FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNLS v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 908*

MIGRATION – Review of decision of Refugee Review Tribunal – whether Tribunal decision revealed irrationality, illogicality and/or unreasonableness – whether the Tribunal failed to comply with obligations under s.424A(1) – whether Tribunal failed to raise with applicant issues that did not "naturally arise" from delegate's decision – whether Tribunal considered conduct that it had said it would disregard pursuant to 91R(3) – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), ss.91R(3), 424, 424A, 424AA, 424B, 425

SZNAV v Minister for Immigration & Anor [2009] FMCA 693
SZNPQ v Minister for Immigration & Anor [2009] FMCA 767
Minister for Immigration v SZKTI [2009] HCA 30
Minister for Immigration v SZLFX [2009] HCA 31
Minister for Immigration & Citizenship v SZNAV [2009] FCAC 109
SZJGV v Minister for Immigration & Citizenship [2008] FCAFC 105
Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425
W148/00A v Minister for Immigration & Multicultural Affairs (2001) 185 ALR 703
SZCOS v *Minister for Immigration & Citizenship* [2008] 570
SZMDS v Minister for Immigration & Citizenship [2009] FCA 210
Minister for Immigration & Citizenship v *SZMDS* [2009] HCATrans 183 (31 July 2009)
SZBYR v *Minister for Immigration & Citizenship* [2007] HCA 26
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471
SZLWI v *Minister for Immigration & Citizenship* [2008] 171 FCR 134
SZMCD v Minister for Immigration and Citizenship [2009] FCAFC 46
Minister for Immigration & Citizenship v Applicant A125 of 2003 [2007] FCAFC 162

Applicant:	SZNLS
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL

File Number:	SYG 877 of 2009
Judgment of:	Nicholls FM
Hearing date:	25 August 2009
Date of Last Submission:	25 August 2009
Delivered at:	Sydney
Delivered on:	15 September 2009

REPRESENTATION

Appearing for the Applicant:	In person
Solicitors for the Applicant:	Nil
Appearing for the Respondents:	Mr J Pinder
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application made on 16 April 2009 is dismissed.

(2) The applicant pay the first respondent's costs set in the amount of $5000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 877 of 2009

SZNLS
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made on 16 April 2009 under the *Migration Act 1958* (Cth) ("the Act"), seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") made on 19 March 2009, which affirmed the decision of a delegate of the first respondent to refuse a protection visa to the applicant.

Background

2. The applicant is a citizen of the People's Republic of China ("China") who arrived in Australia on 27 July 2008 and applied for a protection visa on 22 August 2008 (the application is reproduced in the Court Book – "CB" - CB 1 to CB 56). The application included a statutory declaration made by the applicant setting out the factual basis for his claim to fear persecutory harm if he were to return to China (CB 30 to CB 33).

Claims to Protection

3. The applicant's claims to protection were contained in a statement attached to his protection visa application. The applicant was assisted by a migration agent in his application for a protection visa, Mr Harry Huang of "Priscilla International" (see CB 26 to CB 27).

4. The applicant claimed to fear harm from the Chinese authorities arising from his involvement with a Christian group, known variously as the "Local Church", the "Local Recovery Church", or the "Shouter Church" ("the Local Church"), which was regarded as "illegal" and "anti-government" by the Public Security Bureau ("PSB"). Initially, he converted only to have "more chances to stay together" with his "girl-friend", who was a Christian. But he was eventually "greatly changed" by those who were involved with the Local Church.

5. He worked to "establish and develop organisation and activities of the Local Church" and "transported" copies of the Local Church's Bible and other religious materials. His girlfriend and her aunt organised gatherings of members.

6. He claimed that he, along with his girlfriend and other church members, were arrested by the PSB. He was detained, interrogated, tortured, mistreated by other detainees, and was only released once his girlfriend's aunt paid a bribe. His girlfriend committed suicide while in detention.

7. Upon release, he organised a protest and distributed material against the government's persecution. When he found out that he was to be arrested, he fled to various places in China, before coming to Australia on a "fake" passport. He claimed to be on a "black list". Since his departure, his family and friends have been questioned and church members, including his deceased girlfriend's aunt, have been arrested.

