HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND BELL JJ

Matter No S577/2008

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

SZJGV & ANOR RESPONDENTS

Matter No S578/2008

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

SZJXO & ANOR RESPONDENTS

Minister for Immigration and Citizenship v SZJGV
Minister for Immigration and Citizenship v SZJXO
[2009] HCA 40
30 September 2009
S577/2008 & S578/2008

ORDER

Matter No S577/2008

1. *Appeal allowed.*

2. *Set aside orders 1 to 4 of the orders made by the Full Court of the Federal Court of Australia on 19 June 2008, and in lieu thereof order:*

    (a) *Set aside order 3 of the orders made by the Federal Magistrates Court of Australia on 15 May 2007 and in lieu thereof order that the first respondent to the application in that Court pay the applicant's costs of the application.*

(b) Appeal otherwise dismissed.

3. Appellant to pay the first respondent's costs of the appeal to this Court.

Matter No S578/2008

1. Appeal allowed.

2. Set aside orders 2 to 5 of the orders made by the Full Court of the Federal Court of Australia on 19 June 2008, and in lieu thereof order:

(a) Set aside order 2 of the orders made by the Federal Magistrates Court of Australia on 2 July 2007 and in lieu thereof order that the first respondent to the application in that Court pay the applicant's costs of the application.

(b) Appeal otherwise dismissed.

3. Appellant to pay the first respondent's costs of the appeal to this Court.

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth with D H Godwin for the appellant in both matters (instructed by DLA Phillips Fox)

G T Johnson with D Jordan for the first respondent in both matters (instructed by Fragomen Glogal)

Submitting appearance for the second respondent in both matters

CATCHWORDS

Minister for Immigration and Citizenship v SZJGV
Minister for Immigration and Citizenship v SZJXO

Immigration – Refugees – Review by Refugee Review Tribunal ("RRT") – Where RRT not satisfied that visa applicants engaged in Falun Gong-related activities in Australia otherwise than for the purpose of strengthening claims to be refugees – Where RRT drew adverse inferences about visa applicants' credibility from visa applicants' participation in Falun Gong-related activities in Australia – Whether *Migration Act* 1958 (Cth), s 91R(3) permitted RRT to use evidence of conduct in Australia to make findings adverse to visa applicants' claims to be refugees.

Words and phrases – "any conduct", "disregard", "in determining whether", "purpose", "strengthening".

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

FRENCH CJ AND BELL J.

Introduction

1 The first respondents to these two appeals each applied unsuccessfully to the Minister for Immigration and Citizenship ("the Minister") for protection visas under the *Migration Act* 1958 (Cth) ("the Migration Act"). They were also unsuccessful before the Refugee Review Tribunal ("the Tribunal") which affirmed the decisions. The Federal Magistrates Court dismissed their applications for judicial review of the decisions of the Tribunal. They succeeded, however, in persuading the Full Court of the Federal Court that the Tribunal had erred by taking into account, adversely to them, and contrary to s 91R(3) of the Migration Act, conduct in which they had engaged in Australia.

2 The first respondents' success before the Full Court turned upon the construction of s 91R(3) which provides:

> "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;
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> disregard any conduct engaged in by the person in Australia unless:
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> (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."

3 The question posed by these appeals is whether s 91R(3) prohibits a decision-maker, in making the determination contemplated in par (a), from drawing inferences *adverse* to a visa applicant based on the applicant's conduct within Australia unless the condition referred to in par (b) is satisfied.

4 The factual and procedural history leading to these appeals and the background to the enactment of s 91R(3) have been set out in the judgment of Crennan and Kiefel JJ. The appeals should be allowed and orders made in the terms which they propose. Our reasons for coming to that conclusion depend primarily upon the construction of par (a).

The construction of s 91R(3)

5 The construction of s 91R(3) begins with the ordinary and grammatical sense of the words having regard to their context and legislative purpose. That purpose in this case, as shown in the reasons of Crennan and Kiefel JJ, was to overcome the effects of decisions of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Mohammed*[1] and *Minister for Immigration and Multicultural Affairs v Farahanipour*[2]. Those decisions concerned cases in which the applicant for a protection visa had deliberately engaged in conduct within Australia calculated to strengthen his claim for protection under the Refugees Convention[3] by enhancing the risk of persecution if he were to be returned to his country of origin[4]. In each case the Full Court held that although such bad faith conduct might well lead to adverse findings about an applicant's credibility, it did not automatically bar the claim for a visa which would have to be assessed by reference to Australia's obligations under the Refugees Convention.

6 Section 91R is concerned with the application of the criteria in Art 1A(2) of the Refugees Convention to determining whether a person is a refugee within the meaning of that Article and to whom Australia owes "protection obligations" within the meaning of s 36 of the Migration Act. The first two sub-sections of s 91R are closely related. Section 91R(1) limits the range of circumstances in which apprehended harm will be characterised as persecution for the purposes of Art 1A(2). Section 91R(1)(b) requires that such persecution involve serious harm to the person and s 91R(2) sets out a non-exhaustive list of instances of serious harm.

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1 (2000) 98 FCR 405.

2 (2001) 105 FCR 277.

3 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

4 In *Mohammed* the applicant sent a letter to his family in his country of origin containing gratuitous material which, upon its predictable interception by security forces in that country, would alert them to his opposition to the government. In *Farahanipour* the applicant was found to have arranged for publication of an article in a newspaper in Australia, citing comments by him severely critical of the activities of the government in his country of origin and calculated to bring himself to the attention of the authorities in that country.

7 Section 91R(3) stands apart from the two preceding sub-sections. Unlike them, it does not define limits to be applied, for statutory purposes, to the criteria in Art 1A(2). Rather it operates as an awkwardly framed command to the world by the use of "disregard" in an imperative sense. Section 91S, which concerns "membership of a particular social group" as an occasion of apprehended persecution in Art 1A(2), is drafted along similar lines. The command in s 91R(3) is clearly directed, although not expressly, to the Minister (and therefore to the Minister's delegates) determining applications for protection visas and to the Tribunal in reviewing such decisions. It is in its character as a command to administrative decision-makers that it must be construed. It is not directed to the courts, for the courts are not involved in determining such cases on their merits. But a court, upon judicial review, may be required to determine whether the command, where applicable, has been applied in accordance with its terms properly construed.

