FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZCOV & ANOR v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 1171

MIGRATION – Refugee Review Tribunal – impermissible merits review – no bias or apprehended bias on the part of the Tribunal – findings not "obviously illogical" – no "inconsistent" finding – no failure pursuant to s.424A – s.424AA does not arise – no failure pursuant to s.91R(3) – no failure to accord procedural fairness – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), ss.424A(1), 424AA, 91R(3)

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
SZJGV v Minister for Immigration and Citizenship [2008] FCAFC 10
Re Refugee Review Tribunal; Ex parte H (2001) 75 ALJR 982; [2001] HCA 28
Minister for Immigration Multicultural Affairs v Jia (2001) 205 CLR 157
SBBS v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 749; [2002] FCAFC 361
Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431
VFAB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 102
SCAA v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 668
SZHPD v Minister for Immigration and Citizenship [2007] FCA 157
S20/2002 v Minister for Immigration and Multicultural Affairs (2003) 198 ALR 59; [2003] HCA 30
Minister for Immigration and Multicultural and Indigenous Affairs v NAMW (2004) 140 FCR 572
VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 82
QAAC of 2004 v Refugee Review Tribunal [2005] FCAFC 92
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609; [2007] HCA 26
SZGSI v Minister for Immigration and Citizenship [2007] FCAFC 110
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152; [2006] HCA 63
SZLQX v Minister for Immigration and Citizenship [2008] FCA 1286

Applicant:	SZCOV & SZCOW
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3356 of 2007
Judgment of:	Nicholls FM
Hearing date:	10 April 2008
Date of Last Submission:	29 July 2008
Delivered at:	Sydney
Delivered on:	28 August 2008

REPRESENTATION

Counsel for the Applicant:	Nil
Solicitors for the Applicant:	Nil
Counsel for the Respondents:	Ms L Clegg
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The application made on 30 October 2007, and amended on 9 January 2008, is dismissed.

(2) The applicants pay the first respondent's costs set in the amount $7,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3356 of 2007

SZCOV & SZCOW
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(As Corrected)

1. This is an application made under the *Migration Act 1958* (Cth) ("the Act") on 30 October 2007, and amended on 9 January 2008, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") signed on 25 September 2007, and handed down on 4 October 2007, which affirmed the decision of a delegate of the first respondent to refuse protection visas to the applicants.

Background

2. The first respondent has put a bundle of relevant documents before the Court (the Court Book – "CB") from which the following background may be ascertained.

3. The applicants are husband ("the applicant husband") and wife ("the applicant wife"). They are nationals of the People's Republic of China

("China"). They arrived in Australia on 3 March 2001 and 23 February 2002, respectively (see in particular CB 13 and CB 68). The applicant husband applied for a protection visa on 6 June 2002 (CB 1 to CB 48 with annexures, including a statement from the applicant at CB 46 to CB 48).

The Applicant Husband's Claims

4. The applicant husband claimed that he was tolerant of an employee (who was also a distant relative) who practised Falun Gong, and allowed him to continue his practice. Further, that he assisted the employee when he had been detained in 1999 by the authorities, and continued to employ him after his release.

5. The applicant husband then claimed that he further assisted this employee (particularly with an investment of funds) in setting up a commercial advertising company that "actively but secretly" distributed Falun Gong material. Following a break-in into the company's place of business, and upon investigation, the police found Falun Gong materials and his former employee was arrested. The applicant husband was implicated in the former employee's Falun Gong activities and was regarded therefore as a "political dissident and major organiser for anti-government promotion activities". The applicant husband claimed that he was subsequently put on a "blacklist" by the relevant security bureau, and that his wife was subjected to questions and interrogation.

6. The delegate found that the applicant's claims lacked credibility and rejected those claims for reasons set out in her decision record (see in particular CB 54) on 14 June 2002.

The Applicant Wife's Claims

7. The applicant wife applied for a protection visa on 25 June 2002 (CB 56 to CB 98 with annexures, including a statement by the applicant wife CB 96 to CB 98). I note that the applicants' daughter was included in that application (CB 56). But she is not an applicant before the Court. (She has since returned to China.)

8. The applicant wife's claims to fear harm on return to China arose out of the claimed circumstances that her husband had "been regarded as a political dissident and major organizer for anti-government promotion activities, and his name has been on the black list of the PSB since then" (CB 96.4). The applicant wife claimed that in January 2002 she was detained by police following a break-in at the premises of the printing and publishing company which her husband had helped to set up (financial help in particular). She claimed that she was interrogated overnight and physically mistreated by the police (CB 97.5). When she returned home found that her home "had been thoroughly searched by the policemen, my properties had been broken, and especially my poor daughter was in the corner of the room with tears" (CB 96.7).

9. She claimed that she continued to be the subject of harassment by police or government officers, and was arrested again in January 2002 because the police suspected that she might have been personally involved in the establishment of the advertising company. She was again detained until 15 February 2002 and was subjected to physical and mental torture. She claimed to have been released with the assistance of "a kind female police" and secretly escaped from China with her daughter.

10. The delegate refused this application on 10 July 2002 (CB 101 to CB 104). The delegate found that the applicant wife's claims were: "vague and imprecise and amount to nothing more than unsupported allegations". Her failure to provide documentary or other evidence to support such claims was found to detract "considerably from the credibility of the applicant's claims" (CB 103.5).

The Tribunal

11. The applicant husband applied for review by the Tribunal on 18 June 2002. (CB 105 to CB 108. See also an attached statement at CB 109 to CB 113 and a further statement at CB 116 to CB 128.)

12. The applicant wife applied for review on 31 July 2002 (CB 227 to CB 230 – with annexures).

13. It would appear that at some point the Tribunal generally treated both the applicants' applications together. They each attended an oral

hearing on 7 May 2003, and again on 25 November 2003 (CB 129, CB 240, and CB 180 and CB 244). (While the hearings were held on the same day they appear to be held one hour apart.)

14. The Tribunal made a decision on 5 December 2003 and handed it down on 6 January 2004 (CB 260 to CB 284). It affirmed the decisions under review. The applicants subsequently sought judicial review and the Federal Magistrates Court remitted the matter to the Tribunal for reconsideration (CB 286).

15. The applicants were both invited to a hearing on 20 April 2006 (CB 288 and CB 325). (Again I note that while the date of the hearing was the same, the hearings were held 2-and-a-half hours apart.)

