THE IMPACT OF THE MIGRATION REFORM ACT ON THE IMMIGRATION REVIEW TRIBUNAL

*Pamela O'Neil**

Text of an address by Pamela O'Neil to the Migration Institute of Australia Annual Conference, Sydney, 16 March 1995.

Introduction

On 1 September 1994 the *Migration Reform Act 1992* came into effect. Together with *the Migration Legislation Amendment Act 1994*, which made further changes to the *Migration Act 1958* and renumbered that Act, the Migration Reform Act made changes to Australian migration law of equal significance to those made by the *Migration Legislation Amendment Act 1989* which, with effect from 19 December 1989, codified much of what had previously been contained in departmental policy. This paper addresses the impact of the Migration Reform Act on the Immigration Review Tribunal ("IRT") but I will refer to other significant changes as necessary.

Changes to the structure of the review system

One part of the Migration Reform Act, that establishing the Refugee Review Tribunal ("RRT"), was brought into effect, as had originally been intended, on 1 July 1993. The commencement of the remainder of the changes made by the Act was deferred by the *Migration Laws Amendment Act 1993* from 1 November 1993 until 1 September 1994. Apart from the creation of the RRT the Act did not make major changes to the structure of the review system in relation to migration decisions.

The IRT had never had jurisdiction in relation to decisions on refugee status: what occurred in that jurisdiction was the replacement of a previous form of review which did not have a statutory basis, the Refugee Status Review Committee, with the statutorily based RRT. This had previously happened in 1989 in respect of migration decisions other than decisions on refugee status when the Immigration Review Panels, which did not have a statutory basis, were replaced by the IRT. The Administrative Appeals Tribunal ("AAT") retained the criminal deportation jurisdiction which it had always had. It also retained its jurisdiction in respect of the cancellation of business visas on grounds of failure to take a substantial ownership interest in a business or failure to participate in the day to day management of a business and its jurisdiction in respect of decisions refusing to grant or cancelling visas on character grounds, both of which it had gained in 1992.

For the vast majority of migration decisions, however, the avenue of review remained the two tier structure comprising the Migration Internal Review Office ("MIRO") within the Department of Immigration and Ethnic Affairs and the IRT. Significant changes were, however, made to enlarge the jurisdiction of MIRO and the IRT.

* *Pamela O'Neil was, until recently, the Principal Member of the Immigration Review Tribunal.*

Changes to the IRT's jurisdiction

Under the system as in force before 1 September 1994 the jurisdiction of MIRO and the IRT was confined to certain reviewable classes of visas and entry permits. The only decisions which were reviewable were decisions refusing to grant visas or entry permits of the reviewable classes, decisions rejecting nominations or sponsorships lodged in connection with applications for visas or entry permits of the reviewable classes, and decisions by way of points test assessments in relation to applications for concessional family visas. Within this regime there were also further specific exceptions, for example those in relation to decisions refusing further temporary entry permits to holders of entry permits granted for the purpose of English language study and decisions refusing permanent residence to holders of visitor entry permits.

With the exception of the December 1989 entry permits, the capacity to seek review was conferred on both applicants present in Australia and on nominators or sponsors. However, despite provisions extending rights of review in this area, there still remained reviewable classes of visas applied for off-shore for which there was no requirement for nomination or sponsorship and in respect of which there was therefore nobody who had a right to seek review. Confusion was also caused in relation to extended eligibility (family) entry permits where there was no criterion in the Migration Regulations requiring sponsorship (and therefore no entitlement on the part of a sponsor of the application to seek review) even though the departmental form required that there be a sponsor.

On 15 July 1992 the then Minister for Immigration, Local Government and Ethnic Affairs, the Hon. Gerry Hand, announced that, as part of changes also including the establishment of the RRT, the IRT would be given:

> jurisdiction to review decisions on all valid applications lodged in Australia, except for those lodged at the border and those relating to refugee status.[1]

This announcement was substantially implemented by the Migration Reform Act and the associated changes which came into effect on 1 September 1994. The legislative provisions relating to review were simplified and part of what had been formerly contained in the Migration (Review) Regulations was incorporated in the Act whilst the remainder was incorporated in the Migration Regulations 1994. As indicated in the Minister's announcement, the most significant change was that all on-shore decisions refusing to grant visas became reviewable. The IRT was also, for the first time, given jurisdiction to review on-shore decisions cancelling visas. The regime in respect of off-shore decisions refusing to grant visas remained much the same and rights of review in respect of cancellations were not extended to decisions taken off-shore.

