FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZHZD v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 4

MIGRATION – Application to review decision of Refugee Review Tribunal – whether the Tribunal failed to comply with s.425 of the Migration Act, whether apprehended bias, failure to have regard to relevant considerations or constructive failure to exercise jurisdiction.

Migration Act 1958 (Cth), ss.414, 422B, 425

Applicant S214 of 2003 v Refugee Review Tribunal [2006] FCA 375
Htun v Minister for Immigration and Multicultural Affairs [2001] FCA 1802
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
M164 of 2002 v Minister for Immigration [2004] FMCA 118
Minister for Immigration & Citizenship v Applicant A125 of 2003 [2007] FCAFC 162
Minister for Immigration & Multicultural Affairs v Djalal (1998) 51 ALD 567
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507
Minister for Immigration & Multicultural Affairs v Lay Lat [2006] FCAFC 61
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12
NACB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 236
NADR v Minister of Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 167
NAIS v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 77
NAJO v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 356
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1
Re Refugee Review Tribunal and Another; Ex parte H and Another (2001) 75 ALJR 982
Re Ruddock; Ex parte S154/2002 (2003) 201 ALR 437
S1194/2003 v Minister for Immigration and Multicultural Affairs [2006] FCA 1133
SBSS v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 749

SZBEL v Minister for Immigration & Multicultural Affairs & Indigenous Affairs (2006) 231 ALR 592
SZCIJ v Minister for Immigration & Multicultural Affairs & Anor [2006] FCAFC 62
SZGQN v Minister for Immigration and Citizenship [2007] FCA 428
SZILQ v Minister for Immigration & Citizenship [2007] FCA 942
SZJBA v Minister for Immigration and Citizenship [2007] FCA 1592
SZJUB v Minister for Immigration & Citizenship [2007] FCA 1486
VGAO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 68
W389/01A v Minister for Immigration and Multicultural Affairs [2002] FCAFC 432
WACO v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 171
WAEJ v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 188
WAGJ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 277
WAGU v Minister for Immigration & Multicultural & Indigenous Affairs (2003) FCA 912
WAHP v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 87
WAIJ v The Minister for Immigration and Multicultural and Indigenous Affairs (2004) 80 ALD 568
WAJR v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 106
WAKK v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 225

Applicant:	SZHZD
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent	REFUGEE REVIEW TRIBUNAL
File number:	SYG 3846 of 2005
Judgment of:	Barnes FM
Hearing date:	22 November 2007
Delivered at:	Sydney
Delivered on:	8 February 2008

REPRESENTATION

Counsel for the Applicant:	J R Young
Counsel for the Respondent:	B K Nolan
Solicitors for the Respondent:	Phillips Fox

ORDERS

(1) That the application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3846 of 2005

SZHZD
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(As Corrected)

Background

1. This is an application for review of a decision of the Refugee Review Tribunal handed down on 25 October 2005 affirming a decision of a delegate of the first respondent not to grant the applicant a protection visa.

2. The applicant, a citizen of Bangladesh, arrived in Australia in April 2005 and applied for a protection visa. He claimed to be an active member of the Awami League (the AL) in Bangladesh who was targeted by the then ruling government as a result of his political activities and that he was unable to obtain the protection of the authorities. He also claimed that false charges had been laid against him and that he would be detained and tortured and might be killed if he returned to Bangaldesh.

3. The application was refused and the applicant sought review by the Tribunal. He attended a Tribunal hearing on 30 August 2005. On 31 August 2005 the Tribunal wrote to the applicant's solicitor/migration agent advising that if he wished to provide further material he should do so on or before 14 September 2005. On 12 September 2005 the applicant's adviser wrote to the Tribunal enclosing a number of documents provided by the applicant, extracts from country information and submissions in relation to matters relevant to the applicant's claims. Included in the documents provided to the Tribunal were a statutory declaration from the applicant elaborating on his political involvement in the Awami League and why he feared returning to Bangladesh and supporting letters dated 4 September 2005 from the General Secretary of the Bangladesh Awami League in the city in which the applicant lived in Bangladesh and from the President of one of the ward branches of the Awami League in that city.

The Tribunal decision

4. In its reasons for decision the Tribunal summarised the written claims and information provided by the applicant and his oral evidence at the Tribunal hearing. The transcript of the Tribunal hearing is before the Court. The Tribunal also referred to independent country information in relation to the situation in Bangladesh.

5. In its findings and reasons the Tribunal described the applicant's claim as a claim to fear persecution from a number of Bangladeshi government authorities and members of the BNP because he was "…*a member and official of the AL*." It set out his claims that he feared arrest and that he may be killed if he returned to Bangladesh and his claim that a friend and co-worker in the AL was killed by officers of the RAB (Rapid Action Battalion) in 2004 and that he feared the same would happen to him.

6. However, the Tribunal did not accept that the applicant was ever a worker, member or official of the Awami League. It had regard to inconsistencies and vagueness in the applicant's account at the Tribunal hearing as to when and how he became a member and as to how officials were chosen in branches of the AL. It found that his claim that he did not know how he became a member of the AL was

inconsistent with his evidence that he was a worker for the AL from 1997, that he became a member in 2003 and then *"was almost immediately chosen or appointed an official of his party branch"*. The Tribunal also referred to the applicant's generalised answer in response to a request that he describe his social welfare activities. It found that he had not explained his involvement in such activities. The Tribunal formed the view that the applicant had not been involved in such activities. The Tribunal noted that the applicant had not attempted to answer a question in the hearing as to how the Awami League was organised. It had regard to the applicant's lack of knowledge about aspects of policy and organisation of the Awami League and as to how the committee of the branch he claimed to belong to worked. While he could describe the flag of the Awami League, the Tribunal considered that this would be a matter of common knowledge and found:

> *In the overall context of his evidence I do not consider that it shows a level of knowledge that I would expect of an active worker, member or official of the Awami League.*

7. The Tribunal also formed the view that the applicant's claims that he had been visited by officers of the RAB had been fabricated to support his application for refugee status given the lack of detail he had provided when questioned about that claim.

8. In relation to the applicant's claim that the RAB were looking for him because they had killed a friend of his named "Sweet" who was involved with the AL and that the RAB was interested in the applicant because of his involvement in the AL, the Tribunal observed that the applicant could not remember when Sweet was killed. The Tribunal referred to press reports indicating that Sweet was a high profile AL activist with a long history of political activism and also involvement in a series of murders and in arms trading. While it accepted that the applicant may have read about the death of Sweet and may have some local knowledge of his activities (which appeared to have been well publicised) it did not accept that the applicant had ever been involved in any way with the AL and it did not accept that he was friend or political colleague of Sweet.

9. The Tribunal addressed the applicant's claim in the statutory declaration provided after the Tribunal hearing to the effect that he had

been nervous at the hearing and could not answer the Tribunal's questions. In that declaration he had also claimed that he had been the publicity secretary of a city branch of the Awami League (having been appointed to that position in 2003) and that he was active until his departure from Bangladesh and reiterated his claim to fear that he would be targeted by police and the *"terrorists workers"* of the BNP (in particular the RAB).

10. The Tribunal found that having observed the applicant at the hearing and taken into account his claim that he was nervous (which it accepted), nonetheless it did not accept that being nervous:

> *would have resulted in the complete absence of any demonstrated knowledge of his own experiences as an active worker with the party, of his becoming a member, of his involvement in social welfare projects and of the process of becoming a branch official. I would expect that a person who had personal experience in such matters would be able to give an account of his experiences even if that account was given in a halting and nervous fashion, or in a disorganised fashion or with some minor inconsistencies or omissions. I would have expected if the applicant had been either an active worker, member of official of the Awami League as claimed he would have been able to give both core and peripheral detail of those matters claimed. However I found his evidence to be significantly lacking in those details.*

11. The Tribunal referred to the fact that the applicant had been given a further opportunity to provide evidence after the hearing. However, it found that in his statutory declaration he did not provide greater detail of his claims, but rather sought to restate his assertions. As the Tribunal did not accept that the applicant was ever involved with the Awami League or that he had a connection with Sweet, it did not accept the evidence at the hearing or in the statutory declaration that the applicant or members of his family were visited by members of the RAB seeking information or that members of the RAB had abused and threatened him or his family members with harm.

