

# BAD FAITH IN ASYLUM CLAIMS UNDER THE REFUGEES CONVENTION – THE AUSTRALIAN EXPERIENCE

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*The Refugees Convention 1951 makes no direct reference to when an asylum-seeker makes fraudulent claims, or claims made in bad faith. This article examines the doctrinal origins of bad faith in international law and the different interpretations when applying it. By way of comparison, it looks at the contrasting opinions in New Zealand and the United Kingdom on the subject of bad faith. The article then outlines bad faith in the Australian context. It considers the jurisprudential history of the relevant bad faith provision in section 91R(3) of the Migration Act 1958. This provision sets up an evidentiary exclusion targeted at decision-makers who determine asylum claims. The article grapples with this awkwardly worded provision and presents counter arguments on the provision's interpretation and utility. This provision has proved to be controversial within Australian jurisprudence, with leading academics and legal bodies observing that it collides with fundamental protections outlined in international human rights law such as the law of refoulement. The article concludes that section 91R(3) unnecessarily complicates the processing of asylum-seekers and questions whether it would be more useful to repeal the provision.*

## **1. Introduction**

A bad faith claim relates to a situation where a person has dishonestly created or strengthened a claim to refugee status by deliberately carrying out activities that enhance their claims for protection. Within the international framework of the *Refugees Convention* of 1951 (hereinafter, the Convention), bad faith claims, in this context, are not explicitly mentioned. The limits expressly outlined by the Convention relate to where a refugee is deemed dangerous<sup>1</sup> or unworthy of protection<sup>2</sup>. There is also a provision within the Convention relating to when protection has been available but there is a fundamental, stable and durable change within the country of origin, and

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<sup>1</sup> Art. 33(2) of the *Refugee Convention 1951*.

<sup>2</sup> Art. 1F.

therefore refugee status ceases.<sup>3</sup> However, none of these situations apply specifically to a refugee claim made in bad faith. Perhaps this reflects the fact that at the time of the Convention's inception, the drafters did not envisage such claims.

Under international law, states have the right to decide how they will implement their obligations under international treaties. In Australian legislation, there is a bad faith provision in the *Migration Act 1958* under s.91R(3). This provision was passed as part of a series of amendments to the *Migration Act*<sup>4</sup> in the wake of the Tampa crisis<sup>5</sup> in September 2001<sup>6</sup>. It was enacted by the former Howard government to explicitly minimise what were seen as contrived claims to refugee status coming through the courts.<sup>7</sup> There have been a number of different interpretations of bad faith and this provision by the courts which will be discussed later. It is important to note at the outset, however, that s.91R(3) is a provision that has been criticised by academics<sup>8</sup> and organizations such as the Australian Human Rights Commission<sup>9</sup> for potentially colliding with one of the fundamental principles of the Convention relating to *refoulement*<sup>10</sup>, that is, the duty not to return a refugee to their country of origin if there is a risk of persecution. It is a provision that primarily relates to what is known as *sur place* claims. *Sur place* claims, as defined by the United Nations High Commissioner for Refugees (UNHCR), concern a person who was not a refugee when

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<sup>3</sup> Arts. 1C(5) or (6).

<sup>4</sup> *Migration Legislation Amendment Act (No 6) 2001*.

<sup>5</sup> In August 2001 a Norwegian freighter the *MV Tampa*, rescued 433 mainly Afghan asylum-seekers on route to Australia, from a distressed fishing vessel in international waters. These asylum-seekers were refused entry to Australia, transferred to *HMAS Manoora*, and sent to the Pacific Island of Nauru.

<sup>6</sup> T. Meyrick, Researcher with Gilbert + Tobin Centre of Public Law, University of New South Wales, "What got left behind", Australian Policy Online, available at <http://www.apo.org.au> (last visited 3 Nov. 2010).

<sup>7</sup> Second Reading Speech, House of Representatives Hansard, 28 August 2001, at 30422, Senate Hansard, 24 September 2001, at 27604.

