FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNGL v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 583*

MIGRATION – Review of decision of Refugee Review Tribunal – Tribunal's application of s.91R(3) – whether Tribunal had regard to applicant's conduct in assessing credibility – whether s.91R(3) requires "sole" or "dominant" purpose test – whether Tribunal applied "dominant" purpose test – Tribunal's decision record read fairly – inference drawn that Tribunal did not use conduct in Australia in making adverse credibility finding – section 91R(3) requires "sole" purpose test – Tribunal applied "dominant" purpose test – jurisdictional error – relief granted.

Migration Act 1958 (Cth), ss.36, 64, 91R, 422B, 425, 425A, 441A, 424A, 424AA, 426A
Migration Regulations 1994 (Cth) reg.4.35D

Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors [1996] HCA 6; (1996) 185 CLR 259
SJSB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 225
NAST v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 208
Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003 [2005] FCAFC 73
SZEHN v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1389
Singh v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 1113
Minister of Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30
Applicant A169/2003 v Minister of Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 8
WAEE v Minister of Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630; [2003] FCAFC 184
Paul v Minister of Immigration and Multicultural Affairs (2001) 113 FCR 396; [2001] FCA 1196
SZEJF v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 724
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1; (2000) 168 ALR 407
SBBS v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 361

Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431
Minister for Immigration and Multicultural and Indigenous Affairs v NAOS of 2002 [2003] FCAFC 142
SCAA v Minster for Immigration Multicultural and Indigenous Affairs [2002] FCA 668
Minister for Immigration and Multicultural Affairs v Lay Lat (2006) 151 FCR 214; [2006] FCAFC 61
SZCIJ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 62
SZFDE v Minister for Immigration and Citizenship (2007) 237 ALR 64; [2007] HCA 35
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152
SZMCD v Minister for Immigration and Citizenship [2009] FCAFC 46
Minister for Immigration and Multicultural and Indigenous Affairs v NAMW [2004] FCAFC 264; (2004) 140 FCR 572
VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 82
QAAC of 2004 v Refugee Review Tribunal [2005] FCAFC 92
SZMJE v Minister for Immigration and Citizenship [2008] FCA 1751
SZLOJ v Minister for Immigration and Citizenship [2008] FCA 1693
SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190; [2007] HCA 26
VAF v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 123; (2004) 206 ALR 471
SZJGV v Minister for Immigration and Citizenship [2008] FCAFC 105
SZJZN v Minister for Immigration and Citizenship (2008) 169 FCR 1; [2008] FCA 519
SZNAB v Minister for Immigration & Anor [2009] FMCA 152
Somaghi v Minister of Immigration, Local Government and Ethnic Affairs [1991] FCA 389

Applicant:	SZNGL
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 418 of 2009
Judgment of:	Nicholls FM
Hearing date:	20 April 2009

Date of Last Submission:	18 May 2009
Delivered at:	Sydney
Delivered on:	24 June 2009

REPRESENTATION

Appearing for the Applicant:	In person
Solicitors for the Applicant:	In person
Appearing for the Respondents:	Ms B Anniwell
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari issue, quashing the decision of the second respondent made on 28 January 2009.

(2) A writ of mandamus issue, requiring the second respondent to redetermine the matter according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 418 of 2009

SZNGL
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made under the *Migration Act 1958* (Cth) ("the Act") on 23 February 2009, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") made on 28 January 2009, which affirmed the decision of the delegate of the first respondent to refuse a protection visa to the applicant.

Background

2. The first respondent has put a bundle of relevant documents before the Court (the Court Book – "CB") from which the following background may be discerned.

3. The applicant is a national of the People's Republic of China ("China") who arrived in Australia on 1 July 2008 (CB 3), and applied for a protection visa on 4 July 2008 (CB 1 to CB 36, with annexures).

4. The application was refused on 2 October 2008 (CB 50 to CB 62).

5. The applicant applied for review by the Tribunal on 11 October 2008 (CB 57 to CB 60). By letter dated 10 November 2008, the applicant was invited to attend a hearing before the Tribunal scheduled for 9 December 2008. The applicant attended (see the Tribunal's account of what occurred at the hearing reproduced in its decision record at CB 103 to CB 112).

Claims to Protection

6. The applicant claimed to fear persecution on the basis of her, and her mother's, practice of Falun Gong (CB 102.2). Specifically, her claims were that her mother was a high profile opera singer who practiced Falun Gong, and that she had been arrested and detained by police because of this practice. Her mother was ultimately sent to a "Labour Camp", where she was tortured, forced to work, "brainwashed", and made to study material that was opposed to Falun Gong.

