FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMZA v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 1418 (No.2)

MIGRATION – RRT decision – Chinese applicant claiming persecution for attending underground church – Tribunal had regard to applicant's Church attendances in Australia – effect of s.91R(3) – consideration of applicant's motives – failure to address the correct question – matter remitted.

Federal Court Rules (Cth), O.62
Federal Magistrates Court Rules 2001 (Cth), r.21.02(2)(c)
Migration Act 1958 (Cth), ss.91R(3), 91R(3)(b), 424A

SZBYR v Minister for Immigration & Citizenship (2007) 235 ALR 609, [2007] HCA 26
SZJGV v Minister for Immigration & Citizenship (2008) 247 ALR 451, [2008] FCAFC 105
SZMDC v Minister for Immigration & Anor [2008] FMCA 1282
SZMZA v Minister for Immigration & Anor [2008] FMCA 702

Applicant:	SZMZA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 471 of 2008
Judgment of:	Smith FM
Hearing dates:	21 May & 18 August 2008
Date for Last Submission:	23 September 2008
Delivered at:	Sydney
Delivered on:	21 October 2008

REPRESENTATION

Counsel for the Applicant:	Applicant in person
Counsel for the First Respondent:	Mr S Free
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 31 January 2008 in matter 071956613.

(2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 18 December 2007.

(3) The first respondent pay the applicant's costs as agreed or taxed under r.21.02(2)(c) and O.62 of the Federal Court Rules.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 471 of 2008

SZMZA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This matter has taken a tortuous path at all stages, including while it has been in my docket. The applicant arrived in Australia in May 2006. He was assisted to make a protection visa application which made false claims to fear persecution as a Falun Gong practitioner if he returned to The People's Republic of China, and this was refused on 28 July 2006. He did not appeal, and was taken into immigration detention in October 2006.

2. He then wrote to the Minister many letters claiming that he had been repeatedly detained and mistreated over a long period by Chinese authorities, because he attended *"an underground church which belonged to the Shouter's sect"*. It is unnecessary for me to recount the details of his claims. Eventually, the Minister allowed him to make a second protection visa application, which was lodged on 16 November 2007 with the assistance of a migration agent. He presented evidence of involvement in a number of Christian activities in Australia, both before and after his detention.

3. He was interviewed by a delegate of the Minister, who refused the application on 18 December 2007. The delegate considered that there was no evidence that the applicant had been persecuted on account of his claimed religion in China. He referred to s.91R(3) of the *Migration Act 1958* (Cth), and said that he was not satisfied that the applicant's Church attendances in Australia had been undertaken *"for any other reason other than to strengthen his claim to be a refugee"*. He concluded:

> *At best, the applicant could be regarded as someone who may or may not attend a house church if he returns to Fujian … it would be difficult to categorise the applicant's chance of persecution on account of his religion as being anything more than within the realm of speculation, and therefore not well founded.*

4. On appeal, the applicant was assisted by his migration agent to present his submissions and evidence to the Tribunal. This included confirmation that the applicant had attended the West Sydney Chinese Christian Church since May 2006, and was believed by its minister to be *"a genuine follower of our Lord Jesus Christ"*. The Tribunal invited, and received, the applicant's written comments on adverse matters, and also conducted a hearing on 25 January 2008 which was attended by the applicant and his agent. On 31 January 2008, the Tribunal handed down a decision which affirmed the delegate's decision.

5. The application to this Court was filed on 27 February 2008. It seeks orders setting aside the Tribunal's decision and remitting the matter for further consideration. It was given expedition by the Court, since the applicant was still in detention. However, in circumstances which I explained in *SZMZA v Minister for Immigration & Anor* [2008] FMCA 702, I adjourned the hearing to 18 August 2008, to allow the applicant to obtain advice on whether he should proceed with his application to the Court, in view of recent action by the Department of Immigration which gave him the right to make a second application to the Tribunal. The applicant was later released from immigration detention.

