FEDERAL COURT OF AUSTRALIA

SZCOV v Minister for Immigration and Citizenship [2008] FCA 1800

MIGRATION – application for review from decision not to grant protection visa – Tribunal did not accept as truthful claims of the applicants – whether Tribunal properly disregarded conduct of the applicants pursuant to s 91R(3) – where comments made by the Tribunal seemed on their face anomalous or inconsistent – Tribunal wrongly used the terms "implausible" and "untruthful" as interchangeable – the Tribunal should say what it means – where Tribunal's language reflects a finding of fact that certain events did not take place – where s 91R(3) therefore not breached – appeal dismissed

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

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 cited
SZCOV & Anor v Minister for Immigration and Citizenship & Anor [2008] FMCA 1171 affirmed
SZJGV v Minister for Immigration and Citizenship [2008] FCAFC 105 cited

SZCOV and SZCOW v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1488 of 2008

SPENDER J
28 NOVEMBER 2008
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1488 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZCOV** **First Appellant**
	SZCOW **Second Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**SPENDER J**
DATE OF ORDER:	**28 NOVEMBER 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants pay the costs of the first respondent of and incidental to the appeal, fixed in the sum of $4000.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

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	SZCOW **Second Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
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JUDGE:	**SPENDER J**
DATE:	**28 NOVEMBER 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal from a judgment of Federal Magistrate Nicholls, given on 28 August 2008, dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) dated 25 September 2007. The Tribunal had affirmed a decision by a delegate of the Minister to refuse to grant protection visas to the appellants.

2 There is an extensive background of litigation to this appeal. The first appellant, SZCOV, is the husband of the second appellant, SZCOW. Both appellants are citizens of the People's Republic of China.

3 The first appellant first entered Australia on 2 March 1997 on a three-month multiple entry Temporary Business (Subclass 456) visa, using a Chinese passport in his name. According to the departmental movement details, he travelled extensively between Australia, New Zealand and China over the next five years, travelling in and out of Australia on

approximately 10 occasions between 1997 and March 2001. He has not left Australia since March 2001.

4 In March 2002, he applied for a Temporary Business Long Stay visa. After that visa application was refused, he applied for a protection visa on 6 June 2002. On 14 June 2002, a delegate of the Minister refused to grant that visa, and on 18 June 2002, the first appellant applied to the Tribunal for review of that decision. On 5 December 2003, in a decision which was handed down on 6 January 2004, the Tribunal affirmed the decision of the delegate.

5 The second appellant arrived in Australia on 23 February 2002 with their daughter. On 22 June 2002, she applied for a protection visa. On 10 July 2002, a delegate of the Minister refused to grant the visa. On 29 July 2002, the second appellant applied to the Tribunal for review of that decision. On 5 December 2003, in a decision handed down on 6 January 2004, the Tribunal affirmed the decision of the delegate.

6 From that time onwards, the two appellants filed applications for review together, which were heard at the same time, and were the subject of joint decisions of the Tribunal and the Federal Magistrates Court.

7 The first application by both the husband and wife for review of decisions refusing each of them a protection visa was filed in the Federal Magistrates Court on 29 January 2004. On 7 March 2006, the Federal Magistrates Court set aside each decision by consent, and remitted the matters to the Tribunal. On 8 June 2006, the Tribunal, differently constituted, affirmed the delegate's decisions.

8 Each of the appellants again applied for review to the Federal Magistrates Court, and on 26 March 2007, the Court once again set aside the decisions by consent, and again remitted the matter to the Tribunal. On 25 September 2007, the Tribunal, again differently constituted, once more affirmed the delegate's decisions.

9 On 30 October 2007, the appellants applied again to the Federal Magistrates Court for review. On 28 August 2008 Nicholls FM dismissed the application for review, and on 18 September 2008, the appellants filed a Notice of Appeal in this Court.

PROCEEDINGS BEFORE THE THIRD TRIBUNAL

10 The first appellant lived in China until 2000, the second appellant until 2002. The first appellant travelled out of China to Australia legally with a legitimate passport and visa. Between 1997 and 2000, he travelled in and out of Australia some ten times, including travel to China and the South Pacific.

