FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZJBH & ORS v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1441

MIGRATION – Review of Refugee Review Tribunal decision – refusal of protection visas – applicant husband from Taiwan but abandoning claims of persecution before the Tribunal – applicant wife from China and raising claims of persecution in her own right before the Tribunal – Tribunal finding that neither applicant met the prescribed criteria for a protection visa under the Regulations but considering and rejecting the wife's claims anyway – no reviewable error found – application dismissed.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.36, 48B, 65, 91R, 424,424A, 426
Migration Regulations 1994

Dranichnikov v Minister for Immigration (2001) 109 FCR 397
Mijoljevic v Minister for Immigration [1999] FCA 834
Minister for Immigration v Mohammed [2000] FCA 576
Munkayilar v Minister for Immigration (1997) 49 ALD 588
NAEA of 2002 v Minister for Immigration [2003] FCA 341
SAAP v Minister for Immigration (2005) 79 ALJR 1009
SBCC v Minister for Immigration [2006] FCAFC 129
Soondur v Minister for Immigration [2002] FCAFC 324
Sunarso v Minister for Immigration (2000) 99 FCR 125; [2000] FCA 57
SZGDA v Minister for Immigration & Anor [2007] FMCA 1152
SZHAY v Minister for Immigration & Anor [2006] FMCA 261
SZIBK v Minister for Immigration & Anor [2006] FMCA 1167
Thayananthan v Minister for Immigration (2001) 113 FCR 297
V120/00A v Minister for Immigration (2002) 116 FCR 576
Yilmaz v Minister for Immigration [2000] FCA 906
Zubair v Minister for Immigration (2004) 139 FCR 344

First Applicant:	SZJBH
Second Applicant:	SZJBI
Third Applicant:	SZJBJ

First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1779 of 2007
Judgment of:	Driver FM
Hearing date:	21 August 2007
Delivered at:	Sydney
Delivered on:	18 September 2007

REPRESENTATION

Counsel for the Applicant:	Mr C Jackson
Solicitors for the Applicant:	Mark A Cruice, Solicitor
Counsel for the Respondents:	Mr T Reilly
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) The application is dismissed.

(2) The first and second applicants shall pay the first respondent's costs and disbursements of and incidental to the application in the sum of $5,000 in accordance with rule 44.15(1) and item 1(c) of Part 2 of Schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1779 of 2007

SZJBH
First Applicant

SZJBI
Second Applicant

SZJBJ
Third Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was signed on 30 April 2007 and was handed down on 10 May 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicants protection visas. I adopt as background, for the purposes of this judgment, paragraphs 2 through to 5 of the Minister's written submissions filed on 16 August 2007:

The applicant husband and wife most recently arrived in Australia on 2 January 1998: relevant documents (RD) 139.2. Their son (the third applicant) was born in Australia on 2 April 1998: RD 32. The applicants applied for the visas on 6 May 2003: RD 1-34. The delegate's decision refusing the visas was made on 9 May 2003: RD 38-47, and renotified to the applicants on 10 February 2006: RD 56-65.

The applicants applied to the Tribunal for review on 13 March 2006: RD 68-71. On 22 March 2006 the Tribunal wrote to the applicants pursuant to s.424 of the *Migration Act 1958* (Cth) ("the Migration Act"): RD 93. The Tribunal held a hearing on 28 April 2006 and on the same day wrote to the applicants pursuant to s.424A of the Act: RD 126-127.

This decision of the Tribunal (differently constituted) was set aside by consent on 22 November 2006 by Scarlett FM (RD 159-160), following which the Tribunal held a further hearing on 13 February 2007: court book, page 180. On 14 February and 20 March 2007 the Tribunal wrote to the applicants pursuant to s.424A: RD 200-204, 213-216.

As ultimately presented to the Tribunal, the applicant wife claimed to fear persecution in China for reason of her religion or membership of a particular social group, being a Falun Gong (FG) practitioner. The Tribunal held the applicant husband could not apply as a member of the applicant wife's family unit, as he had originally made specific claims to fear harm in Taiwan, although he retracted these before the Tribunal: RD 283.4. It also held that the applicant wife could not transform her original claim as a member of her husband's family unit into a separate claim on her own account: RD 283.9-284.6. However the Tribunal also went on to consider the applicant wife's claims on her own account on the assumption that its view of the law was wrong: RD 284.6. In the result, the Tribunal was not satisfied that the applicant wife or husband were credible, and considered that the applicant wife had studied FG from September 2005 to support her application for refugee status: RD 286.9, and applied s.91R(3) of the Migration Act to disregard this conduct: RD 287.3. It found that the applicant wife did not genuinely hold FG beliefs and had fabricated her claims to this effect to attempt to remain in Australia: court book, page 287.7.

