FEDERAL COURT OF AUSTRALIA

SZLDV v Minister for Immigration & Citizenship [2008] FCA 1211

SZLDV v MINISTER FOR IMMIGRATION & CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 569 OF 2008

JESSUP J
6 AUGUST 2008
SYDNEY

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 569 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZLDV**
Appellant

AND: **MINISTER FOR IMMIGRATION & CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **JESSUP J**

DATE OF ORDER: **6 AUGUST 2008**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the costs of the first respondent.

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

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JUDGE: **JESSUP J**
DATE: **6 AUGUST 2008**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal from a judgment of the Federal Magistrates Court given on 14 April 2008 dismissing an application by the appellant for orders of certiorari and mandamus in relation to a decision by the Refugee Review Tribunal ("the Tribunal") handed down on 3 July 2007. In that decision, the Tribunal affirmed an earlier decision of a delegate of the respondent Minister not to grant a Protection (Class XA) Visa to the appellant pursuant to the *Migration Act 1958 (Cth)* ("the Act"). The second respondent, the Tribunal, has filed a submitting appearance.

2 The appellant is a citizen of China who arrived in Australia on 3 December 2006. On 29 December 2006, he lodged an application for a protection visa. The appellant claims to have practised Falun Gong since 1997. He claims to have been subject to mental and physical torture from the government as a result of his participation in a demonstration in support of Falun Gong in 1999. He also claims to have been arrested by police in 2006 and beaten, tortured, held for three days and released only after his wife paid a large fine.

3 In his amended application in the Federal Magistrates Court, the appellant made three assertions against the Tribunal, namely, bias, making assumptions and failure to comply with its statutory duty, in particular, a breach of s 424A. In her reasons for judgment published on 14 April 2008, the Federal Magistrate dealt with each of those grounds and rejected them. Substantially corresponding grounds have been relied on by the appellant in his Notice of Appeal in this court. Those grounds are as follows:

> 1. The Tribunal had bias against me and did not accept my claims are genuine.
> 2. The Tribunal's satisfaction that I am not a refugee was not based on rational and logical foundation. The decision was biased.
> 3. The Tribunal failed to consider my application in accordance with S424A of the Migration Act 1958. The Tribunal failed to notify me in writing and the information which formed the reasons for affirming the decision of the delegate.

4 The appellant represented himself in his appeal in this court. In making submissions in support of his appeal he read from a document which he told me had been prepared by a friend of his who knew a little bit about the law in this area. The appellant himself claimed to know nothing about the law. In those submissions, the appellant said nothing about the ground of bias or the ground of failure to comply with s 424A of the Act. Each of those grounds was advanced in the proceedings below and dealt with by the Federal Magistrate. No basis upon which it might be supposed that her Honour was in error in relevant respects appears from her reasons and, as I have indicated, the appellant himself did not touch upon these questions in his submissions today. In the circumstances, I reject the first and third grounds in the appellant's Notice of Appeal.

5 The second ground was dealt with by the appellant in his submissions, from which it appears that the gravamen of his complaint is that the Tribunal rejected evidence which he had presented to it, including the significance of marks on his own body which were said to have indicated injuries at times past, and based its decision on speculation rather than upon that evidence. To an extent, the Federal Magistrate dealt with the appellant's complaints in these respects and nothing which he has put to me today has even dealt with the question whether her Honour may have been in error in these respects. To the extent that the appellant's submissions now travel beyond the case which he advanced before the Federal Magistrate, I accept the submissions of Ms McWilliam, who appeared on behalf of the

Minister, that the allegation that the Tribunal's decision was based on speculation rather than evidence is utterly without foundation.

6 The Tribunal was engaged in an exercise of assessing positive claims advanced by the appellant, and it is as clear as may be that the Tribunal rejected those claims because it rejected the factual basis of the appellant's case, proceeding in what appears to have been a perfectly conventional way of fact-finding. The Tribunal reasoned that the appellant's evidence was not to be believed, and rejected the fundamental pillar upon which the rest of his case was supported, namely, that he was a genuine adherent of, or practitioner in, Falun Gong during his time in China. In reaching that conclusion, the Tribunal engaged in nothing which could be remotely described as speculation, and it did so, as I have said, quite convincingly, in accordance with the evidence and material that was before it.

