FEDERAL COURT OF AUSTRALIA

SZJZN v Minister for Immigration and Citizenship [2008] FCA 519

CITIZENSHIP AND MIGRATION – migration – review of decisions – Refugee Review Tribunal – conduct of review – *sur place* conduct disregarded per s 91(3) – when conduct to be disregarded if also engaged in for purposes other than strengthening protection claim

CITIZENSHIP AND MIGRATION – migration – review of decisions – Refugee Review Tribunal – conduct of review – conduct disregarded per s 91(3) – whether to be disregarded for all purposes of decision-making

Held:

(1) appeal dismissed;

(2) only where an applicant has engaged in *sur place* conduct for the dominant purpose of strengthening a refugee claim may decision-maker not have regard to it;

(3) where such conduct is disregarded for one purpose of the assessment of the claim it must be disregarded for all such purposes

Migration Act 1958 (Cth) ss 91R(3), 425
Minister's Second Reading speech on the *Migration Legislation Amendment Bill (No. 6) 2001* (Cth)

District Council of Coober Pedy v Collector of Customs (1993) 42 FCR 127 cited
Minister for Immigration and Multicultural Affairs v Mohammed (2000) 98 FCR 405 cited
NBKT v Minister for Immigration and Multicultural Affairs (2006) 156 FCR 419 cited
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152
SZHAY v Minister for Immigration [2006] FMCA 261 approved
SZJSD v Minister for Immigration [2007] FMCA 604 approved
Wang v Minister for Immigration and Multicultural Affairs (2000) 105 FCR 548 cited

SZJZN v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 1379 OF 2007

MADGWICK J
18 APRIL 2008
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1379 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZJZN** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**MADGWICK J**
DATE OF ORDER:	**18 APRIL 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1379 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZJZN** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**MADGWICK J**
DATE:	**18 APRIL 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

HIS HONOUR

1 This is an appeal from a decision of the Federal Magistrates Court adverse to the appellant, arising out of a decision of the Refugee Review Tribunal (the Tribunal). The Tribunal rejected the appellant's application under s 65 of the *Migration Act 1958* (Cth) (the Act) for a protection (class XA) visa.

A claim of religious persecution

2 The appellant is a national of the People's Republic of China. He arrived in Australia on 4 August 2006 and lodged an application for a protection visa one week later. His application was based on a number of claimed reasons to fear persecution by the Chinese authorities, however the only one presently relevant is his Catholic faith. The appellant's fear of persecution due to his faith was, as finally formulated, based principally on the following matters:

•

he was born into a Catholic family;

- the church he attended was closed when he was 9 years old;
- the Catholic community was forced to attend "house churches", mostly at his house, where a bishop, assisted by a priest, conducted services;
- that priest was often interrogated;
- the police raided his house in June 2003 and confiscated Bibles left behind by the fleeing faithful;
- on 9 April 2004 the police interrupted a conference of Catholic priests at his house. The appellant was detained by police for five days, interrogated and tortured;
- a priest who had held mass at the appellant's home had disappeared in 2006;
- in July 2006, he was informed by a contact in the security service (PSB) that he was wanted by the authorities for allowing Catholicism to be practiced in his house or for being a practitioner himself. He was advised to leave the country; and
- at Villawood Immigration Detention Centre (VIDC) his faith had strengthened and deepened; he had been chosen to prepare to become an acolyte (a person who assists the celebrant in the performance of the Catholic mass).

3 The Tribunal comprehensively rejected the appellant's credit for lengthy and apparently thorough reasons given. However, in the course of this in its findings and reasons, the Tribunal noted that the appellant had promptly presented his refugee claims and said that, while this was a factor that "would generally speak in an applicant's favour", the material which the Tribunal had before it did not reveal whether the appellant had only initiated the request for protection after it was detected that the passport he had used to enter Australia (and obtained in Malaysian after he travelled there from China on his genuine, Chinese passport) was false. The Tribunal said that, as a result of that gap in the evidence, the promptness of the claim was "of little assistance in its assessment" of the appellant's case.

4 The Federal Magistrates Court on 29 June 2007 declined an application for judicial review.

Relevant provisions of the Act

5 Section 91R(3) provides:

> 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.