12. As it did not accept that the applicant was involved with the Awami League or that he had been harmed or threatened with harm for reasons of his claimed involvement, the Tribunal did not accept that if he were to return to Bangladesh now or in the foreseeable future he would face harm from police, RAB or any government authorities because of an

alleged connection with Sweet or because he was involved in Awami League activities.

13. The Tribunal referred to the letters of support from Awami League officials, but gave them no weight. It stated:

> *The applicant also lodged a number of letters purporting to be from officials of the Awami League in Bangladesh giving details of the applicant's position with the Awami League, a very general description of his Awami League activities and the risks he faced if he returned to Bangladesh. I have read the letters carefully, however, as I consider that the applicant completely lacks credibility in relation to his claims of involvement with the Awami League and consequent threats or mistreatment by government authorities or members of the BNP I do not accept that the contents of the letters are true. I consider that the letters have been written to assist the applicant in his application for refugee status but do not provide an accurate account of his membership with the Awami League.*
>
> *In* Re MIMA; Ex parte Applicant S20/2002 *and* Appellant S106/2002 v MIMA (S20), *the High Court held that, having found that the applicant in that case completely lacked credibility; it was not illogical or irrational for the Tribunal to reject or give no weight to evidence which corroborated the applicant's claim. In this case I have disregarded the letters submitted on the applicant's behalf and given them no weight in determining his claims for the reasons set out above.*

14. Given that it did not accept that the applicant was ever a member of the AL and as it was of the view that he *"completely lacks credibility"*, the Tribunal did not accept the applicant's claim that he was ever a colleague or co-worker of a person called Salim who, according to newspaper reports, had been killed by the police. It noted the absence of independent evidence of such a relationship or of any claim to this effect at the hearing.

15. The Tribunal continued:

> *In his original written claims the applicant claimed that there were false cases against him. He did not raise this claim at hearing or in the statutory declaration of 12 September 2005 in which he sought to clarify his claims. I consider that the applicant does not wish to press or continue with this claim but in any event, as I do not accept that the applicant has ever been*

involved with the Awami League I also do not accept that he has had false cases made against him for reasons of his political opinion or activities with the Awami League.

16. While the Tribunal accepted on the basis of country information that there was a high level of political conflict and violence in Bangladesh, on the evidence before it it did not consider that the applicant faced any risk of persecution for reasons of his political opinion or for any other reason should he return to Bangladesh now or in the foreseeable future. It concluded that it was not satisfied that the applicant had a well-founded fear of persecution for any Convention reason.

17. The applicant sought review by application filed in this Court on 23 December 2005. While the application states that there is one ground (that the Tribunal failed or constructively failed to exercise its jurisdiction under the Act) counsel for the applicant clarified that there were two aspects of the Tribunal decision from which the grounds asserted by the applicant arose: the "letters of support" issues and the "false charges" issue.

Letters of support issues

18. It is convenient to consider first the issues raised by the applicant in relation to the manner in which the Tribunal treated the letters of support from officials of the AL. Paragraphs 2 to 4 of the application address these letters as follows:

> *2. The Tribunal failed to provide the applicant with procedural fairness as required by section 425, or at all, in relation to the letters he gave the Tribunal from the Awami League political party. Whilst the documents, on their face, are authentic, and whilst the Tribunal does not identify anything in its reasons about the documents themselves that would suggest that they were not authentic, the Tribunal states at page 14 of its decision:*
>
> > *"The applicant has also lodged a number of letters purporting to be from officials of the Awami League in Bangladesh giving details of the applicant's position with the Awami League, a very general description of his Awami League activities and the risks he faced if he returned to Bangladesh. I have read the letters carefully, however, as I consider that the applicant completely lacks credibility in relation to his claims of involvement with the Awami League*

and consequent threats or mistreatment by government authorities or members of the BNP I do not accept that the contents of the letters are true. I consider that the letters have been written to assist the applicant in his application for refugee status but do not provide an accurate account of his membership with the Awami League.

In Re: MIMA; Ex parte Applicant S20/200*2 and* Appellant S106/2002 v. MIMA *(S20), the majority of the High Court held that, having found that the applicant in that case completely lacked credibility; it was not illogical or irrational for the Tribunal to reject or give no weight to evidence which corroborated the applicant's claims. In this case I have disregarded the letters submitted on the applicant's behalf and given them no weight in determining his claims for the reasons set out above."*

These letters were provided by the applicant after the Tribunal's hearing. At no stage did the Tribunal communicate with the applicant about any doubts it had as to the authenticity of these documents. These documents, if accepted, would have been determinative of the applicant's entire claim for protection, and the Tribunal ought to have alerted the applicant to the fact that it had doubts as to their authenticity, or at least made some inquiry as to their genesis, and given the applicant a chance to make submissions or to obtain further evidence on that issue, including perhaps expert evidence as to the authenticity of the documents, and further evidence as to their genesis.

3. Further, the passage from the Tribunal above gives rise to a reasonable apprehension of bias on the part of the Tribunal as to the potential authenticity of any *corroborative evidence. Upon the conclusion of the hearing, the Tribunal's mind appears to have become closed to the probative value of any subsequent corroborative evidence that may have been given. The authorities cited by the Tribunal did not entitle the Tribunal to disregard the letters, as is admits it did.*

4. On the question of credibility generally, the Tribunal ought to have had regard to the letters that corroborated the applicant's claims, before it concluded on its findings on credibility. The letters were directly relevant to that question, and potentially determinative of it. Instead, the Tribunal made a decision and closed its mind on credibility without regard for the letters, and then said that having already made up its mind in relation to that, it was not obliged to have regard to the letters. This is a failure to have regard in any real sense to that relevant evidence and

relevant considerations, and again exhibits a closed mind on the matter giving rise to a reasonable apprehension of bias.

19. Counsel for the applicant clarified that it was contended that there had been a constructive failure to exercise jurisdiction, a breach of s.425 of the *Migration Act 1958* (Cth), apprehended or actual bias or a failure to give genuine or proper consideration to relevant evidence in relation to the Tribunal's treatment of the two letters of support said to be from officials of the Bangladesh Awami League dated 4 September 2005.

20. The court book contains two versions of the first letter in the name of the president of an Awami League Ward in the city in which the applicant lived in Bangladesh. One is on a letterhead in English language and the other is not. These documents are otherwise in identical terms and certify that the applicant was known to the writer and was the publicity secretary of a specified ward of the Awami League in a particular city, that he was a very sincere worker of the Bangladesh Awami League and always very active in all kinds of programs. The letter stated that the applicant's activities made him the target of police and terrorist workers of the BNP and that they were afraid about his "*life security"* in Bangladesh as "*His life may spoil or he will be in imprisonment for a long life*."

21. The other letter is said to come from the general secretary of the Awami League in the city in which the applicant lived in Bangladesh. It certified that the applicant was known to the writer, that he was a man of excellent moral character and an efficient worker of the AL. It stated that he was the publicity secretary of a specified ward and that his role "*on every democratic and anti-Autocratic movement is appraisable. He is political (Awami League) organizer."*

22. The letter claimed that taking a *"life risk"* the applicant had "*played a vital role in every Democratic movement from 16-06-01 which Bangladesh Nationalist Party (B.N.P) is in power"* (sic). It stated that the applicant was always in danger due to his "*politically courageous*" role and that for this reason he "*has failed from public opinion after direct participation on behalf of Awami league*" (sic). It was claimed that many cases had been instituted against the applicant "*due to this*" and that "*W/A has been issued against him and police is looking for him tremendously*". He was said to have left Bangladesh "*due to last of*

free and legal right and due to cruelty and danger of life" (sic). The letter claimed that the applicant "*has no safety on life in Bangladesh. His life may spoil or he will be life imprisonment if he returns during the time of this Government.*"

23. As set out above, these letters were provided to the Tribunal after the Tribunal hearing. It was submitted for the applicant that these letters asserted that he was a person of some profile who had done certain things which placed him at a threat of harm and that the Tribunal had fallen into jurisdictional error in the manner in which it dealt with such letters.

