FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMOK & ANOR v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 1710

MIGRATION – Review of decision of RRT – where Tribunal determined that certain documents submitted by the applicant were fabricated without referring the finding to the applicant and where the documents had not been the subject of any discussion between the Tribunal and the applicant at the hearing or subject of 424A letters or s.424AA advice at hearing.

Migration Act 1958, ss.422B, 424A, 424AA

WACO v Minister for Immigration [2003] FCAFC 171
Meadows v Minister for Immigration (1998) 90 FCR 370
WAGU v Minister for Immigration [2003] FCA 912
S20/2002 (2003) 198 ALR 59
WAEJ v Minister for Immigration [2003] FCAFC 188
S58/2003 v Minister for Immigration [2004] FCAFC 283
S214/2003 v Refugee Review Tribunal [2006] FCAFC 166
WAHP v Minister for Immigration [2004] FCAFC 87
Minister for Immigration v SZGMF [2006] FCAFC 138

First Applicant:	SZMOK
Second Applicant:	SZMOL
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 1958 of 2008
Judgment of:	Raphael FM
Hearing date:	10 December 2008
Date of last submission:	10 December 2008
Delivered at:	Sydney
Delivered on:	22 December 2008

REPRESENTATION

Counsel for the Applicant:	Mr C Jackson
Solicitors for the Applicant:	Kazi & Associates
Solicitors for the Respondent:	DLA Phillips Fox

ORDERS

(1) An order in the nature of certiorari setting the purported decision of the Tribunal aside.

(2) An order in the nature of mandamus remitting the matter back to the Tribunal to be determined according to law.

(3) The First Respondent pay the Applicants' costs assessed in the sum of $5,000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1958 of 2008

SZMOK
First Applicant

SZMOL
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicants, a husband and wife, are citizens of Bangladesh who arrived in Australia on 21 November 2007 and applied to the Department of Immigration & Citizenship for protection (Class XA) visas on 3 December 2007. On 4 March 2008 a delegate of the Minister refused to grant protection visas and on 27 March 2008 the applicants applied for review of that decision by the Refugee Review Tribunal. On 20 May 2008 the Tribunal held a hearing at which the male applicant ("the applicant") attended. His wife had completed Section D of the PVA as a member of his family who did not have her own claims to be a refugee. On 11 June 2008 the Tribunal determined to affirm the decision under review and handed that decision down on 1 July 2008.

2. The grounds upon which the applicant claimed to be a person to whom Australia owed protection obligations was for the convention reason of

political opinion. The applicant claimed that he was an active member of the Awami League and between 1992 and 1995 had worked as a journalist for the Sangram Newspaper. He claimed he was a political reporter and that as a result of writing reports publicising the illegal activities of BNP leaders and thugs in his local area he was threatened by the BNP and told to publish a retraction. He was told that if he did not do so within two weeks he would be killed and because he did not wish to compromise his principles he fled Bangladesh in 1995.

3. The applicant went to live in Singapore. He did not work as a journalist in that city but in a variety of other jobs. He appears to have left Singapore when his employer became reluctant to extend his visa. [CB 37 – 38]. The applicant claimed that he had suffered harm from the local BNP people by being hit on the head and was required to be taken to a private hospital for treatment in 1995. He told that his wife was harassed in her village after his marriage in 2003 and before she came to live with him in Singapore in August 2007. The Tribunal's views about the majority of the applicant's claims are expressed in [62] of [CB 182] of its findings and reasons:

> *"The applicant claims that he is an AL activist and a journalist. He claims that the BNP will seek to harm him for these reasons. The Tribunal has considered the letters he submitted from AL and Chhatra League associates in Bangladesh and his former employer at* The Daily Sangram*. The Tribunal accepts that prior to his departure from Bangladesh in 1995, the applicant was an active member of the Chhatra League, an active supporter of the AL, and he was employed as a journalist. The Tribunal accepts that while he was in Bangladesh, active with the AL, and working as a journalist, he was harassed by members of the BNP in his local area. However, the Tribunal finds that the applicant has greatly exaggerated the risk he faces in Bangladesh because of his association with the AL and journalism. It finds that the applicant's difficulties with the BNP in Bangladesh were confined to a particular area of the country, at a particular time before 1995, when he was actively involved with the AL, writing articles against the BNP, at a time when the BNP was in power. The Tribunal finds that those conditions no longer exist. The Tribunal finds that the applicant is not an AL or Chhatra League activist. He has not demonstrated any interest in the party since he arrived in Australia and, despite his claim that he maintained contact with the party since he left Bangladesh in 1995, there is no persuasive evidence that he has been an activist for the party since 1995. The Tribunal has formed the view that if the applicant was a committed member of the AL he would have sought some involvement with the party in Australia despite his wife's pregnancy. The Tribunal finds that the applicant's associated claims, relating to him being a journalist, are also greatly exaggerated. The Tribunal finds that the applicant has not been a journalist for a considerable period of time and there is no*

apparent interest or opportunity for him to resume such an occupation in the reasonably foreseeable future. The Tribunal accepts that the applicant may still have BNP enemies in Bangladesh, in the area where he previously lived and worked, but if finds that he can avoid those persons by relocating internally within Bangladesh."

4. The findings set out above were preceded by certain findings which formed the core of the applicant's claim that the Tribunal fell into jurisdictional error. At the hearing, and for the first time, the applicant claimed that there were false cases pending against him in Bangladesh. He told the Tribunal that he had only heard about those claims recently and did not mention them before because he did not have any evidence to support them. The applicant asked the Tribunal for time in which to provide documentary proof of these claims and eventually the Tribunal reluctantly gave him seven days. After the hearing the applicant submitted a series of documents indicating that a complaint had been issued against him in 1995 and that a case was proceeding against him in Bangladesh [CB 144 – 156]. It is the treatment of these documents that the applicant says led the Tribunal into jurisdictional error. The relevant parts of Tribunal's decision in relation to these documents is contained at [60 -61] of [CB 181].

> *"[60] The Tribunal considers it implausible that a case could have been lodged or pending against the applicant in Bangladesh but he did not mention it until the hearing because he did not have evidence to support the claim. The Tribunal has formed the view that in seeking refugee status in Australia it would have been obvious to the applicant that a politically motivated false case against him was a relevant consideration in his bid for refugee status. The Tribunal has formed the view that if indeed the applicant had such a case pending against him he would have mentioned it in his lengthy statements to the Tribunal prior to the hearing and he would have made some effort to find out more about the case before the hearing. The Tribunal has formed the view that the applicant fabricated the claim, at the hearing, to enhance his protection visa application. The Tribunal does not accept as credible the applicant's claim that a false case is pending against him in Bangladesh.*
>
> *[61] The Tribunal has considered the documents lodged by the applicant after the hearing in support of his claim that a false case is pending against him in Bangladesh. In view of the above finding that that the claim lacks credibility, the Tribunal is not satisfied that the documents submitted by the applicant are genuine. The Tribunal has formed the view that there is no case against the applicant in Bangladesh and it finds that there can be no genuine documents relating to such a case. The Tribunal finds that the documents were fabricated by the applicant to enhance his protection visa application and it does not accept as credible his claim that the case mentioned in those documents exists.*

> *The Tribunal does not accept as genuine the applicant's claim that he is a person of interest to the authorities or government in Bangladesh because a politically motivated false case is pending against him and it is not satisfied that the documents he submitted in support of that claim are genuine."*

5. In his application filed with this court on 29 July 2008 the applicant gave as his sole ground of application that:

> "The Tribunal have failed to accord the applicant procedural fairness and failed to comply with s.422B(3) of the Act in failing to warn the applicant that it would reject a number of court documents recording a case against the first applicant as documents fabricated by the first applicant for the purposes of his refugee claim and those documents were corroborative of the applicant's case (*WACO* [2003] FCAFC 171)."