The application

2. The applicants rely upon a show cause application filed on 6 June 2007. The applicants assert notification of the Tribunal decision on

10 May 2007. I find that the application was filed within time. There are four grounds within the application:

> *Ground One*
>
> *The second respondent erred in law, that error going to jurisdiction, in finding that because the second applicant did not articulate claims pursuant to schedule 2, subclass 866.211(a) of the* Migration Regulations *("the regulations") at the time of the application, the second applicant could not validly make such claims on review, nor did the second respondent have to assess them.*
>
> *Ground two*
>
> *The second respondent erred in law, that error going to jurisdiction, in its application of section 91R(3) of the Act, and/or took into account and irrelevant consideration, or took into account a matter that it was not permitted to take into account under that section, in using the second applicant's evidence about her conduct of* falun gong *in Australia together with its conclusion for the reasons for that conduct to find that she would not practice falun gong upon her return to China.*
>
> *Particulars*
>
> *Having found that the second applicant's* conduct *of* falun gong *in Australia was to be disregarded for the purposes of section 91R(3) of the Act, the second respondent was obliged to exclude it, and any conclusions drawn about it, from its consideration, instead asking whether or not a person with the knowledge and understanding of the second applicant was a committed* falun gong *practitioner likely to be at real risk of harm upon return to China.*
>
> *Ground three*
>
> *In the alternative to ground 2, the second respondent erred in law, that error going to jurisdiction, in its application of section 91R(3) of the Act, in holding that it should disregard the* consequences *of the second applicant's conduct in Australia pursuant to 91R(3)(b), rather than simply disregard the conduct itself.*
>
> *Particulars*
>
> *The second respondent was obliged to ask whether or not the conduct of the Chinese authorities (rather than the conduct of the*

second applicant herself) in monitoring the activities of falun gong practitioners in Australia was such that she was at risk of harm upon her return to China.

Ground 4

The second respondent erred in law in failing to take into account "third party evidence" being the evidence that the witnesses provided in relation to the conduct of the second applicant, the conduct of the Chinese authorities in Australia and the persecution of falun gong practitioners in China, believing that such evidence was excluded by section 91R(3).

Particulars

The second respondent was obliged to consider evidence from Liljiao Zhao, Zhihui Yan, Lilian Peng and the available independent evidence respecting the persecution of falun gong practitioners in China notwithstanding that it was required to disregard the second applicant's conduct in Australia as a falun gong practitioner. This evidence was significantly relevant to the issue whether the second applicant would be, or had already been, identified by the Chinese authorities as a falun gong practitioner and therefore at risk of suffering persecution in China.

3. Ground 2 in the application was not pressed. The applicants rely upon the other three grounds.

4. The only evidence I have before me is the book of relevant documents filed on 10 July 2007.

Submissions

5. The applicants make the following submissions in relation to grounds 1, 3 and 4:

Ground one

At RD283-4, the Tribunal found that, because the second applicant did not make any independent claims in the first, second, and third applicant's protection visa application, she was not entitled to advance claims in her own right on review.

866.211 is as follows;

Criteria to be satisfied at time of application.

The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:

(a) makes specific claims under the Refugees Convention;

or

(b) claims to be a member of the same family unit as a person (the claimant) who:

(i) has made specific claims under the Refugees Convention; and

(ii) is an applicant for a Protection (Class XA) visa.

It is to be noted in relation to "the time of application" criteria, that it is sufficient if an applicant meet either (a) or (b), yet it is self-evidence that an applicant may meet both; a family member may "make specific claims under the convention", and claim to be part of the same family unit as a co-applicant. The form itself recognises that possibility. In other words, it is an "inclusive or"; you may satisfy either, or both.

It is settled law that a primary applicant who does not meet the "time of application criteria" because they do not "advance specific claims under the Convetion" may, nonetheless, have that failing (which would lead to invalidity) cured upon review in the Tribuna (see for instance, Full Federal Court, Yilmaz v Minister for Immigration & Multicultural Affairs *[2000] FCA 906).*

The claim is both valid, and they are capable of meeting the criterion for the grant of the visa, despite not having made "specific claims under the Refugees Convention".

This principle must apply, as a matter of logic, in relation to an applicant who in their original application already satisfied (b), and subsequently "cures" their failure to satisfy (a).

Though it is not particularly well drafted, in order for the "time of decision" regulations (866.222) to reflect the apparent intention of section 36(2)(a) and (b) of the Migration Act 1958*, and as a matter of logic, it would appear that satisfaction of either 866.221 or 866.222 is required; "protection obligations under the Refugee Convention…" are only owed to a person with their own claims, not to family members, with the consequence*

that if both 866.221 and 866.222 had to be satisfied, then no family members would be eligible for a visa, because they would not be able to meet 866.221.