The Delegate

8. On 29 October 2008 the delegate of the respondent Minister refused the application for a protection visa (see CB 77 to CB 94). The delegate rejected the applicant's claims to be a Christian, noting instances where the applicant demonstrated an inadequate level of knowledge of the

religion, his inability to describe his own baptism, and an incorrect answer relating to the banning of the Local Church.

The Tribunal

9. The applicant applied for review by the Tribunal on 1 December 2008 (CB 59 to CB 62). He was represented by the same migration agents. He accepted the Tribunal's invitation to appear at a hearing before it, and attended a hearing on 28 January 2008. He was assisted by a Mandarin interpreter. His migration agent did not attend the hearing (CB 114 to CB 115).

10. The Tribunal's account of what occurred at the hearing is set out in its decision record ([33] at CB 133 to [73] at CB 138).

11. Ultimately, the Tribunal rejected the applicant's claim to have been a member of the Local Church in China or an "associated activist" (at [89] at CB 143), and the claims flowing from this ([90] to [92] at CB 143). It found that he was not a "witness of truth", and that he had "fabricated" his claims ([89] at CB 143).

12. Its findings were based on:

    1) The "rehearsed" way in which the applicant expressed his knowledge of the Local Church ([84] at CB 141).

    2) Inconsistencies in his account of his baptism (see [85] at CB 141).

    3) His "dismissiveness", and the vagueness of his answers to the Tribunal's relevant questions, as compared to his claim to have been highly committed to the Local Church in China ([86] at CB 141).

    4) The applicant's inability to elaborate on his claims as put in his protection visa application ([87] at CB 141 to CB 143). The Tribunal gave comprehensive examples of these instances.

13. While accepting that he had had some involvement in the Local Church while in Australia, the Tribunal was not satisfied that this was done other than for the reason of strengthening his claims to protection. It

therefore disregarded this conduct pursuant to s.91R(3) ([82] at CB 140).

14. In all, therefore, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason. It affirmed the delegate's decision to refuse the applicant a protection visa.

Application before the Court

15. The application before the Court contains grounds in the following terms:

> *"1. The Tribunal in reaching its decision reveals irrationality, illogicality and/or unreasonableness.*
>
> *Particulars*
>
> *2. The Tribunal failed to comply with its obligations under s.424A(1) of the Act.*
>
> *Particulars*
>
> *3. The Tribunal committed jurisdictional error of law by failing to comply with its obligations under section 425 of the Migration Act so as to give the applicant an opportunity to 'give evidence and present arguments arising in relation to the decision under review'."*

Hearing before the Court

16. The applicant appeared in person. At the hearing before the Court he was assisted by an interpreter in the Mandarin language. Mr J Pinder appeared for the first respondent.

17. The applicant read from a prepared statement before the Court. He confirmed the grounds of his application. He submitted that his application to the Court had been prepared with the assistance of a friend from the congregation at his church who, although not a lawyer, understood the law. The applicant also confirmed that he had received the Minister's written submissions.

18. In particular, the applicant submitted, in support of ground one of the application, that the Tribunal acknowledged that he had a "reasonable

knowledge of the Local Church…" (see [84] at CB 141). Therefore, it was illogical of the Tribunal to subsequently say that his evidence was "rehearsed", because knowledge of the Local Church can only be "learned" by oneself and not based on the experience of others. The applicant also complained that the Minister's submissions were themselves unreasonable to say that, even if in the event that the Tribunal's decision was illogical, that it did not amount to jurisdictional error (see the Minister's submissions at paragraph 19).

19. In relation to ground two, the applicant complained that the Tribunal "violated" s.424A of the Act. He submitted that the Tribunal found his various accounts to be inconsistent. I understood this to be with reference to the applicant's accounts of his baptism (see [85] of the Tribunal's decision at CB 141), and that according to s.424A, the Tribunal should have notified him of this in writing. But it did not do so.

20. The applicant also submitted that the respondent's submissions assert that, because he was given the information "orally", the Tribunal did not need to "abide" with s.424A. The applicant submitted that this was wrong, because if s.424AA applied, the Tribunal should have told him that the information was essential and should have given him a choice as to whether he wanted more time to consider.

