

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZMLD v MINISTER FOR IMMIGRATION & ANOR* [2008] FMCA 1606

MIGRATION – Visa – Protection (Class XA) visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – citizen of China claiming well-founded fear of persecution for reason of being a Falun Gong practitioner – whether Tribunal failed to comply with *Migration Act 1958* (Cth) s.424A – credibility – interpreter – where no transcript of hearing provided – whether Tribunal failed to comply with *Migration Act 1958* (Cth) s.91R(3) – discretion – no jurisdictional error.

*Migration Act 1958* (Cth), ss.91R, 424AA, 424A, 474

*NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 ALR 264; [2004] FCAFC 328

*SZLXU v Minister for Immigration and Citizenship* [2008] FCA 1238

*SZLQD v Minister for Immigration and Citizenship* [2008] FCA 739

*SBCC v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 129

*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323

*Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389

*SZJGV v Minister for Immigration and Citizenship* (2008) 247 ALR 451; [2008] FCAFC 105

*SZKGF v Minister for Immigration and Citizenship* [2008] FCAFC 84

*Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 195 ALR 502

*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158

*SZJSP v Minister for Immigration and Citizenship* [2007] FCA 1925

*SZJHG v Minister for Immigration & Anor* [2007] FMCA 2050

*SZMAN v Minister for Immigration & Anor* [2008] FMCA 1351

*SZJZN v Minister for Immigration and Citizenship* (2008) 101 ALD 284; [2008] FCA 519

*SZLWI v Minister for Immigration and Citizenship* [2008] FCA 1330

*SZHJC v Minister for Immigration and Multicultural Affairs* [2007] FCA 205 followed.

Applicant: SZMLD

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: REFUGEE REVIEW TRIBUNAL

File Number: SYG 1629 of 2008

Judgment of: Scarlett FM

Hearing date: 28 October 2008

Date of Last Submission: 28 October 2008

Delivered at: Sydney

Delivered on: 4 December 2008

## **REPRESENTATION**

Applicant: Appeared in person

Counsel for the Respondent: Mr Godwin

Solicitors for the Respondent: DLA Phillips Fox

## **ORDERS**

- (1) The Application is dismissed.
- (2) The Applicant is to pay the First Respondent's costs fixed in the sum of \$7,400.00.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
SYDNEY**

**SYG 1619 of 2008**

**SZMLD**  
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**  
First Respondent

**REFUGEE REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

**Application**

1. The Applicant, a citizen of the People's Republic of China, asks the Court to set aside a decision of the Refugee Review Tribunal made on 1<sup>st</sup> May 2008. The Tribunal affirmed a decision of the delegate of the Minister not to grant the Applicant a protection visa.
2. The Applicant asks the Court to remit his application to the Refugee Review Tribunal, which would involve an order in the nature of mandamus. In order to make such an order, the Court would need to make an order in the nature of certiorari, quashing the Tribunal's decision.
3. In his application, the Applicant claims that the Tribunal fell into error in two ways.

4. First, he claims that the Tribunal did not assess his application fairly and did not comply with the requirements of s.424 of the Migration Act. In his reference to having been denied an opportunity to explain matters that caused the Tribunal to refuse his application, it is clear that the Applicant is in fact claiming that the Tribunal failed to comply with the requirements of s.424A of the Act.
5. The Applicant's second ground complains that the Tribunal asked him questions about Falun Gong that were too difficult and failed to assess such things as his particular background, his level of education and the level of his understanding of Falun Gong.

## **Background**

6. The Applicant arrived in Australia on 4<sup>th</sup> July 2007. He applied for a Protection (Class XA) visa on 13<sup>th</sup> August 2007, claiming to have been arrested and detained by the police as a result of his practice of Falun Dafa, also known as Falun Gong.
7. The Department of Immigration and Citizenship invited the Applicant to attend an interview with an officer of the Department on 11<sup>th</sup> October 2007, which was later postponed to 18<sup>th</sup> October. The Applicant attended the interview.
8. A delegate of the Minister for Immigration and Citizenship refused his application for a protection visa on 8<sup>th</sup> November 2007. The delegate was not satisfied that the Applicant had demonstrated that he had a real chance of being targeted for persecution for practising Falun Gong whilst in China.
9. The delegate said:

*His periods of detention were of short duration and resulted in no charges or further punishment. After July 2005, the applicant was able to continue with his practice of Falun Gong without further periods of detention, continue with his same employment and live at the same address without being located by the authorities for any mistreatment.*

*The applicant departed China using his own valid passport as the holder of a sponsored Business visa. There is no evidence to*

*indicate the applicant had any difficulties in obtaining his passport.*<sup>1</sup>

10. The Delegate noted that the Applicant had participated in Falun Gong whilst in Sydney, but found:

*Whilst I accept that he may have participated in a role play and participated in home meetings with a Falun Gong<sup>2</sup> in Campsie, I am not satisfied that his level of activity would be of sufficient interest to the authorities back in China.*<sup>3</sup>

11. After his application for a protection visa was refused on 8<sup>th</sup> November 2007, the Applicant applied to the Refugee Review Tribunal for a review of that decision. The Tribunal received his application at its Sydney Registry on 29<sup>th</sup> November 2007. A migration agent, Billie Shi, acted for him.

### **Application for review by the Refugee Review Tribunal**

12. The Tribunal wrote to the Applicant on 19<sup>th</sup> December 2007, inviting him to attend a hearing on 31<sup>st</sup> January 2008. The Applicant did not attend the hearing. An officer of the Tribunal telephoned the Applicant's migration agent on 11<sup>th</sup> February 2008 to inquire if she had received the invitation to attend the hearing. The agent, Ms Shi, said that she had not.
13. That same day Ms Shi faxed a letter to the Tribunal, advising that no hearing invitation had been received and asked for the opportunity for the Applicant to attend a hearing. On 12<sup>th</sup> February 2008 the Tribunal advised Ms Shi that it had cancelled handing down a decision and scheduled a hearing for 11<sup>th</sup> March 2008.
14. On 10<sup>th</sup> March 2008 Ms Shi forwarded to the Tribunal a reference from a Falun Gong practitioner and some photographs of the Applicant at a Falun Gong activity.
15. The Applicant attended the hearing on 11<sup>th</sup> March and gave evidence with the assistance of an interpreter in the Mandarin language. He provided his Chinese passport to the Tribunal. He also provided some further

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<sup>1</sup> See Court Book at page 53

<sup>2</sup> *sic*

<sup>3</sup> Court Book at 54

references from Falun Gong practitioners and an article about a Falun Gong demonstration that took place in Sydney on 1<sup>st</sup> October 2007.

### **The Refugee Review Tribunal decision**

16. The Tribunal signed its decision on 22<sup>nd</sup> April 2008 and handed the decision down on 1<sup>st</sup> May 2008. The Tribunal affirmed the decision not to grant the Applicant a Protection (Class XA) visa.

17. In its Decision Record the Tribunal set out a detailed summary of the Applicant's evidence. The Tribunal put a number of concerns to the Applicant at the hearing:

*The Tribunal outlined concerns it had with his evidence and told him he could comment or respond at the hearing or in writing or the hearing could be adjourned. He stated he was willing to respond straight away.*<sup>4</sup>

18. The Tribunal then put a number of matters to the Applicant and he replied. The Tribunal noted:

*The Tribunal again asked whether he wanted to comment or respond and have further time. He stated he was sure the Tribunal would make a fair and just decision. He had not made up anything or embellished evidence.*<sup>5</sup>

19. The Tribunal set out in its Decision Record details of the independent evidence that it had consulted about Falun Gong, taken from the Falun Gong Website.

### **The Tribunal's findings and reasons**

20. In its findings and reasons, the Tribunal accepted that the Applicant holds Chinese nationality, based on his protection visa application, his Chinese passport and the absence of any contrary indications.

