FEDERAL COURT OF AUSTRALIA

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

MIGRATION - whether denial of procedural fairness - whether compliance by Refugee Review Tribunal with s 424AA *Migration Act 1958* (Cth) - whether the Tribunal failed to give particulars of information which might be the reason or part of the reason for the Tribunal to affirm the decision under review - no breach of s 424AA.

MIGRATION - whether jurisdictional error - whether the Tribunal failed to ignore conduct of appellant in Australia in contravention of s 91R(3) - proper construction of s 19R(3) - contravention established - refused in exercise of discretion.

INTERPRETATION – s 91R(3) *Migration Act* not limited to *sur place* claims - characterisation of appellant's conduct in Australia - s 91R(3) applies to conduct intended to be used as corroborative evidence of appellant's claimed fear of persecution in own country.

Migration Act 1958 (Cth) ss 91R(3), 424A, 424A(2A), 424A(3)(b), 424AA

NABE v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 144 FCR cited
NAOA v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 241 cited
NBKT v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 156 FCR 419 cited
Re Refugee Review Tribunal; ex parte AALA (2000) 204 CLR 82 cited
R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389 cited
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162 cited
SDAQ v Minister for Immigration and Multicultural Affairs (2003) 199 ALR 265 cited
Stead v State Government Insurance Commission (1986) 161 CLR 141 cited
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609 cited
SZGDJ v Minister for Immigration and Citizenship [2008] FCA 722 considered
SZGIY v Minister for Immigration and Citizenship [2008] FCAFC 68 cited
SZHAY v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 199 FLR 148 referred to
SZHFE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) [2006] FCA 648 considered
SZHFE v Minister for Immigration and Citizenship [2007] HCA Trans 10 cited

SZJGV v Minister for Immigration and Citizenship (2008) 102 ALD 226 considered
SZMCD v Minister for Immigration and Citizenship [2008] FMCA 1039 cited
S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 cited

SZLWI v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 940 OF 2008

GILMOUR J
29 AUGUST 2008
SYDNEY

CATCHWORDS

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY NSD 940 OF 2008

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**GILMOUR J**
DATE OF ORDER:	**29 AUGUST 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. Any written submissions on the questions of costs be filed and served by the 8 September 2008 by the respondent.
3. Any submissions in reply be filed and served by the 15 September 2008 by the appellant.
4. Reserve costs.

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

CATCHWORDS

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NEW SOUTH WALES DISTRICT REGISTRY **NSD 940 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZLWI** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**GILMOUR J**
DATE:	**29 AUGUST 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal against a judgment of a Federal Magistrate of 11 June 2008 dismissing an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dated 26 November 2007 and handed down on 18 December 2007. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Citizenship to refuse to grant a protection visa to the appellant.

PROCEDURAL HISTORY

2 The appellant is a citizen of China who arrived in Australia on 25 March 2007. On 8 May 2007 the appellant lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs. A delegate of the first respondent refused the application for a protection visa on 30 July 2007. On 24 August 2007 the appellant applied to the Tribunal for a review of that decision.

3 Before the Tribunal the appellant claimed that he was persecuted by the Chinese government because of his religious beliefs and membership of an underground Christian Church. He claimed that he had been detained a number of times because of his religious

beliefs. First in March 1998 by the Yuhong Branch of Shenyang Municipal Police Security Bureau where he was fined a substantial amount of money and forced to sign a letter saying he would give up his involvement in the underground church. He claimed that he was detained by the Police for 7 days after attending a family gathering in June 2001. The appellant said that during this time he was beaten and his family, job and fortune were threatened if he did not stop participating in illegal church activities. He claimed that his home was broken into by police again in September 2004 and his Bibles and other relevant documents were taken. He and his family were allegedly detained until a sum of money was paid for their release. The appellant said that this time he was detained for a period of 15 days. The appellant alleged that the Chinese authorities sealed his cow farm because of his continued involvement with the underground church. He claims that his wife has told him, since his departure form China, not to return.