24. It was said to be relevant that the Tribunal first made the following:

> *As I do not accept that the applicant was involved with the Awami League or that he has been harmed or threatened with harm for reasons of his claimed involvement I do not accept that if the applicant were to return to Bangladesh now or in the foreseeable future he would face harm from police, RAB or any government authorities because of an alleged connection with "Sweet" or because he was involved in Awami League activities.*

25. As set out at [13] above the Tribunal then considered the letters. It referred to the generality of such letters. It found that as it considered that the applicant completely lacked credibility in relation to his claims of involvement with the AL and consequent threats or mistreatment it did not accept that the comments were true. Rather it considered that the letters had been written to assist the applicant in his application for refugee status. The Tribunal referred to *Applicant S20/2002* in concluding that it disregarded the letters and gave them no weight in determining the applicant's claims.

26. It was submitted that the Tribunal had made positive findings about the letters, in that it found as a fact that they had been written to assist the applicant in his application for refugee status, but that they did not provide an accurate account of his membership or history with the Awami League. It was said that this amounted to a finding that the letters were knowingly false and that the applicant had knowingly submitted false documents to the Tribunal to assist his application for refugee status. It was submitted that this in turn affected the applicant's credibility, so that when the Tribunal went on to consider and reject

claims on the basis of the applicant's lack of credibility (such as his claims about the person called Salim in relation to which the Tribunal found that *"As I do not accept that the applicant was ever a member of the Awami League and that he completely lacks credibility I do not accept that he was a colleague or co-worker with the person known as Salim…"*) the Tribunal must have been taking into account its finding that the applicant had provided incorrect letters to the Tribunal. In these circumstances it was contended that the Tribunal fell into error in a number of ways.

Section 425

27. It was contended first that, although these documents had been submitted after the hearing, where the Tribunal intended to rely on the letters in relation to a positive finding and then to use that positive finding in relation to further issues raised by the applicant, it was obliged by s.425 of the *Migration Act 1958* to give the applicant notice of those matters.

28. Section 425(1) is as follows:

> *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.*

29. Counsel for the applicant referred to what was said by French J in *WAGU v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) FCA 912 at [29] – [30] in relation to what was required under s.425 and pursuant to the principles of procedural fairness imposed by that section, in support of the proposition that s.425 created an obligation on the Tribunal to raise with the applicant at hearing doubts which the Tribunal may have if the Tribunal was disposed to reject documentary evidence on some positive basis. It was submitted that the finding that the documents were written to assist the applicant in his application for refugee status and that they did not provide an accurate account of his membership or history with the Awami League was such a positive basis, so that the Tribunal was obliged to raise with the applicant the subject of the letters before rejecting them on this positive basis. It was submitted that the critical words in s.425 were *"the issues arising in relation to the decision under review"*.

30. It was contended that as the Tribunal had invited the applicant to submit further material and that material of itself gave rise to "an issue arising in relation to the decision under review" the Tribunal was obliged to alert the applicant to that fact. The Tribunal was said, in effect, to have continued the hearing process by indicating that it would consider anything that the applicant submitted within the next 14 days.

31. It was acknowledged that if the Tribunal had simply said that it did not accept the material submitted, the suggested error would not arise. However it was contended that the Tribunal had made positive findings in using the material to assess the applicant's credibility and that this also raised the issue of fairness considered by French J in *WAGU* at [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 as 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 evidence is never weighed in the balance of the general assessment of the tendering party's credibility.*

32. Thus, it was contended that for the Tribunal to make a positive finding in relation to the concoction of material known to be false without putting this to the applicant constituted a failure to comply with s.425 and a jurisdictional error.

33. Paragraph 2 in the application is broadly drafted. It refers to a failure to accord procedural fairness *"as required by section 425, or at all"* and suggests that the Tribunal ought to have alerted the applicant to the fact that it had doubts as to the authenticity of the letters *"or at least made some enquiry as to their genesis"* and to have given the applicant a chance to provide further submissions or evidence.

34. As counsel for the first respondent pointed out, insofar as the grounds relied on by the applicant appear to draw on common law principles of procedural fairness, it has to be borne in mind that following the introduction of s.422B of the Act (which applies in this instance), it is no longer open to an applicant to argue generally that a Tribunal has breached the requirements of procedural fairness in respect of the natural justice hearing rule. Rather the applicant must address whether there has been a breach of one of the statutory requirements in Division 4 of Part 7 of the Act such as s.425 (see *SZCIJ v Minister for Immigration & Multicultural Affairs & Anor* [2006] FCAFC 62 and *Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61).

35. In that respect, as the High Court stated in *SZBEL v Minister for Immigration & Multicultural Affairs & Indigenous Affairs* (2006) 231 ALR 592 at [33], the choice of words by the legislature ("the issues arising in relation to the decision under review") is *"important"* (see [33] – [38]). In *SZBEL* the High Court was considering whether the Tribunal had failed to accord an applicant procedural fairness in failing to put to him for comment its concerns about particular aspects of his claims it later found to be implausible. However, the High Court considered the statutory framework of the Migration Act in determining what procedural fairness required. In doing so, their Honours suggested that a Tribunal would be considered not to have given an applicant the opportunity required by s.425 if it did not give him any indication of the matters it considered to be dispositive, in particular in circumstances where those matters differed from those on which the Minister's delegate had determined the application.

36. The "issues" referred to in s.425 cannot necessarily be identified simply by describing them as whether the applicant was entitled to a protection visa. As the High Court stated in *SZBEL* at [34]:

> *The statutory language 'arising in relation to the decision under review' is more particular. The issues arising in relation to a decision under review are to be identified having regard not only to the fact that the Tribunal may exercise (s.415) all powers and discretions conferred by the Act on the original decision-maker (here, the Minister's delegate), but also to the fact that the Tribunal is to review that particular decision, for which the decision-maker will have given reasons.*

37. The Tribunal's task is to review the delegate's decision. It has to identify the issues that arose in relation to that decision. However, if a Tribunal takes "*no steps to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review"* (SZBEL at [35]).

38. I have had regard to the fact that what is in issue is the scope of s.425, not common law procedural fairness. Hence some caution must be exercised in the application of statements made in that context to s.425. What the High Court stated at [38] reflected approval of the statement by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590 – 591 that the requirement of procedural fairness in the exercise of a statutory power includes the fact that "*The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material"*. In that context the High Court expressed the view (at [38]) that what was *"obviously…open"* in the Tribunal's review *"can be identified only by having regard to 'the issues arising in relation to the decision under review' "*. It was those issues which it was said would determine whether rejection of critical aspects of an applicant's account of events (as was said to have occurred in *SZBEL*) was *"obviously … open on the known material"*. In contrast, in the context of s.425 the focus is on whether the Tribunal has met its obligation to invite the applicant to appear before it to give evidence and present arguments *"relating to the issues arising in relation to the decision under review"*

39. An exercise in characterisation must be undertaken to identify what are the "dispositive" or determinative issues in the sense of issues on which the decision to reject the applicant's claim is based. It is those issues that meet the description of an issue "arising in relation to the decision under review" within the meaning of s.425.