21. The Tribunal noted the Applicant's claim to fear persecution because he is a Falun Gong practitioner and that he had participated in Falun

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<sup>4</sup> Court Book 143

<sup>5</sup> Court Book 145

Gong events in Australia. The Tribunal did not accept the Applicant's claims, saying:

*However, after consideration of the evidence cumulatively the Tribunal does not accept that the applicant is a Falun Gong practitioner or that the applicant will be perceived as such by anyone. The Tribunal finds that he fabricated this claim to establish a basis for refugee status. The Tribunal reached this conclusion based upon the following findings.<sup>6</sup>*

22. The Tribunal then set out those findings under the following headings:

- *His account of his experiences in Australia*
- *Discussion of a significant concept from Zhuan Falun*
- *His account of his experiences in China*
- *The applicant's passport*

23. Under the heading "Summary" the Tribunal made a comprehensive rejection of the Applicant's claims to be a Falun Gong practitioner:

*The Tribunal finds that the applicant improvised claims when his evidence was tested, as discussed above. The Tribunal finds that he is not a credible witness.*

*The Tribunal rejects the applicant's claimed involvement in Falun Gong in China. The Tribunal does not accept that he has practised since 2005; was harassed at his business and had his stock destroyed because he was a Falun Gong practitioner; and was then under police surveillance. The Tribunal does not accept that he had any difficulties getting his passport and in departing China legally; or that he departed China because of a fear of harm. The Tribunal does not accept that it cost over 100,000 rmb for him to leave China. The Tribunal does not accept that the applicant's name was on a blacklist or that the Chinese authorities had any interest in him. The Tribunal concludes that the applicant did not have a genuine fear of persecution for any reason at all.*

*Given the evidence on these matters set out earlier in this decision, the Tribunal does not accept that the applicant's few activities in Australia show he developed an interest in Falun Gong in Australia.<sup>7</sup>*

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<sup>6</sup> Court Book 148

<sup>7</sup> Court Book 153

24. The Tribunal did not accept that the Applicant had attended some of the Falun Gong activities in Australia which he had claimed. It accepted that he had participated in a public event on 1<sup>st</sup> October 2007 and had taken part in public exercise sessions at Campsie NSW on two occasions.
25. The Tribunal was sceptical of the reasons for the Applicant's attendance at the exercise sessions in Campsie and said:

*The applicant's lack of credibility leads the Tribunal to conclude that his attendance at the Campsie rotunda was solely for the purposes of a photo opportunity and not because he was a Falun Gong practitioner. The Tribunal gives no weight to the statements by Yin and Chen as evidence of his participation in Falun Gong. The applicant's lack of credibility leads the Tribunal to conclude that his participation at the 1 October 2007 event was not in good faith: his attendance was solely for the purposes of a photo opportunity and not because he was a Falun Gong practitioner or had an anti-CCP political opinion.*<sup>8</sup>

26. The Tribunal concluded that this conduct by the Applicant was engaged in for the purposes of strengthening his claim to be a refugee and the Tribunal said that it disregarded this conduct as required by s.91R(3) of the Migration Act.
27. The Tribunal then proceeded to deal with what it described as the Applicant's "*Sur plus claim*".<sup>9</sup> The Tribunal considered the fact that two photographs of the Applicant at the Falun Gong event on 1<sup>st</sup> October 2007 had appeared on a Website called the Guang Min Net Information site. The Tribunal noted that the Applicant's agent had handed over to the Department at the interview on 18<sup>th</sup> October 2007 evidence of the publication of those photos.
28. The Tribunal considered whether the publication of those photographs would give rise to the Applicant being identified by Chinese authorities as having participated in the Falun Gong activity and accordingly being perceived as a Falun Gong practitioner or having an anti-CCP political opinion.
29. The conclusion that the Tribunal came to was that the publication of those photographs on the Internet would not lead to that perception by

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<sup>8</sup> Court Book 154

<sup>9</sup> *Ibid.* Clearly, this is a typographical error and the Tribunal is referring to a *sur place* claim.



the Chinese authorities. The Tribunal's reasons for this conclusion was summed up this way:

*In sum, the applicant's lack of public profile, lack of identification on that website, and lack of subsequent identification, lead the Tribunal to conclude that there is not a real chance the applicant will be identified by the Chinese authorities as having participated in the event on 1 October 2007 in Australia.*<sup>10</sup>

30. The Tribunal was not satisfied that the Applicant had a well-founded fear of persecution for one or more of the Convention reasons and affirmed the decision not to grant the Applicant a Protection (Class XA) visa.

