and ethnic upheavals in Sri Lanka in terms of providing incentive for the visa applicant to remain in Australia; however, no material was put before the Tribunal to suggest persons of Burgher ethnicity face any particular risk. The Tribunal also considered the history of the review applicant. It noted the review applicant initially entered Australia on a Tourist Visa, sought to achieve a change in visa status whilst onshore, and was ultimately detained and returned to Sri Lanka. The Tribunal considered, however, that the review applicant's personal circumstances were not comparable to those of the current visa applicant.

In summary, the Tribunal found any factors that suggested the visa applicant had an incentive to remain in Australia after the end of a visit period were outweighed by factors suggesting she would depart. The Tribunal was particularly influenced by its assessment of the credibility of both the review applicant and visa applicant, and the forthright manner in which they provided evidence. The Tribunal, therefore, was satisfied the visa applicant's intention only to visit Australia was genuine and that she satisfied the requirements of cl.679.224.

[1102640](#)

29 September 2011, Brisbane

Ms Kay Kirmos, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 117 (ORPHAN RELATIVE) – NOT MEMBER OF FAMILY UNIT – The delegate of the minister refused to grant a Child (Migrant) (Class AH) visa to the visa applicant because she did not meet the criteria of being an orphan relative of an Australian citizen. The visa application was made on the basis that the applicant in this case was the secondary visa applicant, and a member of her younger brother's [Mr A] family unit. Mr A was granted a subclass 117 visa in May 2011 and arrived in Australia in July 2011. His sponsor was his brother, the review applicant, who was also the brother and sponsor of the current visa applicant. According to the review applicant (the older brother of the visa applicant) the visa applicant, her parents and her brothers fled Afghanistan for Pakistan and settled in Quetta. In 2007, the parents left Quetta to attend a funeral in Afghanistan but never arrived, and had not been heard of since. The visa applicant was left with her younger brothers, of whom the primary visa applicant Mr A was one. It was submitted that the visa applicant had been living with and being cared for by Mr A and another of her brothers [Mr B] in Quetta since the disappearance of their parents.

After the disappearance of his parents, the review applicant sent money to Mr A, Mr B and the visa applicant. He claimed that he sent several thousand dollars at a time, through friends who were visiting Pakistan, as although Mr A and Mr B both worked in Quetta, they earned very little. The review applicant claimed that the visa applicant had been dependent on Mr A and Mr B to get money and shop for food, as the visa applicant was restricted to her home. Mr A initially claimed that the review applicant did not help the family financially after he came to Australia, but later claimed that the review applicant sent money through friends visiting Pakistan, and that the money was given to Mr A to support the family. Mr A claimed that the visa applicant did the shopping in Quetta, and that he and Mr B paid the bills. Mr A claimed that the visa applicant had no independent source of income, was currently supporting herself with money sent by the review applicant, and was attending an Islamic school.

Held: Decision under review affirmed.

The tribunal found that the visa applicant was not a member of Mr A's family unit within the meaning of r.1.12 of the Regulations, as she was not wholly or substantially reliant on Mr A for financial support to meet her basic needs for a substantial period before the application. The tribunal found that the visa applicant did not demonstrate her dependency on the family head, who in this case has been nominated as Mr A, and thus did not meet the secondary criteria for the grant of the visa. The tribunal found that the ultimate source of the greater part of the visa applicant's financial support was the review applicant, and that while Mr A worked in Quetta, as did the visa applicant, they earned very little and relied on money earned and provided by the review applicant.

The tribunal found that the evidence had consistently been that the review applicant provided most of the financial support for the family, both before his parents' disappearance and since, and that the regulation unambiguously stated that it was the financial support to meet the applicant's basic needs that was important. The tribunal found that the greater part of that financial support was never provided by Mr A, and that the ultimate source of support was the review applicant, because he would have supported his sister regardless of the nature of his relationship with the primary visa applicant, and indeed had continued to support her in Mr A's absence. The Tribunal accordingly found that the visa applicant was not at the time of application nor at the time of decision a member of the primary visa applicant Mr A's family unit, and therefore affirmed the decision not to grant the applicant a Child (Migrant) (Class AH) visa.

Partner visas

1005141

31 August 2011, Perth

Mr T Caravella, Presiding Member

Mr C Smolicz, Member

PARTNER (PROVISIONAL) (CLASS UF) VISA – SUBCLASS 309 (PARTNER (PROVISIONAL)) – CL.309.211 – GENUINE SPOUSAL RELATIONSHIP – A delegate of the Minister refused the application for a Subclass 309 visa on the basis the visa applicant did not satisfy cl.309.211, 309.221 and 309.223 of the Regulations. The delegate was not satisfied the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others, or that the relationship between them was genuine and continuing.

The review applicant migrated to Australia from Vietnam in 1991 and obtained permanent residency. The review applicant had two children from a previous relationship. The visa applicant was a Vietnamese national, who resided in Vietnam at the time of the application. The review applicant claimed he was introduced to the visa applicant by a work colleague in Australia who provided the visa applicant's telephone number and work address in Vietnam. The review applicant claimed he spoke with the visa applicant over the telephone, prior to travelling to Vietnam to meet her in person in December 2008. He claimed he met the visa applicant on one occasion in a hairdressing salon where she worked. The review applicant then returned to Australia and subsequently proposed to the visa applicant over the telephone in September 2009. The review applicant claimed he wanted the visa applicant to come to Australia to assist with domestic duties and help look after his elderly mother. He also claimed he was attracted to the visa applicant due to her Buddhist faith and caring nature.

In January 2010, the two applicants were married in Vietnam. Following the wedding, the review applicant returned to Australia. The review applicant then travelled to Vietnam on four further occasions during 2010 and 2011 to visit the visa applicant. The review applicant claimed he stayed with the visa applicant in her parents' home in Hanoi during each of these visits. When in Australia, the review applicant claimed he communicated with the visa applicant several times a week by telephone. The review applicant provided documentation showing money transfers from his account to the visa applicant, as well as evidence of inclusion of the visa applicant in his will and superannuation benefits. Documentation of phone calls to Vietnam and photographs of the couple were also submitted.

The visa applicant told the Tribunal there had been no telephone contact prior to her initial meeting with the review applicant at her hairdressing salon. She claimed the initial meeting with the review applicant was instigated by her aunt in Perth. She claimed she had not discussed the need to look after the review applicant's mother, but that it would be her duty as his wife. She also stated she was aware of the review applicant's children from an existing relationship. Both the review and visa applicants claimed they had discussed their mutual plans for the future, which comprised working and saving money.

Held: Decision under review set aside.

The Tribunal found the parties to be committed to a genuine relationship with each other. The Tribunal specifically noted the regular visits made to Vietnam by the visa applicant since the time of the marriage and the time spent living, travelling and socialising with the visa applicant and her family. The Tribunal found that the review applicant had transferred funds to the visa applicant in Vietnam and added her as a beneficiary to his will and superannuation entitlements. The Tribunal also noted the applicants had discussed their future plans, to work and save money together. The Tribunal found that due to the couple residing in different countries, they have had little opportunity to live together. The Tribunal, therefore, decided to place less weight on this criterion. The Tribunal could not be satisfied as to the facts surrounding the introduction of the two applicants, but placed little weight on these inconsistent accounts and did not have the same concerns regarding the credibility of the remainder of the visa and review applicants' evidence.

In summary, the Tribunal was satisfied that, at the time of application and decision, the applicants had a mutual commitment to a shared life as husband and wife to the exclusion of all others. Accordingly, the Tribunal found the requirements of cl.309.211, 309.221 and 309.223 were met, and remitted the application to the Department for reconsideration.

1007215

21 September 2011, Sydney

Ms S Kamand, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 (SPOUSE (PROVISIONAL)) – r.1.20J – FIVE YEARS SINCE PREVIOUS APPLICATION – A delegate of the Minister refused to grant the applicant a Subclass 309 visa on the basis that the visa applicant did not satisfy cl.309.222, because the delegate was not satisfied that there were any compelling circumstances affecting the review applicant such that r.1.20J should be waived. The review applicant had previously sponsored a former de-facto partner, with that application being lodged in February 2007 and the visa granted in August 2008. The current applicants claimed that they met in Cairns in August 2007 and began a partner relationship one month later, marrying in Japan in December 2009. The review applicant claimed that he lived in Japan from December 2008 to August 2009 and November 2009 to April 2010, where he worked as an English teacher. The visa applicant claimed that she resided in Australia between November 2005 and May 2008.

Statements were received from each party detailing the history and nature of their relationship, along with statutory declarations from two witnesses attesting to the genuineness of the spousal relationship, and photographs depicting the parties together and with third parties. The review applicant also stated that he found it difficult to be separated from the visa applicant.

Held: Decision under review affirmed.

The Tribunal accepted the review applicant's written evidence that he had sponsored a prior de-facto partner for a partner visa and that she was granted a partner visa on the basis of this sponsorship, but that she decided not to come to Australia on that visa, resulting in the review applicant withdrawing his sponsorship.

The Tribunal noted that the review applicant's account of his prior sponsorship was consistent with Departmental records which confirmed that the previous de-facto partner applied for a Spouse visa in March 2007; was granted a subclass 309 visa in August 2007 on the basis of the review applicant's sponsorship; the review applicant withdrew his sponsorship after grant of that visa, in May 2010; and that the previous partner had never entered Australia on the subclass 309 visa.

The Tribunal found that a period of five years had not passed since the date of making the application for that visa, and accordingly, it found that the approval of the review applicant's sponsorship of his current partner was affected by r.1.20J. The Tribunal noted that r.1.20J provided that the sponsorship may be approved if it were satisfied that there were compelling circumstances affecting the sponsor. The Tribunal considered the review applicant's written evidence that he had been with the visa applicant since 2007, that he was deeply in love with her and could not imagine being without her, and that his previous partner did not actually enter Australia. The Tribunal noted that the applicants had also provided statements from third parties attesting to the genuineness of their relationship, however, it did not consider the genuineness of the relationship to constitute a compelling circumstance affecting the sponsor. After considering all of the information, the Tribunal was not satisfied that there were compelling circumstances affecting the sponsor under reg. 1.20J(2), and it therefore found that the sponsorship limitation set out in reg.1.20J precluded the approval of the sponsorship. Accordingly, the Tribunal found that cl.309.222 could not be satisfied for the grant of the visa.