7 The appellant relied also upon two further points in his submissions this morning, I shall deal with the second one first. He told me that he came to Australia on an aeroplane in the company of another gentleman from China. After they disembarked from the plane, they went their separate ways and, until the events to which I shall refer in a moment, he was unaware of the whereabouts of this other person. That was the position, it seems, until recently. He has now become aware of the whereabouts of this person, and, according to what he told me, has spoken to him. He told me that this person also made a claim for a protection visa, and that his claim was successful. He told me that this person indicated a readiness to give evidence on behalf of the appellant in support of his factual case that he was a Falun Gong practitioner while in China. The question before the court, however, and the question before the Federal Magistrate, is not whether the appellant engaged in Falun Gong in China, but whether the Tribunal fell into jurisdictional error in deciding that he did not, or in rejecting his case that he did. Further evidence that would have the potential to lead to a different set of factual findings by the Tribunal, cannot, at least in the circumstances of this case, bear upon the question whether the Tribunal exceeded, or failed properly to exercise, its jurisdiction.

8 The other submission that the applicant made this morning was to the effect that the Tribunal did not assess his claims according to s 91R of the Act. I asked him what he meant by that submission, and he was unable to inform me. I told him that s 91R dealt with a

number of different situations, and I invited him to enlighten me as to what part of s 91R was alleged to have been overlooked by the Tribunal. He was unable to assist me in this respect, but counsel for the Minister responded to the submission as though in effect the appellant desired to rely upon s 91R in all or any of its aspects to the extent that it might be of some assistance to him on this appeal. Counsel referred to the deeming provisions in subs (1) and (2) of s 91R, but I indicated to her, and I take the view, that nothing in the present case gives rise to the potential for those subsections to have significance. I take that view because the present case was decided by the Tribunal at the purely factual level, in which circumstances, the question of characterisation with which s 91R (1) and (2) are concerned does not arise.

9 Counsel referred also to s 91R(3), and drew my attention to the judgment of Jacobson J in *SZHFE v Minister for Immigration, Multicultural and Indigenous Affairs (No 2)* [2006] FCA 648, and to the judgment of the Full Court in *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105. Counsel submitted that the present case was covered by what Jacobson J said in pars 29 and 30 of his reasons in *SZHFE*, which observations were not displaced by the Full Court judgment in *SZJGV*, particularly by reason of their Honours' reservation in par 26 of their reasons in that case. I shall refer further both to *SZHFE* and to *SZJGV* presently, but, before doing so, I should return to the decision of the Tribunal in the present matter.

10 In that part of the Tribunal's written decision which sets out the claims and evidence made by the appellant in the hearing conducted by the Tribunal, the Tribunal said:

> The Tribunal asked the applicant if he had been involved in Falun Gong activities since arriving in Australia. He said that he had not been involved in anything to do with Falun Gong in Australia. He heard that if the Chinese Government hears that someone has applied in Australia for a protection visa on the grounds of their adherence to Falun Gong, then there are real problems for that person if he returns to China.

In that part of the Tribunal's decision which contains its findings and reasons, the Tribunal said:

> The Tribunal also finds it significant that according to his oral evidence the applicant has not participated in the Falun Gong activities since coming to Australia, nor has he sought to obtain any of the Falun Gong literature. He claims that he had not done so because he was told that a person may have

> problems with the Chinese authorities if the authorities become aware that he applied for a protection visa on the basis of adherence to Falun Gong. The Tribunal rejects that explanation as the applicant's participation in Falun Gong activities in Australia need not be related to his application for the protection visa, nor does it explain why the applicant had not engaged in the practice of Falun Gong privately or why he had not sought to obtain any Falun Gong related materials. The Tribunal is of the view that the applicant's inactivity in Australia also indicates his lack of interest and lack of commitment to Falun Gong and is inconsistent with the actions of a genuine Falun Gong practitioner.

Having held that on all the evidence before it, it was not satisfied that the applicant was ever a Falun Gong practitioner or was ever perceived as one, the Tribunal continued:

> The Tribunal notes that the applicant has done nothing in Australia with regard to Falun Gong. He has not sought out practitioners nor any literature. He has not practised Falun Gong in public or in private. The Tribunal finds that there is no chance that the applicant has acquired any adverse regard from the Chinese Government as a Falun Gong adherent during his absence from his homeland.

In the circumstances referred to above, a question arises whether the judgment of the Full Court in *SZJGV* compels or justifies a conclusion that there was jurisdictional error on the part of the Tribunal in the present case.