6. The applicant argues that the actual circumstances of the instant case are so similar to those in *WACO* that the court is obliged to follow that decision. In *WACO* the applicant was an Iranian jeweller. He made certain claims regarding problems with the Iranian authorities at his arrival interview which were substantially expanded in his application for a PVA when he claimed to fear persecution for reasons of religion because of his association with Ayatollah Sayed Mohammad Shirazi, a reformist cleric. He had met the cleric through his attendance at religious classes where he had been taught by a cleric named Jafarri. Jafarri died in what the applicant considered to be suspicious circumstances. The applicant sought help from Ayatollah Shirazi and he provided correspondence between Jafarri and the Supreme Leader which detailed a doctrinal conflict. Ayatollah Shirazi was subsequently arrested and later released under some constraints. The applicant claimed that at the beginning of 1999 he and four other students were taken off a bus travelling to Tehran and questioned about his association with Ayatollah Shirazi. Following the publication of a leaflet and oppressive action by the authorities the applicant claimed that he had been told by Ayatollah Shirazi to leave the country:

> *"In a segment of the transcript of the Tribunal hearing provided to the court by the appellant it is clear that the Tribunal expressed scepticism of the nature and extent (if any) of the appellant's relationship with Ayatollah Shirazi and Jafarri which, in effect, went to the foundation of the appellant's claim for refugee status. The appellant's advisor obtained permission and subsequently provided further information to support the appellant's claims on 4 July 2001 including two letters in Arabic. After a letter from the Tribunal enquiring whether the appellant would be providing any further information the appellant's advisors on 7 November 2001 provided translated copies of the two letters. … The first letter purported to be from*

the Ayatollah Shirazi to the appellant's father. It thanked him for raising a son who had sacrificed himself to preserve the true meaning of the Koran. The second letter from Mr Azizollah Vahdati, the Head of Notary of Public Office in Tehran, testified to the appellant's relationship with the Ayatollah Shirazi. Both letters if accepted as genuine corroborated a critical element of the appellant's claim. The advisors also indicated that the appellant was unable to furnish any further proof of his relationship with Ayatollah Shirazi."

7. The Tribunal did not accept the appellant's account and the nature and extent of his relationship with the Ayatollah Shirazi and indicated in a section of the Tribunal's findings set out at [16] that it did not believe the applicant was an impressive witness. At [19] the court refers to the manner in which the Tribunal dealt with the two letters:

8. The relevant parts of the Full Bench's decision in relation to the letters commences at [40]:

> "[40] It was, as already noted, common ground that at no time did the Tribunal indicate to the appellant that there was any question of the authenticity of the letters or that they were not genuine so as to give the appellant the opportunity, should he wish, to comment on their authenticity or call evidence that the letters were in fact genuine, for example, evidence of a handwriting expert familiar with the handwriting of the writers of them.
>
> [41] A finding that documents are not genuine might, in a particular case, depend upon factors external to the documents. Direct evidence that a document is a forgery will not always be necessary: *Minister for Immigration & Multicultural Affairs v Djalal* (1998) 51 ALD 567. It would not involve an error of law for the Tribunal to reject corroborative evidence on the basis of its view of an appellant's credit: *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59 per McHugh and Gummow JJ at [49].
>
> [42] The question raised here is whether the Tribunal was entitled to reject a document which on its face was genuine without giving the party which tendered it an opportunity to comment upon the genuineness of the document or to call evidence supporting its genuineness. An administrative tribunal undertaking an inquisitorial function is not obliged to put to an appellant an assertion of apparent falsity or unreliability in respect of each and every matter raised by the appellant for the appellant's comment (*Abebe v Commonwealth of Australia* [1999] HCA 14; (1999) 162 ALR 1 per Callinan J at 76). However, the tribunal will have a duty to raise clearly with the appellant the critical issues on which his or her application might depend. It is clear that the question whether the letters were genuine was a matter which went directly to the most critical issue in the case, namely the appellant's relationship with Ayatollah

Shirazi. It was upon this relationship that the claim that the appellant had a well-founded fear of persecution for a convention reason rested."