7. The applicant claimed to have begun practicing Falun Gong after her mother was detained and subsequently released. She also distributed information about Falun Gong. The applicant was arrested by police and threatened. She was ultimately held in a detention centre where she was "humiliated, scolded, torture[ed] and brainwash[ed]" on a daily basis, and where she suffered a miscarriage (CB 101, CB 107). She claimed that upon release she "lost everything", that "her shop was forced to close", and that her boyfriend was pressured to discontinue their relationship (CB 101.8). The applicant claimed to have continued her Falun Gong practice in Australia.

The Tribunal

8. The Tribunal comprehensively rejected the applicant's claims to protection. It did not accept that she had ever been a Falun Gong practitioner (CB 118.1), or that she had ever distributed material relating to Falun Gong (CB 118.7). Flowing from these findings, the Tribunal found that she had never been detained by the authorities (CB 118.8), had never been: "humiliated, scolded, tortured and brainwashed", that any miscarriage that she may have experienced was not caused by any harm exerted on her while in detention, that her boyfriend had not paid bribe to secured her release, and that she had

not relocated to another part of China in an effort to escape harm (CB 120.8 to CB 120.9).

9. The Tribunal also did not accept that the applicant's mother: "had been persecuted by the Chinese authorities because she practised Falun Gong", that her mother: "was stripped of opportunities to perform on stage due to her practice of Falun Gong", that her mother was: "arrested and detained for 1.5 years", that her mother's friends were detained (CB 120.9 to CB 120.10), that police regularly arrested her mother, the other practitioners or the applicant, nor that the police threatened them (CB 122.1).

10. It further considered that the very fact that the applicant was able to depart China on a valid visa and passport, and without experiencing difficulty, meant that she was not a Falun Gong practitioner who had been detained, and that she was not of "adverse interest" to the Chinese authorities (CB 119.8). For this reason, it concluded that the applicant: "would not suffer harm if she was to return to China" (CB 119.9).

11. It found that the applicant's attendance at Falun Gong practice sessions while in Australia had been for the "dominant purpose" of furthering her claims to protection, and it accordingly said it disregarded this conduct pursuant to s.91R(3) (CB 120.5).

12. This comprehensive rejection of all the applicant's claims was underpinned by its overall finding that the applicant was not a credible witness (CB 117.5).

13. It ultimately concluded that as the applicant had never practiced Falun Gong in China, and as she would not practice Falun Gong in the future, she would not be harmed by reason of being a Falun Gong practitioner or by reason of being perceived to be one (CB 122.4 to CB 122.7)

14. In all, therefore, the Tribunal was not satisfied that the applicant was a person to whom Australia owed protection obligations under the UN Refugees Convention. It therefore affirmed the decision under review.

Application to the Court

15. The grounds as stated in the application filed on 23 February 2009 are as follows:

> *"1. I can not go back to China, I will be persecuted by Chinese government.*
>
> *2. Jurisdictional error has bee[n] made. RRT considered my case unfairely [sic]. They doubt my claim without substantive evidence.*
>
> *3. Procedural Fairness has been denied by RRT."*

Hearing before the Court

16. At the hearing before the Court the applicant appeared in person. She was assisted by an interpreter in the Mandarin language. Ms B Anniwell appeared for the first respondent.

17. The applicant confirmed that she had received legal advice in this matter. She complained that the Tribunal did not give consideration to the risk for her in returning to China. She submitted that the Chinese authorities are still "strict" with Falun Gong practitioners, and that her Falun Gong related conduct in Australia would become known to them. She complained that the Tribunal did not believe that she was a Falun Gong practitioner.

Consideration

Ground 1

18. The first ground, in part, is consistent with the applicant's submissions expressed before the Court that she cannot return to China because the Chinese authorities are still "strict" with Falun Gong practitioners. This seeks to re-agitate before this Court the applicant's claim to be a refugee, and appears (at best) to be seeking impermissible merits review. It does not succeed. This Court cannot engage in such review (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* [1996] HCA 6; (1996) 185 CLR 259).

Ground 2

19. The second ground seems to be a complaint that the Tribunal made its findings without "substantive evidence", and is possibly an allegation of bad faith or bias.