Student visas

[1003266](#)

5 September 2011, Melbourne

Mr D Mitchell, Member

STUDENT (TEMPORARY) (CLASS TU) VISA – SUBCLASS 572 (VOCATIONAL EDUCATION AND TRAINING SECTOR) – CL.572.235 – SUBSTANTIAL COMPLIANCE WITH CONDITION 8202 – A delegate of the Minister refused to grant the applicant a Subclass 572 visa on the basis that he had not complied with condition 8202 of his last substantive visa. The applicant arrived in Australia in February 2009 as the holder of a Student visa Subclass 572, valid until March 2010 and subject to a number of conditions, including condition 8202 (meet course requirements). He was enrolled in a Diploma of Business (Marketing) at Cambridge International College (CIC). On 27 October 2009, CIC issued a s.20 notice which stated that the applicant had not achieved satisfactory course attendance, had failed to meet the requirements of cl.8202(3)(b) and had therefore breached condition 8202 of his visa. The applicant's visa was automatically cancelled under s.137J of the Act on 25 November 2009. On 1 December 2009 the applicant sought revocation of the automatic cancellation of his subclass 572 visa, and on 2 December 2009 he was granted a Bridging visa E subject to conditions 8101, 8401, 8505, 8506, and 8207.

On 9 April 2010 the applicant lodged an application for a further Subclass 572 visa, and from that date held a Bridging E visa subject to conditions 8101 and 8506. The delegate refused the application on 14 April 2010 on the basis that the applicant had not complied substantially with condition 8202(3) of his last substantive visa. The applicant lodged an application for review with the Tribunal on 4 May 2010. On 21 September 2010 the Department sent a letter to the applicant, stating that, following the Federal Court decisions in *Hossain v MIAC* [2010] FCA 161 (*Hossain*) and *Mo v MIAC* [2010] FCA 162 (*Mo*), both handed down on 2 March 2010, the purported automatic cancellation of his subclass 572 visa was ineffective as a matter of law.

Held: Decision under review set aside.

On the authority of the Federal Court in *Hossain* and *Mo*, the Tribunal found that the s.20 notice issued by CIC to the applicant on 27 October 2009 was ineffective for s.20 of the ESOS Act and s.137J of the Act, because there was at the time no prescribed condition for the purposes of s.20. As there was therefore no certification for the purposes of subclause 8202(3), the Tribunal found that there had been no failure (substantial or otherwise) to comply with that condition.

Subclause 8202(2) requires that the applicant is enrolled in a registered course, therefore the Tribunal considered whether the applicant was enrolled continuously between 4 August 2009 (when he withdrew from his registered course at CIC) and 15 March 2010 (when his subclass 572 visa expired). The Tribunal

noted academic records that indicated the applicant had enrolled in a Certificate III at the City College of Melbourne starting on 3 August 2009 and ending on 3 August 2010, and was continuously enrolled from 4 August 2009 until at least 15 March 2010, and found that the applicant had complied with the enrolment requirement in subclause 8202(2). The Tribunal therefore found that the applicant complied substantially with condition 8202 of his subclass 572 visa, and that there was no evidence before the Tribunal to suggest that the applicant failed to comply with any of the remaining applicable conditions of his last substantive visa.

The Bridging E visa granted to the applicant on 2 December 2009 was granted on the basis that his last substantive visa had been cancelled automatically on 25 November 2009 and he had applied for revocation of the cancellation of his visa. As the legal position is that the applicant's substantive visa was never cancelled, it follows that the applicant did not satisfy key criteria for the grant of the Bridging E visa. The Tribunal concluded that it was not necessary to consider whether the applicant complied substantially with a bridging visa that had not been validly granted. The second Bridging E visa granted to the applicant on 9 April 2010 was subject to conditions 8101 (no work) and 8506 (notify Immigration of change of address); the Tribunal found that there was no evidence before the Tribunal to suggest that he failed to comply with either of these conditions. Accordingly, the Tribunal found that the applicant met the requirements of cl.572.235 and remitted the application for a Student (Temporary) (Class TU) visa to the Department for reconsideration.

1101217

15 September 2011, Sydney

Mr I Hasan, Member

STUDENT (CLASS TU) – SUBCLASS 575 – NON-AWARD SECTOR – FAILURE TO RESPOND TO NOTICE – CHANGE OF PROVIDER – The delegate of the Minister decided not to revoke the automatic cancellation of the applicant's Student (Class TU) Subclass 575 Non-Award Sector visa under s.137L of the Migration Act. The applicant's visa had been cancelled because he failed to respond to a notice of unsatisfactory attendance issued by Central Queensland University (CQU) in November 2010. As the applicant did not present or attend to the Department within 28 days after the date of this notice, his visa was automatically cancelled in December 2010. CQU had previously sent the applicant warning letters in July and September 2010, and an intention to report letter in October 2010. Further, in October 2010 CQU sent the applicant a letter to the applicant that offered him a chance to explain any extenuating circumstances for his ongoing non-attendance. In January 2011, the applicant wrote to the Department to seek the revocation of his visa cancellation, on the grounds that, at the same time as he was enrolled at CQU, he had enrolled in another English course at the Sea English Academy (SEA). He submitted a letter from SEA stating that he had successfully completed a Certificate in English Communication, and that he was enrolled with SEA between July and December 2010, but that he had not been issued a Certificate of Enrolment by SEA because he was still enrolled with CQU. He subsequently enrolled in an English course at the ABC College (ABCC) between December 2010 and February 2011. CQU had not issued the applicant with a letter of release to study elsewhere.

In July 2011, the applicant wrote to the tribunal and claimed that he did not know that he could not transfer to another education provider, that his attendance at SEA and ABCC was over 80%, and that he was not aware that he had to study for at least 6 months before he could obtain a release to change education provider. At the hearing, the applicant conceded that he had breached condition 8202 of the Regulations, but claimed that this was due to exceptional circumstances beyond his control. He claimed that he did not receive any of the letters sent by CQU because he had lived at different addresses when they were sent. He claimed that he asked CQU staff about a transfer to another education provider three months into his course, but that he was advised that he could not change providers until he had studied at CQU for six months. He changed to SEA regardless, even though he could not enrol with them because he was still enrolled at CQU. He was able to attend classes because this was arranged by his education agent. He claimed that none of the education agents he had spoken to, nor the SEA, advised him that he must obtain a release from CQU. The applicant further claimed that his limited English proficiency and limited knowledge of visa rules also constituted exceptional circumstances.

Held: Decision under review affirmed.

The Tribunal found that the applicant's unsatisfactory course attendance at CQU was not caused by exceptional circumstances beyond his control. The applicant did not obtain his mail from the address he

provided to CQU and did not formally apply for a release or consult with an appropriate staff member from CQU, and the tribunal found this to be careless conduct on the part of the applicant and, accordingly, that the consequent certification was of his own making. The tribunal found that limited English proficiency and understanding of migration rules and regulations were not exceptional circumstances, as these circumstances were encountered by many students from overseas. The tribunal found that it could not accept the applicant's successful completion of studies at SEA and ABCC as exceptional circumstances, because it was within the applicant's control to complete six months of study at CQU, or obtain a release before commencing with SEA. Accordingly, the tribunal affirmed the decision not to revoke the automatic cancellation of the Subclass 575 Non-Award Sector visa formerly held by the applicant.

Other visas

[0904070](#)

28 September 2011, Sydney

Mr T Delofski, Member

DISTINGUISHED TALENT – (MIGRANT) (CLASS AL) VISA – SUBCLASS 124 – CL.124.211(2) – CHINESE SEAL CUTTING – A delegate of the Minister refused to grant the applicant a Subclass 124 visa on the basis that the visa applicant did not satisfy cl.124.211(2) of the Regulations. The applicant based his visa application on his record of achievement in the area of Chinese seal cutting. The visa applicant was nominated by the Australian Oriental Calligraphy Society (AOCS), and in support of the application the President of the AOCS claimed that the applicant was an emerging artist in the Chinese calligraphy world. The President claimed that the applicant was prominent in his field within his province, and was gradually achieving a reputation in the national seal carving landscape. The President claimed that the applicant would definitely contribute to the Australian cultural community as a bridge between the nations of Australia and China, and that the applicant's art works would be a significant influence on local artists. The applicant's representative submitted that in relation to the requirements of cl.124.211(2)(a), the AOCS had attested to applicant's skills and standing as an internationally recognised professional artist.

The applicant submitted reference letters, press clippings from China, Australia, the US and Singapore, 2 DVDs containing media interviews with the applicant, and photographs of the applicant's work. Also cited in support of the application were the visa applicant's numerous awards in Chinese calligraphy and seal cutting competitions in China and exhibits of his work in Singapore, US, Japan and Australia, in addition to his work in China.

Held: Decision under review affirmed.

The Tribunal found that while the evidence indicated that the applicant was a highly accomplished seal cutter, it did not establish that his achievements in this area had attained the level of international recognition of exceptional and outstanding achievement that is required under cl.124.211(2)(a). In making this finding, the Tribunal attached greatest weight to the AOCS's assessment of the applicant when nominating him for the visa. In particular, the President of the AOCS, responding directly to the question in the application enquiring how the applicant had an internationally recognised record of exceptional and outstanding achievement, said only that the applicant was an emerging artist, was most prominent within his province and was gradually achieving his reputation in the national seal carving landscape. Therefore, based on this evidence, the Tribunal was not satisfied that the applicant met cl.124.211(2)(a) of the Regulations for the grant of a Distinguished Talent visa.

[1105749](#)

26 September 2011, Brisbane

Ms J Eutick, Member

TOURIST (CLASS TR) – SUBCLASS 676 (TOURIST) – CL.676.211 – GENUINE INTENTION TO VISIT – A delegate of the Minister refused to grant the applicant a Subclass 676 visa on the basis that the visa applicant did not satisfy cl.676.211 of the Regulations, because the delegate was not satisfied that the expressed intention to only visit Australia was genuine. The visa applicant was seventy years old and widowed, with some extended family in Papua New Guinea. She resided in a village near Lae, in a house owned by the review applicant and her husband, and worked in her garden as a subsistence farmer. She

sought to visit Australia for 12 months to spend time with her daughter, the review applicant, and her grandson. She had previously visited Australia on three occasions; on one occasion, a twelve month stay ended one day after her visa expired. In refusing the application, the delegate noted that the invitation letter written by the review applicant's husband referred to an intention to support an application for a more permanent stay by the visa applicant.

Held: Decision under review set aside.

The Tribunal accepted that the presence of some family members and having her house and garden may encourage the applicant to return to Papua New Guinea, but considered that the limited family support there to assist with daily living, her advanced age and the presence in Australia of family members who are willing and able to provide support suggested that the incentive to remain in Australia was relatively strong.

The Tribunal referred to Departmental policy (PAM – Migration Regulations, General Guide H at paragraph 47.2), and regarded this counsel as indicative that a flexible approach to assessing the 'genuine visit' requirement was appropriate in circumstances where an elderly parent's ultimate intention may be permanent residence, provided there is evidence that the visa applicant will depart within the authorised period of stay of a short term visa. The Tribunal noted that the invitation letter attached to the visa application indicated that the visa applicant's intention was to live with the review applicant and seek permanent residence in Australia, however the Tribunal considered that it needed to be viewed in context. The Tribunal placed weight on the evidence that at the time of application, the visa applicant and her family were aware that if an 8503 condition were applied, the visa applicant would not be able to apply for permanent residence while in Australia.