At [46] their Honours said:

"[46] There would be no unfairness where the person affected knew what he was required to prove to the decision maker and was given the opportunity to do so. An appellant then cannot complain if his application is rejected because the decision maker, without notice to him has rejected what was put forward."

9. The court then refers to *Meadows v Minister for Immigration* (1998) 90 FCR 370 which was another case about letters that the Tribunal found had been fabricated for the purposes of supporting an application. In *Meadows* the letters had been produced to the Tribunal which:

"Did not convey this to the appellants. To the contrary the appellants were in fact told during the hearing that the Tribunal was "not accusing them of anything" in relation to the letters."

The court noted that the Tribunal had left the applicant in no uncertainty that it did not accept the evidence before it about his relationship with Ayatollah so that the letters were provided as documentary proof of the claims. At [53] their Honours said:

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

[55] Nothing in our mind turns here upon the fact that the oral hearing had been concluded before the letters were procured and forwarded to the Tribunal. The Tribunal could easily have relisted the matter and have arranged for the appellant to be apprised of its doubts as to the authenticity of the letters and be

> given the opportunity to comment upon those doubts and call, if possible, evidence to the contrary."

10. The similarities that the applicant argues his case has with *WACO* are that he puts forward a claim before the Tribunal which the Tribunal indicated it had difficulty in accepting. He says that he requested an opportunity to provide documentary evidence that would prove or corroborate his claim. He was reluctantly granted an opportunity to do so. He provided that evidence in the form of the translated documents contained in the court book. The finding of fact that the documents were fabricated to enhance the applicant's protection visa application was a finding that did not turn upon the credibility of the appellant and there was nothing on the face of the documents themselves to alert the decision maker that they were forgeries. The Tribunal could easily have relisted the matter and apprised the applicant of its doubts about the authenticity of the documents. Indeed it was not necessary to relist the matter because since the decision in *WACO* the provisions of s.424A of the *Migration Act 1958* (the "Act") have come into force and so the Tribunal could have written the applicant a letter. It could have pointed out to the applicant the known facts about document fraud in Bangladesh and it could have indicated to the applicant that even if the documents were accepted as genuine the country information already recited in the decision would indicate that if he was now returned to Bangladesh the falseness of the charges would be properly investigated. The applicant argues that s.422B(3) requires the Tribunal to act in this manner by its exhortation to apply Division 4 of the Act in a way that is fair and just.

11. The applicant would also seek support from the views expressed by French J, as he then was, in *WAGU v Minister for Immigration* [2003] FCA 912. This was also a case of rejected documentary evidence where his Honour said at [34]:

> "[34] It may well be the case that where a Tribunal has made findings adverse to the credibility of an applicant before it, those findings may form a basis for rejecting the authenticity of documentary evidence tendered to the Tribunal by the applicant. There is a danger in so proceeding because it may be that documentary material itself should be taken into account in assessing credibility. To proceed otherwise risks putting the cart before the horse. But to complain of such an approach is perhaps to complain about want of logic or inferior modes of reasoning rather than to identify jurisdictional error."

At [35] his Honour quoted from the seminal decision of the High Court in *S20/2002* (2003) 198 ALR 59 at [49] per Gummow and McHugh JJ referring to the ability to treat corroborative evidence as having no weight because "*the well had been poisoned beyond redemption"* but then went on to say at [36]:

> "[36] Corroborative evidence may be rejected as of no weight because it is dependent upon and can be shown to be undermined by findings as to the tendering party's credibility. In such a case a failure to put to the tendering party that the evidence may be so regarded cannot constitute a breach of procedural fairness. This is just a special case of the general proposition that procedural fairness does not require the decision-maker, in this case the Tribunal, to invite comment upon its thought processes on the way to its decision. But where corroborative evidence is rejected on the basis of a finding of fraud or forgery or on some other positive basis which has never been put to the tendering party there may be a failure of procedural fairness. Such a failure may have very practical effects for it means that the corroborative material is never weighed in the balance of the general assessment of the tendering party's credibility."