6 Section 425(1) states:

> The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

The nature of the appeal

7 The appellant appeals to this Court on three bases.

1. The Tribunal misconstrued s 91R in relation to the *sur place* element of the claim. The Tribunal had implicitly decided (and the Court below had expressly held) that it was enough to have s 91R exclude *sur place* conduct from consideration, if the prohibited purpose was merely one of an appellant's purposes for engaging in the conduct. The Tribunal's decision was, to that extent, based upon a wrongful exclusion of relevant material. This was "the first s 91R point".

2. The second s 91R point was that the Tribunal decided that that section precluded him from having regard to the appellant's conduct in Australia to assist the credibility of his claim to a degree of religiosity which would compel him to take a leading role in the practice of his religion, if returned to China. The Tribunal was said, however, to have had regard to that conduct in order to aid the rejection of his claim. Once the conduct was to be disregarded, it should have been disregarded for all purposes.

3. The third point was failure by the Tribunal to comply with s 425. The appellant argued before the court below that there was a breach of s 425 by the Tribunal with respect to its treatment of the timing of the appellant's refugee claim.

The appellant argued that the Tribunal's conclusion that it could not draw any positive inference from the timing of the appellant's claim was, in itself, an issue which attracted the requirement to invite comment from the appellant, but no such invitation was issued.

The Tribunal's decision

8 The Tribunal accepted that the appellant was Catholic. However, it did so with "some reservations" which were, indeed, grave. Ultimately the Tribunal rejected the appellant's account of every significant matter concerning his church and his activities within it in China. In turn, the Tribunal found that the appellant had not suffered harm in China due to his activities within the church, but rather that "[the appellant] and his family are members of a well-established, long-term Catholic minority who, in their particular locality, have been able to practise their religion without official interference."

9 The Tribunal also accepted that the appellant was involved with Catholic detainees and visitors at VIDC. The Tribunal held that

> [t]his flows from his membership of a congregation in China, and it may well be that his commitment has intensified in Immigration detention, where social and spiritual support may take on added significance. However, the Tribunal considers this to be a response to his immediate environment and circumstances, and does not discern in this any more sustained commitment that will motivate his future conduct, eg seeking a higher profile in the church if he returns to China.

10 There was evidence from Rev Dr Andrew Murray, co-ordinator of the Catholic Church Group at VIDC, that the appellant had been chosen from among the detainees to prepare to act as an acolyte. The Tribunal said of this:

> The Tribunal takes this to be an acknowledgment by Catholic visitors and by fellow detainees of his knowledge and commitment. It also suggests that the applicant has taken on a more prominent role, and that he may therefore seek to have a higher profile as a Catholic in the future. Taking into account the applicant's past low profile and the Tribunal's concerns about his credibility, it is not satisfied that the applicant engaged in this conduct – his preparations to be an acolyte and any associated activities – otherwise than for the purpose of strengthening his refugee claims. Section 91R(3) of the Act requires the Tribunal to disregard such conduct in determining whether the applicant has a well-founded fear of persecution.

> With respect to his recently increased role within the Catholic group at Villawood (and leaving aside his conduct, for the reasons stated above), the Tribunal does not consider that the applicant has developed a genuine and sustained interest in taking on a more formal or prominent role within the Catholic church. In the Tribunal's opinion, the applicant's interest in such roles is the product of his immediate environment and circumstances, and does not form the basis for any higher profile future conduct if he returns to China.

11 As to conditions in the appellant's district, Fujian, the Tribunal said:

> In light of all these factors, the Tribunal finds that the applicant has been a member of a Catholic church and that, regardless of its registration with the authorities, it is one of the many Catholic churches whose members have not been persecuted in the past and who do not face a real chance of such harm in the reasonably foreseeable future.

12 In a concluding "Summary", the Tribunal said:

> The Tribunal accepts that the applicant is a low-profile Catholic, living in a locality where such persons have not experienced and do not face a real chance of prospective persecution. The Tribunal does not accept that the applicant has suffered any past harm for reason of his Catholicism; on the contrary, his opening of a new business in October 2005, his past conduct and his travel arrangements (set out in the Tribunal's s.424A letter) display a confidence that is inconsistent with that of a genuine refugee. The Tribunal accepts that the applicant continues to practice as a Catholic in Australia, but finds that his recent activity (preparing to become an acolyte) is not based on a genuine intensification of his faith, and will not result in any future conduct in China that might attract adverse attention.

The decision of the Federal Magistrates Court

13 It is not necessary to recount the fate of arguments pressed in the court below other than those relied on here.

The first s 91R(3) point

14 The appellant had argued that if he had engaged in conduct that was partially for the purpose of strengthening his refugee claim and partially for another purpose, s 91R(3) would not apply to it. The learned Federal Magistrate rejected this construction of the section.

The second s 91R(3) point

15 His Honour did not deal with this point in any detail. He held that the Tribunal had not, contrary to the appellant's submission, made any positive finding that the appellant's conduct at VIDC was not undertaken otherwise than for the purpose of strengthening the appellant's refugee claim. The learned Federal Magistrate drew a distinction between the Tribunal's lack of satisfaction that the appellant's preparations to be an acolyte and any associated activities were undertaken otherwise than for the purpose of strengthening his refugee claims, and the actual finding by the Tribunal that the appellant's preparation to be an acolyte was not based on a genuine intensification of his faith: the latter was a positive finding, the former not.

Failure by the Tribunal to comply with s 425

16 The learned Federal Magistrate considered it necessary to first determine whether there was an actual issue arising which the Tribunal had not invited the appellant to address.

17 Citing *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, his Honour noted that the only issues arising in respect of which s 425 requires an invitation to the applicant are those that will determine the outcome of the application. The learned Federal Magistrate rejected the s 425 point on the grounds that the Tribunal had decided that it could draw *no* inference from the timing of the appellant's claim for protection. His Honour held that, had the Tribunal drawn an inference from the timing of the claim adverse to the appellant (and which might have been taken into account by the Tribunal in reaching its decision), it would have been an issue caught by the requirements of s 425.

The submissions as to the first s 91R(3) point

Appellant's submissions

18 The appellant submits that on the correct construction of s 91R(3) the decision-maker must disregard conduct only where the *sole* purpose is to strengthen a protection claim. When conduct is undertaken for multiple purposes, one of which is

to strengthen a protection claim, then the decision-maker may not disregard the conduct. The appellant cited, amongst other authority, the Second Reading speech for the *Migration Legislation Amendment Bill (No. 6) 2001* (Cth) (which was to become the amending Act inserting s 91R into the Act): the Minister said, "any actions by a person taken after arrival in Australia will be disregarded unless the minister is satisfied that the actions were not done *just* to strengthen claims for protection." (Emphasis added.)

19 The appellant argues that if the Court accepts his construction of s 91R(3), it is then necessary to determine whether the Tribunal accepted that there was any purpose other than the strengthening of his protection claim which motivated the appellant's preparations to become an acolyte, and his other religious conduct. If the Tribunal did accept such other purpose or purposes, then it erred in its application of s 91R(3). The appellant identifies a number of findings by the Tribunal which evidence such an acceptance:

- that the appellant's commitment to his faith may well have intensified while he has been in detention;
- that his preparation to become an acolyte was "an acknowledgement by Catholic visitors and fellow detainees of his knowledge and commitment", and
- that these preparations may suggest that the appellant had "taken on a more prominent role" in the church.

The appellant submits that these findings demonstrate that the Tribunal accepted that the appellant's conduct at VIDC was motivated, at least in part, by an intensified commitment to his Catholic faith.

Respondent's submissions

20 The respondent submits that it is unnecessary to determine whether the appellant's proposed construction of s 91R(3) is correct in order to dispose of the appeal. The respondent contends that the Tribunal's reasons demonstrate that the conduct of the appellant at VIDC was found to have been undertaken for a single purpose only: strengthening of the appellant's claim for protection. Any attempted

reading of the Tribunal's reasons for an implicit acceptance of another purpose is inconsistent with the express finding of the Tribunal.

21 The respondent further submits in the alternative (a notice of contention having been filed) that the Court should in any case refuse to grant discretionary relief in this instance as the outcome would manifestly have been no different. The respondent argues that there were sufficient other determinative and central issues on which the Tribunal made legally unchallengeable, adverse findings to support its determination. In addition, the Tribunal's finding with respect to the conduct in question did not influence any further finding. The respondent submits that an exercise of the Court's discretion to this effect would be consistent with what was said by the majority in *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [27]-[29].

