

Manager, Public Information

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MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZJGV & ANOR
MINSITER FOR IMMIGRATION AND CITIZENSHIP v SZJXO & ANOR
[2009] HCA 40

A decision-maker must disregard conduct in Australia engaged in by an applicant for a protection visa if the conduct is engaged in for the purpose of *strengthening* the person's claim to be a refugee. However, the decision-maker may have regard to the same conduct to make a finding adverse to the person's claim to be a refugee, the High Court held today.

The appeals of SZJGV and SZJXO were heard together, as each appeal concerned the same issue – the interpretation of section 91R(3) of the *Migration Act* 1958 (Cth), which provides that, in determining whether a person has a well-founded fear of being persecuted for one or more of the reasons set out in the Refugees Convention, a decision-maker must disregard any conduct engaged in by the person in Australia unless 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.

SZJGV, a citizen of China, arrived in Australia on 25 January 2006. On 2 February he applied for a protection visa, claiming to have been a practitioner of Falun Gong in China since 1997, and therefore to have a well-founded fear of persecution should he return to China. The Refugee Review Tribunal (RRT) affirmed the original decision to refuse the application. The RRT considered that SZJGV lacked the detailed knowledge of the practice of Falun Gong to be expected of a person who had been practising Falun Gong since 1997. The RRT found that SZJGV's interest in Falun Gong was "a recent invention designed to assist him in his endeavour to remain in [Australia] by strengthening his claims". The RRT disregarded his Falun Gong practice in Australia in accordance with section 91R(3). However, in finding that SZJGV had a tendency to exaggerate and tailor his evidence, the RRT had regard to "his lack of knowledge about Falun Gong [and] his recent attempts to construct a profile of a Falun Gong practitioner". In view of its assessment of his lack of credibility, the RRT was not satisfied that he had a well-founded fear of persecution in China resulting from Falun Gong activities.

SZJXO is a Chinese national who arrived in Australia on 22 April 2006 and claimed to have been practising Falun Gong since 1997. He claimed he would be imprisoned if he returned to China because of his participation in Falun Gong activities, including protests in Australia against China's treatment of Falun Gong practitioners. The RRT considered that his claims lacked credit: his evidence did not disclose that the Falun Gong faith was important in his life; it was devoid of significant supporting detail. It did not appear to arise from first-hand experience. The RRT was satisfied that his involvement in Falun Gong in Australia was to strengthen his claim to be a refugee

and, applying section 91R(3), disregarded that evidence. In concluding that SZJXO did not have a well-founded fear of persecution should he return to China, the RRT did refer to its findings about his motives for his contact with Falun Gong in Australia, concluding there was no reason to believe he would practise or be significantly involved with Falun Gong if he returned to China.

The appellants challenged the decisions of the RRT in the Federal Magistrates Court but their applications for judicial review were dismissed. The Full Court of the Federal Court allowed their appeals from the decisions of the Federal Magistrates Court. It accepted the argument that if section 91R(3) required a decision-maker to disregard an applicant's conduct in Australia then the conduct must be disregarded for all purposes. The Full Court held that to the extent that the RRT had had regard to conduct in Australia to assess the credibility of SZJGV, and to conclude there was no reason to believe SZJXO would be persecuted if he returned to China, it had fallen into jurisdictional error. The High Court granted the Minister for Immigration and Citizenship special leave to appeal the Full Court's decisions.

A majority of the High Court found that the Full Court of the Federal Court had misconstrued section 91R(3) of the Migration Act. The legislative purpose of section 91R(3) was to overcome the perceived anomaly that a refugee applicant could engage in conduct outside of his or her country of nationality for the sole purpose of creating or strengthening a claim to have a well-founded fear of persecution should that person be returned to his or her country of nationality. The majority concluded, on the basis of textual and contextual analyses of section 91R(3), that the only conduct which is to be disregarded in accordance with that section is conduct which would *strengthen* a person's claim to be a refugee within the meaning of the Refugees Convention. If the conduct does not strengthen a person's claim to be a refugee, then the conduct may be taken into account. The High Court determined by majority that the RRT had not erred in either matter. It ordered that the Minister's appeals be allowed and the orders of the Full Court of the Federal Court be set aside, save as to costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*