8 Section 91R takes its place in a legislative scheme providing means by which Australia can comply with its obligations as a Contracting State under the Refugees Convention. A necessary condition for the grant of a protection visa under the Migration Act is that the applicant is, relevantly, "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"[5]. The "protection obligations" are not defined but refer to those of Australia's substantive obligations under the Refugees Convention which can be characterised as protective in nature and imposed with respect to refugees as individuals. They include obligations concerning "the status and civil rights to be afforded to refugees who are within Contracting States" conferred by Chs II-IV and those obligations imposed by Ch V (Arts 25-34)[6]. The substantive obligation of most immediate relevance to a refugee applying for a protection visa in Australia is that imposed by Art 33(1) of the Refugees Convention which provides:

> "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

9 The legislative purpose of s 91R(3) as disclosed in the Second Reading Speech is to ensure that an applicant for a protection visa in seeking to

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5 Migration Act, s 36(2)(a).

6 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15-16 [42]-[43] per McHugh and Gummow JJ; [2002] HCA 14.

demonstrate a well-founded fear of persecution within the meaning of Art 1A(2) cannot place any reliance upon, nor gain any advantage from, conduct engaged in within Australia for the purpose of strengthening his or her claim to meet the criteria of classification as a refugee under Art 1A(2)[7]. Neither that purpose nor Australia's protection obligations under the Refugees Convention require that such conduct be disregarded where it is adverse to an applicant's credibility. Such a result would be irrational. A construction of s 91R(3) to avoid that result may properly encompass a departure from the literal or natural and ordinary meaning of the text[8]. If the language be so intractable that it requires a word or words to be given a meaning necessary to serve the evident purpose of the provision, then such a course may be permissible as a "realistic solution" to the difficulty[9]. In the 12th edition of Maxwell's *On the Interpretation of Statutes* the approaches which can be taken in dealing with statutory language whose ordinary meaning is plainly at odds with the statutory purpose were explained[10]:

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning." (footnote omitted)

This approach is reflected in decisions of the Courts of the United Kingdom. In *Inco Europe Ltd v First Choice Distribution*[11], Lord Nicholls of Birkenhead

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7 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 August 2001 at 30422.

8 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

9 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 per Gibbs CJ; [1981] HCA 26; *Cramas Properties Ltd v Connaught Fur Trimmings Ltd* [1965] 1 WLR 892 at 899 per Lord Reid; [1965] 2 All ER 382 at 386.

10 Maxwell, *On the Interpretation of Statutes*, 12th ed (1969) at 228.

11 [2000] 1 WLR 586; [2000] 2 All ER 109.

restated the need for the Court to correct obvious drafting errors. He referred to the third edition of Cross' *Statutory Interpretation*[12]:

> "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."

The limits of the judicial role, as pointed out by Lord Nicholls, require that the courts "abstain from any course which might have the appearance of judicial legislation."[13] Three matters of which the court must be sure before interpreting a statute in this way were the intended purpose of the statute, the failure of the draftsman and parliament by inadvertence to give effect to that purpose, and the substance of the provision parliament would have made. The third of these conditions was described as being of "crucial importance". Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation[14].

10 The construction of s 91R(3) in accordance with its legislative purpose begins with a consideration of the nature of the ministerial determination with which par (a) is concerned. In this respect there are two ways of reading par (a). The first way is to read "whether" as introducing alternatives in the sense of "whether or not". That reading would apply the command of the sub-section to all processes of reasoning which could lead to determinations favourable or unfavourable concerning the existence of an asserted well-founded fear of persecution within the meaning of Art 1A(2). It accords with the natural and ordinary meaning of "whether" as "[i]ntroducing a disjunctive dependent question or its equivalent expressing doubt, choice, etc between alternatives"[15]. It would require the decision-maker to disregard, for all purposes relevant to a determination of the existence of a well-founded fear of persecution, any conduct engaged in within Australia, however probative of the falsity of an applicant's claim, unless the condition in par (b) were satisfied. The creation of false

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12 Cross, *Statutory Interpretation*, 3rd ed (1995) at 103.

13 [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115.

14 [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115. See also *R (Confederation of Passenger Transport UK) v Humber Bridge Board* [2004] QB 310 at 326 [53] and 333-334 [82]; *R (Crown Prosecution Service) v Bow Street Magistrates' Court* [2007] 1 WLR 291 at 301 [41]-[44]; [2006] 4 All ER 1342 at 1352.

15 *Oxford English Dictionary*, 2nd ed (1989), vol XX at 221.

documents to support a claim would be an example of such conduct. Such an outcome is improbable and inconvenient to a degree that would be irrational.

11 The Solicitor-General of the Commonwealth submitted that the words "in determining" in par (a) refer to a process undertaken after findings of primary fact have been made and said:

> "So after all the facts are found once and for all, what the direction in the section requires is that conduct in fact engaged in by the person in Australia be disregarded, that means simply left out of account, in determining whether, which we would say means as a basis for determining that, such fear of persecution as a person may in fact have is to be characterised in terms of Article 1A(2) as well-founded."