11 Notwithstanding that s 91R(3) was relied upon by the appellant neither in the Federal Magistrates Court nor in the grounds set out in his Notice of Appeal in this court, the appellant's attempt to rely upon the section in his submissions before me, and Ms McWilliam's preparedness to deal with so much of that submission as implied reliance upon subs (3), make it appropriate that I should deal with the point on its merits. I do so, of course, because, if sound, the point would speak as to the jurisdiction of the Tribunal, a matter of significance not only in this case but in the public interest.

12 *SZJGV* raised the question of the construction and scope of s 91R(3) of the Act. The judgment resolved three proceedings, in each of which the applicant for a protection visa had produced evidence before the Tribunal as to his or (in one case) her conduct in Australia. In each case the Tribunal had not expressed satisfaction that the applicant in question had engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee. In each case, in certain respects, the evidence was taken into account to the disadvantage of the applicant.

13 The Full Court held that s 91R(3) prevented the Tribunal from having regard to the evidence for the purposes which it did. It rejected the proposition that s 91R(3) cut in one direction only, and effectively held that once an applicant sought to rely upon his or her conduct in Australia, that conduct should be disregarded for all purposes of the application. While recognising that the Parliamentary materials which accompanied the introduction of s 91R(3) disclosed a legislative purpose which was confined to sur place claims, their Honours pointed out that the subsection was not so confined in terms. It did apply to such claims, but it likewise applied to claims which were based upon events which had occurred in an applicant's country of origin, and for which further support was sought to be provided by conduct engaged in in Australia.

14 In the course of giving their reasons in *SZJGV*, their Honours on the Full Court referred to a number of judgments by Driver FM in the Federal Magistrates Court of Australia. In *SZHAY v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 199 FLR 148 at 164 to 165, Driver FM observed that where an applicant sought to introduce conduct engaged in by him or her in Australia in support of an application, he or she bore the onus of satisfying the decision-maker that the conduct was engaged in otherwise than for the purpose of strengthening his or her protection visa claims. His Honour continued:

> Different considerations apply, in my view, where the information about the applicant's conduct in Australia is introduced by a decision maker or some third party. It would be absurd to impose on an applicant an onus of satisfying a decision maker that information should not be disregarded where it is not the applicant's information. The applicant may not even know about it. There is no statutory duty on decision makers to disclose favourable information. Moreover, the obligation of disclosure under provisions such as s.424A would be nonsensical if applicants were called upon to comment on why negative information should not be disregarded. The RRT is under no general duty to make its own enquiries, but if it chooses to do so, the RRT must have regard to the information obtained: s.424(1). In my view, that obligation underscores the non application of s.91R(3) in those circumstances.

15 Their Honours in *SZJGV* referred also the judgment of Jacobson J in *SZHFE*. In that matter the Tribunal had adverted to the applicant's lengthy period of residence in Australia, during which he had not articulated any fears of persecution in his home country, nor made inquiries about, or sought to obtain refugee protection until he was detained by the immigration authorities. The Tribunal observed that the prolonged period of silence and

inactivity were strong evidence that the applicant did not leave his country of origin for his safety and that he did not have a well-founded fear of prospective persecution. It was submitted on behalf of the applicant before Jacobson J that s 91R(3) disclosed a legislative intention that evidence, which was admitted as a result of a finding by the decision-maker, that the conduct to which it related had been engaged in otherwise than for the purpose of strengthening the applicant's claim to be a refugee, could not then be "used against him". It was submitted that all evidence of an applicant's conduct in Australia, if unhelpful, should be disregarded. In passages referred to in the reasons of the Full Court in *SZJGV*, Jacobson J said, at par 29 to 30 of his reasons:

> The effect of the respondent's written submissions is that I should reject the approach of the appellant because the clear purpose of section 91R(3) is to provide a disincentive to applicants for refugee status from taking steps while in Australia to make them more likely to be persecuted on return to their country of origin.
>
> The effect of the submission is that section 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. In my opinion this is plainly the effect of section 91R(3) and the subsection is not enlivened in the present case.

16 Having referring to the authorities set out above, and to other judgments by Driver FM, the Full Court in *SZJGV* said, in par 22 of their reasons:

> 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).