4 The appellant also claimed that he was fined a lot of money and his farm in the Heilongjiang province was confiscated for breaching China's one child policy. He claimed that the authorities tried to cut off his means of earning an income.

THE TRIBUNAL DECISION

5 The Tribunal determined that the appellant was not a credible witness and did not accept the appellant's claims and evidence in relation to his Christian beliefs and practice in China. In coming to this conclusion the Tribunal had regard to the appellant's limited knowledge and lack of knowledge in relation to a number of significant aspects of Christianity. In particular it found that he:

(a) was unable to explain which group or denomination he belonged to;

(b) gave vague and general evidence regarding the religious gatherings that he attended;

(c) was not aware of when Christ's crucifixion took place;

(d) lacked knowledge of the trinity;

(e) He had no knowledge of how the bible was set out or structured, notwithstanding that he had claimed to have studied the bible;

(f) was not able to recite the Lord's prayer;

(g) lacked knowledge of Communion.

6 The Tribunal was not satisfied that the appellant's attendance at church in Australia had been conduct otherwise than for the purpose of strengthening his claims to be a refugee. Accordingly, pursuant to s 91R(3) of the *Migration Act 1958* (Cth) ("the Act"), the Tribunal disregarded this aspect of his claim. As the Tribunal did not accept that the appellant had ever been a genuine practising Christian in China or Australia, the Tribunal also did not accept that there was a real chance the appellant would be persecuted for reason of his religion if he returned to China now or in the reasonably foreseeable future.

7 In relation to the appellant's claim that he was harshly treated by authorities following his breach of China's one child policy, the Tribunal accepted that those penalties may have been significant and that he may have felt harshly treated and compelled to relocate as a result. However, on the basis of the appellant's evidence, the Tribunal noted that such fines were imposed some years ago, that the appellant had been able to operate another business and that there was no evidence that the authorities would continue to penalise the appellant.

8 The Tribunal also accepted that the appellant might be experiencing problems relating to his cow farm and that some of those problems may have arisen from his tax obligations. However, the Tribunal did not accept that the problems arose because of his religion or that the taxes imposed were imposed in a discriminatory manner for a Convention reason.

9 Finally, while accepting the views expressed by the appellant in relation to the Chinese Community Party, on the evidence before it, the Tribunal did not accept the appellant would suffer serious harm on account of those views on his return to that country.

PROCEEDINGS IN THE FEDERAL MAGISTRATES COURT

10 Before the Federal Magistrate the appellant claimed that:

1. the tribunal denied the appellant procedural fairness as it failed to give the appellant information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review as required by s 424A of the *Migration Act* 1958 (Cth) ('the Act').

2. the Tribunal incorrectly applied the law in finding that the one child policy was a law of general application.

3. the Tribunal was subjective in its approach to the appellant's case and therefore the Tribunal decision was affected with bias.

4. the appellant's son, who gave evidence, was scared due to the Tribunal's attitude towards him.

11 The Federal Magistrate was satisfied that the Tribunal complied with s 424AA of the Act by putting to the appellant at the Tribunal hearing clear particulars of the information upon which it would make an adverse finding against him and ensuring as far as was reasonably practical that the appellant understood the relevance of the information and the consequences of the Tribunal's reliance on it. The statutory exceptions to s 424A under s 424A(3)(b) and under s 424A(2A) which incorporates s 424AA of the Act had been made out. The Federal Magistrate further stated that the Tribunal was not required to notify the appellant of its subjective thought processes or appraisals of evidence.

12 In relation to the one-child policy the Federal Magistrate stated that the Tribunal did not in fact reach any conclusion as to whether the policy was a law of general application. Rather, the Tribunal found that there was no real chance that the appellant would suffer persecution in consequence of that policy if he returned to China.