12 The proposition that s 91R(3) is concerned with the process of determination after the primary facts have been found does not meet the textual difficulty generated by the ordinary meaning of the word "whether". However, the Solicitor-General's submission does lead to consideration of an alternative construction, which is to read "whether" as "that": not introducing alternatives, but indicating only processes of reasoning leading to a favourable determination. The usage is awkward and probably reflects a misuse of the term "whether" in par (a). But such misuse is not entirely without precedent[16]. In this case, the substituted text corrects what would be an obvious drafting error were "whether" to be construed according to its ordinary and natural meaning. On the alternative construction, par (a) hypothesises the existence of a chain of reasoning leading to a determination in favour of the applicant where that determination is based in whole or in part upon inferences drawn from conduct engaged in by the person in Australia. The command in s 91R(3) therefore requires that the decision-maker not apply any such chain of reasoning unless the condition in par (b) is satisfied with respect to the relevant conduct. We consider that to be the correct

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16 The *Oxford English Dictionary*, 2nd ed (1989), vol XX at 221 refers to a usage of "whether" which, by "suppression of the second alternative", introduces a "simple dependent question, and becomes the ordinary sign of indirect interrogation". The *Dictionary* refers, by way of example, to Ben Jonson's epigramme to John Donne "Who shall doubt, Donne, [whether] I a Poet bee, When I dare send my Epigrammes to thee?". Fowler refers to the misuse of "that" and "whether" in connection with the word "doubtful": *Fowler's Modern English Usage*, 2nd ed (1965) at 139. The usage of "whether" to mean "that" was argued in *Pitcher Products Pty Ltd v Country Roads Board* [1964] VR 661 and rejected on the basis that there was not "sufficient reason" to depart from the ordinary meaning of the word "whether": at 666 per Hudson J; see also at 662 per Dean J and 671 per Little J.

construction. It meets the purpose of the sub-section and avoids absurd results. Upon that construction the appeals must be allowed.

13 As to what is necessary to satisfy the condition in par (b), we agree with Crennan and Kiefel JJ that an applicant seeking to rely upon conduct engaged in in Australia must show that the conduct was not engaged in solely to strengthen his or her claim. By way of example, conduct in Australia may reflect a continued commitment by the applicant to religious practices followed or political opinions held and expressed in his or her country of origin. It could not be said to have been engaged in solely to strengthen the claim to be a refugee. It might then be relied upon by a decision-maker to infer prior commitment to a particular religious practice or political opinion in the country of origin.

Conclusion

14 For the preceding reasons the construction adopted by the Full Court of the Federal Court in these appeals was erroneous. The appeals should be allowed and orders made as proposed in the joint judgment of Crennan and Kiefel JJ.

15 HAYNE J. The facts and circumstances giving rise to these appeals are set out in the reasons of Crennan and Kiefel JJ. I need not repeat them.

16 Section 91R(3) of the *Migration Act* 1958 (Cth) is cast as a direction to disregard certain conduct "[f]or the purposes of the application of this Act and the regulations to a particular person ... in determining whether the person has a well-founded fear of being persecuted" for a Convention reason[17]. The sub-section does not identify who is to disregard that conduct. Instead, it specifies the occasion for disregarding the conduct, and identifies that occasion as being "determining whether the person has a well-founded fear of being persecuted". The sub-section describes what is to be disregarded as "any conduct engaged in by the person in Australia". Paragraph (b) of s 91R(3) qualifies the generality of that direction to disregard conduct in Australia. More particularly, the direction to disregard conduct in Australia does not apply if 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".

17 The central question in these appeals is whether, if the qualifying provision of par (b) does not apply, the direction to disregard any conduct engaged in by the person in Australia is to be given its literal application. It was not disputed that if par (b) does not apply, conduct of the visa applicant in Australia cannot be used to *support* the conclusion that the criteria for a protection visa are met. The conduct cannot be used to strengthen the person's claim to be a refugee. But, if a visa applicant's conduct in Australia shows, or tends to show, that the person does *not* meet the criteria for a protection visa, is that conduct to be disregarded?

18 The appellant submitted (in effect) that to construe s 91R(3) as requiring disregard of conduct in Australia that shows or tends to show that protection obligations are not owed to the person in question would be at odds with the evident purpose of the *Migration Legislation Amendment Act (No 6)* 2001 (Cth) which inserted subdiv AL of Div 3 of Pt 2 (ss 91R to 91X) in the *Migration Act*. That subdivision made particular provisions about protection visas. It may be accepted that an important purpose of these provisions was to confine the class of persons eligible for protection visas. And subject to whatever qualification may follow from the confinement worked by subdiv AL, it may also be accepted that stating the criterion for grant of a protection visa in s 36(2)[18] by reference to

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17 Article 1A(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

18 Section 36(2) provided at the relevant time:

"A criterion for a protection visa is that the applicant for the visa is:

(Footnote continues on next page)

whether Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol reveals that the provisions of the *Migration Act* which deal with protection visas are to be construed in a way that will enable performance of those international obligations.

19 The task of construing s 91R(3) must begin with its text. In describing the occasion for the disregard required by the sub-section as the occasion of "determining whether" the person has a well-founded fear of being persecuted for a Convention reason, the drafter of s 91R(3) may have had, at the forefront of consideration, the use of conduct in Australia *in aid* of the conclusion that the person had a well-founded fear. Certainly the qualification provided by par (b) of s 91R(3) points in that direction. But the drafter did not frame the direction to disregard conduct in Australia as a prohibition against using that conduct in aid of one outcome of the determination rather than another. Instead, the drafter stated the occasion for disregarding conduct in Australia as the occasion of determining an issue (whether the applicant has a well-founded fear). By fixing upon the determination of the issue as the occasion for the disregard (rather than upon use of the conduct in aid of a particular outcome of the determination) s 91R(3), in its terms, requires disregard of conduct in Australia that was not engaged in for purposes other than strengthening the claim, regardless of whether the decision-maker would use the conduct for or against the visa applicant.

20 Are the words of s 91R(3) susceptible of another construction? In particular, read in their context and with proper attention to the purposes of the statute as a whole, can the words of the provisions yield the meaning for which the appellant contended in this case? It is well established that "the manifest intention of a statute must not be defeated by too literal an adhesion to its precise language"[19].

21 If, as the Minister submitted, a purpose of subdiv AL was to confine the class of persons eligible for protection visas, reading s 91R(3) literally would not

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(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa."