40. The nature of the s.425 obligation is illustrated by the approach taken by Bennett J in *SZJUB v Minister for Immigration & Citizenship* [2007] FCA 1486. In that case the appellant had claimed to be involved in a Bible smuggling operation and to be targeted by

authorities. The Tribunal did not raise with her the specific questions of why she would take the risk of smuggling Bibles when she had a business and also an 11 year old dependent child. It relied on these matters in its decision.

41. Bennett J referred to the fact that in the Tribunal hearing the Tribunal had put the appellant on notice that it was having real difficulty in accepting she would take the risk of being involved in a Bible smuggling operation and being the target of the authorities, although it did not refer to her business and child. The statements and questions by the Tribunal were said to have "*sufficiently indicated*" to the appellant that everything she said on this subject was in issue (see *SZBEL* at [47]). Her Honour stated at [25]:

> *The issue for the Tribunal was whether to believe the appellant. That raised the issue of whether she would have smuggled Bibles in view of the potential risk. The question is whether the fact that she had a business and a dependent child were issues in themselves or factual matters that related to the issue of risk. If they are factual matters that go to the issue arising in relation to the decision under review (ie, risk generally), the Tribunal was not obliged to put each of those factual matters to the appellant. The Tribunal is obliged to inform her of the issue but not of each fact that relates to it".*

42. While Bennett J accepted that the issue of risk was an important factor in the rejection by the Tribunal of the appellant's claim, her Honour found (at [28]) "*that the business and the child were not the issues on which the decision to reject the appellant's claim were based. They were not determinative but additional factual matters that elaborated the matters to be balanced against the risk. The key point in the Tribunal's assessment was the fact that there was a risk to the appellant and, in those circumstances, it did not accept that there was sufficient reason for her to take such a risk. The appellant was directed to that issue at the hearing, asked about it and told that the Tribunal found it difficult to accept her evidence. The Tribunal did not fail to comply with s.425 of the Act in this regard".*

43. Thus, it was necessary for the Tribunal in this instance to raise with the applicant determinative issues in the sense of issues on which the decision to reject the claim were based, but it was not required to

descend into all the underlying factual matters when meeting its obligation under s.425. Nor was it obliged to provide *"a running commentary upon what it thinks about the evidence that is given"* (*Minister for Immigration & Citizenship v Applicant A125 of 2003* [2007] FCAFC 162 at [89]).

44. In this case the delegate had accepted as plausible the applicant's claims that he was a member of the Awami League. However in the Tribunal hearing the Tribunal clearly put the applicant on notice of its concerns about his claims to be a member and official of the Awami League and also as to his credibility generally. The Tribunal questioned the applicant about specific aspects of his claims (including about how he had become a member of the AL, what activities he had been involved in with the AL and about the party and committee organisation). The Tribunal recorded in its reasons for decision that the applicant gave inconsistent answers and evidence that it found *"vague and unsatisfactory"*. As the Tribunal recorded, when the applicant was pressed on membership (the Tribunal asked *"do you know anything about how you became a member of the Awami League?"* the applicant responded *"No"* (transcript p.11)) the applicant stated that he did not know how he became a member.

45. As well as questioning the applicant about how he became a member of the AL, the Tribunal also asked him about his social welfare activities as a member and official of the AL. In its reasons for decision it referred to the applicant's *"generalised"* answer when asked to describe his social welfare activities and his failure to explain his involvement. The exchange in question was as follows (transcript pp. 11 – 12):

> *TRIBUNAL MEMBER: All right. Can you tell me about some of the activities you say you were involved with?*
>
> *THE INTERPRETER: Can you explain me a little bit easily and I can tell you?*
>
> *TRIBUNAL MEMBER: In your application you said that you were involved in a number of activities, including social welfare projects.*
>
> *THE INTERPRETER: All of that is during the flood time, we actually distributed help to the affected people.*

TRIBUNAL MEMBER: When was this?

THE INTERPRETER: 2004. In 2004.

TRIBUNAL MEMBER: Anything else that you can tell me?

THE INTERPRETER: I can't remember at this moment.

46. The Tribunal then asked the applicant a number of questions about the AL as follows :

TRIBUNAL MEMBER: Can't remember. Okay. All right. The Awami League in Bangladesh is the opposition party at the moment. It has a very large party structure all through Bangladesh. Can you tell me as part of that structure what is the name of the body that decides policy?

THE INTERPRETER: I am sorry, ask a little bit more.

TRIBUNAL MEMBER: Okay. I guess I am asking a question of someone who says he was an active member of the Awami League. So someone who has a lot of knowledge about politics and the way the Awami League runs in Bangladesh. Now the Awami League publishes policy and there is a group within the Awami League that decides on that policy. Do you know the name of that body?

THE INTERPRETER: I can't remember.

TRIBUNAL MEMBER: Okay. What do you know about how the way the party is organised in Bangladesh?

THE INTERPRETER: I can't remember.

TRIBUNAL MEMBER: Okay. Can you tell me how your particular committee worked?

THE INTERPRETER: I can't remember.

47. Later in the hearing, after discussing country information indicating that persons targeted were generally high profile political leaders or activists in the AL, the Tribunal gave the applicant the opportunity to tell it anything else about what happened to him in Bangladesh (transcript p.15). The applicant did not add anything. Importantly, the Tribunal then specifically drew its concerns about the level of the applicant's knowledge of the AL to his attention. It stated (transcript p.15):

TRIBUNAL MEMBER: Okay. Now I will just tell you about a few things that trouble me. You say that you fear harm because you are an active membership or involvement in the Awami League but from what we have talked about you don't know very much about the Awami League at all.

END OF TAPE ONE SIDE A (1A)

START OF TAPE ONE SIDE B (IB)

TRIBUNAL MEMBER: Can you explain that?

THE INTERPRETER: You maybe think that I am not the activist of the Awami League but really I am a very active worker of my party.

TRIBUNAL MEMBER: I would have expected that if you had been you would have been able to give me a very long and detailed history of your activities.

THE INTERPRETER: I can't remember at this point.

TRIBUNAL MEMBER: Okay. The country information I have looked at indicates that politics in Bangladesh is a very violent occupation on both sides. Many people injured and killed in conflicts between mainly the government or police and the Awami League. They generally occur in the context of violent demonstrations. Recently there has been mass short-term arrests of Awami League supporters who want to strike to bring down the government. Particular targeting has generally been well-known high profile activists of the Awami League but as I said before, there have been mass arrests, short-term arrests of supporters involved in demonstrations and strikes. So I am looking at your claims in the context of that country information. Is there anything that you want to say about that country information? Do you agree with it or not agree with it?

THE INTERPRETER: I agree with you.

48. The adviser then sought, and was granted, time to provide any further submissions or information. The applicant was given a further opportunity to tell the Tribunal anything else he thought they had not covered (transcript p.16).

49. I am satisfied that the Tribunal sufficiently raised with the applicant its concern about the credibility of his claim to be an active member of or have involvement in the AL. The Tribunal put to the applicant in

substance the basis for its concerns. In particular, the applicant was clearly put on notice that the Tribunal had difficulties with his claims, in light of inadequacies in that evidence as well as the country information put to him and with which he agreed (transcript of hearing at pages 15 – 16). The basis for such difficulties was revealed in the applicant's answers to the Tribunal's questions, notably in that he did not know the answer to fundamental questions about the organisation of the political party of which he claimed to be an active member and could not provide details of his activities with the AL. I am satisfied that the transcript reveals that the applicant was alerted to the Tribunal's doubts about the truth of his claims during the Tribunal hearing. Hence he was on notice as to the possibility that he might be disbelieved.

50. The Tribunal's questions in the hearing sufficiently indicated to the applicant that everything he said in support of the application was in issue. I note in that respect that, as the Full Court of the Federal Court stated in *Minister for Immigration & Citizenship v Applicant A125 of 2003* [2007] FCAFC 162 at [88]: "*s.425 does not require the RRT to identify the significance of the questions that it puts to a claimant or the ultimate matter or issue to which those questions go. That is not what is required by* SZBEL." Moreover, as *SZBEL* makes clear (at [48]) "*The RRT is not obliged to provide 'a running commentary upon what it thinks about the evidence that is given'"* (and see *Applicant A125 of 2003* at [89]).