### **Application for judicial review**

31. The Applicant commenced proceedings in this Court on 24<sup>th</sup> June 2008 when he filed an application and an affidavit in support. He has not filed any further documents.
32. The Minister filed a Response on 3<sup>rd</sup> July 2008, opposing the Orders sought. The Minister filed a written outline of submissions, prepared by Mr Godwin of counsel, on 15<sup>th</sup> October 2008.
33. The Applicant attended Court on the hearing date and made an oral submission with the assistance of an interpreter in the Mandarin language. He told the Court that his migration agent did not give the full grounds of his claim to the Refugee Review Tribunal. He said that it was not the case that he did not answer the questions about Falun Gong but that his answers differed from the Tribunal Member's view and the Member thought he was wrong. He said that no-one can explain the Falun Gong book *Zhuan Falun* properly except Master Li. He said that the RRT was unfair to him. Because of the language barrier he was not able to grasp what he was being asked.
34. After Mr Godwin, who appeared for the Minister, had addressed the Court about the Tribunal's finding that the Applicant's conduct had to be disregarded under s.91R(3) of the Act, the Applicant told the Court that he did not agree with the Tribunal's finding on that issue. He said it

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<sup>10</sup> Court Book 155

was his migration agent who had gone to that particular Website and accidentally found the two photographs of the Applicant.

35. The Applicant told the Court that when he felt secure about his safety in China he would return there.

36. In the Applicant's affidavit filed in support of his application, the Applicant claimed:

*I think my application was not fairly assessed by the RRT Member. All the reasons are listed in the attached appeal application form.*<sup>11</sup>

37. The application sets out two grounds:

*(1) My application wasn't assessed fairly. The member didn't invite me to comment on the issues he used to refuse my application after the interview. In his decision letter he mentioned that he had mentioned to me whether I needed more time to give him the answers or explanations. First I didn't understand that question from a legal point; secondly I think the interpreter had translated differently as I didn't recall that I was asked that question at all. As the Member had made a decision based on my answers during the interview without giving me an opportunity to explain the doubts in his mind about my application after the interview, I think it is not a fair decision. I knew about this requirement under the Act 424, that every officer should give his/her client an opportunity to explain the information the officer held in his hands and he would make an unfavourable decision because of those (that) information. The RRT Member didn't let me know those (that) information or let me comment on those (that) information, neither had he asked me to explain in writing after the interview. Given this reason I think the RRT has made a jurisdiction error.*

*(2) By assessing an application the RRT member has failed to go to the details or overlooked the details of my situation. The questions about Falun Gong he had put to me was too difficult that not many Falun Gong practitioners could answer. He failed to assess my particular background such as how many years I have practiced, my education level and my understanding level to Falun Gong etc.*

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<sup>11</sup> Applicant's affidavit filed on 24 June 2008 at paragraph [1]

38. The Applicant's oral submissions touched peripherally on the matters in his application.

### **The First Respondent's case**

39. The First Respondent, the Minister for Immigration and Citizenship, filed a Response on 3<sup>rd</sup> July 2008, opposing the orders sought and addressing the Applicant's grounds for these reasons:

- a) the alleged breach of s.424A of the Migration Act is founded upon the incorrect assumption that the section obliges the RRT to put to an applicant its reasoning processes for comment and no particulars of information pursuant to s.424A were provided; and
- b) the second ground of review was neither particularised nor supported by any evidence. The RRT is entitled to control the direction of the hearing, including by asking questions in order to satisfy itself of the merits of the application: *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>12</sup> at [124]-[125].

40. Counsel for the Minister submitted, correctly in my view, that the Applicant's first ground in fact contains more than one allegation:

- a) an interpretation error, in that the Applicant claimed that he did not recall being asked by the Tribunal Member whether he needed more time to address the issues that the Member put to him in the course of the hearing; and
- b) a failure to explain to the Applicant the information upon which "*he would make an unfavourable decision*". Whilst there is a reference to s.424 of the Act the substance of the allegation is based on ss.424A and 424AA.

