FEDERAL COURT OF AUSTRALIA

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

MIGRATION – effect of s 91R(3) of the *Migration Act* 1958 (Cth) (“the Act”) – s 91R(3) of the Act can only sensibly be applied once preliminary findings of fact have been made – as the Refugee Review Tribunal (“the Tribunal”) was not satisfied the applicant’s conduct in Australia satisfied s 91R(3)(b) of the Act, s 91R(3) required the Tribunal to disregard the applicant’s conduct in Australia – the Tribunal breached s 91R(3) of the Act and therefore committed a jurisdictional error

WORDS & PHRASES – “disregard any conduct engaged in by the person in Australia”

Migration Act 1958 (Cth) s 91R(3)

SZHAY v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 199 FLR 148 cited

SZIBK v Minister for Immigration and Multicultural Affairs [2006] FMCA 1167 cited

SZGDA v Minister for Immigration and Citizenship [2007] FMCA 1152 cited

SZHFE v Minister for Immigration and Indigenous Affairs (No 2) [2006] FCA 648 cited

Minister for Immigration and Multicultural Affairs v Mohammed (2000) 98 FCR 405 cited

Minister for Immigration and Multicultural Affairs v Farahanipour (2001) 105 FCR 277 cited

SZJGV v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL

NSD 955 OF 2007

SZJXO v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL

NSD 1424 OF 2007

SZKBK v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL

NSD 1520 OF 2007

SPENDER, EDMONDS AND TRACEY JJ

19 JUNE 2008

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 955 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZJGV Appellant

AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP

	First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent

JUDGES:	SPENDER, EDMONDS AND TRACEY JJ
DATE OF ORDER:	19 JUNE 2008
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of the Federal Magistrates Court made on 15 May 2007 be set aside.

3. The application for review of the decision of the Refugee Review Tribunal be allowed with costs.

4. The matter be remitted to the Refugee Review Tribunal, differently constituted, to be heard and determined according to law.

5. The first respondent pay the appellant's costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA	

NEW SOUTH WALES DISTRICT REGISTRY	NSD 1424 OF 2007

APPLICATION FOR LEAVE TO APPEAL AND ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZJXO Appellant
AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent

JUDGES:	SPENDER, EDMONDS, TRACEY JJ
DATE OF ORDER:	19 JUNE 2008
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The application for leave to appeal be granted.
2. The appeal be allowed.
3. The orders of the Federal Magistrates Court made on 2 July 2007 be set aside.

4. The application for review of the decision of the Refugee Review Tribunal be allowed with costs.

5. The matter be remitted to the Refugee Review Tribunal, differently constituted, to be heard and determined according to law.

6. The first respondent pay the appellant's costs of the application for leave to appeal and of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1520 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZKBK Appellant
AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent REFUGEE REVIEW TRIBUNAL

	Second Respondent

JUDGES:	SPENDER, EDMONDS, TRACEY JJ
DATE OF ORDER:	19 JUNE 2008
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed

2. The orders of the Federal Magistrates Court made on 16 July 2007 be set aside.

3. The application for review of the decision of the Refugee Review Tribunal be allowed with costs.

4. The matter be remitted to the Refugee Review Tribunal, differently constituted, to be heard and determined according to law.

5. The first respondent pay the appellant's costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA	

NEW SOUTH WALES DISTRICT REGISTRY	NSD 955 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZJGV Appellant
AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1424 OF 2007

APPLICATION FOR LEAVE TO APPEAL AND ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZJXO Appellant

AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1520 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZKBK Appellant
AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent

JUDGES:	SPENDER, EDMONDS AND TRACEY JJ
DATE:	19 JUNE 2008
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE COURT:

1 There are before the Court, two appeals from the Federal Magistrates Court and an application for leave to appeal from that Court. In each case, the Federal Magistrates Court dismissed an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dismissing an appeal from a decision of the Minister's delegate to reject an application for a protection visa. The appeals in SZJGV and SZKBK and the application for leave to appeal in SZJXO were heard together. At the outset of the hearing, counsel for the appellants and the applicant sought leave to file amended notices of appeal and an amended draft notice of appeal. These applications were not opposed by the first respondent and the Court granted leave in each case. It will be convenient hereafter to refer to SZJXO as an appellant.

2 As amended, the notices of appeal each raised the same construction point. The ground had not been relied on in argument in any of the cases in the Federal Magistrates Court. The Federal Magistrates had, however, held that they could not identify any jurisdictional error on the part of the Tribunal. The complaint was that the Tribunal had erred by having regard to the conduct of the appellants in Australia when determining their applications for protection visas. In so doing, the appellants contended, the Tribunal failed to comply with the stipulation, made in s 91R(3) of the *Migration Act 1958* (Cth) ("the Act"), that such conduct must be disregarded. Section 91R(3) provides:

"For the purposes of an 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."

