FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZHIU v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 1154*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a Protection (Class XA) visa – no reviewable error – application dismissed.

The applicant in these proceedings is not to be identified pursuant to s.91X of the *Migration Act 1958* (Cth) and has been given the pseudonym "SZHIU".

Migration Act 1958 (Cth), ss.91R(3), 91X, 424A, 425

Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 184
Lee v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 464
Livesey v NSW Bar Association (1983) 151 CLR 288
Minister for Immigration & Ethnic Affairs v Wu Shan Liang & Ors; (1996) 185 CLR 259
Minister for Immigration & Multicultural Affairs v Jia Legeng (2001) 205 CLR 507
Minister for Immigration & Multicultural & Indigenous Affairs v NAMW & Ors (2004) 140 FCR 572
NADH of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 214 ALR 264
NAHI v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 10
NAOA v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 241
Refugee Review Tribunal, re ex parte H (2001) 75 ALJR 982
SBBS v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 361
SCAA v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 668
SZBYR v Minister for Immigration & Citizenship & Anor [2007] HCA 26
SZHWI v Minister for Immigration & Multicultural Affairs & Anor (2007) 95 ALD 631
SZIWY v Minister for Immigration & Anor [2007] FMCA 1641
SZIYN v Minister for Immigration & Citizenship [2008] FCA 151
Tin Shawe v Minister for Immigration & Multicultural Affairs [2000] FCA 988
VAF v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 123

VFAB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 872
WABC of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 286
Yit v Minister for Immigration & Multicultural Affairs [2000] FCA 885

Applicant:	SZHIU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 3500 of 2007
Judgment of:	Lloyd-Jones FM
Hearing date:	18 April 2008
Delivered at:	Sydney
Delivered on:	15 August 2008

REPRESENTATION

Applicant:	The applicant appeared in person with the assistance of a Bengali interpreter.
Counsel for the Respondents:	Mr J Knackstredt
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) The application filed on 12 November 2007 is dismissed.

(2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3500 of 2007

SZHIU
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The Proceedings

1. The male applicant was born on 10 February 1970 in Bangladesh and is also a citizen of Bangladesh. The applicant indicated in his Protection visa (Class XA) application that he can speak, read and write Bengali and English and can speak Hindi. He further indicated that he is of Muslim faith, was married in Dhaka on 18 September 1992 and has a daughter born in 1993 and a son born in 1998 both in Bangladesh. The applicant also indicated that he was educated for 14 years in Bangladesh between 1974 and 1988.

2. The applicant is seeking protection in Australia as he claims that he is a member of the Ahmedia (Khadiani) community and will be killed by the opposing religious Muslim party, in Bangladesh. The applicant states that the police and the law generally in Bangladesh are corrupt.

3. The applicant arrived in Australia on 4 February 2005 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa on 14 February 2005. The delegate refused to grant a visa on 29 March 2005 and the applicant applied to the Refugee Review Tribunal ("the Tribunal") after reviewing his rights. On 2 September 2005, the Tribunal affirmed the delegate's decision. The applicant sought judicial review of this decision and the Federal Magistrates Court remitted the matter back to the Tribunal on 30 May 2007. The second Tribunal affirmed the delegate's decision, RRT reference number 071531076, signed on 4 October 2007 and it is this decision that is the subject of the proceedings in this Court.

4. A Court Book ("CB") was prepared and filed by the first respondent's solicitors is marked Exhibit "A" which is the only evidence before the Court.

Tribunal decision

5. On 30 May 2007 orders were made by this Court quashing the first Tribunal decision and remitting the matter to the Tribunal for determination according to law (CB 206). On 17 July 2007, the Tribunal invited the applicant to a second hearing and the applicant attended on 29 August 2007 (CB 213, 258). On 12 September 2007 the Tribunal sent an "Invitation to Comment on Information" letter to the applicant pursuant to s.424A of the Act (CB 274). On 26 September 2007 the applicant's agent sought an extension of time to respond to the invitation but this was declined (CB 287, 290). On 4 October 2007 the second constituted Tribunal signed its decision to affirm the decision of the Minister's delegate (CB 296) and handed down the decision on 16 October 2007.

