FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGTZ v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1898*

MIGRATION – Review of RRT decision – where Tribunal did not accept applicant's claims as credible – where applicant provided corroborative evidence – where Tribunal gave no weight to corroborative evidence in light of credibility finding – where Tribunal concluded other corroborative evidence was a self-serving fabrication – whether procedural fairness.

Migration Act 1958, s.425(1)

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Limited [1994] 49 FCR 576
SZBEL v Minister for Immigration [2007] 231 ALR 592
Re MIMA; Ex parte S20/2002 (2003) 198 ALR 59
WACO v Minister for Immigration [2003] FCAFC 171
Minister for Immigration & Multicultural Affairs v Djajal (1998) 51 ALD 567
WAKK v Minister for Immigration [2005] FCAFC 225
WAIJ v Minister for Immigration [2004] FCAFC 74

Applicant:	SZGTZ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 2406 of 2006
Judgment of:	Raphael FM
Hearing date:	7 November 2007
Date of last submission:	7 November 2007
Delivered at:	Sydney
Delivered on:	19 November 2007

REPRESENTATION

Counsel for the Applicant:	Mr L Karp
Counsel for the Respondent:	Mr T Reilly
Solicitors for the Respondent:	Sparke Helmore

ORDERS

(1) A writ of certiorari bringing the Tribunal's decision into this Court to be quashed.

(2) A writ of certiorari and/or an injunction to restrain the First Respondent, his servants and agents, from acting upon the Second Respondent's decision.

(3) A writ of mandamus remitting the matter back to the Second Respondent and directing the Second Respondent to reconsider and re-determine the applicant's application for a Protection Visa according to law.

(4) The First Respondent pay the Applicant's costs assessed in the sum of $5,000.00.

(5) The name of the First Respondent be amended to "Minister for Immigration and Citizenship".

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2406 of 2006

SZGTZ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant is a citizen of Sri Lanka. He arrived in Australia on 17 February 2001 and applied to the Department of Immigration & Multicultural Affairs for a protection (Class XA) visa on 6 March 2001. This application was refused by a delegate on 31 May 2001. The applicant sought review of the delegate's decision from the Refugee Review Tribunal. The decision of the delegate was affirmed by the Tribunal on 17 March 2003 but the Tribunal's decision was itself set aside by consent in the Federal Magistrates Court on 24 May 2004. The decision was affirmed again by a Tribunal differently constituted on 20 May 2005. That second decision of the Tribunal was also the subject of review in the Federal Magistrates Court which on 27 April 2006 made orders setting it aside. The matter was referred to the present Tribunal which held a hearing that the applicant attended together with his representative on 17 July 2006. On 24 July 2006 the third Tribunal determined to affirm the decision not to grant a protection visa and handed that decision down on 3 August 2006.

2. The applicant's claims to be a person to whom Australia owed protection obligations arose out of his imputed association with members of the LTTE. The applicant, who had always lived in Kalutara, moved to Wellawatte, a suburb of Colombo, after leaving school and taking up his first employment as a salesman. In Wellawatte he roomed with another young man who he knew as Muraly. The applicant is a Muslim Tamil. Muraly is a Jaffna Tamil. The two young men roomed together for approximately four months, possibly a bit longer, in 1999. Because they were rooming together they became friendly. They cooked together, or ate together at eating places outside the rooming house. Muraly had two friends, Suresh and Rajah, whom they met out or who came around to their boarding house from time to time. On weekends they would all go together to the cinema.

3. In October 1999 the applicant was on the back of Muraly's motorcycle, going to Colpetty to buy some clothes. They were stopped at a checkpoint. The applicant's ID was demanded and given, as was Muraly's. They were questioned. The applicant stated that Muraly was picked up and pushed into a jeep and the applicant was asked to go into the jeep too. He was driven to Wellawatte police station and Muraly was there questioned. The applicant was hit in the back by a gun. Muraly was also hit. After about three hours some different police officers came into the room and they were questioned about the LTTE. The applicant says that one of the officers kicked him in his head with his boot, and this was very painful and caused an injury which has not yet resolved. The applicant stated that he was kept in the police station for six days, was not given proper food or toilet facilities, suffered considerably from the kick in his head and was not allowed to see a doctor. The officers constantly questioned him about his association with Muraly.