The appellants contend that s 91R(3) of the Act prevents the Tribunal from having regard to an applicant's conduct in Australia for any purposes, unless the applicant satisfies the Tribunal (which none of the appellants in the present appeals did) that the conduct was engaged in otherwise than for the purposes of strengthening the applicant's claims to be a refugee. The Minister contends that s 91R(3) of the Act does not prevent the Tribunal having regard to conduct in Australia for the purpose of fact finding. He accepts that, once facts have been found, however, s 91R(3) precludes the use of findings concerning an applicant's conduct in Australia to determine whether the applicant has a well-founded fear of persecution by reason of that conduct, unless the Tribunal is satisfied that the conduct was engaged in otherwise than for the purpose of strengthening his or her claims to be a refugee.

THE FACTS

SZJGV

3 SZJGV is a Chinese national. He arrived in Australia on 25 January 2006. He applied for a protection visa on 2 February 2006. A delegate of the Minister refused the application on 9 March 2006. He appealed to the Tribunal. He claimed to be a refugee by reason of a fear of persecution on the ground of his political opinion and membership of a particular social group. He claimed to be a Falun Gong practitioner, who, for that reason, had been persecuted by authorities in China. At the hearing, the Tribunal questioned the appellant about his knowledge of Falun Gong exercises and the principles which underpin those exercises. It was not satisfied that he had exhibited the degree of familiarity with these matters which a Falun Gong practitioner would have been able to demonstrate. The Tribunal referred to evidence from an instructor which suggested that the appellant had been taught Falun Gong while in Australia. It concluded that: "[t]he evidence clearly points to the fact that the [appellant] attempted to join practise sites and was taught how to perform some of the exercises in Australia only recently." It continued:

"The [appellant's] conduct and his evidence at the hearing leads the Tribunal to find that he was not a Falun Gong practitioner in China since 1997 as he claimed and that his interest in Falun Gong is a recent invention designed to assist him in his endeavour to remain in this country by strengthening his claims against a protection visa application."

It was at this point in the Tribunal's reasons that it dealt with s 91R(3) of the Act and determined that it should disregard the appellant's Falun Gong related activities in Australia. The Tribunal found that "the [appellant's] Falun Gong related activities in Australia are *sur place* claims and are subject to s 91R(3) of the Act." It therefore determined that it would disregard SZJGV's "Falun Gong related activities in Australia." The reasons continued:

“As the Tribunal rejected the [appellant’s] claim that he was a Falun Gong practitioner in China, the Tribunal does not accept that he participated in or conducted sit-ins, or was questioned, interrogated or harassed by the authorities. In reaching this conclusion, the Tribunal has had regard to the following additional reasons:

First …

Second …

Third, the *totality of the [appellant’s] oral evidence* shows a propensity to exaggerate and tailor his evidence in a manner which achieves his own purpose. In reaching this view the Tribunal has had regard to his lack of knowledge about Falun Gong, *his recent attempts to construct a profile of a Falun Gong practitioner for himself* and the contradictions, inconsistencies and the gradual shifts in his evidence regarding his protest activity in China. In view of the [appellant’s] *overall credibility*, the Tribunal does not accept that he was engaged in any form of protest or lone sit-in and he [sic] Tribunal does not accept that he has suffered any harm amounting to persecution in China for that reason or for the reason of his Falun Gong activities.

In sum, the Tribunal considers that the [appellant’s] account of his activities in China lacks credibility. The Tribunal does not accept that the applicant practised Falun Gong in China and the Tribunal does not accept that he was of any interest to the Chinese authorities for this reason. *The Tribunal disregards the [appellant’s] Falun Gong related activities in Australia*. The Tribunal does not accept that he participated in or staged any form of protest activity in China. The Tribunal does not accept that he has suffered any harm amounting to persecution in China for the reason of his Falun Gong or protest activities in China. The Tribunal does not accept that the [appellant] is of any adverse interest to the Chinese authorities [for] Falun Gong related reasons or for having participated in or staged protest activities linked directly or indirectly to Falun Gong. The Tribunal is satisfied that the [appellant] does not have a well-founded fear of persecution for a Convention reason. He is not a refugee.” (Emphasis added)

SZJXO

4 SZJXO is a Chinese national. He arrived in Australia on 22 April 2006. He applied for a protection visa on 18 May 2006. A delegate of the Minister refused the application on 19 July 2006. He appealed to the Tribunal. He also claimed to have been persecuted in China by reason of his being a Falun Gong practitioner. He said that he had been arrested and detained four times by the police and that he fled China after an informant had told the police that he was responsible for pasting some Falun Gong materials on the walls of a local government building and a police station. He had, in Australia, practised Falun Gong and engaged in protests against the attempts by Chinese authorities to suppress Falun Gong activities in China. The Tribunal determined that it was “not satisfied that the reason for [the appellant’s] involvement with Falun Gong in Australia has been other than to strengthen his claim to be a refugee” and that, accordingly, as required by s 91R(3) of the Act, it had “disregarded this conduct in reaching [its] decision”.