20. If this is a complaint that the Tribunal did not have any evidence to support its findings, I note the provisions of ss.65 and 36(2) of the Act, and that before a protection visa may be granted, the Tribunal must form the requisite level of satisfaction such that the applicant, in effect, comes within the definition of "refugee" as set out in Article 1A(2) of the Refugees Convention (*SJSB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 225 at [15] to [16], *NAST v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 208 at [4] to [5], *Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003* [2005] FCAFC 73). Accordingly, the relevant statutory framework requires that the Tribunal, on the evidence that is put before it, reach a requisite level of satisfaction such that the applicant is, in effect, a refugee before a protection visa is to be granted.

21. The issue, therefore, is not that the Tribunal has to find evidence to "prove" that the applicant is not a refugee or to find evidence to "prove" that she is. The relevant task imposed by the legislation is to form a requisite level of satisfaction on the material before it that the applicant, in effect, meets the definition of "refugee", such that a protection visa must be granted. If the state of satisfaction is not reached, the visa must be refused.

22. To the extent that this ground may be construed as a complaint that the Tribunal failed to consider evidence that would support findings contrary to those ultimately made by the Tribunal, this complaint is not made out.

23. First, the Tribunal is not required in its written reasons to deal with every piece of evidence that might be thought to be relevant (*SZEHN v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1389, per Lindgren J and authorities there cited, *Singh v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1113).

24. Second, the Tribunal is not required to make findings on each piece of evidence before it, nor is it required to refer to each individual piece of evidence to demonstrate that it has taken into account the fact or facts to which the evidence refers (*Minister of Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [68], [73] to [74] and [91], *Applicant A169/2003 v Minister of Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 8 at [24], *WAEE v Minister of Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630; [2003] FCAFC 184 at [47], *Paul v Minister of Immigration and Multicultural Affairs* (2001) 113 FCR 396; [2001] FCA 1196).

25. Third, in my view, having regard to the Tribunal's reasons for decision, and on a plain reading of its decision record, there is no suggestion that the Tribunal failed to undertake a "proper, genuine and realistic consideration [of] the merits of the case" (*SZEJF v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 724 at [39], per Rares J).

26. In any event, while noting that the Tribunal is not required to refer to every piece of evidence before it, in my view, the Tribunal did extensively refer to, and set out, the evidence to support its findings.

27. The evidence to which it referred included the following:

1) The Minster's departmental file (CB 99.3).

2) The delegate's decision record and the material referred to in it (CB 99.3).

3) The applicant's protection visa application, including the attached statement (CB 99.5 to CB 101.9).

4) The applicant's statements at the interview with the delegate on 11 September 2008 (CB 101.10 to CB 103.1).

5) The applicant's oral evidence given at the Tribunal hearing (CB 103.2 to CB 112.8).

6) The applicant's documentary evidence (CB116.6).

7) Independent country information (CB 112.8 to CB 116.5).

8) What the Tribunal referred to as "other material from a range of sources" (CB 99.3).

28. Not only did the Tribunal comprehensively set out this evidence (some of it, in great detail), it clearly set out its findings in relation to the applicant's claims, and gave cogent reasons for making such findings.

29. In this matter, the Tribunal was unpersuaded by the evidence and material that had been put before it that the applicant would be at risk of harm for a Convention reason if she were to return to China. The Tribunal made a finding that the applicant was not a credible witness and rejected the applicant's claims on this basis. This was a finding made within jurisdiction (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407), and for which it gave reasons.

30. Further, if the applicant seeks to make an allegation of bad faith or bias, this must be clearly made and proven (*SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361, *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, and *Minister for Immigration and Multicultural and Indigenous Affairs v NAOS of 2002* [2003] FCAFC 142). The applicant has not done so, and nor is there anything before the Court to support such a claim. It is rare that such a complaint can be made out with reference only to the Tribunal's decision record (*SCAA v Minster for Immigration Multicultural and Indigenous Affairs* [2002] FCA 668 at [38]).

31. Further, the applicant's complaint made before the Court that the Tribunal did not believe her evidence that she was a Falun Gong practitioner does not assist her. Without anything further, this is a challenge to the merits of the Tribunal's factual findings. It does not reveal jurisdictional error (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407).

32. The applicant also complained that the Tribunal did not give consideration to the risk for her if she were to return to China. This complaint also does not succeed. The Tribunal squarely addressed that issue (see [94] at CB 122 for its conclusion). The applicant needs to

understand that the Tribunal found her not to be credible as to what she said had occurred in China. This was a finding made by the Tribunal within the proper exercise of its jurisdiction. It is not a finding that this Court can re-visit. It was this finding that led to its finding that she was not a Falun Gong practitioner and, as a consequence, its finding that the harm that she claimed to have occurred in the past did not occur. Consequently, the Tribunal reasoned that on return to China she would not be at risk from the authorities and would not suffer harm. The Tribunal's conclusion was open to it. I cannot see error.