The Tribunal had regard to the judgment of the Full Federal Court in *MIMA v Saravanan* [2002] FCA 348, in relation to the issue of "genuineness" of a proposed visit to Australia. In that case Marshall J took the view that subclause 676.221(2)(c), which is the equivalent of the current version of subclause 676.221(2)(a), is met if the decision maker is satisfied that the applicant would not overstay in the event that their application for a further visa was refused. The Tribunal did not consider that the applicant having previously overstayed a twelve month visa by one day was material and placed no weight on that matter. The Tribunal placed weight on the applicant's past history of abiding by her visa conditions, and the assurances by the review applicant and her husband that they would ensure that the visa applicant would leave within the authorised period of stay, if an 8503 condition were imposed or if it took longer to process an application in Australia for another substantive visa. The Tribunal was satisfied that the visa applicant's intention only to visit Australia was genuine and found that the visa applicant satisfied the requirements of cl.676.211 and cl.676.221 and remitted the application for a Tourist (Class TR) visa for reconsideration.

REFUGEE REVIEW TRIBUNAL DECISIONS

Afghanistan

[1108254](#)

22 September 2011, Sydney

Ms R Mathlin, Member

AFGHANISTAN – IMPUTED POLITICAL OPINION – SAZMANI NASR PARTY – SHIA – The applicant claimed that he was a Shia Muslim of the Sayed ethnic group. He claimed that he was a driver for the Sazmani Nasr party in Afghanistan, who were in conflict with Harakat Islami, that he had family members who were with both groups, and that he attempted to 'escape' from Sazmani Nasr in 1995 as he did not want to be involved in fighting against his relatives. The applicant claimed that he was subsequently taken away in a car, blindfolded, beaten, and thrown out of the car, and that he was also imprisoned for a period of days. He claimed that he then left Afghanistan with his family to live in Iran, before returning in 2006, at which time the group discovered that he was back because he went to make a complaint about their past mistreatment of him to a human rights body. The applicant claimed that the group then attempted to kill him on three separate occasions by running him over in vehicles, before he left again for Iran. The applicant claimed that he could not stay in Iran because he was without documents and he was stopped by police every day, his children could not go to school, and his refugee card had expired and the Iranian government refused to extend it. He claimed that Sazmani Nasr was now known as Hezb-e-Wahdat, and that they still retained power in Afghanistan and saw the applicant as a traitor. He claimed that the government could not protect him as there were Hezb-e-Wahdat representatives in the parliament who were former Nasr members, and that as people in power had connections everywhere he would be unable to relocate. He claimed that as a Shia he also feared harm from the Taliban.

Held: Decision under review set aside.

The tribunal accepted that the applicant was a national of Afghanistan who fled in 1995 to Iran, where he was registered as a refugee and remained until 2006. It was also satisfied that, having left Iran, the applicant's refugee registration had lapsed and that he had no legally enforceable right to enter and reside in Iran. Accordingly, the tribunal assessed his claims to refugee status against Afghanistan as his country of nationality. The tribunal was satisfied after assessing the relevant independent information that elements of the former Sazmani Nasr Party remained in powerful positions in the applicant's region. It was further satisfied that by leaving the Nasr party, the applicant was imputed with a political opinion adverse to that party. The tribunal found that the applicant's account of the events of 2006 were both plausible and credible, noting that there was an office in Mazar-e-Sharif of the Afghanistan Independent Human Rights Commission (AIHRC), and it was satisfied that this was the body to which the applicant was referring when he claimed that he was going to lodge his complaint with the "transitional justice human rights office". The Tribunal accepted the applicant's explanation as to the sequence of events in relation to how the attempts to run him down had occurred immediately after he first spoke about the nature of his complaint and named the three prominent men who he believed were responsible. It also found that the applicant's conduct was consistent with the existence of a genuine fear for his safety in Afghanistan given his decision to return there with his wife and children, knowing that he would not be able to re-register in Iran as a refugee, and subsequently deciding that he had to again return to Iran with his family despite the difficult circumstances that he knew they would face there.

The Tribunal noted independent information about the importance of revenge in Afghan culture which suggested that it was quite plausible that enmity such as that described by the applicant would persist over a period of ten or more years, and it accepted that there was a real chance that elements of the former Sazmani Nasr Party still wished to harm him, and would try do so if he were to return to Afghanistan. The Tribunal further accepted that his demonstrated intention to lodge a complaint in 2006 in relation to his past mistreatment by members and former leaders of the party would have re-intensified the enmity felt by the Nasr Party based on his 1995 transgression. The Tribunal therefore found that the applicant had a well-founded fear of Convention persecution in Afghanistan, and was therefore satisfied the applicant is a person to whom Australia has protection obligations under the Refugee Convention.

Burma (Myanmar)

[1107430](#)

8 September 2011, Sydney

Mr A Jacovides, Member

BURMA – ROHINGYA ETHNICITY – MUSLIM RELIGION – POLITICAL OPINION – ANTI-GOVERNMENT – The applicant claimed that he risked serious harm if he returned to Burma due to his ethnicity, religious beliefs, expression of anti-government sentiments and unauthorised departure. According to the applicant, he was a citizen of Burma at birth, however his Rohingya ethnicity led to him being stripped of his citizenship in 1982 under the Citizenship Law. The applicant claimed that he faced ongoing difficulties with authorities in Burma due his ethnicity and expression of anti-government sentiments. He claimed he was detained by authorities on a number of occasions. These periods of detention included an 18 month sentence, imposed without trial, in 1978 for assisting Rohingya Muslims to flee authorities; a one month period of incarceration in 1996 during a government campaign against Muslims; and a further period of detention in 2001 during civil disturbances in Sittwe. The applicant that claimed his wife was also detained and mistreated by authorities in 1991 as part of what he termed an 'extermination campaign' against Rohingyas. According to the applicant, he took part in a number of anti-government protests in 2007 and 2010, but managed to evade capture by authorities on these occasions. The applicant also claimed that he relocated from Arakan to Yangon to escape harassment from authorities, but added that he was only able to reside in Yangon with the assistance of corrupt officials.

Following the 2010 elections in Burma, the applicant claimed that authorities began to target Rohingyas who had expressed criticism of the election process. At this point, the applicant stated he went into hiding for several months until an agent was able to arrange a safe and secure exit from Burma. The applicant arrived in Australia following his departure from Burma. He lodged an application with the Department for a protection visa in May 2011, and a subsequent appeal with the Tribunal in July 2011.

Held: Decision under review set aside.

The Tribunal accepted the applicant's claim that his Burmese citizenship was taken away due to his Rohingya ethnicity. The Tribunal also accepted the applicant's claims that he has expressed strong opinions against the former and current governments of Burma, and that he has been targeted by authorities for holding these views. After considering information from external sources relating to the treatment of Rohingya Muslims from Arakan State by the Burmese Government, the Tribunal accepted the applicant's claims that Rohingyas are a particularly vulnerable group in Burma and that authorities have a history of targeting this group with impunity. The Tribunal further found that the applicant would experience difficulty avoiding harm in Burma by relocating within the country, due to restrictions placed on the movement and activities of Rohingyas.

The Tribunal formed the view that the applicant would face an additional risk of harm by authorities due to his previous political activities and his current political views against the government. Independent information regarding the recent transition of the military government to a civilian administration in Burma was considered by the Tribunal; however, the Tribunal was not satisfied that human rights conditions have improved sufficiently to allow the applicant to return there safely in the foreseeable future. The Tribunal considered there was a real chance the applicant would be subjected to persecution in Burma for reasons of race and political opinion, and was therefore satisfied the applicant is a person to whom Australia has protection obligations under the Refugee Convention.

China

[1105663](#)

13 September 2011, Melbourne

Mr G Ledson, Member

CHINA – POLITICAL OPINION – ETHNICITY – UYGHUR – The applicant was an ethnic Uyghur who claimed that he was involved in the Urumqi riots of 5 July 2009. He claimed that the police tried to break up the demonstration by beating people and firing gunshots, resulting in many people being killed. He claimed that he ran away and escaped down a narrow street that had not been blocked off. The applicant claimed that after the protest the police had pursued young Uyghur men, going from door to door looking for those who had been involved in the protest, and that he had been taken away. He claimed that he was questioned about his whereabouts on the day of the protest and that he was abused and beaten. The applicant claimed that his parents decided that he should leave China and sought assistance through a friend to apply to study in Australia. He claimed that when he departed China from Guangzhou airport, he was taken into a private room by officials where he was searched and questioned about his involvement in the riots due to him being a Uyghur. He further claimed that his family home was subsequently visited by Chinese authorities who reported these activities to his parents and accused him of being a terrorist and a separatist.

The applicant claimed that in Australia he had attended celebrations for the national day of East Turkestan, as well as a democracy and human rights training workshop with Rebiya Kadeer, the leader of the World Uyghur Congress (WUC), as he supported the rights of the Uyghur people. He claimed that many Uyghur expatriates did not want to get involved, as Chinese spies reported on their activities. The applicant claimed that he had not participated in these activities to enhance his claims for protection, but rather, due to his commitment to the Uyghur cause, and that he feared returning to China because he believed that he would be killed as the Chinese authorities would consider him to be a terrorist.

Held: Decision under review set aside.

The Tribunal accepted the claims made by the applicant in respect of the treatment of Uyghur by the Chinese authorities, noting that independent information confirmed that the circumstances for Uyghur were tenuous, particularly if they challenged their treatment by the Chinese authorities. The Tribunal accepted that the applicant had suffered discrimination during his education and that he suffered restrictions in the practice of his Muslim religion. It accepted that he participated in the riots in Urumqi on 5 July 2009 and that he was arbitrarily detained by the police during a house to house sweep of Uyghur homes three days later and questioned about his involvement in the riots. The Tribunal accepted that during this detention the applicant was abused and threatened by the police and warned not to involve himself in any future anti-government protests.

