FEDERAL MAGISTRATES COURT OF AUSTRALIA

WZANF v MINISTER FOR IMMIGRATION & ANOR *[2010] FMCA 110*

MIGRATION – Protection visa – Turkish national of Armenian descent – alleged failure to properly consider the claim – whether failure to consider relevant evidence – whether failure to properly consider probative value of relevant documents – whether bias – whether failure to inquire – whether failure to give particulars of information and invitation to comment on particulars – whether failure to inform of lack of genuineness of documents a failure to invite to appear and give evidence and present arguments – whether identification of a wrong issue.

WORDS AND PHRASES – "purport" – "authenticity" – "authentic" – "verify".

Evidence Act 1995 (Cth), ss.48(1)(b)(i) & (4)(a), 49, 51, 142, 190(3) Dictionary, Pt 2, cl.5(c)
Federal Court Rules 1976 (Cth), O 40, rr.9 and 11, O 49 sub-r.4(3) and (4)
Migration Act 1958 (Cth), ss.36, 65, 414, 420(1) & (2)(a), 424A, 424A(3)(b), 425, 427(1)(d), 476
Migration Amendment Regulations 2008 (No 5) (Cth)
Migration Regulations 1994 (Cth), Schedule 2, Parts 785.221 and 866.221

Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 16
Festa v R (2001) 208 CLR 593; [2001] HCA 72
Lewis v Nortex Pty Ltd (In Liq) [2002] NSWSC 337
Minister for Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123; [2009] HCA 39
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507; [2001] HCA 17
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30
MZXBQ v Minister for Immigration and Citizenship & Anor (2008) 166 FCR 483; [2008] FCA 319
NBKT v Minister for Immigration and Multicultural Affairs (2006) 156 FCR 419; [2006] FCAFC 195
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476; [2003] HCA 2
Re Refugee Tribunal; Ex parte H (2001) 179 ALR 425; [2001] HCA 28
Smith v R (2001) 206 CLR 650; [2001] HCA 50
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152; [2006] HCA 63
SZDGC v Minister for Immigration and Citizenship (2008) 105 ALD 25;

[2008] FCA 1638
SZHKA v Minister for Immigration and Citizenship (2008) 249 ALR 58; [2008] FCAFC 138
WACO v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 511; [2003] FCAFC 171
WAJR v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 204 ALR 624; [2004] FCA 106
W148/00A v Minister for Immigration and Multicultural Affairs (2001) 185 ALR 703; [2001] FCA 679

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Applicant:	WZANF
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	PEG 130 of 2008
Judgment of:	Lucev FM
Hearing date:	5 December 2008
Date of Last Submission:	5 December 2008
Delivered at:	Perth
Delivered on:	24 February 2010

REPRESENTATION

Counsel for the Applicant:	Mr RL Hooker
Solicitors for the Applicant:	SCALES Community Legal Centre
Counsel for the Respondents:	Ms LB Price
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) That the application be upheld.

(2) That a writ of certiorari issue directing the second respondent to quash the decision made by it in relation to the applicant and handed down on 24 July 2008.

(3) That a writ of mandamus issue directing the second respondent to determine according to law the applicant's application dated 15 February 2008 to the second respondent for review of the Delegate's Decision of 6 February 2008.

(4) That a writ of prohibition issue directed to the first respondent preventing the first respondent from acting on the Delegate's Decision of 6 February 2008 to refuse a protection visa to the applicant.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT PERTH

PEG 130 of 2008

WZANF
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. Under s.476 of the *Migration Act 1958* (Cth)[1] the applicant seeks judicial review of the Refugee Review Tribunal's[2] decision[3] to affirm a decision of a delegate[4] of the first respondent[5] not to grant the applicant a protection (Class XA) visa.[6]

Protection visa application

2. The applicant was born in Turkey and is of Armenian ethnicity.[7] On 13 November 2005 the applicant arrived in Australia on a student visa.[8] On 19 November 2007 the applicant applied for a protection visa.[9]

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[1] "*Migration Act*".
[2] "Tribunal".
[3] Court Book ("CB") 215-227 ("Tribunal Decision").
[4] CB 64-76: "Delegate's Decision" and "the Delegate" respectively.
[5] "the Minister".
[6] "protection visa".
[7] CB 13.

3. The applicant made the following claims in his protection visa application:

a) Armenians have problems expressing their ethnic identity in Turkey and are ostracised;

b) his family has experienced problems expressing their Armenian identity for generations and have hidden their identity;

c) in 2002/2003 he started privately studying about ethnic minorities who have been suppressed in Turkey;

d) he began researching and writing about the genocide of the Armenians in Turkey in order to reveal the truth about the Armenian genocide and to show the unfairness in the way Turkey has treated his ancestors;[10]

e) his family members told him not to do the Research;

f) he went to the State Archives in Istanbul to begin the Research and told the people at the university archives about the Research;

g) whilst in Istanbul he was followed and questioned by the police on two occasions about the Research:

i) the first time he was questioned at the Istanbul University in June or July 2002 as to what he was doing; and

ii) the second time, also in the summer of 2002, he was taken to the police station for a few hours where he was interrogated, verbally abused and physically mistreated by being pushed around, and punched in the head;

h) he subsequently received threatening phone calls;

i) he set up an organisation[11] in January 2004 to research the generations that went through the Armenian genocide, and the Organisation consisted, he says, at that time, of four other members, whom he names;

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[8] CB 32-33.
[9] CB 1-43.
[10] "the Research".
[11] "the Organisation".

j) in late 2004 as part of the Research, he and the other members of the Organisation visited the Mayor and the Governor of a town[12] named in the protection visa application to research the ethnic demography of the population of the Town;

k) he says the Mayor and the Governor of the Town did not make the Organisation welcome and told Organisation members they were traitors and were trying to divide Turkey;

l) he began visiting Armenian families and neighbourhoods in the Town in an attempt to locate Armenian families still living there;

m) a radio interview was arranged in the Town but he claims that police cut the interview short;

n) a "Genocide Conference"[13] to be held in the Town on World Human Rights Day, 10 December 2004 was organised by the Organisation;

o) on the day of the Conference:

    i) a number of police officers arrived at the Conference and advised him that he was required to obtain permission to run the event; and

    ii) people began arriving at the Conference and began shouting and attacking the organisers;

p) the police subsequently took him to the police station and put him into an isolated room where he alleges they:

    i) ripped his clothes, and gave him new clothes when he left;

    ii) left him in a dark room for three days;

    iii) did not permit him to speak to his family;

    iv) put another person who had been tortured into the room with him;

[12] "the Town".
[13] "the Conference".

v) beat him with a baton, broke his tooth, split his forehead and bruised his body; and

vi) treated him like an animal, throwing food and water in front of him, and threatened that they could kill him and report that he had hit his head against the wall;

q) says however that the police did not seriously interrogate him but tried to intimidate him to prevent him from doing the Research;

r) after his release, he was charged with provoking people to divide Turkey, undermining law and order, hindering the police, organising a meeting without permission and establishing an illegal organisation, but he was not subject to any bail conditions;

s) he then decided to conduct the Research based on sources outside Turkey, so he applied for a student visa to come to Australia to study and improve his English so that he could better understand the information;

t) an active member[14] of the Organisation was murdered in 2005 and he suspects that he was killed by the government;

u) he arrived in Australia on 13 November 2005 on a student visa valid until 7 August 2006;

v) he returned to Turkey on 23 July 2006 for a hearing in relation to the charges made against him which hearing was adjourned;

w) he subsequently travelled around:

i) visiting Georgia, where there is an Armenian community, for one day to conduct research; and

ii) visiting Azerbaijan to conduct research and to visit his parents and a brother (who had shifted there in 1997 for business reasons),

[14] "the Dead Person".

and returned to Australia on 8 October 2006 (having obtained, whilst in Turkey, a new visa valid from 3 October 2006 to 14 November 2007);

x) he did not return to Turkey for his final hearing in August 2007 because he thought he would be exonerated;

y) two or three months prior to making his protection visa application he rang his brother living in Turkey and was told that he had been convicted and sentenced to two and a half years prison; and

z) he now fears that if he returns to Turkey he will be killed by unknown people, the state, or secret powers within the state or imprisoned by the state.[15]

Delegate's Decision

4. On 6 February 2008 the Delegate refused to grant the applicant a protection visa. The Delegate found the applicant's claims that he would be subject to serious harm amounting to persecution implausible.[16] The Delegate refused to grant a protection visa on the basis that the Delegate was not satisfied that the applicant was owed protection obligations for the purposes of s.36 of the *Migration Act* and Parts 866.221 or 785.221 of Schedule 2 of the *Migration Regulations 1994* (Cth).[17]

Review application in the Tribunal

Application and Invitation

5. The applicant filed an application for a review of the Delegate's Decision on 15 February 2008.[18] The Tribunal invited the applicant to

[15] CB 40-42 ("November 2007 Statutory Declaration").
[16] CB 75.
[17] "*Migration Regulations*". Part 785 was repealed in August 2008: *Migration Amendment Regulations 2008 (No 5)* (Cth), but applies in this case.
[18] CB 80-83.

attend a hearing before the Tribunal on 10 April 2008 to give oral evidence and present arguments, and the applicant did so.[19]

Section 424A invitation and response

6. After the hearing, on 19 May 2008, the Tribunal wrote to the applicant in accordance with section 424A of the *Migration Act* inviting him to comment on adverse information.[20]

7. The s.424A Letter sought the following information for the reasons stated:

> *The particulars of the information are:*
>
> - *The information is that although you arrived in Australia in November 2005 you did not apply for a protection visa until November 2007.*
>
> *This information is relevant because it indicates that you did not fear persecution.*
>
> - *The information also is that in your student visa applications you said you were not the subject of any outstanding criminal charges.*
>
> *This information is relevant because it contradicts your protection claims and reflects on your credibility.*
>
> *You are invited to provide further information:*
>
> - *The original of the … newspaper dated 13 December 2004.*[21]

8. The applicant provided a further statutory declaration dated 26 May 2008 in response to the s.424A Letter.[22] He also provided an additional letter purportedly from the Dead Person's mother[23] which stated that all other members of the applicant's Organisation were in jail and that she feared he may be killed like her son.

9. In the May 2008 Statutory Declaration the applicant also advised that:

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[19] CB 87.
[20] CB 141-142 ("s.424A Letter").
[21] CB 141.
[22] "May 2008 Statutory Declaration"; CB 144.
[23] "Dead Person's Mother" and "Dead Person's Mother's Letter" respectively. A copy of the Dead Person's Mother's Letter is at CB 185-186 with an English translation at CB 189.

a) he did not have the original of a newspaper article which had been provided to the Tribunal in relation to events surrounding the Conference;[24]

b) his brother had obtained the copy of the Newspaper Article for him from the offices of the Newspaper, after the applicant made his protection visa application, and that his brother did not obtain the original;

c) after making the protection visa application the applicant "*specifically asked … [his brother] if he could get the original,*" and his brother "*told me he could not get the original because it was in the archives and he could not get it even if he paid money for it.*"[25]

Tribunal Decision

10. On 30 June 2008 the Tribunal affirmed the decision of the Delegate not to grant the applicant a protection visa.[26]

11. The Tribunal rejected the claims that the applicant and his friends (who were alleged to be members of the Organisation) were attacked at the Conference or arrested and tortured by the police. Nor did it accept that he had been charged, convicted and sentenced.[27] The Tribunal was not satisfied as to the authenticity of the documents submitted by the applicant and did not accept the applicant's explanation as to why he did not have certain court documents in relation to his conviction and sentencing.

Grounds of application and orders and relief sought

12. The grounds of the applicant's application to this Court seeking review of the Tribunal Decision are that the Tribunal:

(1) Failed properly to undertake a review of the decision of the First Respondent's delegate as required by s.414 of the Migration Act 1958 (Cth).

[24] "Newspaper Article"; and the newspaper is hereafter "Newspaper".
[25] May 2008 Statutory Declaration, para.4.
[26] Tribunal Decision; CB 215-227
[27] CB 225-226.

Particulars

a) The Tribunal failed properly to evaluate the evidence of the Applicant in light of its finding (based on unchallenged evidence) that the Applicant was suffering from Post Traumatic Stress Disorder.

b) In finding, specifically, that the Applicant had not conducted research into the Armenian genocide in Turkey, the Tribunal failed to take account of the Applicant's evidence that his writings had been confiscated by the police.

c) The Tribunal failed properly to consider the reliability and potential probative value of the following relevant documents:

i) Turkish court and prosecutor's documents evidencing the Applicant's charge and subsequent conviction in Turkey for offences related to his activities connected with researching the Armenian genocide and setting up an associated organisation, the … [Organisation];

ii) the Constitution of the … [Organisation];

iii) a newspaper report from [paper named], the [Town] Weekly [Newspaper], dated 13 December 2004, concerning the conference attempted to be convened by the Applicant and other members of his [Organisation];

iv) a letter from the mother of … [the Dead Person], a Kurdish/Armenian who was targeted and ultimately killed for his involvement in the … [Organisation].

d) The Tribunal failed to undertake any investigation or inquiry into the factual matters associated with particulars (a)–(c) above.

e) The Tribunal approached its assessment of the nature and credibility of the Applicant's claim on the premise that the conduct he asserted was "naïve", a consideration which was irrelevant to whether he had a well-founded fear of persecution for a Convention-based ground.

(2) Acted with ostensible or apprehended bias, in that a fair-minded lay observer might reasonably apprehend that the Tribunal might not have brought an impartial mind to its process of satisfaction pursuant to ss.36 and 65 of the Act.

Particulars

The Particulars to Ground 1 are repeated.

(3) In purporting to comply with s.424A of the Act, failed to give notice to the Applicant of certain information, within the scope of that section, as being reasons for affirming the decision under review, ensuring that the Applicant understood why it was relevant to the review, and inviting him to comment on it. That information was the reliability and potential probative value of the following relevant documents:

a) Turkish court and prosecutor's documents evidencing the applicant's charge and subsequent conviction in Turkey for offences related to his activities connected with researching the Armenian genocide and setting up an associated organisation, the [Organisation];

b) The Constitution of the [Organisation];

c) A newspaper report from [paper named], the [Town] Weekly [Newspaper] dated 13 December 2004, concerning the conference attempted to be convened by the Applicant and other members of … [the Organisation];

d) a letter from the mother of … [the Dead Person], a Kurdish/Armenian who was targeted and ultimately killed for his involvement in the … [Organisation].

(4) In concluding that there was not a real chance of the Applicant becoming active or vocal on this issue of the Armenian genocide in Turkey in the reasonably foreseeable future, the Tribunal failed to ask the correct question for the purpose of its statutory task, namely whether it was satisfied that the Applicant was a person to whom Australia owes protection obligations.

13. At the hearing on 5 December 2008 the applicant was granted leave to amend his grounds of appeal to include a new ground of appeal which effectively claims a breach of s.425 of the *Migration Act.*[28]

> *4. Further or alternatively to ground 3, failed to invite the Applicant to give evidence and present arguments relating to certain particular issues arising in relation to the decision under review, namely the reliability and potential probative value of the documents particularised at ground 3(a)–(d), breached s.425 of the Act and thereby committed jurisdictional error.*

Jurisdictional error

14. A decision of the Tribunal is only liable to be set aside upon review if it involves jurisdictional error.[29] An error by the Tribunal will only constitute jurisdictional error if the Tribunal:

a) identifies a wrong issue;

b) asks the wrong question;

c) ignores relevant material; or

d) relies on irrelevant material,

in such a way that the Tribunal's exercise or purported exercise of power is thereby affected resulting in a decision exceeding or failing to exercise the authority or powers given under the relevant statute.[30]

Consideration of grounds of application

Ground 1 - failure to properly undertake a review under s.414

15. Section 414 of the *Migration Act* relevantly provides as follows:

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[28] Transcript at 5. This became the new ground 4: the old ground 4 is now ground 5 of the Application.
[29] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 506 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2 at para.76 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
[30] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 per McHugh, Gummow and Hayne JJ; [2001] HCA 30 at para.82 per McHugh, Gummow and Hayne JJ.

> *(1) Subject to subsection (2), if a valid application is made under section 412 for review of an RRT-reviewable decision, the Tribunal must review the decision.*

16. The role of the Tribunal in conducting a review under s.414(1) of the *Migration Act* is assessing whether the applicant would have a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion if returned to Turkey.[31]

17. The Tribunal ultimately found:

> *"61. The Tribunal does not accept that the applicant experienced persecution due to his ethnicity (or religious background, since Armenians are historically Christians) or political opinion, or that he fears persecution in Turkey due to these reasons. As a general matter, the fact that the applicant did not make a protection visa until quite a long time after his arrival in Australia was not satisfactorily explained. The applicant claimed a history of mistreatment of himself and his family and that he was charged with a political crime, outstanding the whole time he was in Australia. If such charges were real there would be no basis for him to expect an acquittal. The applicant's failure to make a protection claim earlier is an indication that he did not experience or fear persecution."*[32]
>
> and
>
> *"71. The Tribunal is not satisfied that the applicant faces a real chance of persecution in Turkey due to his ethnicity, religious background or political opinion. The Tribunal is not satisfied that the applicant has a well-founded fear of persecution within the meaning of the Convention."*[33]

18. On the face of it there was a review as contemplated by s.414 of the *Migration Act*. However, the applicant says that it was not such a review when regard is had to the matters particularised under ground one which are dealt with hereunder.

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[31] *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16 at para.41 per Lee J (with whom Tamberlin J agreed: para.108) ("*Applicant M164/2002*").
[32] CB 225.
[33] CB 226.

Ground 1 – particular (a) – evaluation of evidence of applicant's PTSD

19. It is alleged that the Tribunal failed to properly evaluate the evidence of the applicant in light of a finding (based on unchallenged evidence) that the applicant was suffering from post traumatic stress disorder.[34]

20. The applicant provided to the Tribunal:

    a) a report from a Trauma Counsellor/Advocate,[35] Pearl Proud, from the Association for Services to Torture and Trauma Survivors Inc,[36] dated 4 April 2008 stating that the applicant had been referred to a psychiatrist; and

    b) a consultant psychiatrist's report dated 4 April 2008.[37]

Trauma Counsellor's Report

21. The Trauma Counsellor's Report sets out the applicant's presentation (as at approximately December 2007) as being one:

> *"…in need of intervention due to his prevailing PTSD symptoms with Suicide Ideation. [The applicant] outlined his past experiences of torture and trauma … he suffered in Turkey, his country of origin, due to his status [as] part of the Armenian ethnic minority. He was forced to flee Turkey, leaving behind his parents, two brothers, grandparents and extended family."*[38]

22. The Trauma Counsellor referred the applicant to a consultant psychiatrist because of his suicide ideation which she asserted:

> *"..comes out of his sense of helplessness regarding the uncertainty of his ability to remain in Australia which is of great concern."*[39]

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[34] "PTSD".
[35] "Trauma Counsellor's Report", CB 126-127.
[36] "Torture and Trauma Survivors Association".
[37] "Consultant Psychiatrist's Report", CB 123-124.
[38] CB 126.
[39] CB 126.

Consultant Psychiatrist's Report

23. The Consultant Psychiatrist's Report indicates that the psychiatrist had 25 years experience with PTSD expertise, and that she had been the consulting psychiatrist with the Torture and Trauma Survivors Association for the last 12 years. It was in that capacity that she was asked to assess the applicant "*with respect to his current mental state and coping responses.*"[40]

24. The Consultant Psychiatrist's Report then details the applicant's background and sets out certain of his circumstances, obviously as related by the applicant, before continuing as follows:

> *"He has constant intrusive memories of his periods of imprisonment and torture, he experiences frequent episodes of panic and his sleep is disturbed. He demonstrates significant features of post traumatic stress disorder with associated generalized anxiety. He attempts to mask this much of the time and uses denial about his true situation in order to go on coping. However these coping strategies are gradually breaking down and he is becoming increasingly vulnerable to his symptoms of trauma.*
>
> *Currently [the applicant] is being supported in a counselling relationship at [name of organisation] but the therapeutic process is impeded by the uncertainty of his situation. It is an essential requirement in any treatment regime for trauma that an environment of safety be established first. This has not been possible for [the applicant] as he remains in fear of a possible return to Turkey and the consequences he will face. Nor has he been able to study or work due to the restrictions of his Bridging Visa. As a result I have significant concerns for his ongoing psychological status and coping resources. His marked level of internal fear and the sense he has given up all opportunities in his life for his beliefs, and the persecution this has engendered, places him in a high risk category for self harm if unable to establish his life and safety within Australia. This is a real consequence and not one [the applicant] readily expresses and nor should it be seen as a manipulative threat.*
>
> *Overall, [the applicant] impresses as a mature young man who has symptoms of chronic post traumatic stress disorder and persistent anxiety due to his unresolved circumstances and very*

[40] CB 123.

real fear of his future. He frequently minimizes his symptoms and attempts to present well but I consider his level of psychological vulnerability and risk to himself is high. This tendency to minimize his trauma, it is an avoidance of emotional pain which is well known to occur in post traumatic stress disorder, also restricts his ability to detail the threats he has undergone in the past and also to describe those in the future in the detail that may be required. I have had no reason to doubt the intensity of his symptoms or presentation and our aim has been to help him gain as much psychological stability as possible in the current situation.

Your consideration of [the applicant's] case would be greatly appreciated and will have a significant bearing on his future emotional and psychological progress."[41]

25. In the Tribunal Decision the Tribunal said:

> *70. The Tribunal has given careful consideration to the submissions by the applicant's counsellor and psychiatrist. It is apparent that they accept that his claims about his past actions and experiences are true, and as a natural consequence they attribute his symptoms to having been severely mistreated by the authorities (i.e. they conclude that he suffers from PTSD, as well as anxiety about his migration status). It was not explicitly argued that his symptoms could* ***only*** *be the result of his claims being true. The Tribunal had to weigh these reports against its strong concerns about the evidence outlined above.*[42]

26. The Tribunal says that it "*has given careful consideration"* and "*had to weigh*" the reports by the Trauma Counsellor and the Consultant Psychiatrist. Those statements were made in the context of arriving at an ultimate state of non-satisfaction as to whether the applicant was a person to whom Australian had protection obligations under the Refugee Convention.

27. The Tribunal considered and weighed the evidence. There is no express finding by the Tribunal (contrary to what is said in particular (a)) that the applicant suffered PTSD, and the Tribunal noted that it was not argued that the applicant's symptoms could only be the result of his claims being true.

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[41] CB 123-124.
[42] CB 226.

28. Evaluation of the evidence is a task for the Tribunal. In relation to PTSD it conducted this evaluation by considering and weighing the psychiatric and psychological evidence, and having done so concluded that there was no basis for the applicant to have a well-founded fear of persecution within the meaning of the Convention.

29. In relation to the evaluation of the PTSD evidence there was no jurisdictional error.

Ground 1 – particular 1(b) – failure to take account of evidence of confiscation of Research

30. The applicant alleges that in finding, specifically, that the applicant had not conducted the Research the Tribunal failed to take account of the applicant's evidence that a substantial portion of his Research had been confiscated by the police in Turkey.

31. The Tribunal found as follows:

> *62. The Tribunal does not accept that the applicant conducted research into, or wrote about the Armenian genocide or any other political issue. Specifically supporting this finding are the following considerations: the applicant has not produced any such writings; his descriptions at the hearing of how he went about conducting research were hesitant and sketchy, and he did not appear to have made contact with any other researchers working on the subject. He claimed, when pressed on this subject, to have visited Agos newspaper but did not elaborate on or substantiate this claim, as would be expected if he had indeed made such contact.*
>
> *63. It follows that the Tribunal does not accept that the applicant was questioned twice, abused and mistreated in the course of conducting such research in Istanbul as he claimed, or that he received threatening phone calls afterwards.*[43]

32. The applicant gave evidence that a substantial part of his Research had been confiscated by the police in Turkey.[44]

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[43] CB 225.
[44] April 2008 Statutory Declaration at para.2; CB 106.

33. The Tribunal cited evidence supporting the finding that the Research was not conducted by the applicant. In particular, it found that "*the applicant has not produced any such writings.*"[45] However, the Tribunal failed to consider evidence as to why the applicant says that he was unable to produce the Research in written form, that is, that the Research was on a hard drive confiscated by the Turkish police at a time when the applicant was already in Australia.

34. Given that the alleged Research undertaken by the applicant into the Armenian genocide is central to the reason why the applicant alleges he has a well-founded fear of persecution it was incumbent upon the Tribunal to consider evidence of the reason why the applicant was unable to produce the Research in written form. Not to do so was to ignore relevant material. If the applicant's explanation had been considered it may or may not have altered the Tribunal Decision. However it is possible that it may have done so, and that is sufficient, in conjunction with its obvious relevance, to conclude that it may have affected the Tribunal's exercise of power by resulting in a different decision.[46] Furthermore, it is possible that consideration of this relevant material, if determined favourably to the applicant, might not only have altered the finding of the Tribunal in relation to the existence or otherwise of the Research, but also other findings adverse to the applicant which followed, namely:

    a) that he was not questioned, abused or mistreated and threatened as a consequence of conducting the Research;

    b) that he did not set up the Organisation;

    c) that he did not go to the Town in relation to his Research activities;

    d) that the Newspaper Article was not authentic; and

    e) that he was not attacked by right wing nationalists and arrested and tortured by the Police.

[45] CB 225.
[46] *Applicant M164/2002* at paras.117-118 per Tamberlin J.

35. The Tribunal has failed to consider relevant material before it, and for this reason, the Tribunal Decision is affected by jurisdictional error.

Ground 1 – particular (c) – failure to consider value of documents

36. This ground alleges that the Tribunal failed properly to consider the reliability and potential probative value of relevant documents, namely:

    a) documents from the Turkish police, and the Turkish Public Prosecutors Office;

    b) the Organisation's Constitution;[47]

    c) the Newspaper Article;[48] and

    d) the Dead Person's Mother's Letter.[49]

37. It is convenient to consider these documents in the chronological order in which they are alleged to have been created.

The Organisation's Constitution

38. The applicant said that the Organisation's Constitution was on his USB,[50] and that it outlined particular details, objectives and the nature of the activities of the Organisation.

39. The Tribunal did not accept that the applicant had helped set up the Organisation and found that there was:

    a) "*no independent evidence of the existence of such an organisation*";[51] and

    b) "*[t]he document submitted as a constitution written in 2004 need not be contemporaneous – the Tribunal gives it little weight as evidence.*"[52]

[47] CB 134–137 ("the Organisation's Constitution").
[48] CB 119 and 138.
[49] CB 185-186 and 189. Also an envelope in which the letter arrived at CB 184.
[50] CB 219.
[51] CB 225.
[52] CB 225.

40. The assertion that there is no independent evidence of the existence of the Organisation may not be correct. The applicant also attached to his April 2008 Statutory Declaration the Newspaper Article, published in the Town concerning the Conference.[53] A copy of the Newspaper Article in Turkish is attached,[54] and there is a copy of a translation of the text into English.[55] Having recited the source as the Newspaper – which was the Town weekly newspaper – and the date as 13 December 2004, the translated copy read as follows:

> *"**Custody by the Police for (the participants of) the Illegal Conference***
>
> *Police have not given permission for a conference which was planned to be held by the … [Organisation named] under the title of "Journey to Hope" on 10 December at … [named] Reception Hall in … [named] District. The members of the … [Organisation], … [the name of five persons including the applicant], who wanted to hold the conference, were manhandled and taken into custody as a result of resisting the police. [The applicant], who wanted to make a statement on behalf of the group, said they will hold the conference no matter what, for the purpose of "a democratic stand to come into open and the injustices to be evident in Turkey."*[56]

41. The Newspaper Article has a photograph of a number of what appear to be policemen (two with jackets with the letters "POLIS" and another with "PO" with part of what appears to be an "L" obscured) visible in the photograph in which seven men surround the back of what appears to be a van.

42. The persons named in the Newspaper Article are the same persons whom the applicant says were the original members of the Organisation.

43. Unless the Newspaper Article is discounted as not authentic or as having no weight (the Tribunal found that the Newspaper Article was not authentic, and gave it little weight) then there is independent evidence of the existence of the Organisation in the Newspaper Article. The Organisation is expressly referred to in the Newspaper Article.

[53] CB 107.
[54] CB 119.
[55] CB 138.
[56] CB 138.

Each of the "founding members" named in clause 6 of the Organisation's Constitution is also named in the Newspaper Article.

44. Assuming for present purposes that the Newspaper Article was authentic, there was independent evidence of the existence of the Organisation (and of its founding members) in the Newspaper Article, and, on that basis, the Organisation's Constitution would have been relevant material in determining the scope, aims and intended activities of the Organisation, and whether, if acted upon, they might give rise to the applicant having a well-founded fear of persecution.

45. The applicant submits that the only sensible meaning that can be given to the statement by the Tribunal as to the contemporaneity of, and weight attributable to, the Organisation's Constitution, is that the document was created after the event to give a false impression that it was in fact contemporaneous.[57]

46. The respondent conceded that the words used by the Tribunal were not clear, however submitted that the words "*need not be contemporaneous*" meant that the document submitted was not dated, there was no evidence as to when it was created and that the document did not support the applicant's claim to have set up the Organisation.[58]

47. As to whether the Constitution produced by the applicant is or is not contemporaneous the inference to be drawn would be that the Constitution is not contemporaneous, and not authentic, save for the fact that the Tribunal gave the document weight. Technically, weight cannot be given to a document which is not authentic. In a formal sense weight can only be attributed to admissible evidence: evidence is relevant or it is not, and weight can only be attached to relevant, therefore admissible, evidence.[59] Thus, the best view of the Tribunal's comment is that it accepts that the Constitution exists,[60] but does not

[57] Transcript at 13.
[58] Transcript at 24.
[59] *Smith v R* (2001) 206 CLR 650 at 653 per Gleeson CJ; Gaudron, Gummow and Hayne J; [2001] HCA 50 at para.6 per Gleeson CJ; Gaudron, Gummow and Hayne J; *Festa v R* (2001) 208 CLR 593 at 599 per Gleeson CJ; [2001] HCA 72 at para.14 per Gleeson CJ, where the distinction is made between questions as to admissibility of evidence and the strength of the totality of the evidence. Generally, on questions of admissibility and the weight of evidence, see JD Heydon, *Cross on Evidence*, Seventh Australian Edition (Chatswood: LexisNexis Butterworths, 2004) pp.103 and 115; G Roberts, *Evidence, Proof and Practice* (Sydney: LBC information Services, 1998) pp.75-77.
[60] There was no finding that it was not authentic.

necessarily accept that it was written in 2004, and therefore may have been written at a later time, and in those circumstances its probative weight is minimal.

48. The question of what weight to be given to a document or evidence is ordinarily a matter for the Tribunal, and any grievances to the weight attributed to documentary evidence is a grievance about the merit of the Tribunal Decision, which is not reviewable by this Court. Therefore, at least on the face of it, there is no jurisdictional error in respect to the Tribunal's consideration of the evidence concerning the Constitution. Because, for reasons set out below,[61] jurisdictional error has been established in relation to the Newspaper Article by reason of it being relevant material which was not considered by the Tribunal, it might be that more weight ought to have been attributed to the Organisation's Constitution by the Tribunal. But that is still a matter of weight for the Tribunal, and could not amount to jurisdictional error.

Newspaper Article

Newspaper article

49. As set out above the Newspaper Article is entitled "*Custody by the Police for (the participants of) the Illegal Conference*" and dated 13 December 2004. The Newspaper Article states that the Organisation intended to hold a conference but had not received permission from the police. It lists the applicant as one of the members of the Organisation, names the other founding members and includes a picture of what seems to be a number of police officers.

50. The Tribunal placed little weight on the Newspaper Article as the activities of the group were "*unrealistic…which indicated the artificial construction of an account of claimed conflict with the authorities*".[62] The Tribunal stated that "*without an original its [the Newspaper Article's] authenticity cannot be verified*."[63]

[61] See paras.61 and 64 below.
[62] CB 225.
[63] CB 225.

51. The applicant submits that, in substance, the Tribunal found that the Newspaper Article was not authentic because it did not give any weight to it at all. The applicant also submits that the Tribunal's finding that the article lacks authenticity because there is no original is contrary to the contemporary approach to the assessment of documents in general.

52. The respondent submits that the Tribunal's preference for an original article does not imply a finding that the article was contrived, that there was in fact no finding that the document was not authentic, and that the Tribunal was clear in its assessment of the article and to the weight attributed to it.

53. The Newspaper Article was said by the Tribunal to be one "*purporting to be a copy*"[64] and the "*authenticity*" of which was not able to be "*verified*".[65] To "*purport*" is to "*profess or claim by its tenor*",[66] as in "*a document purporting to be official*",[67] and "*especially falsely*".[68] The "*authenticity*" of a thing relates to the "*quality of being authentic*", that is whether the thing in question is "*true in substance*", "*genuine*" or "*real*".[69] A finding that a document's authenticity is not able to be verified is a finding that it is not authentic, that it is not "*[r]eally proceeding from its reputed source or author*" and is not "*genuine*". A document which is authentic is the opposite of a document which is a "*counterfeit … [or] forged*".[70] To "*verify*" something is "*[t]o show to be true by demonstration or evidence; to substantiate*."[71]

54. The collocation of "purporting", "authenticity" and "verified" in the sentence in which they appear, and the context of the sentences which precede and succeed them lead inexorably to the conclusion that the Tribunal was asserting that the Newspaper Article was not authentic.

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[64] CB 225.
[65] CB 225.
[66] The Shorter Oxford English Dictionary on Historical Principles, Vol. 2 (Oxford: Clarendon Press, 1973) page 1712.
[67] The Macquarie Dictionary (Second Edn) (Macquarie University: The Macquarie Library Pty Ltd, 1991) p.1430.
[68] Webster Comprehensive Dictionary, Encyclopedic Edition, Vol. Two (Chicago: J.S. Ferguson Publishing Co, 1992) p.1025.
[69] The Shorter Oxford English Dictionary on Historical Principles, Vol. 1 (Oxford: Clarendon Press, 1973) page 134.
[70] The Shorter Oxford English Dictionary on Historical Principles, Vol. 1 (Oxford: Clarendon Press, 1973) page 134.
[71] The Shorter Oxford English Dictionary on Historical Principles, Vol. 2 (Oxford: Clarendon Press, 1973) page 2465.

There was therefore a finding by the Tribunal that the Newspaper Article was not authentic.

55. The respondents' submission that the Tribunal was clear in its assessment of the Newspaper Article, and the weight to be attributed to it, is flawed. Because it was not authentic, no weight could be placed on it as probative evidence.[72] Placing even a "*little weight*"[73] on it demonstrates that the Tribunal was not clear in its assessment of the article, because if, as found, it was not authentic then no weight could be placed upon it.[74]

56. The Tribunal perceived that it was necessary for an original of the Newspaper Article to be in evidence before it could be satisfied as to the authenticity of the Newspaper Article. The Tribunal is, however, not a body bound by the laws and rules of evidence,[75] and must act in a manner "*fair, just, economical, informal and quick.*"[76] It does not therefore necessarily have to have an original of a document before it to be satisfied that a document is genuine. To do so imposes a standard to which even federal courts are not obliged to comply since the abolition of the best evidence and original documents rules by the introduction of s.51 of the *Evidence Act*. Those rules were abolished because they resulted in litigation which was complex, inflexible and costly,[77] everything the Tribunal is not meant to be.[78] Furthermore, the copy might be admissible in a federal court by reason of s.48(4)(a) of the *Evidence Act*[79] because it is impracticable for the applicant to produce the original,[80] it being, at the time of the Tribunal hearing, three and half years old and located in newspaper archives in a foreign country at a time when the applicant was in Australia, and where he had made efforts through his family to produce the original, without

[72] See para.47 above.
[73] CB 225.
[74] The position with the Organisation's Constitution was different because there was no finding by the Tribunal that the Constitution was not authentic. See para.47 above. Issues which would trouble a federal court, such as the hearsay nature of a newspaper article, and whether the discretion in s.190(3) of the *Evidence Act 1995* (Cth) ("*Evidence Act*") ought to be exercised, do not arise before the Tribunal: *Migration Act*, s.420(2)(a).
[75] *Migration Act*, s.420(2)(a).
[76] *Migration Act*, s.420(1).
[77] S Odgers, *Uniform Evidence Law* (8th Edn) (Pyrmont: Law Book Co, 2009) para.1.2.5280.
[78] *Migration Act*, s.420(1).
[79] The Newspaper Article would not be admissible under s.48(1)(b)(i) of the *Evidence Act* because of the provisions of s.49 of the *Evidence Act*.
[80] *Evidence Act*, Dictionary, Pt 2, cl.5(c).

success.[81] Under s.48(4)(a) of the *Evidence Act* where the document is required to be "*a copy of*" the document in question, that is a fact which would only have to be proved on the balance of probabilities.[82] Reasonable inferences may be drawn from the document itself.[83]

57. Therefore, the Tribunal, where the rules of evidence do not apply, has insisted on the production of an original when production of a copy might be sufficient before a federal court where the rules of evidence do apply. Reliance on the necessity for an original demonstrates that the Tribunal proceeded on the basis of an erroneous approach as to the necessity for an original document in order to authenticate a copy, and this resulted in the copy of the Newspaper Article, not being considered at all by the Tribunal.

58. There are further problems with the Tribunal's approach to the Newspaper Article. In *WACO v Minister for Immigration and Multicultural and Indigenous Affairs*[84] the Full Court of the Federal Court observed as follows:

> *53 In the present case and in Meadows the question whether the letters were genuine did not directly depend upon the evidence of the appellant. However, it can be said that a finding that the letters were forgeries could turn upon the credit of the appellant in so far as the finding is that the letters have been concocted by the appellant to advance his case. But if this is the case fairness would require that before a finding of forgery is made the person so accused be given the opportunity of answering it. A finding of forgery, just like a finding of fraud is not one that should lightly be made. Both involve serious allegations. Forgery, indeed, is a criminal offence.*
>
> *54 Where the finding of fact made does not turn upon the credibility of the appellant and where there is nothing on the face of the documents themselves to alert the decision maker that they are forgeries it is likewise inherently unfair that the decision maker conclude that they are not genuine without affording the*

[81] Whilst it might be possible for the applicant to produce the original, different considerations apply, and different outcomes might be effected by, inquiries through official channels. As to which: see below at paras.106 and 109.
[82] *Evidence Act*, s.142; *Lewis v Nortex Pty Ltd (In Liq)* [2002] NSWSC 337 at para.8 per Hamilton J.
[83] *Evidence Act*, s.183.
[84] (2003) 131 FCR 511; [2003] FCAFC 171 ("*WACO*").

person affected by that conclusion the opportunity of dealing with it.[85]

59. In *Applicant M164/2002* one member of the majority in the Full Court of the Federal Court said that:

> *" … There was no material before the Tribunal on which it could make the finding that the documents presented by the appellant had been fabricated for the purpose of the claims. The statement by the Tribunal that the documents were not genuine was a bare assertion. The Tribunal did not identify in any respect how the documents could be characterised. This is not a case where the Tribunal, on proper grounds, had already determined that the substantive claims of the appellant were dishonestly made and, therefore, any documentary material that purported to corroborate those claims necessarily bore the same stamp. If an applicant's claims are palpably fanciful, or important elements thereof are shown to be false, those circumstances will permit the Tribunal to disregard other material presented by the applicant in support of those claims.*
>
> *…Serious findings of forgery, fraud or perjury cannot be based on a superficial examination of relevant events and materials, particularly where the conclusion reflects no more than a suspicion held by the Tribunal, and where that suspicion remains untested by reasonable use of powers available to the Tribunal to have further enquiries made…*
>
> *…The Tribunal's treatment of the documentary material relied upon by the appellant to support her claims tainted the review process with fundamental unfairness…the decision of the Tribunal was not a determination made in accordance with the Act."*[86]

60. The finding of fact, that the Newspaper Article is not authentic, does not depend upon the credibility of the applicant, but rather the non-production of the original. In those circumstances there must be something on the face of the document, the Newspaper Article, to alert the Tribunal that the Newspaper Article is not authentic, which must then be put to the applicant. In this case nothing on the face of the

[85] *WACO* FCR at 524 per Lee, Hill and Carr JJ; FCAFC at paras.53-54 per Lee, Hill and Carr JJ.
[86] *Applicant M164/2002* at paras.89–92 per Lee J. At para.86 Lee J said: "*The Tribunal engaged in speculation as to what a more likely course of events may have been but had no basis on which it could say that the events described by the appellant did not happen. The Tribunal may not have been persuaded that events occurred as claimed but it had no material on which it could convert such a doubt into a positive finding that the events had not occurred*."

Newspaper Article indicates that the Newspaper Article is not authentic. If anything, to the contrary. The Newspaper Article:

a) has the appearance of an article from a Turkish Newspaper;

b) is dated shortly after the date of the alleged events;

c) names the Organisation;

d) names the applicant;

e) names the Dead Person; and

f) names each of the foundation members of the Organisation.

Additionally, the Newspaper Article is consistent with the evidence given by the applicant to the Tribunal about those events, and about the existence of the Organisation and its members, all of which is corroborative of aspects of the applicant's account. Further, it was relevant material, both because of its content and its propensity to corroborate the applicant's account of events, absent a finding that the Newspaper Article was not authentic.

61. At no stage was it put to the applicant by the Tribunal that the Newspaper Article was not authentic because the original was not produced. Authenticity was not put in issue by the s.424A Letter: it did no more than ask for an original, and when no original was produced the matter was taken no further. Likewise at the Tribunal hearing, although the Tribunal noted that it did not have the original of the Newspaper Article, it did no more than ask for an original to be provided,[87] and did not raise with the applicant any issue as to the Newspaper Article's authenticity. There was simply no exploration of how the applicant is alleged to have produced a non-authentic copy of a portion of the Newspaper. In the circumstances, the Tribunal committed jurisdictional error:

a) because it concluded that the Newspaper Article was not authentic without:

[87] Affidavit of Vanessa Margaret Fothergill Moss, sworn 11 August 2008 ("Ms Moss' Affidavit"), Annexure VM2, Transcript of Proceedings before the Tribunal, 10 April, 2008 ("Tribunal Transcript") at pp25-26 and 27-28.

i) there being anything on the face of the document to indicate that it was not authentic; and

ii) giving the applicant an opportunity to comment to the Tribunal on whether or not it was authentic; and

b) because it failed to consider relevant material, namely the Newspaper Article.

62. A further problem with the manner in which the Tribunal has dealt with the Newspaper Article is highlighted by the following passages from *SZDGC v Minister for Immigration and Citizenship*:[88]

> *"23 It is only necessary to deal briefly with the second ground. The complaint is that the tribunal failed to "consider the corroborative evidence in the form of the Summons against the husband of the applicant and the Administrative Penalty Order, before making the adverse credibility finding". I take it to be a trite proposition that a decision-maker required to find facts, whether the decision-maker be a judge or an administrative official, must consider the totality of the evidence that bears upon the facts to be found. That requires the decision-maker to consider any direct evidence of the existence of the fact in issue together with any corroborative evidence that bears on that issue. This is nothing more than common sense. There may be circumstances where it is not necessary to pay due regard to corroborative evidence. In Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59; 73 ALD 1; [2003] HCA 30 at [49] McHugh and Gummow JJ said "it is not unknown for a party's credibility to have been so weakened in cross-examination that the tribunal of fact may well treat what is proffered as corroborative evidence as of no weight because the well has been poisoned beyond redemption". That proposition is no doubt true. But the circumstances for its application will be rare indeed. Even experienced advocates can only point to a handful of cases where a witness' credit has been so badly destroyed in cross-examination that it is possible to make findings of fact based on that evidence alone and simply disregard any corroborative evidence.*
>
> *24 For example in WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 80 ALD 568; [2004]*

[88] (2008) 105 ALD 25; [2008] FCA 1638 ("*SZDGC*").

FCAFC 74 the appellant complained that the tribunal failed to have regard to certain documents because the tribunal was not convinced that the documents could overcome the difficulties that it had with the appellant's evidence. Lee and Moore JJ said (at [27]):

> *Such a circumstance may arise where an applicant's claims have been discredited by comprehensive findings of dishonesty or untruthfulness. Necessarily, such findings are likely to negate allegedly corroborative material: see S20/2002 at [49] per McHugh and Gummow JJ. Obviously to come within that exception there will need to be cogent material to support a conclusion that the appellant has lied … it will not be open to the Tribunal to state that it is unnecessary for it to consider material corroborative of an applicant's claims merely because it considers it unlikely that the events described by an applicant occurred. In such a circumstance the Tribunal would be bound to have regard to the corroborative material before attempting to reach a conclusion on the applicant's credibility. Failure to do so would provide a determination not carried out according to law and the decision would be affected by jurisdictional error: see Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 ; 180 ALR 1 ; 62 ALD 225; [2003] HCA 30 at [82]-[85] per McHugh, Gummow and Hayne JJ.*

…

27 … Putting to one side the fact that the tribunal misunderstood the appellant's claim, it is false reasoning to find that the corroborative evidence was not authentic because the tribunal without regard to that evidence found the appellant to be dishonest. The tribunal should have had regard to the documents when assessing the appellant's credibility. In that process it might have found the documents not to be authentic. But that would need to have been for independent reasons, unless the appellant's evidence fell into the S20/2002 category. It plainly did not fall into that category."[89]

63. In *Applicant M164/2002* one member of the majority in the Full Court of the Federal Court said:

> *"A view that part of a claim cannot be accepted does not mean that any documents relating to that claim must be contrived or*

[89] *SZDGC* ALD at 30-31 and 32 per Finkelstein J; FCA at paras.23, 24 and 27 per Finkelstein J.

> *false and should be disregarded. Each of the documents should be examined and considered on its face and in context. If one or more supportive documents, when properly considered, are found to be genuine, this consideration may strongly support a finding that a claim is credible and has been made out. It may override an impression gained by the Tribunal that the claim lacks substance. A document accepted as genuine after proper consideration can be strongly corroborative of an applicant's case. This is particularly so in cases concerning refugees, where documentary evidence may be of greater assistance than oral assertions in establishing facts which cannot, in any meaningful sense, be properly investigated by way of probative independent evidence."*[90]

64. In this case there was not cogent material suggesting that the applicant had lied about his account of events. The applicant was never tested by the Tribunal on the genuineness of the Newspaper Article, or to any degree or significant degree on any of the documents save the Police Summonses and Authority to Capture dealt with below. Rather, the Tribunal applied its own subjective perception of how the applicant, at the time a 22 year old Turkish university student of Armenian ethnicity, ought to have conducted himself in carrying out the Research and preparing to conduct the Conference, to arrive at the conclusion that his account of events was an "artificial construction". It is clear from the Tribunal Decision that the Tribunal arrived at that conclusion without regard to the potentially corroborative and relevant material in the Newspaper Article. That failure, in the circumstances, constituted jurisdictional error.

Police Summonses and Authority to Capture

65. The applicant states that he was charged with "provoking people to divide Turkey, undermining law and order, hindering the police, organising a meeting without permission, and establishing an illegal organization".[91]

66. The applicant provided to the Tribunal three documents headed "Request To Attend Police Station" with a certified copy of their English translations, which were requests addressed to the applicant to

[90] *Applicant M164/2002* at para.117 per Tamberlin J.
[91] November 2007 Statutory Declaration, CB 41.

attend a named police station in Turkey on dates in June, September and November 2007 concerning "Investigation in relation to you".[92]

67. The applicant also submitted what he said was a copy of a document said to be a memo between the prosecutor and the police, obtained by his brother, who obtained it, by means of payment of a bribe to a Turkish Court clerk.[93] On its face, the document is an authority to capture a convicted person issued by the Public Prosecutor.[94]

68. The Authority to Capture is entitled "Authority to Capture (For Convicted Persons)". It is in relation to a particular decision number, 2007/213 in relation to a convicted person, who is named as the applicant. The charge is said to be "Membership of an illegal organisation." There are various "Court reference and order Numbers", including reference numbers to the years 2005, 2006 and 2007 (being an earlier 2007 number than the decision number referred to above). The authority issuing judgment is said to be the First Criminal Court of Bursa and the nature of the sentence is said to be "Heavy Imprisonment" for a duration of five years and two months. The document is then addressed to the "PROVINCIAL POLICE DEPARTMENT", and contains authority to capture the convicted person, "so that he can serve his sentence" and the date of 21 October 2007 then appears.[95] Then the words "Clerk of the Court" appear, followed by the seal and signature of the Public Prosecutor.

69. At the Tribunal hearing the Tribunal dealt with the Police Summonses and Authority to Capture in the following manner:

> *TM [Tribunal Member]: Now what I do have a concern about is that in spite of the fact that you were charged and there was a court date that you say was adjourned in the middle of 2006 I think it was, and you were subsequently convicted, there are no documents about this at all. When I say that, I mean original public court documents. Because the judicial process in Turkey is not secret.*

[92] CB 92-97 and 114-116 ("Police Summonses"). The translations say "Investigatigation", but it is clearly intended to be "Investigation".
[93] CB 106, April 2008 Statutory Declaration at para.9. A translated copy of the document was provided: see CB 133.
[94] CB 133 ("Authority to Capture").
[95] CB 133.

[Applicant]: When I was released on bail to attend court in the future there was no date. That date is you are issued some sort of a summons or you are advised by the police officers later on which I never received, because I wasn't there. They need to serve the documents in person to you in your hand. In the first hearing there was no decision to remand us in custody, we were released again. In the second hearing they handed down that decision. To get a copy of this decision taken in the second hearing you need to be there in person which I wasn't there so I couldn't possible have received it. The second thing is I wasn't there in person so I couldn't get the document. My brother sent the documents after many efforts and obtained some documents…It's not a court order as such but it's a letter written by the registrar to the police department in relation to warrant's. It's not normally available you can't get this documents but my brother paid some bribes, he bribed some people and obtained a copy of the documents.

…TM: I still come back to the point that if there was a conviction and a sentence handed down there would be a properly available record in court.

[Applicant]: …in this country but in Turkey it is impossible. If it could be done my brother could have done it and he is still trying to get it…that order must be served on you in person, or your power of attorney, er, your attorney, but I haven't given my power of attorney or representative, I had no representation.[96]

70. The Tribunal Decision says that:

"The Tribunal does not, it follows, accept that the applicant and his friends were attacked by right wing nationalists or arrested and tortured by the police. It does not accept that the applicant was charged, convinced [sic - convicted] and sentenced. It does not accept that one of his friends was killed and the others are all in goal. The documentation submitted by the applicant was slender, to the point where the Tribunal was not satisfied as to its authenticity. If the applicant was really charged, bailed, tried in absentia, convicted and sentenced, it is not plausible that he would have no records from the court itself. The Tribunal was not persuaded by the applicant's explanation for this, that his absence meant the documents were unavailable. He could (and in reality would) have appointed an attorney to at least receive the evidence and result. Moreover, given the very specific information that is held by human rights organisations and reported internationally, about persons even being charged in Turkey in connection with

[96] Tribunal Hearing Transcript at 18-19.

the Armenian issue, it is most unlikely that the conviction and gaoling of several would go unreported."[97]

71. The respondents argue that the Tribunal did not make a finding that the Police Summonses and Authority to Capture provided were fraudulent, but rather the Tribunal did not believe the applicant's explanation that his absence from Turkey meant that other, and specifically Court, documentation was not available.

72. The Tribunal says of the Police Summonses and Authority to Capture, that it "*was not satisfied as to its authenticity*".[98] When the reasons for the Tribunal's finding of a lack of authenticity for these documents are examined, it can be seen that it is said that:

a) the documents are "slender";[99]

b) it is "not plausible" that the applicant would have no records from the relevant Turkish Court;[100] and

c) the applicant "could (and in reality would) have appointed an attorney to at least receive the evidence and result."[101]

73. The characterisation of the Police Summonses and the Authority to Capture as "slender" is not especially helpful. If it is intended to convey a meaning as to the size of the documents, it is not helpful because the size of a document does not determine its genuineness, particularly in the cases of summonses and arrest warrants, which, even in Australia, are often single-page documents.[102] It cannot have been intended to convey a meaning as to any weight to be attributed to the documents because, for reasons set out above,[103] weight cannot be attributed to a document which is not authentic.

74. As to the Tribunal's view that it was "not plausible" that the applicant would not have records from the Turkish Court, the observation that

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[97] CB 225-226.
[98] CB 226.
[99] CB 226.
[100] CB 226.
[101] CB 226.
[102] See, for example, Arrest Warrant Issued by the Local Court under the *Criminal Procedure Act, 1986* (NSW); Form 48 – Warrant for Arrest under *Federal Court Rules* Order 40, Rules 9 and 11, Order 49 Sub-rules 4(3) and (4); Form 49 – Warrant for Committal under Order 37 Rule 9 of the *Federal Court Rules*.
[103] See paras.47-48 above.

something is "not plausible" or "implausible" is an unsatisfactory observation. It falls short of a positive finding. It leaves open a conclusion consistent with a claim for protection as a refugee because, while there may be a real chance of something having happened, on the balance of probabilities, it did not happen. Whilst the use of "not plausible" on its own is probably not sufficient to constitute jurisdictional error it is a matter to be taken into account overall when determining whether there has been a jurisdictional error by the Tribunal.[104]

75. The Tribunal's assertion that the applicant could, and would have, appointed an attorney to receive the evidence and result is nothing more than speculation, and has no foundation in any fact before the Tribunal. The applicant gave an explanation, namely that he was in Australia and that he thought that he would be exonerated, for his failure not to attend the Turkish Court proceedings or appoint a lawyer. In any event, there is no factual basis for a finding that the applicant would have appointed a lawyer to represent him.

76. In this case however the Tribunal has put the question as to whether documents exist to the applicant, and were it just a question in relation to a finding as to authenticity, the Tribunal would probably have, in the Court's view, put that matter in issue sufficiently for the Court to find that there was no jurisdictional error.

77. There is, however, a further difficulty. The Tribunal has proceeded, both in the Tribunal Hearing and in the Tribunal Decision, on the basis that there are no court records, and has failed to consider both the Police Summonses and the Authority to Capture when considering this issue. The Police Summonses are relevant, and ought to have been considered by the Tribunal, because they do, on their face, indicate that there was an investigation ongoing in relation to the applicant. He was being requested to attend the police station in relation to whatever that investigation was. The Police Summonses are, at least on their face, not inconsistent with the account given by the applicant to the Tribunal. The Authority to Capture however goes further. If it is not itself a court

[104] *Applicant M164/2002* at para.111 per Tamberlin J; *W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ALR 703 at 717 per Tamberlin and RD Nicholson JJ; [2001] FCA 679 at para.67 per Tamberlin and RD Nicholson JJ: "*It is not sufficient simply to make general passing comments on general impressions made by the evidence where the issue is important or significant.*"

record, it is certainly a record related to court proceedings. It bears the signature and seal of the Public Prosecutor. It refers to the Clerk of the Court, the court itself, and the charge, imprisonment and the duration of the sentence. Significantly, the charge is "Membership of an illegal organisation", which is, at least in part, consistent with the applicant's account of events. Before simply dismissing these documents as not being authentic, the Tribunal ought to have considered and weighed the matters referred to in those documents, for reasons set out above. Further, there is nothing on the face of the Police Summonses and the Authority to Capture which would indicate that they are not authentic documents. As indicated above, the Tribunal probably put sufficient to the applicant during the course of the Tribunal Hearing to satisfy the requirement that the applicant be given an opportunity to comment on the authenticity of the documents, but in considering the authenticity of the documents, the Tribunal has failed to consider the contents of the documents themselves, and for that reason has committed jurisdictional error.

The Dead Person's Mothers Letter

78. The Dead Person's Mother's Letter laments that her son had been killed and that the applicant's friends were in jail. The Dead Person's Mother writes that the applicant may also be killed and that he should be careful and alert.

79. The respondents argue that the Tribunal had already found the applicant's claims (relating to the information in the Dead Person's Mother's Letter) to be false. Given that finding, the respondents say that the Tribunal is permitted to disregard any further supporting material, such as the letter in question.[105] That, however, was not the basis on which the Dead Person's Mother's Letter was not relied upon by the Tribunal. The Tribunal did not rely upon it because:

> *The letter purporting to be from … [the Dead Person's Mother] is given no weight, considering that its authorship cannot be verified.*[106]

[105] *Applicant Ml64/2002* at paras.89-92 per Lee J.
[106] CB 226.

80. In this case the use of "*purporting to be from*" and "*cannot be verified*" make it clear that, for reasons essentially the same as those related to the genuineness of the Newspaper Article,[107] the Tribunal, at the very least, does not consider that the Dead Person's Mother was the author of the Dead Person's Mother's Letter, and possibly, that the letter itself was not genuine.

81. There was nothing on the face of the Dead Person's Mother's Letter, or its accompanying envelope which cast doubt on its author being the Dead Person's Mother.

82. At no stage did the Tribunal raise with the applicant the authorship of the Dead Person's Mother's Letter, or whether it was possible to verify that authorship. If the applicant had been given an opportunity to attempt to verify that the Dead Person's Mother was the author of the Dead Person's Mother's Letter, and had the applicant been able to do so, a very different complexion might have been open to be put upon the applicant's evidence. It is relevant that:

a) the envelope in which the Dead Person's Mother's Letter allegedly came bears what appears to be the Dead Person's Mother's name, the "surname" of which is the same as the Dead Person;[108]

b) the envelope has what appears to be a Turkish stamp;[109] and

c) the content of the Dead Person's Mother's Letter refers to:

i) the Dead Person as the author's "son";[110]

ii) the applicant's "friends" from his "group";[111] and

iii) the Dead Person, and his involvement in "this association".

83. All of the above was material relevant to:

a) a determination of authorship; and

[107] See paras.53-54 above.
[108] CB 184.
[109] CB 184.
[110] CB 189.
[111] CB 189.

b) if the author was verified as the Dead Person's Mother, then to the applicant's claim.

84. The Tribunal committed jurisdictional error because:

a) in circumstances where there was nothing on the face of the Dead Person's Mother's Letter (and the accompanying envelope) to cast doubt on its authorship, it drew a conclusion about the genuineness of the authorship of the Dead Person's Mother's Letter without giving the applicant an opportunity to comment to the Tribunal on that matter; and

b) it failed to consider relevant material, namely the content of the Dead Person's Mother's Letter.

Ground 1 – particular (d) - failure to exercise its power under s.427(1)(d)

85. The applicant claims that the Tribunal failed to properly exercise its jurisdiction in that, to the extent it was not satisfied as to certain issues and as to the authenticity of critical documents provided to the Tribunal, it should have exercised its power under s.427(1)(d) of the *Migration Act*.

86. Section 427(1)(d) of the *Migration Act* provides relevantly that:

> *(1) For the purpose of the review of a decision, the Tribunal may:*
>
> …
>
> *(d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.*

87. In *Minister for Immigration and Citizenship v SZIAI*[112] the High Court observed:

> *"Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the*

[112] (2009) 83 ALJR 1123; [2009] HCA 39 ("*SZIAI*").

Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. [35] It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case.[113]

88. In *Applicant M164/2002* the majority of the Full Court of the Federal Court said that*:*

> *"To determine whether the newspaper extracts … were genuine may have taken more time but would not have imposed an unreasonable task on the Secretary. No doubt if circumstances showed such steps to be appropriate the Secretary could request assistance from relevant authorities in … [an overseas country], using official channels … if necessary."*[114]
>
> and
>
> *"[…] having regard to the importance of the foregoing documents to determining whether the appellant's claims were to be accepted; the significant public interest in discovering whether fraudulent documents had been used in the application; and the ease which enquiries could have been made to test the authenticity of the documents presented, it is surprising that the Tribunal failed to exercise the discretion available to it under the Act…"*[115]

89. As a result of the Tribunal's decision not to investigate the critical documents pursuant to s.427(1)(d) of the *Migration Act*, the applicant submits that the Tribunal could not have been satisfied to the requisite degree as required by s.65 of the *Migration Act* and therefore a determination was not made under the Act.

90. The respondents assert that there is no duty to inquire, and the failure of the Tribunal to cause any inquiries to be made does not constitute jurisdictional error.

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[113] *SZIAI* ALJR at 1129 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; HCA at para.25 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[114] *Applicant M164/2002* at para.64 per Lee J (with whom Tamberlin J agreed at para.108).
[115] *Applicant M164/2002* at para.65 per Lee J (with whom Tamberlin J agreed at para.108).

91. The applicant says that the Tribunal ought to have made further inquiries:

a) to evaluate the extent of the applicant's PTSD; and

b) as to the confiscation of the Research.

92. The applicant identifies the following documents as critical documents in respect of which inquiries ought to have been made:

a) the Police Summonses and Authority to Capture;

b) the Organisation's Constitution;[116]

c) the Newspaper Article;[117] and

d) the Dead Person's Mother's Letter.[118]

93. After dealing with the PTSD and Research issues the Court will deal with the documents in chronological order.

PTSD

94. The applicant put before the Tribunal evidence in the form of the Trauma Counsellor's Report and the Consultant Psychiatrist's Report, as well as hearing oral evidence from the Trauma Counsellor, who was a psychologist.[119]

95. The terms of s.427(1)(d) of the *Migration Act* envisage the possibility that the Tribunal may require the Secretary to arrange any medical examination the Tribunal thinks necessary. In this case, the Tribunal had before it the Consultant Psychiatrist's Report and the Trauma Counsellor's Reports. There does not seem to have been any suggestion from the applicant at the Tribunal Hearing that further reports were necessary, and, given that the Consultant Psychiatrist's Report and the Trauma Counsellor's Report were favourable to the applicant's claims, that is not surprising. The Tribunal considered the evidence before it, properly, as the Court has already found, and

[116] CB 134–137.
[117] CB 119 and 138.
[118] CB 185-186 and 189.
[119] Tribunal Hearing Transcript at 24-25.

formed a view as to that evidence. The fact that that view was not favourable to the applicant's case is not a reason for the Tribunal to, of its own volition, request further medical examination of the applicant. The Court considers that it was not necessary for the Tribunal to request that further medical examination of the applicant be undertaken.

Research

96. The applicant contends that the Tribunal ought to have taken steps using its power under s.427(1)(d) of the *Migration Act* to have the Secretary inquire into the existence of the Research.

97. The applicant has produced the Research that he says he retained in his possession. Otherwise, he says that the Research was confiscated by the police in Turkey at a time when the applicant was in Australia. There is no evidence as to what happened with the Research from that point in time. It is not, for example, evident that any further use was made of it by the Turkish police or that it was used in any proceedings in the Turkish courts. Even if it were used by the Turkish police or Turkish courts there is no evidence to suggest how it might be obtained, or whether it is difficult or easy to obtain it or to ascertain what use has been made of it, if any, by the Turkish police or the Turkish courts. In the circumstances, it is difficult to imagine what more the Tribunal might have been expected to do in this regard. It is certainly not evident that there is any avenue of obvious inquiry leading to easily ascertainable facts relevant to the existence of the Research.

98. In the circumstances, the Court considers that it was not necessary for further inquiries to be requested to be made by the Tribunal in relation to the Research.

Organisation's Constitution

99. The applicant contends that it was incumbent upon the Tribunal to use its power under s.427(1)(d) of the *Migration Act* to have the Secretary inquire into the authenticity of the Constitution, even though such an inquiry may be fairly difficult.

100. The applicant has produced what he says is a copy of the Constitution. There is no evidence that there are copies elsewhere. There is no evidence that the Constitution is a document required to be filed or registered in any particular manner in Turkey which might be discoverable upon inquiry by the Department to the relevant Turkish government officials. It is difficult to imagine what more the Tribunal might be expected to do in this regard. It is certainly not evident that there is any avenue of obvious inquiry leading to easily ascertainable facts relevant to the existence of the Constitution. Even the applicant's submission concedes it would be "fairly difficult".

101. In the circumstances, the Court considers that it was not necessary for further inquiries to be requested to be made by the Tribunal in relation to the Organisation's Constitution.

The Newspaper Article

102. The applicant contends that the Tribunal could have requested the Secretary to find out:

a) if the Newspaper existed;

b) if the Newspaper keeps its archives; and

c) if the Newspaper Article was printed as alleged by the applicant.

103. Given the centrality of the Newspaper Article to the activities of the applicant and the Organisation, and the fact that the Tribunal's finding that the Newspaper Article was not authentic meant that the Tribunal precluded itself, wrongly, for reasons set out above, from considering corroborative evidence contained in the Newspaper Article, particularly:

a) the naming of the Organisation, indicating that it did exist; and

b) the naming of the five founding members of the Organisation referred to in clause 6 of the Organisation's Constitution, again indicating that the Organisation did exist; and

c) the similarities between the Newspaper Article account of events and the events described by the applicant in evidence before the Tribunal,

the authenticity or otherwise of the Newspaper Article was critical. The Newspaper Article was arguably the most critical corroborative document in the review given the adverse consequences which the applicant says followed from the reported events.

104. The applicant was asked by the Tribunal to produce "the original" of the article. The applicant said that he was unable to do so because his brother was unable to obtain the original because it was in the newspaper archives and he was not able to get a copy even if he paid money for it.[120]

105. The Tribunal made no apparent attempt to exercise its powers under s.427(1)(d) of the *Migration Act* to inquire as to:

a) the existence of the newspaper;[121]

b) the publication of the article; and

c) the availability of the article.

106. Although the applicant's brother was not able to obtain a copy of the article from the Newspaper's archives, the Court considers that this type of information is the type of information that might be the subject of a request by the Tribunal to the Secretary of the Department to see if it could be obtained (or, perhaps more pertinently, confirmed) by a Turkish government official, or even a DFAT official in Turkey. This is particularly so where the evidence discloses that the Newspaper has archives, and it is possible (and even probable on the evidence) that there is a copy of the Newspaper Article in the archives.

107. Because the Newspaper Article was a critical document, and because it would have been corroborative of a number of the integers of the

[120] Applicant's Statutory Declaration, 26 May 2008, para.4: CB 144. It needs to be borne in mind that this request for an "original" was made to, and conveyed through, Turkish speakers. If the request for an "original" was put to the Newspaper, it is hardly surprising that no "original" was forthcoming, especially three and a half years after the printing of the paper in question.

[121] By way of comparison, the Tribunal, of its own volition, accessed a website (using Google) to bring in to its decision-making process material which contradicted the applicant's evidence as to the ethnicity of the Dead Person: CB 226.

applicant's claim, the Tribunal committed a jurisdictional error by failing to require the Secretary of the Department to arrange for the making of inquiries as to:

a) the existence of the Newspaper;

b) the publication of the Newspaper Article; and

c) if the Newspaper Article was published in the Newspaper, the possibility of obtaining a copy, and not necessarily the original, of the Newspaper Article.

Police Summonses and Authority to Capture

108. The applicant contends that the Tribunal could have requested the Secretary to investigate the authenticity of the Police Summonses and the Authority to Capture.

109. For reasons set out above,[122] the contents of the Police Summonses and the Authority to Capture, if authentic, were materially relevant to the applicant's account of why he considered he had a well-founded fear of persecution. Each of the documents are on their face a form of official record. In particular, the Authority to Capture appears to be a form of arrest warrant issued under seal by the Turkish Public Prosecutor's office. Given that those documents were a critical element of the applicant's case, and their alleged lack of authenticity was critical to conclusions reached by the Tribunal as to the applicant being charged, convicted and sentenced, it might be that if the existence of those documents, and what their contents purport, could be easily ascertained, then the failure to make the inquiry might constitute a failure to review. The Police Summonses are a critical element of the applicant's case, and if they did exist, they would assist to corroborate part of the chain of events constituting the applicant's case. They do not however necessarily go to the Tribunal's conclusion that the applicant was not charged, convicted or sentenced. Therefore, in the Court's view, it was not necessary for the Tribunal to request the Secretary to investigate with respect to the authenticity or content of the Police Summonses. The Authority to Capture falls in a different

[122] See para.77 above.

category. As indicated above, it appears to be a form of official record under seal, by the Turkish Public Prosecutor. Further, it contains details of the offence, the court convicting of the offence and the sentence. Given the nature of the document, and the nature of its content, it was a document critical to not only the applicant's case but the Tribunal's conclusion that the applicant was not charged, convicted or sentenced for, it deals with each of those issues. Furthermore, the existence of the Authority to Capture document, and the veracity of its content, might be matters upon which a simple inquiry through appropriate official channels, either by telephone or letter, might evince a response confirming or denying the authenticity of the Authority to Capture and the veracity of its content. In the circumstances, the Court considers that the Authority to Capture was a critical document, containing critical facts, in respect of which an obvious inquiry might have easily ascertained the authenticity of the document and the veracity of its content. In those circumstances, the Court considers that the failure of the Tribunal to request that the Secretary make that inquiry constitutes jurisdictional error.

The Dead Person's Mother's Letter

110. The applicant also contends that the Tribunal ought to have requested the Secretary to make inquiries concerning the authenticity of the Dead Person's Mother's Letter.

111. The Tribunal decided that it was not able to be satisfied, not of the existence of the Letter, but of its authorship by the Dead Person's Mother. In order for that to be confirmed it would be necessary for various inquiries to be made within Turkey to locate the Dead Person's Mother and to confirm who she was and that she wrote the Dead Person's Mother's Letter. Such inquiries, which would involve travel, interviewing the Dead Person's Mother and obtaining official records to confirm identity (assuming that the Dead Person's Mother can be found and wants to be interviewed, and that the records exist) go beyond what, in the Court's view, is intended to be done under s.427(1)(d) of the *Migration Act.* Therefore, there was no jurisdictional error by reason of failure to request an inquiry in respect of the Dead Person's Mother's Letter.

Ground 1 – particular (e) – approach to assessment of credibility

112. The applicant alleges that the Tribunal approached its assessment of the nature and credibility of his claim on the premise that the conduct he asserted was "naïve", which it is said was an irrelevant consideration as to whether the applicant had a well-founded fear of persecution for a Convention based ground.

113. In making findings concerning the applicant's activities in Turkey the Tribunal said that:

> *"The applicant's descriptions of some of their activities there were unrealistic, not in a way which suggested naïve passion for a cause, but in a way which indicated the artificial construction of an account of claimed conflict with the authorities."*[123]

114. The Tribunal observed that various activities undertaken by the applicant, or the Organisation of which the applicant was a member, were "*not satisfactorily explained*", or "*could not be justified given the well known sensitivity of the [Armenian genocide] issue*", and were "*not substantiated*".[124]

115. The Tribunal has not approached the assessment of the applicant's claim on the premise that the conduct he asserted was "*naïve*". Rather, it has approached it on the basis that the conduct was an "*artificial construction*". Thus, the basis for whatever findings flow from a consideration of the incidents described, is the Tribunal's finding of artificial construction, rather than a finding with respect to the applicant's naivety. In this regard, the applicant is not assisted by reference to the Tribunal Hearing Transcript, for although much of the questioning there suggests that the Tribunal regarded the applicant as naïve, that has not ultimately been the basis for the finding made by the Tribunal.

116. This aspect of the application must therefore fail.

[123] CB 225.
[124] CB 225.

Ground 2 - bias

117. The applicant says that the mindset of the Tribunal member was not objective, nor open to persuasion.

118. To prove actual bias on the part of the Tribunal requires evidence of a state of mind such that the Tribunal is so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented.[125] The test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the judicial officer or decision-maker might not bring an impartial mind to the resolution of the question to be decided.[126]

119. Having:

a) read the Tribunal Decision;

b) read the Tribunal Transcript; and

c) listened to an audio recording of the Tribunal Hearing,

the Court is not persuaded that the Tribunal was biased. Rather, those aspects of the Tribunal Decision which have been held to constitute jurisdictional error, appear to be the result of poor judgment and a failure to properly carry out the tasks assigned the Tribunal under the *Migration Act.* The Court has particularly considered, as requested by the applicant, the tone adopted by the Tribunal during the Tribunal Hearing. The Tribunal's tone does variously appear at times to be incredulous about, and critical and condescending toward, the applicant. However, the Court is unable to conclude that the tone evinces any bias.

120. It follows that this ground of the application must fail.

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[125] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 532 per Gleeson CJ and Gummow J; [2001] HCA 17 at para.72 per Gleeson CJ and Gummow J.
[126] *Re Refugee Tribunal; Ex parte H* (2001) 179 ALR 425 at 434 per Gleeson CJ; Gaudron and Gummow JJ; [2001] HCA 28 at para.27 per Gleeson CJ, Gaudron and Gummow JJ; and in relation to administrative proceedings: ALR at 434-435 per Gleeson CJ, Gaudron and Gummow JJ; HCA at para.28 per Gleeson CJ, Gaudron and Gummow JJ.

Ground 3 - failure to comply with s424A of the *Migration Act*

121. The applicant says the Tribunal has failed to meet the requirements of s.424A of the *Migration Act*. That section relevantly provides that:

> ***424A Information and invitation given in writing by Tribunal***
>
> *(1) Subject to subsections (2A) and (3), the Tribunal must:*
>
> *(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
>
> *(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and*
>
> *(c) invite the applicant to comment on or respond to it.*
>
> …
>
> *(3) This section does not apply to information:*
>
> *(a) …; or*
>
> *(b) that the applicant gave for the purpose of the application for review; or*
>
> *(ba) …; or*
>
> *(c) …*

122. The applicant complains that:

a) the Tribunal failed to put to the applicant that it had reservations as to the reliability of the critical documents; and

b) the term "information" should not be read down to exclude this particular type of situation, that is, that the Tribunal did not advise the applicant that it doubted the genuineness of the documents.

At hearing, the applicant formally put these arguments, but did not advance them in any serious or meaningful way.

123. The respondent submits that the documents were provided by the applicant for the purposes of the review and therefore fall under the exception in s.424A(3)(b) of the *Migration Act*.

124. Where, as here, the information in the form of the documents referred to in the particulars of this ground of the application, has been given to the Tribunal by the applicant, s.424A(3)(b) of the *Migration Act* is not enlivened.[127] Therefore, this ground of the application must fail.

Ground 4 - failure to give notice pursuant to s.425 of the *Migration Act*

125. The applicant submits that the Tribunal failed to inform the applicant that the genuineness of the critical documents was an issue pursuant to s.425 of the *Migration Act.* The applicant says that the Tribunal should have invited him to give evidence and/or make submissions on the point and that fairness requires that the applicant be given an opportunity to comment on such fundamentally important matters.

126. Section 425 of the *Migration Act* relevantly provides that:

> ***425 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.*

127. The applicant submits that s.425, at a general level, requires the affected party to be advised of any relevant issues and be given the opportunity to be heard on those issues.[128] Section 425 has two main purposes:

a) to allow an applicant to give evidence; and

b) to allow an applicant to present arguments in relation to issues arsing in relation to the decision under review: it gives the

[127] *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419 at 431-436 per Young J; [2006] FCAFC 195 at paras.48-63 per Young J; *MZXBQ v Minister for Immigration and Citizenship & Anor* (2008) 166 FCR 483 at 493 per Heerey J; [2008] FCA 319 at para.32 per Heerey J.
[128] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; [2006] HCA 63 at paras.32-33 per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

"*applicant the chance to persuade the decision-maker to accept the accuracy of the information provided by the applicant*".[129]

128. The respondents submit that:

a) the Tribunal's doubts as to the genuineness of the documents do not amount to a finding that the critical documents were concocted or fabricated, and, accordingly, procedural fairness does not require the respondents to invite the applicant to comment on the documents; and

b) the Tribunal's lack of satisfaction as to the applicant's claims in relation to the documents produced does not amount to a breach of s.425.

129. In *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs*[130] the Federal Court said:

> *"Section 425 requires the Tribunal to invite an applicant to give evidence and to present arguments relating to the issues arising in relation to the decision under review. On one view, the genuineness of the appellant's documentary evidence was an issue raised by the Tribunal itself and of which the appellant was given no prior notice nor an opportunity to comment before the Tribunal made its decision. If that characterisation be correct, then the Tribunal's failure to invite the appellant to make submissions on whether the letters relied upon were genuine, or forgeries, or concoctions, was a failure to comply with s 425. A failure to conduct a hearing of the kind contemplated by s 425 in my opinion would amount to a failure to comply with the obligation imposed by that section upon the Tribunal to invite an applicant to participate in such a hearing. That obligation is so central to the conduct of the Tribunal process that it necessarily conditions the power to make an adverse decision on review. A failure to comply with s 425 will therefore amount to jurisdictional error…."*[131]

[129] *SZHKA v Minister for Immigration and Citizenship* (2008) 249 ALR 58 at 60-61 per Gray J; [2008] FCAFC 138 at para.6 per Gray J.
[130] (2004) 204 ALR 624; [2004] FCA 106 ("*WAJR*").
[131] *WAJR* ALR at 637-638 per French J; FCA at para.58 per French J.

130. For reasons set out above,[132] the Tribunal failed to put to the applicant, and allow the applicant the opportunity, to comment upon the genuineness of:

a) the Newspaper Article; and

b) the authorship of the Dead Person's Mother's Letter.

Those, and particularly the Newspaper Article, were critical documents giving rise to relevant material in respect of which the Tribunal did not allow the applicant the opportunity to make submissions or raise argument in relation to the genuineness issues prior to the handing down of the Tribunal Decision. This constituted a failure to comply with s.425 of the *Migration Act*, and therefore constitutes jurisdictional error.

Ground 5 – identification of a wrong issue

131. The applicant alleges that the Tribunal identified a wrong issue, in that, in concluding that there was not a real chance of the applicant becoming active or vocal on the Armenian genocide issue in Turkey in the reasonably foreseeable future, it failed to ask the correct question for the purpose of its statutory task, namely, whether it was satisfied that the applicant was a person to whom Australia owed protection obligations.

132. The applicant says that the Tribunal:

a) questioned the applicant's claims because he did not investigate whether other organisations existed to raise awareness about the Armenian genocide in Turkey:

> *The Tribunal observed that it would have expected that before setting up his organisation the applicant would have wanted to know if there were any existing organizations working on the same issue.*[133]

b) became concerned with whether the applicant's actions were "naive" and "unrealistic" and may have thus not been addressing

[132] See paras.61 and 84 above.
[133] CB 221.

the correct issue. For example the Tribunal stated in the Tribunal Decision:

> *The Tribunal observed that it seemed unrealistic to expect support from the mayor and governor….*[134]

c) implied that it believed that the applicant would suffer harsh consequences if he did in fact organise a meeting about the Armenian genocide:

> *Referring to the claim that police quickly broke up the meeting, The Tribunal asked the applicant what he expected would occur, given the contentious subject matter.*
>
> …
>
> *The Tribunal commented that to expect anything useful to come out of a public meeting on such a sensitive subject seemed unrealistic to the point that the Tribunal doubted the plausibility of the event itself.*[135]

133. In the Tribunal hearing itself the question the Tribunal member put to the applicant was:

> *What did you honestly think would be the outcome of that action?*[136]
>
> …
>
> *TM: OK but you know how sensitive this issue is in Turkey, not just among the ultra nationalists, but with the mainstream government of Turkey – their official policy. I don't actually see what you could have possibly hoped to achieve that would be cognitive from such an exercise as this that would be useful to the Armenian question.*
>
> *[Applicant] Look I understand your question, it's a sensitive issue in Turkey. Just because it is a sensitive issue there is no rule that you should be sitting doing nothing with your hands tied. I mean if you believe that something had happened, if there is law in the country, if there is rule of law and then you are entitled to seek your objectives through legal means.*

[134] CB 221.
[135] CB 222.
[136] Tribunal Hearing Transcript at 15.

> *TM: I completely agree with you, it's just ------- I just want to finish this because I need to make sure you completely understand the point I'm making. The public meeting that you described as having occurred, or attempted to be organized seems to be such a naïve way of approaching the Armenian question in Turkey, that I don't actually believe that anybody would have done such a thing. What I am saying is I don't think that actually happened.*[137]

134. The Tribunal did not identify a wrong issue as asserted by the applicant. The Tribunal was seeking to establish whether or not there was a well-founded fear of persecution for a Convention based reason by asking the applicant about the activities of the Organisation and the arrangements for the Conference. Whether or not the events alleged by the applicant to have occurred might or might not have occurred was a matter which the Tribunal was required to explore. In that regard, the Tribunal was entitled to robustly question the applicant and put to the applicant alternative scenarios or issues arising from the alleged events, including the probability or possibility of their having occurred or not occurred, as the case may be. All that the Tribunal has done in this instance is to deal with a relevant issue in a particularly robust manner, but nevertheless a manner which was open to it (as it did not evince bias)[138] as it sought to determine a relevant issue in the proceedings.

135. The Court therefore considers that the Tribunal did not identify a wrong issue, but simply dealt with a relevant issue in a particularly robust way. The fact that others might have dealt with the matter differently, less robustly and less adversarially, does not constitute jurisdictional error. This ground of the application must therefore fail.

Conclusion and orders

136. For reasons set out above, the Court has concluded that the Tribunal Decision is in various parts affected by jurisdictional error, namely:

    a) a failure to take into account relevant material, namely the evidence of the confiscation of the applicant's Research by the Turkish police;

    b) concluding that the Newspaper Article was not authentic without:

[137] Tribunal Hearing Transcript at 15-16.
[138] See para.119 above.

i) there being anything on the face of the document to indicate that it was not authentic; and

ii) giving the applicant an opportunity to comment to the Tribunal on whether or not it was authentic;

c) failing to consider relevant material, namely the Newspaper Article;

d) failing to consider relevant material, namely the contents of the Police Summonses and the Authority to Capture;

e) the drawing of a conclusion about the genuineness of the authorship of the Dead Person's Mother's Letter:

i) where there was nothing on the face of the Dead Person's Mother's Letter (and the accompanying envelope) to cast doubt on its authorship; and

ii) without giving the applicant an opportunity to comment to the Tribunal on that matter;

f) failing to consider relevant material, namely the content of the Dead Person's Mother's Letter;

g) failing to require the Secretary of the Department to arrange for the making of inquiries as to:

i) (A) the existence of the Newspaper;

(B) the publication of the Newspaper Article; and

(C) if the Newspaper Article was published in the Newspaper, the possibility of obtaining a copy, and not necessarily the original, of the Newspaper Article; and

ii) the existence, and veracity of the content, of the Authority to Capture; and

h) failing to comply with s.425 of the *Migration Act* because it did not allow the applicant to make submissions or raise arguments in relation to the genuineness of:

i) the Newspaper Article; and

ii) the authorship of the Dead Person's Mother's Letter,

prior to handing down the Tribunal Decision.

137. There will therefore be orders granting prerogative relief. In the circumstances, it would be preferable if the matter were allocated to a Tribunal differently constituted to the Tribunal which made the Tribunal Decision.

138. The Court will hear the parties as to costs.

I certify that the preceding !Syntax Error, **and** !Syntax Error, **(138) paragraphs are a true copy of the reasons for judgment of Lucev FM**

Associate: Sandra Gough

Date: 24 February 2010