His Honour referred to the views expressed by the Full Bench in *WACO* and then discussed a similar case; *WAEJ v Minister for Immigration* [2003] FCAFC 188 quoting from the Full Bench at [44] of his decision:

> *"On its face the foregoing was a statement by the RRT the document was not authentic. This was not a case where dishonesty on the part of the appellant had been demonstrated thereby providing support for the further conclusion that the appellant had arranged for the preparation, and tender of, a non-authentic, or forged document which the RRT could disregard. There was no finding by the RRT that the evidence of the appellant was so discredited that any purportedly corroborative material presented on his behalf could be discarded without further analysis."*

WACO has been considered in several other cases. In *S58/2003 v Minister for Immigration* [2004] FCAFC 283. The Tribunal was permitted to make a finding about the credibility of certain letters produced by applicants who did not attend a hearing without having to put the matter to them. At [26] of the decision the Full Bench cited with approval [46] of *WACO* extracted at [8] of these reasons.

12. The respondent argues that the documents in relation to the false case were not critical to the question of whether the applicant had a well founded fear of persecution. They were provided to bolster the

applicant's claim that even though he had left Bangladesh in 1995 and had lived outside Bangladesh for twelve years there was a false claim pending against him. I cannot agree with the respondent in regard to this submission. The allegation about the false case was critical. Without the false case there was hardly anything to suggest that the applicant had a well founded fear of persecution should he return to Bangladesh. The false case changed all of that. It took his claim up another notch. Even though he had left in 1995 if he went back now the documents indicated that he was the subject of a charge which he said was false. Persecution for that charge could have provided him with a well founded fear.

13. The second point put by the respondent is that the finding of fact that there could be no genuine documents turned on the applicant's credibility and unlike *WACO* the applicant's credibility in this case was always in issue. As I read *WACO* the applicant's credibility was in issue, particularly his claims about his association with the Ayatollah. In the instant case the Tribunal accepted that the applicant had been a journalist and was a low level supporter of the Awami League. The Tribunal didn't think that the applicant's claims were untrue, more that they were exaggerated. In other words the applicants felt they gave him more reason for a well founded fear than the Tribunal did. The non-credibility issue only arose with regard to the claim about the false charges. The Tribunal took the view, available on the evidence, that the applicant would not make no reference to these charges previously if they had existed. As in *WACO* this was made plain to the applicant and the documentary proof was intended by the applicant to alleviate the Tribunal's concern.

14. The respondent argues that the factual circumstances and the Tribunal's approach in making it clear to the applicant that it had difficulty in accepting his claim that there was a false case differentiated it from *WACO* and makes reference to *S214/2003 v Refugee Review Tribunal* [2006] FCAFC 166. The applicant in that case had submitted a newspaper report to support his account of relevant events which the Tribunal made it clear it did not accept. The Tribunal wrote to the applicant advising that it did not accept that the newspaper article was genuine. He then submitted to the Tribunal some statutory declarations including one from his sister. She said that she recalled seeing the

newspaper article and the photograph of the applicant printed separately beside their photograph of her father. The Tribunal had asked the applicant why he had not mentioned the newspaper article in his original statement and he had said that he had not had it at the time. The Tribunal went on to give reasons why it could not accept the newspaper article as genuine before dealing with the sister's statutory declaration. The Tribunal stated:

> *"I do not consider that the purported corroboration of the applicant's evidence to a limited extent by his sister outweighs the views I have formed of the credibility of the applicant on the basis of his demeanour at the hearing before me and the adverse impression I have formed as a result of the contradictions in the applicant's own evidence in relation to his arrest and the arrest of his father. I consider that the applicant's sister has provided her statutory declaration in an attempt to assist her brother's application for a protection visa."*