Some restrictions do remain with regard to the review of on-shore decisions. The main constraint in relation to decisions refusing to grant visas (other than decisions refusing to grant bridging visas to non-citizens who are in immigration detention as a result of the refusal) is that the decision must be made after the applicant has been immigration cleared: non-citizens whose applications are refused in immigration clearance or after being refused immigration clearance do not have rights of review. Similarly, decisions to cancel visas made at a time when the visa holder is in immigration clearance are not reviewable unless the decision is one to cancel a bridging visa and the non-citizen is in immigration detention as a result of the refusal. The capacity to seek review of on-shore decisions is confined to the person who applied for the visa which has been refused or whose visa has been cancelled.[2] The capacity to seek review no longer depends on whether the

applicant was lawfully present in Australia at the date of primary application but the applicant for review must be physically present in the migration zone when the application for review is made.[3]

As noted above, the old regime is essentially maintained in relation to off-shore decisions. That is, rights of review are confined to some person in Australia rather than being conferred on applicants overseas. However the problem of reviewable classes of visas in respect of which there was no person with capacity to seek review under the old scheme has been eliminated: essentially rights of review exist only in respect of those decisions where there is someone with the capacity to seek review of the decision. The following off-shore decisions are reviewable:

- decisions refusing to grant a visa which could not be granted while the applicant is in the migration zone where the applicant has been nominated or sponsored, as required by a criterion for the visa, by an Australian citizen, the holder of a permanent visa, a New Zealand citizen who holds a special category visa, a company that operates in the migration zone or a partnership that operates in the migration zone;[4]

- decisions refusing to grant a visa which could not be granted while the applicant is in the migration zone where a parent, spouse, child, brother or sister of the applicant is an Australian citizen or an 'Australian permanent resident' within the meaning of the Regulations (that is, the holder of a permanent visa who is usually resident in Australia) and a criterion for the visa is that the applicant has been an 'Australian permanent resident' (essentially decisions refusing to grant resident return visas);[5]

- decisions refusing to grant a visa which could not be granted while the applicant is in the migration zone where a criterion for the visa is that the applicant intends to visit an Australian citizen or an 'Australian permanent resident' who is a parent, spouse, child, brother or sister of the applicant and particulars of whom were included in the application (essentially close family visitor visa decisions);[6] and

- decisions by way of points test assessments in relation to an applicant for a visa which could not be granted while the applicant is in the migration zone where the applicant has been nominated or sponsored, as required by a criterion for the visa, by an Australian citizen, the holder of a permanent visa or a New Zealand citizen who holds a special category visa and the Minister has not refused to grant the visa (essentially points test assessments in concessional family visa cases).[7]

The right to seek review is conferred on the nominator or sponsor or the relevant relative as the case may be.[8] Decisions rejecting nominations or sponsorships are no longer separately reviewable.

As under the old regime, certain decisions are not reviewable by MIRO but come directly to the IRT. These are:

- decisions made by the Minister personally;[9]

- decisions refusing to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal or cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation;[10]

- decisions refusing a substantive visa where the applicant is in immigration

detention when the decision is notified to him or her;[11]

- decisions refusing a substantive visa where the applicant is a member of a family unit of which another member is in immigration detention at the time the decision is notified to the applicant and the applications for visas by those 2 members were combined;[12]

- decisions refusing a substantive visa where the applicant is a person whose right to make further applications while in Australia was, at the time of application, restricted under section 37 of the Migration Act as in force prior to 1 September 1994 or section 48 of the Act as in force on and after that date (that is, applicants who were not the holders of entry permits or substantive visas at the date of application and who had previously been refused an entry permit or visa while in Australia);[13]