6. The Tribunal accepted that the applicant is a citizen of Bangladesh (CB 325) and was satisfied that the applicant had direct involvement in the preparation of his Protection visa application and was aware of the information that was required for each question on the application form (CB 328-329). The applicant made claims based on the Convention groundsof religion and political opinion. The Tribunal had before it material submitted to the Minister's delegate, the contents of additional statements and documents provided to the Tribunal and evidence

provided during the applicant's two hearings (CB 299-314). The Tribunal also had access to independent country information (CB 314-319) and it had forwarded a s.424A letter (CB 320-325).

7. In respect of the applicant's claims of religious persecution, the Tribunal found:

   a) the applicant is not an Ahmadi or a member of the Ahmadiyya community;

   b) it did not accept that he had developed an ongoing interest in the Ahmadi religion in Bangladesh over some three years;

   c) it did not accept that he would be perceived as an Ahmadi or imputed to be an Ahmadi;

   d) it did not accept that he will have any association with the Ahmadiyya community in Bangladesh if he returns;

   e) it did not accept that he was motivated to learn about or develop an interest in the Ahmadi in Bangladesh if he returns;

   f) it found that he fabricated a claim to establish a basis for refugee status; and

   g) it found that he will not face any real chance of persecution in Bangladesh for reasons of his religion or imputed religious belief.

8. In respect of the applicant's claim of persecution on the basis of political opinion, the Tribunal found:

   a) that the applicant was not a credible witness;

   b) that it did not accept that the applicant;

      i) was involved in the Awami League in Gazipur or held position in the party in that constituency;

      ii) was a close associate of Ahsanullah MP;

      iii) was attacked by members of other political parties as a result of his Awami League involvement;

iv) false charges or arrest warrants were raised against the applicant;

v) the police harassed the applicant;

vi) BNP activists and Jamat e-Islami activists ransacked the applicant's house and insulted his brother;

vii) was beaten by BNP Cadres;

viii) he was of interest to members and supporters of the BNP, Jamat e-Islami or any other political or religious party; and

ix) would be an Awami League activist or would be motivated to develop an interest in being such an activist or would have a close association with the Awami League if he returned to Bangladesh.

c) found that he was not present at the scene of the murder of Ahsanullah Master MP as claimed and instead found that his claim had been fabricated;

d) rejected the applicant's claim that he maybe the target of the perpetrator's of that murder because he had been a witness to it;

e) that his claims to have suffered harm in Bangladesh as a result of his political activism and political opinion were not true and were on the contrary fabricated to establish a basis of refugee status; and

f) that the chance that the applicant would suffer harm amounting to persecution for the reason of being a general supporter of the Awami League in the reasonably foreseeable future was remote and therefore he would not face a real chance of persecution in Bangladesh for reasons of his political opinion.

Consideration

9. In the application for judicial review filed on 12 November 2007 the applicant raised five un-particularised grounds and in his written

submissions raised three further grounds which I will treat as grounds six to eight respectively.

Ground one

> *The second respondent made jurisdictional error by imperssibly delegating its role as a further of fact to the Ahmadiyya Muslim Associate ("AMAA").*

10. In the Tribunal's "Findings and Reasons", it makes the following statement:

> *Independent information shows that the Ahmadiyya Muslim Association of Australia is located at Marsden Park in Sydney (www.ahmadiyya.org.au) . The applicant therefore had ready access to the major Ahmadiyya community in Australia. Independent information shows that Ahmadis live in closely knit social networks that are organised along national lines with highly formalised relations. [DFAT Report 641 of May 2007; Immigration and Refugee Board of Canada 1991 'Cultural Profile: The Ahmadiyya' June pp110]). Independent information shows that Ahmadi mosques provide a religious, social and recreational environment for all Ahmadis, and any Ahmadi going from one country to another 'can simply offer to volunteer in a mosque and join an instantly recognisable organisation with familiar rituals and events'. [Belzani, M. 2006, "Transnational marriage among Ahmadi Muslims in the UK', Global Networks, vol 16, no.4 pp350]. The independent information strongly suggests that an Ahmadi arriving in Australia would seek out the national network for religious reasons as well as for the social and recreational environment. The applicant has been in Australia since February 2005. However, at the hearing he stated that since arrival he had only phoned "them" two or three times but they would not help him as he had no evidence, and they did not return his calls. The applicant has had no involvement with the Ahmadiyya community in Australia at all, and this leads the Tribunal to conclude that he was not and is not an Ahmadi.* (CB 326)