21. In relation to ground three, which asserts a breach of s.425 of the Act, the applicant referred to paragraph 86 of the Tribunal's decision (CB 141). He complained that the Tribunal reported that at the hearing the applicant said that he did not disclose his religion to his brother. The applicant submitted that his brother was not a Christian, and that was the reason that he was unable to disclose his Christianity to him. The applicant also took issue with the Tribunal's "statement" at that paragraph that his responses at the hearing were "casual". He submitted that how could he not be "casual", when he has no friends here, no brother that he can talk candidly to, or indeed, anyone else.

22. During the course of the hearing before the Court, Mr Pinder also fairly raised the issue arising from a recent judgment per Raphael FM in *SZNAV v Minister for Immigration & Anor* [2009] FMCA 693 ("*SZNAV*") and noted that, as in that case, the Tribunal in the current

case sent to the applicant an "acknowledgement letter" in the "same" terms as in *SZNAV* (CB 104 to CB 105).

23. For the reasons set out in *SZNPQ v Minister for Immigration & Anor* [2009] FMCA 767, a matter involving a letter in "identical terms" as the one in *SZNAV*, I would not have followed the reasoning set out in *SZNAV* and found that the "acknowledgement letter" was an invitation for "information" pursuant to s.424, and that it breached the requirements of s.424B in that it did not provide the prescribed time for the giving of that "information".

24. In any event, the matter is now beyond doubt given the High Court's judgement handed down subsequent to the hearing in this matter in *Minister for Immigration v SZKTI* [2009] HCA 30 and *Minister for Immigration v SZLFX* [2009] HCA 31, as well as the Full Federal Court's judgment in *Minister for Immigration & Citizenship v SZNAV* [2009] FCAC 109 also handed down subsequently.

25. Also, during the course of the hearing, I raised with Mr Pinder whether the Tribunal's finding, in relation to the application of s.91R(3), that it disregarded "conduct" in Australia, was nonetheless inconsistent with what was said by the Full Court in *SZJGV v Minister for Immigration & Citizenship* [2008] FCAFC 105 ("*SZJGV*"), in that the Tribunal may have subsequently taken such conduct into account (see with reference to the Tribunal's decision record at [82] and [86]). This issue is addressed below.

Consideration

Ground One

26. By way of ground one of the application, the applicant complains that the Tribunal's decision was irrational, illogical and unreasonable, in that it found that the applicant had a reasonable knowledge of the Local Church, its doctrine, practices and history, and yet said that his evidence was rehearsed. The applicant described this as an unwarranted assumption on the part of the Tribunal.

27. I agree with submissions by Mr Pinder that, on any plain reading of the Tribunal's decision, no illogicality, irrationality or unreasonableness can be found.

28. What the Tribunal reasoned was that the applicant presented in oral evidence as having a reasonable knowledge of the Local Church but, for reasons which it set out, the Tribunal found that this knowledge, as presented, was not derived from personal experience in engaging in relevant activities in China. But that the knowledge was found and learnt after the time of the claimed experiences themselves and plainly, in context, for the purpose of the making of the application for a protection visa.

29. In my view, it was not inconsistent, illogical, irrational or unreasonable for the Tribunal to evaluate the applicant's evidence as exhibiting a reasonable knowledge, but for other reasons which were open to it on the material before it, find that such knowledge was learnt for the purposes of the application, and not derived from past experiences in China as claimed.

30. It must be remembered that the Tribunal is the relevant finder of fact in conducting the review of the delegate's decision. The Tribunal's finding in this regard was not capricious or arbitrary. The Tribunal's account of what occurred at the hearing remains unchallenged by any other evidence brought before this Court by the applicant and, in particular, any transcript of the hearing. On his own submission, the applicant has had the benefit of assistance from a friend who has some knowledge of the law. At the first Court date in this matter, the applicant was given the opportunity to subsequently put on evidence by way of transcript in support of what he may wish to have said had occurred at the hearing with the Tribunal. He has not done so.

31. What remains, therefore, as relevant evidence before the Court, is the Tribunal's own account of what it said occurred. This account reveals that it was open to the Tribunal to find that the applicant's evidence appeared rehearsed, given its assessment of the applicant's demeanour, the content of what he said, and the manner of its delivery. There is no evidence from the applicant before the Court to challenge the basis of these findings by the Tribunal. In particular, in the face of the Tribunal's own report of what it said had occurred at the hearing, the

Tribunal is entitled to take such matters into account (*Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at [34]; *W148/00A v Minister for Immigration & Multicultural Affairs* (2001) 185 ALR 703 at 64; *SZCOS* v *Minister for Immigration & Citizenship* [2008] 570 at [18]).