6. At the resumed hearing, the applicant remained unrepresented, although he continued to have assistance from Ms Milne. He informed me that he wished to proceed with his present application. He did not file any written submissions, and relied upon five grounds formulated in his original application. These challenged the rationality of some of

the Tribunal's reasoning, and its procedures in relation to the s.424A letter. It is unnecessary for me to examine these grounds, since I consider it sufficient for me to explain shortly a jurisdictional error which arises from the Tribunal's reasoning based upon findings about the applicant's church attendances in Australia.

7. The applicant's evidence to the Tribunal about this was summarised by the Tribunal:

> *The Tribunal asked the applicant what was the denomination of the church he attended. He said that it was a Shouter church. The Tribunal asked the applicant why he had not mentioned this in his application. The applicant said that it was written in his letters but the agent did not ask this question. The Tribunal noted that it did not recall this information from any of the applicant's letters to the Minister. He said that it was written in his Chinese letter. The Tribunal asked the applicant what was the denomination of the church that he had been attending in Australia. He said that as soon as he came to Australia, in May 2006 he went to the West Sydney Chinese Christian Church. The Tribunal asked the applicant if it was a Shouter church. He said that he came to Australia and could attend any church. He did not have to attend a Shouter church. The Tribunal asked the applicant if he had any commitment to the Shouter church or if he was happy attending any church. He said that he did not know if there was a Shouter church, he thought that as long as he hears the word of God, that would be sufficient. The Tribunal again asked the applicant if he had any commitment to the Shouter church. He said that he had not been in Australia long and did not find the Shouter church. The Tribunal asked the applicant what inquiries he made about the Shouter church in Australia. He said that it would have been better if he found the Shouter church. The Tribunal again asked the applicant what steps he had undertaken to find a Shouter church in Australia. He said that he had not been in Australia long, he had not made inquiries.*
>
> *The Tribunal noted that the applicant appeared to have attended churches of different denominations since coming to Australia. He said that the central Baptism church goes to VIDC twice a week and Hillsong also visits on Sundays and there is also a Korean church. The Tribunal noted that he referred to Pentecostal and Baptist churches, the Tribunal asked the applicant if the different denominations mattered to him. He said that they learn the teachings and it is about saving the soul, it would be beneficial to him. The Tribunal noted that the applicant did not appear to have*

> *any strong commitment to the Shouter church and that he had been attending different denomination churches in Australia. The Tribunal asked the applicant why he would not be able to attend either a registered church or a church that is able to operate freely in China. He said that the government church operates according to the government regulations while the underground churches do things according to the Bible. The Tribunal asked the applicant why he objected to government regulations. He said that the government regulations promote communism and ask people to donate certain amounts of money every month but these donations are not required by the underground church, they can donate any figure that they are willing to.*

8. It is clear, and is conceded by counsel for the Minister, that in the Tribunal's *"Findings and Reasons"* it had regard to the applicant's evidence about his Australian religious activities when deciding whether his fear of return to China was well-founded.

9. Considering his claimed history of persecution, the Tribunal said that it rejected *"the applicant's claimed involvement with the Shouter or the Local Church"*. One of its reasons was *"the fact that the applicant appears to have had no interest in the Shouter church since his arrival in Australia"*. This adverse conclusion clearly was based upon findings as to the applicant's conduct in Australia.

10. The Tribunal also said that, *"placing significant weight on the applicant's religious activities upon his arrival in Australia, the Tribunal is prepared to accept that the applicant has had some religious involvement with the church in China"*. However, it did not accept that his involvement had been *"with an underground church which was targeted by the authorities"*, and found that it was *"with such a church which was permitted to operate by the authorities"*. The logic and evidentiary basis for these conclusions about the applicant's claimed history in China is challenged by the applicant, but it is unnecessary for me to consider whether jurisdictional error is demonstrated at this point in the Tribunal's reasoning.