4. When the applicant's mother heard about his detention she contacted her brother, who is a businessman in Kalutara. The uncle spoke to a police officer of his acquaintance, paid some 20,000 Rupees and secured the release of the applicant. About two weeks later the applicant was taken into Kalutara police station because by this time Muraly's friend Rajah had been taken into custody and had been identified as an LTTE supporter. The applicant was questioned about Rajah. He was kept in detention for a day but his uncle once again

secured his release by the payment of 15,000 Rupees. The applicant was warned through his uncle that he was in danger of being arrested because of his association with Rajah, a known LTTE supporter, and arrangements were made for him to leave the country and travel to Hong Kong where his brother was a resident. The applicant did this. After a while life in Hong Kong became difficult for him as he was an illegal alien. Arrangements were made for him to come to Australia where he applied for a protection visa.

5. At the commencement of the hearing before the Tribunal the following exchange took place between the applicant's representative and the Tribunal:

> "Adviser: Sorry to interrupt. According to my understanding, there were two decisions of the RRT and two applications to the Federal Magistrates Court.
>
> Ms Morris: I've only got one here.
>
> Adviser: That's why I wanted to draw your attention to that. That's my understanding of the situation. I can give you dates if you like.
>
> Ms Morris: Its irrelevant, because it's ---
>
> Adviser: I know. I just wanted to ---
>
> Ms Morris: It's been newly constituted to me, and so I would be looking at it de novo. Okay?
>
> Adviser: I understand that. Could I just ask, do you have a copy of the decision of 20 May 2005.
>
> Ms Morris: Decided by – who was the member?
>
> Adviser: Janet Beckmounten.
>
> Ms Morris. Yes, I have that copy.
>
> Adviser: It's just ---.
>
> Ms Morris: This is the one I have in front of me.
>
> Adviser: Sorry to interrupt. I raise it just for the specific reason, there was a finding in there that the applicant was arrested, assaulted and detained -

Ms Morris. All right. I'll be making a de novo finding on that today. Remember, this is a newly-constituted tribunal, so it's open to me to make the findings that I wish to make.

Adviser: Indeed."

6. The Tribunal then proceeded to question the applicant. It asked him a number of questions and raised a number of issues. In particular, it raised with him certain independent country information which indicated that Tamil people lived all over Colombo and that it was not correct, as the applicant had stated, that the majority of Jaffna Tamils lived in Wellawatte. It asked the applicant a series of questions about the personal lives of Muraly, Rajah and Suresh, many of which the applicant was unable to answer. It raised with the applicant the fact that Muslims like himself considered that their ethnicity was Muslim rather than, for example, Muslim Tamil and the Muslims were considered an independent ethnic group within Sri Lanka, not aligned to the LTTE. A Muslim showing an identity card would be identified as such and would not necessarily be suspected of LTTE sympathies.

7. The applicant provided the Tribunal with three documents which he believed would corroborate the claims that he had made. The first document was a report from his treating doctor in Australia, Dr Karalasingham, dated 14 January 2003 [CB 53]. The report is reproduced below:

"Dr Ruben Karalasingham
B.Med.Sci. M.B.B.S.(Syd), C.S.C.T.(Obs & Gynae), FRACGP
417 Merrylands Road
MERRYLANDS NSW 2160
Tel: (02) 96375365 Fax: (02) 96371306

I am a General Practitioner in Merrylands, NSW. Mr [applicant's name] is a patient of mine.

He has been consulting me for over 1 year with symptoms of memory loss, frequent regular headaches and nightmares. He has experienced these for 2 years, since the time of his area and torture in the hands of Srilankan armed forces.

My diagnosis are

(1) Head injury causing memory loss. Head injury was from trauma, he received at the hands of Srilankan armed forces.

(2) Head Injury causing frequent headaches.

(3) Post traumatic disorder.

The memory loss will be permanent. I have been giving counselling for the post traumatic disorder.

Yours sincerely

(Dr) Ruben Karalasingham"

8. The second document was a lengthy statement from the applicant's uncle dated 11 July 2006 [CB 150 – 154]. This document deals with the uncle's involvement with the applicant's detention and his payment of money to the police officers to secure the applicant's release. It is set out in conversational form and appears to be a very accurate recollection of what occurred in October 1999. It is accepted it could have provided important corroboration of the applicant's claims.

9. After this document was produced the following exchange took place at [T28]:

"Ms Morris: You said that the OIC, presumably the Kalutara OIC, informed your uncle of vital information. Is that correct? What was the vital information?