<sup>8</sup> See Professor S. Kneebone, *Bouncing the Ball Between the Courts and the Legislature: What is the score on refugee issues?*, Melbourne, Castan Centre for Human Rights Law Conference "Human Rights 2003: The Year in Review" available at <http://www.law.monash.edu.au/castancentre/events/2003/kneebone-paper.pdf> (last visited 2 November 2010), also see Professor P. Mathew, *Good Faith Paper- International Association of Refugee Law Judges*, Sydney, International Association of Refugee Law Judges Regional Conference Australasian Chapter, 2010, available at request of the author.

<sup>9</sup> See "Submissions to the Refugee Review Tribunal regarding s.91R(3) Migration Act 1958", Human Rights Commission, available at [http://www.hreoc.gov.au/legal/submissions\\_court/guidelines/refugee\\_review.html](http://www.hreoc.gov.au/legal/submissions_court/guidelines/refugee_review.html) (last visited 8 November 2010).

<sup>10</sup> Art. 33.

they left their country, but who becomes a refugee due to changes in circumstances in their home country or as a result of their own actions.<sup>11</sup>

## **2. How has bad faith been interpreted in other jurisdictions?**

The concept of an absence of good faith in refugee claims has been explored in a range of common law jurisdictions, including both New Zealand and the United Kingdom (UK). In New Zealand the case of *Refugee Appeal No 2254/94 Re HB*<sup>12</sup> was the seminal case interpreting the Convention as implicitly requiring good faith on the part of the applicant. *Re HB* involved an Iranian asylum-seeker fabricating claims of being persecuted in his homeland. It also involved the media being used as a vehicle to gain public support and sympathy with the asylum-seeker being interviewed on national television and in a national daily newspaper. In this case the then New Zealand Refugee Status Appeals Authority (“the RSAA”) found that there were two alternative bases for denying refugee status. One was a lack of a well founded fear of persecution, as is necessary under the Convention. The second was that the asylum-seeker should be denied the protection of the Convention because of a lack of good faith.

The RSAA deliberated on the issue of whether a state party to the Refugee Convention was required to recognize as a refugee an individual who, not being at risk of harm in their own home country, but wanting recognition as a refugee, cynically manipulates circumstances so as to manufacture a risk of harm in the home country which did not previously exist.<sup>13</sup> Rodger Haines QC, the former Deputy Chair of the RSAA has said an affirmative answer to this issue does not promote the object and purpose of the Refugees Convention. Rather it facilitates manipulation and fraud. Therefore, the object and purpose of the Convention will not be promoted by fraud but defeated by it.<sup>14</sup>

After considering relevant case law in other jurisdictions and the opinions of commentators such as Professor Atle Grahl-Madsen and Professor Jim Hathaway, the RSAA held that it was the ‘intention’ of the Convention to provide protection only to

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<sup>11</sup> See Paragraphs 94, 95 and 96 of the United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status*.

<sup>12</sup> New Zealand Refugee Status Appeals Authority, 21 September 1994.

<sup>13</sup> R. Haines QC, *Sur Place Refugees and Good Faith: Interpreting the Inclusion Clause of Article 1 of the Refugees Convention, A New Zealand Perspective*, Sydney, International Association of Refugee Law Judges Regional Conference Australasian Chapter, 2010, available at request of the author.

<sup>14</sup> *Ibid*.

those who were fundamentally marginalised by the state, not those who fabricated a story of persecution which did not previously exist. The RSAA reviewed the Convention in light of policy considerations relating to the fact that the entire system of refugee status determination can be brought into disrepute by those who seek to manipulate the system. It stated:

While bona fide refugees are required to pass through a stringent examination of the circumstances of their case, a mala fide sur place applicant is free to engage in the most outrageous and cynical conduct, [and] the more outrageous and cynical, the surer the prospect of success. The bona fide asylum-seeker would have little choice but to follow suit. The end result would be a system entirely lacking in purpose. Asylum-seekers would be able to demand, as of right, the grant of refugee status simply because that status was sought. A person could become a refugee as a matter of his or her own choice.<sup>15</sup>

