



# EXERCISE

## Case note practice

---

This exercise is referred to on page 59 of the textbook.

Students should be given the task of reading *Minister for Immigration and Citizenship v SZJXO* (2009) 238 CLR 642 and asked to preparing their own case note. The following essay is a real answer by a first-year law student along with annotation by the marker. It can be a useful learning exercise for students.

# Minister for Immigration Case Note Exercise

The following is a sample case analysis prepared by a first-year student and annotated with feedback using 'track changes'. It sets out the wider analysis included in a case note (Part II). See page 59 in the text for discussion.

## Instructions

You should already have done your own case note on this case. If not, download *Minister for Immigration and Citizenship v SZJXO* [2009] HCA 40 (Unreported, French CJ, Hayne, Crennan, Kiefel and Bell JJ, 30 September 2009) at <http://www.austlii.edu.au/au/cases/cth/HCA/2009/40.html>.

Your case should be prepared as if it is one you would hand in as an assignment. When you have finished, compare it with the one below, taking into account the annotations by the marker.

## Sample Answer: With Annotation

### Case Analysis

#### Minister for Immigration and Citizenship v SZJXO [2009] HCA 40

Date of judgement: 30 September 2009

#### FACTS

##### SZJGV

- Chinese citizen who applied for a protection visa under the Migration Act 1958 (Cth) on the premise that he had been a Falun Gong practitioner in China since 1997; that reason fears persecution if he returns to China
- He claimed to have participated in protests against the treatment of Falun Gong practitioners and their families; consequently been interrogated and harassed by Chinese authorities
- His application refused by the Minister for Immigration and Citizenship (Minister) delegate; decision affirmed by Refugee Review Tribunal (Tribunal)

##### SZJXO

- Chinese national claimed to have practised Falun Gong since 1997
- Claims to have been arrested and detained by Chinese police on four occasions for staging collective practice exercises; verbally/physically abused and had police visit his house and harassed his family
- Application refused by the Minister's delegate and affirmed by Tribunal

#### TRIAL JUDGE'S DECISION

Federal Magistrates Court

- Were unsuccessful as the court dismissed their application; appealed decision Full Court of the Federal Court (Spender, Edmonds and Tracey JJ)
- Claimed that the Tribunal had erred by taking into account, adversely to them, the conduct which they engaged in Australia contrary to s 91R(3) of the Migration Act in which they relied upon that conduct in concluding that they were not refugees; "Decision-makers are, subject to the proviso in para (b), required to disregard 'any' conduct in Australia by an applicant ... If the Tribunal brings the conduct into account it will contravene s 91R(3)."

#### ISSUE ON APPEAL

Whether s 91R(3) prohibits a decision maker, in making the determination of whether a person has well-founded fear of being persecuted as mentioned in Article 1A(2) of the Refugee Convention as amended by the Refugee Protocol, from drawing inferences adverse to a visa applicant based on the applicant's conduct within Australia, unless the condition referred to in para (b) is satisfied.

**Comment [anon1]:** Overall this is more of a case summary (that you might prepare when studying) than a case analysis (which you might hand in as an assignment), which is written in essay not point form.

**Comment [anon2]:** Incomplete citation – see AGLC 2.10 for how to cite unreported judgments

**Comment [anon3]:** Judgment has no 'e' when it is referring to a court judgment. Only used when a person exercises judgement, as in crossing the road or deciding what to say.

**Comment [anon4]:** What about the court, the judges? Need to say these

**Comment [anon5]:** Incorrect – needs italics on short title and year

**Comment [anon6]:** Is this a fact or is the tribunal proceedings part of the procedural history?

**Comment [anon7]:** Again, this last bit is procedural history

**Comment [anon8]:** This heading is not applicable to the content, which covers two courts! And there is more than one judge! In any event we use the heading of procedural history which should cover the first formal procedure to the last!