5 The Tribunal was not satisfied that the appellant had been a Falun Gong practitioner in Australia. It accepted that he had involved himself in Falun Gong activities since his arrival in Australia and had participated in demonstrations in Sydney. When it turned to consider whether he would face persecution upon return to China it said:

"As noted, I am not satisfied that the [appellant] was a Falun Gong practitioner in China or that he ever suffered harm for this reason when he was in China. *Given my findings about the nature and motives for his contacts with Falun Gong in Australia I am not satisfied that there is any reason to believe he would become a Falun Gong practitioner if he returned to China or that he would have any significant involvement with the Falun Gong faith there.* I am not satisfied there is any reason to believe he would suffer harm in China in future for this reason." (Emphasis added)

Ultimately, the Tribunal was not satisfied that SZJXO was a refugee.

SZKBK

6 SZKBK is a Chinese national. She arrived in Australia on 29 August 2006. She applied for a protection visa on 6 September 2006. A delegate of the Minister refused the application on 3 October 2006. She appealed to the Tribunal. She claimed that she was a member of a Seventh Day Adventists Church in China. After her mother had been arrested for being involved in a project to build a new church she had protested by sitting outside a public building with others. She was then arrested and held for three days. She had, on a few occasions since arriving in Australia, attended a Christian church in Sydney.

7 The Tribunal was not persuaded that the appellant was a committed Christian who would face persecution, because of her religion, should she return to China. The relevant passages of its reasons read:

"The [appellant] claims that she fears persecution in China because of her involvement in the Seventh Day Adventists Church. The Tribunal rejects that claim. The [appellant] claims that she attended the Church from 1997 and from 1999 she became a committed Christian because she started to believe. When asked about her church attendance in Australia, the [appellant] said that she attended about three times in the past four months. The [appellant] explained that the reason for that was that she was busy finding a job and she needed for time for her application. The Tribunal does not consider this to be the action of a committed Christian.

The Tribunal asked the [appellant] if she was baptised. The [appellant] stated that she was not baptised, despite claiming that she was a 'true Christian' since 1999. The Tribunal does not accept the [appellant's] explanation that this was because she does not consider herself to be sufficiently good. The Tribunal is of the view that baptism is an important part of the Christian practice and if the [appellant] was a 'true Christian' as she claimed to be, the Tribunal considers it reasonable that she would have been baptised either in China or in Singapore or in Australia. The Tribunal is of the view that the [appellant's] failure to be baptised and *her failure to attend Church in Australia with any degree of regularity indicate that the [appellant] is*

not a committed Christian. The Tribunal cannot be satisfied that the [appellant] was a committed Christian while residing in China or Singapore or that she attended the church regularly since 1997 as she claims. The Tribunal finds that should the [appellant] return to China now or in the foreseeable future, the [appellant] would not continue to attend regular church services in China.

The Tribunal questioned the [appellant] about the denomination of the church she was attending in Australia. The [appellant] stated that she was not sure but it was not the Seventh Day Adventists Church. While the [appellant] said that she minded attending a different church, she did not appear to have taken any active steps to locate the Seventh Day Adventists Church. The Tribunal cannot be satisfied that, should the [appellant] be involved in any religious activity in China now or in the foreseeable future, she would attend an underground or unregistered church. The Tribunal finds that there is no real chance of the [appellant] being persecuted now or in the foreseeable future because of her religion.

The Tribunal also finds that, *to the extent that the [appellant] had engaged in any religious practice in Australia, she had done so for the purpose of strengthening her claims of being a refugee within the meaning of the Convention. The Tribunal disregards such conduct in accordance with s 91R(3).”* (Emphasis added)

The Tribunal concluded that it was not satisfied that the appellant was a person to whom Australia owed protection obligations.

CONSTRUCTION OF SECTION 91R(3)

8 Section 91R(3) was introduced into the Act by the *Migration Legislation Amendment Act (No 6) 2001* (Cth). The Explanatory Memorandum which accompanied the Bill for the amending act explained the new provision as follows:

“25. New subsection 91R(3) applies to *sur place* claims. It is generally accepted that a person can acquire refugee status *sur place* where, as a consequence of events that have happened since he or she left his or her country of origin, he or she has a well-founded fear of persecution upon return to that country. Difficulties have arisen in cases when Australian courts have found that a person may act while in Australia with the specific intention of establishing or strengthening their protection claims and this intention cannot be taken into account in assessing the existence of protection obligations under the Refugees Convention.

26. Actions undertaken intentionally to raise the risk of persecution or create the pretext of such a risk, raise also serious questions about the presence of subjective fear in the mind of the protection visa applicant. In order for a fear of persecution to be well-founded, it must be both objectively and subjectively based. Under new section 91R, for the purposes of an application of the Act and the regulations to a particular person, any conduct engaged in by the person in Australia

must be disregarded unless the person satisfies the Minister that he or she engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugee's Convention.