With respect to the applicant's time in Australia, the Tribunal accepted that he had been involved in activities that had been organised by Uyghur groups or individuals, noting the submission of photographs of his involvement in a World Congress of Uyghur held in Melbourne in March 2011, and his participation in a demonstration outside the Chinese Consulate in Melbourne to mark the anniversary of the Urumqi riots in 2009. The Tribunal further noted that the applicant had provided photographs taken with two key advocates of Uyghur human rights – Rebiya Kadeer and Alin Seytoff – as well as statements of support from the Uighur Association of Australia and the President and Imam of the Dandenong Turkish Islamic Cultural Society. The Tribunal found that whilst the activities in which the applicant had participated in whilst in Australia would be viewed by the Australian community as benign, the Chinese authorities view them as separatist or terrorist activities and those involved in such activities would attract a harsh response. The Tribunal was satisfied that the activities of expatriate Uyghur in Australia would in all likelihood be reported to Chinese authorities, and that there was more than a remote chance that the applicant may be at risk of serious harm for his participation in these activities if he were to return to China. The Tribunal found that the applicant's activities in Australia were not engaged in for the sole purpose of strengthening his claims for protection, and therefore found that the applicant had a well-founded fear of persecution for the purposes of the Convention, if he were to return to China, now or in the reasonably foreseeable future, and was therefore satisfied the applicant is a person to whom Australia has protection obligations under the Refugee Convention.

East Timor

[1003210](#)

15 September 2011, Sydney

Mr J Silva, Member

EAST TIMOR – ALFREDO ALVES REINADO – INTERRACIAL AND GANG VIOLENCE – ECONOMIC HARDSHIP – NO CONVENTION GROUNDS – The applicant cited several reasons behind his fear of returning to East Timor, including retribution for his association with former rebel leader Alfredo Alves Reinado, interracial and gang conflict, the inability of East Timorese authorities to provide protection, and concerns he would be unable to support his family financially. The applicant lodged a claim for protection on behalf of himself and two dependents, his son and nephew. The dependents did not make any additional claims to those put forward by the primary applicant.

The applicant claimed he worked as a truck driver for two different international aid organisations in East Timor between 1999 and 2004. During a period of civil unrest in March 2006, he claimed he and his family left Dili in a truck borrowed from a neighbour and drove to the mountains. Soon after their arrival, Alfredo Reinado and his men appeared. The applicant claimed he had previously known Reinado, and Reinado therefore knew he had been employed as a truck driver. He claimed Reinado persuaded him to drive one of the rebels' vehicles between Dili and a nearby village to transport supplies. After one month passed, his family returned to their home in Dili, however the applicant claimed it was unsafe for him to do so and that he went into hiding prior to his travel to Australia later that year.

The applicant and his two dependents arrived in Australia on Tourist Visas in September 2006 and remained in the country on a series of visitor and bridging visas after the initial visa expired. The applicant stated that the purpose of this visit was to look after his sick, elderly mother. He claimed that two of his brothers, who are resident in Australia, suggested he apply for a Carer's Visa as a pathway to obtaining permanent residency in Australia. The applicant eventually lodged a claim for protection in January 2010. In his application for protection, the applicant claimed that members of the military may still associate him with his work for Reinado, and that members of the military had come to his family home in Dili and threatened his wife due to this association. The applicant also claimed his work as a driver between 1999 and 2004, and his prior association with certain 'gangs', may make him a target if he returned to East Timor. The applicant further referred to a general state of interracial conflict and gang violence in East Timor which would make it unsafe for him, and his dependents, to return.

Held: Decision under review affirmed.

The Tribunal found the evidence presented by the applicant and his nephew to be generally truthful. The Tribunal accepted the applicant's account of his employment as a driver between 1999 and 2004, and that this brought him into direct contact with displaced persons and various militias in the border areas of West and East Timor. The Tribunal also accepted that the applicant and his family fled their home in Dili in 2006, and found the applicants' account of conflict in East Timor during this period to be generally consistent with other reports. The Tribunal, however, was not able to locate independent country information supporting the primary applicant's claims that people involved with food distribution or resettlement work, or those associated with Reinado, were at risk of persecution. The Tribunal also found the applicant's claims to be changeable and uncertain as there appeared to be a blurring of general concerns with potential sources of harm and specific fears. The Tribunal found the delay between the applicants' arrival in 2006 and their application for protection visas in 2010 to be of concern. The Tribunal noted that two of the primary applicant's brothers had previously sought protection in Australia and it would, therefore, be reasonable to assume the applicants had access to information regarding applying for a protection visa .

The Tribunal formed the view that the primary applicant's main concerns related to his, and his family's economic prospects and personal safety. Whilst the Tribunal accepted that East Timor's political, security and economic problems had caused the applicant and his family hardship, it did not accept he, his son, or nephew, had suffered persecution for any Convention reason. The Tribunal acknowledged that significant law and order issues remain in East Timor, however it was satisfied that East Timorese authorities do not condone or tolerate conduct which results in the selective and discriminatory withholding of protection for a Convention reason. The Tribunal, therefore, was not satisfied any of the applicants were persons to whom Australia has an obligation to protect under the Refugee Convention.

El Salvador

[1106467](#)

5 September 2011, Brisbane

Ms M Grau, Member

EL SALVADOR – DOMESTIC VIOLENCE – STATE PROTECTION – NO CONVENTION GROUNDS –

The applicant claimed to fear persecution at the hands of her former de facto husband, who had allegedly abused her for the past 15 years. She claimed that her former de facto had taken all the money she earned; had accused her of cheating, bashed her and thrown her out of their house, after which she did not see her children for four years; had continually harassed her and beaten her in public; and had forced her to relocate to hide from him. She further claimed that the police could not protect her because they were “under siege from drugs and gangs and uncontrollable violence”, and that witnesses to the assaults would not give statements for fear of revenge from her former de facto. The applicant claimed to be tired of running and being scared, that she was always looking over her shoulder, and that her former de facto sometimes harassed and assaulted her while she was waiting for the bus. If she returned to El Salvador, the applicant claimed that she would have to “live running and hiding”, and that many women in El Salvador died as a result of domestic violence.

Prior to the tribunal hearing, the applicant provided three documents: a letter from a community worker in El Salvador, stating that the applicant had come to Australia to escape domestic violence; a statement signed by the applicant’s children, claiming that they “witnessed beatings, maltreatment and humiliations of their mother”; and a statement from the applicant’s sister in El Salvador, claiming that the applicant had been a victim of domestic violence, that she lived in hiding, and that she had been attacked by her former de facto at a bus stop in April 2009. In her evidence to the tribunal at the hearing, the applicant claimed that this attack in fact took place in April 2010 rather than April 2009. In response to questions from the tribunal, the applicant stated that she had not sought assistance from domestic violence shelter organisations in El Salvador. When the tribunal suggested to the applicant that El Salvador had laws against domestic violence, public education programmes, police protection, and domestic shelter and counselling help for victims of domestic violence, the applicant generally agreed with these statements. However, she claimed that corruption and bribery undermined the rule of law in El Salvador, that the government did not care about people like her, and that one had “to be there to see the reality”. Finally, the applicant claimed she could not relocate in El Salvador, because her former de facto could find her anywhere.

Held: Application under review affirmed.

The tribunal found that the applicant had in fact lived at her mother’s home between 1995 and 2000, and then at her sister’s home for a period of nine years, and that there was no evidence that she was assaulted at these homes. Therefore, the tribunal did not accept that the applicant had been living in hiding out of fear of her former de facto, as claimed. The tribunal accepted that the applicant may have suffered harassment from her former de facto from time to time while travelling to work, but found that the applicant was last assaulted in April 2009, as claimed in her family’s statement to the tribunal, and not April 2010, as claimed by the applicant.

The tribunal found that the applicant felt a real fear of harm from her ex-de facto husband if she returned to El Salvador, and further found that he may seek to continue to inflict emotional and physical abuse on the applicant. Nonetheless, the tribunal found that the applicant’s ex-de facto husband wished to harm her for a personal reason, and not for a Convention reason. Based on the available country information, the tribunal was satisfied that state protection was available to women in the circumstances of the applicant. The tribunal was not satisfied that there would be a selective and discriminatory withholding of state protection from the applicant for a Convention reason, and therefore found that the applicant was not a person to whom Australia had protection obligations under the Refugee Convention.

Fiji

[1105236](#)

28 September 2011, Brisbane

Mr A Mullin, Member

FIJI – INDIAN ETHNICITY – VIOLENCE BY FATHER AND FORMER PARTNER – POLITICAL OPINION – The applicant was born in Fiji and is of Indian ethnicity. She claimed to have witnessed violent attacks and abuse directed at ethnic Indian Fijians during the coups of 2000 and 2006, and to fear harm from ethnic Fijians. She also claimed to fear harm from her father, who killed her mother when the applicant was a child and served a term of imprisonment, but has since been released. She claimed also to fear harm from a former partner who beat her when they lived together and threatened her with violence after she discontinued the relationship in 2006. Additionally, she claimed that she had received harassing telephone calls from her former partner's current wife, who also telephoned members of the military in Fiji and accused the applicant of continuing a relationship with her former partner. As a result, she claimed that she and her former partner were summoned to an army barracks where military personnel threatened her and warned her to end the relationship. She claimed that, in Australia, her former partner's current wife continued to harass her via Facebook.

She claimed to be a member of the Fiji Democracy and Freedom Movement (FDFM), and that she would be arrested and harmed by the authorities in Fiji because of her opposition to the regime, or simply at random.

Held: Decision under review affirmed.

The Tribunal considered the applicant's claims regarding fear of harm for reason of her ethnicity, and noted that there was nothing in the available independent country information to indicate that ethnic Indians in Fiji have been targeted or discriminated against by the current regime. The Tribunal accepted that the applicant may have a strong subjective fear of her father, however, on the information before it, the Tribunal was not satisfied that the applicant's fear of harm from her father had any objective basis or that she was at risk of harm from him. The Tribunal accepted that the applicant may have suffered domestic violence from her former partner, but was not satisfied that she would now be unable to obtain protection from the authorities. The Tribunal observed that independent country information indicated the police and other authorities in Fiji do not withhold assistance to women who complain of domestic violence, even though some limitations may be placed on their ability to respond. The Tribunal noted that any further threats or violence from her former partner would be outside the context of domestic violence, and was not satisfied that the applicant would be denied state protection from such criminal harm.

The Tribunal accepted the applicant's claim that she had been harassed by telephone by her former partner's wife and that harassment had continued after her arrival in Australia in the form of a Facebook page containing defamatory material. However, the Tribunal was not satisfied that such harassment could reasonably be seen as amounting to serious harm, nor that there was anything to indicate a connection with a Convention reason. The Tribunal was not satisfied that the applicant's claims regarding the response of the military to telephone calls made to them by her former partner's wife were credible.

The Tribunal accepted that the applicant may have expressed criticism of the military regime since the 2006 coup, but was not satisfied that the applicant had a strong political opinion against the regime such that she would face serious harm if she should return to Fiji. Further, the Tribunal was not satisfied that she had placed herself at risk of harm from the Fiji authorities by anything she had done since leaving the country. The Tribunal noted the applicant's claim that she feared harm from the military because the regime was unpredictable and arbitrary and suppressed human rights, however it was not satisfied that people were detained quite arbitrarily. Moreover, the Tribunal was not satisfied that any harm that occurred in such a random and non-discriminatory fashion was for a Convention reason. Finally, the Tribunal noted that the delay of nearly three months between the applicant receiving her Australian tourist visa and her departure from Fiji cast further doubt on the credibility of her claim to have feared serious harm there.

The Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason should she return to Fiji, now or in the reasonably foreseeable future, and accordingly was not satisfied that the applicant is a person to whom Australia had protection obligations under the Refugee Convention.

Malaysia

[1100737](#)

23 September 2011, Melbourne

Ms A Murphy, Member

MALAYSIA – YI GUAN DAO – CHINESE ETHNICITY – FORCED RELIGIOUS CONVERSION – STATE PROTECTION – The applicants, a husband and wife of Chinese ethnicity, claimed that they were followers of Yi Guan Dao. The applicant wife claimed that her parents had in the past sought the assistance of an Islamic faith healer, Mr D, who held a position high in the Islamic hierarchy, and that her parents agreed that the applicant wife and/or her brother, Mr H, would marry children of Mr D when they came of age. However, by the time Mr D came to the parents' house to request that the applicant wife marry his son, Mr C, she was already in a relationship with the applicant husband and refused to marry Mr C. Mr H did, nonetheless, marry Mr D's daughter, Ms E, but the applicant wife claimed that this was not completely voluntary, and was rather an attempt to "put an end to the family's problems".

The applicant wife also claimed that she was mistreated in Malaysia because of her religion. She claimed that Mr D wanted to force her family to convert to Islam, and sent people to her home to "cause trouble" when she hosted Yi Guan Dao gatherings. She claimed that her daughters would be "forced to undergo female genital mutilation" if she returned to Malaysia and was forced to convert to Islam. She further claimed that Mr D tried to prevent her displaying her religious idol in her home, and that he destroyed the idol at her parents' house. The applicant wife claimed that she and her husband were both unable to work in Malaysia because Mr D and his followers made trouble for them at their workplaces, and that the applicant husband's car had been damaged on several occasions. According to the applicant wife, she and her husband moved to Kuala Lumpur but Mr D's friends found them there and assaulted the applicant husband, and the police were unwilling to assist them for lack of evidence. The applicants also claimed that they would suffer persecution in Malaysia due to their Chinese ethnicity.

Held: Decision under review affirmed.

The tribunal found that the applicants were followers of Yi Guan Dao. The tribunal accepted that the applicant wife's parents sought the assistance of Mr D, and that the parents agreed that the applicant wife and/or her brother would marry Mr D's children when they came of age. Further, the tribunal accepted that the applicant wife was already in a relationship with the applicant husband and was resistant to the proposed marriage to Mr D's son. The tribunal accepted that the applicant wife's brother married Mr D's daughter, but found that he did so willingly. The tribunal accepted that Mr D was angry when he discovered that the applicant wife and husband were married, but found that the applicant wife did not have a well-founded fear of being forced to marry Mr C if she returned to Malaysia, as laws against bigamy would prevent a forced marriage.

The tribunal found, on the available country information, that the applicants could not be compelled to convert to Islam if returned to Malaysia, and nor could their two daughters be forced to convert without parental consent. Accordingly, the tribunal found that there was no real chance that their daughters would face female genital mutilation. The tribunal found that the written and oral testimonies of the applicants varied and, consequently, did not accept that Mr D or his associates harassed the applicants at their workplaces. The tribunal found that while the applicant husband's car may have been damaged on several occasions, Mr D or his associates were not responsible for this. The tribunal accepted that Mr D may have destroyed the idol in the parents' home, but due to inconsistencies in the applicants' evidence found that Mr D or his associates had not visited the home of the applicants or been involved in violence there. The tribunal found that the applicant husband had not experienced difficulties in his workplace in Kuala Lumpur, nor had he been harassed or harmed by Mr D or any other person.

Based on the available country information, the tribunal found that the applicants did not face a real chance of persecution on the basis of their Yi Guan Dao faith, as it was widely practised by ethnic Chinese in Malaysia without recent reports of harassment. The tribunal found that, while the applicants may have faced discrimination in the workplace due to their Chinese ethnicity, this did not amount to a real risk of serious harm. In light of the tribunal's findings on each of these matters, and the tribunal's overall concerns about the credibility of the applicants and the inconsistencies in their evidence, the tribunal found that there was not a real chance that either of the applicants would be subjected to serious harm from Mr D, his associates

or any other person for any Convention reason. Accordingly, the tribunal found that the applicants were not persons to whom Australia had protection obligations under the Refugee Convention.

Pakistan

[1103300](#)

8 September 2011, Sydney

Ms D Barnetson, Member

PAKISTAN – SHIA – TEHREEK NIFAZ-E-FIQH JAFARIYA SHIA ISLAM – SIPAH-E-SAHABA – LASHKAR-E-JHANGVI – The applicant claimed that he was persecuted by the Sunni militant groups Sipah-e-Sahaba and Lashkar-e-Jhangvi due to his work with the Shia group Tehreek Nifaz-e-Fiqh Jafariya Shia Islam. He claimed that his father was very religious and had dedicated his life to Tehreek Nifaz-e-Fiqh Jafariya Shia Islam, and that his family was popular because of their religious work. The applicant claimed to have helped his father in his community work after he left school, but that his family was threatened by members of Sipah-e-Sahaba and Lashkar-e-Jhangvi to stop their religious work, and that the father was arrested on false murder charges. The applicant claimed that in June 1993 his father was killed as he came out of daily prayer. He further claimed that “hundreds of people” attended the father’s funeral, and that the applicant was subsequently made “president” of his region, and began working in his father’s place. The killing was reported to the police but they did nothing, and the abovementioned Sunni militant groups began killing Shia leaders from other parts of the city.

He was again threatened by the militant groups, and in 2004 obtained a visa for China and moved there, and later moved to South Korea. On his return to Pakistan in 2008 he lived in Karachi with a friend, who forced him to marry one of his relatives, with whom he had a daughter. The applicant claimed to have been attacked with a gun and to have been shot in the foot by Sunni militants, and that he and his family went to Lahore to attend a religious seminar at which a bomb blast killed more than 40 people and injured hundreds, and caused the applicant multiple arm fractures. The applicant further claimed that the two Sunni militant groups were still looking for him at this time and that they found he was in Karachi, after which his friends helped him to get a visa to travel to Australia. After the tribunal hearing, the applicant claimed to be suffering from extreme stress and depression, and submitted a medical report which stated that the applicant exhibited symptoms consistent with Post Traumatic Stress Disorder, and that he had been admitted to a hospital psychiatric unit and medicated.

Held: Application under review set aside.

The tribunal found that the applicant was an unreliable witness, and that he had given contradictory evidence on the date of, and reason for, his father’s death, the dates of the applicant’s two injuries, and his movements between various parts of Pakistan. However, the tribunal found that the vagueness of the applicant’s evidence was possibly due to severe mental stress and not to lack of credibility as a witness, and that the essential claims made by the applicant were consistent over time. The tribunal found that the applicant’s father had been killed for his religious activities as claimed, and because he had successfully appealed against a murder charge which had been falsely levelled at him because of his religious work. On the basis of country information which indicated that Shia Muslims were targeted by Sunni militant groups, the tribunal accepted that the applicant’s father had been killed because of his religion, and that the applicant had been injured in the arm and the foot by anti-Shia groups because of his religion.

The tribunal found, on the available country information, that it would not be reasonable for the applicant to relocate to avoid the risk of harm, and that the applicant could not access effective state protection due to the near-collapse of the rule of law and impunity for human rights abusers in Pakistan. The tribunal accepted that the applicant would face a real chance of persecution for a Convention reason if he was to return to Pakistan, and therefore the tribunal was satisfied that the applicant was a person to whom Australia had protection obligations under the Refugee Convention.

Sri Lanka

[1103791](#)

15 September 2011, Melbourne

Ms S Muling, Member

SRI LANKA – POLITICAL OPINION – MEMBERSHIP OF THE UNP – The applicant claimed that he was a member of the UNP and politically active in the lead-up to the April 2010 elections, and feared that he may be killed or harmed by people connected to a UPFA politician because of this. He claimed that he joined the UNP in February 2010 and, in addition to working as assistant manager in his father's business, become a personal assistant to a UNP candidate and worked in support of that candidate and the UNP. He claimed that he is Muslim and that he became politically active at that time as a result of an interest in educational reform and building a Muslim school. The applicant claimed that UPFA "thugs" committed acts of violence during the election campaign, and that on many occasions he was asked by the UNP candidate to investigate these incidents and to help victims to make police reports or get medical assistance. He claimed that, while putting up UNP posters, he and others were targeted by UPFA supporters who "started to hit our members and smash our cars".

The applicant claimed that on one occasion, outside the UNP office, a certain UPFA politician pointed a pistol at the applicant's head; on another occasion, the same UPFA politician pointed his finger at the applicant, imitating a gun, and threatened to kill him. The applicant claimed that the UPFA politician had previously been linked to violent incidents, including the death of ten Muslims. The applicant claimed that the UPFA politician was elected to parliament and is "a very powerful man". He further claimed that after the elections he received a number of telephone calls from unknown persons who said that they were going to get revenge. He claimed that one night in May 2010, when he was visiting a friend, a group of men sought him at his family home and made threats against him. He did not return home after this incident, but travelled to Negombo and stayed there with a friend until a further incident in September, when a group of men again sought him at his family home in Kandy, prompted his departure for Australia in October 2010.

Held: Decision under review affirmed.

The tribunal did not accept the applicant's evidence regarding how he came to meet and support the UNP candidate prior to the April 2010 elections, and found the claimed association with the UNP and the UNP candidate not credible. The tribunal did not accept that the applicant was a member of the UNP or that he worked for the UNP candidate as his personal assistant or in any other capacity. As the tribunal did not accept that the applicant was a politically active UNP member as claimed, it did not accept that the applicant was targeted by the rival UPFA politician or his associates either prior to the election in April 2010 or after it.

The tribunal placed little weight on police reports regarding the claimed incidents at his family home in May and September 2010, noting discrepancies in the evidence provided by the applicant and the information contained in these reports, and found the applicant's evidence concerning his relocation to Negombo to be inconsistent with the documentary evidence submitted. The tribunal also placed little weight on letters from the UNP candidate, who stated that he had known the applicant's father for a few years; given evidence that the applicant's father was a successful and respected businessman, the tribunal did not find it implausible that the UNP candidate would comply with any requests made to provide such supporting information in order to bolster the applicant's claims. Similarly, the tribunal attached little weight to other letters of support.