32. Further, in the current case it should be noted that the Tribunal did not merely rely on the applicant's mode of delivery of his evidence, that is, his demeanour, but also relied on the content of the evidence, and indeed, other concerns in relation to his evidence. These concerns are set out at paragraphs 85 to 87 (CB 141 to CB 143). In particular, I note the inconsistent accounts given by the applicant in relation to his baptism, and the applicant's inability to give meaning, peripheral information, or further explanation to the narrative set out in his written protection visa application. In its decision record the Tribunal set out nine examples or instances that it said were relevant and noteworthy (CB 142 to CB 143). The applicant's evidence in this regard was assessed as being "uncertain and/or improvised" when asked for more details (CB 142).

33. In all, therefore, based on the material before the Court, the applicant's complaint that the Tribunal's decision revealed irrationality, illogicality and/or unreasonableness is, factually, not made out.

34. Before the Court the applicant also complained about the Minister's submission in the alternative, that illogicality on its own cannot form the basis for jurisdictional error. Given the finding above, it is not necessary to consider this matter. I note only that in relation to the judgement in *SZMDS v Minister for Immigration & Citizenship* [2009] FCA 210 ("*SZMDS*"), which appears to establish a competing position from the authorities relied by the Minister (at [19] of written submissions), that the High Court has granted special leave to the Minister to appeal against the judgment (see *Minister for Immigration & Citizenship* v *SZMDS* [2009] HCATrans 183 (31 July 2009) per Hayne and Heydon JJ).

Ground Two

35. In ground two, the applicant complains that the Tribunal failed to comply with its obligations pursuant to s.424(1) of Act. In the application to the Court, reference is made to paragraph 84 of the Tribunal's decision. But having regard to the actual quote given in the particulars, the applicant seeks to complain about what is set out by the Tribunal at paragraph 85:

> *"As put to the applicant pursuant to section 424AA of the Act, he gave confused and uncertain evidence about the baptism at the Department interview..."*

36. Before the Court, the applicant's complaint (as derived also from what is set out in ground two of the application) is that, while the Tribunal may orally give to the applicant information relating to his oral evidence at the departmental interview, there is no evidence before the Court that the Tribunal made it clear to the applicant as to the particulars of the information, and that the information the Tribunal considered would be the reason, or part of the reason, for affirming the decision under review.

37. Further, that the Tribunal failed to ensure that the applicant understood the relevance of the information to the review, and did not give him an invitation to comment or respond to the information. In these circumstances, the applicant asserts that the Tribunal should have invited him in writing, pursuant to s.424A(1), to comment on this information.

38. First, I agree with Mr Pinder's submission that inconsistencies in an applicant's various accounts is not information for the purposes of s.424A(1) (see *SZBYR* v *Minister for Immigration & Citizenship* [2007] HCA 26 at [18] ("*SZBYR*"); and the reference to *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 cited therein). In *SZBYR* the circumstances relevantly before the Court were inconsistencies found by the Tribunal in what the applicants had said in a statutory declaration given to the Minister's delegate, and what they had subsequently said to the Tribunal at the hearing before it.

39. To the extent, therefore, that the Tribunal relied on inconsistencies in the applicant's various accounts, s.424A is not engaged. In this sense, no s.424A obligation arose (see *SZLWI* v *Minister for Immigration & Citizenship* [2008] 171 FCR 134 at [19]; and *SZMCD v Minister for Immigration and Citizenship* [2009] FCAFC 46 ("*SZMCD*") per Moore, Tracey and Foster JJ).

40. But even if s.424A was enlivened, then the Tribunal's exercise of the avenue available to it pursuant to s.424AA means that if the Tribunal properly exercised s.424AA, the provisions of s.424A(2A) would serve to relieve the Tribunal of any obligation contained in s.424A(1) (*SZMCD* at [2] per Moore J). Nor was it in error of the Tribunal to say that it used s.424AA even if it was not obliged to employ that section.