- decisions refusing applications for December 1989 entry permits which are taken, under the Migration Reform (Transitional Provisions) Regulations, to be applications for Transitional (Temporary) and Transitional (Permanent) visas;[14]

- decisions refusing a visa made by the Secretary or by an officer holding or acting in a Senior Executive Service position;[15] and

- decisions cancelling a visa.[16]

Changes to the procedure for making an application for review

For the most part, the procedures for making an application for review and the time limits within which applications for review must be made remain unchanged. However it is important to note that time does not run for the purposes of review until a person is correctly notified of a decision. A notice of a reviewable decision under the Act must now state:

- that the decision can be reviewed;

- the time within which an application for review may be made;

- who can apply for review; and

- where the application for review can be made.[17]

For decisions refusing to grant substantive visas (other than where the applicant is in immigration detention) the time limits for applications to the MIRO and the IRT remain, as before, 28 days after the notification of an on-shore decision and 70 days after the notification of an off-shore decision.[18] The time limit for applications to the IRT for review of decisions refusing to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal or cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation is 2 working days after the notification of the decision.[19] The time limit for applications to the IRT for review of decisions refusing a substantive visa where the applicant is in immigration detention and decisions cancelling a visa (other than decisions cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation) is:

- 2 working days after the notification of the decision; or

- if the applicant gives notice to the Tribunal within those 2 working days that he or she intends to apply for review of the decision - 5 working days after the applicant gives that notice.[20]

Because of the strict time limits involved, an applicant who is in immigration detention is now permitted to send an application for review to the Tribunal by facsimile transmission as an alternative to

lodging it in the ways previously available.[21] No fee is payable in respect of an application to the IRT for review of a decision refusing to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal or cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation.[22]

Time-limited review and expedited review

The new regime introduces the concepts of 'time-limited review' and 'expedited review' by the IRT. 'Time-limited review' applies where the Tribunal is reviewing a decision refusing to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal or cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation. In such cases the Tribunal must notify the applicant of its decision within 7 working days unless the Tribunal, with the agreement of the applicant, extends this period.[23] 'Expedited review' applies where the Tribunal is reviewing one of three types of decision:

- decisions refusing close family visitor visas where the application for the visa was made for the purpose of participation by the applicant in an identified event of special family significance in which the applicant was directly concerned and the application for the visa was made long enough before the event to allow for review by MIRO and the IRT if the application were refused;

- a decision cancelling a visa (other than a decision cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation, in which case time-limited review will apply, as set out above); and

- a decision refusing a substantive visa where the person who applied for the visa is in immigration detention at the time the application for review is made.

In such cases the Tribunal must 'immediately' review the decision and must give notice of its decision on the review 'as soon as practicable'.[24]

The IRT's powers remain essentially unchanged under the new regime. However, the Tribunal now has determinative powers in relation to all reviewable decisions, including those made by the Minister personally. Also, there is no equivalent of section 121 of the Act as in force prior to 1 September 1994, the power that enabled the IRT to give an on-shore applicant the opportunity to make a further application for an entry permit if it appeared to the Tribunal that the applicant might have grounds for making such an application. Under the new regime a primary decision-maker may invite a fresh application for a visa from an off-shore applicant but both MIRO and the IRT are expressly precluded from exercising this power.[25]

Changes to the IRT's procedures

There are likewise few alterations to the provisions governing the IRT's procedures. Of most significance are the modifications introduced to deal with 'time-limited review'. Whereas in the ordinary course of events the Tribunal first considers the documentary evidence and must then notify the applicant that he or she is entitled to appear before the Tribunal to give oral evidence if it cannot make the 'most favourable' decision on the review, in time-limited reviews the applicant may request the opportunity to give oral evidence in a form accompanying the application for review. Where the Tribunal requires a person to provide evidence which it considers necessary in relation to a time-limited review, the person must provide the

evidence within 2 working days after being notified that the Tribunal has required the evidence to be obtained and may provide such evidence by facsimile transmission.[26]

Referral of matters to the AAT

The new regime also introduces a mechanism whereby the Principal Member of the IRT may refer a review involving an important principle, or issue, of general application to the President of the AAT. The President of the AAT may accept such a referral or decline it, and, if the President accepts it, the AAT will be constituted for the purposes of the review by a three member panel including the Principal Member of the IRT (unless the Principal Member was part of the IRT as originally constituted to deal with the matter).[27] I have previously indicated that I do not envisage this process being used more than a few times a year.[28] It has not in fact been used in the 7 months since the Migration Reform Act changes came into effect.