51. In circumstances whether the central and determinative issue, which proved dispositive of the application for review, was the Tribunal's adverse credibility finding, the Tribunal complied with its duty under s.425(1). The fact that the applicant provided the letters in question after the Tribunal hearing is consistent with the fact that he was alerted to the Tribunal's concerns in that the letters may be seen as an attempt to allay the concerns the Tribunal member had raised with the applicant at the hearing as to the credibility of his claims.

52. The manner in which the Tribunal indicated its concerns also made it apparent that any further submissions and evidence relevant to matters addressed at the hearing would be assessed in light of such concerns.

53. This was not a case in which an additional element to the applicant's claim emerged in post-hearing material in respect of which he had not been given an opportunity to give evidence and present arguments at an oral hearing (see *SZILQ v Minister for Immigration & Citizenship* [2007] FCA 942 at [31]). Rather the evidence, including the letters of support, went directly to the issue of whether the applicant's claim to be a member and official of the AL could be believed. Section 425 does not require the Tribunal to put the applicant on notice of its concerns about the weight to be given to evidence provided in support of his claims in such circumstances or to put to him the manner in which concerns about his credibility may impact on the Tribunal's assessment of corroborative material.

54. The letters were submitted to the Tribunal after it had given the applicant's adviser (who indicated that he had come into the matter late and had not a chance to obtain firm instructions) the requested opportunity to put on further submissions and file documents in support of the application. It could not be said that the Tribunal's invitation to do so was not "*real and meaningful*" (see *SZJBA v Minister for Immigration and Citizenship* [2007] FCA 1592 at [50] – [60]. The Tribunal considered the letters and their content. The fact that because the Tribunal considered the applicant completely lacked credibility, it did not accept that the contents of the letters were true does not establish a failure to meet its s.425(1) obligation.

55. I am not satisfied that the Tribunal intended to or did use the letters in relation to a positive finding in such a way as to give rise to a s.425 obligation. The Tribunal's findings that the documents were written to assist the applicant in his application for refugee status and that they did not provide an accurate account of his AL membership were not determinative issues. The letters were disregarded and given no weight by the Tribunal because it made adverse credibility findings against the applicant (on the basis of the claims he had made about his involvement with the AL and consequent threats or mistreatment) independently of the letters he later provided. It was on this basis that the truth of the letters was rejected. The genuineness of the letters was not a critical step in the reasoning of the Tribunal in relation to the applicant's claims. Thus, as counsel for the first respondent submitted, the Tribunal's view that the letters were written to assist the applicant's

claims was not a basis for its decision or dispositive matter, but rather a finding consistent with the prior finding that the applicant completely lacked credibility.

56. Counsel for the first respondent also addressed common law principles of procedural fairness, insofar as such principles might be said to be applicable in determining whether the Tribunal had made a jurisdictional error by virtue of a failure to comply with s.425 or otherwise as contended in the application. Insofar as the applicant intended to raise an argument that the Tribunal failed in the exercise of its statutory duty by failing to enquire as to the authenticity of the documents, I agree with the submission of the first respondent that in light of the adverse credibility finding no such duty to enquire arose on the facts of this case.

57. It is well established that there is generally no obligation on the Tribunal to conduct its own investigation or to make some particular enquiry (see *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at [42] – [43]; *Re Ruddock; Ex parte S154/2002* (2003) 201 ALR 437 at [58]; *WAGJ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 277 at [25]; *Applicant S214 of 2003 v Refugee Review Tribunal* [2006] FCA 375 at [34]; *S1194/2003 v Minister for Immigration and Multicultural Affairs* [2006] FCA 1133 at [13]; *W389/01A v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 432). There is no provision in Part 7 of the Migration Act which obliged the Tribunal to make enquiries or conduct its own investigation in light of s.422B of the Act (see *SZGQN v Minister for Immigration and Citizenship* [2007] FCA 428 at [28] and cf s.424).

58. It is notable, moreover, that it was not the authenticity of the letters (in the sense of authorship) that was in doubt. Rather it was the truthfulness of their contents that was disbelieved based on the rejection of the applicant's credibility that led to the letters being regarded as of no probative value (compare *M164 of 2002 v Minister for Immigration* [2004] FMCA 118 and *WAGJ* and see *WAGU v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 912 at [36] per French J and *Applicant S20 of 2002* at [11]

– [19] per Gleeson CJ; [46] – [52] per McHugh and Gummow JJ and [173] per Callinan J).

59. Insofar as the applicant contended on the basis of *WAGU* that s.425 created an obligation on the Tribunal to raise doubts which the Tribunal may have if the Tribunal was disposed to reject documentary evidence on some positive basis, that contention must be seen in light of the fact that *WAGU* was determined on principles of procedural fairness not s.425, and that s.422B was not applicable in that case.

60. It is the case that in *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 106 French J applied the principles he espoused in *WAGU* in the context of the operation of s.422B (see [56] to [59]). His Honour found that where there was a clear implication by reference to the appearance of documents that they were concocted for the purposes of the application, then procedural fairness would require an opportunity to be given to the applicant to comment. However, his Honour observed that it *"may be that procedural fairness would not require the Tribunal to invite comment prior to finding no more than that it was not satisfied about the reliability or genuineness of particular documents"* (at [56]). As his Honour also stated in *WAGU* at [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."* Such comments are apposite in this case.

61. This is not a case in which the corroborative evidence was *"rejected on the basis of a finding of fraud or forgery or on some other positive basis never put to the tendering party"* (*WAGU* at [36]) such that there may be said to be a lack of procedural fairness, whereas in *WAGU* the Tribunal had in essence found that the appellant had conspired with others to fabricate information about his claims (at [37]). Similarly, the circumstances in *WAJR* are distinguishable from the present case, as in that case the Tribunal's adverse findings were based on the appearance of documents.

62. As indicated above, while the Tribunal in this case did express the view that the letters *"had been written to assist the applicant in his*

application for refugee status but do not provide an accurate account of the membership or history with the Awami League" this observation followed the finding that as the Tribunal considered that the applicant completely lacked credibility in relation to his claims of *"involvement with the Awami League and consequent threats or mistreatment by government authorities or members of the BNP"* it did *"not accept that the contents of the letters are true"*. The applicant's lack of credibility was the basis for the determinative finding about the letters as is apparent from the Tribunal's subsequent reference to *Applicant S20/2002* and its statements, by reference to the approach in that case, that it *"disregarded the letters"* and gave them *"no weight in determining his claims"*. In other words the Tribunal did not reject the letters because they were fraudulently concocted (or because they had been written to assist the applicant in his application for refugee status) but rather on the basis that the applicant completely lacked credibility in relation to his claims about involvement with the AL and the consequences of such claimed involvement (the matters to which the letters related).

63. As the Full Court of the Federal Court relevantly stated in *WACO v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 171 (at [41]):

> *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 & Multicultural Affairs; Ex parte Applicant S20 of 2000 (2003) 198 ALR 59 *per McHugh and Gummow JJ at [49]*.

64. Further, insofar as the general law principles espoused in *WAJR* and *WAGU* are relevant to an assessment of whether the obligations in s.425 have been met, there are a number of other decisions of the Federal Court also relevant to the determination of such an issue. In particular in *WAHP v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 87 Carr and Tamberlin JJ at [60] to [64] indicated the importance to be attached to the factual matrix in each case (and cf *WAEJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 188 and *WAIJ Minister for Immigration & Multicultural & Indigenous Affairs* [2004] 80 ALD 568).