41. The Tribunal's account of what occurred at the hearings also stands in answer to the applicant's complaint as it is said to arise from (more properly) paragraph 85 of its decision record. At paragraphs 70 and 71 the Tribunal said:

> *"70. At the end of the hearing, the Tribunal alerted the applicant that it had extensive concerns about his evidence. He appeared to have been evasive on numerous points, and his evidence beyond the claims set out in his protection visa application contained gaps and anomalies. For instance, he had been notably uncertain about JC's father and how JC's suicide as a Local Church member might have led back to him. The Tribunal noted the sharp contrast between the applicant's claimed commitment and courage in China, yet his often evasive answers about his travel to Australia and his interest in sharing his faith here.*
>
> *71. It gave him particulars of adverse information about his claimed baptism, namely that he had given inconsistent information in his protection visa application, to the delegate and now to the Tribunal about where it had occurred and the number of people who were baptised. It alerted him that this - together with other concerns about his evidence - could lead the Tribunal to infer that some or all of his claims were untruthful. The consequence could be that the Tribunal decides that he is not a refugee and Australia does not have protection obligations towards him. The applicant - after being alerted to his options to comment or respond on the spot, or request additional time - gave an immediate response"*.

42. In the absence of any evidence by the applicant, by way of transcript for example, as to what he says may have occurred at the hearing with Tribunal, the Tribunal's account stands unchallenged. It reveals, on any plain reading, that the applicant's complaints that the Tribunal failed to give the particulars of the relevant information, that it failed to ensure that he understood why the information was relevant to the review, and that it failed to give him the option to comment, either then or later, is clearly not made out.

43. In all, therefore, ground two does not succeed.

Ground Three

44. In ground three, the applicant complains that the Tribunal failed to raise with him issues arising on the review that did not "naturally arise" from the delegate's decision. The applicant does not refer to *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR ("*SZBEL*") in his application, and nor did he make any such reference in his submissions to the Court. It is, nonetheless, clear that the applicant seeks to rely on what the High Court said in *SZBEL* about procedural fairness obligations in the context of s.425 of the Act.

45. The applicant refers to paragraph 86 of the Tribunal's decision record, which is in the following terms:

> *"86. Third, there is a large gulf between the applicant's account of his high degree of commitment - religious and political - in China, and his casual responses to the Tribunal's enquiries about whether he sustained such interest in Australia. For instance, the applicant told the Tribunal that he has a brother living in Australia, but that he has not disclosed his religion to him because they had infrequent contact and also because he did not wish to cause him problems. The applicant did not clarify what these problems might be. He was similarly dismissive of the Tribunal's enquiries about whether Local Church members in Australia knew of his problems and supported his application; whether the female flatmate who was coincidentally a Local Church member and helped him locate the church had been prepared to give evidence; whether anyone else knew of his faith; and whether he had made any enquiries (for instance, on the internet) about how he might help his brethren in China. The*

> *applicant suggested, vaguely, that this commitment might come about if and when he were granted permanent residency. The Tribunal was left with a strong impression, from the applicant's evidence at the hearing, that he has no genuine interest in the Local Church at all".*

46. In *SZBEL* the High Court found that the purpose of s.425 is to invite an applicant to a hearing to give evidence in relation to the issues arising in relation to the review. The Tribunal is obliged to raise with the applicant issues that are determinative or dispositive of the review. The starting point as to the identification of such issues is with the delegate's decision. The High Court held that the applicant is entitled to assume that what was dispositive before the delegate is determinative before the Tribunal (*SZBEL* at [35]). If the Tribunal relies on other issues, then it is obliged to raise those issues with the applicant at the hearing.

47. The High Court also said (at [47]):

> *"There may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor."*

48. Any plain reading of the Tribunal's decision record reveals that the issue dispositive of this review was the Tribunal's rejection (as being a fabrication) of the applicant's claimed account of what he said had occurred in China in relation to his being an adherent of the Local Church, his associated activities, and his claims of religious and political persecution that followed.

49. As already stated, the applicant has not put before the Court any evidence to challenge the Tribunal's account of what it said occurred at the hearing. This account reveals that the Tribunal gave the applicant the opportunity to set out his account of what he said that factually, and relevantly, had occurred in China. It is clear that throughout the hearing

the Tribunal sufficiently indicated to the applicant the concerns that it had with his evidence (see, for example, [44], [45], [52], [58], [59], [64] and [65]). But, ultimately, the Tribunal squarely put to the applicant that it had "extensive concerns about his evidence" ([70] extracted above). In my view, this was sufficient to alert the applicant to the Tribunal's view that his entire account of what he said had occurred in China was at issue.