41. Mr Godwin submitted that the Tribunal Decision Record shows that the Tribunal asked the Applicant to comment on all the matters it considered to be reasons for making an unfavourable decision. The Applicant has not filed a transcript of the hearing and so, it is

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<sup>12</sup> (2004) 214 ALR 264; [2004] FCAFC 328

submitted, the allegation must fail without evidence of what occurred at the hearing to contradict what the Tribunal recorded as its reasons.

42. As to the alleged breach of s.424A, Mr Godwin submitted that unless the Applicant was able to particularise and prove that a matter was not put to him by the Member in the course of the hearing then there appears to be a compliance with ss.424A and 424AA. He referred the Court to *SZLXU v Minister for Immigration and Citizenship*<sup>13</sup> and *SZLQD v Minister for Immigration and Citizenship*<sup>14</sup>.
43. Mr Godwin submitted that the Applicant's second ground alleged that the Tribunal Member overlooked the details of the Applicant's particular situation and failed to take his background into account. It also alleged that the Tribunal asked questions about Falun Gong that were so difficult that not many Falun Gong practitioners could answer them. He submitted that the Refugee Review Tribunal is entitled to test the Applicant's knowledge to verify his claim to be a Falun Gong practitioner (*SBCC v Minister for Immigration and Multicultural Affairs*<sup>15</sup>). The Tribunal acknowledged that the applicant showed some knowledge of Falun Gong and was able to perform one exercise. The Tribunal is not obliged to refer to every piece of evidence when setting out its reasons for decision (*Minister for Immigration and Multicultural Affairs v Yusuf*<sup>16</sup> at [67]-[68], [73]-[74], [77], [89], [91]; *Dranichnikov v Minister for Immigration and Multicultural Affairs*<sup>17</sup> at [24], [95]).
44. Mr Godwin drew the Court's attention to another issue, one not raised by the Applicant, as to whether the Tribunal complied with s.91R (3) of the Migration Act. He referred to the recent decision of the Full Court of the Federal Court in *SZJGV v Minister for Immigration and Citizenship*<sup>18</sup>. He submitted that there are two s.91R(3) issues in the Tribunal decision:
- i) The Tribunal found the Applicant was not a Falun Gong practitioner and had fabricated his claim to establish a basis for refugee status, based on its consideration of all the

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<sup>13</sup> [2008] FCA 1238

<sup>14</sup> [2008] FCA 739

<sup>15</sup> [2006] FCAFC 129

<sup>16</sup> (2001) 206 CLR 323

<sup>17</sup> (2003) 197 ALR 389

<sup>18</sup> (2008) 247ALR 451; [2008] FCAFC 105

evidence, including his activities in Australia. The Tribunal later stated that it disregarded this conduct under s.91R (3).

- ii) The Tribunal considered whether the fact that photographs of the Applicant had been published on a website established a *sur place* claim as a refugee.

45. As to the first s.91R (3) issue, Mr Godwin submitted that the Tribunal did not impermissibly have regard to the Applicant's conduct. The Tribunal formed an adverse view of the Applicant's credit having regard to the whole of the Applicant's evidence. The finding that the Applicant was not involved with Falun Gong in China was made without any reference to the Applicant's conduct in Australia. It was the Tribunal's adverse view of the Applicant's credit that was the basis for its conclusion that the Applicant's conduct in Australia was not entered into otherwise than for the purpose of strengthening his claim to be a refugee.
46. As to the second s.91R(3) issue, Mr Godwin submitted that the Tribunal reasoned that it was not able to be satisfied that the publication of the photographs of the Applicant was conduct by the Applicant, it could not disregard that conduct under s.91R(3). The Tribunal took the view that the Applicant may not have deliberately sought publicity. It therefore considered whether the publication of the photographs caused the Applicant to become a refugee *sur place*.
47. Mr Godwin also submitted that the issue need not be resolved as it is superfluous because the Applicant's claim was doomed to fail for other reasons. He referred the Court to the decision in *SZKGF v Minister for Immigration and Citizenship*<sup>19</sup> where the Full Court of the Federal Court refused relief in its discretion where there was a technical breach, referring at [15] to the decisions in *re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam*<sup>20</sup> at [38]; *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs*<sup>21</sup> at [56]-[57]; *SZJSP v Minister for Immigration and Citizenship*<sup>22</sup> at [28]-[29]. In all of these decisions it had been held that there was no practical injustice.