65. In *WAKK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 225 the Court referred to what was said by McHugh and Gummow JJ in *Applicant S20/2002* at [49] in finding at [70] to [71]:

> *In our view, the primary judge did not err when he decided that there was no failure to accord procedural fairness in relation to the letter. We accept the submissions of the respondent that the Tribunal dealt with the letter as one piece of evidence which had to be weighed with the other evidence. The Tribunal considered the letter and the other evidence in the context of whether the appellant would suffer persecution on the ground of his political opinions if he was to return to Burma. The Tribunal considered the letter in light of the oral evidence given by the appellant and found an incongruity between the assertion in the letter that he was required to report to the police without fail and the oral evidence that he was never called in or questioned by the police whilst he was in Burma. The Tribunal also relied on the curiosity of the English name. The Tribunal said it did not accept that the letter meant that the appellant had a real chance of persecution. It is apparent that the Tribunal, whilst making no positive finding that the letter was not genuine, accorded the letter no weight, in reaching its final conclusion that on the evidence the appellant did not have a well founded fear of persecution if he was returned to Burma. This conclusion reflected the findings which the Tribunal had made, independently of the letter, which were based on serious credibility problems with the claims made by the appellant for which the letter was relied upon as corroboration. The approach which the Tribunal took was consistent with the observations referred to above by McHugh and Gummow JJ in the case of S20/2002 and French J in WAGU. This approach was not irrational or unfair.*
>
> *Further, as the primary judge said, there was no positive finding by the Tribunal that the letter was a forgery and so there was no requirement on that basis to warn the appellant of the possibility of that finding in order to accord the appellant procedural fairness.*

66. Similarly in this case there was no positive finding of forgery and the Tribunal made adverse credibility findings against the applicant on the basis of the claims he had made and "independently" of the letters he provided as corroboration. Such findings were open to the Tribunal on the evidence before it. This is not a case in which it could be said that

the genuineness of the documents was a critical step in the reasoning of the Tribunal in relation to the claims of the applicant.

67. The weight to be given to particular items of evidence is a matter for the Tribunal. It was because the Tribunal considered that the applicant completely lacked credibility in relation to his claims of involvement with the AL and consequential threats or mistreatment that it found that it disregarded and gave no weight to the letters. In all the circumstances it could not be said that such conclusion in relation to purportedly corroborative letters would not "*obviously be open on the known material"* (see *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 and *SZBEL*). As McHugh and Gummow JJ made clear in *Applicant S20/2002* at [49], it was precisely because of the finding of the complete lack of credibility that the Tribunal was not required to proceed to deal with the potentially corroborative aspects of claims made in the letters, but was entitled to regard them in the same light as it had the applicant's other evidence, that is adversely and for the same reasons. No failure to comply with s.425 or lack of procedural fairness is established on the basis contended for by the applicant.

Applicant S20/2002 and bias issues

68. It was also contended that *Applicant S20/*2002 did not entitle the Tribunal to disregard the letters and that in relation to credibility the Tribunal ought to have had regard to the letters corroborating the applicant's claims before it concluded its findings on credibility. It was submitted that the manner in which the Tribunal proceeded and its decision revealed a closed mind on its part giving rise to a reasonable apprehension of bias and constituting a failure to have regard to relevant considerations (see paragraphs 3 and 4 of the application). Counsel for the applicant observed that the Tribunal had purported to rely on the decision of the High Court in *Applicant S20/2002* on the basis that the majority had held that where the Tribunal had found that the appellant completely lacked credibility, it was not illogical or irrational for the Tribunal to reject or give no weight to evidence that corroborated the appellant's claims. It was submitted for the applicant that this was not a correct analysis of the decision in *Applicant S20/2002*. It was contended that *Applicant S20/2002* could not be used

by a Tribunal to consider only part of the evidence or to make a credibility finding based in part only of that evidence and then to use that credibility finding as a way of disregarding and giving no weight to other evidence and that in doing so the Tribunal had failed to give genuine or proper consideration to the corroborative evidence and that its approach indicated bias or apprehended bias.

69. In *Applicant S20/2002* the evidence of a witness other than the appellant had been given no weight by the Tribunal. However, it was submitted that this was in circumstances where the Tribunal had found that the appellant thoroughly lacked credibility and that he had misled the Tribunal in regard to his claim to fear harm by the authorities in his home country. The evidence of the third party witness related to the circumstances of the applicant's release from detention. The majority of the High Court held that it was not necessarily irrational or illogical for the Tribunal (which was convinced that the appellant was fabricating a story which was considered to be inherently implausible) to reject corroborative evidence of a third party, even though there was no separate or independent ground for rejection of that evidence, apart from the reasons given for disbelieving the principal witness.

70. Counsel for the applicant referred to the following statement by McHugh and Gummow JJ in *Applicant S20/2002* at [49]:

> *In a dispute adjudicated by adversarial procedures, 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. It cannot be irrational for a decision-maker, enjoined by statute to apply inquisitorial processes (as here), to proceed on the footing that no corroboration can undo the consequences for a case put by a party of a conclusion that the case comprises lies by that party. If the critical passage in the reasons of the tribunal be read as indicated above, the tribunal is reasoning that, because the appellant cannot be believed, it cannot be satisfied with the alleged corroboration. The appellant's argument in this Court then has to be that it was irrational for the Tribunal to decide that the appellant had lied without, at that earlier stage, weighing the alleged corroborative evidence by the witness in question. That may be a preferable method of going about the task presented by*

s S430 of the Act. But it is not irrational to focus first upon the case as it was put by the applicant.

71. It was contended that there were a number of differences between the evidence and the treatment of that evidence by the Tribunal in this case compared to what occurred in *Applicant S20/2002*. It was submitted that in *Applicant S20/2002* the evidence in question was corroborative evidence in the true sense, in that it was witness evidence of another person which tended to support the evidence of the appellant. Moreover in *Applicant S20/2002* the Tribunal had done no more than state that it could not be satisfied with the corroborating evidence given by the witness and therefore gave it no weight.

72. In contrast it was reiterated in support of this contention that in this case the Tribunal made positive findings in relation to the letters. The Tribunal was said to have proceeded on the basis that, because of the view it took in relation to the applicant's credibility before it considered the documents, it would not use them for any positive purpose. However, it was said to have used the documents for a negative purpose: to make a finding that the applicant was a complete liar so that his other claims were not to be believed on that basis as well as because of his lack of credibility. Thus it was said that into the "mix" as to whether the applicant completely lacked credibility, was the positive finding that he had submitted documents written simply for a false purpose and providing a false account.

73. It was also contended that on the question of whether the applicant was ever a member of the Awami League, the Tribunal had erred in deciding *a priori* that it would not give the documents any weight. It was contended that in so doing the Tribunal had not only failed to give genuine and proper consideration to the evidence but also that the Tribunal had approached the question of the weight and effect of the letters with a closed mind or that the circumstances were such that there was a reasonable apprehension of bias on the part of the Tribunal. It was also submitted that the Tribunal had not only shut its mind to the possibility that the documents should be weighed in the balance in determining the credibility of the applicant's earlier claims, but that it also went on to use the documents for a negative purpose in relation to other claims and that it flowed from *Applicant S20/2002* that if a

Tribunal did not give genuine or proper consideration to corroborative evidence that could amount to jurisdictional error.

74. In *Applicant S20/2002* it had been argued that it was irrational for the Tribunal to decide that the applicant had lied, without at that stage weighing the alleged corroborative material from another witness. A majority of the High Court had indicated that while it may be preferable for the Tribunal to go about its task in this way, it was not irrational to focus first on the case put by the applicant. However, it was submitted that in this instance the case put by the applicant plainly included the letters of support and so to use the decision in *Applicant S20/2002* as an *a priori* basis to reject not only what the applicant said but also whatever he submitted in support of his claims indicated that the mind of the Tribunal member was closed and that a reasonable observer might conclude that the decision-maker might have been affected by prejudgment or prejudice against the applicant. It was submitted that Gleeson CJ made it clear in *Applicant S20/2002* (at [14]) that the decision in issue did not involve the Tribunal member making up his or her mind about the evidence of the applicant before considering the evidence of the corroborating witness, whereas in this case it was said that the Tribunal had used *Applicant S20/2002* to reject evidence without considering that evidence.