> *At the hearing the applicant stated that they (the Ahmadiyya in Australia) would not help him as he had no evidence. In Australia the Ahmadiyya Muslim Association of Australia will provide an opinion in writing to the effect that a person is, or is not, an Ahmadi, after consulting with the National Ameer of the overseas country (ie the National Ameer of Ahmadiyya Muslim*

> *Jamaat in Bangladesh). The applicant's lack of a letter of support from the AMAA leads the Tribunal to conclude that he was not and is not an Ahmadi.* (CB 327)

11. The Tribunal has relied upon independent country information in respect of the Ahmadiyya Muslim Association in Australia ("the association") and taken into account the applicant's own evidence given during the hearing as to what he has done since his arrival in Australia to establish contact with that association. I agree with the submissions made by Mr Knackstredt that a fair reading of the "Claims and Evidence" section and a subsequent finding of the Tribunal does not demonstrate that the Tribunal delegated its role as a fact finder to the association or any other body or person. The Tribunal carried out its function to source and rely upon the independent country information which it believed was appropriate in the circumstances and relied on that information. In the absence of any particulars in respect of this alleged claim I am satisfied that the Tribunal has undertaken this task appropriately and there is no evidence of any jurisdictional error in its approach.

Ground two

> *The second respondent made jurisdictional error by adopting a rule or [policy] (a requirement of a letter of support from the AMAA) without regard to the merits of the case.*

12. The passage extracted at [10] above indicates that:

> *…Ahmadiyya Muslim Association of Australia will provide an opinion in writing to the effect that a person is, or is not, an Ahmadi after consulting with the National Ameer of the overseas country (ie the National Ameer of Ahmadiyah Muslim Jamaat in Bangladesh). The applicant's lack of a letter of support from the AMAA leads the Tribunal to conclude that he was not and is not an Ahmadi.*(CB 327)

13. The evidence given by the applicant at the Tribunal hearing indicated that he had developed an interest in the Ahmadiyya religion in Bangladesh over a three year period. During that time he had made visits to the main mosque on two or three occasions per week as an observer. He went on to indicate that to become a recognised Ahmadi,

he would be required to continue that pattern for six to seven years before he could be formally recognised with membership certification.

14. The Tribunal then considers the evidence presented by the applicant in support of his claim that he was involved with the Ahmadiyya community and was a practicing Ahmadi. The Tribunal considered a number of factors that raised doubt in respect of this claim:

    a) the applicant was unable to identify differences between the Sunni and Ahmadiyya religion apart from the Ahmadis' faith in a prophet after Mohammed;

    b) his inability to identify the major differences in belief between Sunni and Ahmadiyya did not support his claims that he completed a course in religious teaching and that he developed an ongoing interest over several years in respect to Ahmadiyya;

    c) the applicant's complete lack of involvement in the Ahmadiyya community in Australia since arriving on 4 February 2005 despite his health issues, working two jobs and that the association did not return his calls;

    d) in Australia the applicant would have been able to continue and develop his interests in the Ahmadiyya belief without the fear of being harmed but he did not pursue this course (CB 327).

15. This lead to the Tribunal reaching the following conclusion:

> *In sum, the applicant's lack of knowledge of significant Ahmadiyya beliefs, his account of his involvement in Bangaldesh, and his lack of any involvement with the Ahmadiyya community in Australia, leads the Tribunal to find that he is not an Ahmadi and did not have any involvement in the Ahmadiyya community in Bangladesh. The Tribunal does not accept that he is an Ahmadi, or has had any association with the Ahmadiyya. The Tribunal does not accept that he would be persecuted as an Ahmadi, or imputed to be an Ahmad by anyone. The Tribunal finds that the applicant fabricated his claim to establish a basis for refugee status.* (CB 327-328)

16. I agree with Mr Knackstredt in his written submissions that a fair reading of the Tribunal's reasons discloses that in coming to its conclusion on this integer of the applicant's claim, the Tribunal

considered the merits of the applicant's claim in detail. Moreover, it is submitted that the findings the Tribunal made were open to it on the evidence and it cannot be said that it made its decision without regard to the particular factors of the case.

17. On a fair reading of the decision record there is no indication that the Tribunal adopted a rule or policy requiring a letter of support from the association to establish that the applicant was a member of that faith. The comment recorded in the Tribunal's decision merely states that if an application is made to the association, it will issue an opinion in writing as to the status of the person involved after it has made the appropriate verifying enquiries from the authorities of that faith in the country in which the person making the claim claims to have been a member of that faith. The Tribunal quite definitely did not make any statement suggesting that the issue of such a letter was a necessary pre-requisite in establishing membership of that religious faith. It was on the applicant's own admission that he had only been attending and observing at the mosque in Dhaka for a period of three years and that it would be necessary to have completed six to seven years of that pattern prior to acceptance as a member of the faith.

Ground three

> *The second respondent made jurisdictional error by having regard to conduct in Australia in breach of s.91R(3) of the Migration Act 1958.*

18. The applicant's involvement with the Ahmadiyya community in Australia was discussed with him at the Tribunal hearing held on 29 August 2007. The Tribunal records the following in respect of this aspect.

> *The Tribunal asked whether he developed an interest in the Ahmadi community in Australia. He stated he had not, as he was working. He phoned them and they asked if he had any evidence, he told them he did not and they would not help. The Tribunal asked whether he had done anything with the Ahmadi community in Australia. He stated he had not and described his 2 jobs and his health concerns (asthma and a bad back) which were under treatment. The Tribunal asked how being unwell prevented his involvement with the Ahmadi community. He explained how he*

> *had back pain and had to do plenty of exercise, he went to the gym, he got plenty of rest – he had a hard job as a kitchen hand – he got to bed at 2am and also worked at a factory if they phoned. The Tribunal indicated that he did not associate with, or consider himself a part of the Ahmadi community. He stated that he had no ties here he had called 2 or 3 times but they did not reply – he was working and unwell.* (CB 311)

19. In the Tribunal's "Findings and Reasons" it makes the following statement:

> *…When he prepared his application the only claim he made was based upon being an Ahmadi. However, the applicant has had* ***no involvement at all*** *with the Ahmadiyya community in Australia since arriving in Australia on 4 February 2005 (as shown by his passport produced at the hearing). The applicant's reasons for this were that it had health issues and two jobs and they did not return his calls. But these reasons do not explain why, after fleeing to Australia, he had made no real effort to continue his claim association with the claimed interest in the Ahmadiyya. In Australia he would have been able to continue and develop his claimed interest in Ahmadiyya beliefs without the fear of being harmed and with few or no difficulties. His lack of efforts, particularly in light of his application where being an Ahmadiyya was his only claim, show that he had no interest in Ahmadiyya and the Ahmadiyya beliefs.* (CB 327)

20. The operation of s.91R(3) is as follows:

> *(3) For the purposes of the application of this Act and the regulations to a particular person:*
>
> *(a) in determining whether the person has a well‑founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;*
>
> *disregard any conduct engaged in by the person in Australia unless:*
>
> *(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.*

21. On the applicant's own evidence presented to the Tribunal at the hearing, s.91R(3) of the Act was not invoked and it was unnecessary

for the Tribunal to make any determination under that section. The passages extracted above clearly demonstrate that the applicant is not making any claim in respect of his involvement in the Ahmadiyya faith while in Australia. Consequently there is no claim to pursue this course in an attempt to strengthen his claim. This appears to be nothing more than a misunderstanding of the Act generally and particularly this provision as it is clearly not invoked by the facts in this case and the ground cannot be sustained.

Ground four

> *The second respondent made jurisdictional error in that it breached its heavy obligation under s.425 of the Migration Act in relation to letters sent to the applicant..*

22. This ground is pleaded in the absence of any particulars so the Court can only assume that the applicant is referring to the operation of s.425 as it applies in the context of Part 7, Division 4 of the Act and refers to the letter of 17 July 2007 forwarded to the applicant's agent, Mr Md Sragul for the attention of the applicant (CB 213-214).

23. Section 425 of the Act states:

> *Tribunal must invite applicant to appear*
>
> *(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*
>
> *(2) Subsection (1) does not apply if:*
>
> *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
>
> *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
>
> *(c) subsection 424C(1) or (2) applies to the applicant.*
>
> *(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.*

24. In the absence of any particulars directed at any error or inadequacy of the notice issued under the provisions of the Act it is not apparent that

there is any defect in that notice. The applicant was represented by a qualified migration agent and that agent has not raised any issue in respect of that notice. The applicant via his agent has complied with that notice by forwarding the response to hearing invitation (CB 241) indicating that he intended to appear at the hearing and that he required the services of a Bengali interpreter and that he would be assisted at the hearing by his migration agent. The applicant subsequently appeared at the Tribunal hearing and there is no reference in the decision record as to any problem with the notice or any issue that flowed from it.

25. In the absence of any apparent error regarding the issue of the invitation to the hearing it must be assumed that the applicant is claiming that the method in which the Tribunal conducted the hearing is the basis of his complaint. In his written submissions the applicant claims that the hearing was conducted over a period of six hours without a break and that the Tribunal's method of questioning was unfair. This claim was set out as follows.

> *The Tribunal was biased and applied some [technique] of testing my credibility which the Tribunal already had in its mind that it used those [techniques] to reject the applicant's claims and the style of asking question and trying to give answers were totally under its control to get its expected answer and under that circumstance every complainant will get the same result like this applicant. The RRT member conducted the hearing continuously for 6 hours. No break during the hearing. The Refugee Review Tribunal's decision was unjust and was made without taking into account the full gravity of the applicant's circumstances of the decision.*

26. Contrary to this allegation the Tribunal's hearing record completed by the case officer, Mr Michael Haynes, records that the hearing was to commence at 1.30pm on 29 August 2007 and was scheduled for a period of three hours and thirty minutes. Besides the Tribunal member and the applicant, the applicant's agent in Sirajul Haque the barrister Mr Bruce Levitt and the Bengali interpreter were present. The hearing did not actually start at 1.45pm and continued to 5.55 pm (CB 257-259).

27. There is nothing in the Court Book or on the decision record to indicate that either of the professional advisors representing the applicant or the

applicant himself raised with the Tribunal member any complaint in respect to the duration of the hearing or the conduct. The Court does not have the benefit of a transcript or copies of the hearing tapes to determine whether this issue was raised at any time during the actual hearing. Moreover the applicant has not provided any evidence establishing that requesting a break in the hearing was refused, or that any failure to allow a break significantly affected his ability to give evidence.

28. The applicant also complains about the Tribunal's method of questioning but is unsupported by any evidence. There is nothing on the face of the Tribunal's reasons to indicate that the Tribunal's questions were irrelevant or otherwise unfair. Importantly, the Tribunal's hearing is conducted on an inquisitorial basis. It is necessary for the person conducting the inquisitorial proceedings to test the evidence presented, often vigorously. Moreover, the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that they are plainly confronted with matters which bear adversely on their credit or which will bring their account into question. I agree with Mr Knackstredt's written submissions that the Tribunal was entitled to ask questions and satisfy itself on matters: *NADH of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 214 ALR 264 per Allsop J at [125] (with Moore and Tamberlin JJ agreeing).

29. A convenient summary in respect to the operation of s.425(1) of the Act regarding an applicant's right to participate in a real and meaningful hearing was summarised by his Honour Smith FM in *SZIWY v Minister for Immigration & Anor* [2007] FMCA 1641 at [30] where his Honour stated:

> *[30] Notwithstanding some doubt in the Federal Court whether this section raises merely a requirement to give a hearing invitation, recent judgments of the High Court locate within s 425(1) a significant right for an applicant to participate in a real and meaningful hearing, which in fact affords the opportunity described in s 425(1) (see SZFDE v Minister for Immigration & Citizenship [2007] HCA 35 at [30]–[35], [48]–[53], also Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 221 CLR 1 at [27] and [32], NAIS v Minister for Immigration & Multicultural &*

Indigenous Affairs [2005] HCA 77 at [37], [164], and [171], and SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs [2006] HCA 63 at [26]–[29], and [32]–[37]). SZFDE confirms the opinion of a Full Court in Minister for Immigration & Multicultural & Indigenous Affairs v SCAR (2003) 128 FCR 553 at [37], that a breach of s 425 can occur as a result of circumstances unknown to the Tribunal and beyond its control. It also supports the Full Court's opinion at [38] as to the jurisdictional nature of the requirements implicit in s 425(1).

30. On a fair reading of the material available to this Court I am satisfied that the Tribunal has complied with its obligation under s.425(1) of the Act.

31. The applicant also raises the complaint that certain issues were not drawn to his attention during the Tribunal hearing. The applicant has not identified these issues nor has he provided a copy of the transcript of that hearing. The burden of proof rests with the applicant to establish jurisdictional error and in the absence of any particulars or a transcript of the proceedings it cannot be determined whether there were any issues that arose in relation to the matter in which the applicant was not alerted: *NAOA v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 241 at [21]. I agree with Mr Knackstredt that in the absence of any evidence to the contrary a fair reading of the Tribunal's reasons discloses that the issues raised in relation to the decision under review were adequately canvassed with the applicant in the context of the authorities set out above. It is not apparent that the Tribunal member has not complied with that regime and this does not give rise to a broad allegation that the way in which it conducted the hearing breached the provision or attention of the Act giving rise to a jurisdictional error.

Ground five

The second respondent ignored relevant evidence in relation to four letters of support from Awami League officials.

32. The applicant provided the second Tribunal with the following letters:

    i) Md.. Abdul Jalil, General Secretary of Bangladesh Awami League, dated 5 July 2005 which indicates in part that the

applicant was an active member of the League and his life would be at risk;

ii) Md. Zahid Ahsam Russel, Member of Parliament, dated 30 June 2005 indicates in part that the applicant was a leader of the Tongi Thana Committee and District Committee; worked for the MP's late father and for the MP and that a number of false charges were instigated against him and he fled;

iii) Md. Rojal [illegible], General Secretary of the Tongi Thana Awami League dated 25 June 2005 indicates in part that the applicant was a joint secretary of the Tongi Thana Awami League, was implicated in a number of false cases; on a number of occasions attacked by BNP activists; and

iv) Md. Asmat Ullah Khan, General Secretary of the Bangladesh Awami League Gazipur District Committee dated 29 June 2005 which indicates in part that the applicant had made a significant contribution to the Awami League and faced enormous suffering at the hands of the BNP; was implicated in a number of false cases and would face persecution in Bangladesh (CB 302, 329).

33. In the Tribunal's "Findings and Reasons" the Tribunal made the following observations in respect of these letters.

> *On their face, the documents were prepared by four different people in a short period from 25 June to 5 July 2005. The letter from Mr Md. Abdul Jalia merely referred to the applicant being an "active member". The other letters referred to the applicant's activity in the Awami League and false charges raised against him. The letters support his claim of political involvement with the Awami League. None of the letters referred to an involvement in any level with the Ahmadiyya community, despite this being an integer of his claims to have suffered persecution in Bangladesh. At the hearing the applicant claimed he got a friend in Bangladesh to go around to various authors and asked for letters on behalf of the applicant. His account shows that the documents were apparently obtained by a friend without difficulty, some weeks after the applicant was refused by the delegate.*

> *Independent information [see Independent information – "Documents from Bangladesh"] show that there is a high level of fraudulent documents and corruption in Bangladesh, which have consistently been identified as one of the most corrupt nations in the world. The Tribunal accepts that this does not mean that all documents from Bangladesh are fraudulent. The Tribunal considers that the weight to give the documents depends on their provenance, contents, and in light of all the evidence before the Tribunal.* (CB 329-330)

34. After considering the letters in the context of the remainder of the claims and the information available to the Tribunal the following conclusion was reached:

> *In light of independent information concerning the high level of fraudulent documents and corruption in Bangladesh, and given the finding made above, the Tribunal does not accept the accuracy of the contents of the documents which outline an involvement in the Awami League (from Md. Abdul Jalil, Md. Zahid Ahsan Russell, Md. Royal [illegible], Md. Asman Ullah Khan).* (CB 333)

35. More generally, the Tribunal set out all of the applicant's claims in detail and considered them in turn. (CB 325-333) It is submitted that to thextent that the applicant is able to demonstrate that the Tribunal did not make a finding on a particular matter of fact, it is submitted that it was not necessary for the Tribunal to make a finding on every particular matter raised by the evidence. Those findings would have been subsumed by its more general findings that the applicant had fabricated his claim: *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184 per French, Sackville and Hely JJ at [46]-[47]:

> *[46] It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an*

> *administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised 'with an eye keenly attuned to error'. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.*
>
> *[47] The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.*

36. The applicant has not identified in particulars or submissions what integers of his claims were not addressed. Nor is it apparent from a review of the decision record that the applicant raised integers that have not been considered. To the extent that this ground infers that the Tribunal should have made a different finding is an attempt to invite this Court to undertake a merits review which is clearly outside the jurisdiction of this Court: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang & Ors*; (1996) 185 CLR 259; *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 at [10].

Additional grounds raised in the applicant's written submissions

37. At the first court date directions hearing on 4 December 2007 the applicant was granted leave to file and serve an amended application giving complete particulars for each ground of review relied upon by 19 February 2008 and in addition any further affidavit material in support of those grounds. The applicant failed to comply with that

order. However, on 18 March 2008 the applicant filed written submissions which introduced three new grounds of review not previously raised in the original application. I agree with the approach taken by Mr Knackstredt to address these grounds and they have been referred to as grounds six, seven and eight in this judgment.

Ground six

The Tribunal was biased.

38. This ground is a bland statement of jurisdictional error which is not particularised and not supported by any submissions. There is no attempt to state whether it is actual or apprehended bias. Presumably it is actual bias that may exist where the Tribunal member has a pre-existing state of mind which disables him from undertaking or rendering himself unwilling to undertake any proper evaluation of the relevant materials before him which were relevant to the decision to be made: *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [35] and [72]. Actual bias may be said to exist where the Tribunal member is so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or argument may be presented: *Jia Legeng* at [71]-[72].

39. A party alleging actual bias on a decision maker's part carries a heavy onus and it must be clearly proved: *Jia Legeng* at [69]; *SBBS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 361 at [44]. In this matter there has been no attempt to put before the Court any evidence to support the allegation of actual bias. It is acknowledged that the existence of actual bias might be inferred from facts and circumstances but caution should be exercised, in the absence of evidence of partisanship or hostility, before inferring actual bias from factual or faulty reasoning on the part of the Tribunal member: *Tin Shawe v Minister for Immigration & Multicultural Affairs* [2000] FCA 988 at [27]; *Yit v Minister for Immigration & Multicultural Affairs* [2000] FCA 885 at [46].

40. A case of actual bias is seldom made out by reference solely to the reasons for decision and no inference of bias or pre-judgment can be drawn from the adverse findings in the Tribunal's reasons: *VFAB v*

Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 872; *SCAA v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 668 at [38]; *WABC of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 286 at [3].

41. Apprehended bias will exist where a fair minded lay observer who is properly informed as to the nature of the proceedings, the matter in issue and the conduct of the proceedings, would not apprehend that the Tribunal member might not bring an impartial mind to the resolution of the question to be decided: *Refugee Review Tribunal, re ex parte H* (2001) 75 ALJR 982 at [27]; *Livesey v NSW Bar Association* (1983) 151 CLR 288. It is not a requirement of natural justice that the Tribunal member's mind be absent of any predisposition or inclination for, or against, an argument or conclusion. All that is required is for the Tribunal member to be open to persuasion: *Jia Legeng* at [72] and [86].

42. I agree with the submissions made by Mr Knackstredt that the applicant has not provided any particulars of bias or bad faith which would be sufficient to satisfy the heavy burden for establishing such allegations and the ground cannot be sustained.

Ground seven

Breach of s.424A.

43. This ground is also made without particulars. It should also be noted that the Tribunal did in fact issue an "Invitation to Comment on Information" letter on 12 September 2007 pursuant to s.424A. In that letter the Tribunal indicates that it has information that would subject to any comment made by the applicant, be the reason, or part of the reason for deciding that the applicant was not entitled to a Protection visa. It then sets out the relevant pieces of information and questions each of those (CB 274-279). The applicant makes no reference in his written submissions to this letter and whether his complaint relates to the format of that letter or to other material not contained in that letter.

44. Section 424A(1) of the Act requires the Tribunal to provide an applicant with particulars of any information which would be the

reason (or part of the reason) for affirming the decision of the delegate subject to the exception contained in s.424A(3).

a) Section 424A(3)(a) excludes from the operation of sub-section (1) any information about a class of persons of which the applicant is a member. It has been held that this section includes independent country information: *Minister for Immigration & Multicultural & Indigenous Affairs v NAMW & Ors* (2004) 140 FCR 572 per Merkel and Hely JJ at [123]-[138]; *SZHWI v Minister for Immigration & Multicultural Affairs & Anor* (2007) 95 ALD 631 at [11].

b) Section 424A(3)(b) excludes from the operation of sub-section (1) any information given to the Tribunal by the applicant.

45. The Tribunal's decision was based upon:

a) the evidence given to it by the applicant;

b) independent information relating to both integers of the applicant's claim;

c) a lack of evidence;

d) inconsistencies in the applicant's evidence given during both Tribunal hearings; and

e) inconsistencies between the evidence given to the Tribunal and the applicant's written claims.

All these categories of information are exempt from the operation of s.424A(1).

46. Inconsistencies are not "information" within the meaning of s.424A(1) of the Act requiring notification: *SZBYR v Minister for Immigration & Citizenship & Anor* [2007] HCA 26 at [17]-[18]; *VAF v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 123. Consequently, none of the matters above were required to be drawn to the applicant's attention pursuant to s.424A(1) of the Act.

Ground eight

Failed to consider certain country information.

47. This claim is also made in the absence of particulars or submissions which focus on what is disputed by the applicant. Section 424(1) of the Act confers power on the Tribunal to seek additional information that is relevant to the determination of an application for review. This is a discretionary power and only requires the Tribunal to have regard to such information if it in fact seeks and subsequently obtains it: *SZIYN v Minister for Immigration & Citizenship* [2008] FCA 151 per Emmett J at [16] where his Honour states:

> *[16]… Section 424 of the Act confers power on the Tribunal to seek additional information that is relevant to the determination of an application for review. However, there is no obligation on the Tribunal to exercise that power. The only obligation is for the Tribunal to have regard to such information if in fact it seeks and obtains such information. There is otherwise no obligation on the Tribunal to conduct any independent inquiries. It is not for the Tribunal or any other decision maker to make out a review applicant's case. There is no substance in this ground.*

48. The Tribunal in its decision referred to a considerable amount of independent country information. Whether the Tribunal accepts the relevant weight given to any part of that information falls within the Tribunal's discretionary powers: *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 464 per French J at [27] where his Honour stated:

> *[24] The circumstances in this case were said to bear some analogies to circumstances in which the Tribunal has made findings relating to the genuineness of certain documents without notice to parties. Reference was made in the submissions to WACO v Minister for Immigration and Multicultural Affairs (2003) 131 FCR 511; my own judgment in WAJR v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 204 ALR 624 and related cases.*

49. There is no obligation on the Tribunal to conduct further enquiries to obtain the independent country information referred to by the applicant in his submissions. If the applicant wished for the Tribunal to consider that information then the applicant is required to obtain that

information and supply it to the Tribunal as part of his application or associated submissions.

Conclusion

50. The applicant was a self represented litigant who appeared with the assistance of a Bengali interpreter. At the first court date directions hearing the applicant was granted leave to file an amended application particularising each ground of review together with any additional affidavit material that the applicant wished to supply in support his case. The applicant failed to take this opportunity but did file written submissions which in effect raised three further grounds of review in addition to the five unparticularised grounds contained in the original review application. Unfortunately, it appears that the applicant has relied on the assistance of an unidentified third party with only limited knowledge of this jurisdiction. The original application and the written submissions contain general non particularised grounds of jurisdictional error which are commonly seen in applications to this Court but have little or no relevance to the decision that the applicant is attempting to challenge.

51. Mr Knackstredt assisted the Court with written submissions in response to each of the issues raised by the applicant and I am satisfied that the issues identified have been satisfactorily addressed. However this places an obligation on the Court to independently consider whether arguments based on the material that is the Court Book and in particular the Tribunal decision may support a claim of jurisdictional error that has not been raised by the applicant and the party assisting him. On a fair reading of the material available it is not apparent that any other ground of review exists that would suggest that the Tribunal made a jurisdictional error in its decision making process. Consequently the applicant's claim should be dismissed with costs.

I certify that the preceding fifty-one (51) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM.

Associate:

15 August 2008