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<sup>19</sup> [2008] FCAFC 84

<sup>20</sup> (2003) 195 ALR 502

<sup>21</sup> [2004] FCAFC 158

<sup>22</sup> [2007] FCA 1925

48. Mr Godwin referred the Court to *SZJHG v Minister for Immigration & Anor*<sup>23</sup> at [47], *SZMAN v Minister for Immigration & Anor*<sup>24</sup> at [31]-[38], *SZJZN v Minister for Immigration and Citizenship*<sup>25</sup> at [40] and *SZLWI v Minister for Immigration and Citizenship*<sup>26</sup> at [45]-[46] in support of the proposition that the Court should exercise its discretion and refuse to grant relief in the circumstances.

## Conclusions

49. The Tribunal rejected the Applicant's claim to have been a Falun Gong practitioner in China, which was a key part of his claim for refugee status. It did so on the basis of an adverse credibility finding which relied on, amongst other things, the Tribunal's assessment of the Applicant's evidence at the hearing. The Tribunal found that the Applicant had changed his evidence<sup>27</sup>. It is well established that credibility findings are factual matters and are within the scope of the Tribunal Member.
50. The Applicant's first ground complains that his application was not assessed fairly and the Tribunal failed to comply with the requirements of s.424A of the Migration Act. The Applicant raises the question of errors by the interpreter at the hearing. He has provided no evidence in support of that claim, such as a transcript of the hearing. The information that the Court has is the Tribunal's Decision Record.
51. The Tribunal Decision Record shows that the Tribunal asked the Applicant questions at the hearing about matters that it believed required an explanation<sup>28</sup> and outlined concerns it had with his evidence. The Tribunal says that it told the Applicant he could comment or respond in writing or the hearing could be adjourned, but he said he was willing to respond straight away.<sup>29</sup> The Tribunal set out its concerns and the Applicant made comments in reply.
52. The Tribunal has not failed to comply with s.424A of the Migration Act. The information upon which it relied was information provided by

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<sup>23</sup> [2007] FMCA 2050

<sup>24</sup> [2008] FMCA 1351

<sup>25</sup> (2008) 101 ALD 284; [2008] FCA 519

<sup>26</sup> [2008] FCA 1330

<sup>27</sup> Court Book 139

<sup>28</sup> Court Book 140, 141, 142,

<sup>29</sup> Court Book 143

the Applicant and also Independent Country Information, both of which are excluded by s.424A(3). In any event, the Tribunal appears to have complied with the procedure in s.424AA.

53. The Applicant's first ground of review fails.
54. Turning to the Applicant's second ground, which complains that the Tribunal failed to go into details, overlooked the details of the Applicant's situation and asked questions about Falun Gong that were too hard, I am not satisfied that jurisdictional error has been made out. The Applicant has not shown that the Tribunal failed to consider any relevant matter, and asking hard questions is not a jurisdictional error. The Minister's submission that the Tribunal is entitled to test the Applicant's knowledge is correct and it is certainly the case that the Tribunal is not required to refer to every piece of evidence when giving its reasons for decision.
55. The Tribunal conceded that the Applicant was able to learn at least one Falun Gong exercise and has performed at least one exercise in public, but considered that this did not of itself establish that the Applicant is a Falun Gong practitioner.
56. In my view, the Tribunal did make inquiries of the Applicant about his knowledge of Falun Gong but was not satisfied that the Applicant was a genuine Falun Gong practitioner.
57. The Applicant's second ground has not been made out.
58. Counsel for the Minister has pointed to two possible breaches of s.91R(3) of the Migration Act:

*(a) The first is that the RRT states that it has found the applicant is not a Falun Gong practitioner and that he has fabricated this claim to establish a basis for refugee status. This finding is said to have been based after considering all of the evidence cumulatively – which includes his account of his experience in Australia including attendance at a demonstration on 1 October 2007 and engaging in public exercise of Falun Gong on 2 occasions. The difficulty that this raises is that later in its reasons the RRT expressly states it disregards that conduct and refers to s 91R(3)...*

