FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMCY v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 934*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming religious persecution in China – applicant not believed – whether the Tribunal breached s.91R(3) of the *Migration Act 1958* (Cth) considered – no reviewable error found – application dismissed.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.91R, 424A

SZJGV v Minister for Immigration [2008] FCAFC 105
SZMBK v Minister for Immigration [2008] FMCA 1101

Applicant:	SZMCY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 849 of 2008
Judgment of:	Driver FM
Hearing date:	12 August 2008
Delivered at:	Sydney
Delivered on:	12 August 2008

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents:	Mr A Markus Australian Government Solicitor

ORDERS

(1) The application is dismissed.

(2) The applicant is to 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 849 of 2008

SZMCY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT
(revised from transcript)

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was handed down on 18 March 2008. The Tribunal affirmed a decision of the delegate of the Minister not to grant the applicant a protection visa.

2. The applicant is from China and had made claims of religious persecution. I adopt as background for the purposes of this judgment paragraphs 4 through to 16 of written submissions filed on 2 July 2008 on behalf of the Minister:

> The applicant is a citizen of China who arrived in Australia on 11 September 2007. He applied for a Protection visa on 25 October 2007 (court book, pages 1-33). The applicant's claims were set out in a statement attached to his application (court book, pages 26-27).
>
> The applicant claimed to fear persecuted on the basis of his religion, specifically for his practice of the Catholic faith. He claimed that while attending an underground church meeting, the local police arrived and took the applicant to the police station where he was beaten and

tortured and detained for two weeks. The applicant claimed that Mr Zheng, the leader of the meeting, was sent to a labour reform camp for one year. The applicant claims he lost his job, but moved to Xinjiang with Mr Zheng after the man's release, where they established a Bible class. The applicant then claims that he and Mr Zheng were reported to the local police at Xinjiang, and that Mr Zheng was caught but the applicant escaped and went into hiding. The applicant claims that he divorced his wife to protect her.

On 20 December 2007 the Delegate refused the application (court book, pages 36-52). The Delegate doubted the applicant's credibility. It found the applicant's claims to be vague, lacking in specific detail and unsubstantiated by any evidence. The Delegate found it difficult to believe that the applicant could leave China legally while being a fugitive, and on a visitor's visa while being unemployed.

The applicant applied to the Tribunal on 18 January 2008 for review of the Delegate's decision (court book, pages 53-56).

The applicant was sent two s.424A letters, dated 5 February 2008 (court book, pages 64- 66) and 12 February 2008 (court book, pages 67-68), in which he was invited to comment on or respond to information in writing.

The applicant responded by way of two letters, dated 19 February 2008 (court book, page 76) and 25 February 2008 (court book, page 77).

The applicant attended a hearing before the Tribunal on 4 March 2008 (court book, pages 78-79).

The Tribunal handed down its decision on 18 March 2008.

Tribunal’s decision

The Tribunal was not satisfied on the evidence before it that the applicant had a well-founded fear of persecution for reason of his religion if he returned to China in the foreseeable future. Its reasoning was based on the following findings:-

a) The applicant appeared to have memorised his statement but became hesitant when asked about other matters.

b) The applicant demonstrated only a minimal knowledge of Christianity and of Catholic doctrines.

c) The applicant was willing to abandon his earlier claims regarding his level of involvement in the underground church activities and changed significant aspects of his evidence.

d) The applicant's ability to obtain a passport in his own name while being a fugitive, and to depart the country, is indicative of the fact that the applicant has not been truthful in his claims and that he was of no interest to the Chinese authorities.

> The combination of the above factors caused the Tribunal to find that the applicant was not a credible witness and to reject the entirety of his claims relating to his involvement with the church and other religious activities in China.
>
> Given the Tribunal's findings concerning the applicant's lack of commitment to Christianity in China and his lack of participation in religious activities, as well as the Tribunal's observations about the applicant's credibility, the Tribunal was not satisfied that the applicant engaged in religious worship or other activities in Australia otherwise than for the purpose of strengthening his claims to be a refugee. The Tribunal disregarded such conduct in accordance with s.91R(3) of the *Migration Act 1958* (Cth) ("the Migration Act") .
>
> Finally, the Tribunal noted that the applicant had referred to his spouse being required to undergo sterilisation as part of the family planning provisions but had not made any claims arising from the fact. Accordingly, the Tribunal found the applicant did not have a well-founded fear of persecution on the basis.
>
> For the above reasons, the Tribunal found there was no real chance that the applicant would face persecution if he were to return to China.

3. These proceedings began with a show cause application filed on 9 April 2008. The applicant continues to rely upon that application. The application is supported by a short affidavit in which the applicant repeats some of his protection visa claims. I treated the affidavit as a submission. The only evidence I have before me is the book of relevant documents filed on 22 May 2008.

4. I gave directions by consent in this matter on 13 May 2008. Those directions gave the applicant the opportunity to file an amended application with particulars and affidavit evidence, including a transcript of the Tribunal hearing, by 17 June 2008. The applicant did not take up that opportunity. However, at the hearing of the matter today, the applicant sought an adjournment so that he could provide a transcript of the Tribunal hearing. He also said that he wanted to have translated into Chinese the Tribunal decision because he had not had the opportunity to read and understand it. He said that he knows the outcome of the review by the Tribunal but not the reasons for it. He does, however, understand that he was not believed by the Tribunal. I refused an adjournment on the basis that the applicant has had ample opportunity to put before the Court whatever he wished in support of his application.

5. The application makes unparticularised allegations of a failure to have regard to evidence and a want of procedural fairness. I conducted a show cause hearing in this matter on 7 July 2008 and found that there was no substance in those grounds. However, I required the Minister to show cause why relief should not be granted in relation to the question of whether the Tribunal breached s.91R(3) of the Migration Act in the light of the Full Federal Court decision in *SZJGV v Minister for Immigration* [2008] FCAFC 105.

6. The Tribunal formed the view that the applicant was not a credible witness in the light of the hearing it conducted. The Tribunal found[1] that the applicant had no genuine commitment to the principles of Catholicism or the Christian faith while in China. The Tribunal noted that the applicant had displayed some knowledge of Christianity and accepted that the applicant had been attending Mass in Australia since mid-September 2007. The Tribunal considered that the applicant may have acquired his limited knowledge of the Christian faith as a result of that attendance at Mass. The Tribunal found, however, given its finding concerning his lack of commitment to Christianity in China and his lack of participation in religious activities, as well as the Tribunal's observations about the applicant's credibility, that it was not satisfied that the applicant engaged in religious worship or other activities in Australia otherwise than for the purpose of strengthening his claims to be a refugee. The Tribunal then stated that it was required to disregard such conduct in accordance with s.91R(3) of the Migration Act[2]. In the following paragraph, the Tribunal stated:

> *As the Tribunal found that the applicant has no genuine commitment to Catholicism or Christianity, the Tribunal finds that the applicant will not engage in religious activities if he returns to China. The Tribunal finds that the applicant will have no involvement with an underground church or with other practitioners of the underground church and that he will not engage in any activities of the underground church or be perceived as being so engaged. The Tribunal finds that there is no real chance that the applicant will face persecution for the reason of his religion if he were to return to China.*

[1] court book, page 114
[2] court book, page 115

7. The question is whether the Tribunal breached s.91R(3) by taking into account the applicant's conduct in Australia in finding that he has had no genuine commitment to Catholicism or Christianity. The applicant made no submissions on that issue. Written submissions on behalf of the Minister were filed on 5 August 2008. I incorporate in this judgment paragraphs 5 and 6 of those submissions detailing the content of s.91R(3) and the Full Court's decision in *SZJGV*:

> *Sub-section 91R(3) of the Migration Act 1958 (Cth) ("the Act") provides 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 person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.
>
> *SZJGV*
>
> *In* SZJGV *the Full Court of the Federal Court of Australia considered the operation of s.91R(3) of the Act. It was alleged by the appellants in that case that the Tribunal had committed jurisdictional error by having regard to conduct in Australia when determining their applications for protection visas. The Full Court held (at [22]) that s.91R(3) can only sensibly be applied once primary findings of fact have been made. So, for example, if an applicant claims to have engaged in conduct in Australia which caused him or her to fear persecution in his or her country of origin, the Tribunal must first decide whether or not that conduct occurred. If it has not occurred there will be nothing to disregard, nor will the occasion arise to determine whether s.91R(3)(b) applies. If the conduct is found to have occurred, then*

consideration must be given to the requirements of s.91R(3). Once engaged, s.91R(3) precludes the decision maker from having regard to "any conduct" engaged in by the applicant in Australia unless the decision maker is satisfied that the conduct was engaged in for purposes other than strengthening the applicant's claim to be a refugee. For this purpose, inaction can constitute conduct within the meaning of s.91R(3).

8. I also agree with and adopt for the purposes of this judgment paragraph 8 of those submissions:

> *Under the heading "Findings and reasons" (*[court book, pages] *113-115), the Tribunal first dealt with the applicant's claims of having been actively involved with an underground Catholic Church in China, and made findings as follows:*
>
> - *The applicant was not a credible witness (*[court book, pages]*113.4) as the applicant appeared to have memorised his statement and was hesitant when asked about matters outside of his statement.*
>
> - *The applicant showed minimal knowledge of Christianity and of Catholic doctrines. This caused the Tribunal to reject that the applicant had been actively involved with the Catholic Church since about 2000 (*[court book, pages]*113.6).*
>
> - *The readiness with which the applicant abandoned his earlier claims and changed the significant aspects of his evidence caused the Tribunal to question the applicant's truthfulness and credibility (*[court book, pages]*113.9).*
>
> - *The applicant's claims of having to flee from the authorities and to have been in hiding for a period of almost a year was inconsistent with the facts that he was able to obtain a passport in his own name during the same period, and was able to leave the country on that passport. His claim that only a few days after his departure the police came to his home with an arrest warrant is similarly implausible in view of the applicant's ability to obtain a passport and to be able to depart China in his own name. The Tribunal concluded that the applicant was of no interest to the Chinese authorities while residing in China (*[court book, pages]*114.1).*

- *The ultimate conclusions with respect of the applicant's claimed activities in China were expressed by the Tribunal in the following terms (*[court book, pages]*114.4):*

> The combination of the above factors causes the Tribunal to find that the applicant was not a credible witness and to reject the entirety of his claims relating to his involvement with the Church and other religious activities in China. … The Tribunal finds that the applicant has had no genuine commitment to the principles of Catholicism or of the Christian faith while in China.

9. The finding in issue in this case is the finding that the applicant will not engage in religious activities if he returns to China because he has no genuine commitment to Catholicism or Christianity. The Tribunal did not state whether that finding was limited to its finding of a lack of a genuine commitment in China or whether it extended to a lack of a genuine commitment in Australia. Although the finding might have been more clearly expressed, I accept that the sentence was no more than the fulfilment of the Tribunal's obligation to made a forward-looking assessment as to what, if any, risk of harm the applicant faced in China.

10. The only asserted risk of harm related to the applicant's religion. The Tribunal had found that the applicant had no genuine commitment to the Christian faith in China, having rejected the credibility of his claims about his involvement with the church there and having disregarded the applicant's conduct in Australia. There was nothing before the Tribunal that could point to a genuine commitment. Viewed in that light, there was no breach of s.91R(3).

11. There is an alternative interpretation of the Tribunal's words. That is, that in finding that the applicant had no genuine commitment to Catholicism or Christianity without reference to either China or Australia but generally, the Tribunal was taking into account both its finding that the applicant had no genuine commitment to Christianity in China and that his conduct in Australia was not engaged in for a reason otherwise than for the purposes of strengthening his claims to be a refugee.

12. The Full Court in *SZJGV* left open the question of whether a decision-maker was entitled to have regard to the motivation for conduct which was required to be disregarded pursuant to s.91R(3). In *SZMBK v*

Minister for Immigration [2008] FMCA 1101 at [15] I accepted that, hypothetically, in an appropriate case a distinction might properly be drawn between conduct and information about conduct. Likewise, I think a distinction might properly be drawn between conduct and the motivation for conduct. While s.91R(3) requires the Tribunal to disregard conduct engaged in in Australia, if not engaged in otherwise for the purpose than enhancing protection visa claims, I do not think that the section requires the Tribunal to disregard its own conclusion on an applicant's motivation for conduct in Australia. Therefore, if the Tribunal, in stating that at the time of its decision, the applicant had no genuine commitment to Catholicism or Christianity, the Tribunal was taking into account not only its finding about the applicant's conduct in China but also its finding in relation to the motivation for the applicant's conduct in Australia, I do not think that a breach of s.91R(3) would thereby be established. It would be a case of the Tribunal taking into account the motivation for conduct rather than the conduct itself. I find that there was no breach of s.91R(3) in this case.

13. In his oral submissions, the applicant raised another issue. He said that the Tribunal was unfair in not giving him the opportunity to produce a divorce certificate and a baptism certificate following the hearing. There is nothing in the record of the Tribunal decision or, indeed, in the relevant documents generally, to establish that the applicant requested more time to produce those documents after the Tribunal hearing. I note that in a letter sent to the applicant on 5 February 2008, the applicant was invited to provide evidence of his baptism and an original notarised divorce certificate[3]. Those matters were discussed with the applicant at the hearing[4]. The Tribunal noted that it had requested the applicant to provide a notarised certificate of his divorce and that he had not produced it. The applicant sought to explain why he had been unable to produce it. The Tribunal also noted that the applicant had been requested to provide evidence of his baptism which he had not done. The applicant said that that evidence was at home and he had not been able to get it. There is no indication that the applicant sought more time in order to produce those documents. It does not appear to me that the fact of the applicant's divorce was an issue of

[3] court book, page 66
[4] court book, page 100

significance. The Tribunal did not accept that, if the applicant was divorced, it was because he was seeking to protect his wife.

14. The production of a baptism certificate might well have assisted the applicant but he was unable to produce it. The applicant told me today from the bar table that the baptism certificate could not be produced and he still does not have it. In the circumstances, it does not appear that the provision of extra time would have been of any assistance anyway, even if it had been requested.

15. I find that the decision of the Tribunal in this matter is free from jurisdictional error. It is, therefore, a privative clause decision and the application must be dismissed.

16. Costs should follow the event in this case. The Minister seeks scale costs of $5,000. The applicant referred to his lack of money and his lack of legal assistance. On 7 July 2008, I ordered that the matter be referred to a Registrar with a view to referring the applicant for *pro bono* representation. That referral was made to Mr David Prince, solicitor, on 8 July 2008. Mr Prince advised my Associate earlier today that he and Counsel had examined the case but that they were unable to assist the Court.

17. I will order that the applicant 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).

I certify that the preceding seventeen (17) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 14 August 2008