Bridging visas

Perhaps the most interesting aspect of the new jurisdiction given to the IRT on and after 1 September 1994 is the review of decisions refusing to grant bridging visas. These visas are of course themselves part of the changes introduced by the Migration Reform Act. Under the law in force prior to 1 September 1994 a non-citizen who did not hold a valid entry permit was an 'illegal entrant'. An officer was entitled to detain a person whom the officer reasonably supposed to be an illegal entrant. A person so detained had to be brought before a 'prescribed authority', in practice a magistrate, within 48 hours of being detained or, if that was not practicable, as soon as practicable thereafter. If the person was not brought before a prescribed authority they were entitled to be released. The prescribed authority was required to determine whether there were reasonable grounds for supposing the person to be an illegal entrant. If there were, the prescribed authority could authorise the person's continued detention for 7 days at a time.[29] If the illegal entrant's 28 day 'period of grace' had ended, the Minister could, after following prescribed procedures, order his or her deportation.[30]

Under the new regime a non-citizen in Australia who does not hold a visa in effect is an 'unlawful non-citizen'. An officer must detain a person whom the officer reasonably suspects to be an unlawful non-citizen. An unlawful non-citizen who is so detained may not be released, even by a court, unless he or she is granted a visa. Non-citizens in Australia who have not applied for visas or whose applications have been finally determined and who have not made a further application for a 'substantive visa' - that is, a visa other than a bridging visa or a criminal justice visa - must be removed from Australia as soon as reasonably practicable.[31] However non-citizens who would otherwise be unlawful non-citizens because their visas have been cancelled or have otherwise ceased to be in effect may be able to avoid being detained by being granted a bridging visa.

In order to be eligible to be granted a bridging visa a non-citizen must have been immigration cleared or must fall within one of a number of prescribed classes of persons. These include certain of the so-called 'boat people', referred to in the Act as 'designated persons', who may be granted bridging visas, and so released from detention, if they have been in 'application immigration detention' for more than 273 days, if they are the spouse of an Australian or a member of the family unit of such a spouse or if they are under 18 and appropriate arrangements have been made for their care in the community. Secondly, the prescribed classes also include people who:

- entered Australia before 1 September 1994 without authority and have not

subsequently been granted a visa or entry permit; or

- bypassed immigration clearance on or after 1 September 1994 and have not subsequently been granted a visa;

and who have remained in Australia since 1 September 1994 and have not come to the notice of the Department within 45 days of entering Australia. Finally, the prescribed classes include people who entered Australia on or after 1 September 1994 and who were refused immigration clearance or who bypassed immigration clearance and came to the notice of the Department within 45 days of entering Australia where such persons have applied for protection visas or judicial review of a decision refusing a protection visa and:

- they are under 18 and appropriate arrangements have been made for their care in the community;

- they are over 75 and adequate arrangements have been made for their support in the community;

- they have a special need (based on health or previous experience of torture or trauma) in respect of which a medical specialist appointed by the Department has certified that they cannot be properly cared for in detention; or

- they are the spouse of an Australian or a member of the family unit of such a spouse.[32]

There are five classes of bridging visas but when dealing with people in immigration detention it is only the last of these classes, the Bridging E visa (Class WE), which is normally relevant. There are two subclasses within this class, subclasses 050 and 051. However subclass 051 only applies to the protection visa applicants who entered Australia on or after 1 September 1994, referred to above. The criteria for this subclass simply require that the applicant meets the health and public interest criteria for the grant of a protection visa and that the applicant or a person acting on his or her behalf has signed an undertaking that he or she will depart Australia within 28 days of the final determination of the protection visa application or within 28 days of the completion of judicial review proceedings (if the applicant applies for judicial review). If the applicant has already applied for judicial review of a decision refusing his or her application for a protection visa the criteria simply require that those proceedings not be completed.[33]

The remainder of applications in this class must satisfy the criteria in subclass 050.