16. The Tribunal (differently constituted) affirmed the decisions under review on 8 June 2006 (and handed down on 29 June 2006) (CB 296 to CB 322).

17. This Court (again) quashed that decision and the matter was remitted to the Tribunal for proper consideration.

18. The applicants were again invited to a hearing before the Tribunal, differently constituted for the third time on 18 July 2007 (CB 395 and CB 403). The hearing was part-heard on that day and completed on 1 August 2007 (CB 451.4).

19. While the hearing was described as a "joint hearing", the Tribunal noted that each applicant gave evidence and presented arguments ("each did so separately and in private" (CB 439.9)).

20. On 17 July 2007 the applicant husband gave oral evidence, as did two witnesses (CB 451.4). The hearing was then adjourned to 1 August 2007 when both applicants gave oral evidence.

21. The Tribunal's decision record contains a detailed and extensive account of the evidence given by the applicants and witnesses on behalf of the applicant husband during the course of the hearing (CB 451.3 to CB 463.3).

The Applicants' Claims to Protection Before the Tribunal

22. The applicants claimed to fear harm because of the applicant husband's active support for Falun Gong (although he was not a practitioner in China), and the perception of the Chinese authorities that the applicant wife was associated with this support, and because of the applicant husband's involvement in Falun Gong activities and demonstrations in Australia since his arrival.

23. Specifically, the applicant husband claimed to have provided assistance to a distant relative, including financial assistance, to set up an "advertising company", which was created essentially to promote the creation and distribution of Falun Gong promotional material. He claimed to have been identified by the authorities as an office-holder in the company, and that when the company's activities were discovered, by security officials in early 2002, he was regarded as a political dissident.

24. The applicant wife claimed to have been interrogated by security officials, to have been detained and physically abused on two occasions in early 2002, and to have been released with the help of a female PSB officer who was sympathetic towards her.

25. The applicant husband also claimed that since arrival in Australia he had become a Falun Gong practitioner and claimed that he had practised Falun Gong on an earlier trip to Australia in November 2000.

26. The applicants' daughter, although initially an applicant before the Tribunal, departed Australia and her application was not pressed before the Tribunal.

The Tribunal Decision Under Review

27. The Tribunal's analysis (its "Findings and Reasons") is set out in its decision record as reproduced at CB 465.5 to CB 470.5.

28. This analysis reveals that the Tribunal properly understood the basis of the applicants' claim to fear harm on return to China (CB 465.7), and identified the initial question to be addressed, that is, for the applicants to succeed before the Tribunal, the Tribunal would have to find as

"plausible" the various claims made by the applicants. The Tribunal noted that if their claims were true, and given evidence from other sources about the level of serious human rights abuses facing political activists in China, that in those circumstances there would be a real chance that the applicants would face treatment amounting to persecution in China (CB 465.9).

29. The Tribunal:

1) Was satisfied that the applicant husband's claims to fear harm in the future because of his family's history in being regarded as "Rightists" would not result in his facing harm in the future (CB 466.3).

2) Found that it was not persuaded by the applicants' explanations and arguments as to why the applicant husband chose to put his family at risk by willingly embarking on activities that unnecessarily placed his wife and daughter at serious risk of punishment without warning them of that risk (CB 466.5).

3) Based on a number of factors, found it "implausible that he was a patron or ally of Falun Gong while in China" (CB 467.3).

4) Found that there were a number of other factors that contributed to its conclusion that the applicants had not been truthful about "key aspects of their account" (CB 467.4):

    a) The delay in applying for protection in Australia was "not consistent with either party fearing harm in China for reasons relating to Falun Gong at that time" (CB 467.7).

    b) The applicant husband's failure to refer to having any personal involvement in Falun Gong in Australia at an earlier time "cast serious doubt on his claim that he had been" involved with Falun Gong (CB 467.8).

    c) The applicant husband's contradictory evidence relating to his claim that he asked persons who had given statements to the Tribunal to carry Falun Gong materials back to China was not plausible, and it did not consider the evidence contained in the statements to be reliable (CB 468.2).

d) Based on a number of factors, was not satisfied that the daughter was questioned by Chinese officials on her return to China, and was not satisfied that the daughter was, or had been, harassed by security officials for the reasons asserted by the applicants (CB 468.8).

e) Noted that there was no "persuasive explanation as to why the applicant husband did not contact PRC authorities to deny all knowledge of his relative's Falun Gong-related activities, and further noted the applicant husband's "internally contradictory" evidence in this regard. Further, it found it implausible that if the relative had made assertions for which the applicant knew there was no proof (as he asserted), that in these circumstances he made no effort to convince the authorities of his and his wife's innocence (CB 469.1).

5) The Tribunal relied on independent information to the effect that "apparently fraudulent official documents are easily obtained in China" and that this, coupled with its lack of satisfaction about the plausibility of the account, led it to consider that the documents given in support of the applicant wife's period of detention and the authorities' interest in the applicant husband were not reliable sources of evidence that the applicants were suspected of Falun Gong links by the authorities (CB 469.4).

6) While accepting that the applicants may have "had some problems in China, and that they do not want to return to China", was not satisfied that the applicants had been truthful about the circumstances and events that led to the decision to try and remain in Australia. Further, it was satisfied that their reason for leaving China and for making protection visa applications in 2002 in Australia were "unrelated to involvement in Falun Gong" (CB 469.5).

7) The Tribunal considered two witnesses who gave evidence at the hearing before the Tribunal (and another person who provided a statement in support) "were people of integrity who gave truthful evidence and who genuinely believe" the applicant husband to be a Falun Gong practitioner. The Tribunal, further, was satisfied

that the applicant husband had been attending Falun Gong practice sessions and study in Australia since at least 2005, and possibly earlier, but disregarded this conduct pursuant to s.91R(3) of the Act because it was not satisfied that the applicant husband had engaged in Falun Gong activities in Australia other than for the purpose of strengthening his protection visa application (CB 469.7).

8) In relation to the applicants' claims that there are "Chinese spies in Australia", the Tribunal considered, as reliable, evidence that there are such individuals whose aim is to discredit Falun Gong and spy on its members, but was not satisfied on the evidence provided by the applicant husband that he might have even been noticed by such officials, let alone identified by them by name (CB 469.8).

9) Noted again its earlier observation that the applicants may have had some difficulty with the authorities in China, but this was for reasons not advanced by the applicants in their evidence. The Tribunal confirmed that it did not accept that the applicant husband was a supporter of Falun Gong while in China and did not accept that he sent Falun Gong-related materials to China from abroad, and did not accept that the applicant wife was detained in China for reasons arising out of her, or her husband's, imputed support for Falun Gong (CB 470.2).