13 In relation to the appellant's further submissions the Federal Magistrate observed that it was not the function of the Court to conduct merits review. The Federal Magistrate was satisfied that the Tribunal correctly outlined the relevant law and principles applicable to determining whether someone is a refugee, and made findings which were open to it. The Federal Magistrate did not find any evidence of bias, or any suggestion that the Tribunal hearing was conducted in an unreasonable way.

14 Overall the Federal Magistrate concluded that the Tribunal understood the nature of the appellant's claims, had explored those claims with him at the hearing and had identified the determinative issues. The Federal Magistrate was satisfied that the appellant was given sufficient opportunity to give evidence and make submissions on the issues at the hearing. The Federal Magistrate considered the Tribunal's finding of fact to be open to it on the evidence before it and was satisfied that the Tribunal's reasons for the decision were sufficient in detail. The Federal Magistrate found that the Tribunal complied with the

statutory regime in the making of its decision and performed the task required of it in accordance with the law.

THE PRESENT APPEAL

15 The notice of appeal raised the following grounds:

> 1. The Federal Magistrate erred in failing to find the Tribunal made a jurisdictional error by not complying with s424AA of the Migration Act 1958 (Cth) ("The Act")
>
> 2. The Federal Magistrate failed to deal with the claim amounted to carry out the review function and there was jurisdictional error on the part of the Tribunal
> (Transcribed without amendment or alteration)

16 At the hearing of the appeal before me the appellant submitted that he had not been provided adequate time to respond to particulars provided to him at the Tribunal hearing for the purposes of s 424AA of the Act. He contended that the Tribunal rejected the truthfulness of his evidence that he was a committed practising Christian in China without proper grounds. He also complained that the Tribunal member had exhibited a bad attitude towards his son who had given evidence on his behalf.

REASONS

Ground 1

17 The appellant's claim that there was a breach of s 424AA was not raised by the appellant before the Federal Magistrate although the Federal Magistrate was nonetheless satisfied that there had been compliance with this section. This ground is not particularised.

18 Section 424AA of the Act relevantly provides that:

> **424AA Information and invitation given orally by Tribunal while applicant appearing**
>
> If an applicant is appearing before the Tribunal because of an invitation under section 425:
> (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
> (b) if the Tribunal does so - the Tribunal must:

> (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and
> (ii) orally invite the applicant to comment on or respond to the information; and
> (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and
> (iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

19 Section 424AA does not impose any obligation on the Tribunal. It enables the Tribunal, if it chooses to do so, to give oral particulars of adverse information to an applicant at a hearing that may otherwise need to be given in writing under s 424A(1): *SZMCD v Minister for Immigration and Citizenship* [2008] FMCA 1039 at [56]. If the Tribunal chooses to give oral particulars of information under s 424AA but fails to comply with the requirements of s 424AA(b), the consequence is not that it falls into jurisdictional error. The consequence is that s 424A (2A) is not engaged; *SZMCD* at [68]. This is in light of the Explanatory Memorandum. (The abbreviation "RRT" refers to the Tribunal):

> … Section 424AA provides a new discretion for the RRT to orally give information and invite an applicant to comment on or respond to the information at the time that the applicant is appearing before the RRT in response to an invitation issued under section 425. This will complement the RRT's existing obligation under section 424A, in that, if the RRT does not orally give information and seek comments or a response from an applicant under section 424AA, it must do so in writing, under section 424A. The corollary is that if the RRT does give clear particulars of the information and seek comments or a response from an applicant under section 424AA, it is not required to give the particulars under section 424A.

20 The appellant has not particularised the alleged breach of s 424AA. The Court below observed, correctly in my view, that no s 424A(1) obligations arose from the Tribunal's appraisal of the Appellant's testimony: *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [18] and *SZGIY v Minister for Immigration and Citizenship* [2008] FCAFC 68 at [27]. Section 424AA could only apply in this case to the evidence of the appellant's son. Two matters emerge in that respect. First the testimony given by his son did not, in its terms, constitute a basis for an undermining, denial or rejection of the Appellant's claims. It did not form part of the Tribunal's reasons for decision: *SZBYR* at [17]. Second,

the Tribunal clearly complied with the procedure prescribed by s 424AA. Specifically as the Federal Magistrate observed [22]-[23] the Tribunal explained to the appellant and invited his response to its concerns that:

> … it may not accept the son's evidence and may find in any case that his son's evidence was very vague, including that he also could not identify which group the applicant belonged to.
>
> … The appellant stated that he would like more time to comment, but wished to do so at the current hearing. The Tribunal … considered that he did not reasonably require an adjournment of the hearing.

21 There is nothing before me which demonstrates that the Tribunal failed to comply with the provisions of s 424AA or otherwise failed to accord procedural fairness; *NAOA v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 241 at [21]. This ground fails.

Second Ground

22 The appellant has not particularised the claim which he alleges was not considered by the Tribunal. The Tribunal made reasoned findings in respect to the Appellant's claims based on his religion and political opinion. The Federal Magistrate found at [43] that the Tribunal did not reach any conclusion as to the one child policy being a law of general application. Rather, the Tribunal found that there was no real chance that the appellant would suffer persecution in consequence of that policy if he returned to China.

23 The Tribunal is not obliged to speculate on claims that did not squarely arise on the material before it and it is not open for the Appellant to now reformulate his claims on an *ex post facto* basis; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 144 FCR 1 at [58]; *SDAQ v Minister for Immigration and Multicultural Affairs* (2003) 199 ALR 265 at [19]; *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 at [1].

24 The second ground has not been established.

Section 91R(3) of the Act

25 Although no ground of appeal was raised concerning jurisdictional error by the

Tribunal for breaching s 91R(3) of the Act, the first respondent has quite properly raised this for the Court's consideration in light of the recent Full Federal Court decision reported as *SZJGV v Minister for Immigration and Citizenship* (2008) 102 ALD 226. The report, involving the proper construction of s 91R(3), concerns three appeals: one was an application for leave to appeal in respect of which leave was granted. The other two appellants were *SZJXO* and *SZKBK*.

26 Section 91R(3) relevantly provides that:

> (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.

27 The first respondent submits, for the following reasons, that s 91R(3) was not engaged in the present case. If the Tribunal had properly considered s 91R(3) it would not have applied it. Section 91R(3) is confined in its operation to *sur place* claims. The appellant did not make a *sur place* claim based on his conduct in Australia and therefore s 91R(3) did not arise: *SZHFE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2006] FCA 648 at [30]; *SZHFE v Minister for Immigration and Citizenship* [2007] HCA Trans 10; *SZGDJ v Minister for Immigration and Citizenship* [2008] FCA 722 at [17]-[22]. The appellant relied on his conduct in Australia, merely as corroboration of his claims to being a Christian in China. He did not claim to have a fear of persecution in China based on his conduct in Australia. Accordingly, the Tribunal could not have found that the appellant's fears for reason of his Christian conduct in Australia were well-founded and Convention based, because the appellant did not claim to hold such fears based on his conduct in Australia. Accordingly, s 91R(3) had no application.

28 I do not agree. *SZHFE* did not concern a *sur place* claim. The Tribunal in that case found that the applicant's conduct in Australia was not an attempt to enhance his protection visa claims but rather was an attempt to achieve permanent residency by another route.

Accordingly, s 91R(3) did not require that his conduct be disregarded. There appears to have been very little argument before Jacobson J as to the proper construction of s 91R(3). His Honour did however express his opinion that "s 91R(3) is only enlivened where an applicant seeks to rely on conduct in Australia to support a claim to have a well-founded fear of persecution". I do not apprehend his Honour to be saying that the provision is limited in its effect to conduct in support of a *sur place* claim. Nor is this opinion necessarily inconsistent with the construction of s 91R(3) articulated in *SZJGV* by the Full Court.

29 Likewise, the decision of Weinberg J in *SZGDJ v Minister for Immigration and Citizenship* [2008] FCA 722 did not involve a *sur place* claim. The conduct in that case involved a failure by the appellant whilst in Australia to involve himself in the activities of an Awami League support group in Australia. It is not difficult to appreciate why this did not attract the exclusionary operation of s 91R(3).

30 Weinberg J did refer in *obiter* to the second-reading speech relating to the introduction of s 91R that subsection (3) was intended to deal with *sur place* claims. However, the question whether conduct amounting to purported corroborative evidence of alleged refugee status did not arise for consideration in that case. I do not consider that his Honour was expressing a considered opinion as to the reach of s 91R(3).

31 Contrary to the first respondent's submission, the court in *SZJGV* held that s 91R(3), upon its proper construction, is not limited to *sur place* claims which depend on conduct deliberately engaged in by an applicant in Australia to attract the adverse attention of the authorities in his or her country of origin and thereby support a claim to be a refugee. It said at [24]:

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

32 This extended construction was applied by the Full Court in *SZJGV* at [27] where it found that the Tribunal had had regard to the appellant's conduct in Australia, if only for the limited purpose of assessing the credibility of his claim to have been a Falun Gong practitioner in China and to have suffered persecution for having done so. The Full Court held that by so doing the Tribunal contravened s 91R(3) of the Act. This construction of s 91R(3), extending beyond refugee *sur place* claims, is consistent with the approach taken by Driver FM in *SZHAY v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 199 FLR 148 at [32] to which the Full Court referred with apparent approval in *SZJGV* at [10].

33 The Tribunal in this case found that the appellant had a limited knowledge of the Christian faith and that he was not a credible witness in terms of his evidence regarding his Christian beliefs. It did not accept that the appellant was a practising Christian or a member of an underground church in China. The Tribunal, in a separate finding, accepted that the appellant had attended church services in Australia and gained additional knowledge of Christianity but that he had not done so because he is a genuine practising Christian.

34 Accordingly it made the following finding for the purposes of s 91R(3):

> Given the Tribunal's findings in respect of the applicant's Christian beliefs and practice, the Tribunal is not satisfied for the purposes of s 91R(3) of the Act that the applicant engaged in this conduct in Australia otherwise than for the purpose of strengthening his claims to be a refugee. Accordingly, the Tribunal disregards the applicant's conduct in Australia in acquiring knowledge about Christianity and his attendance at services at St Johns Cathedral, in assessing whether he 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.

35 Despite this the Tribunal went on to conclude that:

> As the Tribunal does not accept that the applicant has ever been genuine practising Christian in China **or Australia**, the Tribunal does not accept that he will practice as a Christian in China upon his return. The Tribunal therefore does not accept that there is a real chance that he will be persecuted for reasons of his religion if he returns to China now or in the reasonably foreseeable future. (Emphasis added)

36 The first respondent submits that this finding was based on the Tribunal's earlier finding that the appellant was not a practising Christian and member of an underground church in China and had not suffered persecution for that reason. The first respondent then

characterises these findings as considerations of the appellant's motivation and beliefs as evidenced by his conduct in China and not his conduct in Australia. It submits that s 91R(3) does not apply to a person's conscientious beliefs or motivations for conduct; *NBKT v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 156 FCR 419 at [96] and *SZJGV* at [25] and s 91R(3) should not operate so to oblige the Tribunal to disregard its own ultimate findings as to whether the appellant's conduct in Australia should be disregarded.

37 However that is not, in my opinion, a proper characterisation of what the Tribunal did. The Tribunal stated, purportedly applying s 91R(3), that it disregarded the appellant's conduct in Australia in acquiring knowledge about Christianity as well as his church attendance in assessing whether he had a well-founded fear of being persecuted for a Convention reason should he return to China then or in the foreseeable future. Nonetheless, the Tribunal went on to make the finding set out at [35] above. This is a finding directed to the appellant's asserted Christian **practice** in both China and Australia. The Tribunal employed this finding in arriving at its related finding that he had no well-founded fear of persecution for reasons of his religion should he then return to China or in the reasonably foreseeable future.

38 This mirrors the situation considered by the Full Court in *SZJGV* in the appeal of *SZJXO* at [28]. The Court there said:

> The tribunal did not have regard to the appellant's conduct in Australia for the purpose of deciding whether or not he had practised Falun Gong in China before coming to Australia. **It did, however, have regard to his conduct in Australia for the purpose of determining that there was no reason to believe that he would be persecuted by reason of his Falun Gong activities should be (sic) return to China**. … The tribunal thus brought into account, to the appellant's detriment, his conduct in Australia when determining whether he had a well-founded fear of persecution should he return to China. The tribunal thereby contravened s 91R(3). In doing so it made a jurisdictional error. (Emphasis added)

39 The evidence of the appellant as to his conduct in Australia is correctly characterised, in my opinion, as intended to have been corroborative of his evidence that he was a genuinely committed Christian in China and to have been persecuted there for that reason. No claim was made by him that he feared persecution because of his involvement as a Christian in

Australia. Nonetheless the Tribunal made a finding to that effect as set out at para [35] above.

40 Conduct under either head, where the proviso under s 91R(3)(b) has application, as here, must be disregarded. The Tribunal committed jurisdictional error by contravening s 91R(3) when it relied upon findings as to the appellant's alleged practice of Christianity in Australia as a basis for finding that he would not practice Christianity in China upon his return and that accordingly there was no real chance that he would be persecuted for a Convention reason based in his religious belief then, or in the reasonably foreseeable future.

41 The appellant's conduct was not addressed as evidence to support a *sur place* claim but only as corroborative evidence of his claims to have practised Christianity in China. Nonetheless, as *SZJGV* has made clear, s 91R(3) is properly engaged even in those circumstances.

42 Counsel for the Minister in *SZJGV* did not submit that the Tribunal's decisions could, despite the breach of s 91R(3), be supported independently by reason of other findings.

43 Counsel for the first respondent in this case submits to the contrary.

44 In this case, unlike *SZJXO,* the finding that the appellant was not a committed Christian in China depended on primary findings to which I have referred which were quite discrete from the findings concerning his attendance at church services in Australia. The finding as to his alleged practice of Christianity in China did not depend upon any conduct in Australia. The relevant findings accordingly stand apart. In *SZJXO* the finding that there was no real chance of the appellant being persecuted by reason of her religious beliefs on her return to China was derived from evidence which was intermixed including her conduct in Australia: [28]. The position was the same in the appeal of *SZKBK* at [30].

45 The first respondent submits that even if there has been a breach of s 91R(3), the Court should refuse relief in its discretion. There is merit in the submission. I am satisfied that the findings in respect to the appellant's conduct in China would, independently of the findings as to his conduct in Australia, support the Tribunal's conclusions on the question of persecution: *R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozone*

Theatres (Aust) Ltd (1949) 78 CLR 389 at 400; *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-6; *Re Refugee Review Tribunal; ex parte AALA* (2000) 204 CLR 82 at [104], [131] and [211]; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 at [80], [174] and [211]; see also *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [29].

46 In those circumstances no purpose would be served by granting the relief sought. The appeal should be dismissed. The appellant should pay the first respondent's costs associated with the Notice of Appeal. I will hear the parties on the question of costs related to the s 91R(3) issue which was raised, quite properly so, by counsel for the first respondent.

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

Associate:

Dated: 29 August 2008

Counsel for the Appellant:	Appellant appeared for himself
Counsel for the Respondents:	Mr J Mitchell
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	18 August 2008
Date of Judgment:	29 August 2008