FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZMOK [2009] FCAFC 83

MIGRATION – appeal from judgment of Federal Magistrate – application seeking judicial review of decision of Refugee Review Tribunal – whether Refugee Review Tribunal failed to afford the applicant procedural fairness – applicant raised new issue during Review Tribunal hearing – Refugee Review Tribunal told applicant it would consider corroborative evidence submitted after the hearing – whether s 425 of the *Migration Act 1958* (Cth) required the Refugee Review Tribunal to afford the applicant a further hearing – whether rejection of corroborative evidence by the Refugee Review Tribunal was information within the meaning of s 424A of the *Migration Act 1958* (Cth)

Migration Act 1958 (Cth) ss 29(1), 36(1), 45, 46, 47, 65, 411(1)(c), 412, 414, 415, 420(1), 422B(1), 422B(3), 423, 424, 424AA, 424A, 424B, 425, 425A, 426, 427, 429, 429A
Migration Amendment (Review Provisions) Act 2007 (Cth)

Minister for Immigration & Multicultural Affairs v Eshetu (1999) 197 CLR 611
Minister for Immigration & Multicultural & Indigenous Affairs v Lat (2006) 151 FCR 214
Re Minister for Immigration & Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57
NAFF v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 221 CLR 1
SZBEL v Minister for Immigration & Multicultural and Indigenous Affairs (2006) 228 CLR 152
SZBYR v Minister for Immigration & Citizenship (2007) 235 ALR 609
SZLLY v Minister for Immigration & Citizenship (2009) 107 ALD 352
VAAD v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 117
WACO v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 131 FCR 511
WAGU v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 912
WAJR v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 204 ALR 624

MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZMOK & ORS

NSD 86 of 2009

EMMETT, KENNY AND JACOBSON JJ
2 JULY 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 86 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
Appellant

AND: **SZMOK**
First Respondent

SZMOL
Second Respondent

REFUGEE REVIEW TRIBUNAL
Third Respondent

JUDGES: **EMMETT, KENNY AND JACOBSON JJ**
DATE OF ORDER: **2 JULY 2009**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be upheld.
2. The orders of the Federal Magistrates Court of 22 December 2008 be set aside.
3. In lieu of those orders, it be ordered in the Federal Magistrates Court that:
   a. the proceeding be dismissed; and
   b. the Applicants in the proceeding pay the First Respondent's costs of the proceeding.
4. The First and Second Respondents pay the Appellant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

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BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZMOK** **First Respondent**
	SZMOL **Second Respondent**
	REFUGEE REVIEW TRIBUNAL **Third Respondent**
JUDGES:	**EMMETT, KENNY AND JACOBSON JJ**
DATE:	**2 JULY 2009**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 This appeal is concerned with the operation of Division 4 of Part 7 of the *Migration Act 1958* (Cth) (**the Act**). Division 4 deals with the conduct of a review by the Refugee Review Tribunal (**the Tribunal**) of a protection visa decision made under the Act by the appellant, the Minister for Immigration and Citizenship (**the Minister**), or by a delegate of the Minister.

2 The first and second respondents (**the Respondents**), who are citizens of Bangladesh, arrived in Australia on 21 November 2007. On 3 December 2007, they applied for Protection (Class XA) visas under the Act. On 4 March 2008, a delegate of the Minister refused to grant the visas. On 27 March 2008, the Respondents applied to the third respondent, the Tribunal,

for review of the delegate's decisions. On 11 June 2008, the Tribunal affirmed the decisions not to grant protection visas to the Respondents.

3 On 29 July 2008, the Respondents commenced a proceeding in the Federal Magistrates Court of Australia seeking Constitutional writ relief in respect of the decision of the Tribunal. On 22 December 2008, the Federal Magistrates Court made orders setting aside the Tribunal's decision and remitting the matter to the Tribunal for determination according to law. By notice of appeal filed on 2 February 2009, the Minister appealed to the Federal Court from the orders of the Federal Magistrates Court. The Chief Justice has directed that the appeal be heard by a Full Court.

4 The second respondent is the first respondent's wife. The Respondents' protection visa application was completed on behalf of the first respondent as a person who wished to submit claims to be a refugee. The application form was completed on behalf of the second respondent as a member of the first respondent's family. She did not make a claim in her own right to be a refugee. It is convenient, therefore, to refer to the first respondent as the **Applicant**.

5 The ground on which Constitutional writ relief was claimed in the Federal Magistrates Court was that the Tribunal failed to accord the Applicant procedural fairness and failed to comply with s 422B(3) of the Act, in that the Tribunal failed to warn the Applicant that it would reject a number of documents produced to the Tribunal by the Applicant (**the Impugned Documents**). The Impugned Documents, which were said to corroborate the Applicant's claims to fear persecution in Bangladesh, were translations of what were asserted to be false charges brought against the Applicant in Bangladesh in 1995. The Tribunal found that the Impugned Documents were fabricated by the Applicant for the purposes of enhancing his application for a protection visa.

RELEVANT STATUTORY PROVISIONS

6 Under s 29(1) of the Act, the Minister may grant a non-citizen permission to travel to and enter Australia and to remain in Australia. Such permission is known as a visa. The Act provides that there are to be various classes of visas. Under s 36(1), there is a class of visas to be known as protection visas. Under s 45, a non-citizen who wants a visa must apply for a

visa of a particular class. Section 46 specifies when an application for a visa is valid. Under s 47, the Minister must consider a valid application for a visa but is not to consider an application that is not a valid application. Section 65 provides that, after considering a valid application for a visa, the Minister must, if satisfied as to specified criteria, grant the visa. If the Minister is not so satisfied, the Minister is to refuse to grant the visa.