11 The first appellant claims that in 1999 he became managing director of a company in China of which a distant relative was the finance manager. That relative was a Falun Gong practitioner. The first appellant claims that he was not then Falun Gong, but respected its practice and did not interfere. The first appellant claims that in mid-2000, his relative sought the first appellant's financial help in promoting Falun Gong, to which the first appellant agreed. To that end, the first appellant claims to have set up a company in which he had a substantial monetary investment, and the relative, with the money from the company, began distributing Falun Gong material.

12 It is claimed by the first appellant that in 2002, there was a break-in at the company, and in the ensuing investigations, the police found Falun Gong material on the company computers and arrested the first appellant's relative. It is claimed by the first appellant that the relative identified the first appellant as a partner and investor. The first appellant claims that he has been on a Public Security Bureau (PSB) blacklist since that time, and that the second appellant has been interrogated a number of times, during which her "basic human rights were threatened".

13 The second appellant's claims rest principally upon her husband's. She argues that following his blacklisting, she was arrested, interrogated and physically mistreated. The second appellant claims to have been harassed and threatened daily. She further claims to have been assisted by a sympathetic female PSB worker, who obtained release from prison for her, and helped her and her daughter to flee China.

14 Both appellants claim to be regarded as supporters of an illegal cult and as such face serious harm if sent back to China.

15 The Tribunal, after reviewing the evidence before both previous Tribunals, decided to affirm the delegate's decision.

16 The Tribunal stated at the outset that if the appellants' claims were true, there was a real chance of persecution if they were sent back. However, the Tribunal did not accept the appellants' claims. The Tribunal was satisfied that the first appellant's claims to fear harm in the future because of his family's history in being regarded as "Rightists" would not result in his facing harm in the future.

17 Evidence was also placed before the Tribunal of the first appellant's activities and involvement with Falun Gong in Australia.

18 In dealing with those matters, in the context of s 91R(3) of the *Migration Act 1958* (Cth) (the Act), the Tribunal member mis-uses the word "plausible" or "implausible" to connote "acceptance" or "rejection" of a claim. Thus:

> The remaining applicants, [the appellants] claim to be regarded by the PRC authorities as supporters of an illegal cult, Falungong, and as a result to face serious harm in China if they return there. These claims require the Tribunal to find plausible various claims by the applicants that [the first appellant] became a supporter of Falungong (albeit not a practitioner) in China, that [the second appellant] unknowingly contributed to this support at his behest and was seriously ill-treated as a result, and that after entering Australia [the first appellant] continued that support, as well as becoming a practitioner and participating in political activities in Australia critical of the Chinese government.

19 What the Tribunal was intending to convey was that the claim for a protection visa depended on the Tribunal being satisfied of one or more of the claims being advanced by the appellants to it concerning Falun Gong.

20 The Tribunal later said:

> I have considered the plausibility of [the first appellant's] account in relation to Falungong.

21 The Tribunal then referred to a number of matters touching on whether the first appellant's claims of trafficking in illegal Falun Gong materials were made out. The Tribunal then stated:

> For these reasons the Tribunal considers it implausible that he was a patron or ally of Falungong while in China.

22 The Tribunal continued:

> There are a number of other factors that contribute to the Tribunal's conclusion that they have not been truthful about key aspects of their account.

23 These two sentences indicate to me that, in the Tribunal's view, implausibility of the claims corresponds to their untruthfulness. The Tribunal wrongly uses the term "implausible" and "untruthful" as interchangeable. "Implausible", according to the Macquarie Dictionary, means merely "not having the appearance of truth or credibility."

24 An assessment that an account of events is "implausible" may provide a basis for concluding the events did not happen, and the claim that they did was untruthful, but the assessment of implausibility is not, in terms, a finding that the events did not happen.

25 The second of the factors contributing to the Tribunal's conclusion is expressed as follows:

> Secondly, [the first appellant's] initial application for a protection visa was lodged, as he has since claimed, some 19 months after he first took up the practice of Falungong in Australia and 10 months after sending Falungong materials into China with Mrs Cui. However, in the written submissions to the Department he did not refer to having any personal involvement in Falungong in Australia, in terms of practice or association with it, in any way. Given the significance of the claims he has since made about taking up Falungong practice here and sending Falungong materials back to China in that period, his failure to do so casts serious doubt on his claim that he had been doing these things.