In contrast to the hard line approach taken by New Zealand, in the UK bad faith, whilst considered relevant to the issue of credibility of the claimant, is not considered to automatically disqualify a person to protection under the Convention. In the case of *Danian v Secretary for the Home Department*<sup>16</sup> the English Court of Appeal found that there was no basis for applying the principle of good faith in asylum claims. The Court rejected the argument that there was an implied limitation to the Convention, and made reference to the express limitations in the Convention under Article 1F for example which relate to asylum-seekers deemed unworthy of protection. Buxton LJ stated:

It is very difficult to state what is the 'wrong', in terms of fraud or breach of the law, committed by a person such as Mr Danian; and...in any event...the Convention does not incorporate a judgemental or disciplinary element, so as to deprive a person who has once behaved fraudulently from further protection.

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<sup>15</sup> See [158].

<sup>16</sup> [1999] EWCA Civ 3000.

The Court concluded that even if an asylum-seeker had fabricated a claim to refugee status, if there was a real chance of persecution then the Convention applies. In rejecting an implied precondition of good faith the view taken was that bad faith behaviour was a factual issue with evidentiary significance. In other words, the behaviour might go to matters of the applicant's credibility in relation to his or her claims but was not a disqualification.<sup>17</sup>

The Australian National University Freilich Foundation Professor of Law, Penelope Mathew has said that the opinion taken by the Court of Appeal in *Danian* is the preferable approach, particularly when reading the Convention in light of international human rights law.<sup>18</sup> Professor Mathew has stated that, under human rights law, limitations are to be construed strictly and thus it follows that where there are express limitations on particular rights, no implied limitations should be read in. She cites the International Covenant on Civil and Political Rights (ICCPR) and the "Siracusa Principles" on the limitation and derogation provisions on the ICCPR that state:

no limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.<sup>19</sup>

Professor Mathew also states that in light of the Convention's object and purpose, an implied limitation concerning good faith should not be read into the Convention.<sup>20</sup> Professor Mathew acknowledges the reservations outlined in *Re HB* regarding the whole asylum process being undermined, but has said that this is not the same sort of moral challenge raised by people excluded under Article 1F of the Convention relating to persons who have committed war crimes, crimes against humanity or serious non-political crimes outside the country where they seek asylum.<sup>21</sup>

### **3. The Australian response to bad faith**

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<sup>17</sup> D. O'Brien, *Credibility, Bad Faith Claims and the Effect of Section 91R(3) of the Migration Act*, Sydney, International Association of Refugee Law Judges Regional Conference Australasian Chapter, 2010, available at request of the author.

<sup>18</sup> Penelope Mathew, p 4, See above footnote 8.

<sup>19</sup> United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1085/4, Annex (185), [IA1].

<sup>20</sup> Penelope Mathew, p 6, See above footnote 8.

<sup>21</sup> *Ibid.*

Before s.91R(3) was introduced into Australian legislation, different judicial views developed regarding the extent to which an applicant who deliberately created circumstances in Australia for the purposes of justifying their claim under the Convention, was entitled to recognition as a refugee *sur place*.<sup>22</sup> In some cases, a good faith requirement was deemed necessary before the applicant's conduct in Australia could be taken into account. In other cases, bad faith, while considered relevant to credibility, was not considered to automatically exclude an applicant from protection.<sup>23</sup>

In *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*<sup>24</sup> Justice Gummow stated that:

...it should be accepted that actions taken outside the country of nationality...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...in such cases will not be 'well-founded'.<sup>25</sup>

Subsequent court decisions supported this view that there be an element of good faith in an applicant's conduct and that any conduct within Australia designed purely to gain refugee status be disregarded.<sup>26</sup> However, other judicial consideration expressed a different view on the subject. In *Minister for Immigration and Multicultural Affairs v Mohammed*<sup>27</sup> Justice Lee rejected any requirement of good faith, stating that it was without legal or ethical foundation. He stated:

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

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<sup>22</sup> Tessa Meyrick p 6, See above footnote 6.

<sup>23</sup> Ibid.

<sup>24</sup> [1991] FCA 389.