*(b) The second s 91R(3) issue is the fact that the RRT goes on to consider whether the publication on a website of photos of*

*the applicant attending a demonstration on 1 October 2007 caused the applicant to be a refugee sur place.*

59. First, it is necessary to consider what s.91R(3) actually says:

***Section 91R - Persecution***

*(3) For the purposes of the application of this Act and the regulations to a particular person:*

*(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;*

*disregard any conduct engaged in by the person in Australia unless:*

*(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.*

60. The decision of the Full Court of the Federal Court in *SZJGV v Minister for Immigration and Citizenship*<sup>30</sup> provides a guide to how this subsection should be applied, at [22]-[26]. Their Honours Spender, Edmonds and Tracey JJ said 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).*

61. Thus, the test is:

i) Has the conduct occurred?

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<sup>30</sup> (2008) 247 ALR 451; [2008] FCAFC 105



- ii) If so, was it engaged in otherwise than for the purpose of strengthening the person's claim to be a refugee?

62. The Tribunal found that the Applicant had engaged in some conduct in Australia:

*The Tribunal accepts that the applicant attended and participated in the public event on 1 October 2007 and in public exercising at Campsie on 2 occasions.*<sup>31</sup>

63. Having made that finding, the Tribunal then moved on to the second part of the test, the consideration as to whether the conduct was engaged in otherwise than for the purpose of strengthening the applicant's claim to be a refugee. The Tribunal answered that question in the negative:

*The Tribunal concludes that the applicant's conduct in Australia: the participation on 1 October 2007; and the apparent public exercising at Campsie on 2 occasions; and the photo-taking of those occasions – was engaged in for the purposes of strengthening his claim to be a refugee, and the Tribunal has therefore disregarded the conduct (section 91R(3)).*<sup>32</sup>

64. However, the difficulty has been suggested in that the Tribunal found that the Applicant was not a Falun Gong practitioner and had fabricated his claim after considering all of the evidence cumulatively:

*However, after considering of the evidence cumulatively the Tribunal does not accept that the applicant is a Falun Gong practitioner or that the applicant will be perceived as such by anyone. The Tribunal finds that he fabricated this claim to establish a basis for refugee status. The Tribunal reached this conclusion based upon the following findings.*<sup>33</sup>

65. The Tribunal then set out its examination of the various parts of the Applicant's claim. It found:

*The applicant's lack of credibility leads the Tribunal to conclude that his attendance at the Campsie rotunda on 2 occasions was solely for the purpose of a photo opportunity and not because he was a Falun Gong practitioner...The applicant's lack of credibility leads the Tribunal to conclude that his participation at the 1 October 2007 event was not in good faith; his attendance was*

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<sup>31</sup> Court Book 153

<sup>32</sup> Court Book 154

<sup>33</sup> Court Book 148

*solely for the purposes of a photo opportunity and not because he was a Falun Gong practitioner or had an anti-CCP opinion.*<sup>34</sup>

66. The paragraph quoted above comes directly before the paragraph quoted in [63] above, in which the said that it disregarded that conduct in Australia. Seen in that context, it is clear that the paragraph quoted in [65] above is the Tribunal's description of its process of reasoning leading to its conclusion that it was not satisfied that the conduct was engaged in otherwise than for the purpose of strengthening the applicant's claim to be a refugee. Therefore, the Tribunal was bound to disregard that conduct under s.91R(3)(b).
67. That leaves the paragraph quoted in [64] above, that the Tribunal did not accept that the Applicant was a Falun Gong practitioner after considering the evidence cumulatively. The Tribunal had then set out the findings that led to its non-acceptance of the Applicant's claim.
68. However, that paragraph was a summary based on the Tribunal's findings on various aspects of the Applicant's evidence. As far as the evidence of the Applicant's conduct in Australia is concerned, the Tribunal had specifically disregarded that evidence under s.91R(3)(b). Thus, the evidence that the Tribunal considered cumulatively can only sensibly be read as the evidence which it set out with the exception of the evidence of the Applicant's conduct in Australia, which it had disregarded.
69. I am satisfied that there is no breach of s.91R(3) in that regard.
70. That leads to the second issue, the consideration of whether the publication on a website of photos of the Applicant attending a demonstration on 1<sup>st</sup> October 2007 caused the Applicant to become a refugee *sur place*. The Full Court considered this sort of an eventually in *SZJGV* at [24], saying:

*It may be accepted that the catalyst for the introduction of section 91R(3) was decisions of this Court which held that a person could become a refugee as a result of conduct, deliberately engaged in in Australia, to attract the adverse attention of the authorities in his or her country of origin. In this way, a person who was not otherwise a refugee could become a refugee sur place. Section 91R(3) and does require such conduct to be disregarded when assessments are*

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<sup>34</sup> Court Book 154

*being made. It is not (although it could have been) confined in its terms to conduct which may render a person a refugee sur place. Decision makers are, subject to the proviso in paragraph (b), required to disregard 'any' conduct in Australia by an applicant. The conduct is to be disregarded in determining 'whether' an applicant has a well-founded fear of persecution for a Convention reason. The conduct may suggest that such fear is or is not well-founded. In either case it must be disregarded. If the Tribunal brings the conduct into account it will contravene s.91R(3).*

71. This passage clearly illustrates the “two-edged sword” attribute of subsection 91R(3). In the present case, the Applicant had referred to the two photographs of himself that were published on the Guang Min Net Information site. The Applicant told the Tribunal that he did know about the photographs but did not know that they were published online.

72. The Tribunal went on to find:

*Regardless of when the applicant knew of the photos' publication, there is no compelling evidence before the Tribunal to show that the photos were sent to the website at the behest of the or direction of the applicant. The Tribunal cannot discount that the independent action of a third party led to the photos being published on the website.<sup>35</sup>*

73. The Tribunal considered that the publication of those photographs on the website did not lead to a conclusion that there was not a real chance that the Applicant would be perceived as a Falun Gong practitioner or as having an anti-CCP political opinion and, therefore, would not lead to a well-founded fear of persecution in China.

74. It has been argued that this could lead to a finding of a contravention of s.91R(3). I am not persuaded that this is so. True it is that the Tribunal gave the Applicant the benefit of the doubt when it found that there was no evidence that he had arranged for the publication of those photographs on the website. However, this was a finding of fact, and it was a matter for the Tribunal. The Court has no role to second guess the Tribunal on matters of fact or judgment (*SZHCJ v Minister for Immigration and Multicultural Affairs*<sup>36</sup> at [3]).

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<sup>35</sup> Court Book 154

<sup>36</sup> [2007] FCA 205

75. What the Tribunal has done is to distinguish the Applicant's attendance at the public event and, for that matter, participating in being photographed, both of which are included under the heading of conduct in which the Applicant engaged in Australia, from the publishing of the those photographs on the website. The Tribunal found that there was no evidence that the photographs were put on the website at the Applicant's behest or direction. The Tribunal found that it could not discount that the independent action of a third party led to those photographs being published there.
76. Again, that might appear to be a narrow distinction and perhaps a rather generous finding as far as the Applicant is concerned, but, again, it is finding of fact that was within the Tribunal's power to make. What it leads to is a conclusion that this was not strictly conduct engaged in by the Applicant in Australia and therefore not covered by s.91R(3). Thus, it did not have to be disregarded. It was the Applicant's claim that the publication of the photographs on the website that led to his having a *sur place* claim. The Tribunal considered the evidence and decided that it did not lead to that finding.
77. The Applicant has not established any jurisdictional error, nor has counsel for the Minister. Accordingly, I am satisfied that the Tribunal decision is a privative clause decision as defined by s.474(2) and therefore not subject to orders in the nature of certiorari, mandamus or prohibition.
78. The application will be dismissed and it is appropriate to consider the question of costs.

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**I certify that the preceding seventy-eight (78) paragraphs are a true copy of the reasons for judgment of Scarlett FM**

Associate: V. Lee

Date: 28 November 2008