10) In all, therefore, it concluded that it was not satisfied that the applicants were persons to whom Australia owed protection obligations under the Refugees Convention and on that basis affirmed the decisions not to grant the applicants protection visas (CB 470.4).

Application to the Court

30. By way of amended application the applicants put forward the following grounds (some particulars are provided and some complaints seemed to be expressed by way of submission rather than properly pleaded grounds but nonetheless the following grounds can be discerned):

1) An apprehension of bias, or actual bias, on the part of the Tribunal.

2) The Tribunal's finding "is obviously illogical".

3) The Tribunal made an inconsistent finding.

4) A failure to comply with s.424A(1) of the Act.

5) The Tribunal did not assess the application "properly and fairly" [considered with ground one].

31. Annexed to the amended application is a document headed "Applicant's Submissions" which annexes a letter signed by persons who are described in the letters as "genuine Falun Gong practitioners" put in support of the applicant husband. Such a letter cannot assist the applicants before this Court as, of course, the Court has no power (or role) to determine whether the applicant husband is a "genuine" Falun Gong practitioner. This question was one for the Tribunal. The submission of this letter does not rise above a request for impermissible merits review (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 ("*Wu Shan Liang*")).

Hearing Before the Court

32. At the hearing before the Court, the applicant husband and applicant wife appeared in person. They were assisted by an interpreter in the Mandarin language. Ms L Clegg of Counsel appeared for the first respondent.

33. I note that at that time the Court also had before it written submissions filed by the applicants (and written submissions in reply by the first respondent). The submissions addressed the complaints of apprehended bias and the failure to comply with s.424A(1) of the Act, and added a further complaint that the Tribunal failed to comply with its obligations pursuant to s.424AA of the Act.

34. At the hearing, the applicant husband confirmed that his complaints about the Tribunal decision were that the Tribunal treated him unfairly and unreasonably, that it did not comply with s.424AA of the Act, nor with s.424A(1) of the Act, that the "decision was biased", and that the

Tribunal did not take account of his practice of Falun Gong in Australia because of s.91R(3) of the Act, even though there was evidence provided by two witnesses who supported his claims in that regard. The applicant wife relied on her husband's submissions ("… we are together").

Further Written Submissions

35. Following the hearing of this matter, and just before handing down judgement in this matter, the Full Federal Court handed down its judgement in *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105 ("*SZJGV*") which dealt with the understanding and application of s.91R(3) of the Act. In view of the Tribunal's use and reliance on this section, I subsequently gave both parties the opportunity to make further written submissions. Both parties have filed supplementary submissions in relation to this issue.

Ground One – Bias and Apprehended Bias

36. In ground one of the amended application, the applicants complain that the Tribunal decision "has included a reasonable apprehension of bias", and that the Tribunal has not acted "properly and fairly" in considering their claims, a complaint which is repeated at ground five of the amended application and which, at best, I understood to be a complaint that the Tribunal was biased against the applicants. In written submissions this is explained as a complaint of apprehended bias.

37. I note the relevant authorities in this regard (*Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982; [2001] HCA 28, *Minister for Immigration Multicultural Affairs v Jia* (2001) 205 CLR 157, *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749; [2002] FCAFC 361 at [43]-[44], *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 102).

38. In particular I note that it is a rare and exceptional case where bias can be demonstrated solely from the published reasons for decision (*SCAA v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 668 ("*SCAA*") at [38], per von Doussa J). An allegation of

bias must be distinctly made and clearly proven (*SZHPD v Minister for Immigration and Citizenship* [2007] FCA 157 at [22]).

39. By way of particulars to this complaint, the applicants have set out lengthy extracts from the Tribunal's decision record and seek to take issue with the Tribunal's findings:

    1) Particular one: that it was not open to the Tribunal to "use words" like "… I am not persuaded by these arguments …" to reject the applicant husband's "major claims". To the extent that the Tribunal found that it did not accept the explanations as to why the applicant husband put his family at risk without telling them, the applicants seek to argue now that it is customary in China that a husband would make decisions affecting his family without consulting them.

    2) Takes issue with the Tribunal's finding that the applicant husband's failure to warn his wife of the danger in which she was placed by his action was "inexplicable".

    3) Argues that the Tribunal displayed an apprehension of bias in rejecting all of their claims because it did not accept their explanation for the delay in making their applications for protection visas after arrival in Australia.

    4) Complains that the Tribunal ignored the explanation as to why the applicant husband did not mention at some time earlier that he had sent Falun Gong materials into China.

    5) Complains that the Tribunal failed to bring "an independent mind" to the evidence provided by one of their witnesses in support of their claims.

    6) Takes issue with the Tribunal's analysis relating to their claims of what occurred to their daughter on return to China.

40. First, I note that each of the matters complained of by the applicants now, and which they say reveals the apprehension of bias (or even bias) on the part of the Tribunal, were all matters that were fully discussed at the hearing with the Tribunal. While the applicants had hearings before earlier constituted Tribunals, what is clear in the circumstances

of this case is that the Tribunal member whose decision is currently the subject of review before the Court did approach the hearing conducted with these applicants (over two separate days) with a fresh mind, and without seeking to rely on what had occurred at the hearings before earlier constituted Tribunals. Further, the applicants have not put before the Court any transcript of the Tribunal hearing such as to challenge the Tribunal's extensive account of what occurred.

41. Second, it is a rare circumstance that the apprehension of bias, or for that matter bias, can be made out simply with reference only to the Tribunal's decision record (*SCAA* at [38]).

42. Third, each of the matters raised by the applicants now which they say reveals bias, or the apprehension of bias, on the part of the Tribunal were all matters that were discussed with the applicants at the hearing, and matters where the Tribunal plainly put its doubts and concerns to the applicants (see in particular CB 453.2, CB 453.4, CB 454.4, CB 454.7, CB 454.8, CB 454.10, CB 455.6, CB 455.7, CB 455.8, CB 456.2, CB 456.4, CB 456.5, CB 458.5, CB 458.7, CB 460.3, CB 461.3, CB 461.8, CB 462.9).