50. *SZBEL* does not require the Tribunal to provide the applicant with a full running commentary on the evidence given by him, or specific concerns that the Tribunal may have with particular details of the applicant's case (see *SZBEL* at [48]).

51. Nor is it required to identify the significance of the questions that it puts to an applicant, or even "the ultimate matter or issue to which those questions go" (*Minister for Immigration & Citizenship v Applicant A125 of 2003* [2007] FCAFC 162 per Emmett, Weinberg and Lander JJ at [88]).

52. The matters complained of at paragraph 86 of the Tribunal's decision were, in any event, the subject of discussion with the Tribunal at the hearing. For example, the reference to the applicant's brother living in Australia (see [39]), whether Local Church members in Australia knew of his problems, and whether his female flatmate, who was also a Local Church member, had been prepared to give evidence on his behalf (see [63] and [64]).

53. In all, therefore, the applicant's third ground does not succeed.

Further Consideration

54. As stated above, I did raise with Mr Pinder whether what is set out at paragraph 86 meant that the Tribunal had regard to conduct in Australia, which it had previously said it would disregard pursuant to s.91R(3) of the Act.

55. In *SZJGV* the Full Federal Court (per Spender, Edmonds and Tracey JJ) set out direction as to how the Tribunal is to approach s.91R(3) What I understand that can be drawn relevantly from *SZJGV* at paragraph 22, is:

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

b) 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.

c) If the Tribunal finds that the conduct has not 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.

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

e) 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*).

f) 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".

g) 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.

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

56. At paragraph 82, the Tribunal accepted that the applicant had attended the Local Church in Australia and associated study groups on a regular basis. These were factual findings made by the Tribunal as to this particular conduct in Australia. The Tribunal, however, determined that it could not be satisfied that the applicant was motivated to engage in this conduct other than for the purpose of strengthening his refugee

claims, and therefore disregarded that conduct pursuant to s.91R(3) of the Act.

57. Mr Pinder submitted that a plain reading of paragraph 86 of the Tribunal's decision record reveals that, firstly, the first sentence of paragraph 86 is not about the conduct in Australia which the Tribunal found had occurred, but rather the applicant's evidence about this conduct given at the hearing.

58. Secondly, that in any event, what the Tribunal relied on at paragraph 86 was not the applicant's conduct in attending church activities in Australia, but rather the applicant's relationship with his brother in Australia and his relationship with others in Australia, including Local Church members and his female flatmate, and what he had told them.

59. I agree with submissions by Mr Pinder that *SZJGV* does not stand for the proposition that, once the Tribunal disregards one aspect of an applicant's conduct in Australia, then it needs to disregard all of the applicant's separate and different conduct in Australia.

60. It is true that, even in light of the guidance provided by *SZJGV*, s.91R(3) does still present a Tribunal with a number of practical problems. One is, as in this case, how to steer a clear line between conduct which has been accepted has occurred and said to be disregarded on the one hand, and what an applicant says about his relationship with others as it may indirectly relate to such conduct. That is, in relation to his brother, why he did not tell his brother about his religion which he also practised in Australia.

61. On balance, however, and on at least a fair reading of what the Tribunal said at paragraph 86, I also accept Mr Pinder's submissions that what the Tribunal relied on there was the applicant's responses to the Tribunal's questions about his relationship with various people in Australia, and not about the conduct which it said it had accepted, namely, his attendance at church activities, and which it said it would disregard.

62. This, in my view, is to be clearly distinguished from the conduct disregarded pursuant to s.91R(3). For example, the Tribunal did not say

that it would disregard every conversation that he may have had with his flatmate.

Conclusion

63. For the applicant to succeed before the Court, there is a need to discern jurisdictional error (at least) in the Tribunal's decision. As I cannot see such error as it is said to arise from the applicant's grounds, nor otherwise, this application is therefore dismissed.

I certify that the preceding sixty-three (63) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Deputy Associate: C Jackson

Date: 15 September 2009