The applicant relied on the Tribunal's failure to warn the appellant that the evidence of his sister in respect of the events could not be accepted and that she was involved in an attempt to deceive the Tribunal. At [30] after quoting from *WACO* their Honours Allsop, Jacobson and Graham JJ said:

> "[30] The appellant submits that the present case falls fairly and squarely within the last mentioned statement of principle asserting that the Tribunal had 'a duty to raise clearly with the appellant the critical issues on which his ... application might depend'.
>
> The genuineness of the appellant's sister's Statutory Declaration was never in issue. The relevant 'critical issue' for the appellant was whether the events, recounted by him as having taken place in India in 1991, in fact occurred. On this issue the appellant's account was of particular importance, as was the alleged newspaper article said to have been a report on the occurrence. The matters deposed to within the sister's statutory declaration were germane but not critical. She gave no evidence about having purchased a newspaper containing the alleged article, nor did she give any description of 'the newspaper' or the time and place at which she saw it, if, indeed, she did. As the Tribunal Member observed, the appellant did not seek to have his sister give evidence."

The Full Bench discussed *WACO* further and compared it with *WAHP v Minister for Immigration* [2004] FCAFC 87 before saying:

> "[34] The findings of the Tribunal in respect of the motivation of the appellant's sister for making her statutory declaration were not directed at the resolution

of the 'critical issue' in question. It is true that the statutory declaration purported to offer some level of corroboration of the appellant's claims, but the Tribunal Member did not consider that this outweighed the views he had already formed in the course of the hearing about the credibility of the claims.

[35] It should be recalled that in the Tribunal Member's reasons for decision, as quoted above at [22], he said:

> "Having regard to the view I have formed of the credibility of the Applicant and the contradictions in his evidence regarding his arrest and that of his father, I do not accept that he and his father were arrested ..."

[36] He then continued:

> "... and I therefore do not accept the evidence of his sister that she visited her father in the police station or the gaol in "Trichy"."

[37] The Tribunal Member also said:

> "I do not consider that the purported corroboration of the Applicant's evidence to a limited extent by his sister outweighs the view I have formed of the credibility of the Applicant on the basis of his demeanour at the hearing before me and the adverse impression I have formed as a result of the contradictions in the Applicant's own evidence in relation to his arrest and the arrest of his father."

[38] It can be seen that the matter which was pivotal to the Tribunal Member's reasoning was that he simply did not believe the appellant's account of what was said to have occurred concerning the detention of himself and his father in India in 1991.

[39] Whilst it may have been inappropriate for the Tribunal Member to go so far as to find that the appellant's sister was a party to a fraud on the Tribunal, it is appropriate to observe that the Tribunal Member's reasoning was predicated upon an observation that she claimed to have remembered seeing a photograph of her father in the newspaper article which the Tribunal Member found to have been fabricated.

[40] In our opinion it was not inherently unfair for the Tribunal Member to conclude that the observations of the appellant's sister were unacceptable without affording the appellant an opportunity of dealing with such a conclusion. The acceptance or otherwise of the facts and matters contained in the appellant's sister's statutory declaration was a necessary step in the reasons for decision of the Tribunal Member. However, it was open to the Tribunal to reject that evidence without further warning the appellant that the evidence may not be accepted. The reasons for this are clearly stated in [33] – [34] of the learned primary judge's reasons which we have reproduced above at [24]."

15. The respondent argues that in this case the applicant would have been in no doubt that the truth of his claims are seriously in issue and therefore the genuiness of any document he provided would also be in issue. The respondent points to a number of extracts from the transcript. I think these extracts should be considered in their entirety rather than just for references to the Tribunal's apparent incredulity.