43. The Tribunal's findings complained of now by the applicants were clearly findings that were open to the Tribunal to make on the material before it, and for which it gave extensive and cogent reasons. In all the circumstances, I cannot see that the applicants' complaint of an apprehension of bias or bias is made out. I can only agree with submissions by Ms Clegg that the applicants seek to re-agitate before the Court claims and explanations made to the Tribunal. As such the applicants seek impermissible merits review (*Wu Shan Liang*). These grounds do not succeed.

44. By way of submissions the applicants also complain that the apprehension of bias can also be seen in the Tribunal finding that it was not satisfied that the applicant husband had engaged in Falun Gong practice or protest activities in Australia other than for the purpose of strengthening his claims to be a refugee, even though it was satisfied that the two witnesses, and a third person who had provided a statement, were sufficient to satisfy the Tribunal that he had been attending Falun Gong practice sessions and doing Falun Gong study in Australia.

45. The applicants complain that given that the Tribunal accepted that the witnesses were people of integrity, then its finding can only mean that its decision had the appearance of bias.

46. This complaint misunderstands the finding made by the Tribunal, and the operation of s.91R(3) of the Act. Clearly, the Tribunal did not reject that the applicant husband had attended a Falun Gong practice in Australia, and had attended at Falun Gong demonstrations. It is not inconsistent of the Tribunal to find that evidence supporting the applicant husband's claims to be a Falun Gong practitioner in Australia is genuine and creditworthy, and to further accept the applicant's claims to have engaged in such conduct, but nonetheless to take the view that such conduct was engaged in for no other purpose other than for the purpose of strengthening the protection visa application. This finding needs to be seen in the context of the Tribunal's analysis as a whole.

47. The Tribunal clearly had rejected the applicant husband's claims to have been a Falun Gong supporter in China. In these circumstances it was open to the Tribunal to find that even though it accepted that he had engaged in Falun Gong practice in Australia that this was done for the purpose of enhancing his protection visa application. What the applicants' submissions appear to overlook is that it is not inconsistent of the Tribunal to accept the applicants' witnesses as being people of integrity, yet to reject the credibility and the truthfulness of what the applicants themselves told the Tribunal. This complaint also does not succeed in revealing bias or the apprehension of bias on the part of the Tribunal.

Ground Two – "Obviously Illogical"

48. Ground two of the amended application complains that the "Tribunal's finding is obviously illogical". This is particularised specifically with reference to the Tribunal's having "suggested" that the applicant husband ("who claimed to be a person with strong political opinions and beliefs against the Communists") made no effort to contact the Communist authorities to convince them of his and his wife's innocence.

49. Noting of course that to the extent to which illogicality may be available as a ground of review showing jurisdictional error in any

event, the particular relied on by the applicants in this ground does not reveal any illogicality in the Tribunal's thinking or analysis, let alone come close to that type of extreme situation of illogicality which may open the Tribunal's decision to being impugned in this way.

50. The Tribunal's thinking in this regard is clear. The Tribunal asked the applicant husband to explain why he did not contact the authorities to deny knowledge of his distant relative's activities in circumstances where he himself had said that he knew that there was no proof against him to support anything adverse that might have been said by the relative to the authorities after he had been arrested and detained. The Tribunal was not satisfied with nor persuaded by the explanation. It gave reasons for this. It was plainly open to the Tribunal to take this view on what was before it. I can only agree with Ms Clegg that this does not rise above a disagreement with the Tribunal's thought processes.

51. I also agree with the first respondent's submission as to the relevance to the circumstances in this case of what was said in *Applicant S20/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59; [2003] HCA 30 per Gleeson CJ at [5]:

> *"As was pointed out in* Minister for Immigration v Eshetu *[(1999) 197 CLR 611 at 626 [40] per Gleeson CJ and McHugh J] to describe reasoning as illogical, and unreasonable, or irrational, may merely be an emphatic way of expressing disagreement with it. If it is suggested that there is a legal consequence, it may be necessary to be more precise as to the nature and quality of the error attributed to the decision-maker, and to identify the legal principle or statutory provision that attracts the suggested consequence."*

52. I cannot see that the applicants' complaint in this regard is made out in relation to this particular. Nor for that matter that any other part of the Tribunal's reasoning suffers from any similar defect. This ground therefore does not succeed.

Ground Three –The Tribunal Made an "Inconsistent" Finding

53. Ground three in the amended application complains that the Tribunal made an "inconsistent" finding. The example used is the same example relied on by the applicants in written submissions in asserting

apprehended bias on the part of the Tribunal. That is, the applicants complain that the Tribunal accepted that the applicant husband was a "genuine Falun Gong practitioner" on the evidence, and that the evidence given from the two witnesses was "true and correct", but that the Tribunal did not think that "we would continue practising Falun Gong".

54. First, I note that to the extent that the use of the "we" may imply that the Tribunal made some such finding in regard to the applicant wife, then it is quite clear that the evidence before the Tribunal did not reveal that the applicant wife had engaged in any such activity in Australia (and nor for that matter in China).

55. The applicant wife's own evidence was that "she sometimes now followed her husband when he went out to do Falungong activities; however that did not mean that she practised Falungong" (CB 459.5). Further, her evidence was "she said that her father had died long ago and if she took up Falungong she would be unable to commemorate his death each year at a Buddhist temple. She said that Falungong would stop her doing that because, as she understood it, it required total devotion".

56. In all, the applicants' complaint in this regard can only be understood as referring to the applicant husband.

57. As already referred to above, this complaint, whether it be one used to support a complaint of the apprehension of bias, or a complaint about the Tribunal making an "inconsistent" finding (noting that "inconsistent" finding on its own would not necessarily reveal jurisdictional error), but in any event for the reasons already referred to above, this particular complaint does not assist the applicants in showing error on the part of the Tribunal. The complaint however also fails at the factual level as the Tribunal's finding was plainly not inconsistent.

58. The witnesses' evidence before the Tribunal is set out at CB 456.9 to CB 457.10. It is clear that both witnesses gave evidence that the applicant husband attended Falun Gong activities, protests, and demonstrations.

59. The first witness (Mr Lin Zheng) was specifically asked by the Tribunal whether he considered persons on behalf of whom he gave evidence to be "genuine practitioners". The witness's response is

recorded as: “I can only say that [the applicant husband] has done the practice. But I can distinguish between good and bad people. I think that [the applicant] is a relatively good, serious, learner. But I did not notice him before a year ago, so can say he was not as active before a year ago” (CB 457.7). The second witness reported that: “she considered him to be a Falungong practitioner” (CB 457.9).