33. In all, therefore, ground two is not made out.

Ground 3

34. The third ground makes a general assertion that procedural fairness was denied. I note, in this regard, that this is a case to which s.422B of the Act applies, making the matters set out in Division 4 of Part 7 of the Act the exhaustive statement of the natural justice hearing rule, absent bias (*Minister for Immigration and Multicultural Affairs v Lay Lat* (2006) 151 FCR 214; [2006] FCAFC 61 at [59] to [67], *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62 at [8], *SZFDE v Minister for Immigration and Citizenship* (2007) 237 ALR 64; [2007] HCA 35 at [48]).

35. The applicant was invited to a hearing pursuant to s.425 and subsequently attended that hearing. This invitation, in itself, complied with all the relevant statutory requirements for the provision of the invitation, the giving of notice, and relevant notice periods. I have in mind ss.425, 425A, 441A(4)(c), reg.4.35D(b). There was also the statement of the matter as set out in s.426A.

36. On what is before the Court (the Tribunal's unchallenged decision record) the applicant was accorded procedural fairness at the hearing (with *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 in mind). The applicant was given the opportunity to set out her claims, evidence, and explanations. The opportunity extended to her setting out the substratum of facts in support of her claims.

37. The Tribunal's account showed that it "sufficiently indicated" to the applicant the concerns that the Tribunal had with aspects of her evidence, leading it to question the applicant's credibility. (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at [47]. See, in particular, CB 104.4, CB 108.4, CB 108.8, CB 109.4 and CB 110.5, and what follows to CB 112.8.)

38. The Tribunal also, in this latter part of the reported hearing, engaged and complied with s.424AA.

39. In *SZMCD v Minister for Immigration and Citizenship* [2009] FCAFC 46 ("*SZMCD*") the Full Court found that (per Tracey and Foster JJ at [104] and Moore J at [2]) that s.424AA and s.424A are intended to be complementary. It is clear that the Tribunal has the benefit of s.424A(2A). (See *SZMCD* at [106].)

40. In any event, there was no breach of s.424A for the following reasons:

    1) The independent country information relied on by the Tribunal comes within the exception contained in s.424A (3)(a) of the Act (*Minister for Immigration and Multicultural and Indigenous Affairs v NAMW* [2004] FCAFC 264; (2004) 140 FCR 572 at [71]; *VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 82 at [12] to [14], *QAAC of 2004 v Refugee Review Tribunal* [2005] FCAFC 92 at [22]).

    2) The information provided by the applicant for the purposes of the review (for example, information provided at the hearing) falls within the exception contained in s.424A (3)(b).

    3) Information contained in the applicant's protection visa application falls within the exceptions contained in s.424A(3)(b) to (ba) of the Act *(SZMJE v Minister for Immigration and Citizenship* [2008] FCA 1751 at [22], *SZLOJ v Minister for Immigration and Citizenship* [2008] FCA 1693 at [15]).

    4) The Tribunal's "subjective appraisals, thought processes or determinations" or "identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps" is not

> "information" for the purposes of s.424A (*SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190; [2007] HCA 26 at [18], per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, citing what was said per Finn and Stone JJ in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 123; (2004) 206 ALR 471 at 476 to 477).

41. I cannot see that any other part of the procedural code was engaged or breached by the Tribunal.

42. For those reasons, ground three does not succeed.

Section 91R(3)

43. During the hearing, I raised with Ms Anniwell the issue of whether the Tribunal breached s.91R(3) of the Act. In particular, by having regard to the applicant's conduct in Australia when assessing the credibility of the applicant's claim to have been a Falun Gong practitioner. This was raised with particular reference to what was said by the Full Court in *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105 (*"SZJGV"*) (per Spender, Edmonds and Tracey JJ).

44. I also raised the question of the Tribunal's use of the word "dominant" when referring to the purpose for the applicant engaging in Falun Gong related conduct in Australia. At [91] (CB 120) the Tribunal stated:

> *"As the Tribunal has found that the applicant was not a Falun Gong practitioner in China and found that she lacked credibility, the applicant has not satisfied the Tribunal that she engaged in the conduct, including attending the Parramatta practice group, practicing at home and any other related activities in Australia otherwise than for the purpose of strengthening her claims to be a refugee. As the Tribunal finds that the* ***dominant purpose*** *for the applicant practising Falun Gong in Australia is to strengthen her refugee claims the Tribunal concludes that she engaged in conduct for the purpose of strengthening her claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol. In accordance with section 91R(3) of the Migration Act 1958 the Tribunal is required to disregard the applicant's conduct in Australia."*
>
> [Emphasis added]

45. I gave the parties the opportunity to file further written submissions. The respondent filed supplementary submission. Nothing further has been received from the applicant.