75. It was said that the Tribunal's conduct gave rise to a reasonable apprehension of bias in circumstances where it had disregarded for any positive probative purpose the letters submitted on the applicant's behalf and given them no weight on an *a priori* basis simply because of its prior disposition on the basis of the applicant's manner of giving evidence at the Tribunal hearing and the fact that the Tribunal did not consider that he had the kind of knowledge that would have been expected if he had been an active worker, member or official of the AL. It was pointed out that this was the very matter which the applicant was seeking to address in his post-hearing submission, in his assertion that while he did not equip himself well at the hearing the Tribunal should weigh the supporting letters in the balance. Moreover, while the Tribunal had indicated in its reasons for decision that it would not take the material into account because the applicant was a person who lacked credibility, it was said that it nonetheless then used the material in relation to other claims made by the applicant.

76. While accepting that such allegations should not be made lightly, counsel for the applicant pressed the ground of apprehended bias. It was submitted that the Tribunal showed by its reasoning in the context described, that at least insofar as the issue about the letters was concerned it had a closed mind based upon the pre-existing position from the perspective of what had occurred at the Tribunal hearing. It was submitted that it could be said that at the point at which the Tribunal hearing ended, the Tribunal had formed a view, having come to the conclusion that the applicant was a person lacking in credibility and hence that it was going to disregard the letters.

77. Insofar as it may be intended to suggest that there was actual bias on the part of the Tribunal, such a serious allegation involves personal fault on the part of the decision-maker. It must be clearly articulated and proved (see *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 and *SBSS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749).

78. In *Re Refugee Review Tribunal and Another; Ex parte H and Another* (2001) 75 ALJR 982 the High Court discussed the test for apprehended bias in the context of administrative proceedings. Gleeson CJ, Gaudron and Gummow JJ stated (at [27] – [28]):

> *[27] The test for apprehended bias in relation to curial proceedings is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided7. That formulation owes much to the fact that court proceedings are held in public. There is some incongruity in formulating a test in terms of "a fair-minded lay observer" when, as is the case with the Tribunal, proceedings are held in private.*
>
> *[28] Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias. Whether or not that be the appropriate formulation, there is, in our view, no reason to depart from the objective test of possibility, as distinct from probability, as to what will be done or what might have been done. To do otherwise, would be to risk confusion of apprehended bias with actual bias by requiring substantially the same proof.*

79. Neither actual nor apprehended bias is established. First it has not been established that the Tribunal had formed a view (or appeared to do so) at the point the Tribunal hearing ended that the applicant lacked credibility and that it was going to disregard subsequent material. It is notable that the Tribunal gave the applicant time after the hearing to put further information to it. His adviser suggested that the applicant appeared nervous. The Tribunal referred to the applicant's post-hearing statutory declaration in assessing the credibility of his claims, but noted that it did not provide greater detail of the claims made by the applicant at hearing (which the Tribunal found to be significantly lacking in detail) but merely sought to restate his assertions. In other words such material did not demonstrate any knowledge on the part of the applicant of his own experiences beyond that apparent at the hearing. Having determined on the basis of his own evidence that the applicant completely lacked credibility in relation to his claims of involvement with the AL, the Tribunal's decision to disregard and give no weight to the letters of support was open to it, consistent with its understanding of *Applicant S20/2002*.

80. The applicant contended that the Tribunal's reliance on *Applicant S20/2002* to reject his claims as well as his corroborative evidence and its reasoning in relation to the letters was evidence of it having a closed mind when it came to a corroboration of his evidence. However it has not been established that the relevant circumstances were such that a fair minded and informed person might reasonably apprehend that the Tribunal did not bring an impartial mind to bear on its decision (see *Re Refugee Review Tribunal and Another; Ex parte H and Another* (2001) 75 ALJR 982 at [27] – [32]). *Applicant S20/2002* makes it clear that where an applicant's claims have been rejected on the basis of an adverse credibility finding, the Tribunal is entitled to give no weight to evidence purportedly corroborative of those claims (see [11] – [19] per Gleeson CJ [46] – [52] per McHugh and Gummow JJ and [173] per Callinan J). On a fair reading of the Tribunal's decision it did not misunderstand this principle. Even if it had, such a misunderstanding of the law would not of itself establish apprehended bias. The Tribunal did not "use" *Applicant S20/2002* to reject the applicant's oral claims in a manner indicative of either actual or apprehended bias. Findings of fact, including findings in relation to credit are a matter for the Tribunal (*NADR v Minister of Immigration and Multicultural and Indigenous*

Affairs [2003] FCAFC 167 at [97]). In this instance the Tribunal's findings in that respect were open to it on the material before it for the reasons it gave.

81. Nor did the Tribunal use the letters of support or its findings about these letters for a negative purpose in relation to other claims in such a way as to constitute jurisdictional error. As the Tribunal stated, it was the adverse credibility finding made on the basis of the applicant's own evidence (not taking into account its findings about the letters which were disregarded and given no weight) that led it to reject his claims about and based on a relationship with a person known as Salim (a claim first made in his adviser's written submission of 17 October 2005) and his claims about false cases made in connection with his protection visa application. In that respect, I note that although the Tribunal's consideration of the letters was not the last matter it adverted to in its reasons, undue emphasis should not be placed on the order of the Tribunal's reasons for decision as Gleeson CJ indicated in *Applicant S20/2002* at [14]. Rather, this case was of the nature contemplated by Lee and Moore JJ in *WAIJ*. The Tribunal was of the view that the applicant's claims had been comprehensively discredited in such a way as to necessarily negate allegedly corroborative evidence (*WAIJ* at [27]). This is not a case where the Tribunal had any doubt about the truth of the applicant's claims. It therefore did not have to assess the corroborative material before coming to its conclusions on credibility.

82. Nor does the Tribunal's decision demonstrate a closed mind to the applicant's supporting evidence. The Tribunal was entitled to reject the letters for the reasons it gave. It did not fail to have regard to relevant evidence or relevant considerations in a manner constituting jurisdictional error. No jurisdictional error is established on any of the bases contended for in paragraphs 2, 3, or 4 of the application.

"False charges" issue

83. A further basis on which the Tribunal is said to have fallen into jurisdictional error by failing or constructively failing to exercise its jurisdiction under the Act is in the manner contended for in paragraph 5 in the application. It is as follows:

> *The Tribunal notes at page 15.5 of it decision that whilst the applicant made claims in his original protection visa application regarding false charges laid against him for political reasons, he did not raise that claim in his Tribunal proceedings. The Tribunal then infers that the applicant therefore did not "press or continue" that claim. The Tribunal asked no question of the applicant in relation to that matter. The purpose of a Tribunal hearing is for the Tribunal to question the applicant about matters over which it may have doubts or may require further information. At no stage was it suggested by the Tribunal that it had doubts about that aspect of the applicant's claims, and at no stage did the applicant abandon those claims. The Tribunal either failed to take into account in any real sense this claim, or failed to afford the applicant procedural fairness as required by section 425, or at all, in relation to that matter.*

84. It was submitted that the Tribunal based its conclusion (that the applicant did not wish to press or continue with his claim that there were false cases against him) on the fact that he did not raise that claim at the hearing or in his statutory declaration of 12 September 2005 in which he sought to clarify his claims. It was submitted that to fail to deal with this distinct aspect of the claims of an applicant was to fail to review the decision as the Tribunal was required to do under s.414 of the Act (see *Htun v Minister for Immigration and Multicultural Affairs* [2001] FCA 1802 at [42] per Allsop J).