<sup>25</sup> [1991] FCA 389 at 118.

<sup>26</sup> See for example *Li Shi Ping & Anor v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 557 at 580, not disturbed on appeal: (1994) 35 ALD 225, *Khan v Minister for Immigration and Multicultural and Indigenous Affairs* (1997) 47 ALD 19 and "*O*" v *Minister for Immigration and Multicultural and Indigenous Affairs* [2000] 265 at [12].

<sup>27</sup> 1999 56 ALD 210.

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.<sup>28</sup>

Justice Lee's findings were affirmed by the Full Federal Court<sup>29</sup> and in later Federal Court decisions.<sup>30</sup> Justice Lee's view has received support as being more consistent with international refugee law.<sup>31</sup> However Australia's commitment to the Convention resides in the Migration Act, and in this case, the provision of s.91R(3), which I will now discuss.

#### **4. Section 91R(3), its interpretation by the Courts and the assessment of credibility**

There is no doubt that s.91R(3) was inserted into the Migration Act to resolve the conflicting opinions arising from cases like *Somaghi* and *Mohammed* and the then government's concern that there was an increasing number of claims coming through the Federal Court relating to applicants who deliberately fabricated claims for refugee status after they arrived in Australia.<sup>32</sup>

Section 91R(3) provides as follows:

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 Refugee Convention as amended by the Refugees Protocol.

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<sup>28</sup> 1999 56 ALD 210 at 215.

<sup>29</sup> *Mohammed v Minister for Immigration and Multicultural and Indigenous Affairs* (2000) 98 FCR 405 (Spender & French JJ with Carr J dissenting).

<sup>30</sup> See for example *Minister for Immigration and Multicultural and Indigenous Affairs v Farahanipour* (2001) 105 FCR 277 and *Minister for Immigration and Multicultural and Indigenous Affairs v Kheirollahpour* [2001] FCA 1306 (French J, 16 August 2001).

<sup>31</sup> Tessa Meyrick, at p 5, See above footnote 6.

<sup>32</sup> See both the Second Reading Speech and the Revised Explanatory Memorandum to the *Migration Legislation Amendment Bill* (No.6) 2001.

There are two prominent features of this section:

The first is that, unlike the law in New Zealand, a person is not simply excluded from refugee status because they have acted in bad faith. Rather, the section sets up an evidentiary exclusion, and requires decision-makers to disregard any conduct which is engaged in for the purpose of strengthening or embellishing a claim.

The second point is that this section reverses the burden of proof. Rather than the delegate or Refugee Review Tribunal being satisfied that the person engaged in conduct to strengthen the claim to refugee status as opposed to acting on a genuine belief, the onus is on the applicant to satisfy the decision-maker that any conduct engaged in within Australia was *not* for the purpose of strengthening the claim to refugee status.<sup>33</sup>

The case law on this section is indicative of the difficulty the courts have had with the construction of s.91R(3). The section is an awkwardly and loosely drafted single sentence command to the world. One less contentious point is that despite the Explanatory Memorandum and Second Reading Speech mentioning that the section was introduced to deal with *sur place* claims, it is not, in terms, confined to such claims. In *SZHAY v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>34</sup> I stated in my judgment:

[Section 91R(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

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<sup>33</sup> Penelope Mathew, p 7, See above footnote 8.

<sup>34</sup> 2006 FMCA 261; (2006) 199 FLR 148.

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.<sup>35</sup>

In considering s.91R(3), the full extent of conduct in Australia should be clearly identified. In this regard the term “engaged in” can be construed as meaning “carried on” rather than “commenced”.<sup>36</sup> For example a person may commence engaging in religious practice in Australia to support their protection visa claims, but over time may become a genuine adherent such that they are carrying on the conduct for different reasons.<sup>37</sup>