27. This maintains the integrity of Australia's protection process by ensuring that a protection applicant cannot generate *sur place* claims by deliberately creating circumstances to strengthen his or her claim for refugee status …"

9 The Minister's second reading speech contained the following passages:

"I am also concerned about court decisions that have recognised the claims of applicants who have deliberately set out to contrive claims for refugee status after arriving in Australia.

Such action, deliberately seeking to attract hostile attention from a home country government, makes a mockery of an applicant having a real fear of persecution.

The legislation will make it clear that any actions by a person taken after arrival in Australia will be disregarded unless the minister is satisfied that the actions were not done just to strengthen claims for protection.

…

However, in exceptional cases where a person has acted purely to strengthen their claims, and so as a result needs some protection, my ministerial intervention powers will allow me to intervene in the public interest."

See Parliamentary Debates, Senate, 24 September 2001, at p 27604.

10 In a series of cases decided under s 91R(3), it has been common ground that the sub-section suffers from a lack of clarity. Before turning to the difficulties to which the drafting gives rise, it will be convenient to mention some uncontentious matters relating to the construction of the subsection. First, the subsection is cast in imperative terms: it obliges a decision maker to disregard conduct in Australia by an applicant for a protection visa subject to the proviso in paragraph (b). Secondly, the stipulation that a decision maker must "disregard" an applicant's conduct in Australia requires that such conduct not be brought into consideration when determining whether the applicant has a well-founded fear of being persecuted for a Convention reason. Thirdly, although the Explanatory Memorandum and the second reading speech both indicate that s 91R(3) of the Act was introduced to deal with *sur place* claims, it is not, in terms, so confined. Conduct in Australia which is undertaken in order to attract the adverse attention of the authorities in the applicant's country of origin, would support a *sur place* claim. Other types of conduct may not. Section 91R(3) obliges decision makers to disregard "*any"* conduct by the applicant in

Australia. That requirement is qualified by paragraph (b) which provides scope for an applicant to satisfy the decision maker that he or she has engaged in the relevant conduct “otherwise than for the purpose of strengthening the person’s claims to be a refugee …”. Conduct in Australia which attracts adverse attention from a foreign government for Convention related reasons would strengthen a person’s claim to be a refugee. So too, however, would conduct in Australia which, in an evidentiary sense, rendered it more likely that an applicant had engaged in conduct in his or her home country which led to persecution in that country. Both types of conduct may be engaged in in Australia. As Driver FM observed, in *SZHAY v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 199 FLR 148 at 164:

“[Section 91(3)] is not expressly limited to sur place claims and neither do the extrinsic aids to interpretation support a conclusion that it should be so limited. It would have been a simple matter for Parliament to expressly limit the section to sur place claims. It did not do so. It is easy to see why. The mischief which the provision is intended to deal with is conduct engaged in in Australia in order to enhance claims to refugee status. That conduct may take diverse forms. It may take the form of conduct intended to set up a sur place claim. It might also take the form of conduct intended to lend support to a claim of persecution based upon asserted events in the applicant’s country of origin. For example, an applicant may engage in political, religious or particular social group activities in Australia in order to support a claim that he or she engaged in like activities in his or her country of origin. There may be no sur place claim but the conduct may be intended to have a corroborative effect. In my view, s 91R(3) was intended to do deal with all such circumstances.”

11 Other aspects of s 91R(3) of the Act have occasioned greater difficulty for those called on to construe the subsection. These difficulties have emerged in a series of cases decided in the Federal Magistrates Court.

12 In *SZHAY*,the Federal Magistrates Court reviewed a decision of the Tribunal which had rejected claims by an applicant that he had been persecuted in China because of his practise of Falun Gong. The Tribunal found that the applicant’s evidence lacked credibility and that he had fabricated his claims. In coming to that view, it had regard to the applicant’s behaviour after his arrival in Australia. He had not made any serious effort to seek out other Falun Gong practitioners during the five months before he was taken into detention. He had joined a Falun Gong group in the detention centre one week before the Tribunal hearing. This was not conduct which, in the view of the Tribunal, suggested that the applicant was genuinely committed to Falun Gong. The evidence in relation to the applicant’s conduct in Australia had been given by the applicant in response to questions from the Tribunal. Driver FM held that the Tribunal had not contravened s 91R(3) of the Act. His Honour held that it was implicit in the Tribunal’s finding that the applicant’s conduct in Australia established that he had no particular interest in Falun Gong, that the Tribunal was satisfied that he had not engaged in conduct in Australia for the purpose of strengthening his claims to be a refugee.

13 His Honour made a number of observations about the meaning and application of s 91R(3) of the Act not all which were necessary for deciding the case before him. He said (at 164-5) that:

"A question then is whether decision makers are obliged to ignore all information about such conduct in relation to an application or merely information from an applicant in support of an application.

It is apparent from the terms of s 91R(3) that where an applicant seeks to introduce in support of an application conduct engaged in by him or her in Australia he or she bears 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.

Decision makers may indicate their satisfaction expressly or by necessary implication from their reasons. It is better that they do so expressly. Unless a decision maker can be said to have been satisfied in the terms required by s 91R(3) expressly or by necessary implication, the conduct sought to be relied upon by the applicant must be disregarded. If a decision maker cannot be said to have been satisfied as required and the information is not disregarded, then, in my view, the section will have been breached and, given the mandatory language of it, jurisdictional error will have been established.

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 may 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.

Another question is whether, if an applicant introduced information about his or her conduct in Australia, and the RRT is not satisfied that the conduct was engaged in otherwise than for the purposes of enhancing an applicant's refugee claims, decision makers are entitled to use that information to reject an application. In my view, the answer to that question is no. If *information*is required to be disregarded to pursuant to s 91R(3) it must be disregarded for all purposes. It would be unjust and inconsistent with the language of the section to permit information introduced by an applicant relating to his or her conduct in Australia that was engaged in to strengthen refugee claims to be used by a decision maker to dismiss an application but not to grant it. This is not a purely academic question. Information about conduct in Australia may be intended to support a protection visa application by enhancing claims to be a refugee and may have precisely the intended effect. The information may also have the opposite effect by damaging the applicant's credibility. In either case the information must be disregarded unless the applicant discharges the onus imposed by s 91R(3).

I see nothing in the terms of s 91R(3) or the extrinsic aids to interpretation to support the applicant's contention that the section precludes the decision maker from taking into account actions or inaction that did not support a claim to be a refugee. It is implicit in the terms of s 91R(3) that a decision maker may take into account such *information* if satisfied that the applicant's conduct was not engaged in for the purpose of enhancing his or her claims. The information relating to the conduct may nevertheless be irrelevant or otherwise unavailable to a decision maker but that would depend upon the circumstances of each case." (Emphasis added) (Footnotes omitted)

In these passages the word "information" is used on a number of occasions and in two different senses. On the two occasions on which the word appears in italics, it would appear to be intended to refer to "conduct". On the other occasions we understand it to be used as a synonym for "evidence".

14 In *SZIBK v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1167 Driver FM affirmed the views that he had expressed in *SZHAY* about the operation of s 91R(3). Nonetheless, he was prepared to accept that, in a given case, the Tribunal, while disregarding conduct engaged in Australia, might, consistently with s 91R(3), take into account the reason the conduct was engaged in. In that case the applicant claimed to fear persecution by reason of his involvement in an underground Christian church in China. He also told the Tribunal that he had attended a church in Sydney because he was a committed Christian and he wanted to learn more about the Bible and Christianity. The Tribunal rejected the applicant's claims to have been involved in an underground Christian church in China and to have studied the Bible while in China. It accepted that he had attended church in Sydney but found that he had done so in order to enhance his claim for a protection visa.

15 His Honour held that the Tribunal had not committed any jurisdictional error. Relevantly, his reasoning was that:

"… This is a case, not of a *sur place* claim, but of an applicant seeking to corroborate claims of persecution in China for reasons of religion by pointing to like activities in Australia. Relevantly, the applicant sought to corroborate his claim that he was a practising Christian in China by attending church in Australia. The applicant also sought to corroborate his claim that he studied the Bible in China by claiming he also studied the Bible in Australia.

The applicant's claim was that he had a well-founded fear of persecution in China by reason of his religious practice there, not that he would be persecuted in China by reason of his religious practice in Australia. Consistently, with the views I expressed in *SZHAY*, s.91R(3) nevertheless has a potential operation. In my view, the section operates in relation to conduct in Australia, whether it relates to a *sur place* claim or whether the conduct merely is intended to have a corroborative effect in relation to claims of conduct in the country from which the applicant has fled."

Having noted that the Tribunal had found that the applicant had fabricated his claims to have studied the Bible in China and in Australia his Honour continued:

"… In my view, the presiding member was not required to disregard the applicant's conduct of having allegedly studied the Bible in Australia because the factual claim was rejected. There is, in my view, no obligation on decision makers to disregard conduct engaged in, in Australia, unless the decision maker accepts that the conduct, in fact, occurred. Section 91R(3) relates to established conduct, not asserted conduct which is disbelieved.

However, the presiding member did accept the applicant's claim of having attended church in Australia …

Nevertheless, having reached the conclusion that the applicant attended church in Australia to enhance his protection visa application, the [Tribunal] was, on my view of s.91R(3), required to disregard at least the fact of that church attendance. It was not disregarded and the failure to disregard it points to jurisdictional error. If the applicant had made a *sur place* claim, then the error would probably be sufficient to warrant the provision of relief in the form of constitutional writs.

However, as I have already found, in this case the applicant was not making a *sur place* claim. He was using his conduct in Australia to corroborate his claims that he was a practising Christian in China. His fear of persecution related to his asserted conduct in China. All his claims relating to that conduct in China were disbelieved. As I have already found, the adverse credibility findings by the [Tribunal] concerning the applicant's claims in relation to his conduct in China were open to [it] on the material before [it]. Those findings completely and independently support the decision."

16 Driver FM gave further consideration to the construction of s 91R(3) in *SZGDA v Minister for Immigration and Citizenship* [2007] FMCA 1152. That case involved an applicant from Nepal who claimed to fear persecution by reason of his political opinion. While in Australia he contributed articles to Nepalese newspapers. He submitted one of the articles to the Tribunal. The Tribunal rejected the applicant's claim to fear persecution should he return to Nepal, partly on the basis that, had he had such a fear, he would not have procured the publication of the articles in the newspapers. Rather, the Tribunal considered that the articles had been published "solely in order to provide him with evidence to submit to [the] Tribunal." His Honour held that the Tribunal, in these circumstances, was bound to disregard the applicant's conduct in arranging for the newspaper articles to be published. He held, relying on the decision of Jacobson J in this Court in *SZHFE v Minister for Immigration and Indigenous Affairs (No 2)* [2006] FCA 648, that s 91R(3) of the Act was enlivened where an applicant seeks to rely on conduct, engaged in Australia, to support a claim to have a well-founded fear of persecution. Driver FM continued:

"… It is true that the mischief to which s. 91R(3) is directed is conduct engaged in by applicants in Australia intended to force the hand of decision makers. It does not follow, however, that Parliament intended that the Tribunal should be required to disregard such conduct in considering whether to make a different decision from that of the delegate but would be permitted to have regard to the conduct in deciding to affirm the decision of the delegate. The language of the section does not permit such

an interpretation. Paragraph (b) in sub-s.(3) must be read with (a). The obligation on decision makers is to disregard any conduct engaged in by applicants in Australia in determining **whether** the applicant has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention unless the applicant satisfies the decision maker that the person engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee. The use of the word "whether" satisfies me that the section requires the conduct to be disregarded whether the conduct is considered by the decision maker to enhance or detract from the applicant's claims. For the purposes of paragraph (b) the issue is the applicant's **purpose** of engaging in the conduct, not whether the purpose was successfully achieved or not.

It would, in my view, have been open to the Tribunal to have regard to the information provided to the Tribunal about the applicant's conduct in finding that the applicant did not have a genuine fear of harm. That information related not just to the conduct, but the reason for it. However, in my view, having found for the purposes of s.91R(3) that the conduct itself must be disregarded, the Tribunal was not then entitled to have regard to that conduct in deciding whether the applicant had a well-founded fear of being persecuted. It was a part of that consideration to decide whether the applicant had a subjective fear of harm. …

Section 91 R(3) is couched in terms which lead me to the view that it is an imperative requirement. It goes to the heart of the consideration of applications before all decision makers dealing with protection visa claims. It is couched in terms which brook no equivocation. The Tribunal recognised, correctly, that the applicant's conduct in Australia in arranging for newspaper articles to be published in order to support his claims to be a refugee had to be disregarded. It was not then open to the Tribunal to consider the same conduct in order to decide that the applicant had no subjective fear of persecution and that there was no substance to his claims. In using the conduct to reach those findings, the Tribunal fell into jurisdictional error and the applicant is entitled to the relief he seeks." (Footnote omitted)

17 The decision of Jacobson J in *SZHFE* was an appeal from Driver FM. Driver FM had reviewed a decision of the Tribunal in which it had rejected a claim for a protection visa by a Bangladeshi national who had sought a protection visa after having been Australia for nearly seven years. The claim was made only after the applicant had been taken into immigration detention and the Tribunal considered that, had he had genuine fears of persecution, he would have raised them by applying for a protection visa much earlier than he had done. Driver FM found no error in the Tribunal's approach. He reasoned that the applicant's failure, over the seven year period, to make any claim for refugee status could not be understood as an attempt to enhance his claim to being a refugee. He was prepared to infer that the Tribunal had so found. The Tribunal was, therefore, entitled to have regard to the applicant's conduct in Australia. Jacobson J dismissed the appeal and a subsequent motion that this order be set aside. The appellant before him accepted that, on a literal construction of s 91R(3) Driver FM was correct, but contended that this construction was inconsistent with a purposive construction of the provision; any evidence of an applicant's conduct in

Australia, if unhelpful to the applicant should be disregarded. His Honour rejected this submission. He said:

"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 that subsection is not enlivened in the present case.

Accordingly, in my view it is clear that there was no error in the RRT having regard to that conduct in making the findings which it did. This is particularly so in the present case where the appellant did not rely on his conduct in Australia to support his claim for refugee status."

THE APPELLANTS' CONTENTIONS

18 The appellants submitted that the language of s 91R(3) "plainly requires" that an applicant's conduct in Australia "not be taken into account at all by the Tribunal in deciding whether a person is a refugee." Counsel for the appellants contended that, in each case, the Tribunal had taken the appellant's conduct in Australia into account in determining the appellant was not a refugee, notwithstanding the failure of the appellant to satisfy it that the conduct was engaged in for a purpose other than enhancing the appellant's claim to be a refugee. Particular reliance was placed on Driver FM's determination, in *SZHAY* and *SZJSD* that, if a decision maker is required, by s 91R(3), to disregard an applicant's conduct in Australia, the decision maker must disregard that conduct for all purposes in making the relevant decision.

THE MINISTER'S CONTENTIONS

19 The Minister accepted that s 91R(3) precludes the use of findings of fact concerning an applicant's conduct in Australia in determining whether the applicant has a well-founded fear of persecution by reason of that conduct unless the proviso contained in paragraph (b) is engaged – but not before the decision maker has made primary findings of fact relating to the applicant's claims. The Minister disputes the appellants' contention that relevant conduct must not be taken into account "at all" in deciding whether a person is a refugee. Such a construction would, in the Minister's submission, give rise to absurdity. In their written submissions, counsel for the Minister identified two reasons why this would be so:

"First, if the section is interpreted in the manner contended for by the Appellants it would require the [Tribunal] to disregard any steps that the applicant took in Australia to make a claim for refugee protection.

Second, the Appellants' construction would require the Tribunal to revisit its own findings and assessment of the evidence in a manner which could be potentially never ending. In determining whether s 91R(3) is engaged the Tribunal must first determine whether it is satisfied or not 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 Refugee Protocol"* (s 91R(3)(b)). To address that question the Tribunal will have to first make findings as to what conduct was engaged in and why. As the reasoning in SZJGV illustrates, a consideration of why the relevant applicant engaged in the conduct in Australia will often require a consideration of, and findings as to, the applicant's conduct prior to arriving here. For example, the genuineness of a person's religious observation in Australia may often need to be assessed against their conduct in the country of origin. According to the Appellants' construction, the Tribunal would have to first make findings as to the conduct engaged in by the applicant and the reasons for that conduct and then apply s 91R(3). If the applicants did not satisfy 91R(3) then, according to the Appellants, the Tribunal would then have to revisit all of its findings to expunge any reference to their conduct after their arrival (and evidence concerning that conduct). The outcome of this may lead to a different view being taken of the applicant's motivation. It is submitted that this is not what is required by the section."

20 Given the possible absurdity which would arise were the appellants' construction to be accepted, counsel for the Minister argued that these were appropriate cases in which the Court should be guided by the extrinsic materials in order to establish the true meaning of the provision. Reference was made to the Second Reading Speech and the Explanatory Memorandum which are quoted above at [8] and [9]. These materials, it was submitted, established that s 91R(3) was introduced into the Act to reverse the effect of decisions such as *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405 and *Minister for Immigration and Multicultural Affairs v Farahanipour* (2001) 105 FCR 277 which held that a person could be found to be a refugee by reason of conduct in Australia which was engaged in with the intention of rendering the person a refugee *sur place*.

CONSIDERATION

21 In each of the cases under consideration the appellant complains that the Tribunal had regard to evidence, adduced by the appellant, concerning the appellant's conduct in Australia when determining that the appellant was not a refugee. The evidence was taken into account to the disadvantage of the appellant, despite the Tribunal not being satisfied that the conduct had been engaged in otherwise than for the purpose of enhancing the appellants' claim to be a refugee.

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).

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.

24 The central issue in these cases is, then, whether, in these circumstances, the appellants' conduct could be and was taken into account by the Tribunal when it determined that they were not refugees. In our view such conduct could not lawfully be brought into account. It may be accepted that the catalyst for the introduction of section 91R(3) was decisions of this Court which held that a person could become a refugee as a result of conduct, deliberately engaged in in Australia, to attract the adverse attention of the authorities in his or her country of origin. In this way, a person who was not otherwise a refugee could become a refugee *sur place*. Section 91R(3) was intended to and does require such conduct to be disregarded when assessments are being made. It is not (although it could have been) confined in its terms to conduct which may render a person a refugee *sur*

place. Decision makers are, subject to the proviso in paragraph (b), required to disregard "any" conduct in Australia by an applicant. The conduct is to be disregarded in determining "whether" an applicant has a well-founded fear of persecution for a Convention reason. The conduct may suggest that such a fear is or is not well-founded. In either case it must be disregarded. If the Tribunal brings the conduct into account it will contravene s 91R(3).

25 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.

26 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.

SZJGV

27 In SZJGV, the Tribunal's principal reason for rejecting the appellant's claim was that it did not believe that he had practised Falun Gong in China or had been questioned, interrogated or harassed by authorities by reason of such practise. The Tribunal considered evidence, adduced by the applicant, about his practise of Falun Gong in Australia. It concluded that the appellant had engaged in Falun Gong activities in Australia for the purpose of establishing that he was a Falun Gong practitioner both in China and Australia. The Tribunal acknowledged that it was bound, by s 91R(3), to disregard the evidence. Had it stopped there, no issue of jurisdictional error would have arisen. The Tribunal, however, when explaining its reasons for rejecting the appellant's claim to have been a Falun Gong practitioner in China relied, *inter alia*, on the appellant's "recent attempts to construct a profile of a Falun Gong practitioner for himself" as undermining the credibility of his claim to have practised Falun Gong in China. In the immediately following paragraph, the Tribunal makes the contradictory statement that it disregarded the appellant's Falun Gong related activities in Australia. Both statements cannot be correct. Having regard to the Tribunal's reasons as a whole, we think it more likely than not that the Tribunal did have regard to the appellant's conduct in Australia, if only for the limited purpose of assessing the credibility of his claim to have been a Falun Gong practitioner in China and to have

suffered persecution for having done so. In doing so, the Tribunal contravened s 91R(3). It thereby made a jurisdictional error. This appeal should be allowed.

SZJXO

28 SZJXO also claimed to have been arrested and detained in China because of his Falun Gong related activities. He gave evidence to the Tribunal that he had practised Falun Gong in Australia and had engaged in Australia in protests against attempts to suppress Falun Gong activities in China. The Tribunal determined that the appellant had not been involved in Falun Gong activities in China and had not been arrested and detained for that reason. It held that s 91R(3) required it to disregard the evidence relating to the appellant's conduct in Australia. The Tribunal did not have regard to the appellant's conduct in Australia for the purpose of deciding whether or not he had practised Falun Gong in China before coming to Australia. It did, however, have regard to his conduct in Australia for the purpose of determining that there was no reason to believe that he would be persecuted by reason of his Falun Gong activities should be return to China. It said that the nature of and the motives for the appellant's contacts with the Falun Gong movement in Australia was one of its reasons for concluding that he would not have any significant involvement with Falun Gong on his return to China. This finding was one of the reasons given by the Tribunal for determining that the appellant was not a refugee. The Tribunal thus brought into account, to the appellant's detriment, his conduct in Australia when determining whether he had a well-founded fear of persecution should he return to China. The Tribunal thereby contravened s 91R(3). In doing so it made a jurisdictional error. Leave to appeal should be granted. The appeal should be allowed.

SZKBK

29 SZKBK claimed to have been a member of a Seventh Day Adventists Church in China and that she had attended a Christian church in Sydney on a few occasions after arriving in Australia. She claimed to fear persecution on return to China by reason of her membership of a Christian church. The Tribunal concluded that there was no real chance of her being persecuted by reason of her religious beliefs on her return to China. The principal reason for this conclusion was that the appellant was not a committed Christian. The Tribunal was led to this conclusion by a number of factors including the appellant's failure to attend church regularly in Australia and her failure to take any active steps to locate a Seventh Day Adventists Church in Australia. Having set out these reasons and its conclusion the Tribunal then said that it disregarded the appellant's conduct in Australia because it was satisfied that her limited contact with the Christian church in Australia had occurred in order to strengthen her claim to be a refugee.

30 Had the Tribunal made its findings in relation to the appellant's conduct in Australia, then applied s 91R(3) and thereafter paid no regard to that conduct in its reasons, it would not have fallen into error. This, however,

is not what it did. It expressly relied on conduct in Australia in determining that the appellant was not an active Christian and would not, therefore, face a real chance of persecution should she return to China. Only after these findings had been made was the relevance of s 91R(3) recognised and the statement made that the Tribunal disregarded the applicant's conduct in Australia. The Tribunal did not, however, then return to the earlier analysis and consider whether or not it should be reviewed, given that certain evidence, originally relied on, was no longer to be taken into account. We are not persuaded, notwithstanding the Tribunal's asserted disregard of the appellant's conduct in Australia, that the Tribunal did act in accordance with the requirements of s 91R(3). On the contrary, its reasons strongly suggest that the appellant's conduct in Australia was taken into account for the purpose of determining her application to the Tribunal. The Tribunal erred in law. The appeal should be allowed.

DISPOSITION

31 Counsel for the Minister did not contend that, even if the Tribunal had contravened s 91R(3) in any case, its decision could, nonetheless, be upheld because it was independently supportable by reason of other findings.

32 The two appeals (in SZJGV and SZKBK) should be allowed. The application for leave to appeal (in SZJXO) should be granted and the appeal allowed. In each appeal there should be an order remitting the matter to the Tribunal, differently constituted, to be heard and determined according to law.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Spender, Edmonds and Tracey.

Associate:

Dated: 19 June 2008

Counsel for the Appellants:	Mr G T Johnson
Counsel for the Respondents:	Mr R Beech-Jones SC and Mr D Godwin
Solicitor for the Respondents:	DLA Phillips Fox

Date of Hearing:	23 November 2007
Date of Judgment:	19 June 2008