46. In relation to the issue of credibility and conduct in Australia, the Minister submits that the Tribunal's finding that the applicant was not a "credible witness" is found at paragraph [82] of its decision record (CB 117.4):

> *"82. The Tribunal did not find the applicant to be a credible witness. In reaching this view the Tribunal has had regard to her limited knowledge and understanding of Falun Gong, despite having been a Falun Gong practitioner since early 2007, and the inconsistencies between her written claims and the oral evidence she provided at the hearing. She informed the Tribunal that her migration agent had read her application back to her in Mandarin and it was an accurate and truthful record of the protection visa application. Considered alongside the inconsistencies discussed below and the inconsistencies between the account of what happened to her in China and independent country information, the Tribunal is not satisfied that any of her explanations, in themselves, or considered together, account for the inconsistencies. Rather, the Tribunal is satisfied that the inconsistencies are a result of the applicant's attempts to manufacture claims of persecution where none has actually been suffered or is actually feared."*

47. The Minister's submission is that the applicant's lack of knowledge and inconsistent evidence on which the adverse credibility finding was based was summarised by the Tribunal in [83] to [89] and, in particular, was based on the applicant's:

1) Limited knowledge of Falun Gong ([83]).

2) Distribution of Falun Gong material in a car park near a shopping centre ([84] and [85]).

3) Travel to Korea [86].

4) Ability to obtain a visa and exit China using her own name and passport ([87] to [89]).

48. The Minister's position is that, notwithstanding that [90] (which deals with the applicant's practice of Falun Gong in Australia) commences

with the word “Fifth” (implying some sequential connection to [82], given that intervening paragraphs are headed by “First”, “Second”, “Third”, and “Fourth”), the Tribunal commenced a separate assessment of the applicant’s Falun Gong activities while in Australia.

49. The Minister submits that the Tribunal’s reasoning at paragraph [90] does not contain any findings or comments about the applicant’s lack of knowledge or inconsistent evidence which might have contributed to the credibility finding made at [82]. The Tribunal accepted the applicant’s explanation for the discrepancy between what she said at the interview with the departmental delegate and at the hearing before the Tribunal regarding the number of Falun Gong practitioners “in Parramatta”. The Minister submits that, having assessed the facts set out at [90], the Tribunal (at [91]) went on to apply s.91R(3) by disregarding that conduct.

50. In essence, therefore, the submission is that paragraphs [90] and [91] should be read together, that paragraph [90] contains the outline of the applicant’s claimed conduct in Australia, and that at paragraph [91] the Tribunal accepts that the applicant’s claimed conduct in Australia occurred, and then proceeds to disregard it pursuant to s.91R(3).

51. Therefore, having expressly disregarded the applicant’s conduct in Australia at paragraph [91], the Minister submits that the Tribunal did not rely upon the evidence outlined in paragraph [90] when making the adverse credibility finding at paragraph [82]. In all, therefore, it is “more likely than not” (with reference to this *SZJGV*) that the Tribunal did not have regard to the applicant’s conduct in Australia when assessing the credibility of her claim to have been a Falun Gong practitioner in China, and to have suffered persecution for having done so.

52. In relation to the use of the words “dominant purpose” in the context of s.91R(3), the Minister submits that the Tribunal (at [91]) disregarded the applicant’s conduct in Australia based on a positive finding that “the dominant purpose” for the applicant practising Falun Gong in Australia was to strengthen her claims to be a refugee.

53. The Minister refers to *SZJZN v Minister for Immigration and Citizenship* (2008) 169 FCR 1; [2008] FCA 519 at [34] to [35] where

Madgwick J observed that "the purpose" in s.91R(3) could be interpreted as meaning "the dominant purpose" to reflect the legislature's intention.

54. The Minister's submission is that there is no jurisdictional error in the Tribunal's interpretation and application of s.91R(3) by its use of the term "dominant purpose". That even if s.91R(3) imposes "any purpose" rather than a "dominant purpose", the Tribunal's finding that the applicant had the dominant purpose of strengthening her claims to be a refugee would necessarily fall within s.91R(3).