A distinction between beliefs, knowledge and conduct has also been drawn for the purposes of s.91R(3).<sup>38</sup> It has been stated that conversion is a matter of conscientious belief rather than conduct, such that s.91R(3) may not authorise the Minister or Tribunal to disregard the fact of religious conversion (or the motivation for the conduct), as distinct from the conduct of the convert in Australia.<sup>39</sup> It has also been noted that s.91R(3) speaks in terms of “conduct” not “knowledge”. The fact that the Tribunal may be obliged to disregard conduct in Australia does not prevent it from testing the applicant’s claims against the applicants actual knowledge, for example testing claims of Falun Gong adherence against the applicant’s knowledge of its tenets and practices.<sup>40</sup>

It has been determined that the conduct to which the language of s.91R(3) is directed relates only to the applicant, and not to third parties<sup>41</sup> such as the media. If a third party’s conduct (such as media attention to an applicant or group) is at the direction of the applicant and can be seen as an immediate consequence of the applicant’s own conduct, those actions may be disregarded by the decision-maker.

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<sup>35</sup> 2006 FMCA 261 at [32].

<sup>36</sup> *SZGYT v Minister for Immigration and Citizenship* [2007] FMCA 883.

<sup>37</sup> *SZGYT v Minister for Immigration and Citizenship* [2007] FMCA.

<sup>38</sup> Refugee Review Tribunal Document, ‘Well-Founded Fear’, June 2009, available at [www.mrt-rrt.gov.au/ArticleDocuments/126/wff\\_ch3.pdf.aspx](http://www.mrt-rrt.gov.au/ArticleDocuments/126/wff_ch3.pdf.aspx)

<sup>39</sup> *SZJZN v Minister for Immigration and Citizenship* (2008) 169 FCR 1 at [39]-[40] where Madgwick J held that the Tribunal had rejected the appellant’s *sur place* motivations and beliefs as an indicator of likely “higher profile” if returned to China, but did not have regard to his conduct so as to contravene s.91R(3).

<sup>40</sup> *SZMLM v Minister for Immigration and Citizenship* [2008] FMCA 1493. See also *SZLZX v Minister for Immigration and Citizenship* [2008] FMCA 1390 and *SZMBK v Minister for Immigration and Citizenship* [2008] FMCA 1101.

<sup>41</sup> *SZNCT & SZNCU v Minister for Immigration and Citizenship* [2009] FMCA 233.

Whether relevant conduct of a third party could be sufficiently linked to the applicant's conduct is a finding of fact for the decision-maker.<sup>42</sup>

The High Court in September 2009 in *Minister for Immigration and Citizenship v SZJGV*<sup>43</sup>, clarified the meaning of s.91R(3). Confirming the decision in *Somaghi*, the High Court held that if the applicant's **sole** motive in engaging in the conduct was to strengthen the refugee claim and the conduct has that effect, then the conduct is to be disregarded. It appears, however that the conclusion reached by a decision-maker in considering an applicant's motivation for the conduct may nonetheless be taken into account for evidentiary purposes in assessing the applicant's credibility.<sup>44</sup> Further, even if it is concluded by the decision-maker that the conduct in Australia was engaged in for the sole purpose of strengthening a claim, it is still possible to find that the applicant has a well-founded fear of persecution. Such a finding may be based on other evidence submitted by the applicant or otherwise obtained.

Prior to the High Court's decision it was considered that conduct engaged in Australia for the purpose of strengthening a refugee claim could not be taken into account for any purpose<sup>45</sup>, including in relation to credibility issues, and that s.91R(3) needed to be addressed whenever conduct in Australia was considered.<sup>46</sup> However the High Court ruled that s.91R(3) does not require a decision-maker to disregard conduct falling within the terms of that provision for all purposes. Conduct does not have to be disregarded if it does not strengthen a claim. Neither does it have to be disregarded if there is a motivation for it other than to strengthen the claim. For example, if an applicant was to show that their conduct in Australia was part of a consistent commitment to a particular religion, or a political opinion held and expressed in their own country of origin, then the conduct could be taken into account when assessing their claim to refugee status.<sup>47</sup>

All Justices of the High Court made reference to the awkward structure and framing of s.91R(3). The High Court overcame this by turning away from the literal

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<sup>42</sup> See *SZMLD v Minister for Immigration and Citizenship* [2008] FMCA 1606 at [76].