19 *R v Vasey* [1905] 2 KB 748 at 751 quoted by Dixon J in *H Jones & Co Pty Ltd v Kingborough Corporation* (1950) 82 CLR 282 at 318; [1950] HCA 11.

give full effect to that purpose. It would not do that because, although conduct in Australia engaged in only for the purpose of strengthening a claim to a protection visa is to be disregarded if it would in fact strengthen the claim, so too is that conduct to be disregarded even if it would show, or tend to show, that the applicant was not entitled to protection. But the language of s 91R(3) is intractable[20]. It is not possible, in my opinion, to read the language as permitting regard to be had to conduct in Australia, engaged in for the sole purpose of strengthening a claim to a protection visa, if, or to the extent that, it is conduct that shows or tends to show the claim should not be accepted.

22 The Minister did not submit, either in this Court or in the Full Court of the Federal Court[21], that s 91R(3) should be read as prohibiting regard to physical acts undertaken in Australia but permitting consideration of the purpose motivating the conduct. It is therefore not necessary to consider whether the provision could be construed in that way.

23 It was not submitted on behalf of the Minister, or suggested in any way during argument, that the drafter of s 91R(3) had made a mistake or that to read s 91R(3) literally would produce an operation of the *Migration Act* that warranted the description "capricious" or "irrational"[22]. It is neither capricious nor irrational to disregard certain matters no matter whether they would work for or against the visa applicant. It is neither absurd nor irrational to direct the mind of the decision-maker principally to what the visa applicant did outside Australia by excluding from consideration certain kinds of conduct in which the applicant engaged while in Australia.

24 Absent demonstration that reading the sub-section as it is written leads to capricious or irrational results, there can be no basis for a submission that the words of the sub-section should be recast. The Minister did not submit that s 91R(3) should be read as if the word "that" were substituted for "whether". Nothing that is said in *The Oxford English Dictionary* treatment of "whether", or in any edition of *Fowler's Modern English Usage*, supports the view that the word "whether" was misused by the drafter when "that" was intended. The caution which Fowler urged in the entry "doubt(ful)" in the first edition[23] was against usage "contrary to idiom to begin the clause that depends on [doubt or

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20 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320; [1981] HCA 26.

21 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 528 [25].

22 *Cooper Brookes* (1981) 147 CLR 297.

23 Fowler, *A Dictionary of Modern English Usage*, (1926) at 121-122.

doubtful] with *that* instead of the usual *whether*, except when the sentence is negative". And it is this caution which Sir Ernest Gowers repeated in the second edition[24]. It is altogether too large a step to suggest that this idiomatic distinction in use between "whether" and "that" after "doubt" could support the view that the drafter of s 91R(3), through ignorance or mistake, used "whether" in the command provided by s 91R(3) when "that" was intended. Moreover, even recasting the sub-section in the manner suggested does not lead to the solution proffered. The question which the decision-maker must determine (however it is described) can be determined for or against the visa applicant. Only by assuming that the legislature intended the disregard to work always and only against the visa applicant does the asserted meaning follow.

25 Each appeal should be dismissed with costs.

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24 See *Fowler's Modern English Usage*, 2nd ed (1965) at 139, building on Gowers' more pithy advice about the word "doubt" in *ABC of Plain Words*, (1951) at 46: "Idiom requires *whether* after a positive statement and *that* after a negative." Burchfield treated the point differently in the third edition: *The New Fowler's Modern English Usage*, 3rd ed (1996) at 229.

26 CRENNAN AND KIEFEL JJ. These appeals were heard together. They concern the interpretation of s 91R(3) of the *Migration Act* 1958 (Cth) ("the Act") which provides:

> "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."

27 The evident intention of s 91R(3) is that applicants for protection visas should not be able to make their case for refugee status stronger by evidence of conduct which they have engaged in for that purpose, since their arrival in Australia. The Refugee Review Tribunal ("the Tribunal") found that in each of these cases that was the reason why the first respondent had undertaken Falun Gong-related activities in Australia. The Tribunal used the evidence of the first respondents' engagement in these activities, and its findings about their motivation for doing so, to cast doubt upon their claims. A Full Court of the Federal Court held that the terms of s 91R(3) did not permit the Tribunal to have regard to the conduct for that purpose. For the reasons which follow, on its proper construction s 91R(3) does not require a person's engagement in such conduct, and the reason for it, to be disregarded by a decision-maker for all purposes in connection with the determination of an application for a protection visa.

SZJGV

28 The first respondent to the first appeal, SZJGV, is a citizen of China who arrived in Australia on 25 January 2006. He applied for a protection visa on 2 February 2006. He claimed to have been a practitioner of Falun Gong in China since 1997 and for that reason to fear persecution if he were to return to China. He said that he had participated in protests against the treatment of Falun Gong practitioners and their families and that he had been interrogated and harassed by the Chinese authorities. His application was refused by a delegate of the Minister and that decision was affirmed by the Tribunal.

29 The Tribunal found that the first respondent had not been a Falun Gong practitioner in China as claimed. It gave as its reasons for that conclusion the first respondent's lack of detailed knowledge about Falun Gong or Falun Gong exercises, such as would be expected of a person who had been a practitioner since 1997. The Tribunal was unpersuaded by the first respondent's evidence about his practice of Falun Gong in Australia since April or May 2006, which was after the delegate's refusal but before the Tribunal hearing. That evidence pointed to the fact that he had only recently been taught how to perform some Falun Gong exercises. The Tribunal found that the first respondent's interest in Falun Gong was "a recent invention designed to assist him in his endeavour to remain in this country by strengthening his claims …". The Tribunal considered that s 91R(3) of the Act applied and said that it would disregard the first respondent's Falun Gong-related activities in Australia.

30 It followed, in the Tribunal's view, from its rejection of the first respondent's claim to have been a Falun Gong practitioner in China, that he did not participate in protests and was not harassed by the authorities in that country. It said that, in reaching this conclusion, it took into account some additional reasons.

31 The first reason the Tribunal identified was that the claims were inconsistent with independent information concerning the likely reaction of the Chinese authorities to any protests after July 1999. That information suggested that had the first respondent participated as claimed, he would have been arrested and detained. The second reason involved the shifting nature of aspects of the first respondent's evidence and an important contradiction in it, which led the Tribunal to the view that he had exaggerated his evidence. The third reason is of particular importance. The Tribunal said that his evidence overall showed a tendency to exaggerate and to tailor it. The Tribunal said that:

> "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 his lack of credibility the Tribunal said that it did not accept that the first respondent suffered any harm amounting to persecution in China by reason of his Falun Gong activities. It said that it was not satisfied that he had a well-founded fear of persecution for a Convention reason and that he was not therefore a refugee.

SZJXO

32 The first respondent to the second appeal is also a Chinese national who claimed to have practised Falun Gong since 1997. He arrived in Australia on 22 April 2006. He claimed to have been arrested and detained by police on four occasions in China for staging collective practice exercises, to have been verbally and physically abused and that the police had visited his house and harassed his family. His application for a protection visa was refused by the Minister's delegate and that decision was affirmed by the Tribunal.

33 There was evidence before the Tribunal that the first respondent had attended Falun Gong practice sites in Australia since May 2006. He submitted to the Tribunal photographs of himself participating in demonstrations in Australia, which involved protests against China and against its treatment of Falun Gong prisoners. He claimed that if he returned to China he would be imprisoned for his involvement with Falun Gong including his participation in protests in Australia.

34 The Tribunal was not satisfied that the first respondent had been a Falun Gong practitioner in China. It considered that his claims lacked credit, in particular because his evidence did not disclose that the Falun Gong faith had importance to his life, it was devoid of significant supporting detail and it did not appear to arise from first-hand experience. The Tribunal did not consider that the first respondent's involvement in Falun Gong activities since his arrival in Australia meant that he had become a practitioner. It was not satisfied that the reason for his involvement was other than to strengthen his claim to be a refugee and, in accordance with s 91R(3), it proposed to disregard it. In its conclusions concerning the prospect that the first respondent might suffer harm in the future in China, the Tribunal nonetheless referred to that conduct, saying that, given its findings about his motives for his contacts with Falun Gong in Australia, there was no reason to believe that he would practise Falun Gong if he returned to China or have any significant involvement with it there.

The appeals to the Federal Court

35 Both respondents unsuccessfully sought review in the Federal Magistrates Court, but did not raise any issue concerning the application of s 91R(3). On the appeals to the Federal Court, which were heard together with another matter, the first respondents submitted that despite acknowledging the applicability of s 91R(3), the Tribunal had had regard to the conduct of the first respondents in Australia in determining their claims. In each case the Tribunal had relied upon that conduct in concluding that the first respondents were not refugees. The first respondents argued that if s 91R(3) required a decision-maker to disregard an applicant's conduct in Australia, then it must be disregarded for all purposes.

36 A Full Court of the Federal Court (Spender, Edmonds and Tracey JJ) agreed with this argument[25]. Their Honours accepted that s 91R(3) could only be applied once primary findings of fact had been made, as the Minister had submitted. It would be necessary for the Tribunal to determine whether the conduct had occurred and, if it had, whether s 91R(3) applied. Their Honours continued[26]:

> "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."

It followed, in the view of the Court, that since s 91R(3) applied in these cases, the conduct could not lawfully be brought into account[27]. The Court said[28]:

> "Decision-makers are, subject to the proviso in para (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)."

37 The Full Court held that in each case the Tribunal had fallen into jurisdictional error by having regard to the conduct of the first respondents. This was so even though in *SZJGV* the first respondent's conduct was used for the limited purpose of assessing the credibility of his claim to be a Falun Gong practitioner[29]. In *SZJXO* the Court held that the conduct had wrongly been used

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25 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515.

26 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 527 [22].

27 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 528 [24].

28 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 528 [24].

29 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 528-529 [27].

to determine whether there was any reason to believe that the first respondent would be persecuted should he return to China[30].

The history of s 91R(3)

38 A statutory criterion for a protection visa is that an applicant be a non-citizen "to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"[31]. A person who falls within the definition of a "refugee" in Art 1A(2) of the Convention relating to the Status of Refugees[32] is such a person. A refugee is there defined as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" is unable or unwilling to avail himself of the protection of his country of nationality.

39 Section 91R was introduced into the Act in 2001[33]. As its heading suggests, it is concerned with the element of persecution in the Convention definition. Sub-section (1) concerns the reasons for persecution mentioned in Art 1A(2) of the Convention. It requires, inter alia, that persecution involve serious harm to the person. Sub-section (2) gives examples of what may amount to "serious harm" for the purpose of the preceding sub-section. Sub-section (3) is concerned with the person's conduct outside their country of nationality as it relates to their claim to have a well-founded fear of persecution.

40 A person who becomes a refugee after leaving their country of nationality or habitual residence is called a refugee "sur place"[34]. A person may become a refugee sur place for different reasons. There may be a change in the conditions of that country after their departure from it, which results in that person

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30 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 529 [28].

31 *Migration Act* 1958 (Cth), s 36(2)(a).

32 Done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together here referred to as "the Convention").

33 *Migration Legislation Amendment Act (No 6)* 2001 (Cth), Sched 1.

34 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1979, rev ed 1992) at 22 [94]; Hathaway, *The Law of Refugee Status*, (1991) at 33; Waldman, *The Definition of Convention Refugee*, (2001) at [8.102.1].

developing a well-founded fear of persecution if they were to return to it. A person may also become such a refugee as a consequence of their own activities after their departure because those activities may come to the attention of the authorities in that country[35].

41 Prior to the introduction of s 91R(3), differing views had been expressed about the extent to which the conduct, in Australia, of an applicant for a protection visa could bear upon their claim to refugee status. In some jurisdictions the potential for abuse led to the implication of a requirement of good faith on the part of an applicant seeking protection in accordance with the Convention. On this view, a person who purposefully creates circumstances designed to engage Convention protection is not considered to be a genuine refugee to whom the Convention applies[36]. In other jurisdictions bad faith, whilst considered relevant to credibility, is not considered to automatically disentitle a person to protection on the basis of a well-founded fear of persecution[37]. In Australia the different approaches were taken up, to an extent, in decisions of the Federal Court.

42 In *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*[38] Gummow J (with whom Keely and Jenkinson JJ agreed on this point) did not go so far as to suggest that a person who deliberately engages in conduct designed to create the circumstances which might engage Convention protection should be denied the potential status of refugee. His Honour considered that evidence of the actions taken should be excluded from a consideration of a claim to that status. His Honour said that[39]:

> "… it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the

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35 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1979, rev ed 1992) at 22 [95]-[96].

36 See for example *Re HB*, Refugee Appeal No 2254/94 (NZRSAA) 21 September 1994, available at http://www.refugee.org.nz/Casesearch/Fulltext/2254-94.htm and in (1995) 7 *International Journal of Refugee Law* 332.

37 *Danian v Secretary of State for the Home Department* [1999] TLR 756; *Ghasemian v Canada (Minister of Citizenship and Immigration)* (2003) 242 FTR 164 at 170 [31]-[33] per Gauthier J.

38 (1991) 31 FCR 100.

39 (1991) 31 FCR 100 at 118.

> country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. The fear of persecution, to which the Convention refers, in such cases will not be 'well-founded'."

43 Some years later a different view was expressed by Lee J in *Mohammed v Minister for Immigration and Multicultural Affairs*[40], which was upheld by a Full Court on appeal[41] and followed by the majority in *Minister for Immigration and Multicultural Affairs v Farahanipour*[42]. Lee J said[43]:

> "Consistent with the terms of the Convention, and the obligations undertaken by a contracting state thereunder, recognition of refugee status cannot be denied to a person whose voluntary acts have created a real risk that the person will suffer persecution occasioning serious harm if that person is returned to the country of nationality. In some cases, albeit extraordinary, fraudulent activity by an applicant for refugee status may, in itself, attract malevolent attention from authorities in the country of nationality, giving rise to a well-founded fear that serious harm will occur if that person is returned."

44 In the Explanatory Memorandum to the 2001 Act it was said that the provision that became s 91R(3) was inserted to deal with sur place claims[44]. It was said that difficulties had arisen in Australian courts where it had been found that a person had acted while in Australia with the specific intention of

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40 (1999) 56 ALD 210.

41 *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405, Spender and French JJ, Carr J dissenting; and see also Hathaway, *The Law of Refugee Status*, (1991) at 39.

42 (2001) 105 FCR 277, Ryan and RD Nicholson JJ, Tamberlin J dissenting.

43 *Mohammed v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 210 at 215 [28].

44 Australia, Senate, Migration Legislation Amendment Bill (No 6) 2001, Revised Explanatory Memorandum at 10 [27].

establishing or strengthening their claim to refugee status[45]. The provision was said to be designed to maintain[46]:

> "… 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."

45 The Second Reading Speech confirmed that actions 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."[47] In exceptional cases, where a person had acted "purely to strengthen their claims", an application might nonetheless be granted in the exercise of ministerial discretion[48].

The proper construction of s 91R(3)[49]

46 The question about s 91R(3) which arises on these appeals, and which must be resolved by construing that provision, concerns the extent of its operation. More particularly, the question is whether sub-s (3) operates to prevent a decision-maker drawing upon evidence about conduct engaged in by an applicant for a protection visa, since their arrival in Australia, and views formed by the decision-maker about the reason why that person engaged in the conduct, to make findings adverse to that person's claim to refugee status.

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45 Australia, Senate, Migration Legislation Amendment Bill (No 6) 2001, Revised Explanatory Memorandum at 10 [27].

46 Australia, Senate, Migration Legislation Amendment Bill (No 6) 2001, Revised Explanatory Memorandum at 10 [29].

47 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 August 2001 at 30422.

48 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 August 2001 at 30422; and see *Migration Act* 1958, s 417.

49 The word "purpose" could be used in different senses in these reasons: to refer to a person's reason or motive in par (b) of s 91R(3); to refer to the statutory purpose or object of sub-s (3); and to refer to the purposes of the decision-maker in using evidence of conduct. To avoid confusion, in these reasons reference is made to a person's motive; to the statutory object; and to the decision-maker's purpose.

47 The statement that the context, general purpose and policy of a statutory provision may be the surest guides to construction[50] is apposite to s 91R(3). Those considerations provide a better guide to the intended operation of sub-s (3) than does resort merely to the language and structure of the sub-section. The modern approach to statutory construction uses "'context' in its widest sense"[51]. A consideration of the statutory context within which s 91R(3) operates directs attention to the questions which a decision-maker is required to address in determining an application for a protection visa and what may be involved in that process. Sub-section (3) will deny the use of some evidence to that determination. The extent of the operation of sub-s (3), with that result, is to be determined by reference to its object and what is necessary to achieve it.

48 Before proceeding further, mention should be made of a possible distinction which might be drawn between the person's motive for the conduct and the conduct itself. Section 91R(3) is expressed to effect an exclusion of conduct, and therefore evidence about conduct, from the determination of whether the person is a refugee. Views formed by the decision-maker about the person's motives for that conduct are not referred to.

49 The Full Court did not draw a distinction between conduct and motive in determining the operation of s 91R(3). The Court was aware of a possible argument that the decision-maker was only bound to disregard conduct, but did not decide the point[52]. In view of the conclusions reached on the appeals it is not necessary to decide whether such a distinction should be drawn. Sub-section (3) should not be read as requiring that evidence about the person's conduct be disregarded for all purposes connected with an assessment of their claim. It follows that even if the direction to disregard "any conduct" in sub-s (3) is apt to refer to the motive for the conduct, views formed and findings made concerning that motive are not excluded from the determination.

50 There can be little doubt that s 91R(3) was inserted into the Act to quell the controversy which had arisen by reason of decisions of the Federal Court and

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50 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27, referred to in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

51 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2.

52 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 528 [25].

that the view expressed in *Somaghi* was to prevail. The section effects an evidentiary exclusion, which Gummow J had suggested in *Somaghi* as an appropriate response to deliberate conduct. However his Honour spoke of excluding from the consideration of a decision-maker actions undertaken for the sole purpose of *invoking*, which is to say creating, a claim to refugee status. When his Honour said that such actions "should not be considered as supporting an application for refugee status"[53] his Honour was speaking of the actions providing the sole evidentiary basis for a claim. The terms of s 91R(3) are expressed differently. They refer to an exclusion of evidence of conduct, the purpose of which is to *strengthen* a person's claim to a well-founded fear of persecution.

51 The Full Court was aware of the historical background to s 91R(3)[54], but concentrated upon its language in determining the extent of its operation. The Court considered it to be of significance to the question of the extent of the sub-section's operation, that its terms extended its application beyond sur place claims, strictly so called. It may be accepted that the section extends to any claim for refugee status, where conduct has been engaged in by a person in Australia and is relied upon in support of that claim. It is not limited to cases in which the conduct in question is undertaken to *create* the circumstances in which Convention protection might be engaged. However it does not follow that the section operates in the manner suggested by the Full Court, so as to prevent the application of evidence of conduct, or views about that conduct, adverse to the claim.

52 The Full Court may also have been encouraged to focus upon the language of sub-s (3) because, as it noted, there had been a series of cases in that Court and in the Federal Magistrates Court, concerning s 91R(3), in which it had been common ground that it suffered from a lack of clarity[55]. At least so far as concerns the question presently under consideration that cannot be doubted. Sub-section (3) is expressed in a way which focuses upon the evidentiary burden that a person has, to have conduct undertaken in Australia taken into account in support of their claim, not what use the conduct, or the motive for it, may be put to if they are unsuccessful. But the recognition that the answer to the question is

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53 *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 118.

54 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 528 [24].

55 *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at 521 [10].

not readily provided by the language and structure of sub-s (3) should suggest that the answer may lie in considerations of the sub-section's object.

53 The proper starting point for a consideration of the operation of the section is the task of the decision-maker under the Act, to which sub-s (3) is addressed, and what it entails. The opening words of s 91R(3) confirm that regard is to be had to the application of the Act as a whole, to the person, in applying sub-s (3). Section 65(1) requires the decision-maker to be satisfied that the statutory criteria for the visa in question are met. The relevant criterion for a protection visa is provided by the Convention definition of a refugee. The determination to which par (a) of s 91R(3) refers, as the subject of the evidentiary exclusion, is that part of the definition of a refugee which refers to a person having a well-founded fear of persecution. That part of the Convention definition of refugee has been held to encompass both subjective and objective elements[56]. The subjective question is whether the applicant for a protection visa has a fear of persecution. If that question is answered in the affirmative, the following question, whether that fear is well-founded, is an objective one[57]. Evidence about the person's conduct, and their motive for it, may have particular relevance to the subjective question.

54 The decision required by s 65(1) of the Act will require an assessment of the claim by the decision-maker. It will involve the weighing of evidence and information for and against the claim. Much of what is asserted as fact may be unsupported by evidence. Independent information available to the decision-maker may only go so far towards a resolution of the issues which arise. It is well recognised that, in these cases, evidence concerning an applicant's course of conduct, including inconsistencies in it, and the credibility of the applicant may assume importance. It is unlikely to have been intended by the insertion of s 91R(3) that a decision-maker be prevented from taking such factors into account in the process of determination. As will be shown, the only conduct to which sub-s (3) is directed is that which may be weighed in favour of an acceptance of the person's claims.

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56 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 498 [72] per Gummow and Hayne JJ; [2003] HCA 71; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; [1997] HCA 22.

57 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 498-499 [72] per Gummow and Hayne JJ; and see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; [1989] HCA 62.

55 The reasons of the Full Court seek to give effect to the terms of the direction in s 91R(3). In considering the conduct which must be disregarded in the determination of "whether" the person has a well-founded fear of persecution, it focused upon the expression "any conduct". The meaning given to that expression by the Court was significant to the conclusion it reached about the extent of the operation of s 91R(3). It may be inferred from the passage set out above[58] that it approached the meaning of that expression in two ways.

56 First, the Full Court observed that the words "any conduct" were largely unqualified, since they were subject only to the proviso in par (b). How the proviso impacted upon the application of sub-s (3) to conduct in Australia was not discussed. Save for conduct coming within the proviso, on the Full Court's approach those words could refer to all conduct of any kind. The Court secondly considered the words "any conduct" read with the direction that it be disregarded and held that conduct must be disregarded whether it suggests that a fear is well-founded or not. This is a conclusion as to the intended evidentiary effect of the direction. It therefore depends upon the object of sub-s (3), but that object was not further discussed by the Court. The Court took the words to refer to conduct of any kind regardless of any evidentiary effect it may have.

57 The only qualification which the Full Court admitted to the application of s 91R(3) to conduct was the proviso in par (b), to which attention may now be directed. As will be seen, the inquiry to which it gives rise, and the conclusions thereby reached, are important to an understanding of the operation of s 91R(3).

58 The proviso, in par (b) of s 91R(3), is not expressed to except from the statutory direction conduct of a particular kind. Rather, it qualifies the conduct which may be excepted from the operation of sub-s (3) by reference to the person's motive. If a person is able to satisfy the decision-maker that the conduct was engaged in for some reason other than to strengthen the person's claim, the decision-maker may have regard to it. The conduct which the decision-maker is able to take into account is that engaged in "otherwise" than for that purpose or motive.

59 In considering the operation of the proviso in par (b) it is necessary to bear in mind that "the purpose" spoken of is a singular purpose. It is *the* purpose of strengthening the claim. Sub-section (3) is concerned with conduct which is engaged in for that purpose alone. This meaning accords with the statement by Gummow J in *Somaghi*[59], that conduct which has as its *sole* purpose the creation

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58 At [36] of these reasons.