**Comment [anon9]:** Did the student actually say whether the appeal was allowed or dismissed?

**Comment [anon10]:** Excellent

## THE HIGH COURT

The High Court comprised French CJ, Hayne, Crennan, Kiefel and Bell JJ

### French CJ and Bell JJ

The appeals should be permitted due to the interpretation of para (a) of s 91R(3) also overcome the decisions of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Mohammed* and *Minister for Immigration and Multicultural Affairs v Farahanipour* which held that despite the defendant's engagement in conduct within Australia for the sole purpose of strengthening their claim for protection under the Refugee Convention by enhancing their chance of persecution if they returned to their country of origin, it didn't automatically bar them for a visa which would have to be assessed by Australia's obligation under the Refugee Convention.

**Comment [anon11]:** Grammar problem in this sentence

Section 91R is concerned with the application of the criteria stipulated in Article 1A(2) of the Refugee Convention; to determine whether a person is a refugee within the meaning of the article and to whom Australia owes "protection obligations" with s 36 Migration Act; thus to ensure that an applicant for a protection visa in seeking to demonstrate a well-founded fear of persecution within the meaning of Art1A(2) cannot place any reliance upon or gain any advantage from, conduct engaged within Australia for the purpose of strengthening his or her claim to meet the criteria of being classified as a refugee under Article 1A(2).

**Comment [anon12]:** Use single quote marks and save double quote marks for a quote inside a quote – see AGLC

Substitution of the meaning of the term "whether" to "that" in para (a) corrects the drafting error in which "whether" would be interpreted incorrectly with its ordinary meaning. On the alternative interpretation, it suggests there is a chain of reasoning leading to a determination that is completely or partly based upon inferences drawn from conduct engaged in by the person in Australia in favour of the applicant. However, these chains of reasoning must not be applied unless the condition in para (b) is satisfied with respect to the relevant conduct as it satisfies the purpose of the subsection and avoids absurd results. The individual must prove that their engagement in the conduct was not solely to strengthen his or her claim; upon this interpretation the appeal should be allowed.

Their Honours believed the appeal should be permitted on the premise that the individual seeking refugee status must indicate that the engagement in conduct is not purely attributed to strengthen their claim for a protection visa.

**Comment [anon13]:** Is that a proper term – permitted?

### Hayne J

The central issue of these appeal is as to whether qualifying provision of para (b) is inapplicable and such, the direction to disregard any conduct engaged in by the person in Australia is to be given its literal application.

Interpreting s 91R(3) as the disregard of conduct in Australia indicates that Australia doesn't owe protection obligations to that person contradicts and conflicts with the purpose of the Migration Legislation Amendment Act (No 6) 2001 (Cth). It is agreed that this provisions of this legislation was created to confine the class of persons eligible for protection visas, however, the Act must be interpreted in a sense where it doesn't obstruct its obligations under the Refugee Convention.

**Comment [anon14]:** Again, not the proper way to cite legislation

**Comment [anon15]:** Mixture of singular and plural – grammar problem

The Minister did not consider, either in this court or the Full Court of the Federal Court that s 91R(3) should be interpreted as prohibiting physical acts in Australia but permitting the consideration of the motive behind the conduct; thus not necessary to consider whether the provision could be interpreted in that way. Nor was there the submission that the drafter of s 91R(3) made a mistake or that to read s 91R(3) literally would produce an operation of the Migration Act that would be termed as "irrational"; or that the s 91R(3) should be read as if the word "that" were substituted for "whether" in which there was nothing in The Oxford English Dictionary which supported the idea that the drafter misused the term "whether" and intended "that". The question which the decision must determine can be determined either for or against the visa applicant. Only assuming that the legislature intended the disregard to work always and only against the visa applicant does the asserted meaning follow.

**Comment [anon16]:** Not a proper sentence – expression problem

**Comment [anon17]:** We don't use 'the' here

**Comment [anon18]:** Expression problem

Each appeal should be dismissed

**Comment [anon19]:** No full stop!

### Crennan and Kiefel JJ

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 Tribunal had found in each of these cases, the predominant reason behind their actions; participation in Falun Gong activities in Australia.