<sup>43</sup> Heard together with *Minister for Immigration and Citizenship v SZJXO* [2009] HCA 40 (French CJ, Crennen, Kiefel and Bell JJ, Hayne J dissenting).

<sup>44</sup> See *SZJGV* at [49] and [62].

<sup>45</sup> *SZJGV v Minister for Immigration and Citizenship* (2008) 170 FCR 515 at [22].

<sup>46</sup> D. O'Brien, p 6, See above footnote 17.

<sup>47</sup> *Ibid.*

meaning of the section, and instead focussed on parliamentary intent.<sup>48</sup> Denis O'Brien, Principal Member of the Refugee Review Tribunal has commented that what the High Court appears to be saying in *SZJGV* is that s.91R(3) imposes an evidentiary burden on an applicant who seeks to have conduct engaged in Australia taken into account in the determination of their claim but that the provision is not concerned with the use which a decision-maker might make of motive for the conduct if the applicant is not successful in convincing the decision-maker that the conduct was engaged in otherwise than for the purpose of strengthening the applicant's claim.<sup>49</sup> Further, it is important to bear in mind that the High Court reasoned that decision-makers are not required to disregard conduct intended to enhance protection visa claims if it does not have that effect.

Effectively, the High Court decision separated bad faith assessments from the general credibility assessment of an applicant. This was a distinction that had been blurred in the past. The High Court has now allowed bad faith conduct to be considered in a credibility assessment if it does not enhance the protection visa claim, and, so it appears, even if it does, to the extent that the decision-maker has formed adverse views about the motivation for it.

Federal Magistrate Raphael has stated in his judgment of *SZOIW v Minister for Immigration*<sup>50</sup>, that there are three steps<sup>51</sup> in the proper application of s.91R(3):

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The applicant argues that the proper approach to the application of s.91R(3) consistent with the views expressed by the High Court in *Minister for Immigration v SZJGV* [2009] HCA 40 is what he describes as a three step approach. First, the Tribunal must consider whether it is going to grant a protection visa taking into account any evidence given in relation to an applicant's activities in Australia. He argues that this step is consistent with the views expressed by the High Court at [12] where French CJ and Bell J said:

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<sup>48</sup> See D. O'Brien, p 8, See above footnote 17 and T. Meyrick, p 8, See above footnote 6.

<sup>49</sup> D. O'Brien, p 8, See above footnote 17.

<sup>50</sup> [2010] FMCA 568 (2 August 2010) [16] and [17].

<sup>51</sup> At [16].

‘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 construction.’

The second step, if the Tribunal considers that it would grant a visa based upon all the evidence, is to consider the motivation of the applicant and the third step, if the Tribunal is satisfied that the motivation was otherwise than for the purposes of enhancing the applicant’s claim is to grant the visa. If, on the other hand it is not so satisfied, then evidence of what occurred in Australia must be excluded and the Tribunal should consider again whether or not it is to grant a visa. This interpretation of the s.91R(3) requirement, which I endorse, does not prevent the use of evidence concerning the applicant’s activities whilst in Australia that would not strengthen the claims and thus be consistent with the views expressed by Crennan and Kiefel JJ at [54] and [64]. It should be noted that if this is the correct approach then it would be necessary for a Tribunal on some occasions to make an additional determination. That is because the nature of what occurs in Australia may give ground for a sur place claim. This should also be considered at step 1 and should take into account the evidence of that activity in Australia for that purpose.

As I have stated in a recent judgment<sup>52</sup>, I do not accept that the High Court's decision in *SZJGV* requires a decision by a decision-maker that he or she would make a favourable decision based upon the applicant's conduct in Australia if that conduct were taken into account. All that is required is a chain of reasoning tending in that direction, which may be implied rather than expressed explicitly.