> "A: I have heard about them from other sources, that they have lodged a court case against me and they have put their name, actually they have lodged cases against too many other people and they have put the name as well. I am not really certain about this but I have heard about that.
>
> T: You didn't mention this in any of your submissions.
>
> A: I just learned about this, that's why I couldn't put anything on it.
>
> T: So who is lodging a false case against you?
>
> A: The BNP. One of the local BNP men who lodge a case as an enemy, as a rival party.
>
> T: Right. When was this alleged false case lodged?
>
> A: I don't know the exact date but it was an old case which commenced when BNP was in power and that happened against some Awami activist and that was a case of keeping arms or weapons.
>
> T: Okay, I have to warn you, first of all you didn't mention it to the Department or to the Tribunal. You're introducing it just now. The details are very vague. I may not accept this claim as being credible?
>
> A: I didn't say this because I was unable to get any documents or any proper evidence about that to support this claim and if I would have those then maybe I would claim.?
>
> T: Anyway, I'm just putting you on notice that I probably … I will think about it but I am probably not going to accept it as credible because you haven't presented it consistently and you don't have any details..
>
> A: I just heard about these events that are happening, and as I was unable to get any documents from the other end, that's why I didn't mention this, but later it is required by the Tribunal and by this time if I was able to get those documents from there, from the real source then I would be happy to provide it?
>
> …

A: We are at the same level and it is said that my name is said also in there, in relation to this case as well.

T: Why didn't you mention this before?

A: I was not certain about that treatment or how true it is. That's why I didn't mention it before.

T: See, it sounds to me like you're making it up now, to enhance your application

A: No, I'm not making it up right now, because if our member wants some proof or evidence in relation to this then I can provide it if I can obtain those. The reason I wasn't able to provide all those documents or proof before, because I learned about this just after I was submitting all these applicants and things.

…

A: I won't be able to go back because if I live with my other family members and we stay together under the same roof, as I said, I don't have the ability to establish a new house again and it won't happen. There are some events that are also, I've heard that the president from my local area who has been taken away and who was actually shot dead by the [RAB] people, and apart from that there are some cases against our activists and under the governance of the current government these things are happening because are getting more opportunities to raise all these issues. Because now if someone got with a false case and lodged a case then the person is arrested and there is no bail at all."

16. Whilst it seems to be clear from these extracts from the transcript that the Tribunal had considerable doubts about the existence of the false cases the applicant was also trying to provide an explanation for why the matter had not been raised earlier. Did the failure to provide this information before poison the well of credibility beyond redemption? Or has the Tribunal overreached itself in making the firm finding that the documents were fabricated rather than giving them no weight because of the lateness of their introduction. One would have difficulty in saying that the preponderance of evidence in this case against the genuineness of the documents was equal to the preponderance of evidence in *S214/2003*. In that case the authenticity of the newspapers articles was already a matter in contention that had been drawn to the attention of the appellant. Whilst in this case the fact of the false charges was a matter in contention there was no suggestion that documents alleged to corroborate the existence of the charges were not

genuine had been made to the applicant because no such documents had been provided to the Tribunal at the time of the hearing.

17. I am of the view that this case has more similarities with *WACO* and *WAGU* than with *S214/2003*. I believe that the critical test is the one expressed in *S20* and extracted by French J in *WAGU*. If the applicant's credibility has not been irrevocably compromised by his previous testimony then he would be entitled to the procedural protection of s.424A (or 424AA) because to provide it would be "just and fair" (s.422B(3)).

18. Perhaps the strongest support for an *S20* finding in this case can be found at [61] of [CB 181] of the Tribunal's reasons where it says:

> *"The Tribunal has formed the view that there is no case against the applicant in Bangladesh and it finds that there can be no genuine documents relating to such a case."*

This statement would appear to indicate that the well had been poisoned before the Tribunal saw the documents because of the lateness of the introduction of this claim and the unsatisfactory nature of the applicant's explanations. In the extract from the transcript found in the affidavit of Laura Frances Weston sworn on 10 December 2008 the applicant is asking the Tribunal for some further time to lodge these documents:

> "A: If the member would like to give me some more time then I can really provide you with the documents and all the proof before handing down the decision, which will be helpful to you.
>
> T: I'll give you a week. One week.
>
> A: [Unclear].
>
> T: Well sir you have a week. If you send me something within a week I'll have a look at it. If you don't send me anything I will proceed with the information that I've got. I'll wait a week and then I'll make a decision and when I've made the decision you'll be invited to come pick it up. A copy will go to the Immigration Department and then it's up to the Immigration Department to process their decision and let you know what is going to happen next.
>
> A: I would request more time.
>
> T: Request denied.