7 Part 7 of the Act deals with the review of decisions in respect of protection visa applications. Under s 411(1)(c), which is in Part 7, a decision to refuse to grant a protection visa is an **RRT-Reviewable Decision**. Section 412 provides for the making of an application to the Tribunal for review of an RRT-Reviewable Decision. If a valid application for review is made under s 412, s 414 requires the Tribunal to review the decision. Section 415 specifies the powers and discretions that may be exercised by the Tribunal for the purposes of such a review. Section 420(1) provides that, in carrying out its functions under the Act, the Tribunal must pursue the objective of providing a mechanism of review that is **fair, just, economical, informal and quick**.

8 Against that background, Division 4 of Part 7 deals with the conduct of a review of an RRT-Reviewable Decision by the Tribunal. Division 4 consists of ss 422B to 429A. Section 422B is of particular significance in the appeal. Under s 422B(1), Division 4 is taken to be an exhaustive statement of the requirements of **the natural justice hearing rule** in relation to the matters it deals with. Under s 422B(3), the Tribunal must **act in a way that is fair and just** in applying Division 4.

9 The natural justice hearing rule referred to in s 422B(1) reflects those aspects of the requirements of procedural fairness that relate to the presentation of an applicant's claims to the Tribunal. The statement that Division 4 is to be taken to be exhaustive of those aspects of the requirements of procedural fairness in relation to the matters it deals with imports a somewhat more specific limitation upon the scope of procedural fairness than might have been the case by a global reference to the conduct of reviews by the Tribunal. Thus, the matters that Division 4 deals with are to be identified by reference to its particular provisions and not by reference to its general subject matter (see *WAJR v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 204 ALR 624 at [57]).

10 Section 422B was intended to overcome the effect of the decision of the High Court in *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. That is to say, Division 4 was intended to provide comprehensive procedural codes that contain detailed provisions for procedural fairness. However, these codes exclude the common law natural justice hearing rule in relation to the matters dealt with in Division 4. On the other hand, those aspects of the common law of natural justice that are not dealt with by Division 4, such as the bias rule, are not excluded (see *Minister for Immigration & Multicultural & Indigenous Affairs v Lat* (2006) 151 FCR 214 at [64]-[67]).

11 It is necessary, therefore, to identify the matters with which Division 4 deals. Those matters may be summarised, relevantly, as follows:

- An applicant for review may provide a statutory declaration and written arguments – s 423.
- In conducting the review, the Tribunal may get any information that it considers relevant and may invite a person to give additional information – s 424.
- The Tribunal must give to the applicant for review, by a method specified in the Act, clear particulars of certain information that the Tribunal considers would be the reason for affirming the decision under review – s 424A.
- If a person is invited under s 424 to give additional information or invited under s 424A to comment on, or respond to, information, the invitation must specify the way in which the information, comments or response are to be given – s 424B.
- Unless the Tribunal considers that it should decide the review in the applicant's favour, or the applicant consents to the Tribunal deciding the review without the applicant appearing before it, the Tribunal must invite the applicant to appear before it to give evidence and present arguments relating to **the issues arising in relation to the decision under review** – s 425.
- If the applicant is to be invited to appear before the Tribunal, the Tribunal must give the applicant, by one of the methods specified in the Act, notice of the time and place for the hearing and the notice must inform the applicant that he or she is invited to appear to give evidence and may request the Tribunal to obtain oral evidence from another person - ss 425A and 426.

- For the purposes of a review, the Tribunal may take evidence on oath or affirmation, adjourn the review from time to time, give information to the applicant and require the Secretary of the Tribunal to arrange for the conducting of investigations and medical examinations – s 427.
- The hearing of an application for review must be in private – s 429.
- The Tribunal may allow the appearance by the applicant, or the giving of evidence by the applicant, or any other person, by telephone, closed circuit television or any other means of communication – s 429A.

12 The effect of s 422B is that, in relation to the matters thus summarised, Division 4 is an exhaustive statement of the requirements of procedural fairness. Further, in exercising the powers and performing the duties described in Division 4, the Tribunal must act in a way that is fair and just.

13 The extent, if any, to which the introduction by s 422B(3) of an obligation for the Tribunal to act in a way that is fair and just impinges on the operation of s 422B(1) is not entirely clear. Section 422B(3) was introduced by the *Migration Amendment (Review Provisions) Act 2007* (Cth) (**the Amending Act**). The Explanatory Memorandum published in connection with the Bill for the Amending Act stated that the proposed s 422B(3) would ensure that, in carrying out the procedures and requirements set out in Division 4, which would continue to be an exhaustive statement of the natural justice hearing rule, the Tribunal must do so in a way that is fair and just. The Explanatory Memorandum said that that would complement s 420(1) of the Act.

14 Provisions such as those found in s 420(1) are intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law and regarded as inappropriate to Tribunals (see *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 (***Eshetu's Case***) at [49]). The direction in s 420(1) that the Tribunal pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick does not amount to a requirement that the Tribunal observe a particular procedure in connection with the making of a particular decision for the purposes of Division 4 (see *Eshetu's Case* at [108]). Thus,

s 422B(1) did not remove the exhortation of s 420(1) in respect of Division 4. Rather, s 420(1) was intended to continue to operate, notwithstanding the inclusion of s 422B(1).

15 Clearly, s 422B(1) has not been repealed by s 422B(3). Accordingly, s 422B(1) continues to exclude common law procedural fairness in relation to the matters dealt with by Division 4, except to the extent of the procedural codes set out in Division 4. Section 422B(3) may be understood as an exhortative provision in the same way as s 420(1) is an exhortative provision. Just as s 420 does not create rights or a ground of review, additional to specific rights of review that are expressly given by the Act, so s 422B(3) should not be understood as creating a procedural requirement over and beyond what is expressly provided for in Division 4 (see *Eshetu's Case* at [158]).

16 Section 424A does not require the Tribunal to put its thought processes or preliminary conclusions to an Applicant (see *SZBYR v Minister for Immigration & Citizenship* (2007) 235 ALR 609 at [18]). Further, s 422B(3) should not be construed as imposing such an obligation or requiring s 424A to be interpreted as imposing such an obligation. Section 422B(3) speaks of how the Tribunal must act in applying Division 4. It is not a free standing obligation, but simply draws content from the other provisions of Division 4.

17 Thus, s 422B(3) was not intended to qualify or cut down in any way the express statement in s 422B(1) that Division 4 contained an exhaustive statement of the application to the conduct of a review by the Tribunal of the natural justice hearing rule in relation to the matters dealt with in Division 4. In that sense, s 422B(3) complements s 420(1). The unequivocal statement in s 422B(1) of the exhaustive nature of Division 4 renders it unarguable that some other requirement of fairness are to be implied.

18 However, while the effect of s 422B(1) was to make Division 4 an exhaustive statement of the rule, there was nothing in Division 4 to indicate that any of the procedural powers contained in it were to be used fairly. Accordingly, it was possible that those powers could be used in ways that were not fair, without infringing the procedural requirements of Division 4. Section 422B(3) might therefore be understood as restoring fairness and justice as a procedural concept. In those circumstances, the requirement that the Tribunal act in a way that is fair and just does not refer to substantive notions of justice or fairness but is more usefully to be compared with the content of the words "justice" and "fairness" in the

expressions "natural justice" and "procedural fairness", respectively (see *SZLLY v Minister for Immigration & Citizenship* (2009) 107 ALD 352 at [22] to [24]).

CONDUCT OF THE REVIEW BY THE TRIBUNAL

19 The thrust of the Applicant's complaint concerning the conduct of the review by the Tribunal is that the Tribunal failed to give him an appropriate warning that it may not accept as genuine the Impugned Documents. In order to put the Tribunal's rejection of the Impugned Documents in context, it is necessary to say something about the Applicant's claims.

The Protection Visa Application

20 The Applicant claimed that he was born in 1972. He had twelve years of education and worked as a journalist from 1992 until 1995 in Bangladesh. In September 1995, he departed Bangladesh and lived in Singapore until he came to Australia in 2007. He returned to Bangladesh in March 2000 and February 2003 and again in 2004. In the course of his second visit he married the second respondent and they then returned to Singapore.

21 In response to a question in the visa application form as to why he left Bangladesh, the Applicant said:

> I experienced persecution in my country of origin for my political belief. My life was at risk. I left that country for safety of my life. In order to perform my professional responsibilities as journalist I was threatened to be killed by the BNP activities.

The Applicant then gave answers to questions about what he feared would happen to him if he went back to Bangladesh and who he thought would harm or mistreat him. In response to a question as to why those things would happen to him if he went back to Bangladesh, the Applicant said:

> I believe that I shall be harmed by the BNP thugs as they will take revenge from me… They have been trying to find opportunities to take revenge from me… Many of our political activists are in detention in relation to **false cases** filed at the time of present caretaker government. [Emphasis added]

In response to a question as to why the authorities of Bangladesh cannot and will not protect him, the Applicant said:

> The government authority is not preferring any political activists of Awami League. Rather, they are filing **false cases** against Awami League leaders and activists. [Emphasis added]

22 It is significant that in the visa application form, while the Applicant referred to "false cases" being filed against political opponents, he made no mention of any false case having been filed against him. The handwritten responses in the application form were supplemented by a typed statement of claims attached to the application form. No mention was made in the statement of claims as to any spurious proceedings against the Applicant or false cases having been commenced against him in Bangladesh.

The Delegate's Decision

23 In his decision record, the Minister's delegate who refused the protection visa applications observed that the Applicant had provided scant detail and no documentary evidence to support his claims to have been involved in student political activity as a member of the Awami League, in both Bangladesh and Singapore. The delegate observed that the Applicant claimed to have achieved a high profile in Bangladesh, which attracted harassment from opposition parties but failed to explain how that claimed high profile was achieved. The delegate was prepared to accept that the Applicant may have been a low level Awami League student activist, who at some time was the victim of harassment by an opposition political party. The delegate regarded the Applicant's stated fear of being attacked and murdered on account of his activity in the Awami League as exaggerated and unsupported by objective evidence. The delegate was not satisfied that the level of harm he claimed to have been subjected to was serious enough to amount to persecution.

24 A copy of the delegate's decision record was received by the Applicant shortly after 4 March 2008. The Applicant wrote to the Tribunal on 27 March 2008 in support of his application to the Tribunal for review of the delegate's decision. Significantly, the Applicant's letter of 27 March 2008 noted that the delegate mentioned that he had provided scant detail and no documentary evidence to support his claim. Thus, it was apparent to the Applicant that a significant reason for the delegate's decision was the lack of objective evidence to substantiate his claims.

The Application for Review

25 The Applicant's letter to the Tribunal of 27 March 2008 asserted that the Applicant had not been given any opportunity to provide documents to the delegate in support of his claims. The letter went on to say as follows:

> 1. Since caretaker government came to power the democracy no more prevails in Bangladesh. There is no right to speak, no freedom to protest against any activity of the government and no right to organise any meeting or demonstration as a defector [sic]. Marshal law exists in Bangladesh and the government is backed by the army.
> 2. Many political leaders and activists are behind bar. They are detained without any formal charge. **False cases** are filed against them. Human rights in Bangladesh are a matter of serious concerns.
> 3. The life of a political activist and journalist like me is in risk. I shall be at the attention of the authority and also at the attention of my opponent who are powerful in my area. [Emphasis added]
>
> …

Again, it is significant that, although the Applicant refers to false cases being filed against political leaders, no mention is made of a false claim against him.

26 The Tribunal wrote to the Applicant on 27 March 2008 acknowledging receipt of his application of the same day. The letter informed the Applicant that the Tribunal may invite him to attend a hearing at which he would be given the opportunity to give the Tribunal evidence to support his application. The letter said that evidence could include information or documents that the Applicant might give the Tribunal or information or documents that he might ask others to give the Tribunal. The letter said that the Applicant should immediately send to the Tribunal any documents, information or other evidence that he wanted the Tribunal to consider. The letter said that any documents not in English should be translated by a qualified translator.

27 On 10 April 2008, the Tribunal wrote to the Applicant again, saying that it had considered the material before it but was unable to make a favourable decision on that information alone. The letter invited the Applicant to appear before the Tribunal to give oral evidence and present arguments. The day appointed for the hearing was 20 May 2008.

28 On 16 May 2008, the Applicant wrote again to the Tribunal making detailed submissions in support of his application for a review. Again, the letter referred to the

conclusions of the delegate that the Applicant had not provided any documentary evidence. The letter went on to say that the Applicant was providing letters substantiating his involvement with student politics as a member of the Awami League and a letter from the editor of a newspaper as proof of his employment as a journalist. Copies of those documents were attached. The Applicant's letter asserted that those documents proved the Applicant's profile in Bangladesh as a political activist and his position as a journalist that contributed to his persecution prior to his departure from Bangladesh.

29 The Applicant's letter to the Tribunal of 16 May 2008 went on to describe events in Bangladesh after the BNP came to power in 1996 when the government's anti-Awami League attitude became prominent. The letter referred to Awami activists being killed "by BNP thugs". The letter also referred to a statement by the acting president of the Awami League deploring the filing of false cases against 60 leaders and workers in 1996. The letter went on to say that, since 2001, the government had not allowed the activists of the Awami League to seek justice "for their politically motivated cases". The letter asserted that many leaders were arrested when they tried to organise peaceful, democratic programs, rallies, processions and demonstrations. Once again, it is significant that, although the letter refers to false cases against Awami League activists, the Applicant made no mention of any false case against himself.

The Hearing before the Tribunal

30 The Applicant attended a hearing of the Tribunal on 20 May 2008. After some preliminary exchanges, the Tribunal invited the Applicant to tell the Tribunal why he did not want to go back to Bangladesh. His response was that, in 1991, he had joined the Chhatra League, the extreme wing of the Awami League. He said that, after he started organising meetings and demonstrations, the BNP noticed his activities and started making threats against him. He said that, at one stage, he was hit when he was called over to the BNP office and his eye was injured. He said that he did not consent to go to the office and that he was engaged in news reporting, during the course of which he highlighted the anti-socialist and terrorist activities of the BNP. Significantly, the Applicant made no mention of false cases having been commenced against him in Bangladesh.

31 After asking questions concerning the Applicant's activities in Singapore, the Tribunal asked the Applicant about his three visits to Bangladesh in 2000, 2003 and 2004. The Applicant said that, when he went to Bangladesh in 2000, the Awami League was in power, so he had no problems. He said that, when he went in 2003, he could not enter his local area and had to take shelter in a hotel in Dhaka. He said that the BNP people did not know he was in Bangladesh or in Dhaka so he did not have any problems in 2003. Finally, the Applicant said that there were some problems with his wife when he visited in 2004, but that after his marriage in 2003 he stayed at his in-laws' house. He said that no one knew he was there so he did not have any problems from the BNP.

32 After further questioning concerning incidents involving the Applicant's wife, the Tribunal asked the Applicant what he thought would happen if he now went back to Bangladesh. The Applicant responded that, even though he has been away for 12 years, they looked for him on a few occasions and that when they became aware that he was married they started harassing his wife and looked for him and approached his wife as well.

33 The Applicant then said:

> And just before coming to Australia, from Singapore to Australia when the caretaker government took power, I have heard about them from other sources, that they have lodged a court case against me and they have put their name, actually they have lodged cases against too many other people and they have put the name as well. I am not really certain about this but I have heard about that.

The Tribunal observed that that had not been mentioned in any of the Applicant's submissions. The Applicant responded that he had just learned about that and that is why he could not put anything in his submissions.

34 When asked when the case against him had been lodged, the Applicant replied that he did know the exact date but that it was an old case which commenced when the BNP was in power. The Tribunal then pointed out to the Applicant that he had not previously mentioned the false case to the Department or to the Tribunal and that he was introducing it then for the first time. The Tribunal said that the details were very vague and that the Tribunal may not accept the claim as being credible. The Applicant replied that he did not mention it previously because he was unable to get any documents or any proper evidence about it to support his claim. The Tribunal said that it would probably not accept the claim as credible

because the Applicant had not presented it consistently and did not have any details. The Applicant replied that he had heard about the events and was unable to get any documents "from the other end" and that is why he did not mention it. He said that, if he was able to get documents from Bangladesh, he would be happy to provide them. The Tribunal observed that the Applicant should have organised all of that before he came to the hearing and that the Tribunal was not prepared to give him time to go searching for documents.

35 The Tribunal drew the Applicant's attention to independent information concerning events in Bangladesh. The Applicant made reference to a political colleague of his who had been arrested and sentenced to 24 years imprisonment. When asked what that had to do with him, the Applicant replied that he and his colleague were at the same level and that his name "is also in there" in relation to that case. When asked why he had not mentioned that before, the Applicant said that he was not certain about the treatment or how true it was and that is why he did not mention it.

36 The Tribunal then told the Applicant that it sounded like he was making it up to enhance his application. The Applicant replied that he was not making it up and that, if the Tribunal wanted some proof or evidence in relation to the matter, he could provide it. He said that the reason why he was unable to provide all the documents or proof before was that he learned about it just after he submitted the application. He said that he had not mentioned it in his letter of 16 May 2008 because he did not have exact details.

37 The Tribunal then told the Applicant that it seemed that all of his claims were exaggerated. First, the Applicant talked about being an Awami League activist and a journalist, when in fact he has not been either of those things for a long time. Further, he had been back to Bangladesh on three occasions when nothing happened and he managed to get out of Bangladesh without harm. When invited to comment, the Applicant's response was to the effect that, when he returned, he was unable to enter his local area and stayed in Dhaka. The Tribunal asked why he could not avoid his enemies by not going back to his local area. The Applicant responded that he did not have the ability to establish a new house and that it would not happen. He then said that the president from his local area had been taken away and shot dead and that there are some cases against activists and that, if someone lodges a false case, the person is arrested and there is no bail.

38 The Tribunal referred to United States Department of State reports indicating that the current government of Bangladesh is investigating false cases and that there is a huge backlog of false cases that they are working their way through. The Tribunal said that the Department of State report indicated that bail conditions continue to apply to the majority of cases that come before the courts.

39 After a further exchange with the Tribunal, the Applicant said that the matters had not been mentioned because he was unaware of them and just learned about them. He said that, if the Tribunal would like him to get more details, he could provide the details to the Tribunal if he was granted some more time and if he was allowed to put in some more submissions. The Tribunal said that the Applicant had had enough time, having been in Australia for six months. The Applicant said that his problem was that he was unable to provide the documents regarding the false case because he learned about it very recently and was unable to obtain the details because the system in Bangladesh is not very well organised.

40 The Tribunal then observed that the false cases were presumably lodged while the BNP were in government more than a year ago. The Tribunal said that, if the false cases were made against the Applicant before January 2007, the Applicant would have heard about it by now. The Tribunal said that it was not going to give the Applicant any more time and that he had had enough time. The Tribunal said that the Applicant had had ample opportunity, both at the Department level and with the Tribunal, to provide his case fully and thoroughly. The Tribunal said that what appeared to be happening was that, when the Tribunal indicated there was some weaknesses in the Applicant's case, he wanted to bolster it up by giving new and bigger claims. The Tribunal said that the Applicant was "making it up".

41 After a further exchange, the Applicant said that, if the Tribunal would like to give him more time, he could provide the Tribunal with the documents and all the proof, which would be helpful to the Tribunal. The Tribunal then said that it would give the Applicant one week and that if the Applicant sent the Tribunal something within a week, the Tribunal would look at it. If the Applicant did not send anything within a week, the Tribunal would proceed on the information that it had. The Tribunal said that it would wait a week and then make a decision.

42 The Applicant asked for more time. The Tribunal refused to give him more than a week, saying that the Applicant had been out of Bangladesh for 12 years, that he had been in Australia for six months and that, if he wanted to provide more information in support of his case, he should have organised it in the time he had before actually lodging the application. The Tribunal then terminated the hearing.

The Impugned Documents

43 On 2 June 2008, the Applicant wrote to the Tribunal. After referring to the hearing before the Tribunal, the Applicant's letter relevantly said:

> I brought an issue at the time of hearing which amounts to persecution. The fact is that a false case was filed against me which was politically motivated. You advised me to give evidence of that case. Please find attached the translated copy of the case filed against me for your information. I request your Honour to take into consideration of my fear of persecution at the time of decision and look into my case…

44 The enclosures with the letter consisted of the Impugned Documents. The Impugned Documents are in English and are stated to be "Translated True Copy". The Applicant's name appears in some of the Impugned Documents. It is by no means clear what charges are said to have been brought against the Applicant by the Impugned Documents.

The Tribunal's Findings and Reasons

45 In the Findings and Reasons section of its Decision Record, the Tribunal, after referring to the Applicant's claims, said that it was not satisfied that the Applicant provided a truthful account of his circumstances and was not satisfied as to the Applicant's general credibility. The Tribunal formed the view that the Applicant had greatly exaggerated the risk of harm that he faces in Bangladesh because of his political opinion and his work as a journalist. The Tribunal said that it had formed the view that the Applicant had fabricated his core claims to enhance his protection visa application.

46 The Tribunal then said that it did not accept as credible the Applicant's claim that there is a false case pending against him in Bangladesh. The Tribunal observed that the Applicant introduced that claim at the hearing and had very limited details regarding the case. The Tribunal recorded that the Applicant said that he only heard about it recently and did not

mention it before because he did not have evidence to support the claim. The Tribunal said that the Applicant submitted a series of documents after the hearing indicating that a complaint had been issued against him in 1995 and that a case against him was proceeding in Bangladesh. The Tribunal considered that it was implausible that a case could have been lodged or pending against the Applicant in Bangladesh but that he did not mention it until the hearing because he did not have evidence to support the claim.

47 The Tribunal considered that it would have been obvious to the Applicant, in seeking refugee status in Australia, that a politically motivated false case against him was a relevant consideration. The Tribunal considered that, if the Applicant had such a case pending against him, he would have mentioned it in his lengthy statements to the Tribunal prior to the hearing and would have made some effort to find out more about the case before the hearing. The Tribunal considered that the Applicant had fabricated the claim at the hearing to enhance his protection visa application. The Tribunal therefore did not accept as credible the Applicant's claim that a false case is pending against him in Bangladesh.

48 The Tribunal said that it had considered the Impugned Documents but that, in view of its finding that the Applicant's claims lack credibility, the Tribunal was not satisfied that the Impugned Documents were genuine. The Tribunal considered that there was no case against the Applicant in Bangladesh and found that there could be no genuine documents relating to such a case. The Tribunal therefore found that the Impugned Documents were fabricated by the Applicant to enhance his protection visa application. The Tribunal did not accept as credible the Applicant's claim that the case mentioned in the Impugned Documents exists. The Tribunal did not accept as genuine the Applicant's claim that he is a person of interest to the authorities or government in Bangladesh because a politically motivated false case is pending against him. The Tribunal was not satisfied that the Impugned Documents were genuine.

49 The Tribunal then referred to other aspects of the Applicant's claims, including claims that the current government is targeting members of the Awami League. The Tribunal was satisfied that the current government of Bangladesh is not targeting Awami League members or demonstrating any preference for the BNP. The Tribunal found that the Applicant had greatly exaggerated the risks he currently faces in Bangladesh from political opponents and

the authorities. The Tribunal observed that the Applicant had been able to return to Bangladesh in 2003 and 2004 without any apparent interest from the BNP or the authorities, at a time when the BNP was in power. The Tribunal found that conditions in Bangladesh had improved since the caretaker government came to power and that the political targeting that was prevalent under the BNP and Awami League governments had decreased significantly.

50 The Tribunal concluded that, despite the restrictions imposed by the current government with regard to political activity in Bangladesh, Awami League members and supporters of political parties have been able to express their political opinion during the state of emergency that was imposed by the current government to curb political violence. The Tribunal found that restrictions have gradually been lifted by the government and the Tribunal was satisfied that the Applicant can, both currently and in the reasonably foreseeable future, express his political views in Bangladesh without adverse interest from the government. The Tribunal concluded that the Applicant does not have a well founded fear of persecution in Bangladesh for reasons of political opinion or any other reason under the Refugees Convention.

THE FEDERAL MAGISTRATES COURT

51 In the Federal Magistrates Court, the Respondents claimed Constitutional writ relief in respect of the decision of the Tribunal on the ground that the Tribunal failed to accord the Applicant procedural fairness and failed to comply with s 422B(3) of the Act. The Respondents complained that, in circumstances where the Impugned Documents were corroborative of the Applicant's case, the Tribunal failed to warn the Applicant that it would reject the Impugned Documents as having been fabricated by the Applicant for the purposes of his claim to be a refugee.

52 The primary judge referred extensively to the decision of the Full Court in *WACO v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 131 FCR 511 (***WACO's Case***) and the decision of French J in *WAGU v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 912 (***WAGU's Case***), on which the Applicant relied. Each of *WACO's Case* and *WAGU's Case* involved the rejection of documentary evidence proffered to the Tribunal by an applicant.

53 The primary judge considered that, while it seemed to be clear, from the exchanges between the Applicant and the Tribunal summarised above, that the Tribunal had considerable doubts about the existence of a false case against the Applicant, the Applicant was trying to provide an explanation for why that matter had not been raised earlier. His Honour formulated the question of whether the failure to provide any of that information before "poison[ed] the well of credibility beyond redemption" or whether the Tribunal "over-reached" itself in making a firm finding that the Impugned Documents were fabricated, rather than giving the Impugned Documents no weight, because of the lateness of their introduction.

54 His Honour observed that, if the Applicant's credibility had not been irrevocably compromised by his previous testimony, he would be entitled to the procedural protection of s 424A, or s 424AA, because to provide it would be just and fair. That appears to be a reference to s 422B(3). His Honour observed that the Tribunal's statement, that it had formed the view that no case had been brought against the Applicant and that there could be no genuine documents relating to such a case, appeared to indicate that:

> …the well had been poisoned before the Tribunal saw the documents because of the lateness of the introduction of this claim and the unsatisfactory nature of the Applicant's explanations.

55 The primary judge then referred to the final exchange between the Applicant and the Tribunal, when the Tribunal gave the Applicant a further week to provide documents, and observed that the tenor of that exchange indicated that the Tribunal had come to a particular view about the Applicant's credibility in relation to the false charges and that, while it agreed to allow the Applicant a short further period of time in which to produce the documents, and agreed to look at them when they were produced, it was unlikely that they would have any convincing effect. His Honour did not consider that the Tribunal's statements indicated a closed mind to the Impugned Documents.

56 Nevertheless, the primary judge was concerned that, having concluded that the Impugned Documents were forgeries, the Tribunal had taken no steps to give notice under s 424A or to reconvene the hearing under s 425. His Honour concluded that the giving of notice under s 424A to the Applicant or reconstituting the hearing under s 425 "would have been consistent with" the decisions in *WACO's Case* and *WAGU's Case*.

57 His Honour considered that, if the Tribunal believed that the late reference to false charges pushed its view of the Applicant's credibility from tolerance of exaggeration to clear disbelief, it could have said so, without making the further finding that the Impugned Documents were fabricated. His Honour also considered that, "once it determined to go there", the Tribunal was obliged "to act fairly" and put the matter to the Applicant. While his Honour accepted that others may take the view that "the well had been poisoned", his Honour concluded that the Applicant was entitled to Constitutional writ relief setting aside the Tribunal's decision.

THE APPEAL

58 The grounds of appeal may be summarised as follows:

- The primary judge erred in relying on *WACO's Case*, which has no application since it is based on common law procedural fairness, which does not apply, because of s 422B(1).
- Section 422B(3) does not affect the operation of s 424A and the primary judge erred in so finding.
- Section 422B(3) did not create an obligation on the Tribunal to inform the Applicant that it may find the Impugned Documents were fabricated and the primary judge erred in so concluding.
- The primary judge erred in concluding there was a breach of procedural fairness because the Applicant was sufficiently alerted to the Tribunal's concerns about the Applicant's claim to be the subject of false charges.

Some Relevant Principles

59 A finding that documents are not genuine might, in a particular case, depend upon factors external to the documents. Thus, direct evidence that a document is a forgery will not always be necessary. Further, it is not an error of law for the Tribunal to reject corroborative evidence on the basis of its view of an appellant's credit (see *WACO's Case* at [41]).

60 Where it is clear that factual matters are in dispute, it will not be necessary for the decision maker to indicate to the person affected that the decision maker is likely to reach an

adverse conclusion. However, where a decision maker intends to reject an application for some reason that is personal to the applicant, it may be necessary to give notice to that applicant that the decision maker had formed a view adverse to the applicant, so as to afford the applicant the opportunity to put to the decision maker arguments or evidence to the contrary. On the other hand, there is no unfairness where a person affected knows what he is required to prove to the decision maker and is given the opportunity to do so. An applicant cannot complain if his application is rejected because the decision-maker, without notice to him, rejects what he puts forward (*WACO's Case* at [46]).

61 Nevertheless, fairness may require that, before a finding of forgery is made, the person accused of forgery be given the opportunity of answering the accusation. A finding of forgery, like a finding of fraud, is not one that should be lightly made. Both involve serious allegations. A finding that documents are forgeries could turn upon the credit of an applicant in so far as the finding is that the documents have been concocted by that applicant to advance his case (*WACO's Case* at [53]).

62 Under s 425, an Applicant is to be invited to give evidence and present arguments relating to **the issues arising in relation to the decision under review**. Those issues will not be sufficiently identified in every case by describing them simply as whether the Applicant is entitled to a protection visa. The issues arising in relation to a decision under review are to be identified having regard, not only to the fact that the Tribunal may exercise all the powers and discretions conferred by the Act on the original decision-maker, namely the Minister's delegate, but also to the fact that the Tribunal is to review the particular decision for which the decision-maker will have given reasons. The Tribunal will not be confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal (see *SZBEL v Minister for Immigration & Multicultural and Indigenous Affairs* (2006) 228 CLR 152 (***SZBEL's Case***) at [33] to [35]).

63 However, if the Tribunal takes no step to identify some issues other than those that the delegate considered dispositive, and does not tell an applicant what that other issue is, that applicant is entitled to assume that the issues the delegate considered dispositive are the issues arising in relation to the decision under review. On review by the Tribunal, the issues

arising in relation to the decision under review would be those that the original decision maker identified as determinative against the relevant applicant, unless some other additional issues are identified by the Tribunal, as they may be. If the Tribunal invites an Applicant to appear and says nothing about a matter on the basis of which the Tribunal decides against the Applicant, then it would not have complied with s 425 and the Applicant would not have been accorded procedural fairness (see *SZBEL's Case* at [37]).

64 There may well be cases where the Tribunal's questions during a hearing sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. Such an indication may be given in many ways. It is not necessary for the Tribunal to put to an applicant, in so many words, that the applicant is lying or that the applicant may not be accepted as a witness of truth or that the applicant may be thought to be embellishing the account that is given of certain events. The Tribunal is not to adopt the position of a contradictor. However, where there are specific aspects of an applicant's account that the Tribunal considers may be important to the decision and may be open to doubt, the Tribunal must at least ask that applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted (*SZBEL's Case* at [47]). Nevertheless, procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. To adopt such a course could run a serious risk of conveying an impression of prejudgment (*SZBEL's Case* at [48]).

65 Where the Tribunal indicates to an applicant, in the course of a hearing, that the purposes of the review had not been completely fulfilled, such that the Tribunal considered that procedural fairness required some further steps to be taken, there may well be procedural unfairness if the Tribunal then fails to take those steps. Thus, where the Tribunal informs an applicant that, because of inconsistencies in the applicant's statements, the applicant may not be accepted as a credible witness or a witness of truth, and the Tribunal tells the applicant that it will write to the applicant affording the applicant the opportunity of commenting on the inconsistencies, the review will not be complete. In circumstances where the Tribunal fails to do so, there will be a denial of procedural fairness (see *NAFF v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 221 CLR 1 (***NAFF's Case***) at [32]).

66 In some circumstances, it may be necessary for an unsuccessful applicant for review to file evidence about what steps would, or at least could, have been taken if the alleged breach of procedural unfairness had not occurred. That would not apply where the procedural unfairness resulted from failure to give the applicant the opportunity of commenting on inconsistencies that caused concern to the Tribunal. In such a case, the applicant would not be able to file an affidavit stating what answers would have been given to particular questions without knowing what the questions would have been (see *NAFF's Case* at [32] to [34]).

67 Where the remarks of the Tribunal reveal that the Tribunal thought that the applicant's cause might be retrieved, or at least aided, by an explanation of the inconsistencies in the applicant's evidence that were of concern to the Tribunal, the Tribunal must be taken to have considered that it was not possible fairly to conclude the review adversely to the applicant without giving the applicant the opportunity of commenting on the inconsistencies (see *NAFF's Case* at [41]).

68 While the Tribunal has a duty to raise clearly with an applicant the critical issues on which a review may depend, there is no general rule that the Tribunal cannot make a finding that a document is not genuine without specifically referring to its concerns about the document. The circumstances may be such that the Tribunal had sufficiently alerted an applicant to the doubts it had about the genuineness of all documents that the applicant had submitted. While a finding of forgery should not be lightly made, the circumstances of a particular case may be such that it would be unnecessary to afford a person affected by such a conclusion the opportunity of dealing with it. The decision of the Full Court in *WACO's Case* turned upon the application of well known and established principles to the particular and peculiar circumstances of that case (*VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [64]). *WACO's Case* does not establish any new principle.

The Present Case

69 The Applicant contended that s 425 of the Act required the Tribunal to afford him a further hearing. However, in the present case, it is clear that the Tribunal had formed the view that the Applicant was an unreliable witness and that the failure to advert to the alleged

false charge against him, except during the course of the hearing, demonstrated that his claim was a fabrication. In the light of the exchanges that took place between the Applicant and the Tribunal at the hearing, there was no failure on the part of the Tribunal to abide by the procedural code set out in Division 4, in not accepting the Impugned Documents as corroborating any part of the Applicant's claim to fear persecution in Bangladesh.

70 In the present case, it was not suggested by the Tribunal that any documents provided by the Applicant might retrieve his position. Further, nothing was said by the Tribunal to indicate that it could not conclude the review adversely to the Applicant without giving him a further opportunity to prove the authenticity of any documents he might provide. The Tribunal was extremely reluctant to give the Applicant further time to provide documents. The Tribunal simply said that it would consider any documents provided, and it did so.

71 The thrust of the conclusion reached by the primary judge was that there was something unfair or unjust on the part of the Tribunal because, having allowed the Applicant the opportunity of providing additional documents, it did not afford the Applicant the opportunity of responding to the Tribunal's conclusion that the Impugned Documents were fabrications. However, having regard to the way in which the Tribunal conducted the hearing, in circumstances where there was a total absence of any suggestion of false charges on the part of the Applicant before the hearing, there was nothing unfair or unjust about the way in which the Tribunal acted in applying Division 4.

72 The Applicant was aware that the Tribunal was concerned by the absence of documentary evidence to support his claim. The Tribunal had informed the Applicant that it was unable to make a favourable decision on the information that had been provided to it by the Applicant. Further, the Tribunal invited the Applicant to provide any documents that he wanted the Tribunal to consider. When the Applicant was invited at the hearing to tell the Tribunal why he did not want to go back to Bangladesh, he made no mention of false charges against him. Accordingly, when the Applicant subsequently alleged that, before coming to Australia from Singapore, he had heard about a court case being lodged against him in Bangladesh, the Tribunal was understandably doubtful: the Applicant had not previously mentioned such a case, either in his application for a protection visa or in his submissions to the Tribunal.

73 The Tribunal made it abundantly clear to the Applicant that it did not believe the very late claim that he was then making. The Tribunal was at first reluctant to give the Applicant time to provide further material, because it was of the view that the Applicant had made up the claim as he went along. It must have been abundantly clear to the Applicant that, even if some documents were provided, the Tribunal may not accept them.

74 In the circumstances of the present case, the Tribunal had given the Applicant the opportunity to give evidence and present arguments relating to the issues in relation to the decision under review. There was not an issue as to the authenticity of the Impugned Documents that were subsequently provided to the Tribunal by the Applicant. While there may have been an issue, raised by the Applicant in the course of the hearing, as to whether there was false charge brought against him in Bangladesh, he had been given ample opportunity to give evidence and present arguments relating to that issue, as the Tribunal pointed out to him at the hearing. The Tribunal did not believe him. There was no failure to comply with s 425. Further, the rejection by the Tribunal of the subsequently provided documents was not information within s 424A. There was no failure to comply with s 424A. There was no failure to comply with the provisions of Division 4 in the Tribunal's conduct of the review of the delegate's decision.

75 There was nothing unfair or unjust in the way in which the Tribunal applied Division 4 in its conduct of the review of the delegate's decision. It follows that the primary judge erred in concluding that the Tribunal had committed jurisdictional error in dealing with the review.

CONCLUSION

76 The appeal should be upheld, the orders made by the Federal Magistrates Court should be set aside. In lieu of those orders, there should be an order that the application for Constitutional writ relief be dismissed and that the Respondents pay the Minister's costs of the proceeding in the Federal Magistrates Court. The Respondents should pay the Minister's costs of the appeal.

I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable

Justices Emmett, Kenny, Jacobson.

Associate:

Dated: 2 July 2009

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Date of Judgment:	2 July 2009