FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNAB v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 152*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – concession by the Minister that the Tribunal applied the wrong test for the purposes of s.91R(3) of the *Migration Act 1958* (Cth) – that test is a sole purpose test not a dominant purpose test.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.91R(3), 425

Guo v Minister for Immigration (1997) 191 CLR 559
Minister for Immigration v SZJGV [2008] FCAFC 105
Minister for Immigration v SZJGV [2009] HCATrans 103
Somaghi v Minister for Immigration (1991) 31 FCR 100
SZJZN v Minister for Immigration [2008] FCA 519

Applicant:	SZNAB
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3173 of 2008
Judgment of:	Driver FM
Hearing date:	3 June 2009
Delivered at:	Sydney
Delivered on:	3 June 2009

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents: Ms B Anniwell
Australian Government Solicitor

ORDERS

(1) A writ of certiorari shall issue, quashing the decision of the Refugee Review Tribunal signed on 21 October 2008 and handed down on 4 November 2008.

(2) A writ of mandamus shall issue requiring the Refugee Review Tribunal to redetermine the review application before it according to law.

(3) The first respondent shall pay the applicant's costs and disbursements of and incidental to the application in the sum of $374, representing the filing fee paid by the applicant.

(4) The first respondent shall pay to the Court the setting down fee of $447 payable by the applicant but unpaid.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3173 of 2008

SZNAB
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT
(revised from transcript)

1. I have before me an application to review a decision of the Refugee Review Tribunal ("the Tribunal) signed on 21 October 2008 and handed down on 4 November 2008. The Tribunal affirmed a decision of a delegate of the Minister not to grant the application a protection visa. The applicant is from China and made claims of persecution based upon his asserted Christian faith. His claims extended to his attendance at Church activities in Australia on a regular basis.

2. The Tribunal was, therefore, called upon to consider whether it must disregard the applicant's conduct in Australia, pursuant to s.91R(3) of the *Migration Act 1958* (Cth) ("the Migration Act"). In paragraphs 75 to 78 of its decision, the Tribunal dealt with that issue and concluded that it must disregard the applicant's conduct in attending church activities in Australia because, in the Tribunal's view, the main or

dominant purpose of those activities was to strengthen the applicant's protection visa claims[1]:

> *The Tribunal has considered the evidence of the applicant's Christian activities in Australia.*
>
> *The Tribunal accepts the applicant has attended church activities in Australia on a regular basis. The Tribunal finds that the applicant has demonstrated knowledge of important aspects of Christianity at a simple level. He was able to tell the Tribunal at a simple level about matters such as the purpose of Jesus' birth on earth, the meaning of baptism and communion, and the meaning of Jesus' crucifixion. He was able to recite the Lords Prayer. The Tribunal considers that although the applicant may have been introduced to some of these aspects of Christianity during his stay in Korea, he has essentially acquired the knowledge during his stay in Australia. However given the adverse findings above with respect to the applicant's credibility, the Tribunal does not accept that the applicant has acquired the knowledge or participated in church activities because he is a genuine or committed Christian. The Tribunal concludes that the* ***main purpose*** *of the applicant's attendance at church services and gaining knowledge of Christianity is to strengthen his refugee claims.*
>
> *In considering conduct in Australia in relation to an applicant's claims to fear persecution, regard must be had to the provisions of s.91R(3) of the Migration Act 1958 (the Act). Section 91R(3) provides that in determining whether a person has a well-founded fear of being persecuted for one or more of the Convention reasons, any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the Minister (or the Tribunal on review) that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee.*
>
> *The Tribunal has found that the applicant has attended church services in Australia regularly and has gained some knowledge of Christianity. However the Tribunal has found that he has done so not because he is a genuine or committed Christian. The Tribunal has found that the* ***dominant purpose*** *in doing so is to strengthen his refugee claims. The Tribunal accordingly disregards the applicant's conduct in Australia in its determination of whether the applicant has a well-founded fear of*

[1] court book (CB) 120

being persecuted for one or more Convention reasons. (emphasis added)

3. The applicant relies upon a show cause application filed on 2 December 2008. In that application, he asserts jurisdictional error in the incorrect application of s.91R(3). The matter came before me for a show cause hearing on 26 February 2009. At that time, my view was that the Tribunal did not err in relation to its application of s.91R(3). In relation to the application of the dominant purpose test, I was guided by the decision of his Honour Madgwick J in *SZJZN v Minister for Immigration* [2008] FCA 519 at [35]:

> *In my opinion the problem referred to can be adequately overcome, and the real mischief that concerned the legislation's framers met, by interpreting "the purpose" as meaning "the dominant purpose". The Second Reading speech gives a sharper account of the mischief the subsection was aimed at than the Explanatory Memorandum and it supports the approach I favour. The context generally speaks against giving the statute an over-literal interpretation. There is some textual, as well as contextual, support in the statute for such an approach. The statutory test is whether the person concerned "engaged in the conduct otherwise than for* the *purpose of strengthening" his or her claim to refugee status. The use of the word "the" rather than "a" suggests that there will be a single purpose that can be regarded as "the" purpose. In a real world where behaviour commonly has multiple motivations and purposes, to fulfil the statutory notion it would be sufficient to read "purpose" in the way I propose (but also in no lesser way). That is obviously not to say, as the appellant would have it, that wherever there are multiple purposes, no matter how strong the purpose of simply aiding one's case, s 91R(3) will not apply. I therefore think that the draconian construction favoured in the court below was erroneous.*

4. I did, however, make a show cause order pursuant to rule 44.12(1)(b) of the *Federal Magistrates Court Rules 2001* (Cth) in relation to the question of whether the Tribunal breached s.425 of the Migration Act by failing to ensure at the hearing conducted by the Tribunal, that the applicant understood that an important issue for the review was the applicant's conduct in Australia and his motivation for that conduct.

5. The Minister has responded to that order in supplementary submissions filed on 20 May 2009. It is, however, unnecessary to deal with those

submissions. It is necessary to re-visit the view I took at the show cause hearing about the Tribunal's application of the dominant purpose test in relation to s.91R(3). That issue is currently under consideration in the High Court in the appeal from the Full Federal Court decision in the *Minister for Immigration v SZJGV* [2008] FCAFC 105. On 20 May 2009, in argument on the appeal, the Solicitor-General for the Commonwealth submitted that the observations of Madgwick J in *SZJZN* about the dominant purpose test were *dicta* and were also incorrect. The Solicitor-General pointed out that his Honour's reasoning in *SZJZN* was inconsistent with the decision of the Full Federal Court in *Somaghi v Minister for Immigration* (1991) 31 FCR 100 where the Full Federal Court held that actions taken outside the country of nationality or, in the case of a person not having nationality outside the country of former habitual residence, which were undertaken for the **sole purpose** of creating a pretext of invoking a claim to well founded fear of persecution should not be considered as supporting an application for refugee status[2].

6. The Minister's position is that s. 91R(3) is a statutory reinforcement of the fourth element of the test under the Refugees Convention to determine whether a person is a refugee. That fourth element is that an asserted fear of persecution must be well founded. A fear will not be well-founded if it is not genuine[3].

7. Consistently with that view, the Minister is willing to concede jurisdictional error by the Tribunal in this case in its application of a dominant purpose test rather than the sole purpose test established by *Somaghi*. I accept that that course is open to the Minister and that is open to me to accept the Minister's concession. That is because I accept the authority of the Full Federal Court decision in *Somaghi* in respect of the sole purpose test and further accept that the observations of Madgwick J in *SZJZN* were *dicta* not binding upon me.

8. It follows that pending the outcome of the High Court appeal in *SZJGV*, the Tribunal and this Court should proceed on the basis that s.91R(3) calls for the application of a sole purpose rather than a dominant purpose test in considering the motivation of an applicant in

[2] *Minister for Immigration v SZJGV* [2009] HCATrans 103
[3] *Guo v Minister for Immigration* (1997) 191 CLR 559 at 570-572

undertaking conduct in Australia. I do not consider that the concession has any immediate implications for other aspects of the interpretation of s.91R(3).

9. In light of the Minister's concession, I will make order that a writ of certiorari shall issue, quashing the decision of the Refugee Review Tribunal signed on 21 October 2008 and handed down on 4 November 2008. A writ of mandamus shall issue requiring the Refugee Review Tribunal to redetermine the review application before it according to law.

10. The first respondent shall pay the applicant's costs and disbursements of and incidental to the application in the sum of $374, representing the filing fee paid by the applicant. The first respondent shall pay to the Court the setting down fee of $447 payable by the applicant but unpaid.

I certify that the preceding ten (10) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 4 June 2009