The Tribunal did not find the applicant to be a credible witness in relation to his claims of persecution. The Tribunal did not accept that the applicant was ever involved in politics either as a member of the UNP or as a personal assistant to a UNP candidate, and therefore did not accept the applicant experienced any problems in Sri Lanka as a result of his alleged political opinion. The Tribunal found that if the applicant were to return to Sri Lanka he would not face a real chance of persecution for reason of his alleged UNP membership and political opinion, or his alleged affiliation with a UNP candidate. The Tribunal therefore found that the applicant did not have a well-founded fear of persecution for a Convention reason, now or in the reasonably foreseeable future. Accordingly, the Tribunal was not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugee Convention.

Turkey

[1103215](#)

18 September 2011, Sydney

Mr D O'Brien, Principal Member

TURKEY – POLITICAL OPINION – EMEK PARTISI (EMEP) – The applicant claimed that he and his family were in opposition to the Turkish Government and were blacklisted because of their political history, particularly that of the applicant's father, who was one of the founders of the Turkish Revolutionary Communist Party (TDKP) and later one of the founders of the Labour Party (EMEP). The applicant claimed that his father was a lawyer who defended a man who was later executed and that, as a result, the applicant's father was also jailed, the applicant's mother lost her career and the applicant was discriminated against at university. He claimed that his father had since moved to another province, but that his legal practice had been subject to inspections and fines from Treasury inspectors, and his bank accounts and properties had been frozen. He claimed that his father still spoke out against the Turkish Government at international conferences, and that the applicant had problems at university in Turkey because he and other students in the EMEP mounted a campaign against the university administration concerning the proposed location of a mobile phone tower on campus. He further claimed that he had been charged and sentenced to a period of two years imprisonment in 2010 in relation to a speech he made at university in 2003. He claimed that while in Australia he had sought through the Turkish Embassy to continue the deferral of his military service training pending completion of his tertiary studies; however, his application was refused, and if he returned to Turkey he would be jailed and would still be required to do his military service.

The applicant submitted a number of documents to the Tribunal, including: material relating to the case of the executed man; documents regarding the applicant's military service; court documents relating to actions brought by the applicant against government agencies in relation to injuries suffered; documents regarding the criminal proceedings against him from 2003; and photographs of the applicant at an EMEP congress, and of his claimed injuries.

Held: Decision under review affirmed.

The Tribunal found that the applicant had provided no evidence of his membership of EMEP, nor had he provided any evidence of persecution specifically on the basis of his party membership. The Tribunal noted that his case was founded on the basis that he had been persecuted in the past because of his association with his father, and because of his record as a political agitator when he was at university. Accordingly, the tribunal found that if the applicant had a well-founded fear of persecution, he would not have delayed his protection visa application for over five years. It found the claim that his application was prompted by the constitutional changes which he asserted had the effect of restricting his access to the European Court of Human Rights (ECHR) did not make sense, noting that, having been convicted, it would have "defied common sense" to refrain from making a protection visa claim arising from proceedings brought against him because of the possibility of ultimately overturning the conviction in the ECHR, especially given that the ECHR already had a queue of 16,100 Turkish cases.

The Tribunal found that there was no evidence that proceedings had been brought against the applicant because of political discrimination due to his family's politics, and noted that the record of the court's decision in his case contained no indication that the defence raised any suggestion of this kind. The Tribunal considered that the applicant's expulsion from university did not involve serious harm to the applicant as required under s.91R of the Act, nor was there any evidence that any of the injuries suffered involved a convention nexus. The Tribunal accepted the evidence which suggested that the applicant's father was able to freely speak at international gatherings where the Turkish Government had been criticised on human rights grounds, and it found that if his father was not persecuted for his political opinion, there was not a real chance of the applicant being so persecuted. The Tribunal noted that the applicant's allegation that he had been unable to renew his passport in Australia because of his outstanding military service obligations was consistent with independent information which suggested that persons regarded as draft evaders were unable to renew their passports while overseas. However, the Tribunal found that Turkish laws relating to compulsory military service were laws of general application, and that enforcement of these laws against the applicant did not constitute persecution. The Tribunal therefore concluded that the applicant was not a person to whom Australia owed protection obligations under the Refugee Convention.

COUNTRY ADVICE

Afghanistan

[AFG38997](#) – Kabul – Pro-Western – Western Goods – Security – 18 August 2011

Provides information on people perceived to be pro-Western, or selling Western-style goods, and state protection in Kabul.

China

[CHN39107](#) – Tianjin – Demolitions – Petitioners – Compensation – Detention Procedures – Exit and Re-entry Procedures – Document fraud – 5 August 2011

Provides information on Tianjin Province: demolitions, petitioners, compensation, detention procedures, exit and re-entry procedures and document fraud.

[CHN38886](#) – Forced Sterilisation/Contraception – Guangdong – Childbearing Age – 29 June 2011

Provides information on forced sterilisation and contraception in Guangdong Province, and on childbearing age.

[CHN38095](#) – House Church Christians – Heilongjiang Province – 1 February 2011

Provides information on Christians in Heilongjiang, including mistreatment of House Christians.

East Timor

[TLS36930](#) – Alfredo Alves Reinado – Targeting of IDPs – 24 June 2010

Provides information on the movements of Alfredo Alves Reinado between May and August 2006, targeting of IDPs by Reinado's forces or the military, and the situation for persons previously linked to Reinado.

Fiji

[FJI37575](#) – Solomon Island and Melanesian Descendants – Land Ownership – 14 October 2010

Information on the treatment of Solomon Island descendants in Fiji.

Ghana

[GHA38912](#) – Ethnic Violence – Mamprusis – Kusasis – State Protection – Languages – Bawku – Cultural Festivals – 24 June 2011

Provides information on languages spoken by Mamprusis; significant cultural festivals common to Mamprusis and to the Bawku Municipality; landmarks in Bawku; maps showing Bawku and the Upper East Region; tribal violence between Mamprusis and Kusasis in Bawku; and state protection in Bawku and other parts of Ghana.

India

[IND38934](#) – Gujarat – Godhra Train Incident – RSS – BJP – Chhatra Parishad – Akhil Bharati – State Protection – Election Results – 4 July 2011

Provides information on the 2002 Godhra train incident, the RSS & BJP, Chhatra Parishad, Akhil Bharatiya, state protection for Muslims in Gujarat, relocation, and 2007, 2009 and 2010 election results.

Iraq

[IRQ39094](#) – Badr Organisation – Babel – Wassit – Children – 15 August 2011

Information on the Badr Organisation activities in Babel and Wassit, and the situation for children in Iraq.

Malaysia

[MYS38898](#) – Klang City – Chinese Business Owners – Police Protection – 7 July 2011

Provides information on police protection of business owners in Klang City or Selangor State, and police in Klang or Selangor State more widely.

Mauritius

[MUS38857](#) – Spouse of a Citizen of Mauritius – Right to Reside in Mauritius - 6 June 2011

Provides information on the right of the spouse of a Mauritian citizen to reside in Mauritius.

Nepal

[NPL38704](#) – Rastriya Prajatantra Party – Maoists – Young Communist League – Myagdi – Kathmandu – Police and Security Forces – 20 May 2011

Provides information on the Rastriya Prajatantra Party and Rastriya Prajatantra Party-Nepal, whether they are active in Myagdi, whether the Maoists or Young Communist League are targeting RPP members or monarchists, particularly in Myagdi and Kathmandu, and state protection for RPP members.

Pakistan

[PAK38780](#) – Hazaras – Quetta – State Protection – 15 July 2011

Provides information on Hazaras and the security situation in Quetta.

Sri Lanka

[LKA38454](#) – Security Update – Northern Provinces – Tamils – Karuna Group – 5 April 2011

Provides information on the treatment of Tamils in north Sri Lanka, and the activities of the Karuna group.

United Arab Emirates

[ARE38151](#) – Human Rights – Police – Christianity – Catholics – 7 February 2011

Provides information on the treatment of government critics; whether the subject of an arrest warrant could leave the country; and the situation for Christians, Catholics in particular.

Vietnam

[VNM38946](#) – Ho Chi Minh Communist Youth – Employment – Police – Returnees – 22 July 2011

Provides information on the Ho Chi Minh Communist Youth and access to government employment; Community Party members returning from travel overseas; and treatment of failed asylum seekers.

Zimbabwe

[ZWE38529](#) – Treatment of MDC Members by ZANU-PF– Election-related Violence in Masvingo West – MDC History – 27 April 2011

Provides information on treatment of MDC members by ZANU PF and supporters; MDC history; and 2008 election-related violence in Masvingo Province; Masvingo Prison.

FEDERAL COURT JUDGMENTS

Gordon v MIAC & Anor

[2011] FCA 818

Federal Magistrates Court of Australia, Barnes FM, SYG 439 of 2011, 20 October 2011

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

The applicant applied for a Partner (Temporary) (Class UK) visa on 17 May 2005. Prior to the delegate's decision the applicant's former sponsor had advised the Department that the relationship had ended and the applicant had given birth to a child from another man. The delegate refused the visa on the basis that the applicant was not in a genuine spousal relationship with the sponsor. The Tribunal invited the applicant to a hearing during which the applicant confirmed that her relationship with the sponsor had ceased. The Tribunal referred to correspondence it had received from the former sponsor in January 2010. Additionally, it explained to the applicant the spousal relationship requirements of cl.820.221 and the exceptions, including the domestic violence exception, in cl.820.221(3). The applicant stated there was one instance of domestic violence which she had taken to court but did not obtain the final AVO. The Tribunal noted that since she did not present evidence of domestic violence in accordance with the statutory requirements, it "could not consider" the claim. In its reasons for decision the Tribunal found that the relationship with the sponsor had ceased. It observed that the applicant did not provide evidence of domestic violence in accordance with the requirements of Division 1.5 of the Regulations and was therefore not satisfied that the applicant or a dependent child had suffered domestic violence committed by the sponsoring spouse, and on this basis it found the applicant did not meet cl.820.221(3)(b)(i).

The applicant contended, among other things, that the Tribunal made a jurisdictional error when it refused to consider her claim to have suffered domestic violence for cl.820.221(3) and by failing to comply with its obligation under s.359A(1) in relation to the adverse information provided by the former sponsor that their relationship was no longer continuing, including a letter given to the Department withdrawing his sponsorship.

Held: Appeal dismissed.