Therefore the Tribunal erred in its construction of the criteria for the grant of the visa in holding that the second applicant's failing to meet 866.222, in circumstances where the second applicant had made claims under 866.221, was fatal to the applicants' claim.

Ground three

Section 91R(3) is as follows;

> (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.

In SZHAY*, the Court held (in paragraph 36) …, in relation to section 91R(3), that it would not apply*

> where the information about the applicant's conduct in Australia is introduced by a decision maker or some third party. It would be absurd to impose on an applicant an onus of satisfying a decision maker that information should not be disregarded where it is not the applicant's information (And see also paragraph 39.)

In this case, the first Tribunal took evidence from a witness (RD147.21; and see RD241.38), …, who had submitted a statutory declaration (at RD97) attesting to having practised Falun Gong with the second applicant in public, and stating that;

> Her movements of the exercises are one of the most accurate I have ever seen, I believe that she has been practicing for quite a long time.

It is apparent that additional details were provided in her oral evidence, including that the applicant "practised almost every day", and that "she was told that [the applicant had learnt it from her mother many years before]).

It is the Tribunal who calls witnesses (at section 426(3)), therefore, the evidence obtained from the witness in this case was not evidence "introduced by the applicant".

Support for that proposition is also found by way of analogy in SAAP v Minister for Immigration and Multicultural and Indigenous Affairs *(2005) 79 ALJR 1009 (et al), which confirms that evidence obtained from witnesses called does not fall within 424A(3)(b), as it is not information that "*the applicant *gave for the purpose of the applicant…." (remembering that in* SAAP, *the evidence was taken from the applicant's daughter).*

If His Honour in SZHAY *is correct, then the Tribunal was obliged to consider the evidence, adduced from the witness, that the applicant was publicly practicing Falun Gong "nearly every day" in Hornsby, and by implication, to consider the second applicant's sur place claim, as supported by the witness.*

The Tribunal would then have erred in not doing so, and in finding that section 91R(3) applied to all of the second applicant's conduct (at RD287.30), and not only the evidence of that conduct adduced by the applicant herself.

His Honour's reading, with respect, allows section 91R(3) to be read more consistently with Australia's international obligations, which do not place any bona fide requirement on asylum-seekers; such a requirement would add a gloss on the plain words of the Convention (see MIMA v Mohammed *[2000] FCA 576). On the other hand, a reading as urged upon the Court would simply reflect an evidentiary exclusion based upon the unreliability of the asylum-seeker's self-reporting.*

Ground four

Ground four urges a statutory interpretation consistent, as in ground three, with the obligations Australia has undertaken under the Refugee Convention. On this interpretation, the conduct engaged in within Australia is to be disregarded in evaluating the applicant, and cannot be used either to support or weaken the

applicant's claims in relation to their past of future beliefs or conduct.

Again, it is an evidentiary exclusion. It reflects a view that conduct which is self-serving is unreliable in assessing the genuineness of the applicant's claim, therefore it is excluded. However, evidence of the consequences of the conduct is not excluded. If the exclusion is read in this way, then the independent evidence of [the three witnesses] *should have been taken into account in determining the claim, in other words, the Tribunal was still obliged to consider whether a person who had engaged in the conduct which the applicant engaged in was likely to have come to the attention of the authorities, and was at risk of harm upon their return.*

6. The Minister's submissions on the grounds pressed are as follows:

Ground one claims that the Tribunal erred in holding that the Applicant wife could not make independent claims before the Tribunal. The Tribunal rejects the argument that it has power to "transform" the Applicant's wife's original status as a member of her husband's family unit at RD 284.4. The Tribunal's conclusion is consistent with Sunarso v MIMA *(2000) 99 FCR 125 (Katz J) at [49], [59-60] and cases there cited, and with* V120/00A v MIMA *(2002) 116 FCR 576 (Kenny J) at [59-60] and* NAEA of 2002 v MIMA *[2003] FCA 341 (Gyles J) at [13-14] (concerning the effect upon family unit members of the death of a principal applicant before the Tribunal's decision). Cl 866.222 plainly applied to the Applicant wife, and she equally plainly failed to satisfy it because the Applicant husband had not been granted a protection visa. Accordingly she did not satisfy the criteria for the visa and so it had to be refused: s 65(1)(b). The case of* Yilmaz v MIMA *(2000) 100 FCR 495 (FC) referred to in the Applicant's Submissions concerns the Tribunal's jurisdiction to deal with invalid applications, and has no relevance to the construction of cl 866.222.*

Accordingly ground one fails. The Applicant's Submissions para 1 acknowledge that in such a case the Application must be dismissed. The remaining submissions are accordingly made on the basis that ground one succeeds.