Substantially for the reasons there set out, their Honours allowed each of the appeals in that case. They did, however, make it clear that their reasons ought not to be understood as going further than was necessary to do so. Particularly, their Honours reserved for possible later consideration, the circumstances to which they referred as follows (pars 25 and 26):

> It may be, in a particular case, as Driver FM was minded to accept in *SZIBK* and *SZGDA*, that a distinction might be drawn, for the purposes of s 91R(3), between an applicant's conduct and the reason or reasons for which that conduct has occurred. It is arguable that the Tribunal is only bound to disregard the conduct. It may be able to rely on the motivation for the conduct for the purpose of bolstering or undermining the applicant's credibility. Such a distinction may not easily be drawn in many cases. In none of the present cases did the Tribunal either expressly or by implication seek to draw this distinction. A decision on whether or not such a distinction may be drawn for the purposes of s 91R(3) should await a case in which the point is raised.
>
> A second question which does not arise on these appeals and need not be resolved is whether s 91R(3) is enlivened only when an applicant seeks to rely on his or her conduct in Australia to support a claim to be a refugee. There may be cases in which the decision maker becomes aware of relevant conduct from other sources. The evidence may be prejudicial to an applicant who will not seek to rely on it. Even so, it is arguable that s 91R(3) will be engaged and will require the decision maker to disregard the evidence.

17 Uninstructed by authority, I would take the view that as a matter of construction, s 91R(3) of the Act is concerned with a situation in which an applicant for refugee status would have an interest in having his or her conduct taken into account, and is concerned to prevent such an applicant from so modifying what would otherwise be his or her conduct in Australia for the purpose of establishing a case for the recognition of such status, and then relying upon that conduct. I would have agreed with the views of Jacobson J, in *SZHFE*. It seems, however, from the reasons of the Full Court in *SZJGV*, that s 91R(3) is not so limited. How much wider the operation of the subsection may be was not definitively established by *SZJGV*, but it is clear at least that evidence advanced by an applicant, whether it has the tendency to support or to damage the applicant's case, must be disregarded unless the decision maker reaches the state of satisfaction to which the subsection refers. The Full Court made it clear that their reasons were not to be understood as dealing with evidence or information other than that led, adduced or relied upon by the applicant in question.

18 Additionally, there is a question as to the reach of their Honours' brief observation at the conclusion of par 22 of their reasons that "inaction can constitute conduct within the meaning of s 91R(3)". For my own part, with respect, I accept that inaction can constitute conduct in relevant respects, but I do not read their Honours' observation as amounting to the statement of a universal truth that inaction will always – that is to say, necessarily – constitute conduct in relevant respects. It must be remembered, in my respectful view, that s 91R(3) refers not to conduct simpliciter but to conduct engaged in by the person. I do not read their Honours' observation in par 22 of *SZJGV* as requiring the decision maker always to treat a situation in which nothing has happened as amounting to conduct "engaged in by the person" in question. To take an extreme case, I would not regard the circumstance that the Chief Justice did not sit as a member of the Full Court in *SZJGV* as conduct engaged in by his Honour.

19 Returning to the facts of the present case, in his evidentiary case before the Tribunal, the appellant said nothing about his conduct in Australia apropos the practice of Falun Gong. He relied only upon his conduct in China. In the course of the hearing before the Tribunal, the Tribunal member inquired of the appellant whether he had been involved in Falun Gong activities since arriving in Australia, and the appellant responded in the negative. In so doing, in my view, the appellant was informing the Tribunal, in response to a question, of something which had not happened. I do not regard the circumstance of which he so informed the Tribunal as amounting to conduct engaged in by him within the meaning of s 91R(3) of the Act. Neither do I regard the subsection as applicable to that circumstance, because it was not an element of the appellant's evidentiary case before the Tribunal. Unlike what appeared to have been the situation in the three proceedings dealt with by the Full Court in *SZJGV*, in the present case the appellant did not introduce the material in question.

20 For reasons which I have attempted to explain, I take the view that I am not bound by *SZJGV* to hold that the Tribunal in the present case fell into jurisdictional error by using to the appellant's disadvantage the circumstance that he had, since arriving in Australia, taken no steps to become involved in the practice of Falun Gong.

21 For the above reasons, I propose to dismiss the present appeal.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 18 August 2008

Counsel for the Appellant:	The appellant appeared in person
Counsel for the Respondents:	Ms V McWilliam
Solicitor for the Respondents:	DLA Phillips Fox
Date of Hearing:	6 August 2008
Date of Judgment:	6 August 2008