60. Even taking the view that the applicant husband’s first witness believed him to be a genuine Falun Gong practitioner in Australia (his answer to the relevant question appears to fall short of that), what the applicants’ complaint fails to understand is that it is not inconsistent for the Tribunal to find that the witnesses had given truthful evidence as they believed it, but nonetheless to find, in all the circumstances, that this was conduct engaged in in Australia only for the purpose of strengthening the refugee claim.

61. The Tribunal is of course the relevant finder of fact. No inconsistency is revealed. (Nor would any such inconsistency on its own lead to jurisdictional error simply because the Tribunal accepted that the applicant husband had engaged in certain conduct (both witnesses supported this), but that the applicant’s motive was to enhance his claim to protection in Australia.) There is clearly a difference between finding that such conduct occurred, but then the Tribunal forming the view that it was done for a particular purpose. No inconsistency is revealed in this regard. Further, there was plainly material evidence before the Tribunal to support such a conclusion.

62. The applicant husband claimed never to have practised Falun Gong in China. The claim that he had practised Falun Gong on a visit to Australia in November 2000 was considered as a possibility by the Tribunal (CB 469.6). But given the Tribunal’s adverse view of the applicant husband’s credibility, a conclusion which was amply supported by cogent reasons in the Tribunal’s analysis, it was plainly open to the Tribunal to reach the conclusion that it did. This complaint also does not succeed. (See further below in relation to s.91R(3) of the Act.)

Ground Four – Failure to Comply with s.424A(1) of the Act.

63. Ground four in the amended application asserts that the Tribunal failed to comply with s.424A(1) of the Act. While there is some attempt at particularisation in the amended application, the particulars are nothing more than an assertion that the Tribunal failed to comply with each of paragraphs (a), (b) and (c) of s.424A(1).

64. The applicants' written submissions, however, appear to provide some particularity in this regard (when paragraph 2 of the submissions is read with paragraph 1, and applying the particulars in paragraph 1 to a complaint of a failure to comply with s.424A(1) of the Act).

65. The particulars, therefore, in the applicants' complaint can be seen to be in relation to:

    1) Information available from Australian Government Departments that fraudulent, apparently official, documents are easily obtained in China.

    2) That the Tribunal did not provide to the applicants for comment its view that notwithstanding that it accepted that the applicant husband had practised Falun Gong in Australia (relying on the evidence of two witnesses), that it nonetheless found pursuant to s.91R(3), that such conduct should be disregarded.

66. Before the Court, the applicant husband complained about a breach of s.424A(1) in more general terms when he submitted that the Tribunal should have provided him with "the information" that the Tribunal would take into consideration when making its decision.

67. First, the Tribunal's reliance on information that was provided from the first respondent's Department and from the Department of Foreign Affairs and Trade relating to fraudulently obtained "official documents" from China (see CB 469.3 and CB 465.3), being non-in personam information, clearly falls within the exception contained in s.424A(3)(b) from the obligation in s.424A(1) (*Minister for Immigration and Multicultural and Indigenous Affairs v NAMW* (2004) 140 FCR 572 at [71], *VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 82 at [12]-[14], *QAAC of 2004 v Refugee Review Tribunal* [2005] FCAFC 92 at [22]).

68. Second, the view that the Tribunal took of the applicant husband's conduct in Australia is not "information" such as to enliven s.424A(1). See *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 at [18]. As was said in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 476-477 per Finn and Stone JJ, "information" does not encompass the Tribunal's "subjective appraisals, thought processes or determinations".

69. In relation to the applicant husband's more generally expressed complaint at the hearing before the Court, information provided by the applicants themselves by way of their evidence given to the Tribunal at the hearing was information caught by the exemption in s.424A(3)(b) as it related to their individual claims and thus, therefore, in this regard, exempt from the requirement set out in s.424A(1).

70. In relation to each applicant's evidence as it related to the claims of the other, and in particular to the extent that the applicant husband's evidence was viewed as implausible and contradictory in part, and also relied upon in relation to the applicant wife in this case, I note what was said by the Full Federal Court (per Moore, Finn and Marshall JJ in *SZGSI v Minister for Immigration and Citizenship* [2007] FCAFC 110 ("*SZGSI*")) that where the evidence of one applicant is the reason, or part of the reason, for affirming the decision of the delegate in cases where there are two joint applicants, that such information derived from this evidence does not fall within the exception contained in s.424AA(3)(b) for the purposes of reasoning adversely in relation to the other applicant.

71. However, in my view, the circumstances in the current case can be distinguished from what was before the Court in *SZGSI*. In that case, the Minister conceded that the evidence given by one of the two spouses, in particular, information given by one of the applicants concerning a trip to China by the other applicant was accepted as being "information" for the purposes of s.424A(1) (the argument was that in any event it fell within the exception contained in s.424A(3)(b)). (See [45] per Marshall J, [3]-[4] per Moore J.)

72. In the current case, no such concession is made. Ms Clegg submitted that, to the extent that evidence given by the applicant husband was used adversely in assessing the applicant wife's claims, that such

evidence was not "information" for the purposes of s.424A because none of this evidence was "in [its] terms a rejection, denial or undermining of the [applicants'] claims to be a [person] to whom Australia owed protection obligations" (see *SZBYR* at [17]).

73. Further, to the extent that the Tribunal noted (at CB 466.5) that the applicant wife: "has expressed understanding as to why [the applicant husband] did not tell her" (about his embarking on activities that unnecessarily placed her and her daughter at risk), such evidence, again, does not by its terms amount to a rejection, denial or undermining of the applicant husband's claims to be a person to whom Australia owes protection obligations (again, *SZBYR* at [17]). I agree with this submission.

74. Notwithstanding that this was the third occasion on which the applicants appeared before the Tribunal (the first as constituted by that Tribunal member), the Tribunal relied for its reasoning and consideration on the evidence provided by the applicants at the hearing, and on independent country information available to it. Both, for the reasons already set out above, fall within one of the exceptions to s.424A(1), or is not "information" for the purposes of that section.

75. To the extent that the Tribunal made reference to inconsistencies in the applicants' claims, and the Tribunal identified either gaps, defects or lack of detail, or doubts, or the absence of evidence, and even inconsistencies as between what the applicants said at the hearing before it, and what they said in earlier statements, the Tribunal's reasoning in this regard was also not "information" for the purposes of s.424A(1) (see *SZBYR* at [18]).