These criteria specify that a visa of subclass 050 may be granted where:

- the Minister is satisfied that the applicant is making, or is the subject of, acceptable arrangements to depart Australia; or

- the applicant has made a valid application for a substantive visa and that application has not been finally determined or the Minister is satisfied that the applicant will apply, within a period allowed by the Minister for the purpose, for a substantive visa; or

- the applicant has applied for judicial review of a decision; or

- the applicant has applied for merits review of a decision:

  - to cancel a visa; or

  - to refuse a visa on character grounds;

  or the Minister is satisfied that the applicant will make such an application for merits review; or

- the applicant held a visa that has been cancelled because he or she is a member of the family unit of a person whose visa has been cancelled and the latter person has applied for review of the decision to cancel his or her visa or the Minister is satisfied that the latter person will make such an application; or

- the applicant has made a request to the Minister for the exercise of the Minister's discretion to substitute a more favourable decision for one made by a review officer or a Tribunal; or

- the applicant is in 'criminal detention', that is, the applicant is serving a term of imprisonment (including periodic detention) following conviction for an offence or is in prison on remand; or

- the applicant is the holder of a bridging visa Class E and the Minister is satisfied that the applicant has a compelling need to work, meaning that the applicant is in financial hardship.[34]

The other criteria for this subclass require that the decision-maker be satisfied that the applicant will abide by the conditions, if any, imposed on the visa and that a security has been lodged if asked for by an officer authorised under section 269 of the Act.[35] Section 269 deals with the requirement and taking of a security by an authorised officer for compliance with the provisions of the Act or with any condition imposed for the purpose of the Act or the regulations. By virtue of subsection 5(3), a power which may be exercised by an authorised officer may also be exercised by the Minister and hence by the IRT, standing in the shoes of the Minister.

The IRT's jurisdiction to review decisions refusing bridging visas of subclass 050 is therefore very much like a bail jurisdiction: the Tribunal must consider whether the applicant will comply with any conditions it may impose on the visa and it may require a financial security against the possibility of non-compliance with those conditions. The conditions which may be imposed include a reporting condition and a condition that the holder notify any change of address at least 2 working days in advance to the Department. However, as the Tribunal noted in one of its early decisions on a bridging visa case:

> ... there is nothing in the Act or the regulations which would suggest when or why any of the range of available conditions should be imposed.
>
> ...
>
> It would seem that the Act and the regulations impose a broad, perhaps unfettered, discretion on officers (and the Tribunal) as to what conditions they should impose.[36]

Having considered relevant decisions of the courts the Tribunal concluded that:

> ... it is consistent with the scope and purpose of the Act that the discretion to impose a condition on a bridging visa Class E should be exercised in the national interest in a manner so as to facilitate the effective regulation of the presence in Australia of non-citizens. But this discretion should be exercised in a beneficial manner to ensure that consistent with such regulation, the discretion to impose conditions and thereby in the long run to issue a visa should be favourably exercised. It is not, after all, in the national interest unreasonably to detain people, at great fiscal and human cost. This means that unreasonable barriers should not be put to the granting of a bridging visa, nor should there be any presumption either express or tacit that persons who are in immigration detention should remain there.

The most important conditions to be imposed, the Tribunal suggested, would be:

> ... conditions that make it possible readily to locate, contact and communicate with the non-citizen.
>
> In many cases involving unlawful non-citizens, and indeed almost by definition,

> the applicant for the bridging visa will have been in Australia in breach of migration law for a considerable time. Again, almost by definition, the applicant will have for understandable reasons worked in breach of the law. In many cases they will have at one time or another not used their correct name.
>
> These matters are almost 'given' in this context, and it cannot have been intended by the legislature that they should be seen as reasons for refusing a bridging visa. ... There is no logical reason, for example, why a person who has in the past breached the law by virtue of their very presence in Australia - or by working out of necessity - will necessarily breach the law by failing to comply with reporting conditions.[37]

The Tribunal observed that past activities which might indicate a likelihood that an applicant might fail to comply with conditions included past failure to comply with reporting conditions, a repeated lack of cooperation with departmental officers while in detention, and the refusal to take steps to obtain a passport or other travel document where the applicant knows that the failure to obtain such a document will make removal from Australia difficult or impossible.[38] In the case before it on that occasion the Tribunal found that the applicant had failed to comply with a condition imposed on her in May 1990 requiring her to report to the Department twice a week. She had reported only twice between May 1990 and her detention for working without permission in April 1994. She had given inconsistent explanations for her failure to report, saying first that she was ill and later that she had been afraid that she would be sent back to China if she went in to report. Although she stated that she had a friend whom she could live with there was nobody who was prepared to offer a financial guarantee of her compliance with any conditions which might be imposed on the visa. Accordingly the Tribunal found that she was unlikely to comply in the future with reporting conditions and it affirmed the decision refusing her a bridging visa.

Some other early IRT decisions on bridging visa cases provide illustrations of these principles. In *Re Daus*[39] the Tribunal found that the applicant had no less than nine different identity cards in false names. He had few friends in Carnarvon, where he had lived and worked for only four months prior to being detained in February 1994. The Tribunal concluded that it was not satisfied that the applicant would abide by any conditions it might impose were it to grant the bridging visa sought. In *Re Salen*[40] the Tribunal noted that the applicant had refused to sign an application for an Indonesian passport. It said that applicants who were in custody and who decided not to cooperate in respect of travel documentation were unlikely to succeed before the Tribunal because:

> by failing to cooperate in relation to their travel documentation they are indicating that there is a high likelihood that they will not abide by the final determination in relation to their status.[41]

The Tribunal noted that the applicant had said that he was fearful he would be deported but it observed that he would not be able to be deported until all his avenues of review were exhausted. It therefore affirmed the decision refusing him a bridging visa.

The three decisions referred to so far all resulted in negative outcomes. However it is important to emphasise that the IRT has reversed departmental decisions and has granted bridging visas in some 60 per cent of the cases coming before it to date. By way of example, in *Re Steve Lee*[42] the Tribunal had before it an applicant who had been convicted of a number of offences involving passport fraud and imprisoned for six months. There was evidence that he was wanted to give evidence at the Coroner's Court in relation to the disappearance of the man whose passport he had used as the basis for an application for grant of resident status but the Tribunal observed that he had not been charged with any offences other

than the passport offences for which he had already served a term of imprisonment. The Tribunal noted that there was evidence that Mr Lee had been a model prisoner. He had substantial family ties in Australia including his Australian citizen wife, their young son and his parents-in-law who were prepared to provide security for his compliance with reporting conditions in the sum of $5,000. The Tribunal therefore granted him a bridging visa subject to a condition that he report twice a week to the Department.

In *Re Shobna Devi*[43] the Tribunal was dealing with an applicant who had obtained permanent residence on the basis of a contrived marriage. When this subsequently came to light she had become an illegal entrant by operation of law. She had subsequently applied for a Class 816 entry permit providing evidence of educational qualifications which she knew to be false. The Tribunal stated that it recognised that Ms Devi was frequently deceptive and that she had resorted to deceit in order to obtain permanent residence in Australia. However it said that 'failure to tell the truth does not necessarily indicate a general propensity to flout legal or procedural requirements'.[44] She had previously been released from custody pending the outcome of an application for review she had brought in the Federal Court and she had complied with reporting conditions on that occasion. She had a fiance who was prepared to provide a financial security in respect of her compliance with conditions in the sum of $3,000. In light of these considerations the Tribunal set aside the decision under review and granted Ms Devi a bridging visa on receipt of a security in the sum of $5,000, $3,000 of which was provided by her fiance.

One final example may suffice. In *Vijendra Kumar Sharma*[45] the applicant admitted that he had tried to hide when departmental officers had detained him. He also admitted that he had documents in the name of Vijay Kumar but he stated that this was the name he was known by and denied any intention to mislead. He had married an Australian citizen and he had an Australian citizen child. He also had a friend whom the Tribunal accepted as being a reputable person who was interested in helping him to sort out his immigration status. The Tribunal observed that it considered the departmental decision-maker had been unduly influenced by a view which the decision-maker had formed with regard to the likelihood of success of the application which Mr Sharma had made for a Class 818 entry permit. The Tribunal said that it was important for decision-makers to separate the issue of the likelihood of success of any substantive application from the issue of the likelihood of the applicant abiding by any conditions which might be imposed on a bridging visa. The Tribunal found that there was nothing in Mr Sharma's history to show that he would not comply with conditions and it therefore granted him the bridging visa which he sought.

It is interesting to note that a product of the Tribunal's relatively high set aside rate in bridging visa cases has been an apparent change in the departmental practice in these cases. The Tribunal has observed that the numbers of bridging visa reviews coming to it have diminished over the last few months and, while it has no statistics as to the pattern of decision-making in this area, one obvious explanation is that departmental officers have modified their approach to these cases in light of the Tribunal's decisions.

Cancellations

The other area which may be of interest in terms of the impact of the Migration Reform Act on the IRT is the review of decisions cancelling visas. As noted above, this is a completely new jurisdiction. To date the Tribunal has dealt only with cancellations pursuant to section 116 of the Act: it has not had any cases arising under section 109, the cancellation

power which has replaced the old section 20 procedure in relation to false or misleading statements made in visa or entry permit applications or passenger cards. The section 116 cases it has had, moreover, have related essentially to visa holders breaching conditions attaching to their visas, specifically holders of visitor visas and bridging visas breaching conditions prohibiting them from working and holders of student visas breaching the condition which requires them to satisfy course requirements.

Section 116(1) states that the Minister 'may' cancel a visa if the Minister is satisfied that the holder has not complied with a condition of the visa. In *Re Huan Ching Tseng* the Tribunal stated that it was:

> ... of the view that the proper interpretation of section 116(1) is that the decision to cancel is at the discretion of the Minister. The Act is silent, however, as to what matters are to be considered in exercising the discretion to cancel a visa.[46]

In that case the Tribunal found that Mr Tseng had failed to satisfy course requirements. He had been enrolled in a hospitality course at the Gold Coast TAFE and his official attendance records indicated that he had attended a total of only 6 classes of the 25 scheduled for the period from 25 July 1994 to his exclusion from the course on or about 6 September 1994. Mr Tseng disputed these records but accepted that he had been excluded from attendance at the course by the Gold Coast TAFE by reason of his poor attendance record. He claimed that his failure to attend had been the result of illness and a temporary need to work to support himself when financial support from his parents had ceased due to financial difficulties. The Tribunal found Mr Tseng's explanations unconvincing and inconsistent. It observed that there might be a case for giving a person in Mr Tseng's situation a second chance, as for example where they remained enrolled or had been accepted into another course of study. In the present case, however, the only evidence was that Mr Tseng had been excluded from the Gold Coast TAFE and that he was not enrolled in any other course of study. Accordingly the Tribunal affirmed the decision cancelling his student visa.

This case may be contrasted with *Re Kam Wan Yip*[47] where the applicant had likewise failed to attend classes in a TAFE course. The evidence was that Ms Yip had dropped out of Year 11 studies at Southside Christian College early in 1994 and that in June or July 1994 she had made inquiries at TAFE regarding enrolment in an office skills course. She had been advised that her enrolment in such a course was contingent upon her achieving a certain score in an English proficiency test but that if she failed to attain that score she would still be eligible for enrolment provided that she also enrolled in an ELICOS course. She sat the test and apparently assumed that she had obtained the required result to enrol in the office skills course without further studies in English. However TAFE accepted her only for enrolment in an English course, commencing on 15 August 1994, and when she discovered this she ceased attending classes. Subsequent to the cancellation of her visa she sought to re-enrol at TAFE and, when this proved impossible, she enrolled in an ELICOS course at a private institution which would subsequently allow her to undertake business studies at the same institution. The Tribunal found that Ms Yip had at all times had a bona fide intention to study and that her age and her limited ability in English had contributed to the confusion in relation to her enrolment in the TAFE course. Her family was present in Australia and had undertaken to provide her with support in her studies. On the facts as it found them in this case the Tribunal considered that it should exercise its discretion to set aside the cancellation of the visa.

Conclusion

The changes to the jurisdiction of MIRO and the IRT made as part of the package of changes contained in the Migration Reform Act and associated legislation have resulted in a significant expansion of rights of review for applicants in Australia. The IRT is still breaking new ground in its decisions on bridging visas and visa cancellations but there is evidence that its positive approach to the legislation is already influencing departmental decision-makers in this area.

Acknowledgment

Acknowledgment is made of the contribution to the above address by Mr Giles Short, BA LLB, who was Director of Research, Immigration Review Tribunal, at the time that it was prepared.

Endnotes

1 Media Release No. MPS 35/92, 15 July 1992.

2 Migration Act, sections 339(2)(a) and 347(2)(a).

3 Migration Act, sections 229(3) and 347(3).

4 Migration Act, paragraph (e) of the definition of 'Part 5 reviewable decision' in section 337.

5 Migration Act, paragraph (f) of the definition of 'Part 5 reviewable decision' in section 337.

6 Migration Act, paragraph (g) of the definition of 'Part 5 reviewable decision' in section 337.

7 Migration Act, paragraph (h) of the definition of 'Part 5 reviewable decision' in section 337.

8 Migration Act, sections 339(2)(b) and (c) and 347(2)(b) and (c).

9 Migration Act, sections 338(2)(a) and 346(1)(b).

10 Migration Act, sections 338(2)(c) and 346(1)(c).

11 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(a)(i).

12 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(a)(ii).

13 Migration Act, sections 338(2)(d) and 346(1)(d), Migration Regulations, regulation 4.09(a)(iii) and (iv), and Migration Reform (Transitional Provisions) Regulations, regulation 8.

14 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(b).

15 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(c).

16 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(d).

17 Migration Act, section 66(2)(d).

18 Migration Regulations, regulations 4.02(2) and 4.10(1)(a) and (c).

19 Migration Regulations, regulation 4.10(2)(a).

20 Migration Regulations, regulations 4.10(1)(b) and (2)(b).

21 Migration Regulations, regulation 4.11.

22 Migration Regulations, regulation 4.13.

23 Migration Act, section 367, and Migration Regulations, regulation 4.26.

24 Migration Regulations, regulations 4.23, 4.24 and 4.25.

25 Migration Regulations, regulation 2.11.

26 Migration Regulations, regulation 4.17.

27 Migration Act, sections 381, 382 and 384.

28 O'Neil, P, 'The Experience of Introducing Merits Review to a New Portfolio: Recent Changes and New Trends in Merits Review of Immigration Decisions', in *Admin Review*, No.35 (Autumn 1993), pp2-6 at p4.

29 Migration Act as in force before 1 September 1994, sections 14 and 92.

30 Migration Act as in force before 1 September 1994, Section 59.

31 Migration Act, sections 13 and 14, 189, 196 and 198.

32 Migration Act, section 72, and Migration Regulations, regulation 2.20.

33 Migration Regulations, Schedule 2, clause 051.212.

34 Migration Regulations, Schedule 2, clause 050.212.

35 Migration Regulations, Schedule 2, clauses 050.213 and 050.214.

36 *Re Qing Mei Fu* (IRT Decision 4388, 20 September 1994), p5.

37 *Ibid*, pp 6-8.

38 *Ibid*, p 9.

39 IRT Decision 4113, 14 September 1994.

40 IRT Decision 4401, 14 September 1994.

41 *Ibid*, at p 4.

42 IRT Decision 4387, 6 October 1994.

43 IRT Decision 4396, 13 September 1994.

44 *Ibid*, p 6.

45 IRT Decision 4409, 20 September 1994.

46 IRT Decision 4498, 31 October 1994, p 9.

47 IRT Decision 4622, 7 December 1994.