Ground three claims that the Tribunal misapplied s 91R(3) in disregarding the consequences of her actions in practising FG in Australia. The Applicant's Submissions claim this is because a witness called by the Applicant wife also gave evidence that she practised FG in Australia. The Tribunal found that this evidence

did not outweigh its concerns as to the Applicant wife's credit: RD 286.5. This does not involve disregarding the witness' evidence pursuant to s 91R(3), so this ground fails. It cannot be that the consequences of s 91R(3) can be avoided simply by calling corroborative evidence from a witness. If the Tribunal is satisfied s 91R(3) applies then the conduct concerned - even if corroborated by a witness - must be disregarded. As the Tribunal held, at RD 288.3, it was only through the Applicant wife's conduct, which had to be disregarded, that she could possibly be considered to be at any risk of harm upon return to China. As the Tribunal notes at RD 288.1, the facts are similar to those considered in SBCC v MIMA *[2006] FCAFC 129, where no error was found in the application of s 91R(3). Ground three accordingly fails.*

Ground four is essentially the same as ground three and fails for similar reasons. As already stated, the Tribunal did not disregard or exclude the evidence of the Applicant wife's witnesses, but found that this evidence did not outweigh its concerns: RD 286.5. This ground accordingly proceeds upon a false premise and must fail.

Reasoning

7. The applicants concede that in order for them to be successful in their application they must establish jurisdictional error in both the decision of the Tribunal relating to the application of the criteria for the grant of a protection visa and the decision of the Tribunal pursuant to s.91R(3) of the Migration Act. This is because the two arms of the Tribunal decision concerning those matters stand independently of one another and each is capable of wholly supporting the Tribunal decision. The first ground is directed at the finding by the Tribunal concerning the criteria for eligibility for a protection visa. The Tribunal dealt with that issue in the following terms:

> ***The applicant husband as a person to whom Australia has protection obligations***
>
> *The Tribunal is satisfied that the applicant husband has made an application for a Class XA visa and that this is validly subject to review. While there is concern that he was apparently unaware of the precise nature of this application, he did authorise the application for residence in Australia which is the subject of this*

review and provide the appropriate level of detail necessary to identify himself and the claims made.

The Tribunal is also satisfied that the applicant husband is a national of Taiwan and no other country. He has travelled using a passport issued by authorities of that country and has consistently maintained this as his nationality as a result of his birth there.

In respect of cl.785.221 and cl.866.221, the Tribunal must consider whether the applicant husband is a person owed protection obligations by Australia.

The Tribunal finds that the applicant husband is not a person owed protection obligations. His most recent oral evidence given to the Tribunal and confirmed in a subsequent submission is that he does not hold a subjective fear of harm should he return to his country of nationality.

The original application form included claims to the effect that he held such fear, however, the claimed past experiences have been abandoned. While in the hearing of 28 April 2006 and related written statements he did indicate he was unsure of what would happen if he did return, there has been no evidence presented or which is otherwise available to the Tribunal that would indicate that a person such as the applicant has any chance of being harmed on return to Taiwan. His previously advanced claims of potential harm arising from membership of the KMT and having a wife of Chinese ethnicity do not rise above mere speculation in the Tribunal's view and there is nothing known to the Tribunal which suggests there is any likelihood of harm on this basis. The most recent oral evidence and submission support this view.

As the applicant husband does not hold any fear of harm on return to Taiwan, he cannot be said to have a well-founded fear of any harm, and as such is not owed protection obligations by Australia. He therefore does not satisfy the criterion prescribed at cl.785.221 or cl.822.221.

The applicant husband as a member of the applicant wife's family unit

The applicant husband is not a person to whom subclauses 866.221(b) or 785.211(b) apply as he made specific claims to be a person to whom Australia had protection obligations at the time of the application. Clauses 866.222 and 785.222 are not, therefore, relevant to him. Their relevance to the applicant wife and son are considered below.

Have the applicant wife and son made valid applications for a visa?

The Tribunal is satisfied that the applicant wife and son have made a valid application for a Class XA visas. There must be some concern about the application in a context where the applicant wife was unaware of the nature of the application and has given evidence that she did not sign the application form. This does suggest an act of fraud on the part of the person who signed the form, however, the details of the applicant wife and her son were both included in the application with sufficient detail to identify them. The applicant husband clearly intended his wife and son to be included as part of the application, although they were at the time of application included as the members of his family unit. Particularly, in the context of family unit members to import a requirement that the individual was aware of the nature of the application to be valid would present some difficulties in respect of infant children.