Where conduct engaged in in Australia is not required to be disregarded it may be considered as part of a general credibility assessment. Further, where conduct is required to be disregarded the motivation for it may nevertheless be considered in that credibility assessment. Assessments of credibility are first and foremost made by the decision-maker. This is a difficult task, and one that arises in many cases when conflicting evidence is presented. The credibility inquiry consists of both an external and internal consistency requirement (i.e. does the applicant's testimony match up with country information from their country of origin and is the applicant's testimony consistent and non-contradictory?). There is also a plausibility element to the Tribunal's finding on credibility.<sup>53</sup> Amanda MacDonald, the Deputy Principal Member of the Refugee Review Tribunal has observed that the Tribunal's decision is often complicated by an applicant's lack of English language skills, by their being economically disadvantaged, in unfamiliar social structures, and apprehensive of authority. Additionally, there may be cultural factors which prevent an applicant from making relevant claims when they would be expected to have done so. Many applicants also appear before the Tribunal unassisted.<sup>54</sup> All of these factors must be considered when weighing up credibility of evidence. In the event that certain evidence is rejected on the basis of credibility, it does not necessarily follow that all the evidence must be rejected.

## **5. Remaining issues when interpreting s.91R(3)**

There has been a significant number of criticisms of s.91R(3) and the additional burden it places on an applicant to establish not only a well-founded fear of being persecuted for Convention reasons, but also that any conduct in Australia is *bona fide*. The Monash University academic Susan Kneebone has argued that this section adds

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<sup>52</sup> *SZNIL v Minister for Immigration and Citizenship* [2010] FMCA 470 at footnote 21.

<sup>53</sup> Denis O'Brien, p 2-3, See above footnote 17.

<sup>54</sup> A. MacDonald, *Assessment of Credibility and Its Pivotal Role in Decision-Making*, Sydney Legalwise CPD Seminar: "Administrative Law: Improving the Decision-Making Process", 2010, available at request of the author.

an element to the “real chance” of persecution test which requires a weighting of evidence and the prediction of future possibilities, potentially colliding with the principle of *non-refoulement*.<sup>55</sup> Professor Penelope Mathew has said that by reversing the burden of proof, s.91R(3) goes against the principle that should apply in refugee status determination that the applicant should get the benefit of the doubt.<sup>56</sup> She quotes from the UNHCR Handbook on Determining Refugees which states:

While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicants account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.<sup>57</sup>

Professor Matthew observes that in reversing the onus of proof there is a potential conflict for asylum-seekers when exercising their civil liberties in Australia. She acknowledges that it is only conduct that was solely engaged in to strengthen claims that will be disregarded, but states nevertheless that the *assumption* that all such activity would only be taken to strengthen a claim has a chilling effect on an applicant’s political activities. The message according to Professor Matthew is, “take care, it will be assumed these activities are for the purpose of generating a refugee claim and they might be used to cast doubt on the rest of your claim”.<sup>58</sup>

The Australian Human Rights Commission has also made a number of criticisms of s.91R(3). It has stated that s.91R(3) must be read in line with international human rights law, and in particular with Australia’s obligations pursuant to Article 19(2) of the *International Covenant on Civil and Political Rights*<sup>59</sup> relating

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<sup>55</sup> Susan Kneebone, p 8, See above footnote 8.

<sup>56</sup> Penelope Mathew, p 8, See above footnote 8.

<sup>57</sup> See Paragraph 196 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (2<sup>nd</sup> edn, 1992).

<sup>58</sup> Penelope Mathew, p 9, See above footnote 8.

<sup>59</sup> Adopted by United Nations General Assembly December 1966, ratified by Australia in 1980 and entered into force in 1980.

to freedom of expression. Like Professor Mathew, the Commission has said that s.91R(3) undermines the right to freedom of expression for applicants. The Commission has further submitted that s.91R(3) should be read as narrowly as possible so as to avoid undue inconsistency with the central principle of *non-refoulement*.<sup>60</sup>

In my view, there remain several unresolved issues:

First, the High Court appears to have permitted a decision-maker who is required to disregard conduct pursuant to s.91R(3) to nevertheless take into account the decision-maker's views about that conduct in making an overall credibility assessment. A question remains over the fact that the High Court did not decide whether there was any distinction between motivation and conduct<sup>61</sup>. In my view there must be such a distinction, otherwise how could a decision-maker use conduct that enhanced a claim in order to reject a claim? Bad faith relates to the motivation for the conduct, rather than the conduct itself. Accordingly, the only sensible way to interpret the High Court's decision is to conclude that where an applicant's conduct must be disregarded pursuant to s.91R(3), the applicant's bad faith, that is his or her motivation for that conduct, can still be taken into account.

Secondly, s.91R(3) does not prevent the grant of a protection visa where a person acting in bad faith sufficiently agitates someone in his or her country of origin to put the applicant at serious risk of harm amounting to persecution. For example, suppose an applicant engages in political conduct in Australia directed against the government of their country of origin solely for the purpose of enhancing protection visa claims. Under s.91R(3) such conduct must be disregarded. But suppose that conduct has the effect of causing the government of the applicant's country of origin to take an adverse interest in the applicant so that there is evidence that the applicant would suffer persecution if returned to that country. In those circumstances it would seem that the applicant would still have grounds for protection and a decision-maker could grant a protection visa. The unresolved issue then is that in these circumstances does s.91R(3) serve any purpose at all? It does not prevent a decision-maker taking into account an applicant's bad faith in making an overall credibility assessment. It also does not prevent a decision-maker making a favourable decision even where bad

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<sup>60</sup> See "Submissions to the Refugee Review Tribunal regarding s.91R(3) Migration Act 1958", Human Rights Commission, available at

[http://www.hreoc.gov.au/legal/submissions\\_court/guidelines/refugee\\_review.html](http://www.hreoc.gov.au/legal/submissions_court/guidelines/refugee_review.html)

<sup>61</sup> *SZJGV* at [49].

faith is established. In substance, therefore, s.91R(3) would not seem to significantly alter the position in this country from that which applies in the UK.

A third issue relates to considerations of a temporal and qualitative nature when applying s.91R(3). The issue arose in my recent judgment of *SZNIL v Minister for Immigration and Citizenship*<sup>62</sup> where the applicant had made three visits to Australia and claimed conduct associated with being a Falun Gong practitioner. In that judgment I stated:

[...] the Tribunal may categorise conduct in a number of ways. For example, there may be a temporal factor so as to divide conduct between conduct engaged in before an applicant applies for a protection visa, and conduct engaged in after the application is made. It is arguable that a person cannot display bad faith in relation to an application for protection until the application is made. In my opinion, the better view is that a person may, in bad faith, plan a protection claim before making it...Further, there may be a qualitative difference in the conduct which may justify different conclusions in relation to similar or related conduct. For example, an applicant may be a genuine Falun Gong practitioner and may engage in the practice of Falun Gong for a purpose otherwise than to strengthen protection visa claims, but may engage in demonstrations and protests relating to Falun Gong for the sole purpose of strengthening protection visa claims. While such a distinction may be difficult to draw, it is not, in theory, impossible.<sup>63</sup>

## **6. Conclusion**

Section 91R(3) unnecessarily complicates the process of decision making under the Migration Act. As demonstrated by the High Court decision in *SZJGV*, there has been much litigation arising from the fact that s.91R(3) is awkwardly worded and cumbersome in application. There have been many criticisms of it, particularly how it potentially offends international law in the form of the principle of *non-refoulement* and how it clashes with civil liberties set out in international law documents such as the *Covenant on Civil and Political Rights*. The decision making process is already a very complicated process, requiring credibility assessments and other evidence based assessments, and the extra assessment outlined in s.91R(3) adds very little to this

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<sup>62</sup> [2010] FMCA 470 (16 August 2010) at [34] to [38].

<sup>63</sup> See both [34] and [35].

process. The fact that it reverses the burden of proof places an unnecessary burden on the applicant. Further, the section does not fundamentally alter the legal position under the Convention as recognized in the UK, namely that bad faith is a matter to be taken into account in assessing the credibility of a claim for protection, and the existence of bad faith does not prevent protection being granted. For all these reasons it is my view that the section should be repealed.