The submissions as to the second s 91R(3) point

Appellant's submissions

22 The appellant submits that the learned Federal Magistrate was incorrect in finding that the Tribunal had not made a positive finding that the appellant's conduct at VIDC was not undertaken otherwise than for the purpose of strengthening his refugee claim. The Tribunal did take the appellant's conduct into account when determining that he did not have a well-founded fear of persecution in China on the basis of his Catholic faith, after having found that it should be rejected because of s 91R(3).

23 The appellant submits that the Tribunal erred in so doing. Once the Tribunal held that the conduct in question was to be disregarded due to s 91R(3), it had to disregard that conduct for *all* aspects of its decision. The appellant relies on two authorities to support his construction of s 91R(3), both decisions of Driver FM: *SZHAY v Minister for Immigration* [2006] FMCA 261 and *SZJSD v Minister for Immigration* [2007] FMCA 604.

Respondent's submissions

24 The respondent submits that consideration of the second s 91R(3) point is also unnecessary in the present case. The finding in question was premised on the Tribunal's finding with regard to the appellant's *motivation* and not his *conduct* per se. According to the respondent, in assessing whether the appellant engaged in conduct otherwise than for the purpose of strengthening his protection claim, the Tribunal found that such conduct was not premised on a genuine intensification of his faith, but rather was for the purpose of strengthening his refugee claims. The respondent argues that the Tribunal's allegedly erroneous finding was based on a necessary anterior finding as to the motivation for the conduct, rather than the conduct itself, and is not required to be disregarded.

25 The respondent submits that s 91R(3) only requires the Tribunal to disregard "conduct", not, as in this case, its own reasons regarding the motivation for, or consequences of, the conduct. The respondent relies on the Revised Explanatory Memorandum to the Bill referred to above, and points to the distinction therein between the existence of a subjective fear (the motivation) and the conduct itself. The relevant extract reads (at [27]-[28]):

> New subsection 91R(3) applies to *sur place* claims. It is generally accepted that a person can acquire refugee status *sur place* where, as a consequence of events that have happened since he or she left his or her country of origin, he or she has a well-founded fear of persecution upon return to that country. Difficulties have arisen in cases where Australian courts have found that a person may act while in Australia with the *specific intention* of establishing or strengthening their protection claims and *this intention cannot be taken into account* in assessing the existence of protection obligations under the Refugees Convention.
>
> Actions undertaken intentionally to raise the risk of persecution or create the pretext of such a risk, raise also serious questions about the presence of subjective fear in the mind of the protection visa applicant. In order for a fear of persecution to be well founded, it must be both objectively and subjectively based. Under new section 91R, for the purposes of the application of the Act and the regulations to a particular person, any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the Minister that he or she 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.
> (Emphasis added.)

26 The respondent submits that the appellant's contention on this point is

contrary to the plain language of the section and the purpose as drawn from that extrinsic material.

The submissions as to the alleged failure by the Tribunal to comply with s 425

Appellant's submissions

27 The appellant repeats the submission, made before the court below, that the timing of and motivation for the appellant's protection visa application was an issue in relation to the decision under review that would attract s 425. The delegate who made the original decision did not indicate any concern about the timing of or motivation for the appellant's lodging of his protection visa application. The appellant submits that, in accordance with what was said in the High Court in *SZBEL* 228 CLR 152 at [36], he was entitled to assume, in the absence of notification to the contrary from the Tribunal, that the timing of and motivation for his application for protection was not a "live issue" before the Tribunal.

28 The appellant submits that while the court below treated the issue as "neutral" and hence not adverse to the appellant, *SZBEL* 228 CLR 152 at [36] indicates that the Tribunal's obligation under s 425 extends beyond putting the appellant on notice of proposed findings that are strictly negative. The obligation includes notifying the appellant of doubts about claims, or where the Tribunal is unable to decide an issue in the appellant's favour. The Tribunal's "finding" that it was not satisfied about the timing of and motivation for the appellant's protection application deprived him, without a chance to be heard, of the opportunity to gain credit for a circumstance that might have forced a reassessment of his creditworthiness generally.

29 In these circumstances, the appellant argues, failure to notify the appellant of the Tribunal's intended approach to an important credit issue was a breach of the Tribunal's obligation under s 425.

Respondent's submissions

30 The respondent submits that the appellant's approach to the Tribunal's treatment of the timing of and motivation for the appellant's protection visa

application is premised on an assumption that a positive finding would or might have been drawn had the appellant been given the opportunity to present arguments and give evidence on the topic. The respondent submits that an assumption of this nature is simply not open, given the depth and strength of the Tribunal's general disbelief of the appellant. Further, a proper reading of the remarks on this topic indicates, according to the respondent, that the Tribunal was simply not assisted by the possible fact of an early application in making its overall determination and, therefore, nothing turned on it. In short, the issue was not "one of the determinative issues arising in relation to the decision under review" cf *SZBEL* 228 CLR 152.

Consideration

31 In general, although with some stated exceptions that do not alter the result, it seems to me that the respondent's submissions should be upheld.

First s 91R(3) point

32 It cannot, in my opinion, be the position that, where an applicant has multiple purposes for engaging in conduct in Australia, no matter how relatively unimportant the s 91R(3) purpose may be, its existence will prevent the decision-maker from having regard to it. In a different context, this result might be avoided by a familiar technique of statutory construction: construing "the purpose" to mean "the *real and substantial* purpose": see eg. *District Council of Coober Pedy v Collector of Customs* (1993) 42 FCR 127. However such a simple solution would still leave problems.

33 An example prompted by current events may make this clear. Suppose that a Tibetan claiming refugee status here is asked by a friend to participate in a public protest against China's alleged maltreatment of Tibetan dissidents who include friends of his. Suppose his main purpose is to express his genuine outrage and to try to send a message to the Chinese government; suppose that he has another purpose, namely to have his protest photographed and sent back to dissident elements in Tibet in order to encourage them; suppose further that he also intends to use photographs thus taken to support his application for a protection visa but that he already possesses abundant, incontrovertible evidence of participating in similar protests outside Australia, so that, as he perceives matters, the intended photographs will be, as it were, merely the icing

on the cake. Nevertheless, assume that supporting his refugee claim is a real and substantial purpose of his, albeit a relatively quite minor one. Suppose finally that before he can deliver his other, incontrovertible evidence to the Tribunal he loses it and cannot replicate it. It would, in my view, clearly be unfair by ordinary standards to prevent him from using the *sur place* evidence, and absent the clearest statutory language such an unfair result should not be imputed to be Parliament's intention.

34 True it is that the example may be extreme and that hard cases can make bad law. True it is also that s 417 provides, at least in theory, a means for dealing with such hard cases (though its practical application seems in recent years to have been uncertain, and a parliamentary preference for the fiat of the Minister over a process that includes recourse to an independent tribunal should not readily be inferred). Nevertheless, the background to the enactment of s 91R(3) was the practice that arose of refugee status applicants participating in demonstrations of protest against the governments of their countries of nationality with the sole or at least dominant purpose of manufacturing evidence for their applications. Decisions of this Court may unintentionally have encouraged this practice, see eg *Minister for Immigration and Multicultural Affairs v Mohammed* [2000] FCA 576; (2000) 98 FCR 405. Such at least was the Minister's view in his Second Reading speech. He said:

> I am also concerned about court decisions that have recognised the claims of applicants who have deliberately set out to contrive claims for refugee status after they have arrived in Australia.
>
> Such action, deliberately seeking to attract hostile attention from a home country government, makes a mockery of an applicant having a real fear of persecution.
>
> The legislation will make it clear that any actions by a person taken after arrival in Australia will be disregarded unless the minister is satisfied that the actions were not done *just* to strengthen claims for protection.
>
> The convention was not intended to provide protection to applicants who contrive claims in second or third countries *and who have no other basis* for claims to refugee status.
>
> However, in exceptional cases where a person has acted *purely to strengthen* their claims, and so as a result needs some protection, my ministerial intervention powers will allow me to intervene if it is in the public interest.
> (Emphasis added.)

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.

36 That error, however, does not in my opinion avail the appellant. In the first place, while his Honour may have erred, it is by no means clear to me that the Tribunal did so.

37

Secondly, as the respondent points out, the Tribunal affirmatively found that it was "not satisfied that the applicant engaged in [the relevant] conduct ... *otherwise than for* the purpose of strengthening his refugee claims" (emphasis added). That is, s 91R(3), construed as I conceive that it should be, would still require that conduct to be disregarded. In the necessary exercise of discretion as to whether a constitutional writ should go, I would for that reason decline the relief sought.

Second s 91R(3) point – disregard for all purposes conduct purposed to strengthen a claim?

38 Again, on a correct understanding of the Tribunal Member's reasons and findings, if there were any error by the Tribunal in understanding s 91R(3) it was, in my opinion, quite immaterial here.

39 The Tribunal member was clearly alive to the distinction between religious activity (or conduct) and the belief which allegedly motivated it. The Tribunal spoke, for example, of whether, "leaving aside his conduct", the appellant had "a genuine and sustained interest" in higher order religious practice. (That is so despite what may be the Tribunal's slightly confusing or ambiguous use of the term "role" as distinguished from conduct – I think the Tribunal was using "role" to indicate the perception of him that others would have.) The distinction between motivation or belief on the one hand and "conduct" on the other has been noticed in this Court: see *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 1599; (2000) 105 FCR 548 at [16] per Gray J and *NBKT v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 195; (2006) 156 FCR 419 at [91]-[96] per Young J.

40 I agree with the respondent's analysis that the Tribunal rejected the appellant's *sur place* motivations and beliefs, but did not have relevant regard to his conduct, as an indicator of a likely "higher profile" if returned to China than he previously had there (on the Tribunal's findings). I accept, as the respondent seems to have done *sub silentio*, that Driver FM's point in *SZHAY* [2006] FMCA 261 and *SZJSD* [2007] FMCA 604 is correct: the word "disregard" in the subsection admits of no ambiguity. For the reasons given, however, there was no breach by the Tribunal of that statutory

injunction. If, contrary to my view and that of the other judges I have referred to, *sur place* "conduct" in s 91R(3) should be regarded as including ideas and beliefs motivating the conduct, the only infraction of the subsection by the Tribunal was in looking at such ideation with a view to considering whether it might *assist* the appellant in relation to his likely future conduct if returned to China, and coming to a negative conclusion. It is very plain that, had no such regard been had to that ideation, the appellant's application was in any case doomed to failure. Again therefore, any error was immaterial, did not taint the decision and would not result in the issue of writs.

Section 425 and the early application for refugee status

41 The respondent's position is that the factual question concerned was not "one of the determinative issues arising in relation to the decision under review", that being the test identified in *SZBEL* 228 CLR 152. There was no sufficient indication that, were the appellant able to show that he made his application before he was in trouble over entering Australia on a false passport, the Tribunal's decision would or even might (cf *SZBEL* 228 CLR 152 at [47]) have been different. Further, the Tribunal had simply been, as counsel put it, "not assisted" at all by the timing issue, so that it certainly was not a determinative issue.

42 I cannot agree with the last point: the Tribunal said that, as things were, the timing factor was "of little assistance" because of the gap in the evidence (see the reference to "therefore" in the Tribunal's reasons). There is an implication that, at least theoretically, it might have been of considerably greater assistance if further facts were known. Nor, as a theoretical matter, can it be discounted that the Tribunal may have reconsidered its general assessment of the appellant's credit had it been shown that he had quite innocently made a very prompt application for refugee status.

43 The difficulty is to try to assess the degree of reality of those theoretical possibilities. There is no bright line between what might, as a matter of reality, be a determinative issue in a case and what, though theoretically capable of being so, might not. In many cases, for a judge to try to determine that matter will involve the judge straying into the fact-finding arena, a no-go zone. However in some cases it

will be clear that, having regard to the Tribunal's reasons as a whole, even had an invitation to comment of the kind contemplated by s 425 been given, and the doubt in the Tribunal's mind been favourably cleared up, the decision must have been the same.

44 In my opinion this case is an instance of the latter type. So thoroughgoing was the Tribunal's rejection of the appellant's credibility and so firmly expressed were its reasons and findings, that it defies belief that the Tribunal might have departed from the view it otherwise had merely because there might have been untainted promptness of the application.

45 In my view the s 425 attack also fails.

Disposition

46 For these reasons the appeal will be dismissed with costs.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick.

Associate:

Dated: 18 April 2008

Counsel for the Appellant: Ms N McGarrity

Solicitor for the Appellant: Craddock Murray Neumann

Counsel for the Respondent: Ms B Nolan

Solicitor for the Respondent:	DLA Phillips Fox
Date of Hearing:	21 September 2007
Date of Judgment:	18 April 2008