11. As I shall explain, such an error was made when the Tribunal considered whether the applicant's conduct in Australia supported a future risk of persecution in China if he returned. The Tribunal addressed this in its last three paragraphs:

The Tribunal will now consider the applicant's conduct in Australia. The applicant stated that he started attending the church since his arrival in Australia in May 2006 and he provided a statement from Rev. David Wong to confirm his attendance at the church since May 2006. The Tribunal accepts, on the basis of this evidence, that the applicant has been attending the West Sydney Chinese Christian Church since May 2006. The applicant stated in oral evidence that it was not a Shouter church and that he did not make any inquiries about finding a Shouter church after his arrival in Australia. He also stated that he was content to attend any Christian church and not necessarily a Shouter church. The Tribunal also finds it significant that since his arrival in Australia and in particular during the detention the applicant has been attending churches of different denominations. The applicant's desire upon his arrival in Australia appears to have been to attend any church and he stated that he was free to attend any church and not a Shouter church. The Tribunal is of the view that the applicant's commitment to Christianity is not limited to his commitment to the Shouter church but is broader.

The Tribunal accepts, having regard to the applicant's oral evidence and evidence from third parties, that the applicant has some commitment to Christianity and that he had been engaged in religious activities in Australia. The Tribunal cannot be satisfied that the applicant's conduct in Australia has been for the purpose of strengthening his claim to be a refugee and therefore the Tribunal must have regard to such conduct. The Tribunal finds, having regard to the applicant's conduct in Australia and his past conduct in China, that he may also engage in religious activities if he were to return to China now or in the reasonably foreseeable future. However, the Tribunal also found that the applicant had previously participated in an official or a recognised church in China. This fact, together with the applicant's apparently indiscriminate religious involvement in Australia, causes the Tribunal to find that the applicant will continue to attend an official or a registered church if he were to return to China. The Tribunal further finds that the applicant will not attend a Shouter church or an unregistered church in China. The Tribunal makes this finding not because it expects the applicant to modify his conduct in order to attend a registered church but because it believes that the applicant would do so as part of his normal conduct. The Tribunal also makes this finding despite the applicant's claim that he does not like the official church due to its differences with the Bible and its teachings and promotion of the communist ideals. As noted above, the applicant appeared content with attending a church in order to gain an 'eternal life' and he appeared to have no commitment to the type of

the church he attended. Thus, the Tribunal finds that the applicant may continue to attend the official church despite its differences.

For these reasons, the Tribunal finds that there is no real chance that the applicant will face persecution if he were to return to China now or in the reasonably foreseeable future due to his religion, membership of a particular social group or any other Convention reason.

12. A critical issue emerges in relation to this reasoning, arising from the recent examination of s.91R(3) of the Migration Act by the Full Court in *SZJGV v Minister for Immigration & Citizenship* (2008) 247 ALR 451, [2008] FCAFC 105. I canvassed this issue with counsel for the Minister at the hearing. However, it had not been clearly raised by any of the applicant's grounds of review, and I therefore gave both parties an opportunity to present further written submissions after the hearing.

13. 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.*

14. In *SZJGV*, the Full Court construed the provision as requiring a decision-maker to make findings as to an applicant's conduct in Australia, and then to disregard the conduct which it found, unless it made a finding about that conduct expressing the satisfaction specified in s.91R(3)(b). In their Honours' opinion, the prohibition applies to a Tribunal's reliance upon an applicant's Australian conduct as reasons for accepting or for rejecting a claim of fear of persecution based upon his or her actions in the person's home country or in Australia (see

paragraphs [10], [22] and [23]). They described a general pattern of reasoning by the Tribunal in the three cases before them, which they held amounted to jurisdictional error:

> 23 *In each of the present cases, the Tribunal received evidence and made findings about the appellant's activities (or lack of them) in Australia. In each case, the evidence that led to the findings was called by the appellant. In each case, the Tribunal appreciated that s 91R(3) applied and that, unless it was satisfied that the appellant had engaged in the conduct for a purpose other than that identified in paragraph (b), it was bound to disregard that conduct. In each case, the Tribunal either declared that it was not satisfied that the appellant's conduct was undertaken for a purpose other than that of enhancing his or her claim to be a refugee or that it was satisfied that the conduct had been engaged in to assist the claim. It further declared that the conduct must, accordingly, be disregarded. Despite these declarations, counsel for the appellants submits that, in each case, the Tribunal did have regard to the appellant's conduct. It did so by relying on that conduct, in part, as a reason for concluding that the appellant was not a refugee.*

15. In the present case, the Tribunal clearly thought that it was addressing s.91R(3) in the course of its reasoning in the above two paragraphs. Its reasoning contains no disclaimer of reliance on the applicant's conduct in Australia. Rather, it contains an express reliance on his *"indiscriminate"* attendances at non-Shouter churches in Australia to support its prediction that if he returned to China he would not attend *"a Shouter church or an unregistered church"*. The issue, therefore, is whether, using the Full Court's language, the Tribunal *"appreciated that … unless it was satisfied that the [applicant] had engaged in the conduct for a purpose other than that identified in paragraph (b), it was bound to disregard that conduct"*.

16. The Tribunal said nothing to show that it did properly understand the effect of s.91R(3), and I have concluded that it did not. In particular, I have concluded that the Tribunal did not appreciate that s.91R(3)(b) required it to be positively satisfied about the applicant's conduct in terms of paragraph (b), before it could take it into consideration as a reason for excluding a well-founded fear of persecution.

17. The Tribunal expressly identified and addressed the relevant issue, but did so in a manner which reversed the required state of satisfaction identified in the subsection, by saying:

> *The Tribunal cannot be satisfied that the applicant's conduct in Australia has been for the purpose of strengthening his claim to be a refugee and therefore the Tribunal must have regard to such conduct.*

18. This purported application of s.91R(3) gives the section the legal effect that conduct is only required to be disregarded if the Tribunal is positively satisfied that the conduct *"has been for the purpose of strengthening his claim to be a refugee"*. That is, the Tribunal has proceeded upon an incorrect legal opinion that conduct is to be taken into account where it is left in doubt about an applicant's motives for engaging in activities in Australia. However, this reflects a clear error of law in the application of the section, and one which is capable of having material consequences in the assessment of refugee claims such as the present.

19. *SZJGV* holds that an erroneous application of s.91R(3) has jurisdictional effect. Consequently, the present decision of the Tribunal can only be saved if the Tribunal's apparent error in its critical sentence is to be understood as an unintended infelicity of language, or if it had no material effect on the Tribunal's operative conclusions (cf. *SZJGV* at [31], and *SZBYR v Minister for Immigration & Citizenship* (2007) 235 ALR 609, [2007] HCA 26 at [28], [55]-[59], [91]).

20. I explored with Counsel for the Minister the possibility that the Tribunal might have accidentally become entangled in double negatives, for example, by omitting "not" between "has" and "been" and mistakenly saying "regard" rather than "disregard" in its critical sentence. However, I accept his submission that the Tribunal clearly did not intend to say that it had not been satisfied in terms of s.91R(3)(b), because it plainly did have regard to the applicant's conduct in Australia, and was plainly aware that it was doing so. The Tribunal said that it thought that it was bound to have regard to the conduct.

21. The Tribunal said that it had regard to the conduct because it "cannot" be satisfied that the applicant was motivated by the purpose of strengthening the applicant's refugee claims. However, it did not say that it had been

satisfied by the applicant that his conduct was motivated "otherwise" than to strengthen his refugee claims, which is the motive identified in s.91R(3)(b). The implication, in my opinion, is that the Tribunal arrived at the position where it could not be satisfied positively whether or not the applicant had the motive identified in s.91R(3)(b), yet it thought that it was bound to take the conduct into account.

22. Counsel for the Minister submitted that the apparent error by the Tribunal in the question it posed for itself under s.91R(3) could be overlooked, because it could be found implicitly to have made findings which positively accepted that the applicant's conduct in Australia was not for the purpose of strengthening his refugee claims. He submitted:

> *8. The decisive proposition of fact with which s. 91R(3)(b) is concerned is whether a person has engaged in conduct in Australia for the improper purpose of strengthening his or claim for refugee status or otherwise than for that purpose. The RRT, as indicated in the passage quoted above, addressed itself to that question of fact and to whether it was "satisfied" of the proposition that the applicant had engaged in conduct in Australia otherwise than for the improper purpose. This is apparent from the first sentence of the passage quoted above which indicates that the RRT was satisfied that the applicant had some commitment to Christianity. Given that the RRT was in the process of considering the application of s. 91R(3) and, in contrast to other passages in the RRT's reasons where the RRT doubted the applicant's credibility, this is implicitly a finding that the RRT was satisfied (on the basis of the applicant's evidence) that the commitment was genuine, in the sense that the conduct was engaged in otherwise than for the improper purpose. The RRT's satisfaction as to this matter is confirmed by the following sentence, which is in substance the same proposition expressed in the negative – ie the RRT was* **not** *satisfied that the conduct had been engaged in for the* **improper purpose**. *Reading the second sentence in isolation might suggest that the RRT had approached the proposition from the wrong perspective. However, reading the two sentences together, it can be seen the RRT's statement that it was not satisfied that the conduct was engaged in for the improper purpose is in substance the same as a statement that the RRT was satisfied that the conduct was engaged in for purposes otherwise than for the improper purpose. It follows that there was no error in the*

> *RRT's formulation of the test in s. 91R(3).* (emphasis in original)

23. As I explained in *SZMDC v Minister for Immigration & Anor* [2008] FMCA 1282 at [29]-[31], *SZJGV* appears to accept that a Tribunal's reliance on an applicant's conduct in Australia without a finding in terms of s.91R(3)(b) might not always give rise to jurisdictional error, if the Court is satisfied that the Tribunal implicitly held the required opinion as to the applicant's motives. In that case, the nature of the relevant conduct in Australia and the course of the Tribunal's reasoning allowed me to conclude that the requisite finding was *"so obvious as to go without saying, and in my opinion it was not necessary for the Tribunal to make that finding expressly"*. However, the present reasoning of the Tribunal is not, in my opinion, open to the same approach.

24. I am not persuaded by counsel's submission for two reasons. Most importantly, because the Tribunal expressly misstated the question posed by s.91R(3) at the critical point in its reasoning, and in a way which is impossible to dismiss as a momentary slip of the pen. Rather, the critical sentence is the only place in the Tribunal's statement of reasons where it purports to address the prohibition in the section. The section itself is never expressly identified by the Tribunal at this point or elsewhere. There is no mention of it even in the Tribunal's standard opening discussion of the "relevant law".

25. In this situation, I am not persuaded that the critical sentence should not be accepted, and treated, as containing an accurate indication of the Tribunal's understanding of the question posed by s.91R(3). I am not persuaded to conclude that, having shown a legally incorrect understanding of the section, the Tribunal accidentally then applied it correctly.

26. Moreover, I do not accept that it is possible to elicit from the Tribunal's subsequent reasoning about the applicant's conduct in Australia, that it implicitly found positively that he was not motivated to strengthen his refugee claims when attending church activities in Australia. In my opinion, the Tribunal clearly avoided making such a finding, and did so as a result of its mistaken understanding of the question posed by s.91R(3). The facts found by the Tribunal allowed different conclusions as to the applicant's relevant motives, if only because his Church

activities occurred in periods which included his 2006 application for protection, his period of unlawful residence, and his immigration detention at Villawood and pursuit of a second protection visa application based on religious claims.

27. I can find in the Tribunal's reasoning only a conclusion in which it was left in doubt about the applicant's motives for his conduct in Australia, and thought that this then required or allowed it to take his conduct into account. It then took it into account for the purpose of finding that his refugee fears were not well-founded. In my opinion, this erroneous application of s.91R(3) was clearly material to its decision to affirm the delegate's decision. Its decision was therefore affected by jurisdictional error.

28. Counsel for the Minister made no submission that relief should be refused, if I arrived at the above conclusion. I therefore shall make orders of the nature of certiorari and mandamus, requiring the Tribunal to reconsider the matter. If the Tribunal is also currently considering another application by this applicant, there would seem to be obvious benefits in the two matters being decided together by the same member of the Tribunal, and not by the member who previously constituted the Tribunal. However, this is something for the President of the Tribunal to consider.

29. It is unclear to me whether the applicant has incurred any costs which would be recoverable on taxation, but I shall make a costs order which will allow a claim for costs to be raised by him.

I certify that the preceding twenty-nine (29) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 21 October 2008