- (i) The Tribunal did not breach s.359A. The basis for the Tribunal's finding was information given by the applicant herself that she was no longer in a relationship with the sponsor. There was no evidence or necessary inference that the Tribunal member "considered" the impugned information at any time prior to the hearing. The fact that the Tribunal referred to some of the information from the sponsor in its account of the claims and evidence does not have the consequence that it should be inferred that the Tribunal considered it would be part of the reason for decision. The only proper inference to be drawn was that the Tribunal did not consider the contents of the adverse information from the sponsor to be the reason or part of the reason for affirming the decision under review.
- (ii) The Tribunal did not refuse to consider the applicant's claim of domestic violence. It had regard to the fact that she had said that there was an instance of domestic violence which she referred to a court. It found however that she had not provided any evidence of domestic violence in accordance with the requirements of Division 1.5 of the Regulations and on that basis was not satisfied that the applicant or a dependent child had suffered domestic violence committed by the sponsoring spouse in the sense referred to in cl.820.221(3)(b)(i).

Patel v MIAC

[2011] FCA 1220

Federal Court of Australia, Robertson J, NSD 992 of 2011, 31 October 2011

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to refuse a Skilled (Provisional)(Class VC) Subclass 485 Skilled Graduate visa.

The appellant gave "Family Counsellor" as the nominated occupation in his visa application and listed as an Australian educational qualification Master of Information Systems. He later provided a skills assessment related to the nominated occupation of "Environmental Health Officer". The delegate refused the visa on the basis that his qualification was not closely related to his nominated occupation as required by cl.485.213 of Schedule 2 to the Migration Regulations 1994. The appellant subsequently submitted a "Notification of incorrect answer" listing "Family Counsellor" and "Environmental Health Officer" as information which was incorrect for his nominated occupation and "Computing professional 2231-79" as the correct information, claiming that he had intended to nominate the occupation of Computing Professional. He also provided evidence that he had applied for a skills assessment from the Australian Computer Society in November 2008, after the date of his visa application. The Tribunal found the appellant did not provide an "incorrect" answer on his visa application, that his intention was to nominate the occupation of Family Counsellor, and that he could not "change" his nominated occupation. The Federal Magistrate found no error in these findings.

The two issues that arose on appeal were first, whether, having regard to ss.54, 55, 104 and 105 of the *Migration Act 1958*, the appellant could in the circumstances of the case change his nominated skilled occupation; and secondly, how cl.485.214 should be construed in light of *Berenguel v MIAC* (2010) 264 ALR 417, and in particular, whether it required the appellant to have applied for an assessment of his nominated skilled occupation of computer professional at the time of his application.

Held: Appeal dismissed.

- (i) The application for a skills assessment was required to be made at the time of application and was not so made in this case.
- (ii) *Obiter*: Section 55 of the Act does not treat as "information" material which is fundamental to the making of a valid application. Further, a change of mind as to the occupation nominated does not answer the statutory description of "additional" relevant information. Section 104 does not encompass a change of mind about a nominated occupation. Section 105 did not apply to this case because the answer given about the nominated occupation was not incorrect when it was given or provided.

**Cheng v MIAC
[2011] FCA 1290**

Federal Court of Australia, Flick J, NSD 1174 of 2011, 11 November 2011

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Migration Review Tribunal (the Tribunal) that it lacked jurisdiction to review a decision of the Minister's delegate to refuse a Student (Temporary)(Class TU) visa.

The appellant's visa application identified his residential address as a particular address in NSW. However, the wrong apartment number was provided. The appellant was assisted by L, who was not a registered migration agent. L completed and lodged the visa application without disclosing that he assisted with the form. The notification letter advising the appellant that he had been refused the visa was sent by the Department of Immigration to the address provided in the application and was returned unclaimed. Subsequently, the Department provided a copy of the letter to the appellant and in a telephone conversation he was advised by a Departmental officer he had six days remaining to lodge an application for review. The appellant did not lodge a review application within that time. Notwithstanding the letter was sent to an incorrect address, the Tribunal and the Federal Magistrate found the review application was lodged outside the prescribed time.

A question raised by the Court on appeal was whether issues of procedural fairness arose in connection with the Tribunal's consideration of whether it has jurisdiction in a matter and whether there was an entitlement to be heard in such circumstances.

Held: Appeal dismissed

- (i) There was no denial of natural justice. Given the absence of any power to extend the time within which an application for review may be made, and an apparent acceptance of the underlying factual basis upon which the Tribunal declined jurisdiction, the utility of extending any opportunity to be heard in respect to the return of the letter and the circumstances in which the erroneous address was

provided remained elusive. Where there is a genuine dispute as to the facts, including whether or not a letter was in fact posted or where there is discretion to extend time, an opportunity to be heard may have some utility. An opportunity to make submissions as to jurisdiction was extended to the appellant by the Tribunal by letter.

- (ii) Furthermore, the applicant was advised that he had six days to lodge an application but took no action to do so. He was not misled into thinking that the time could be extended.
- (iii) There was insufficient evidence to establish fraud on the part of L.
- (iv) The Department's letter was sent in accordance with s.494B - that is to the last residential address provided by the appellant. There was no merit in the claim that the address was not provided by the appellant but by L.

FEDERAL MAGISTRATES COURT JUDGMENTS

MZYLH v MIAC & Anor

[2011] FMCA 888

Federal Magistrates Court of Australia, Whelan FM, MLG 358 of 2011, 17 November 2011

The applicant, a Pakistani national, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to refuse him a Protection (Class XA) visa.

The Tribunal accepted that the applicant could be harmed for a Convention reason in the Federally Administered Tribal Areas (FATA) and Northwest Frontier Province (NWFP) but found that if he relocated outside those areas he would not have a well-founded fear of persecution. In addressing the reasonableness of relocation the Tribunal considered a number of factors including his psychological difficulties as outlined in medical reports, stating that there was no information that indicated that he would be unable to obtain employment on account of any Convention characteristic or that he would be denied treatment for his psychological conditions. It considered that despite his ongoing psychological difficulties he would not be unable to find accommodation and employment.

The applicant alleged, among other things, that the Tribunal asked itself the wrong question in relation to relocation in that it limited its consideration to assessing whether there was a real chance of persecution on a Convention ground; and that, when determining the reasonableness of relocation, it had failed to take into account relevant considerations including whether the applicant would, in the place of relocation, have available to him treatment, services and/or support for his psychiatric condition, including suicidal tendencies.

Held: Application allowed. Tribunal decision quashed and remitted for reconsideration.

- (i) The Tribunal did not ask the right questions or apply the right approach, despite referring to it, in considering if it was reasonable in all the circumstances to expect the applicant to relocate. The issue was not whether the applicant might be denied treatment for his mental illness for a Convention reason but whether he could relocate within Pakistan and maintain himself given the state of his health. Country information that was available to the Tribunal would suggest, at the very least, some practical difficulty in accessing treatment for his psychological conditions.
- (ii) The approach to relocation mandated by *Randhawa v MILGEA* (1994) 52 FCR 437 requires the decision-maker to consider whether the applicant has a well-founded fear of persecution for a Convention reason; if yes, whether real protection is available elsewhere within the country of nationality; and, given the applicant's particular circumstances and the impact upon him of relocation, whether it is reasonable to expect him to relocate. Whether it is "reasonable", as in practicable, for a person to relocate to an area where they would be protected from persecution for a Convention reason can only involve a consideration of factors which are *not* an applicant's Convention characteristics.

- (iii) It could not be concluded that the Tribunal's decision was logically based on probative material and logical grounds. A large part of the crucial material in the Tribunal's decision was unattributed material and the conclusions on a key issue were copied from an unrelated decision by another member. Additionally, the findings in relation to relocation made statements for which no material was cited and failed to address the actual circumstances of the applicant.

MZYMP v MIAC & Anor

[2011] FMCA 884

Federal Magistrates Court of Australia, Whelan FM, MLG 653 of 2011, 16 November 2011

The applicant, a citizen of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision of the delegate of the respondent not to grant a protection visa.

The applicant claimed to fear persecution from government authorities due to involvement with the Bangladesh National Party (BNP). The Tribunal wrote to him under s.424A of the *Migration Act 1958* (the Act) inviting a comment or response within 14 days to a report concerning the authenticity of documents submitted by him and country information concerning the level of fraudulent documents and corruption in Bangladesh. On the due date the applicant's representative requested an extension of time for the reason that the applicant was waiting for documents from Bangladesh which may take another 35 days. The Tribunal refused to grant an extension of time given the lateness of the request and lack of information concerning the relevance of the documentation which the applicant was allegedly obtaining from Bangladesh in order to respond to the s.424A letter. No material was submitted and the Tribunal affirmed the delegate's decision.

The applicant contended, among other things, that the Tribunal breached s.424B(2) of the Act because the s.424A invitation did not specify the correct prescribed period of 28 days as required by r.4.35(5) of the Migration Regulations 1994 (the Regulations) because the information was of a character such that the information or comment to which the invitation related was to be provided from a place that is not in Australia. The applicant also contended that the exercise of the discretion to extend time under s.424B(4) miscarried because the Tribunal failed to take into account relevant considerations, including that the information to which the invitation related was, as indicated in the representative's letter, of a character such that the information or comment was to be provided from a place that was not in Australia.

Held: Application dismissed.

- (i) Regulation 4.35(3) was appropriately invoked by the Tribunal and the period of 14 days was the correct prescribed period. The distinction between r.4.35(3) and 4.35(5) is based on where the person from whom the comment or response is to come is located and not where potential sources of information which may be needed to frame a comment or response might be located.
- (ii) The Tribunal had regard to the reasons given by the applicant in support of the application to extend time and rejected the application. That was a matter within its discretion.

Chen v MIAC & Anor

[2011] FMCA 859

Federal Magistrates Court of Australia, Lloyd-Jones FM, SYG2451 of 2010, 8 November 2011

The applicant sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) affirming a decision of the Minister's delegate to refuse to grant a Skilled (Temporary) (Class VC) Subclass 485 Skilled Graduate visa.

In his visa application the applicant had specified "Chef" as his nominated skilled occupation although his qualifications and work experience were all with respect to a Cook. In his application to Trades Recognition Australia (TRA) he had requested assessment as a Chef, but he was unsuccessful in that assessment and TRA had assessed him as a "Cook".

Before the Tribunal, the applicant had stated that he had mistakenly nominated "Chef" rather than "Cook" because he did not realise the difference. The Tribunal found him to be a frank and honest witness and accepted that he had not differentiated in his own mind the skilled occupations "Cook" and "Chef", but found that this did not mean that he intended to nominate "Cook". It also stated that

there was no mechanism in the legislation for applicants to “otherwise correct or alter the skilled occupation they have nominated” in the visa application.

Before the Court it was contended that the Tribunal’s reasoning was illogical or irrational when it found that the applicant intended to nominate “Chef” as his skilled occupation, having accepted that he did not differentiate between a Chef and a Cook; and secondly, that the terms of the legislation are wide enough to encompass a change of nominated skilled occupation after the application is made.

Held: Application dismissed

- (i) The Tribunal’s decision was not illogical or irrational. The applicant lodged the visa application in a particular way which was deliberate, under the mistaken belief that “Chef” was the appropriate nominated skilled occupation for him.
- (ii) The legislation requires the nomination of a single skilled occupation and there is no mechanism to change this nomination once the application has been lodged.

AZABR v MIAC & Anor

[2011] FMCA 825

Federal Magistrates Court of Australia, Lindsay FM, ADG94 of 2011, 31 October 2011

The applicant, a citizen of Pakistan, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision of the delegate of the respondent not to grant a protection visa.

The applicant claimed that he was from the Haripur District and feared persecution by the terrorist organisation Tehrik-e-Taliban Pakistan (TTP). The Tribunal accepted his claim that if he returned to live in Haripur he would be subject to persecution by the TTP because he would be seen as a person who had lived in the Western country and would be regarded as a “non-Muslim”. The Tribunal then considered the question of relocation, stating that the relevant test was “whether there is a real chance the applicant would face persecution for a Convention reason if he moved to another area of Pakistan, and whether in his particular circumstances it is reasonable for him to do so”. It went on to find that it was reasonable for the applicant to relocate to another area of Pakistan such as Karachi as it found that the threat to the applicant was localised. In reaching this conclusion, it placed emphasis on his personal circumstances including his level of education, his ability to live independently and away from home in Australia, and his membership of the majority religion in Pakistan.

The applicant contended that the Tribunal had applied the wrong legal test in relation to relocation. The applicant further submitted that the Tribunal’s decision was affected by apprehended bias because the same Tribunal member had delivered a decision in respect of two other applicants on the same day, expressing its key findings in all three decisions in very similar language, with very similar reasoning, and very similar consideration of the country information.

Held: Application dismissed

- (i) The Tribunal asked itself the wrong question in relation to whether relocation to another part of the applicant’s country was reasonable. It did not have to be satisfied that there was a real chance that the applicant would face persecution for a Convention reason if he moved to that other area. Once the reasonable apprehension of persecution for a Convention reason within a particular locality of a country has been satisfied, the Tribunal’s attention should be focused upon whether in all of the circumstances of the applicant a move to another region or area of the country is a reasonable one for him to make. However a fair reading of the Tribunal’s reasons indicated that it understood properly that the test was a much broader one, and that it did not fail to take into account the applicant’s specific individual circumstances in assessing whether a relocation to another part of the country was reasonable.
- (ii) The ground of apprehended bias was not made out. Given that the key aspects of the claims of all three applicants were remarkably similar, it was unsurprising that there was a consistency in outcome and that in explaining how the Tribunal reached that particular outcome, similar language and thought processes were evident.

**Ghosh v MIAC
[2011] FMCA 822**

Federal Magistrates Court of Australia, Lloyd-Jones FM, SYG 2470 of 2010, 21 October 2011

The applicant sought judicial review of a decision of the Minister's delegate to cancel his Student (Temporary)(Class TU) visa under s.116(1)(b) of the *Migration Act 1958*, for breach of condition 8202(2)(a) of the Migration Regulations 1994 (the Regulations) (requirement to be enrolled in a registered course).

The applicant had been enrolled in a Bachelor of Information Technology with the University of Ballarat, however his Confirmation of Enrolment was cancelled in August 2010 because he had not enrolled for the semester commencing in July 2010 and because of non-payment of enrolment fees. The applicant travelled to India in October 2010, and on his return to Australia, while still in immigration clearance, the Minister's delegate made the decision to cancel his visa. In an interview with the delegate the applicant stated the University had decided to exclude him from the course because of poor performance, but after an interview with the University this decision had been reversed. It had been too late for him to enrol in studies commencing in July, but he had been advised by the University he could re-enrol and re-commence studies in November 2010. The delegate was satisfied that the applicant had not complied with condition 8202(2)(a) as he was not enrolled in a registered course, and found that as he did not present any exceptional circumstance beyond his control to explain the breach of condition, cancellation was mandatory.

Before the Court, the applicant contended that the decision maker did not properly address the requirement in r.2.43(2)(b)(ii), in that she had approached the question on the basis that the visa holder had to satisfy her that there were exceptional circumstances beyond his control, rather than requiring her to be satisfied that the breach of condition was not due to such circumstances. The applicant contended exceptional circumstances had been put forward, namely the reversal of the exclusion decision, and that these had not been considered for the purposes of r.2.43(2)(b)(ii).

Held: Application dismissed

- (i) The delegate was entitled to find that no exceptional circumstances had been presented by the applicant. All that was advanced was argument cavilling with the fact the University's exclusion decision had been overturned. In the absence of any exceptional circumstances, there was only one decision that the delegate could have made.
- (ii) In order to allow the discretion available under r.2.43(2)(b)(ii) to be exercised, there at least has to be something for the delegate to consider that the applicant has put forward as a reason why the breach occurred in order for the delegate to consider whether that explanation amounts to an exceptional circumstance beyond the visa holder's control. The obligation to advance evidence of an exceptional circumstance beyond the visa holder's control lies with the applicant.
- (iii) In cases of this nature, there can be something raised before a delegate which may cause the delegate to undertake further inquiry, but nothing of that nature arose in this matter.

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

ACTS

Migration Amendment (Complementary Protection) Act 2011

This Act amends the *Migration Act 1958* to introduce a statutory regime for assessing claims that may engage Australia's non-refoulement (non-return) obligations under various international human rights treaties otherwise known as 'complementary protection'. Sections 1 to 3 of the Act commenced on 14 October 2011 (the day on which the Act received the Royal Assent).

Deterring People Smuggling Bill 2011

This Bill was introduced into the House of Representatives on 1 November 2011. The purpose of the amendments in this Bill is to clarify the law relating to people smuggling, and for related purposes.

REGULATIONS

Migration Amendment Regulations 2011 (No. 6)

These Regulations amend the *Migration Regulations 1994* to strengthen and improve immigration policy and to implement some recommendations made in the Hon Michael Knight AO's report, *Strategic Review of the Student Visa Program 2011*.

Migration Regulations 1994 - Specification under paragraph 2.25A(1)(b)- Specification of Countries - October 2011

This Specification lists additional countries which are able to clear the necessary medical examinations undertaken for the purpose of meeting Australia's health requirements.

INSTRUMENTS

Migration Regulations 1994 - Specification under clauses 4005, 4006A and 4007 - Specification of Health Care and Community Services - November 2011

This instrument specifies health care and community services for the purposes of cl. 4005(3), 4006A(1B) and 4007(1B) of the *Migration Regulations 1994*.

Migration Regulations 1994 - Specification under paragraph 2.04(3)(b) and subparagraph 2.08AC(4)(a)(ii) - Specified Place - November 2011

This instrument specifies places where visa applicants (other than applicants for a bridging visa or a Witness Protection (Trafficking) (Permanent) (Class DH) visa) who are offshore, are to provide personal identifiers, other than by way of an identification test carried out by an authorised officer.

Migration Regulations 1994 - Specification under clause 5A102 - Alternative English Language Proficiency Tests to the International English Language Testing System for Student Visa Purposes - November 2011

This instrument specifies which English language proficiency tests may be used as an alternative to IELTS, in

which countries, and the relevant scores that must be achieved by applicants. It also removes the requirement for English language testing in a limited number of instances where English language proficiency is now to be determined by the provider of intensive English language courses.

Migration Regulations 1994 - Specification under paragraph 2.04(3)(b) and subparagraph 2.08AC(4)(a)(ii) - Specified Place - November 2011

This instrument specifies places where visa applicants (other than applicants for a bridging visa or a Witness Protection (Trafficking) (Permanent) (Class DH) visa) who are offshore, are to provide personal identifiers, other than by way of an identification test carried out by an authorised officer.

CASELOAD OVERVIEW

MRT Decisions - November 2011

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total	% Total
Bridging refusal	1	25	2	2	30	4.3%
Visitor refusal	47	13	2	5	67	9.6%
Student refusal	72	66	24	15	177	25.4%
Temporary business refusal	7	7	17	6	37	5.3%
Permanent business refusal	3	5	8	3	19	2.7%
Skill linked refusal	17	36	8	4	65	9.3%
Partner refusal	64	26	9	8	107	15.4%
Family refusal	23	17	9	3	52	7.5%
Student cancellation	17	52	4	18	91	13.1%
Sponsor approval refusal	2	2	10	0	14	2.0%
Other	12	8	11	6	37	5.3%
Total	265	257	104	70	696	100.0%

RRT Decisions – November 2011

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total	% Total
China (PRC)	9	38	1	1	49	21.9%
Egypt	16	6	0	0	22	9.8%
India	0	16	0	3	19	8.5%
Fiji	3	11	0	0	14	6.3%
Lebanon	6	6	1	0	13	5.8%
Pakistan	6	4	1	0	11	4.9%
Sri Lanka	3	7	0	0	10	4.5%
Bangladesh	2	7	0	0	9	4.0%
Zimbabwe	5	3	0	0	8	3.6%
Korea, Republic of	0	7	0	0	7	3.1%
Malaysia	0	5	0	2	7	3.1%
Indonesia	0	4	0	0	4	1.8%
Nepal	0	4	0	0	4	1.8%
Papua New Guinea	1	3	0	0	4	1.8%
Turkey	2	2	0	0	4	1.8%
Vietnam	1	3	0	0	4	1.8%
Congo, Democratic Republic Of	3	0	0	0	3	1.3%
Iran	2	1	0	0	3	1.3%
Brazil	0	2	0	0	2	0.9%
Burma (Myanmar)	2	0	0	0	2	0.9%
Ghana	0	1	1	0	2	0.9%
Kuwait	1	1	0	0	2	0.9%
Nigeria	1	1	0	0	2	0.9%
Peru	0	2	0	0	2	0.9%
Stateless	2	0	0	0	2	0.9%
Thailand	0	2	0	0	2	0.9%
Cambodia	1	0	0	0	1	0.4%
Other	3	8	1	0	12	5.4%
Total	69	144	5	6	224	100.0%

PUBLICATION OF TRIBUNAL DECISIONS

The MRT-RRT publish decisions on AustLii that are considered to be of 'particular interest'. Decisions which are regarded by the MRT-RRT 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 MRT-RRT aim to publish at least 40% of decisions made by each Tribunal. Between 1 January and 30 November 2011, 43.9% of all substantive decisions made have been published (43.6% of MRT and 44.6% of RRT). This figure 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 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 RRT 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 MRT 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-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 MRT-RRT decisions are available on the MRT-RRT's website located at <http://www.mrt-rrt.gov.au/>.

The website also contains information about how to apply to the MRT-RRT, how the MRT-RRT are organised, the function of the MRT-RRT, caseload statistics, as well as copies of this and previous Bulletins. The website is updated on a regular basis.

The MRT-RRT 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.

Please note that MRT-RRT published decisions may be affected by a later court decision.

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