76. In all, therefore, this ground is not made out.

Section 424AA of the Act

77. By way of written submissions the applicants complain that the Tribunal failed to comply with its obligations pursuant to s.424AA of the Act.

78. This complaint does not assist the applicants in the circumstances of this case. Section 424AA was added to the Act by way of provisions in the *Migration Amendment (Review Provisions) Act 2007* which became

operational on 29 June 2007. The transitional provisions contained in that Act (see s.33 of that Act) provide that s.424AA does not apply to applications for review made prior to that date.

79. In the current case, the application for review was made well before the date on which s.424AA became operational, that is, on 31 July 2002. (I note further that the introduction of that section to the Act post-dates the date of the last remittal of the applicant's case to the Tribunal by this Court – 19 April 2007 – CB 393). In all, therefore, the complaint relying on s.424AAis not available to the applicants, and therefore does not assist them.

Section 425 of the Act - *SZBEL*

80. I should just note that given that the applicants appeared unrepresented before the Court, I did consider during the hearing, and raised with Ms Clegg, whether there was any failure of procedural fairness in relation to s.425 of the Act, bearing in mind *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; [2006] HCA 63 ("*SZBEL*").

81. However, any plain reading of the Tribunal's account of what occurred at the hearing (unchallenged by any evidence to the contrary) reveals that the Tribunal did more than sufficiently indicate to the applicants the issues relevant to the review (with reference to *SZBEL* at [47]). As already set out above (see [42] of this judgment), the Tribunal plainly, and squarely, put to the applicants its concerns with their claims, and evidence, and gave them the opportunity to address these matters at the hearing.

Application of *SZJGV*

82. As referred to above ([35]), and following the hearing in this matter, the Full Federal Court handed down its judgment in *SZJGV*, a matter which concerns the understanding, operation and application of s.91R(3) of the Act. Given that the Tribunal invoked this provision in its reasoning, I subsequently gave the parties the opportunity to make supplementary written submissions in relation to this issue. Both the first respondent and the applicants have taken up this opportunity.

83. In written submissions, the applicants set out, extensively, extracts from *SZJGV* ([21]-[28]). The applicants complain that the Tribunal on the one hand gave regard to the applicant husband's involvement in Falun Gong activities in Australia as part of the reason for assessing the applicant husband's credibility, or his fear of being persecuted on return, yet on the other hand said that it disregarded his conduct in Australia in relation to his Falun Gong practice and activities.

84. The applicants' submissions refer to two parts of the Tribunal's decision record in this regard:

1) At CB 467.8:

> *'Secondly his initial application for a protection visa was lodged, as he has since claimed, some 19 months after he first took up the practice of Falungong in Australia and 10 months after sending Falungong materials into China with Ms Cui. However in the written submissions to the Department he did not refer to having any personal involvement in Falungong in Australia, in terms of practice or association with it, in any way. Given the significance of the claims he has since made about taking up Falungong practice here and sending Falungong materials back to China in that period, his failure to do so casts serious doubt on his claim that he had been doing these things"*

2) At CB 469.6:

> *"The Tribunal considers that the two witnesses at the most recent hearing Mr Lin Zheng and Ms Juan Xu, were people of integrity who gave truthful evidence, and who genuinely believe (the applicant husband) to be a Falungong practitioner, as does Mr John Deller. The Tribunal is satisfied that (the applicant husband) has been attending a Falungong practice sessions and doing Falungong study in Australia since at least 2005, and possibly (as he has claimed) earlier. It is generally accepted that a person can acquire refugees status sur place where he or she has a well-founded fear of persecution as a consequence of events that have happened since he or she left his or her country. However this is subject to s.91R(3) of the Act which provides that any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant*

satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention. (The applicant husband) has not satisfied the Tribunal that he engaged in Falungong practice or protest activities in Australia other than for that purpose. Therefore the Tribunal has disregarded that conduct in coming to its decision."

85. In written submissions, the first respondent referred the Court in to *SZJGV*, in particular, at [22]:

> *"We accept the Minister's submission that s 91R(3) can only, sensibly, be applied once primary findings of fact have been made. If, for example, an applicant claims to have engaged in conduct in Australia which causes him or her to fear persecution if returned to his or her country of origin, the Tribunal must decide whether or not that conduct has occurred. If it has not occurred then there will be nothing to disregard; nor will the occasion arise to determine whether or not paragraph (b) may have application. If it has occurred then consideration must be given to the requirements of s 91R(3). We do not understand the appellants to contend otherwise. Their submissions do, however, overreach when they assert that, if an applicant seeks to rely on his or her conduct in Australia and the Tribunal accepts that such conduct has occurred, the conduct cannot be taken into account "at all" in deciding the application. As the Minister points out, the lodging of an application for a protection visa in which particular claims are made is a relevant matter which is properly to be brought into account. Once, however, the adjudication process has commenced and primary facts have been found which include conduct engaged in by the applicant in Australia, then s 91R(3) is engaged. Once engaged, s 91R(3) precludes the decision maker from having regard to 'any conduct' engaged in by the applicant in Australia unless the decision maker is satisfied that the conduct was engaged in for purposes other than strengthening the applicant's claim to be a refugee. Inaction can constitute conduct within the meaning of s 91R(3)."*

86. I agree with the characterisation of the reasoning of the Court as set out at paragraph 2 of the first respondent's supplementary submissions (with additions). What can be drawn relevantly from *SZJGV* at [22], is:

1) Section 91R(3) can only sensibly be applied once primary findings of fact have been made.

2) If an applicant claims to have engaged in conduct in Australia which causes him or her to fear persecution if returned to the country of origin, the Tribunal must decide if that conduct has in fact occurred.

3) If the Tribunal finds that the conduct has occurred, there will be nothing to disregard, and there will be no occasion to decide whether or not paragraph (b) of s.91R(3) may have application.

4) If the Tribunal finds that the conduct has occurred, then consideration must be given to s.91R(3).

5) That the Tribunal may consider the applicant's claims of having engaged in certain conduct in Australia up to the point (and presumably for the purpose) of making primary findings of fact relating to the applicant's claims (see also [19] of *SZJGV*).

6) Once, however, "the adjudication process has commenced and primary facts have been found which include conduct engaged in by the applicant in Australia, then s.91R(3) is engaged".

7) Once engaged, s.91R(3) precludes the Tribunal from having regard to "any conduct" engaged in by the applicant in Australia unless the Tribunal is satisfied that the conduct was engaged in other than for the purpose of strengthening the applicant's claim to be a refugee.

8) The reference to "any conduct" as appearing in s.91R(3), and in the reasoning of the Court in *SZJGV* at [22], is clearly not to "all" conduct, but to "any conduct" which the Tribunal has accepted has occurred.

9) Inaction can constitute conduct within the meaning of s.91R(3).

87. The applicant husband's conduct in Australia as claimed and put forward by him in support of his claim to fear persecutory harm on return to China, was:

1) The claim that the applicant husband asked various persons (at least including Ms Cui who gave evidence on his behalf) to take

Falun Gong material from Australia into China (see CB 458.2, CB 458.8, CB 467.8 to CB 468.2).

2) The applicant husband's claimed Falun Gong practice in Australia (see CB 454.5, CB 456.6 to CB 457.10).

3) Relevant to this is the applicant husband's delay (and for that matter, the applicant wife's) in raising significant claims (Falun Gong practice in Australia and his sending of Falun Gong materials into China) some nineteen and ten months, respectively, after first having applied for protection (see CB 456.5 to CB 456.8).

88. In relation to the applicant husband's claimed conduct that he asked people to carry Falun Gong material to China, the Tribunal found that such conduct had not occurred (CB 467.9 to CB 468.3). The Tribunal found in this regard that the applicant husband's oral evidence to it was "vague", and "contradictory", and did not consider the evidence from the people who supported the applicant in this claim "to be reliable". I agree with Ms Clegg that, given what was set out in *SZJGV*, this claimed conduct on the part of the applicant husband did not engage s.91R(3) because the Tribunal found, as a finding of fact, that it had not happened.

89. In relation to the applicant husband's claimed conduct to have engaged in Falun Gong practice and activities in Australia, the Tribunal relied on evidence provided by two witnesses at the hearing before it. (The Tribunal found them to be: "people of integrity who gave truthful evidence and who genuinely believe [the applicant] to be a Falun Gong practitioner".) On this basis, the Tribunal accepted that the applicant husband had engaged in this conduct in Australia. On the basis of what was set out in *SZJGV*, therefore, this required consideration to be given to the requirements of s.91R(3). The Tribunal did give such consideration (CB 469.7 to CB 469.8). The Tribunal found that it could not be satisfied that the applicant husband engaged in this conduct other than for the purpose of strengthening his refugee claims, and therefore said that it would disregard this conduct in making this decision.

90. The question, therefore, now is whether, as the applicants submit, the Tribunal's reference at CB 467.8 to the applicant husband's conduct in Australia (that is, his claimed Falun Gong practice and activities) did

not thereby disregard this conduct in assessing his credibility and thereby falling into jurisdictional error as explained by the Full Court in *SZJGV*. (See also [27] of *SZJGV* as to how the principles enunciated in that case were applied.)

91. The first respondent's submission is that this part of the Tribunal's decision record, while making reference to the applicant husband's Falun Gong practice in Australia, does not, however, reveal that such conduct was taken into account. The first respondent submits that this paragraph refers to the Tribunal's thought processes and findings about the applicant husband's delay in lodging his protection visa application in circumstances where he had claimed to have been practising Falun Gong in Australia, yet despite those significant claims he delayed seeking protection.

92. The first respondent submits that it was this delay that reflected adversely on the applicant husband's credit, and that such delay could: "in no way amount to conduct which could be said to attract or engage s.91R(3)". The first respondent's submissions being that such delay in lodging the protection visa application could not be said to be conduct that enhances a claim for a protection visa. The submission therefore is that no breach of s.91R(3) has occurred as the Tribunal's findings and reasons do not "fall foul of the principles in relation to the proper application of s.91R(3) as held by the Full Court in *SZJGV*".

93. In my view, a clear distinction may be drawn between the conduct claimed by the applicant husband to have occurred in Australia (that is his practice of Falun Gong, and even his sending of Falun Gong documents to China) and the timing, that is the quite separate "conduct" of the timing of the making of his application for a protection visa. The applicant husband's own evidence, was that the significant claims that he subsequently made existed some nineteen and ten months prior to his making his application for a protection visa. The factual basis of the delay was therefore provided by the applicant husband himself in his evidence to the Tribunal.

94. As I understand what was said in *SZJGV*, the Tribunal can make reference to conduct (which subsequently becomes the subject of consideration pursuant to s.91R(3)) up to the time that "primary findings of fact have been made". I am persuaded by Ms Clegg's

submission that the focus of the Tribunal at this part of its analysis was on the delay in making the protection visa application in the first place, and then delay in circumstances where even in the making of that application, no reference was made to significant claims until later. In that sense delay in the raising of these significant claims was the focus of the Tribunal. It was not the applicant husband's actual conduct in Australia (including both his claimed Falun Gong practice nor even his claim to have sent Falun Gong materials to China).

95. I further agree that such delay, to the extent that it may be said to be conduct in Australia, is not conduct such as to engage s.91R(3), because contrary to being conduct engaged in by the applicant husband "for the purpose of strengthening" his claim to be a refugee, such conduct plainly leads to the negative of that proposition. Unlike the conduct which the Tribunal found had occurred – his Falun Gong practice – which clearly went to the issue of strengthening his claim to fear persecutory harm on return to China. That is, it was a positive for the applicants.

96. In *SZLQX v Minister for Immigration and Citizenship* [2008] FCA 1286 ("*SZLQX*"), a matter on appeal from this Court and in part concerning consideration of s.91R(3) of the Act, Jacobson J said, with reference to *SZJGV* and *SZHFE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2006] FCA 648 ("*SZHFE*"), at [21]-[22] (a case in which he stated relevant principles):

> "*21. In my view the answer to the suggestion that there was a breach of s 91R(3) is found in a decision which I gave in a matter of* SZHFE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) *[2006] FCA 648. The Full Court in* SZJGV *referred to this decision at [16] and [17] of its reasons for judgment, without any apparent disapproval of my reasons. In that case I was of the view that the effect of s 91R(3) is that it is only enlivened where an applicant seeks to rely on conduct in Australia to support a claim to have a well-founded fear of persecution.*
>
> *22. The conduct to which the Tribunal referred, namely the appellant's work-related activities in Australia, was not conduct upon which she sought to rely to support her claim to have a well-founded fear of persecution. It seems to me, therefore, that the Tribunal was not bound under s 91R(3) to*

> *disregard that conduct. In my view, there is no breach of that section within the principles which I stated in* SZHFE, *nor is there any breach of the principles stated by the Full Court in* SZJGV.*"*

97. In the current case, the applicants' delay in making their protection visa claims and raising significant claims was not conduct upon which they sought to rely to support the claim to have a well-founded fear of persecution. In the circumstances, quite the contrary. In light of *SZLQX* and *SZHFE* the Tribunal was not bound under s.91R(3) of the Act to disregard that conduct. There is therefore no breach of the principles set out by the Full Court in *SZJGV* in this regard.