26 The third of those factors is expressed as follows:

> Thirdly, [the first appellant] has submitted evidence in support of his claim to have asked at least two people to carry such items to Shanghai from Australia. The Tribunal has considered how much weight can be given to the statements. One of them is from China and purports to be from Ms Ciu's husband, and both support the claim that [the first appellant] gave them material to take back. [The first appellant's] friend Ms Cui stated that he has since told her that she carried some Falungong-related material into China for [the first appellant] in 2001. His oral evidence to the present Tribunal as to whether she knew at the time that she was carrying such materials back into China was vague. He first stated that she did know (having asked him if he had given her anything which might get her into trouble) and subsequently stated that she did not, the latter having been confirmed by her. His initial contradictory evidence on this point casts doubt on the plausibility of the claim that he asked her to carry anything Falungong-related into China. Further, as has

been discussed above, it is difficult to believe that he would allow a friend to unwittingly put herself at risk in this way. Further, Ms Cui has no direct knowledge of carrying Falungong materials into China for [the first appellant]. The source of that information is [the first appellant] himself. I do not consider the evidence from Ms Cui or her husband in China to be reliable.

27 The Tribunal continued:

> The Tribunal considers that the two witnesses at the most recent hearing, Mr Lin Zheng and Ms Juan Xu, were people of integrity who gave truthful evidence, and who genuinely believe [the first appellant] to be a Falungong practitioner, as does Mr John Deller. The Tribunal is satisfied that [the first appellant] has been attending Falungong practice sessions and doing Falungong study in Australia since at least 2005, and possibly (as he has claimed) earlier. It is generally accepted that a person can acquire refugee status *sur place* where he or she has a well-founded fear of persecution as a consequence of events that have happened since he or she left his or her country. However this is subject to s.91R(3) of the Act which provides that any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention. [The first appellant] has not satisfied the Tribunal that he engaged in Falungong practice or protest activities in Australia other than for that purpose. Therefore the Tribunal has disregarded that conduct in coming to its decision.

28 The Tribunal concluded:

> … for the reasons set out above the Tribunal does not accept that [the first appellant] was a supporter of Falungong while in China and does not accept that he sent Falungong-related materials from abroad. The Tribunal also does not accept that [the second appellant] was detained in China for reasons arising out of her or [the first appellant's] imputed support for Falungong. …
>
> I am satisfied that neither applicant will participate in Falungong-related practice or other activities if they return to China.
>
> The Tribunal finds that [the appellants] do not have a well-founded fear of Convention-related persecution in China.

REVIEW BY THE FEDERAL MAGISTRATES COURT

29 Federal Magistrate Nicholls said, at [34] of his reasons for judgment (*SZCOV & Anor v Minister for Immigration and Citizenship & Anor* [2008] FMCA 1171):

> At the hearing, the applicant husband confirmed that his complaints about the Tribunal decision were that the Tribunal treated him unfairly and unreasonably, that it did not comply with s.424AA of the Act, nor with s.424A(1) of the Act, that the "decision was biased", and that the Tribunal did not take account of his practice of Falun Gong in Australia because of s.91R(3) of the Act, even though there was

evidence provided by two witnesses who supported his claims in that regard.

30 His Honour continued, under the heading "Further Written Submissions", at [35]:

> Following the hearing of this matter, and just before handing down judgement in this matter, the Full Federal Court handed down its judgement in *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105 ("*SZJGV*") which dealt with the understanding and application of s.91R(3) of the Act. In view of the Tribunal's use and reliance on this section, I subsequently gave both parties the opportunity to make further written submissions. Both parties have filed supplementary submissions in relation to this issue.

31 In "Ground One – Bias and Apprehended Bias" Nicholls FM concluded that the fact that the Tribunal rejected the applicant's claim to have supported Falun Gong in China was open to it, and was not demonstrative of bias, saying in [43]:

> The Tribunal's findings complained of now by the applicants were clearly findings that were open to the Tribunal to make on the material before it, and for which it gave extensive and cogent reasons. In all the circumstances, I cannot see that the applicants' complaint of an apprehension of bias or bias is made out.

32 Federal Magistrate Nicholls concluded that the applicants were seeking to re-agitate before the Court claims and explanations made before the Tribunal, and thus were seeking impermissible merits review (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259).

33 With regard to the applicants' claim that the Tribunal's finding is "obviously illogical", Nicholls FM could not discern any illogicality in the approach of the Tribunal. Moreover, his Honour questioned whether any such claimed illogicality could found jurisdictional error.

34 Federal Magistrate Nicholls rejected complaints that there had been a failure to comply with s 424A(1) and a failure to comply with s 424AA of the Act. His Honour said at [80] of his reasons:

> … I did consider during the hearing, and raised with Ms Clegg [counsel for the Minister], whether there was any failure of procedural fairness in relation to s.425 of the Act, bearing in mind *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152. …

35 Federal Magistrate Nicholls continued, at [81]:

> However, any plain reading of the Tribunal's account of what occurred at the hearing (unchallenged by any evidence to the contrary) reveals that the Tribunal did more than sufficiently indicate to the applicants the issues relevant to the review (with reference to *SZBEL* at [47]). As already set out above (see [42]) of this judgment), the Tribunal plainly, and squarely, put to the applicants its concerns with their claims, and evidence, and gave them the opportunity to address these matters at the hearing.

36 No error has been demonstrated in the rejection by Nicholls FM of the above claims.

37 The one aspect of this appeal which requires detailed consideration is whether the Tribunal was in breach of the requirement of s 91R(3) of the Act in its consideration of the evidence of the first appellant's practice of Falun Gong in Australia, in the light of the judgment of the Full Court of the Federal Court in *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105 (*SZJGV*).

38 Section 91R(3) provides:

> (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.

39 The point which the appellant seeks to make is neatly set out in Ground 4 of the Notice of Appeal filed 18 September 2008.

> 4. The learned Federal Magistrates made incorrect findings. As a matter of fact, the Tribunal erred in law in assessing my evidences in relation to my active involvement in *Falun Gong* in Australia according to s.91R(3) of *the Migration Act 1958* ("the Act") (subject to the decision of the Full Federal Court in *SZJGV v Minister for Immigration & Citizenship* [2009] FCAFC 105). In my case, the Tribunal, on one hand, has regarded my involvement in *Falun Gong* activities in Australia, as a reason or part of reason to assess my credibility or my fear of being persecuted on return. For example,
>
> > Secondly, his initial application for a protection visa was lodged, as he has since claimed, some 19 months after he first took up the practice of Falungong in Australia and 10 months after sending Falungong materials into

> China with Ms. Cui. However in written submissions to the Department he did not refer to having any personal involvement in Falungong in Australia, in terms of practice or association with it, in any way. Given the significance of the claims he has since made about taking up Falungong practice here (note: it obviously means in Australia) and sending Falungong materials back to China in that period, his failure to do so casts serious doubt on his claim that he had been doing these things.

But, on the other hand, the Tribunal stated that:

> The Tribunal considers that the two witnesses at the most recent hearing, Mr. Lin Zheng and Ms. Juan Xu, were people of integrity who gave truthful evidence, and who genuinely believe [the first appellant] to be a Falungong practitioner, as does Mr. John Deller. The Tribunal is satisfied that [the first appellant] has been attending Falungong practice sessions and doing Falungong study in Australia since at least 2005, and possibly (as he has claimed) earlier. It is generally accepted that a person can acquire refugee status sur place where he or she has a well-founded fear of persecution as a consequence of events that have happened since he or she left his or her country. However, this is subjected to s.91R(3) of the Act which provides that any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfied the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claims to be a refugee within the meaning of Convention. [The first appellant] has not satisfied the Tribunal that he engaged in Falungong practice or protest activities in Australia other than for that purpose. Therefore, the Tribunal disregarded that conduct in coming to its decision.

> Obviously, having regard to the Tribunal's reasons as a whole, the Tribunal in fact did not disregard my conducts in Australia in assessing my credibility of my claim to have suffered persecution for my support to the *Falungong* movement in China. It thereby made a jurisdictional error. The Tribunal thereby contravened s 91R(3). In doing so it made a jurisdictional error.

40 It might be thought anomalous or inconsistent that the Tribunal should, on the one hand, note that no reference to the practice of Falun Gong in Australia was made in the initial application for a protection visa, and, on the other hand, find that he engaged in the practice of Falun Gong in Australia for the purpose of strengthening his claims to be a refugee within the meaning of the Convention.

41 If the appellant's conduct in practising Falun Gong in Australia was engaged in for the purpose only of strengthening his claim for a protection visa, why was there no reference to that conduct in his application for a protection visa?