While it has been argued that the Tribunal should exercise its curative powers in respect of the application in the terms of Yilmaz v MIMA *(2000)100 FCR 495,* Thayananthan v Minister for Immigration & Multicultural Affairs *(2001) 113 FCR 297 and* Zubair v Minister for Immigration & Multicultural & Indigenous Affairs *(2004) 139 FCR 344, these are not necessary in respect of the validity of the application. In the Tribunal's view, the applications, made with appropriate authority and sufficient identifying detail, must be considered valid and considered in the context of the legislation governing the grant of Class XA visas. The impact of those decisions identified in connection with clauses 866.222 and 785.222 is discussed below.*

Must the applicant wife satisfy criterion at clause 785.222 or 866.222?

In the Tribunal's view, the applicant wife must meet these relevant provisions and does not do so. It has been submitted that the various authority supports a conclusion that the defect of not having advanced specific claims to be a person to whom Australia has protection obligations at the time of application can be cured by the provision of such claims to the Tribunal. This, it is said, would have the effect of converting the applicant wife from a person referred to in subclauses 866.211(b) and 785.211(b), to one referred to in subclauses 866.211(a) and 785.211(a). In this event, it is said, clauses 866.222 and 785.222 would have no application to her. In the Tribunal's view, the cited cases do not

support this view, and there is no direct judicial consideration of this point.

While the curative powers of the Tribunal in respect of procedural matters do exist is some circumstances, in the Tribunal's view the construction of Parts 785 and 866 is such that if one does not advance specific claims to be a person to whom Australia has protection obligations at the time the application is made, then one must be considered against the provisions of clauses 785.222 and 866.222 at the time of decision. ***The Tribunal does not believe that it has any power to transform the status of an applicant, established at the time of application, during the processing of the same application.***

Those cases referred to on the applicants' behalf deal, in fact, with circumstances where it is in dispute whether a valid application has ever been made. In this matter, a valid application has been made, but on the basis only of being the member of a family unit of a person who has made specific claims, that is a person to referred to in subclauses 785.211(b) and 866.211(b). These provisions clearly apply to the applicant wife, in the Tribunal's view, and as the applicant husband will not be granted a protection visa, she cannot meet the provisions of either clauses 785.222 or 866.222.

Whatever the merits of her specific claims to be a person to whom Australia has protection obligations, those cannot alter the position in respect of this application.

The Tribunal acknowledges that this issue is not clearly determined and has, therefore, decided that it should consider that its view of this matter may be wrong. In light of that, the Tribunal believes it is appropriate to consider, in the alternative, whether the applicant wife meets the provisions of cl.785.221 or cl.866.221. (emphasis added)

8. The Tribunal went on to consider the applicant wife's claim but found that that claim, being a *sur place* claim, must be disregarded, pursuant to s.91R(3) of the Migration Act as it was based on conduct undertaken in Australia solely for the purpose of enhancing her protection visa claims.

9. Clause 866.21 of Schedule 2 to the Migration Regulations relevantly provides as follows:

Criteria to be satisfied at time of application

866.211 the applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:

(a) makes specific claims under the Refugees Convention; or

(b) claims to be a member of the same family unit as a person (the claimant) who:

(i) has made specific claims under the Refugees Convention; and

(ii) is an applicant for a Protection (Class XA) visa.

10. Clause 866.22 relevantly provides:

866.22 Criteria to be satisfied at time of decision

866.221 the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

866.222 In the case of an applicant referred to in paragraph 866.211(b):

(a) the Minister is satisfied that the applicant is a member of the same family unit as a claimant referred to in that paragraph; and

(b) that claimant has been granted a Protection (Class XA) visa.

11. Several things may be said about these clauses. First, clause 866.21 is not well drafted and, on a strict interpretation, appears to be inconsistent with s.36 of the Migration Act which relevantly provides:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non‑citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non‑citizen in Australia who is the spouse or a dependant of a non‑citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

12. It is plain that s.36(2) establishes separate criteria for persons who claim Australia has protection obligations to them and persons who are a spouse or a dependant of such a person. The latter are not expected to satisfy the Minister that Australia has protection obligation to them (directly) under the Refugees Convention. Clause 866.211 in its terms requires all applicants (whether persons claiming a well-founded fear of persecution or members of their family unit) to claim that Australia has obligations under the Refugees Convention to them at the time of application. The word "and" at the end of the opening words of clause 866.211 appear to require members of family groups of claimants to establish at the time of application a claim to protection obligations as well as being a member of the family group of a person who is owed protection obligations and makes specific claims. This could not be what the drafter intended and if it was, the Regulation would be invalid as being inconsistent with the Act. Further, the drafting of clause 866.222 compounds the problem by specifying separately criteria to be satisfied at the time of decision. The first of those is that the Minister be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention and the second is that, in the case of family group members, the Minister be satisfied that the applicant is a member of the same family unit as a principal claimant and that that claimant has been granted a protection visa. It is not stated whether the criterion in 866.221 is additional to or alternative to the criterion in 866.222.

13. Perhaps because of the difficulties of interpreting the criteria, the Tribunal has over time taken a lenient attitude to applications where members of a family group of principal applicants make their own claims for protection. It is not uncommon for such claims to emerge after an initial protection visa claim is lodged. Some applicants are initially inhibited to say anything other than what is said by the principal applicant and only reveal their own claims (which may be personal and embarrassing) when they become entitled to a private hearing before the Tribunal. I have seen numerous instances where the Tribunal, reasonably and in my view, properly, considers separate claims made by members of a family group of a principal applicant

whether those were contained in the original protection visa application, in the review application, at some point in between or even after the review application has been lodged. There is a good practical reason for that lenient approach. If the Tribunal is unwilling or unable to consider separate claims by a member of a principal claimant's family group, the only way in which those claims can be considered is if the Minister exercises his discretion pursuant to s.48B of the Migration Act. There are a myriad of possible circumstances that may give rise to a need or desire of a member of a family group to advance separate claims and it may be administratively inconvenient for the Minister to be called upon to consider all such circumstances.

14. It would be also artificial if applicants were not permitted to amend their applications following their lodgement. In particular, the Tribunal stands in the shoes of the delegate and is expected to conduct a review based upon the material before it at the time of the review. If applicants are held to the terms of their original protection visa applications the process becomes artificial and may be pointless.

15. Notwithstanding all of the above, however, there is authority in the Federal Court, upon which the Minister relies, which supports the decision of the Tribunal on the application of the criteria. In *Sunarso v Minister for Immigration* [2000] FCA 57 at [49] and [59]-[60] Katz J said:

> *As to the Minister's submission that the Tribunal had been under no obligation to deal with any specific claim made under the Convention regarding the daughter, he relied in that respect on cl 866.211 of Sch 2 to the* Migration Regulations *(Cth), dealing with the criteria which must be satisfied at the time of application for a protection visa, and on* Munkayilar v Minister for Immigration and Multicultural Affairs *(1997) 49 ALD 588 (FCA: Beaumont J) and* Mijoljevic v Minister for Immigration and Multicultural Affairs *[1999] FCA 834 (Branson J; unreported; 25 June 1999), both of those cases having construed cl 866.211. In substance, the submission was that the effect of cl 866.211 is that a person who applies for a protection visa must choose between doing so by making specific claims under the Convention respecting him/herself and doing so by claiming to be a member of the same family unit as another person who has made specific claims under the Convention respecting him/herself and who is him/herself applying for a protection visa. The daughter, it was said, had*

fallen into the second of the two categories, so that no question arose of the Tribunal's being obliged to deal with any specific claims under the Convention respecting her.

Applying cl 866.211 to Mr Sunarso's application for refugee status in Australia, it appears to me to be appropriate to treat that application, not as an application made by him alone (as it was, strictly speaking), but as though it were one made by him in which he made specific claims under the Convention regarding himself and, in so far as he had included other members of his family in it, as though it were also applications made by each of those other family members themselves, applying by virtue of their family relationship to him.

In the circumstances which I have just outlined, I conclude that there was no duty on the Tribunal to deal with any specific claims under the Convention regarding the daughter, so that I need not deal with the Minister's alternative submission regarding the Tribunal's treatment of the daughter.

16. I note that counsel for the Minister in this proceeding also appeared for the Minister in that case. In *V120/00A & Ors v Minister for Immigration* [2002] FCA 264 at [59]-[60] Kenny J said:

As the Full Court of this Court noted in Li at 535, the Act "places great emphasis on the need for a visa applicant to complete a prescribed application form". The Regulations do not, so it seems to me, permit the Tribunal to treat the applicants as if they had each sought a Protection (Class AZ) visa in her or his own right. As we have seen, the Regulations prescribed the application to be made by a family member of an applicant for a Protection (Class AZ) visa. This is the form that the applicants completed.

In any event, even if it was open to the Tribunal to have considered their applications in this way, a result adverse to the applicants was inevitable. Having completed an application in December 1996 as a family member of an applicant for a Protection (Class AZ) visa (in reliance on criterion 866.221(b)), none of the present applicants would have been able to satisfy the Tribunal that she or he met criterion 866.222(b), since the principal claimant had died without being granted a Protection (Class AZ) visa. Equally, none of them would have been able to satisfy criterion 866.221(a) and avoid the need to satisfy criterion 866.222(b), since none of them had made specific claims under the Refugees Convention at the time of application for a visa. Upon the death of the deceased, his application for a Protection

(Class AZ) visa lapsed; and it became impossible for his wife and children to satisfy the primary criterion set down in the Regulations for a visa of the class sought by them.

17. Thirdly, in *NAEA of 2002 v Minister for Immigration* [2003] FCA 341 Gyles J agreed with Kenny J. He said at [13]-[14]:

> *Counsel for the applicant has sought to distinguish the reasoning of Kenny J, which the Tribunal followed, in various ways. It is not necessary to explore all of these arguments, as, in my opinion, one of the strands of her Honour's reasoning is fatal to this application. At all material times, including the time of the original application, the time of the Tribunal decision and the present time, a necessary criterion to be established for the grant of a visa of the type applied for was that the claimant (in this case, the husband) has been granted a protection visa. That criterion has been incapable of fulfilment since the death of the husband on 29 October 2001 (see Kenny J at 590 [60]).*
>
> *Counsel for the applicant sought to avoid this result by reference to the decisions of Full Courts in* Dranichnikov v Minister for Immigration & Multicultural Affairs *(2001) 109 FCR 397 and* Soondur v Minister for Immigration & Multicultural Affairs *[2002] FCAFC 324.* Dranichnikov *considered a situation different to that which exists here, namely, that of a family member who lodges a fresh application for a protection visa on his or her own account after the death of the primary applicant. In any event, even if correct, the reasoning in* Dranichnikov *would not assist the present applicant, as it would have the result that she had made no application for a visa.* Soondur *is a special case, the reasoning in which may need to be reconsidered. Be that as it may, it dealt with the case of a child, not an adult, and considered the position which arises if a fresh later application is made on behalf of the child. In the present case, it is quite plain that the applicant deliberately applied for a protection visa on the basis that she was a family member of her husband claimant and not in her own right. There is a fundamental difference between the two bases for a protection visa. In my opinion, the Act and the Regulations require separate and specific applications for each. It would not be open for the Tribunal to grant a protection visa to a person who had applied as a family member on the basis that that person was a refugee. I agree with the reasoning of Kenny J in* V120/00A *at [59].*

18. All of those decisions were made by single judges of the Federal Court in the original jurisdiction of that Court. Although not strictly binding

upon me, judicial comity requires that I follow them unless they are clearly wrong. I am unable to say that they are clearly wrong. Although not well drafted and although the precise terms of the criteria in Schedule 2 to the Regulations have changed somewhat in recent years, in general terms, the apparent intention of the criteria is to give effect to s.36 of the Migration Act which divides visa claimants into those who assert protection obligations and those who ride on their coat tails. One has to be one or the other. I do not pretend to understand why one has to be one or the other and why one cannot be both or change one's position prior to a decision. The Tribunal's decision on the application of the protection visa criteria was consistent with the presently available authorities and, hence, I am unable to conclude that it was infected by jurisdictional error.

19. Having disposed of the first ground of review, it is strictly unnecessary to deal with the remaining grounds. However, in my view, there is no substance to those grounds and I will deal with them briefly.

20. The applicants seek to draw support in relation to ground 3 from my judgment in *SZHAY v Minister for Immigration & Anor* [2006] FMCA 261. I have more recently consolidated the views I have expressed in relation to s.91R(3) in *SZGDA v Minister for Immigration & Anor* [2007] FMCA 1152. In that case at [16] I said in relation to my earlier decision in *SZIBK v Minister for Immigration & Anor* [2006] FMCA 1167:

> *In that case, I also considered whether a distinction could be drawn between conduct and information about conduct. At [11]-[12] I said:*
>
> > Having reached that conclusion[1] then, prima facie, the RRT was required to disregard the applicant's conduct in attending church in Australia. However, Mr Lloyd, for the Minister submits that there is a distinction to be drawn between disregarding conduct and disregarding information about conduct. He used, as an example, the hypothetical situation of a tribunal receiving anonymous information that an applicant had attended church in Australia for the purpose of attempting to bolster a weak claim of persecution. *[Mr]* Lloyd submits that, while in that

[1] That the applicant had engaged in conduct to enhance his protection visa claims

> hypothetical example, a decision maker may be required to disregard the conduct, the decision-maker is not required to disregard the reason for the conduct.
>
> The difficulties with that proposition are first, that the more closely related the information is to the fact of the conduct, the harder it would be for decision makers to draw a meaningful distinction. The other objection is similar to that that I raised in *SZHAY*, that it ought not to be possible for decision makers to use information about conduct in Australia to reject an application when it is not available to grant it. [T]hat would be inconsistent with the language of s.91R(3) as well as being unjust. Mr Lloyd deals with the second objection by agreeing with a proposition from me, that surrounding information may work in favour of an applicant as well as against him. For example, an applicant may seek to bolster a protection visa claim by engaging in conduct in Australia, not because the claim is weak but because the applicant is driven to do so by reason of his fear. That fear may be well-founded. If, to use another hypothetical example, an applicant attends church in Australia because of a well-founded fear of persecution in his country of origin and seeks to bolster that claim, then a decision maker, on the basis of Mr Lloyd's submission, would only be required to disregard the conduct, not the reason for it. In that hypothetical example, information relating to the intensity of the applicant's fear would be available to support the protection visa claim. Although the distinction is conceptually difficult and would, in many cases, give rise to practical difficulties, I accept the proposition that the distinction is there to be made.

21. I also acknowledged that the Tribunal is obliged to take into account information obtained from someone other than the applicant about the applicant's conduct in Australia where that information was obtained by the Tribunal itself[2]. In the present case, at the request of the applicant, the Tribunal took evidence from a witness concerning the applicant's practice of Falun Gong in Australia. The evidence given by that witness is summarised by the Tribunal at RD 264-266. The witness gave evidence about his own involvement with Falun Gong and the repression of the Chinese government of Falun Gong

[2] *SZGDA* at [17]

practitioners. In relation to the applicant wife's conduct in Australia, the witness provided the following information:

> *In respect of the applicant wife's involvement with Falun Gong the witness and his wife practiced with a group every day. In January 2006, just after the New Year holiday, the applicant wife came to practice exercises with the group. She was able to practice and did not need to be taught anything. Her movement was very accurate. In Sydney more than 30 people exercise, they practice and then go home or to work. They do not have time to talk. One month later the witness' wife asked the applicant wife some questions and they got to know each other. Later the witness became aware that the applicant wife did not know some activities and she was invited to join a study group to understand more meaning of Falun Gong. She attended the Friday study group in Parramatta and the witness informed her of other activities. He understood that the applicant attended mostly, but not every week.*
>
> *The first time the witness had met the applicant wife was in January 2006. He thought she could practice very well at this time.*

22. This was information obviously relevant to the Tribunal in determining what conduct the applicant had engaged in in Australia and also in relation to the purpose of that conduct for the purposes of s.91R(3) of the Migration Act, although the witness said little of consequence having a bearing on the applicant wife's purpose.

23. It is plain that the Tribunal took into account information provided by the witness in coming to a view about the purpose of the applicant wife's conduct in Australia. At RD 286 the Tribunal said:

> *The other evidence relied upon in this respect is that of witnesses who have known of the applicant's practice since January 2006. These witnesses attest to the applicant wife's considerable skill in the movements of the exercises in falun gong and it is submitted that this could not have been learned between September 2005 and January 2006. It is also the case that the applicant demonstrated an uncommon understanding of falun gong movements and the basis of its beliefs in the hearing held on 28 April 2006 and still holds this knowledge. In the Tribunal's view, this adds little to the applicant wife's claims.*

24. The Tribunal reasoned that, notwithstanding the applicant's knowledge of Falun Gong and expertise in the exercises, she had engaged in the practise of Falun Gong in Australia for the purpose of enhancing her protection visa claims. It does not appear from the Tribunal's reasons that the Tribunal considered that there was any other reason for the applicant wife's conduct. The Tribunal concluded that it must disregard that conduct pursuant to s.91R(3). This appears to have been an unobjectionable conclusion and consistent with the decision of the Full Federal Court in *SBCC v Minister for Immigration* [2006] FCAFC 129. While, hypothetically, the information provided by the applicants' witness might have been available to the Tribunal for consideration in relation to some other issue, there was no obligation on the Tribunal to seek out other issues in relation to which the information might be considered. I see no jurisdictional error in the Tribunal's approach.

25. Likewise, I reject ground 4. The applicant wife's sole basis for her protection visa claim was her practice of Falun Gong in Australia. Having correctly found that it must disregard that conduct, there was no other basis to consider the applicant wife's claim on. The information available to the Tribunal about the applicant wife's conduct was taken into account for the purpose of determining whether the conduct must be disregarded. Having made that decision, the information ceased to be relevant.

26. I find that the decision of the Tribunal is free from jurisdictional error. It is therefore a privative clause decision and the application must be dismissed. I will so order.

27. As to costs, I see no reason to depart from the Court scale. I will order costs in the scale amount of $5,000. Those costs should only be payable by the two adult applicants.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 18 September 2007