### SZJGV

**Comment [anon20]:** Is it really necessary to repeat the facts again?

- First respondent was a Falun Gong practitioner as claimed due to his lack of knowledge of Falun Gong which would be expected of him if he had actually been practising since 1997
- Tribunal unpersuaded by his evidence in participating in Falun Gong since April/May 2006 which was after the delegate's rejection but prior to the Tribunal hearing; indicating he had only recently been taught how to perform some Falun gung exercises describing it to be a "recent invention designed to assist him in his endeavour to remain in this country by strengthening his claims"
- In response to his claims of being harassed by the Chinese authority and his participation levels; they fell inconsistent with the independent information indicating the likely response from Chinese officials as he would have been arrested and detained

#### SZJXO

- Evidence (photographs of himself participating in Falun Gong demonstrations in Australia) provided suggested he had been participating in Falun Gong activities since May 2006 however, his claims lacked credit
  - Evidence disclosed didn't reflect the importance of the Falun Gong faith to his life
  - Devoid of significant supporting detail
  - Disregarded his claims in accordance with s 91R(3) as they weren't satisfied that the reasons for his involvement was other than to strengthen his claim of being a refugee
- The question about 91R (3) which arises in these appeals concerns the extents of its operation and whether subs (3) operates to prevent decision makers drawing upon evidence about conduct engaged in by an applicant for 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 averse to that person's claim to refugee status.

The context, general purpose and policy of a statutory provision provides the most accurate interpretation as relevant to s 91R(3), indicating the intended operation of the provision. The Full Court did not identify a distinction between the conduct and the motive in determining the operation of s 91R(3).

The insert of s 91R(3) into the Act was reinforce the views expressed in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*, where his Honour said that actions which are solely performed in order to strengthen an applicant's case for visa protection "should not be considered as supporting an application for refugee status".

The proviso in para (b) of s 91R(3) does not exclude all types of conduct but rather it narrows the type of conduct in relation to their motive as if the applicant can prove to the decision maker that their conduct had other means than strengthening their claim, it can be regarded. E.g. the conduct reflects continual practise of their religion

It is essential that the objective of s 91R(3) and the misconduct it was intended to avert and remedy is taken into consideration once interpreting it. The Full Court recognised its objective yet did not take it into consideration whilst interpreting it, with the result that its operation is wider than can be seen as necessary or intended. Thus, in this case should be read more narrowly as evidence of that conduct and findings about the motive should be applied to discredit the applicant's claim.

#### SZJGV

The Tribunal was not in error in taking into account the deliberate engagement of the first respondent in Falun Gong related activities as a matter which adversely affected his credit and that it did not contravene s 91R(3) of the Act.

#### JXO

The Tribunal was not in error in taking into account its findings about the first respondent's motivation for undertaking Falun Gong related activities in Australia in determining whether he would practise these activities once returned to China and on that cause fear persecution.

### IMPACTS ON CURRENT LAW

The majority decision in the case reflected that the Tribunal maintains the right to take into account the purpose of the applicant's conduct within Australia for a protection visa as they must prove that the carrying out of their conduct is besides the sole purpose of strengthening their claims and furthermore it does not contravene s 91R(3) of the Act.

**Comment [anon21]:** Insertion

**Comment [anon22]:** Incomplete case citation

**Comment [anon23]:** Gummow J

**Comment [anon24]:** Can't start a sentence with an abbreviation. Use For example,

**Comment [anon25]:** Full stop needed!

**Comment [anon26]:** Which one? Be specific.

**Comment [anon27]:** This section just summarised the judgments, and did not in any way in the slightest compare or contrast them – did not say who was in the majority, who was in the minority, and if there are four judges in the majority and they have written two judgments, there must be some difference in reasoning otherwise they would have just all written one judgment together.

**Comment [anon28]:** Is this really the impacts, or the ratio? Is there any actual analysis provided here?