59 (1991) 31 FCR 100 at 118.

of a claim to a well-founded fear of persecution, should not be taken into account. It is confirmed by references in the Explanatory Memorandum to a person having a "specific intention"[60] and in the Second Reading Speech, to actions undertaken "just" or "purely" to strengthen claims to protection, as being the concern of sub-s (3)[61].

60 It follows that where it is accepted that a person had more than one reason for engaging in the conduct they will satisfy the requirement of the proviso. Such a situation may arise, for example, where a person satisfies the decision-maker that conduct was undertaken in Australia in order to continue the practice of their religion. It will usually follow in such a circumstance that the person's claim will be strengthened by their engagement in that conduct. In many such cases the person will be conscious of that effect when engaging in the conduct. It could then be said that *a* reason for the person's conduct is to strengthen their claim, although it is not the only reason. But because it was not the *sole* reason for the conduct, the conduct may be taken into account.

61 Paragraph (b) of sub-s (3) is not expressed in terms which require a decision-maker to state a conclusion as to the person's motive or motives, only whether the decision-maker is satisfied that the person had a motive for the conduct in addition to that to strengthen the claim. Regardless of the conclusion stated, because the person's sole purpose is the point of reference, the decision-maker will necessarily determine whether the person had only one motive, that to which par (b) refers. And if the decision-maker is not satisfied by the explanation given for the conduct, the decision-maker will have determined that the person's only motive was the strengthening of the person's claim.

62 That conclusion raises a fundamental question about what may be taken to be the intended operation of sub-s (3). The decision-maker who has found that a person had only the motive spoken of, in engaging in the conduct, will have at his or her disposal a finding which may be relevant to the person's credibility. Such a conclusion will have involved a rejection of the explanation tendered. It seems unlikely to have been intended that a decision-maker undertake the inquiry about the person's motive dictated by sub-s (3), reach a conclusion and then be required to put it out of his or her mind. The result would be to deny the decision-maker evidence or findings which might be influential to the assessment which is at the centre of his or her statutory task. Applying the section in this

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60 Australia, Senate, Migration Legislation Amendment Bill (No 6) 2001, Revised Explanatory Memorandum at 10 [27].

61 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 August 2001 at 30422.

way would permit a person to overcome difficulties created by the person's deliberate engagement in the conduct, the motive for which is an issue raised by sub-s (3) itself. It would defeat the object of sub-s (3) which is to prevent claimants from gaining an advantage from conduct undertaken in Australia. The result of such a construction would be both inconvenient and improbable. This may suggest that an alternative to a literal approach, one which more closely conforms to the legislative intent, is preferable[62].

63 To this point discussion has centred upon the answer to the inquiry in par (b), about the motive of the person, in identifying the conduct which sub-s (3) intends to be included or excluded from consideration of a claim to fear persecution. From that viewpoint, engaging in conduct for the relevant motive will result in its exclusion. But the other reason for its exclusion relates to the quality of the conduct itself. Paragraph (b) itself elucidates this meaning of "conduct". The reason the conduct is to be excluded is that it would have the effect of strengthening the claim, if it were taken into account. The object of sub-s (3) is to deny that evidentiary effect. It requires that evidence of conduct not be applied for the purpose for which it was intended by the person, to strengthen that person's claim to refugee status where it would have that effect. So understood, sub-s (3) says nothing about evidence of conduct which would have the opposite effect, and is in fact adverse to the claim.

64 The approach of the Full Court was to regard sub-s (3) as engaged once the inquiry in par (b) was answered. This does not give sufficient weight to the underlying objective of sub-s (3). It is necessary to its proper operation that when a decision-maker has found that the sole motive of the person in engaging in the conduct was to strengthen the claim, another question, concerning its evidentiary effect, be addressed. If it is determined that evidence of the conduct would strengthen the person's claim, it is to be disregarded, consistent with the objective of sub-s (3); if it would not strengthen the claim, it may be taken into account.

65 It is essential that the object of s 91R(3) and the mischief it was intended to remedy be taken into account in construing it[63]. The Full Court referred to that object but did not take it into account in that process, with the result that its operation is wider than can be seen as necessary or intended. True it is that the

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62 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

63 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Acts Interpretation Act* 1901 (Cth), s 15AA.

object or purpose of a statutory provision is more often called in aid of a broad construction, one broader than might be achieved by a literal approach. In this case the object of s 91R(3) requires that the section be read more narrowly[64]. It should not be read as requiring evidence of a person's conduct in Australia, or that person's motive for that conduct, to be disregarded for any purpose in connection with the determination of their application for a protection visa. Evidence of that conduct and findings about motive may be applied to discredit the applicant's claim.

Conclusions

SZJGV

66 The Tribunal was not in error in taking into account the deliberate engagement of the first respondent in Falun Gong-related activities in Australia as a matter adversely affecting his credit and as supporting its view that his claim to fear harm from persecution lacked credibility. It did not contravene s 91R(3).

SZJXO

67 The Tribunal was not in error in taking into account its finding about the first respondent's motivation for undertaking Falun Gong-related activities in Australia in determining whether he would practise Falun Gong on his return to China and for that reason to fear persecution.

Orders

68 In each case the appeal by the Minister should be allowed. The orders of the Full Court of the Federal Court in *SZJGV* should be set aside, save for those by which the Minister is to pay the costs of the appeal and of the review by the Federal Magistrates Court. In *SZJXO* the orders of the Full Court of the Federal Court should be set aside save for those by which leave to appeal was granted and those by which the Minister is to pay the costs of that application and the appeal, and of the review by the Federal Magistrates Court. In each case there should be an order that the first respondent's appeal to the Full Court of the Federal Court be otherwise dismissed. In accordance with the undertaking given by the Minister as a condition of special leave there should be a further order in each case that the appellant pay the first respondent's costs of this appeal.

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64 See *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 318-319 per Mason J; [1985] HCA 48; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420; [1994] HCA 54; and see Bennion, *Statutory Interpretation*, 5th ed (2008) at 939.

Crennan J
Kiefel J