Consideration: Credibility and s.91R(3)

55. The use of the word "Fifth" at paragraph [90] in the Tribunal's decision record does, on its face, present a problem for the Minister now. But I must bear in mind what was said by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* [1996] HCA 6; (1996) 185 CLR 259 (at 271 to 272):

> *"It was said that a court should not be 'concerned with looseness in the language . . . nor with unhappy phrasing' of the reasons of an administrative decision-maker (Collector of Customs v Pozzolanic [1993] FCA 456; (1993) 43 FCR 280 at 287). The Court continued (Collector of Customs v Pozzolanic [1993] FCA 456; (1993) 43 FCR 280 at 287): 'the reasons for the decision under review are not to be construed minutely and finally with an eye keenly attuned to the perception of error.' These propositions are well settled.'"*

56. On a fair reading of the Tribunal's decision record, I am persuaded that the Tribunal did not contravene s.91R(3) of the Act in this regard, bearing in mind what was said in *SZJGV*.

57. On any plain reading, let alone on a fair reading, with regard to paragraph [82] (see [46] above) the reasons that the Tribunal found the applicant not to be a credible witness were:

1) Her limited knowledge and understanding of Falun Gong, despite claiming to have been a Falun Gong practitioner since early 2007.

2) The inconsistencies between her written claims and oral evidence that she provided at the hearing, and: "considered alongside the

inconsistencies discussed below and inconsistencies between the account of what happened to her in China and independent country information". These inconsistencies were: "a result of the applicant's attempts to manufacture claims of persecution when none has actually been suffered or is actually feared" (at [82]).

58. In my view, on at least a fair reading of the Tribunal's decision record, it is revealed that this lack of knowledge, and these inconsistencies, related to events in China, and did not relate to events in Australia.

59. The Tribunal found that it did not accept that the applicant was a Falun Gong practitioner. In part, this was because it rejected her explanation for her limited knowledge of Falun Gong and because of errors that she made in Falun Gong exercises that she was asked to explain.

60. The Tribunal found aspects of her evidence regarding her distribution of Falun Gong material in a car park to be implausible, and that her claims to have distributed such pamphlets as a Falun Gong practitioner were inconsistent with her evidence that she did not know what the contents of the pamphlets were, that she did not know where the pamphlets had been produced, and her evidence that authorities were not concerned about the distribution of pamphlets except around important occasions such as festivals ([84] to [85] – at CB 118).

61. Further, the Tribunal found that inconsistencies arising from her written application, the written statement attached to it, and what she told the Tribunal at the hearing raised: "doubts about the truthfulness of her claims" (see [86] at CB 119).

62. The explanation for the inconsistency between the applicant's evidence that she did not experience difficulty in leaving China with her claims to have been detained and to have been of interest to the Chinese authorities, was rejected by the Tribunal ([87] to [89] at CB 119). Plainly, the Tribunal found the applicant's claims to have experienced harm, and to have attracted adverse attention from the Chinese authorities, to be inconsistent with her capacity to leave China with a visitor's visa in 2007, to have returned to China, and then to have ultimately left China again for Australia unhindered.

63. The inconsistency was further noted in relation to the applicant's claim to have obtained a passport as against the independent country information available to the Tribunal, indicating that those Chinese citizens who were deemed to be a threat to the government (including members of Falun Gong) "would have difficulty in obtaining travel documents" ([88] at CB 119).

64. I agree with the Minister's submissions that what follows at paragraphs [90] and [91], notwithstanding the use of the word "Fifth" at the beginning of [90], was properly a separate examination of the applicant's conduct in Australia. There are a number of indicators in the Tribunal's decision record which, at least on a fair reading, allows such an inference on balance, or "more likely than not", to be drawn.

65. First, the last sentence of [89] can be seen as a conclusion to the analysis commenced by the Tribunal at [82]. That is, the Tribunal did not find the applicant to be a credible witness in the context, as it said, of the inconsistencies in her account of what she said had occurred in China, and inconsistencies between the account "of what happened to her in China" and independent country information. What follows up to paragraph [89] is the examination of the inconsistencies in that account. It ultimately concluded with: "The Tribunal concludes that the applicant is not a person of adverse interest to the Chinese authorities and would not suffer harm if she was to return to China" (paragraph [89] at CB 119.8).

66. What commences, therefore, at paragraph [90] (notwithstanding the use of the word: "Fifth") is the examination of the applicant's practice of Falun Gong in Australia. The Tribunal recounts in this part of its analysis what relevantly had occurred at the hearing and, importantly, at the end of paragraph [90], despite some concerns, the Tribunal plainly accepted the applicant's accounts of claimed conduct in Australia (at CB 120.4):

> *"The Tribunal accepts the applicant's explanation for the discrepancy between the Departmental interview and at the hearing regarding the number of practitioners attending the practice at Parramatta. The Tribunal accepts that the number of practitioners who attended a practice session would vary between five and ten."*

67. Far from making findings of inconsistencies or rejecting the applicant's claims, in contrast at paragraph [90], in dealing solely with the applicant's claimed conduct in Australia, the Tribunal accepted the applicant's claims as to that conduct.

68. The Tribunal's approach in this regard is, in my view, consistent with what was set out by the Full Court in *SZJGV*. The Tribunal did turn its mind to the applicant's claim to have engaged in conduct in Australia, which caused her to fear persecution if she were to return to China, and decided whether or not that conduct had occurred (*SZJGV* at [22]).

69. The Tribunal found that she had attended Falun Gong practice sessions in Parramatta once a month, that she practised at home, and that she did not practice anywhere else. It resolved, in the applicant's favour, certain discrepancies, or inconsistencies, between what she said at the departmental interview and the hearing before the Tribunal regarding the number of practitioners attending the practice of Falun Gong at Parramatta.

70. In my view, a clear inference can therefore be drawn that the Tribunal did not use the conduct in Australia in making an adverse credibility finding about the applicant. Plainly, as it said at the beginning of paragraph [91], it was not satisfied that she engaged in the conduct other than for the purpose of strengthening her claims to be a refugee because it had: "found that the applicant was not a Falun Gong practitioner in China and found that she lacked credibility". The finding that she was not a Falun Gong practitioner in China, therefore, was not influenced by events in Australia, given that the Tribunal had clearly dealt with that issue separately and previously in its analysis.

71. Also, and significantly, the finding that she lacked credibility could not have been influenced by the Tribunal's findings in relation to the conduct in Australia, given that it made no adverse findings as to her credibility in relation to those matters and, to the contrary, that it accepted her explanations for inconsistencies in the accounts relating to such conduct in Australia.

72. That this is a fair reading of the Tribunal's reasons for decision can also be inferred from what follows. At [92] the Tribunal found that the: "applicant's evidence shows a propensity to fabricate claims for an

immigration purpose." Importantly, the conduct in Australia was not found to be such a fabrication. The Tribunal then went on to find that it did: "not accept that the applicant is a Falun Gong practitioner …"

73. What then follows is an item by item rejection of each aspect of, and detail of, the applicant's claims, to have been a Falun Gong practitioner, and the harm that she claimed had been occasioned to her and to her mother in China and relevant to China. Importantly, and properly, there is no reference to any of the claimed conduct in Australia – properly, because the Tribunal had found that it must disregard such conduct. The rejection of the credibility of the applicant's claims to have been a Falun Gong practitioner in China, and to have suffered persecution for having done so, was based, therefore, on the adverse view that the Tribunal took of the applicant's credibility, an assessment which did not involve the claimed conduct in Australia.

74. I should also note, and deal with, the applicant's complaint before the Court that her Falun Gong related conduct in Australia would become known to the Chinese authorities. That if she were to return she would therefore be at risk of harm for his reason also.

75. This was not a claim made before the Tribunal. But in any event, the Tribunal's finding that she was not a Falun Gong practitioner and its conclusion that it had to disregard the Falun Gong related conduct in Australia (see above) addresses and deals with this complaint.

Section 91R(3) and "Dominant Purpose"

76. However, in relation, to the issue of the Tribunal's use of the concept of "dominant purpose" in relation to its treatment of s.91R(3) (see paragraph [91] of its decision record and [44] above), I am not persuaded by the Minister's supplementary submissions that there was no jurisdictional error in the Tribunal's interpretation and application of s.91R(3) by the use of the phrase "dominant purpose".

77. Nor do I agree with the Minister's "alternative" proposition that even if s.91R(3) imposes a test of "any purpose", rather than a dominant purpose, then the Tribunal's finding that the applicant had a dominant purpose of strengthening her refugee claims would "fall within

s.91R(3)". I do not agree that it is open now to this Court to accept that the relevant test is one of "dominant purpose", or even "any purpose".

78. Interestingly, and subsequently, neither does the Minister. In submissions made (subsequent to the submissions made in the current case) in *SZNAB v Minister for Immigration & Anor* [2009] FMCA 152 (before Driver FM on 3 June 2009 – "*SZNAB*"), the Minister conceded jurisdictional error on the part of the Tribunal in its application of a "dominant purpose" test in relation to s.91R(3) (see *SZNAB* at [7]).

79. In the current case, the Minister's written submissions refer to *SZJZN v Minister for Immigration and Citizenship* [2008] FCA 519 ("*SZJZN"*) per Madgwick J and appear to draw from what was said at [35]:

> *"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."*

80. In *Somaghi v Minister of Immigration, Local Government and Ethnic Affairs* [1991] FCA 389 ("*Somaghi*") the Court held at [35] (per Gummow J):

> *"… it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking*

a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status …"

81. In relation to this issue Driver FM in *SZNAB* said (at [5]):

> *"That issue is currently under consideration in the High Court in the appeal from the Full Federal Court decision in the Minister for Immigration v SZJGV [2008] FCAFC 105. On 20 May 2009, in argument on the appeal, the Solicitor-General for the Commonwealth submitted that the observations of Madgwick J in SZJZN about the dominant purpose test were dicta and were also incorrect. The Solicitor-General pointed out that his Honour's reasoning in SZJZN was inconsistent with the decision of the Full Federal Court in Somaghi v Minister for Immigration [1991] FCA 389; (1991) 31 FCR 100 where the Full Federal Court held that actions taken outside the country of nationality or, in the case of a person not having nationality outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to well founded fear of persecution should not be considered as supporting an application for refugee status."*
>
> [Footnotes omitted]

82. His Honour went on to state (at [8]):

> *"It follows that pending the outcome of the High Court appeal in SZJGV, the Tribunal and this Court should proceed on the basis that s.91R(3) calls for the application of a sole purpose rather than a dominant purpose test in considering the motivation of an applicant in undertaking conduct in Australia."*

83. I respectfully agree with his Honour. The Full Federal Court judgment in *Somaghi* in relation to s.91R(3) requiring a "sole purpose" test is clearly binding on this Court. It is not open to this Court, with respect, to accept or to adopt the observations about the "dominant purpose" in *SZJZN*. For that matter, nor do I accept the Minister's written submissions in this case to the extent that they directly conflict with submissions made by the Solicitor-General on the Minister's behalf to the High Court in *SZJGV*.

84. I did consider whether, notwithstanding its use of the words "dominant purpose" (at [91]), the Tribunal nonetheless understood the relevant test to be applied (the "sole purpose test"), and applied this test in any event to what was before it.

85. There is no reference to any relevant test in the Tribunal's setting out of the relevant law in its decision record. (See [6] to [18] at CB 97 to CB 99), which may assist in the resolution of this matter.

86. While the Tribunal repeats the relevant language in s.91R(3) at [91], in the sentence immediately proceeding the sentence containing the reference to the "dominant purpose", the very juxtaposition of the actual language of the legislation with the term "dominant purpose" would suggest that the Tribunal understood the language of the legislation in the context of a "dominant" purpose test, rather than a "sole" purpose test.

87. Further, on the Tribunal's own account of what occurred at the hearing with the applicant the Tribunal reports ([58] at CB 108):

> *"The Tribunal said that under the Migration Act if it believed she engaged in conduct while in Australia to strengthen her claim to be a refugee it must disregard that conduct in assessing her claim …"*

88. This language is, on a fair reading, and at best, ambiguous as to whether the Tribunal understood the relevant test. It leaves open the possibility that there could be another purpose to the conduct. For example, there is no qualification: "… engaged in the conduct … only to strengthen her claim."

89. Tribunal decisions should not be read "with an eye attuned to error". But, ultimately, the plain language used by the Tribunal in its critical finding was that the "dominant purpose" for the practice of Falun Gong in Australia was to strengthen her refugee claims. That is not reflective of the sole purpose test.

90. Pending the outcome of the appeal in *SZJGV* before the High Court, s.91R(3) requires the application of a sole purpose test, rather than a dominant purpose test in considering the applicant's motives for engaging in conduct (in this case, Falun Gong-related conduct) in Australia. On balance, I am satisfied that the Tribunal applied the dominant purpose test. A misunderstanding or misapplication of the relevant law in these circumstances is jurisdictional error.

91. The relief that the applicant seeks is discretionary. But I can see no overriding reason to deny the applicant the relief that she seeks. I will make orders quashing the Tribunal decision and return the matter to the Tribunal requiring it to review the application according to the law.

I certify that the preceding ninety-one (91) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Associate: C Darcy

Date: 24 June 2009