98. Further, the Tribunal's decision record needs to be read as a whole and the meaning of the various parts of its analysis needs to be understood in context and holistically. In applying the principles which the Full Court had previously set out to the circumstances of *SZJGV* (at [27]) the Court said: "… having regard to the tribunal's reasons as a whole we think it more likely than not …".

99. In this regard, the Tribunal's analysis reveals that once it had addressed as finding plausible the claims relating to the applicant's daughter that she had been suffering from depression (CB 465.8), the Tribunal embarked on an analysis, in chronological order, of the claims made to it. The Tribunal dealt (CB 466) with the plausibility of the applicant husband's account in relation to his activities in China, and ultimately concluded (at CB 467.3) that it was implausible that he was a patron or ally of Falun Gong while in China.

100. The Tribunal then set out a number of factors which it said contributed to its conclusion that the applicants had not been truthful about key aspects of the account (CB 467.4). In the paragraph preceding the impugned paragraph at CB 467.5, the Tribunal squarely addressed the issue of the timing of the making of the application for protection visas.

101. The Tribunal noted evidence provided by the applicant husband that by January 2002 he had become aware of his wife having been detained by security authorities in China, that the applicant wife arrived in Australia on 23 February 2002 claiming that she had been detained and seriously ill-treated by the authorities, and that her bank account was closed and the printing business had been closed down, but it was not

until some time later in June 2002 that they lodged their "respective application for a protection visa and that either of them expressed any fears to the Australian authorities about their safety in China". The Tribunal rejected the applicants' explanations for this delay, and found that this delay was not consistent with either of them fearing harm in China for reasons relating to Falun Gong at that time. (That is, at the time of the making of the protection visa applications.)

102. When read in context, and sequentially, therefore, the Tribunal in the impugned paragraph continues its focus on the applicants' delay. That is, even further, that once the application was lodged, no mention was initially made of significant matters subsequently raised. In the last paragraph of CB 467, the Tribunal dealt with one of those subsequent significant claims (the sending of Falun Gong materials to China), and rejected that it had ever occurred. The Tribunal then dealt (at CB 468) with the plausibility of other aspects of the account, and then dealt (at CB 469.6) with the other claimed conduct in Australia, namely the claimed Falun Gong practice, which it accepted had occurred. But ultimately disregarded pursuant to s.91R(3).

103. In my view, what the Tribunal set out at CB 467.8 with the reference to the applicants' claimed conduct in Australia, was part of the process of setting out the relevant factors to enable it to make the primary finding of fact relating to the applicants' claims, and was plainly focused on the finding that the applicants had delayed making their protection visa application, and raising significant claims, rather than having regard to those claims themselves (claims which clearly included conduct in Australia subsequently disregarded).

104. I agree with Ms Clegg that the Tribunal's adverse view of this delay does not amount to conduct which could be said to attract or engage s.91R(3) which requires the Tribunal to consider whether conduct was engaged in for the purposes of strengthening the claim to be a refugee.

105. I should note that the Tribunal's actual words at the end of the impugned paragraph: "his failure to do so cast serious doubt on his claim that he has been doing these things", did give me pause for further consideration. There could be some suggestion given these words that the focus by the Tribunal may indeed have been on the conduct of the practice of Falun Gong (and sending of documents to

China), and not delay, given the reference to "doubt" that he had "been doing these things".

106. However, the use of the word "doubt", when read fairly and on balance, in my view means that the Tribunal was not making a primary finding of fact in this regard. I draw two things essentially from the Tribunal's analysis beginning at CB 467.5.

107. First, the delay in making the protection visa applications and the failure to mention initially significant claims, contributes to the conclusion that the applicants have not been truthful about key aspects of their account. Second, that it raised doubts about the veracity of these claims made by the applicants.

108. In the case of the claim to have sent Falun Gong materials to China, the "doubts" were subsequently resolved against the applicants and were found not to be plausible, and were found not to have occurred.

109. The "doubts" about the claimed Falun Gong practice in Australia were, on the other hand, resolved in the positive, that is, the Tribunal accepted the evidence of the applicants' two witnesses that such practice had occurred. But ultimately it could not be satisfied that it was conduct engaged in other than for the purposes of strengthening the refugee claims and was disregarded pursuant to s.91R(3).

110. In my view, the last part of the last sentence of the impugned paragraph was a reference to initial doubts held by the Tribunal (following its finding that delay was one factor contributing to its conclusion that the applicants had not been truthful). But significantly does not amount to a primary finding of fact having been made at that point. The Full Court accepted the first respondent's submissions in *SZJGV* (see [22] and [19]-[20]) that s.91R(3) precludes the findings of fact concerning an applicant's conduct in Australia in determining whether the applicant has a well-founded fear of persecution by reason of that conduct, unless the proviso in (b) is engaged – "but not before the decision-maker has made primary findings of fact relating to the applicants' claims".

111. What occurs in my view at the impugned paragraph at CB 467, is the Tribunal making a primary finding of fact that the applicants delayed in

making protection visa applications and bringing forward significant claims (not conduct engaging s.91R(3)), and expressing doubts about some aspects of these claims, and separately expressing doubt about aspects of these claims, on the way to, but not before, subsequently making the relevant primary findings of fact relating to these claims. That is, accepting that one had occurred, and not accepting that the other had occurred.

112. In all, therefore, I agree with the first respondent's submissions that there has been no breach of s.91R(3) of the Act.

Conclusion

113. To succeed before the Court in their application, the applicants would need to establish jurisdictional error on the part of the Tribunal. I cannot discern any such error, for the reasons set out above, on the grounds or complaints advanced by the applicants. Nor otherwise. For this reason the application is dismissed.

I certify that the preceding !Syntax Error, **and** !Syntax Error, **(113) paragraphs are a true copy of the reasons for judgment of Nicholls FM**

Associate: A Douglas-Baker

Date: 28 August 2008

CORRECTIONS

1. Paragraph 29, sub-paragraph 1 – delete “writers” insert “Rightists”.