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# Taking Facebook at face value: The Refugee Review Tribunal's use of social media evidence

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*This article argues that the Refugee Review Tribunal (RRT) is placing excessive weight on evidence gathered from social media in reviewing refugee decisions. It will be argued that the RRT is assigning high truth values to information concerning applicants and others from social media. This is despite detailed research that suggests that social media rarely conveys accurate or consistent information about an individual. In taking such evidence at face value the RRT is misunderstanding social media and potentially making errors in its decisions.*

## INTRODUCTION

The emergence of social media could be seen as a boon for administrative decision-makers who need to construct complex factual pictures of an applicant and their life. Social media offer a potentially rich source of information about the applicant, their lives and their relations with others. However, accessing and relying on information from social media can be problematic. As social media gives the impression that individuals post and control the material on their social media pages decisions-makers could be justified in placing high reliance on social media evidence. However, just because there is publically available information about an applicant that appears to have been posted by the applicant themselves, it does not make that information reliable or truthful. It is these tensions around the appropriate use of information gathered from social media that is explored in this article through an analysis of the Refugee Review Tribunal (RRT) use of social media evidence.

This article argues that the RRT has afforded social media evidence high truth values. In recent decisions the RRT can be seen placing strong reliance on information gathered from social media. By doing so the RRT misunderstands the problematic nature of information available on social media. There has been much contemporary research that suggests that representations about a person within social media have a weak correspondence with their reality. In other words there is often a significant gap between the avatar of a person within social media and the real life of the account holder. Given this weakness the RRT's ascribing of high truth value to social media evidence potentially discloses factual errors and possible jurisdictional error in its decision-making.

This argument is in three sections. The first section, drawing upon recent research, argues that social media cannot be considered accurate repositories of information about the account holder or others. The second section argues that, in contrast to this research, social media evidence is being treated as reliable by the RRT. This will be seen through an analysis of 18 decisions of the RRT where social media evidence was discussed and used. It will also be seen that a small number of decisions show the RRT utilising social media evidence in a more aware and sophisticated manner. The third section briefly considers the lessons for applicants and administrative-decision makers from the RRT's taking of social media at face value. In particular the potential for the taking of social media evidence at face value could amount to a jurisdictional error.

## THE "TRUTHFULNESS" OF SOCIAL MEDIA EVIDENCE

This section argues that the research into the "truthfulness" of social media suggests that social media platforms are not a reliable or truthful repository of information about an account holder, their lives and relationships. It could be expected that as they are comprised of user-generated content, social media platforms could be a reliable repository of information about the real life of an account holder.

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However, as will be seen, psychological factors combined with the technical frameworks of social media platforms significantly reduce the correspondence value between posted information and an account holder's reality.

Much has been written documenting the rise and rise of social media over the 2000s.<sup>1</sup> In essence social media platforms are information exchanges. They create a nexus point in the digital realm for users to upload details, photographs and text to a publicly accessible database where others can comment and interact.<sup>2</sup> Whilst many other social media platforms emerged over the 2000s (LinkedIn, Bebo, Hi5, Flickr), the most successful has been Facebook. Facebook has grown substantially since it started as FaceMash in 2003, a site for students to post and judge photographs of their peers, created by four Harvard University students.<sup>3</sup> By 2006, it had become "Facebook"; it was now available outside the US, had introduced the "tagging" of people in photographs and formed various commercial agreements. With an increasingly smoother interface, superior "sharing" features and the "Like" feature, Facebook has continued to grow and today boasts over one billion active users of which over 11 million are located in Australia.<sup>4</sup> Twitter, another increasingly popular social media platform emerged in 2006. Twitter is essentially a simpler version of Facebook, allowing users to post comments or "tweets" instantaneously to friends and the wider public, depending on their privacy settings. It allows for fast, easily accessible commenting and is often used for "mobile blogging".<sup>5</sup> Together these platforms dominate the social media space.

As social media platforms approach a decade old, social and psychological research into social media account holders and the relationship between their virtual avatar and their non-digital self has begun to emerge. The attraction of social media has been identified as its ability to emotionally unite people regardless of generational or locational differences, creating a "world without borders".<sup>6</sup> However, research into account holders has found that the way in which users engage with social media differs vastly.<sup>7</sup> There has been identified a cohort of account holders who do feel a strong sense of social connectedness through social media and perceive them as genuine social spaces.<sup>8</sup> However in contrast there has been identified a more cynical group of account holders. The average Facebook account holder has at least 130 "Friends" – a word that has a somewhat different meaning to its real life context.<sup>9</sup> Johnstone suggests that this hyper-networking is not a genuine social experience but merely a means for people to collect "social capital"; a kind of virtual popularity contest.<sup>10</sup> Social media provides a different type of communicative experience from in-person conversation; the ability to edit, lack of time constraints, physical isolation from the receiver and loss of visual cues are all factors which reduce a user's cognitive load and allow for greater concentration on the message to be

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<sup>1</sup> See, eg Boyd DM and Ellison NB, "Social Network Sites: Definition, History, and Scholarship" (2007) 13 *Journal of Computer-Mediated Communication* 210; Myers MD and Sundaram D, "Digital Natives: Rise of the Social Networking Generation" 15 *University of Auckland Business Review* 28; Livingstone S and Brake DR, "On the Rapid Rise of Social Networking Sites: New Findings and Policy Implications" (2010) 24 *Children and Society* 75.

<sup>2</sup> Boyd and Ellison, n 1 at 213.

<sup>3</sup> Grimmelmann J, "Saving Facebook" (2009) 94 *Iowa LR* 1137 at 1144.

<sup>4</sup> "Facebook Reports Fourth Quarter and Full Year 2012 Results", <http://investor.fb.com/releasedetail.cfm?ReleaseID=736911>; "Australian Facebook Statistics", <http://www.socialbakers.com/facebook-statistics/australia>.

<sup>5</sup> Democko BM, "Social Media and the Rules on Authentication" (2011) 43 *U Toledo LR* 367 at 378.

<sup>6</sup> Levickaite R, "Generations X, Y, Z: How Social Networks form the Concept of the World without Borders (the Case of Lithuania)" (2010) 3 *LIMES* 170.

<sup>7</sup> Levickaite, n 6 at 170.

<sup>8</sup> Alloway TP and Alloway RG, "The Impact of Engagement with Social Networking Sites (SNSs) on Cognitive Skills" (2012) 5 *Computers in Human Behavior* 1748 at 1751.

<sup>9</sup> North E, "Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites" (2010) 58 *Kansas LR* 1279 at 1284.

<sup>10</sup> Johnson BR, "Untagging Ourselves: Facebook and the Law in the Virtual Panopticon" (2010) 13 *TM Cooley Journal of Practical and Clinical Law* 185 at 189.

conveyed.<sup>11</sup> As a result, it has been observed that individuals strive for self-promotion, creating highly deliberated or fabricated personal information, in the quest to demonstrate all the hallmarks of a socially desirable individual.<sup>12</sup> For example, one study found that college students often misrepresent themselves through the comments they post to appear humorous to their friends.<sup>13</sup> Research also shows individuals of a certain personality type are more prone to impulsive or risk taking behaviour online, hence being more inclined to post an angry message in the heat of the moment, or exaggerate in a way that might later be regretted.<sup>14</sup>

Personality type may also distinguish between whether a person uses Facebook as a means to enhance their relationships and activities in real life or whether they prefer to limit the amount of personal information disclosed and use social media to simply “people watch”.<sup>15</sup> Carpenter and colleagues investigated 194 psychology students, examining whether having a defensive or outgoing personality type impacted on the way they used Facebook. Outgoing people were more likely to use Facebook as a means of facilitating their “real life” by, eg, keeping up to date with friends and events, whilst more defensive individuals avoided emotional investment and were likely to use Facebook “for its own sake”, limiting the amount of detailed information they posted on it.<sup>16</sup> Another study on university students found a contrasting effect of personality on Facebook use. Extroverts were more likely to conceal personal information in order to “advertise themselves”, whilst introverts were actually more comfortable disclosing actual details.<sup>17</sup> This study also found that participants with low neuroticism were less inclined to post or upload photos to Facebook.<sup>18</sup> Results such as these demonstrate a few of the many broad roles psychological factors can play in influencing social media use.

In terms of photographs on social media platforms, it has been found that the profile picture, an element of a Facebook page that cannot be hidden from the public, is also selectively chosen by an account holder in order to convey “meaningful cues” to other users, such as what personality or emotional state they wish to be perceived as embodying.<sup>19</sup> It has been identified that decision-makers utilise photographs from Facebook without considering this context and therefore cannot fully understand the psychosocial motives behind the account holder posting the image.<sup>20</sup> Social media is also likely to create a biased presentation of a person’s life; social norms encourage photography of “happy moments” not times of shame or sadness.<sup>21</sup> Therefore it is to be expected that such a collection of images will fail to demonstrate all aspects of an individual’s life equally. Despite this, it has been found that courts in the US are frequently relying on such pictures as evidence of a person’s total

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<sup>11</sup> Farrington-Flint L et al, “The Lies we Tell and What They Say about Us: Using Behavioural Characteristics to Explain Facebook activity” (2011) 27 *Computers in Human Behavior* 1621 at 1621.

<sup>12</sup> Namkee P et al, “Effects of Self-Disclosure on Relational Intimacy in Facebook” (2011) 27 *Computers in Human Behavior* 1974 at 1981.

<sup>13</sup> Vinson KE, “The Blurred Boundaries of Social Networking in the Legal Field: Just ‘Face’ it” (2010-2011) 41 *Memp LR* 355 at 377.

<sup>14</sup> Morrison CM, “Passwords, Profiles, and the Privilege Against Self-Incrimination: Facebook and the Fifth Amendment” (2012) 65 *Ark LR* 133 at 162.

<sup>15</sup> Carpenter JM et al, “People or Profiles: Individual Differences in Online Social Networking Use” (2011) 50 *Personality and Individual Differences* 538 at 540.

<sup>16</sup> Carpenter, n 15 at 540.

<sup>17</sup> Amichai-Hamburger Y and Vinitzky G, “Social Network Use and Personality” (2010) 26 *Computers in Human Behavior* 1289 at 1293-4.

<sup>18</sup> Amichai-Hamburger and Vinitzky, n 17 at 1293-4.

<sup>19</sup> Brown KR, “Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs” (2011-2012) 14 *Vanderbilt Journal of Entertainment & Technology* 357 at 365.

<sup>20</sup> Brown, n 19 at 381.

<sup>21</sup> Brown, n 19 at 382.

emotional state.<sup>22</sup> Furthermore, it has been suggested that courts have placed substantial weight on the reliability of photographic evidence, failing to consider that significant advances in digital technology make deception through such evidence increasingly possible.<sup>23</sup> Widely available photo editing software such as Adobe Photoshop allows users to alter an image in various ways. Those with little expertise or experience are able to change eye colours, remove or blur identifying features such as a facial blemish or scar and adjust tones and lighting. Users with slightly more advanced knowledge are able to alter an image even more significantly; adding or removing entire objects or subjects in a photo, making a subject appear younger or older, changing hair colour, clothing and even altering the weather or background.<sup>24</sup> These digital manipulations are difficult to detect as any evidence that change has been made or even the origins of the photograph can be made impossible to identify.<sup>25</sup>

Trust is also an issue that affects the extent to which account holders are inclined to post truthful information about themselves on social media. Perceived trust in a social media platform's ability to provide a secure environment where their information will not be mishandled is a predictor of actual use of social media.<sup>26</sup> Disclosure of personal information will be related to trust in both the platforms' reputation, the reliability of other users and past experiences.<sup>27</sup> In May 2012 concerns about Facebook were raised that privately sent messages had been published publicly on some account holders' profiles due to a "rogue bug", which Facebook has not confirmed.<sup>28</sup> Even more recently, both Facebook and Twitter have been attacked by hackers, with the latter admitting that 250 000 accounts had been compromised as a result.<sup>29</sup> Concerns as to privacy are also an issue. Social media platforms provide a range of privacy and security controls that formally allow an account holder to restrict the accessibility of their information. Cyberlaw scholars have long argued that these controls are inconsistent, simplistic and ineffective.<sup>30</sup> Furthermore, privacy settings will be of little use if a "Friend" decides to share comments to a broader audience.<sup>31</sup>

In terms of security, the lack of actual authentication of identity and the ability to create multiple accounts under pseudonyms or the same name means identity theft, fake accounts and account hacking occur frequently on Facebook.<sup>32</sup> This may range from serious hacking attempts to a friend posing as the user and posting a controversial comment as a joke. Most account holders exercise low levels of cybersecurity – disclosing usernames and passwords, having low security passwords or

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<sup>22</sup> Brown, n 19 at 381-382.

<sup>23</sup> Madison B, "Seeing can be Deceiving: Photographic Evidence in a Visual Age – How Much Weight does it Deserve?" (1983) 25 William & Mary LR 705 at 705-706.

<sup>24</sup> Parry ZB, "Digital Manipulation and Photographic Evidence: Defrauding the Courts One Thousand Words at a Time" (2009) 2009 *Illinois Journal of Law, Technology & Policy* 175 at 183.

<sup>25</sup> Parry, n 24 at 183.

<sup>26</sup> Sledgianowski D and Kulviwat S, "Using Social Network Sites: The Effects of Playfulness, Critical Mass and Trust in a Hedonic Context" (2009) 49 *Journal of Computer Information Systems* 74 at 78.

<sup>27</sup> Tow W et al, "Understanding information disclosure behaviour in Australian Facebook users" (2010) 25 *Journal of Information Technology* 2 at 128.

<sup>28</sup> "Users Vow to Desert Facebook Amid Latest Scandal", [http://www.abc.net.au/news/2012-10-04/users-vow-to-desert-facebook-amid-latest-privacy-scandal/4295964?WT.mc\\_id=Innovation\\_News!UsersVowToDesertFacebookAmidLatestScandal\\_FBPlabc](http://www.abc.net.au/news/2012-10-04/users-vow-to-desert-facebook-amid-latest-privacy-scandal/4295964?WT.mc_id=Innovation_News!UsersVowToDesertFacebookAmidLatestScandal_FBPlabc).

<sup>29</sup> "Facebook Hacked, Social Media Company Says", <http://uk.reuters.com/article/2013/02/16/us-usa-social-facebook-idUKBRE91E16O20130216>.

<sup>30</sup> Grimmelman, n 3 at 2009; Comer R, McKelvey N and Curran K, "Privacy and Facebook" (2012) 2 *International Journal of Engineering and Technology* 1626 at 1627-9; Simmons N, "Facebook and the Privacy Frontier" (2012) 33 *Bus LR* 58 at 62.

<sup>31</sup> Nelson S et al, "The legal implications of social networking" (2009) 22 *Regent Uni LR* 1 at 2.

<sup>32</sup> Robbins IP, "Writings on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking" (2012) 13 *Minnesota Journal of Law, Science & Technology* 24.

simply leaving a device logged in – allowing the opportunity for others to tamper with their profile.<sup>33</sup> As a result the account holder and the author of particular posts or the up-loader of specific images to that account may be very different.<sup>34</sup>

In summary, research into social media indicates that there are numerous factors that impact on the correspondence between an account holder's real life and the data about them available on social media platforms. Some use Facebook merely as a "popularity contest", they may exaggerate or lie through the photographs and information they post or omit in order to achieve self-promotion. Furthermore personality type may impact on such exaggerations, as well as whether the individual actively posts on Facebook or prefers to "people watch". Perceived trust in the platform will also impact on their level of disclosure and finally, security issues such as hacking and a lack of authentication mean there is no certainty as to who is in control and responsible for information on an account. What this suggests is that individuals' "online identities" are potentially very different to their "offline" selves, hence it would be a "terrible mistake" to interpret a person's Facebook profile as being representative of their actual identity.<sup>35</sup> It is this potential terrible mistake that is considered in examination of the use of social media evidence by the RRT in the next section.

### TRIBUNAL "LIKES" SOCIAL MEDIA: USE OF SOCIAL MEDIA EVIDENCE BY RRT

This section analyses 18 decisions of the RRT where social media evidence was relied on by the RRT in its findings. This section will first consider the legal basis for the RRT's ability to use social media evidence and then the 18 decisions of the RRT where social media evidence was presented will be discussed. It will be shown that the RRT appears to be making the terrible mistake identified in the previous section. It can be seen accepting social media evidence at face value as accurately depicting information about an applicant.

The RRT is established under the *Migration Act 1958* (Cth) (s 411) with responsibility to review decisions concerning whether an applicant is a refugee under the *Convention relating to the Status of Refugees* and the *Protocol relating to the Status of Refugee*.<sup>36</sup> In essence it conducts full merits review of decisions made by a delegate of the Minister on whether an applicant is a refugee within the meaning of the Convention as amended by the Protocol (s 415(2)). Merits review in this context requires the RRT to undertake complex fact finding and analysis. It must find whether the applicant has "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" (Art 1(A)(2)). In this the RRT is required to conduct reviews that are "fair, just, economical, informal and quick" and is "not bound by technicalities, legal forms or rules of evidence" (s 420(1), (2)).

The RRT has wide ranging information gathering powers. In addition to considering the applicant's file and written submissions from the applicant and the Secretary, the RRT has a general power to "get any information that it considers relevant" (ss 423, 424). The RRT actively uses its independent evidence gathering powers – commentators generally agree that the RRT is "inquisitorial".<sup>37</sup> Part 7 Div 4 of the *Migration Act* purports to codify the common law requirements of procedural fairness as it relates to the RRT. Further, the High Court in *Minister for Immigration & Citizenship v SZIAI* (2009) 259 ALR 429 at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) found that the RRT could make a jurisdictional error if it failed to make "an obvious inquiry

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<sup>33</sup> Griffith H, "Understanding and Authenticating Evidence from Social Networking Sites" (2012) 7 *Washington Journal of Law, Technology and Arts* 209.

<sup>34</sup> Robbins, n 32 at 24.

<sup>35</sup> Brown KR, "Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs" (2012) 14 *Vanderbilt Journal of Entertainment & Technology* 357 at 359.

<sup>36</sup> *Convention Relating to the Status of Refugees* (opened for signature 28 July 1951) 189 UNTS 150 (entered into force 22 April 1954); *Protocol relating to the Status of Refugees* (opened for signature 31 January 1966) 606 UNTS 267 (entered into force 4 October 1967). See Hathaway J, "Why Refugee Law Still Matters" (2007) 8(1) *MJIL* 89.

<sup>37</sup> Bedford N and Creyke R, "Inquisitorial Processes in Australia" (2006) 5; Smyth M, "Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals" (2010) 34(1) *MULR* 230 at 240; Driver R and Bradbury A, "Refugee Status Determination in Australia and New Zealand" (2012) *NZLJ* 283.

about a critical fact, the existence of which is easily ascertained".<sup>38</sup> This suggests that in addition to its statutory authority to gather information the RRT also has residual authority to gather information in specific circumstances. What this means in practice is that RRT has the authority to, and regularly does, gather information from any "other sources".<sup>39</sup> These other sources can be online. Indeed, part of the RRT's 2011-2013 strategic plan was to increase access to online data to ensure decisions are made based on "contemporary and reliable information".<sup>40</sup> It is this context that lies behind the RRT's recent practice of considering social media evidence.

The RRT publishes approximately 40% of their decisions, namely those which are deemed to be of "particular interest" to the public.<sup>41</sup> Using search terms such as "Facebook", "online" and "Twitter" there was identified in excess of 60 decisions that mentioned these and related terms.<sup>42</sup> This identified population was then subjected to a closer reading and 18 decisions were identified as containing discussion of evidence drawn from social media. The sample of decisions is provided in Table 1.

**TABLE 1 RRT Decisions considering social media evidence**

Citation	Outcome	Use of Social Media Evidence by RRT
1008230 [2010] RRTA 1152 (23 December 2010)	Application denied	RRT questioned applicant's credibility because there was no evidence of events attended or friends made on his Facebook page that were specifically homosexual.
0909898 [2010] RRTA 434 (31 May 2010)	Application denied	RRT questioned applicant's credibility because the alleged kidnapped brother was applicant's Facebook "friend".
1007231 [2010] RRTA 1115 (14 December 2010)	Application denied	RRT questioned applicant's claim of being homosexual because his Facebook page said he was "straight".
1107072 [2012] RRTA 428 (24 January 2012)	Application denied	RRT found lack of recent "evangelising" Facebook posts undermined applicant's claim to holding strong religious beliefs
1101971 [2011] RRTA 447 (3 June 2011)	Application denied	Applicant's credibility reduced as he used a pseudonym instead of his real name on his Facebook page when posting political views.
1008711 [2011] RRTA 162 (23 February 2011)	Application denied	RRT used the Facebook page of the political group to show that no demonstration had been held on the day the applicant claimed he had attended one.
1010564 [2011] RRTA 202 (8 March 2011)	Application denied	RRT found applicant was a member of an Indian school's Facebook page, also found photos of him on hi5 to contradict his submission that he had not lived in India.
1106631 [2012] RRTA 38 (9 January 2012)	Application successful	Accepted that having at least one political post on his Facebook page was enough to warrant fear of retribution.
1106630 [2011] RRTA 825 (27 September 2011)	Application successful	RRT questioned applicant's claim to be homosexual when his Facebook page suggested he was heterosexual.
1103034 [2011] RRTA 538 (5 July 2011)	Application denied	RRT found that applicant had "liked" a support group's Facebook page, contradicting his submission that he did not know of anyone who could help him following disappearance of his family.

<sup>38</sup> The High Court reiterated this ground for review in *Minister for Immigration & Citizenship v SZGUR* (2011) 241 CLR 594 at [23] (French CJ and Kiefel J).

<sup>39</sup> Migration Review Tribunal & Refugee Review Tribunal, *Interpreters' Handbook* at [3].

<sup>40</sup> Migration Review Tribunal & Refugee Review Tribunal, Tribunal's Plan 2011-2013 at [8], <http://www.mrt-rrt.gov.au/Tribunals-Plan/Tribunals-Plan/default.aspx>.

<sup>41</sup> Publication of MRT and RRT decisions Factsheet at [1], <http://www.mrt-rrt.gov.au/Factsheets/Factsheets/default.aspx>.

<sup>42</sup> These searches were conducted repeatedly in September and November 2012.

TABLE 1 *continued*

Citation	Outcome	Use of Social Media Evidence by RRT
<i>1103642</i> [2011] RRTA 818 (26 September 2011)	Application denied	RRT found Facebook image that contradicted that he was part-Chinese.
<i>1106810</i> [2011] RRTA 955 (9 November 2011)	Application successful	RRT used evidence of a person's location from Twitter to verify applicant's claims.
<i>1104075</i> [2011] RRTA 835 (28 September 2011)	Application successful	RRT used a Facebook image of applicant with expensive car to question his claims to financial difficulties.
<i>1007284</i> [2010] RRTA 811 (20 September 2010)	Application denied	Facebook images used as means to identify applicant. RRT offered applicant chance to use Facebook to help identify himself.
<i>1112073</i> [2012] RRTA 659 (14 August 2012)	Application denied	Applicant argued that joining a Facebook page of an opposition group, posting and linking videos to it was evidence of political activity.
<i>1204239</i> [2012] RRTA 698 (19 July 2012)	Application denied	Facebook evidence used to question applicant's claim that she had had no correspondence with family.
<i>1112951</i> [2012] RRTA 281 (1 May 2012)	Application successful	Writing and posting photographs with anti-government sentiment on Facebook over a year ago which was removed within a week by applicant was sufficient to contribute to a warranted fear of persecution.
<i>1208265</i> [2012] RRTA 720 (2 August 2012)	Application successful	A photograph of applicant in a police uniform taken from Facebook was the primary evidence for his membership of the Iraqi Police Force.

In 83% (15/18) of these decisions the RRT exercised its inquisitorial powers to independently access social media or asked the applicant to access and present their Facebook accounts to the RRT during the hearing. In 17% (3/18), the applicants themselves provided social media evidence in the form of their profile page or particular comments, at which point the RRT would frequently ask to view the entire account. All of the 18 decisions were applications for review of decisions to refuse protection visas under ss 36(2)(a) and 65 of the Act. Only 33% (6/18) of the applications were successful. The overview of the findings shows that the RRT primarily used social media evidence to question specific statements that the applicant had made in support of their claim for refugee status. When this is done the RRT appears to place a high probate value on the social media evidence. In a few of the decisions the RRT used social media evidence to substantiate an applicant's claims. In both contexts the RRT can often be seen committing the "terrible mistake" of conflating online representations about an applicant with the applicant's actual life.

In 55% (10/18), the RRT took social media evidence at face value preferring the social media evidence over the applicant's testimony.<sup>43</sup> In *1204239* [2012] RRTA 698, the applicant claimed that she did not communicate with her family other than one sister. At the hearing the RRT asked the applicant to access her Facebook account (at [45]). The account showed correspondence between the applicant and persons that the RRT identified as the applicant's other sisters (at [46]-[47]). The RRT did not accept the applicant's explanation for this undisclosed communication and it contributed to the finding that the applicant was unreliable (at [68]). What was not evident from the decision was whether there was any collaborator evidence verifying that the authors of the posts were actually the other sisters. A similar decision was *0909898* [2010] RRTA 434, where an applicant claimed that his brother had been missing since 2006. The RRT found that the applicant's Facebook account had a person with the same name as his brother as a "friend", had recent communication with this friend and that the person had a Facebook page that listed the applicant as a "friend" and had images of the

<sup>43</sup> *1204239* [2012] RRTA 698; *0909898* [2010] RRTA 434; *1008230* [2010] RRTA 1152; *1007231* [2010] RRTA 1115; *1103642* [2011] RRTA 818; *1107072* [2012] RRTA 428; *1101971* [2011] RRTA 447; *1103034* [2011] RRTA 538; *1008711* [2011] RRTA 162.

applicant (at [46]). On the basis of this social media evidence the RRT rejected the applicant's contention that his brother had disappeared (at [65]).<sup>44</sup> In both these decisions the RRT can be seen expecting high correspondence between information about the applicant that is available from social media and the applicant's reality and any discrepancy went against the applicant's credibility. Another example is *1008230* [2010] RRTA 1152, where an applicant claimed in his application for protection that he used Facebook to express his homosexuality (at [69]). The RRT examined his page and found that it did not disclose an active homosexual lifestyle. The RRT did not accept the applicant's claim that he used Facebook passively to receive information (at [69]-[72]). The RRT seemed to expect the applicant's Facebook page to exhibit posts and images of a homosexual life.<sup>45</sup>

This expectation that a homosexual applicant's social media would be "loud and proud" was evident in other decisions where Facebook accounts that were demure and ambiguous went towards a finding against the applicants' sexuality claims. In *1007231* [2010] RRTA at [56], the RRT relied on a comment on the applicant's Facebook page that he was "straight to a fault" to find that he was not homosexual. In making this finding the RRT did not place much weight on other sources of information, posts by "friends" relating to his sexual orientation and a post indicating that he was interested in both sexes, or an external consideration such as his fear of being a target for physical violence while in immigration detention if he publically identified as homosexual (at [40]-[49]). Also raised by the applicant in this decision, but not considered probate by the RRT was that the applicant's Facebook account, including the initial relationship status toggle had been set up by a third party at an internet café and that the applicant had had difficulty adjusting the settings (at [46]). Finally, the applicant, placed in the position of explaining the absence of a "loud and proud" social media profile suggested that as he used Facebook simply as a social space and not a "dating service" he had not prioritised his sexuality on it (at [40], [46]). This was also brushed aside by the RRT (at [60]). There are two elements at work in *1007231* and *1008230*. The first is a highly prejudicial assumption that "real" homosexual people advertise their sexual orientation when using social media.<sup>46</sup> The second is the basic taking of Facebook at face value and if a social media account was not flamboyantly gay the RRT found that the applicant was not homosexual.

Another taking at face value relates to Facebook "friends". In *1007231* the applicant also submitted to the RRT that a Facebook "friend" was not necessarily a real relationship.<sup>47</sup> In *1103642* [2011] RRTA 818 at [42], the fact that the applicant had not sought out Facebook "friends" who shared his ethnic heritage, and possibly similar experiences of persecution in Mongolian, contributed towards a finding that he was not from the claimed ethnic background. In making this determination the RRT did not consider victims of persecution may not place such emphasis on using Facebook extensively to express their experiences. It seemed to assume, in contrast to the research on the diversity of use of social media, that like homosexual men "genuine" displaced persons seek out online communities and the absence of social media use to link with others who have similar experiences went against the applicant.<sup>48</sup> This pattern of the RRT assuming that certain persons use social media in specific ways, and if an applicant does not do this then it goes against their credibility, also applies to applicants who operate a social media account under an alias. In *1101971* [2011] RRTA 447 at [39], the applicant posted political comments on his Facebook account which he used under a

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<sup>44</sup> It must be noted that when asked to respond to the social media evidence, the applicant admitted that he had manufactured the claim about his brother's disappearance.

<sup>45</sup> Carpenter, n 15 at 540.

<sup>46</sup> See Raj S, "Affective Displacements: Understanding Emotions and Sexualities in Refugee Law" (2001) 36(3) *Alt LJ* 177.

<sup>47</sup> *1007231* [2010] RRTA 1115 at [41]. It is difficult to determine from the decision why the applicant felt he needed to justify only having three Facebook friends. It might have been from a line of questioning from the Tribunal based on the prejudicial stereotype that homosexual persons have flamboyant social media accounts with many "Friends".

<sup>48</sup> This also occurred where the RRT determined that an applicant was not as evangelical as purported because evidence of "proselytising activity" over Facebook did not occur consistently over time. The assumption was that once a person starts using Facebook for evangelical purposes they would continue to do so rather than there might have been other factors such as lost interest in the platform or found more rewarding evangelical outlets: *1107072* [2012] RRTA 428 at [101], [107].



pseudonym. The RRT found that by adopting pseudonym the applicant had called into question the credibility of his beliefs, concluding that if these were his genuinely held opinions he would have made them using his own name (at [82]).

In each of these decisions the RRT treated the social media evidence at face value. The social media evidence was preferred to the applicants' explanation. A particular feature was that the RRT seemed to assume a certain form of social media activity and it went to the applicant's credibility if their Facebook account did not meet the RRT's expectations. In this the RRT can be seen not considering the factors that prevent an account holder from posting information online, or using an "avatar name" and also the identified psychological motivations behind an account holder posting material so as to present a preferred image.<sup>49</sup>

One form of evidence where the RRT could seem to be justified in taking the social media evidence at face value is photographic images. In two decisions the RRT preferred inferences from photographic images over the applicant's testimony. In *1010564* [2011] RRTA 202, the RRT used photographs to disprove an applicant's claim that he was not an Indian national. The RRT uncovered over 87 images found on two different social media platforms of the applicant's childhood in India (at [84]-[86], [102]-[103]). In *1103642* [2011] RRTA 818 at [50], [67], the RRT used photographs from Facebook of the applicant with "Chinese or Mongolian" people to determine that the applicant had "markedly European or Eurasian features". This grounded the RRT finding that the applicant was not "half-Chinese" as claimed (at [68]). In both these decisions the RRT assumed that the posted images were undoctored snapshots of the applicants' lives.

In two decisions, the RRT relied on a technical feature of a social media platform to support a finding against an applicant. In *1101971* [2011] RRTA 447 at [42], the RRT accessed the applicant's Facebook page and identified that he had "liked" a support group's page. The RRT used this information to dispute the applicant's contention that he did not know of support services and this contributed to the RRT finding that the applicant was not credible (at [67]). In making this finding the RRT did not accept the applicant's explanation that he "inadvertently" "liked" the group (at [58]). The RRT appeared to be placing excessive weight on the "like" function in Facebook. When an account holder uses the "like" function all that a third party observer can see is, the bare claim that the account holder "liked" the entity. What is not communicated is the context behind the relationship between the account holder and the entity. In *1103642*, the applicant's Facebook page did not disclose when they became aware of the "liked" entity, if they had any detailed knowledge of the "liked" entity, or if he had contacted it and accessed its services. Also in this decision the RRT did not consider that "liking" an entity can often be from an accidentally mistimed mouse click – which the applicant claimed it was – and "un-liking" is a more complicated procedure.

Another technical feature that the RRT has used is Facebook's "Events" space. The "Events" space allows an account holder to update their page on life events they have attended or plan to attend. In *1008711* [2011] RRTA 162 at [74], the RRT used the Facebook page of an Egyptian opposition movement to determine whether a demonstration took place in Alexandria in July 2009. The RRT found that there was not a posted "event" relating to demonstrations in Alexandria in July 2009 and concluded that the applicant was misleading the RRT about his involvement with the opposition (at [94]-[96]). While there is much emerging reflection on the role of social media in the "Arab Spring",<sup>50</sup> the finding that no Facebook entry proves that the alleged demonstration did not take place is problematic. The RRT was accessing the Facebook page in February 2011, 18 months after the date of the event. It assumed that the archive of events on that account had remained unchanged. Account holders can delete event entries and such deletions would not be obvious to third party observers like the RRT. It also assumes that all events would have been posted. Social media use by Egyptian

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<sup>49</sup> See research discussed in the first section of this article.

<sup>50</sup> Joseph S, "Social Media, Political Change, and Human Rights" (2012) 35 *Boston College International and Comparative Law Review* 145; Fuchs C, "Behind the News: Social Media, Riots, and Revolutions" (2012) 36 *Capital and Class* 383.

oppositional movements accelerated towards the halcyon days of early 2011<sup>51</sup> – where the social media archive can be taken as a quasi-official record of the movement's activities – it is possible that a demonstration could have taken place in Alexandria in 2009 but the more patchwork nature of social media use earlier in the uprising could explain why it was not posted to online sources.

In 11% (2/18) decisions the taking at face value of social media evidence benefited an applicant. In *1106810* [2011] RRTA 955 at [85]-[86] the RRT determined that the applicant's father was in specific countries on certain dates based on "Tweets" from a Twitter account that bore the father's name. While this benefited the applicant what remained unquestioned was the reliability of the tweets; the RRT did not substantiate whether it was his account or that the father was actually posting the messages (at [85]-[86]). In *1208265* [2012] RRTA 720 at [37], the RRT accepted that an applicant was a member of the Iraqi Police Force based on Facebook showing him in a police uniform. The RRT took the Facebook images as corroborating the applicant's personal testimony concerning his role with the police force (at [62]). The reliability of the images was not considered by the RRT.

What this establishes is that in a total of 66% (12/18) of decisions in the sample the RRT took social media evidence as highly probate. In 55% (10/18) of decisions there was a conflict between an applicant's story and an inference that the RRT made from social media evidence. In those decisions the inference from the social media evidence was preferred, supporting negative findings against the applicant. In 11% (2/18) the applicant's story was supported by social media evidence and in those decisions the RRT accepted the applicants' contentions. In both circumstances the social media evidence was being taken as having a high truth value. What was not considered in these decisions was the inherent reliability of social media evidence. Absent from these decisions were considerations of the psychosocial motives behind different individuals engaging differently with social media and detailed understandings of the technical limits of social media platforms and the digital environment generally. There seemed to be inappropriate weighting given to a Facebook "like" or the reliance on a Facebook page to be an accurate archive of an underground opposition movement's activities. The possibility that digital photographs can be manipulated went unmentioned. Instead, in these decisions, if it was on (or not on in the case of the applicant's claiming persecution on the grounds of sexuality) Facebook then the RRT took it as true.

From the sample a difficulty for the RRT, when it accords social media evidence a high truth value, relates to the weight to be given to the inferences from social media evidence. In two decisions applicants had posted political statements onto Facebook pages using their real name.<sup>52</sup> In *1106631* [2012] RRTA 38 the RRT held that Facebook and Twitter evidence of the applicant's opposition to the interim ruling Egyptian Supreme Council of the Armed Forces (SCAF) while he was in Australia, which consisted of anti-SCAF posts and organising an anti-SCAF protest in Sydney, presented a "small but real chance that the applicant would face serious harm" if he was returned to Egypt (at [76], [79], [81]). This was in direct contrast to *1112073* [2012] RRTA 659 where an applicant, also claiming persecution from the SCAF if he was returned to Egypt because of his online political activities while in Australia, was not granted protection. In that decision social media evidence that the applicant had joined a political Facebook page, actively posted on that page and linked videos alleging showing military oppression of civilians in Egypt were considered insufficient because the page had over 380,000 "members" which made the applicant's participation inconsequential (at [33], [58], [84], [88]-[92]). In *1106631* evidence of anti-SCAF statements in social media attributable to the applicant substantiated a finding that the applicant could be targeted by the authorities if he was returned to Egypt, while in *1112073* evidence of anti-SCAF statements in social media attributable to the applicant did not.

At one level the seemingly contradiction between *1106631* and *1112073* supports an argument that the RRT is over-relying on social media evidence and making inferences from social media evidence that should have been more adequately substantiated with additional non-social media

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<sup>51</sup> Howard PH et al, "Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring" (Project on Information Technology and Political Islam, UW, 2011).

<sup>52</sup> In contrast to the applicant in *1101971* [2011] RRTA 447.

evidence. However, although not acknowledged directly in *1106631* and *1112073* there is a “hidden” logic to the decisions that glimpse a more sophisticated approach to social media evidence. In *1106631* the applicant used Facebook and Twitter accounts that were in his real name.<sup>53</sup> In *1112073* the applicant did use his own name in posts and uploads that he made to an oppositional movement’s Facebook account.<sup>54</sup> This hidden logic concerns awareness of how search engines link the applicant to their social media statements. In *1106631* a search for the applicant’s name would direct the inquirer to the applicant’s Facebook account where his political activity was immediately evident. In *1112073* a search for the applicant’s name would not directly link the applicant to his political activity. A further consideration was that the technical feature of the movement’s Facebook “Wall” page – to which the applicant posted anti-SCAF comments – would only keep a limited number of posts visible. The RRT observed that the high volume of posts to this “Wall” meant that individual posts disappeared from public view after an hour.<sup>55</sup> In *1106631* social media and search engines would work together to highlight the applicant’s politics. In *1112073* the mechanics of the social media platform, the nature of the applicant’s engagement and search engine algorithms would obscure the applicant’s views. While seemingly contradictory *1106631* and *1112073* do potentially show a more sophisticated dealing with social media evidence.

In the sample there are 16% (3/18) of decisions where a more sophisticated approach to social media evidence can be identified. Like *1007231* and *1008230*, in *1106630* [2011] RRTA 825 at [63]-[80], the applicant’s primary source of evidence to substantiate the claim that he was homosexual was personal testimony. During the course of the hearing the RRT questioned the applicant about his Facebook account, specifically why his “relationship status” was not homosexual, why his homosexuality was not discussed or evident, why there were no images of his “gay friends” and why he had posted images of women (at [84]-[86]). The applicant’s response was that he did not disclose his homosexuality on Facebook so that “his family would think that he was 100% normal” (at [86]). Unlike *1007231* and *1008230* the RRT accepted this explanation, concluded that the applicant was homosexual and the heterosexual façade on Facebook was consistent with his fear of persecution if his sexual orientation became publically disclosed. In this decision not having a “loud and proud” Facebook account actually supported the applicant’s claim that he had closeted his sexuality for fear of persecution. In this decision the social media evidence was not accepted at face value as a truthful insight into the applicant, but did support an inference that was consistent with other evidence that the applicant was homosexual (*1106630* at [130]).