42 The explanation, it seems to me, is to be found in **when** the appellant commenced attending Falun Gong practice sessions and studying Falun Gong in Australia.

43 The Tribunal accepted the evidence of two witnesses in concluding that it was satisfied that the first appellant had been attending Falun Gong practice sessions and studying Falun Gong in Australia since at least 2005 and possibly (as he has claimed) earlier.

44 That finding is not necessarily inconsistent with the finding that the first appellant has not satisfied the Tribunal that he engaged in Falun Gong practice and protest activities in Australia other than for the purpose of strengthening his claim to be a refugee within the meaning of the Convention. Nor is it inconsistent with the finding that the Tribunal was:

> … satisfied that their reasons for leaving [China], and for lodging the protection visa applications in 2002, are unrelated to involvement in Falungong.

45 The first appellant claimed that his Falun Gong practice in Australia commenced some 19 months before his initial application for a protection visa. Yet, that application made no reference to his practice of Falun Gong in Australia. That absence, said the Tribunal, caused it to "cast serious doubt on his claim that he had been doing these things."

46 In my opinion, the omission of any claim to practising Falun Gong in Australia in his initial application for a protection visa was viewed by the Tribunal as demonstrating that his claim that he commenced practising Falun Gong nineteen months before was false, and there was no practice by the first appellant of Falun Gong in Australia prior to the making of the initial application for a protection visa. This, in my opinion, is what the Tribunal was seeking to say in the last sentence of the paragraph of its reasons, which commences "S*econdly* …" set out in [23] above.

47 When the Tribunal expresses its view that the failure to mention two identified instances of the first appellant's conduct in the written submissions to the Department "*casts serious doubts on his claim that he had been doing these things*", in my opinion, the Tribunal in fact is saying that "these things did not happen."

48 This meaning, and with it, the pusillanimous lack of precision of expression used by the Tribunal (which may be born out of a misplaced kindness not to label a person as a liar,

when that is what in fact the Tribunal finds) is confirmed by the observations that introduce the "five factors", of which this is the second: "*There are a number of other factors that contribute to the Tribunal's conclusion that they* ***have not been truthful*** *about key aspects of their account.*" (Emphasis added).

49 It was open to the Tribunal to conclude that the attendance at Falun Gong practice sessions and studying Falun Gong in Australia (which the Tribunal accepted) had commenced **after** the filing of the initial application for a protection visa (which is why it was not referred to in that application), **and** was conduct engaged in only for the purpose of strengthening his claim for a protection visa.

50 Concerning the claim that the first appellant had asked people to carry Falun Gong material to China, the Tribunal found that such conduct had not occurred, finding that the first appellant's oral evidence on the point was "vague" and "contradictory". Further, the Tribunal did not consider the evidence from people who supported the first appellant in his claim "to be reliable".

51 If the claim that he had asked people to carry Falun Gong material to China occurred as he said, 10 months before his initial application for a protection visa, it is a curious circumstance indeed that it was not contained in that initial application. That omission provides a basis on which the Tribunal could conclude, as it did, that that conduct had not occurred. That claimed conduct on the part of the first appellant did not, and does not, engage s 91R(3) because the Tribunal found, as a finding of fact, that that conduct had not happened.

52 The same reasoning informs the Tribunal's conclusion that the first appellant's practice of Falun Gong in Australia "did not happen" prior to the initial application. The claim by the first appellant that it had is the basis for the Tribunal's credibility finding. That claim does not engage s 91R(3), because the Tribunal found as a fact that that conduct had not happened. Further, the Tribunal was not satisfied by the first appellant that his practice of Falun Gong in Australia (which occurred after the initial written submissions to the Department) was engaged in other than for the purpose of strengthening his claim to be a refugee within the meaning of the Convention. That conduct was disregarded, as required by s 91R(3).

53 Federal Magistrate Nicholls was correct to find that there had been no breach by the Tribunal of the requirements of s 91R(3).

54 There is no error shown in the judgment of Nicholls FM.

55 The appeal should be dismissed with costs, which I fix in the sum of $4000.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender.

Associate:

Dated: 28 November 2008

The Appellants appeared in person

Counsel for the First Respondent:	Mr J Smith
Solicitor for the Respondents:	Sparke Helmore
Date of Hearing:	24 November 2008
Date of Judgment:	28 November 2008