85. In *Htun* the applicant had claimed to fear persecution based on what he had done by way of political activity in Australia and also because of friendships here with others of his community of arguably subversive background. He did not expressly identify both bases for that "*sur place*" claim when called on at the Tribunal hearing to articulate his fears, in that he did not expressly refer to his friendships (as distinct from his activities) in Australia. However Allsop J found at [42]:

> *…given the clarity of the expression of this fear in his application for review and the existence of objective material put forward by him to support it, I do not see this basis for the claim as having been abandoned. Conceptually, and in a common sense way, it was quite distinct from his claim based on his activities of the [political] kind referred to earlier.*

86. It was contended that a fair reading of the transcript of the Tribunal hearing in this case showed that the Tribunal member was thoroughly

in control in the hearing and asked the questions that she wished to ask. It was accepted that the Tribunal had asked the applicant whether there was anything that had not been covered and that he had replied that he did not have any more to say. However it was submitted that while the Tribunal may have been entitled to take into account that the applicant had not put these matters forward when given the opportunity to do so, it was not entitled to treat the statement about false charges as having been abandoned.

87. It was also submitted that it should not be open to the Tribunal to find the mere non-mention of a matter entitled it to find that an applicant had abandoned that claim. It was submitted that an abandonment required some positive act or inferred state of mind or presentation by the applicant and was a finding that should not be lightly made. It was noted that this was not simply a finding that the Tribunal was not satisfied in relation to a claim because of the manner in which it had been presented or not pursued. Rather that the Tribunal had said positively that the applicant did not wish to press or continue with the claim.

88. It was contended generally that the treatment by the Tribunal of the applicant's claims was based upon a finding of a general lack of credibility and that even if an applicant gave a plainly false answer to a question the Tribunal was not entitled to simply seize upon this false answer as indicating that the applicant was a liar if other aspects of his or her claim may be shown to be true. (See Kirby J in *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 77 at [65] indicating that it "*remains for the Tribunal to consider any evidence that is not discredited or disbelieved*".) It was said that in this case the Tribunal had "precipitated" a finding that the applicant lacked credibility with a view to rejecting all of his other claims and evidence and hence that it constructively failed to exercise jurisdiction.

89. It was also submitted that it could not be said that the Tribunal had made independent findings that it did not accept that the applicant had ever been involved with Awami League and that it did not accept that he had false cases made against him for reason of his political opinion or activities with the Awami League, because he had put forward a number of matters in relation to why he should be believed in relation

to his claims that he was an Awami League official, one of which was that he had false cases against him. On this basis it was said that, if he had false cases against him, that fact went rationally and probatively to the question of whether he had ever been involved in the Awami League and hence that had to be taken into account by the Tribunal.

90. The applicant's claim about false cases was made in his protection visa application in response to the question *"What do you fear may happen to you if you go back to that country?"*. The applicant claimed that the law enforcement agencies were corrupt and would be unable to protect him and that he may be killed. He claimed that "*as an Awami League member my involvement with politics will create repeated reasons to be persecuted. I have false charges against me and will be detained and tortured. I might be killed.*"

91. In response to a question seeking details of pending criminal charges he indicated under the heading "charge": *"I don't know yet the charges. That is a false charges"* (sic). Elsewhere in the application he claimed he would provide supporting documents. He had not done so by the time of the delegate's decision. The delegate stated:

> *I have very great difficulty accepting his assertion that* "I have false charges against me and will be detained and tortured. I might be killed"*, in view of his lack of any real political profile, the lack of evidence provided, the ease with which he was able to leave Bangladesh and also the fact that he has never been convicted of committing any offence in Bangladesh (see below). If false charges were made against him, I believe he would be able to challenge any such charges against him in the courts. I note that, in Bangladesh there is a fair and independent judiciary: The higher levels of the judiciary display a significant degree of independence and often rule against the Government in criminal, civil, and even politically controversial cases …. I therefore believe that the applicant would be in a position to receive a fair trial, if he were to return to Bangladesh, and the courts of Bangladesh can decide whether or not the applicant is guilty of the charges.*

92. The delegate also referred to the fact that in his application the applicant had indicated that he was not currently being investigated (and that he had never been convicted of committing any offence) in

finding that he was not and never had been of any real interest to the Bangladesh authorities.

93. It is not in dispute that the applicant made no mention of the claim about the false charges in the hearing, including when given an opportunity to add anything that had not been covered in the hearing. Nor was this claim addressed in the post-hearing submissions or statutory declaration. However, the letter of support from the General Secretary of the AL in the applicant's home city did claim that many cases had been instituted against the applicant due to his participation in politics on behalf of the AL. It also stated that *"in that case, W/A has been issued against him and police is looking for him tremendously."* The other letter of support suggested generally that the applicant would be imprisoned.

94. The relevant part of the Tribunal's findings and reasons is as follows:

> *In his original written claims the applicant claimed that there were false cases against him. He did not raise this claim at hearing or in the statutory declaration of 12 September 2005 in which he sought to clarify his claims. I consider that the applicant does not wish to press or continue with this claim but in any event as I do not accept that the applicant has ever been involved in the Awami League I also do not accept that he has had false cases made against him for reasons of his political opinion or activities with the Awami League.*

95. I accept that, consistent with *Htun*, issue could be taken with the Tribunal conclusion that the applicant did not wish to press or continue with the claim in his protection visa application about false cases on the basis that he did not mention it at the hearing or in his statutory declaration. However in this instance this does not establish jurisdictional error because the Tribunal went on to address the claim as if it was pressed, in the findings that commenced with the words *"in any event"*. It rejected such claim on the basis that as it did not accept that the applicant was ever involved in the AL it did not accept that he had false charges against him for reasons of his political opinion or activities with the AL (which was the basis for his claim in that respect). Hence it cannot be said that it failed to take the claim into account in a manner constituting a failure to have regard to relevant considerations.

96. As set out above, having rejected the applicant's credibility, it was open to the Tribunal to give the letters of support no weight in determining his claims. It was also open to the Tribunal, as it did not accept that the applicant had ever been involved in the Awami League, to reject the claim that he had false charges against him for that reason. No jurisdictional error has been established in the manner contended for by the applicant in this respect.

97. Further, given the manner in which the false charges claims were dealt with in the decision of the delegate, the applicant was on notice that such claims may not be accepted. The Tribunal was not obliged to put such possibility to the applicant pursuant to s.425 or otherwise.

98. More generally, insofar as it was contended by the applicant that the Tribunal's credibility finding demonstrated a degree of "absurdity", such suggested absence of logic does not demonstrate an error of law let alone one going to the Tribunal's jurisdiction (see *NACB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 236 at [30] and *VGAO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 68).

99. Nor is it established that the Tribunal constructively failed to exercise jurisdiction in relation to its credibility findings and the consequences of such findings. The Tribunal did not simply seize on a plainly false answer to a question. Rather it had regard to what it described as *"the applicant's complete absence of any demonstrate knowledge of his own experiences as an active member with the [AL], of his becoming a member, of his involvement in social welfare projects and the process of becoming a branch official"*. It took into account that he was nervous at the hearing, but found his evidence *"significantly lacking"* in both core and peripheral details that would have been expected had the applicant been either an active worker, member or official with the AL. It also observed that the post-hearing statutory declaration did not provide greater details, but sought to restate the applicant's assertions. Credibility is essentially a matter for the Tribunal. Its finding in this respect were open to it on the material before it for the reasons it gave.

100. It has not been demonstrated that in coming to a view about the ultimate question of whether the applicant had a well-founded fear of persecution for a Convention reason the Tribunal failed to take into

account a relevant consideration, took into account an irrelevant consideration, committed some other error of law or disregarded the mandatory procedural requirements.

101. As no jurisdictional error has been established the application must be dismissed.

I certify that the preceding one hundred and one (101) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 8 February 2008

Correction

Matter number changed on page 1 of “Reasons for Judgment” from “SYG 3846 of 2007” to “3846 of 2005”.