A: I was not [unclear].

T: Sir, you've been out of the country for twelve years, you've been here for six months, now you want more time. This is not a process that goes endlessly. If you wanted to … if you wanted to provide more information in support of your case you should have organised it in the whole time you've had before you actually lodged this application.

A: It's just that documents …[unclear].

T: One week. Thank you, good bye."

19. The tenor of this interchange between the Tribunal and the applicant would seem to indicate that the Tribunal has come to a particular view about the applicant's credibility in relation to the false charges and that whilst it agrees to allow the applicant a short further period of time in which to produce the documents and agrees to look at them when they are produced one might infer that it was unlikely they would have any convincing effect. Does this indicate the possibility that the Tribunal's mind was closed to the documents and thus suggest the Tribunal might be open to a complaint of apprehended bias? In *Minister for Immigration v SZGMF* [2006] FCAFC 138 at [21] the Full Bench Branson, Finn and Bennett JJ said:

> "Further, there is no obligation on a Tribunal member to maintain a neutral state of mind during the entire course of a review of a delegate's decision. What is critical is that the member not close his or her mind against any additional material that might possibly prove probative. In our view there is no reason to think in this case that the Tribunal member, after the first hearing, had closed his mind against additional material that might possibly prove probative."

In that case a request for further time to make comments was made; at [24] the court said:

> "His Honour considered the paragraph 'indicative of a strong view held by the presiding member at the time the extension of time was sought that the false cases claim was false'. Having regard to the advice from the Australian High Commission in Dhaka that the documents said to support the respondent's false cases claim were not genuine, we do not consider that the Tribunal is to be criticised for forming a strong view that the false cases claim was itself false – provided that it remained open to persuasion that it should modify or alter its view. Indeed, the Federal Magistrate himself observed that '[t]here can be little quarrel with the proposition that the second report from DFAT about the court documents seriously undermined the [respondent's] credibility.' We see no reason to conclude that the Tribunal had closed

its mind against consideration of any further probative material that the respondent might have placed before it."

20. The Tribunal in *SZGMF* did send the applicant a S.424A letter which referred to information that the letters were possibly false. The Full Bench overturned the FMC decision that the Tribunal showed apprehended bias but came to the view that the S.424A letter did not fully explain the significance of the information for the particular documents produced. Whilst I think the case is instructive in relation to any charge of apprehended bias, I think the better view of the Tribunal's statements in the instant case are that they do not indicate a closed mind to the documents. But I am concerned that if there was no predetermination the Tribunal failed to issue a S.424A letter or reconstitute the hearing when it concluded the documents were forgeries. To have done that would have been consistent with *WACO* and *WAGU*. If the Tribunal believed that the late reference to false charges pushed its view of the applicant's credibility from tolerance of exaggeration to clear disbelief it could have said so without making the further finding that the documents were fabricated. Once it determined to go there it seems to me that the Tribunal was obliged to act fairly and put the matter to the applicant. In this case there is no reference to any evidence from which the finding was made and that adds to my concern. I appreciate that the line is fine and others may take the view that a letter was not necessary because the well had been poisoned, but I believe that in these cases applicants should be given the benefit of any judicial doubt.

21. I will give the constitutional writs sought as the Tribunal has fallen into error by failing to refer its conclusions about the documents to the applicant for comment. I order that the First Respondent pay the Applicants' costs assessed in the sum of $5,000.00.

I certify that the preceding twenty-one (21) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: