

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLQY v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 692

MIGRATION – Review of decision by Refugee Review Tribunal – whether Refugee Review Tribunal’s decision affected by jurisdictional error- whether the Refugee Review Tribunal failed to take into account considerations and evidence which it was required to – whether or not the Refugee Review Tribunal had regard to the alleged conduct by the applicant in Australia engaging s.91R(3) of the *Migration Act 1958* (Cth) – whether the Refugee Review Tribunal made findings on relevant matters – whether the Refugee Review Tribunal complied with s.91R(3) – whether the Court should exercise its discretion in remitting the matter to the Refugee Review Tribunal – writs issued.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.91R(3);91R(3)(b); pt.8 div.2

SZJGV v Minister for Immigration and Citizenship [2008] FCAFC 105

Lee v Minister for Immigration and Citizenship [2007] FCAFC 62

Applicant:	SZLQY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 3593 of 2007
Judgment of:	Emmett FM
Hearing dates:	13 & 28 May & 26 June 2008
Date of last submission:	26 June 2008
Delivered at:	Sydney
Delivered on:	22 July 2008

REPRESENTATION

Applicant appearing on his own behalf

Counsel for the Respondent: Mr Y. Shariff

Solicitors for the Respondent: Ms S. Kantaria, Clayton Utz

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 3593 of 2007

SZLQY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Refugee Review Tribunal (“**the Tribunal**”) dated 8 October 2007 and handed down on 25 October 2007.
2. The Applicant claims to be from the People’s Republic of China (“**China**”) and a practitioner of Falun Gong (“**the Applicant**”).
3. The Applicant arrived in Australia on 20 February 2007 having departed legally from Beijing on a passport issued in his own name and a visitor’s visa.
4. On 14 March 2007, the Applicant lodged an application for a protection (Class XA) visa with the Department of Immigration and Multicultural Affairs (“**the Department**”) under the Act.

The Applicant's protection visa application

5. The Applicant provided a statement in support of his protection visa application dated 13 March 2007. The Applicant claimed that in about October 2005 he was introduced to Falun Gong by a business associate. The Applicant stated that he commenced Falun Gong practice in a storeroom at his place of work and in respect of which he was the only one with a key to the room. The Applicant stated that each day after work at 6pm he would stay back at work and then go to the room to do his practice. The Applicant stated that he sought to introduce a fellow employee who suffered from asthma to Falun Gong in about January 2006.
6. The Applicant stated that on 20 January 2007, whilst he and his work colleague were practising Falun Gong in the storeroom, the chief of company security and three police broke into the room and took the Applicant's Falun Gong materials. The Applicant stated that he and his work colleague were then taken to the local police station and interrogated. The Applicant stated that when he refused to make a confession, he was struck by the police with a baton about thirteen times. The Applicant stated that after this beating he was lead to another room where the beating continued resulting in the Applicant's ultimate confession. The Applicant stated that the general manager of his company assisted the Applicant in paying money to the police. The Applicant also stated that he was forced to write a statement of guarantee to promise that he would never take part in Falun Gong activities again.
7. Following his release, the Applicant stated that with the full support of his family and friends he left China on 20 February 2007 for Australia. The Applicant stated that after his arrival in Australia on 20 February 2007 he discovered a Falun Gong practising study site in Campsie which he began to attend on 28 February 2007. The Applicant stated he would go to Campsie Park each morning to do the five sets of exercises.

The Delegate's decision

8. On 3 April 2007, a Delegate of the First Respondent refused the Applicant a protection visa on the basis that he was not a person to

whom Australia had protection obligations. The Delegate found the Applicant's claims to be "*generalised and lacked specific detail which would add substance to his claim.*" The Delegate was not satisfied that the Applicant had studied Falun Gong literature as he had claimed. The Delegate found there was no evidence before it to suggest that the Applicant was "*of significant adverse interest to the authorities.*" The Delegate also found the Applicant's claim of practising Falun Gong in Australia to lack "*substantiating evidence.*"

The Refugee Review Tribunal's decision

9. On 24 April 2007, the Applicant lodged an application for review of the Delegate's decision with the Tribunal.
10. The Applicant provided a further statement in support of his review application however made no reference to any further claims or evidence. The Applicant provided further material to the Tribunal in support of his application.
11. On 16 July 2007, the Applicant attended a hearing before the Tribunal with a witness. However, after ten minutes, the Tribunal member cancelled the hearing. On 3 October 2007, the Applicant and his witness again attended a hearing before the Tribunal on which occasion each gave evidence.
12. The Tribunal identified the written claims made by the Applicant to the Delegate and noted the further evidence provided to the Tribunal in support of the review application.
13. The Tribunal found the Applicant not to be a witness of truth and stated that this finding was based in part on difficulty the Tribunal member had in eliciting the Applicant's evidence from him. The Tribunal said that "*the applicant regularly claimed he could not understand the question being asked (even though I tried to focus on the claims he had put in writing).*" The Tribunal stated that after repeated questioning the Applicant was able to give meaningful responses to some of the questions. Ultimately, the Tribunal found that it was not satisfied that problems with interpretation sufficiently explained the difficulties the Tribunal found it was having in eliciting the Applicant's oral evidence.

14. The Tribunal concluded that the reason that the Applicant had difficulty in readily answering questions about claims he had made was that the claims did not reflect the Applicant's personal experiences. The Tribunal rejected all the Applicant's material claims as false.
15. The Tribunal noted exchanges it had with the Applicant about matters of concern it had arising from the Applicant's evidence and materials. In particular, the Tribunal had regard to the Applicant's evidence that his passport had been confiscated by the tour guide with whom he came to Australia, as a result of which, the Applicant applied for a travel document from the Chinese embassy in Australia as he was told he needed identification in Australia in order to apply for a protection visa. In respect of that conduct, the Tribunal made the following finding:

“...the applicant applied for the Travel Document within two weeks of his arrival in Australia, made no apparent attempt to ensure his family (a wife and child) would not be harmed, and made no apparent enquiry to as to any possible ramifications of applying for the travel document in his own name. In the circumstances, the Tribunal is satisfied this is not the action of a person with a subjective fear of persecution from the authorities in their country of origin.”
16. In relation to the Applicant's claims of practising Falun Gong in the PRC, the Tribunal did not accept the Applicant's claims as plausible.
17. The Tribunal asked the Applicant questions about Falun Gong. It found that most of the information provided by the Applicant was available from public sources. The Tribunal stated that, because it was not satisfied that the Applicant was generally a credible witness, it did *“not intend to give him the benefit of the doubt.”* The Tribunal was not satisfied the Applicant is *“a sincere and genuine Falun Gong practitioner; nor that he would be imputed as such should he return to China.”*
18. The Tribunal noted that the Applicant again claimed that he practised Falun Gong everyday in Australia on his own and attended practice sessions in a public park most Sundays. The Tribunal noted that it asked the Applicant why he did not practise more often and that the Applicant had responded that he did not have time and felt that he did

not need to. The Applicant then stated that he attended weekly practice sessions on Wednesday evenings. The Tribunal noted that, when it asked the Applicant why he had not mentioned this earlier, the Applicant responded that he had misunderstood the Tribunal's earlier questions. The Tribunal rejected this claim of attending weekly study sessions on Wednesday night as "false", having regard to the Applicant's earlier evidence in which he did not mention this practice and the Tribunal's lack of satisfaction that the Applicant was a witness of truth.

19. The Tribunal found that, because the Applicant was not a witness of truth, it did not accept that the suppression of the Applicant's alleged beliefs would constitute persecution for him in China.
20. The Tribunal also considered whether there was a real chance that his alleged practice of Falun Gong in Australia may be reported to Chinese authorities. It found that his practice of Falun Gong would not be of interest to Chinese spies in Australia. The Tribunal concluded as follows:

"Therefore, based on its assessments of the applicant's claims, the Tribunal was not satisfied the present applicant had a real chance of being persecuted for reason of his alleged Falun Gong activities in Australia."

21. Further, the Tribunal was not satisfied that the fact that the Applicant may have departed China illegally was sufficient, without more, to "give rise to refugee protection obligations in Australia."
22. Accordingly the Tribunal affirmed the decision under review.

The proceeding before this Court

23. The Applicant confirmed that he relied upon the ground in his application filed on 20 November 2007 as follows:

"I think that the Refugee Review Tribunal, in the course of finding that 'However I remain not satisfied he has a well founded fear of persecution for any reason in the PRC.'" made no reference in its decision to the promptness with which I applied for a protection visa following my arrival of Australia. I think, in the circumstances, the Refugee Review Tribunal failed to take into

account a consideration or evidence which is was required to take into account, giving rise to jurisdictional error.”

24. I accept the submissions for counsel for the First Respondent that the promptness with which the Applicant made his application is not a mandatory relevant consideration. To the extent that the Applicant’s ground complains that the Tribunal failed to take into account considerations and evidence which it was required to take into account, such complaint is not supported by particulars. The Applicant made no submissions in support of this allegation and was unable to identify any particular evidence of the Applicant’s which the Tribunal failed to consider.
25. In respect of the Applicant’s material claims of his Falun Gong practice in China, the Tribunal makes a clear finding that all the Applicant’s claims in this respect are false. The Tribunal found that the difficulty that it had in eliciting evidence from the Applicant and the inconsistencies in his evidence were because he had fabricated the claims and was having difficulty remembering what he had written. The Applicant has provided no evidence to this Court, by way of a transcript of the hearing or otherwise, nor does the Applicant complain about any mistranslations or difficulties with the interpreter at the hearing. In the circumstances, the Tribunal’s adverse findings in respect of the Applicant’s claims of Falun Gong practice in China were open to it on the evidence before it and for the reasons it gave.
26. Accordingly, the ground in the application is not made out.

Section 91R(3) of the Act

27. During the hearing, the Court raised with counsel for the First Respondent whether or not the Tribunal had complied with s.91R(3), in that the Tribunal did not appear to have made clear findings about the Applicant’s evidence and claims of his alleged Falun Gong activities in Australia and whether or not the Tribunal had disregarded such evidence. The hearing was adjourned to allow both parties an opportunity to consider the issue and to file and serve further written submissions. The First Respondent filed and served further written submissions, whereas the Applicant did not.

28. Section 91R(3) of the Act is as follows:

“(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.”

29. In the recent Full Court of the Federal Court of Australia decision of *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105 (“*SZJGV*”) the Full Court made clear that if an applicant claims that he engaged in conduct in Australia which caused the applicant to fear persecution if he were to return to his country of origin, the tribunal must decide whether or not that conduct occurred. If a tribunal finds that such conduct did occur then s.91R(3) is engaged. The Full Court stated the following at [22]:

“We accept the Minister’s submission that s 91R(3) can only, sensibly, be applied once primary findings of fact have been made. If, for example, an applicant claims to have engaged in conduct in Australia which causes him or her to fear persecution if returned to his or her country of origin, the Tribunal must decide whether or not that conduct has occurred. If it has not occurred then there will be nothing to disregard; nor will the occasion arise to determine whether or not paragraph (b) may have application. If it has occurred then consideration must be given to the requirements of s 91R(3). We do not understand the appellants to contend otherwise. Their submissions do, however, overreach when they assert that, if an applicant seeks to rely on his or her conduct in Australia and the Tribunal accepts that such conduct has occurred, the conduct cannot be taken into account “at all” in deciding the application. As the Minister points out, the lodging of an application for a protection visa in which particular claims are made is a relevant matter which is

*properly to be brought into account. Once, however, the adjudication process has commenced and primary facts have been found which include conduct engaged in by the applicant in Australia, then s 91R(3) is engaged. **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. Inaction can constitute conduct within the meaning of s 91R(3).” (emphasis added)***

30. Counsel for the First Respondent submitted that a fair reading of the Tribunal’s decision disclosed that the Tribunal had rejected the Applicant’s evidence of conduct in Australia and therefore s.91R(3) was not engaged.
31. However, counsel for the First Respondent conceded that if the Court decided that, on a fair reading of the Tribunal’s decision, the Tribunal had not rejected the Applicant’s evidence of conduct in Australia, then s.91R(3) was engaged. In those circumstances, counsel for the First Respondent conceded the Tribunal would have failed to comply with the requirements of the section; that is, that such conduct should be disregarded unless the Applicant satisfied the Minister that the conduct engaged in was otherwise than for the purpose of strengthening the person’s claim.
32. The Tribunal’s decision record disclosed that the following evidence was given by the Applicant about his conduct in Australia:
 - i) He regularly practised Falun Gong between 20 February 2007 (arrival in Australia) and 3 October 2007 (date of Tribunal hearing);
 - ii) He practised every day on his own;
 - iii) He attended a Falun Gong practice with other persons in a named Sydney park almost every Sunday;
 - iv) He thought more than ten people attended such practice; and
 - v) He attended weekly Falun Gong study sessions on Wednesday evenings.

33. In the course of its exchange with the Applicant about his claims of conduct in Australia, the Tribunal noted that it discussed with the Applicant that a petition had been lodged in support of the Applicant's Falun Gong activities in Australia with only two names on it, together with three similarly written, brief witness statements.
34. The Applicant had a witness attend the hearing and give evidence that the Tribunal found "*for all intents and purposes merely sought to briefly corroborate parts of the applicant's evidence.*" However, it is not clear from the decision record whether the witness sought to corroborate only the first four points and not the fifth point of the Applicant's claim of attending Falun Gong study sessions on Wednesday evenings.
35. Ultimately, the Tribunal found that the Applicant's claim to attend study sessions on most Wednesday evenings was "*false*", based on the fact that the Applicant had not mentioned that evidence earlier. The Tribunal noted that it "*repeatedly*" asked the Applicant why he had not mentioned it earlier. A fair reading of the Tribunal's decision record indicates that that finding was open to the Tribunal on the evidence before it and for the reasons it gave. In those circumstances, s.91R(3) was not engaged in respect of that evidence.
36. The Tribunal made no express findings as to whether or not it accepted the claims (i) to (iv) above. However, as stated above, the Tribunal did make an explicit finding with respect to (v) above that the Applicant's claim about attending studies sessions on most Wednesday nights was false.
37. Counsel for the First Respondent submitted that the finding by the Tribunal that it had rejected "*all the Applicant's material claims to invoke refugee protection obligations in Australia as false*" was a rejection of the evidence referred to in (i) to (iv) above and therefore s.91R(3) was not engaged.
38. Counsel for the First Respondent also submitted that the Tribunal's finding that the Applicant was not "*a sincere and genuine Falun Gong practitioner*" disclosed that the Tribunal had rejected his claims of conduct in Australia. However, a fair reading of the Tribunal's decision record makes clear that that finding was made in the context of the

Tribunal considering the Applicant's knowledge about Falun Gong and the Tribunal's conclusion that the Applicant's knowledge was readily available from public sources. I do not regard that finding as relevant to the Tribunal's consideration of the Applicant's evidence about his conduct in Australia.

39. The Tribunal considered whether or not the Applicant was likely to come to the attention of Chinese spies in Australia or whether his activities in Australia would be referred to the authorities in China. The Tribunal concluded, in relation to the Applicant's claims of practice in Australia as follows:

*“However, his alleged practice of Falun Gong in Australia (attendance at some protests and allegedly regular attendance at weekly {Sunday} practice sessions), did not satisfy the Tribunal his profile as a practitioner of Falun Gong would be of any interest to Chinese spies in Australia; or there was a real chance his activities may be reported to the PRC authorities and he therefore had a real chance of being harmed for that reason on his return. That is, the Tribunal is not satisfied the PRC authorities have either the resources or the interest to harm, question or even identify every person who merely practices (or claims to), Falun Gong outside the PRC. Therefore, based on its assessment of the applicant's claims, **the Tribunal was not satisfied the present applicant had a real chance of being persecuted for reason of his alleged Falun Gong activities in Australia.**”*

40. The quotation above makes clear that the Tribunal did not have regard to the Applicant's claims of the Wednesday study sessions. The Tribunal only considered those other aspects of the Applicant's claims about his conduct in Australia namely, attendance at some protests and allegedly regular attendance at weekly Sunday practice sessions.

41. In relation to the Applicant's photographs of his attendance at protests in Canberra, the Tribunal stated as follows:

*“Towards the end of the Tribunal hearing I put to the applicant that based on his oral and written evidence thus far **I may not accept his political or Falun Gong activities in Australia would mean he had a real chance of being harmed in China.** That is, an apparently few photographs taken of his attendants at rallies*

(including the demonstration in support of 23 million members quitting the CCP in Canberra – “23 million” demonstration), would not make him of adverse interest to the PRC authorities. That is because the country information I have seen suggests that only those persons whose activities were (for instance) sufficiently prominent or were sufficiently active, or who may likely continue to dissent on return to the PRC, would continue to be of interest on return to China.”

42. A fair reading of the Tribunal’s decision does not suggest that the Tribunal found the photographs to be forgeries or not genuine. The photographs were of the Applicant’s conduct in Australia in participating in Falun Gong activities. In the circumstances, they were capable of being corroborative of his claims in respect of his activities in Australia. If the Tribunal did not accept them as genuine, then s.91R(3) would not be engaged. However, if the Tribunal did accept them as genuine, then s.91R(3) is engaged and the Tribunal was obliged to consider whether or not it was satisfied that the photographs depicted conduct that the Applicant entered into for the purposes of strengthening his refugee claims.
43. A fair reading of the Tribunal’s decision record suggests that it did not reject the photographs as forgeries and it had regard to them in considering the Applicant’s claims of a fear of persecution if he were to return to China by reason of his Falun Gong activities in Australia. Accordingly, in those circumstances, s.91R(3) was engaged.
44. The effect of s.91R(3) is that having accepted that the Applicant attended rallies in the ACT, the Tribunal was to disregard that conduct in Australia in considering whether or not the Applicant had a real chance of being harmed in China, unless it was satisfied that such conduct was engaged in other than for the purpose of strengthening his refugee claims. However, the Tribunal made no such finding. Neither, did the Tribunal consider what effect the corroborative evidence of the photographs had on its assessment of the prominence of the Applicant’s activities in Australia.
45. A fair reading of the Tribunal’s decision does not make clear whether or not the Tribunal accepted any of the Applicant’s claims of conduct in Australia or the evidence of his witness. The Tribunal peppered its consideration of the Applicant’s evidence with some concluded

findings of falsity and rejection of evidence. In the circumstances, where it has not specifically rejected evidence of conduct in Australia, it is not clear whether it did so because it accepted those claims; or, whether its failure to make specific findings accepting those claims of conduct in Australia meant that the Tribunal was rejecting them.

46. A fair reading of the Tribunal's decision does not support the First Respondent's submission that the Tribunal found all of the Applicant's claims of conduct in Australia to be false.
47. In the circumstances, the Tribunal was obliged to decide whether or not the Applicant engaged in conduct in Australia and, if so, whether s.91R(3) of the Act was enlivened and the Tribunal was obliged to disregard the conduct in Australia unless it was satisfied that such conduct was entered into other than for purpose of strengthening the Applicant's claims.
48. If the Tribunal accepted the Applicant's claims of conduct in Australia and was satisfied that any conduct was not entered into for the purposes of strengthening the Applicant's refugee claims, then the Tribunal was obliged to consider and evaluate that evidence in determining whether the Applicant had a well founded fear of persecution for a Convention related reason.
49. A fair reading of the Tribunal's decision record does not make clear whether or not the Tribunal found any of the Applicant's claims of Falun Gong activities made out. The Tribunal was obliged to do so (*SZJGV* at [22]). If the Tribunal decided that the alleged conduct occurred, then it was bound to consider whether or not the Applicant engaged in such conduct for the purposes of strengthening his refugee claims; and, if so, then, pursuant to s.91R(3)(b) of the Act, it was obliged to disregard such conduct in considering whether the Applicant met the criteria required for a protection visa.
50. I have also had regard to the fact that the Tribunal has made no reference to s.91R(3) in its decision record. I have considered whether an inference could be drawn that the reason it did not refer to s.91R(3) was because it had not accepted the Applicant's claims of conduct in Australia and that therefore, s.91R(3) was not engaged. However, I am not satisfied that a fair reading of the Tribunal's reasons supports such

a proposition in light of the Tribunal's failure to make clear findings as to whether or not the Applicant engaged in any of the alleged conduct in Australia; and, whether or not it accepted or rejected the evidence of the Applicant's witness that the Applicant was involved in Falun Gong activities in Australia.

51. Accordingly, I am satisfied that the Tribunal's failure to decide whether or not the Applicant engaged in conduct in Australia and whether or not it was obliged to disregard such evidence was in breach of s.91R(3) of the Act and was an error going to the Tribunal's jurisdiction.

Discretion

52. In the event this Court was to find jurisdictional error, counsel for the First Respondent submitted that the Court ought not to exercise its discretion to grant the Applicant the relief sought in the application on the basis that no unfairness flowed to the Applicant as a result of the Tribunal's failure to disregard his evidence.
53. Counsel for the First Respondent submitted that if the conduct of the Applicant in Australia had been disregarded, then the Tribunal's other adverse findings in respect of the Applicant's claims of a fear of persecution by reason of his Falun Gong practice had been rejected and his material claims found to be false.
54. Counsel for the First Respondent submitted that, in the alternative, had the Tribunal considered whether or not it was required to disregard such conduct and concluded that it was satisfied that the conduct was entered into other than for purposes of strengthening the Applicant's claims; then the Tribunal had regard to the Applicant's conduct in Australia in considering whether or not the Applicant faced a real chance of being persecuted in China for reason of his activities in Australia and concluded that the Applicant did not face such a real chance.
55. For those reasons, counsel for the First Respondent submitted that any breach of s.91R(3) by the Tribunal was technical and did not result in any unfairness to the Applicant, and, therefore, it would be futile to remit the matter.

56. Futility in remitting a matter for consideration by the Migration Review Tribunal is a recognised basis upon which the Court should refuse to exercise its discretion. As the Full Federal Court found in *Lee v Minister for Immigration and Citizenship* [2007] FCAFC 62 (“*Lee*”), at [47]–[48]:

“47. As to the submission that even if there is a discretion, futility is not a ground upon which it may be exercised, it was put by the appellants that SAAP is authority for that proposition. The submission was that SAAP was authority for the proposition that the discretion to refuse relief may only be exercised if there is some type of disqualifying or disentiing conduct on the part of the applicant for relief. I reject this submission. Disqualifying or disentiing conduct by an applicant may be the principal ground upon which the discretion to refuse relief is exercised, but there is nothing in SAAP to suggest that the Court was qualifying what it had previously said in Aala. In Aala, Gaudron and Gummow JJ said that relief may be refused if, irrespective of any question of procedural fairness or individual merits, the decision-maker was bound by the governing statute to refuse the application (at 109 [58]) ... In my opinion, futility is a ground upon which a Court may exercise its discretion to refuse relief. ...

48. In my opinion, before a Court will exercise its discretion to refuse relief on the ground of futility, it must be quite clear that a rehearing or reconsideration is or will be futile.”

57. The test enunciated in *Lee*, at [48], for when the Court should refuse to exercise its discretion on the basis that to do so would be futile, is that “*it must be quite clear that a rehearing or reconsideration is or will be futile*”.
58. In the circumstances of this case, I am not prepared to speculate as to what conclusions and findings the Tribunal may have made, had it properly considered the Applicant’s claims according to law. In the circumstances of this case, I am not satisfied that it is “*quite clear*” that a rehearing would be futile. The Tribunal was obliged to make clear findings as to whether or not it accepted or rejected the Applicant’s evidence of Falun Gong activities in Australia, including the evidence of his witness and supporting documents, because the enlivenment or not of s.91R(3) of the Act depended on that determination.

59. In the circumstances, I am satisfied that the matter ought be remitted to the Tribunal for determination according to law on the basis that the Tribunal's decision is affected by the jurisdictional error of having failed to make clear findings as to whether or not any of the Applicant's evidence of his Falun Gong activities in Australia was accepted and the effect of s.91R(3) of the Act on any such findings in determining whether or not the Applicant was a person to whom Australia has protection obligations under the Refugees Convention.

I certify that the preceding fifty-nine (59) paragraphs are a true copy of the reasons for judgment of Emmett FM

Associate: S. Kwong

Date: 22 July 2008