Another example of this more sophisticated approach can be seen in *1104075* [2011] RRTA 835 where the applicant claimed he was suffering financial difficulties. The RRT found on the applicant’s Facebook account images of him with an expensive new “BMW Coupe” and posts about his purchase and plans to race the motor vehicle (at [90]). The RRT suggested that the images and posts concerning ownership of an expensive motor vehicle went to the applicant’s credibility as it contradicted his claimed financial difficulties (at [91]-[92]). The applicant provided the RRT with further evidence, which the RRT accepted, that the vehicle was not actually his (at [128]). The RRT in this decision appeared to understand how self-promotion desires impact on the reliability of Facebook disclosures. A further example where the RRT can be seen adopting a more sophisticated approach to social media evidence is *1007284* [2010] RRTA 811, where the primary issue was the actual identity of the applicant. The RRT invited the applicant to access his Facebook account and present any “private communications” that would help him with a positive identification. The applicant declined indicating that he used an alias in Facebook (at [65]).<sup>56</sup> Unlike *110197* where an anonymous Facebook account went against the applicant’s credibility, the RRT in *1007284* simply accepted that it is technically

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<sup>53</sup> *1106631* [2012] RRTA 38 at [76].

<sup>54</sup> *1112073* [2012] RRTA 659 at [52].

<sup>55</sup> *1112073* [2012] RRTA 659 at [84].

<sup>56</sup> In this decision the Department used Facebook to identify associates of the applicant: *1007284* [2010] RRTA 811 at [43].

permissible and widely accepted that the name attached to a Facebook account need not correspond to the actual name of the account holder and this does not necessarily lead to a negative inference about the applicant.

In *1106630*, *1104075* and *1007284* social media evidence was not being taken at face value. Rather social media evidence was treated as simply evidence from which inferences could be made, but were subject to testing for reliability and the inferences that could be made needed further corroboration. These decisions along with *1106631* and *1112073* – the two decisions on the impact of political activity in social media – reveal a greater sophistication in dealing with social media evidence. Two considerations can be identified within these decisions. The first is a greater awareness of the technical capacities of social media; accounts can be held under an alias, only a certain number of posts remain publically visible, accounts where the account name and the account holder's name coincide are likely to be easily discovered through a search using the account holder's name. The second is greater awareness of the complex factors that motivate an account holder to post material to social media; factors that go against whether the posted material corresponds to the account holder's actual life. Some account holders exaggerate elements of their real life, others hide. Rather than truthful repositories of information that the RRT can use to cut through what it has determined as misleading applicant testimony, these decisions treat social media more truthfully – that is, as a contested and limited source of evidence that needs collaboration and to be placed within a wider matrix of facts before inferences can be drawn. It is these decisions that suggest to the RRT and other administrative decision-makers how to better consider and use social media evidence.

### **LESSONS FROM TAKING SOCIAL MEDIA AT FACE VALUE**

This section argues that the taking of social media at face value by the RRT could give rise to three lessons. The first is the developing prudent message for users of social media to be careful in avatar maintenance – to be aware and actively managed what information is publically available. The second concerns lessons for administrative-decision makers on how to more appropriately consider social media evidence. The third is not so much a lesson but a consequence from misusing social media evidence. There is the potential for an error of law grounded on a jurisdictional fact in taking social media at face value. From this study it is clear that when an individual discloses information to a third party, such as a social media platform, there is the possibility that the information will be identified and used by administrative decision-makers such as the RRT. This study has found that this information is likely to be taken at face value over personal testimony of applicants. Much has been written about the lack of privacy of social media and the potential for information posted on a social media platform to be used against an account holder.<sup>57</sup> The findings of this study reinforce the general observations from this literature. It sends a clear message to applicants to be watchful of their digital avatar. To know what it is up to and also to know that decision-makers have been placing emphasis on inferences from social media. It suggests that applicants need to ensure a close correspondence between their social media profile and their lived reality; or if they, like the homosexual applicants discussed above, wish aspects of their life to remain private, not to use social media at all. While this all or nothing approach to social media cuts across the literature on the diversity of social media engagement, it seems prudent advice in the context of the findings of this study. It also sends a message to advocates working for applicants in the RRT to expect the social media evidence about their client to be accessed and discussed at hearings.

The second lesson for administrative decision-makers such as the RRT is on developing more appropriate understandings concerning the reliability of social media evidence and possibly protocols on how to treat social media evidence. In the more narrow and rules of evidence governed realm of the courtroom proper some judges have been reluctant to rely on social media evidence, concerned about “the potential for abuse and manipulation of a social networking site by someone other than its

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<sup>57</sup> Feuer LS, “Who is Poking around Your Facebook Profile: The Need to Reform the Stored Communications Act to Reflect a Lack of Privacy on Social Networking Websites” (2011) 40 Hofstra LR 473 at 513.

purported creator”.<sup>58</sup> In a recent RRT decision social media evidence was put to one side due to reliability concerns with the explanation that the RRT “did not regard this as a reputable or reliable source of information. I put to him [the applicant] that anyone could post anything they wanted on such a page: it did not have to be true”.<sup>59</sup> This taking at “no value” is potentially as problematic as the identified taking at face value. In a rapidly digitalising environment to ignore social media evidence as inherently unreliable would be to miss potentially significant sources of information. Indeed, as will be discussed below, not considering social media evidence could ground an error of law. Instead, the way forward is neither the face value approach nor the no value approach; rather it is through greater sophistication towards social media evidence that emerges from decisions such as those identified in the last section.

What is suggested is that administrative decision-makers should adopt strategies that recognise the reliability limits of social media evidence and allow more uniform evaluation of its reliability. A basic strategy would be to provide administrative decision-makers with training about social media and specifically factors identified that go to the reliability of social media evidence such as privacy concerns, the technical features of social media platforms and the diversity of social media engagement.<sup>60</sup> A more active strategy could involve the asking of a common set of questions for the purpose of authentication before proceeding with the social media evidence. At a minimum, such questions may include; what were the privacy settings used on the account, was it sufficiently password protected, how many people have access to the account, has it been hacked in the past, is it accessed from a public or private computer, is the email address of the account and that frequently used by the person the same, how often does the person use the account, in what way and who actually set up the account?<sup>61</sup> This strategy would give decision-makers insight into the likelihood of fraudulent use of the account and how active the individual is in using social media. A further strategy should be used when an administrative decision-maker wants to draw inferences from a technical feature of a social media platform such as the “Like” or “Events” functions in Facebook. To make reliable inferences from the account holder’s engagement with these features, an administrative decision-maker needs to develop an understanding of the applicant’s level of engagement and sophistication in their social media use. Questions need to be asked that allow the decision-makers to build an understanding of the applicant’s social media usage as a whole by identifying the use of pseudonyms, numbers of posts and uploads and the amount of personal details disclosed. For example, if a social media profile contains few posts and little interaction it would be reasonable for an administrative decision-maker to conclude that the applicant is an inactive user and therefore little emphasis should be placed on whether the applicant had “Liked” a particular organisation. For images available through social media administrative decision-makers need to adopt strategies that assess the reliability of the image. Questions should be asked whether the individual originally posted the image or merely linked it from another page, how long ago the image was taken as opposed to when it was uploaded and consider whether alterations may have been made.<sup>62</sup> Testimony, where available, from someone present when the photograph was taken and analysis by someone with experience of image manipulation software are further measures that could vouchsafe the reliability of such evidence.<sup>63</sup>

The final consequence from taking social media evidence at face value could be that it discloses an error of law grounded on a jurisdictional fact. This involves consideration of the recent High Court decisions that have closely examined the way that the RRT has drawn inference from evidence. The

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<sup>58</sup> Morrison, n 14 at 142.

<sup>59</sup> *1105934* [2012] RRTA 12 at [104]. The RRT was rejecting social media evidence presented by the applicant to substantiate his claims of a real risk of harm if he was returned to Sudan.

<sup>60</sup> Democko, n 5 at 405.

<sup>61</sup> Robbins, n 32 at 32-33.

<sup>62</sup> See, eg *1103642* [2011] RRTA 818 at [69] where the RRT indicated the inference that it was going to make from social media image evidence and asked the applicant to provide additional information countering the inference. From the decision it appeared that no alternative information was provided.

<sup>63</sup> Griffith, n 33 at 222-223.

general principle is that weighing of evidence and inferences from evidence are merit questions and do not disclose errors of law.<sup>64</sup> However, the process of extracting facts from evidence can still be marred by an error of law. In *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611, the High Court stated that RRT would commit a jurisdictional error if, on the probative evidence before it, a logical or rational decision-maker could not have come to the same decision (at [78] (Heydon J), [135] (Crennan and Bell JJ)).<sup>65</sup> The emerging test seems not to involve formal distinctions between “final” and “intermediate” findings of fact.<sup>66</sup> Instead, the High Court scrutinised the reasoning process as a whole to see whether on the evidence the decision was what a “logical or rational decision-maker could make” (at [135] (Crennan and Bell JJ)). In this context *Minister for Immigration & Citizenship v SZJSS* (2010) 243 CLR 164 indicates that decisions as to the weight to be afforded individual pieces of evidence – testimony, letters, photographs, social media evidence – is properly the province of the RRT (at [35]). However, as was identified in *Minister for Immigration & Citizenship v SZIAI* (2009) 259 ALR 429 at [25], the ignoring of probative evidence would not be one that a logical or rational decision-maker would do.<sup>67</sup>

An application of these distinctions – between the leaving it to the merits of *SZJSS* or a decision that is tainted by error by being not logical or rational as in *SZIAI* – can be seen in the Federal Magistrate Court decision of *SZQYU and SZQYV v Minister for Immigration* [2012] FMCA 1114. In that decision two evidential inferences of the RRT were challenged. The first was that the RRT gave “no value” to collaborative evidence presented by the applicants in the form of testimony from their flatmate (at [25] (Cameron FM)). The second was that the RRT had not considered a report in which a social worker concluded that the applicants were in a homosexual relationship based on viewing photographs of the applicants engaged in homosexual intercourse (at [59]). For the first it was found that the RRT had considered the applicants’ collaborative evidence but having considered it, it was logical or rational on the evidence as a whole for the RRT dismiss it as having “no value” (at [42]). This fell within *SZJSS*. However, for the second – the report indicating the existence of photographs – the RRT was found to have committed a jurisdictional error (at [65]). Specifically the significance of the photographic evidence to the finding concerning the applicants’ sexual orientation and relationship was “sufficiently great that the Tribunal’s reasons for rejecting or disregarding that evidence had to be disclosed lest it be inferred that it was not considered” (at [63]). The RRT committed a jurisdictional error through not showing in its decision active consideration of that evidence and as such fell within the rule in *SZIAI*.

For social media evidence the emerging rule of jurisdictional error on the grounds of making a decision that logical or rational decision-makers would not make would appear to work three ways. First, where the RRT’s decision shows an active consideration of social media evidence then there is no error. Second, if a RRT refuses to engage with social media evidence – without actively considering the specific information being presented – then that is likely to not be in accord with what a logical and rational decision-maker would do. Third, there is an argument that if the RRT takes social media evidence at face value, without engaging with other probate evidential sources, then it is arguable that it has also not acted as a logical and rational decision-maker would. It is possible under *SZIAI* to mount an argument that a logical and rational decision-maker would have been cognisant of the limitations of social media evidence and sought collaborative evidence before giving weight to it. It is this potential error that could be argued in several of the decisions examined in this article where social media evidence was taken at face value without the decisions showing the reasoning through which the social media evidence was evaluated. So while most of the time the weight given to social media evidence is a question of merits that rests with the RRT, taking social media evidence at face

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<sup>64</sup> *Minister for Immigration & Citizenship v SZJSS* (2010) 243 CLR 164 at [32] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>65</sup> See also Smith M, “‘According to Law, and not Humour’: Illogicality and Administrative Decision-Making after SZMDS” (2011) 19 AJ Admin L 33.

<sup>66</sup> As was held in *WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 80 ALD 568.

<sup>67</sup> See also *Minister for Immigration & Citizenship v SZGUR* (2011) 241 CLR 594 at [23] (French CJ and Kiefel J).

value within a decision that does not show the reasoning behind this inference could be seen as a decision that no logical or rational decision-maker could make.

### **CONCLUSION**

This article argued that the RRT can be seen placing strong reliance on information gathered from social media. The first section argued, drawing upon recent research, that social media cannot be considered accurate repositories of information about the account holder or others. The second section, through an analysis of 18 decisions of the RRT where social media evidence was discussed and used, argued that social media evidence is being treated as reliable by the RRT. The third section considered the lessons for applicants and administrative decision-makers from the RRT's taking of social media at face value, concluding that in specific circumstances taking social media evidence at face value could amount to a jurisdictional error.