Interpreter: About that I don't know. My uncle has given a statement. Maybe if you look at that you might understand.

Ms Morris: So is this his shop, Praya's Store?

Interpreter: Yes.

Ms Morris: So he is your maternal uncle, presumably?

Interpreter: Yes. Mother's brother.

Ms Morris: Maternal, yes. Paternal is father's, maternal is mother's. This statement was made on 11 July this year. Is that correct?

Interpreter: Yes.

Ms Morris: Just on observation, your uncle must have a remarkable memory given that he's recalling conversations that took place seven years before.

Interpreter: He's travelled a lot in this job to get me out. He has struggled a lot.

Ms Morris:	My comment is that his statement is – conversations he's had seven years before. I find it somewhat remarkable that he could recall with such accuracy this conversation, as I say, seven years before.
Interpreter:	Yes, he has."

There is no further reference to the credibility of the uncle's statement.

10. The third document is a statutory declaration from the applicant's mother [CB 155] (in translation). No reference to the credibility of that document can be found in the transcript.

11. The Tribunal's reasons for decision commence at [CB 162]. The reasons set out in some detail the questioning of the applicant including the questioning of the applicant about the personal information it sought from him about Muraly, Suresh and Rajah. The Tribunal dealt with the independent country information and made a number of observations about the evidence. At [CB 176] the Tribunal deals with representations made by the applicant's advisor including the following:

> *"<u>Acts of Persecution</u>*
>
> *[T]here are two incidents about which evidence the applicant has given. The adviser stated that there is a finding on record that the applicant has been detained and assaulted and that since the Tribunal has not asked in detail about these incidents, the adviser observed that the Tribunal has not asked detailed questions about the physical abuse. Given this the adviser stated that the Tribunal* ***should*** *make a finding that the applicant was detained and assaulted."*

12. After dealing at some length with the independent country information the Tribunal then moves on to its findings and reasons. It deals with the evidence the applicant gave about his knowledge of personal matters relating to Muraly, Rajah and Suresh. On the basis of the applicant's responses to such the Tribunal came to the following conclusions at [CB 182]:

> *"Whilst the Tribunal accepts that the applicant worked in Colombo in 1999 at a menswear shop, it cannot be satisfied that any of the events he claimed to have occurred in 1999 are credible – namely, his evidence of having a Tamil friend with whom he was a "close friend" nor his evidence regarding the two claimed arrest [sic] in October 1999. The applicant's claims and evidence in this regard are implausible, contradictory, internally inconsistent and moreover, inconsistent with the independent evidence.*

In fact, given the range of inconsistencies between the applicant's application evidence and the independent evidence, and more significantly his evidence at hearing regarding the alleged "friend" the Tribunal cannot be satisfied that the applicant has been truthful in his claims and evidence, and cannot be satisfied that he has any claim to have a well founded fear of persecution for a Convention reason."

The Tribunal's principal reason for coming to this conclusion was the applicant's apparent lack of detailed knowledge of personal matters relating to Muraly, Suresh and Rajah. He did not know their surnames, he did not know which villages in Jaffna they came from, (although Jaffna is itself a town), he was not sure how many siblings Muraly had or how many siblings Suresh or Rajah had. He could not give the names of any of Muraly's siblings. The applicant did not know Muraly's birthday, or where Suresh or Rajah attended school. Although he knew that Muraly did not have a father he could not say why or what happened to him. He did not know where Muraly worked prior to his coming to his current employment some eighteen months before they met, nor did he know where Suresh and Rajah worked, although he knew what they did at work. Another Tribunal, which was perhaps more culturally sensitive to what a young Muslim Sri Lankan away from home for the first time in his life might discover about persons he has befriended for a few months, might not have used these examples of failure of knowledge to indicate:

" … [t]he applicant's mendacity on not only the essential elements of his claim"

or to make the finding that:

" … the claims of harm, and threats of harm, by the Sri Lankan authorities, to be a fabrication."

13. It is accepted, however, that in the absence of an allegation of bias these are views to which the Tribunal was entitled to come. It is not here that it is alleged that the Tribunal fell into jurisdictional error, rather in the manner in which the Tribunal dealt with the corroborative evidence from the applicant's doctor, uncle and mother.

14. The doctor's evidence was dealt with by the Tribunal at [CB 186]:

"With regard to the letter from Dr Karalasingham, the Tribunal notes the author's claims that the applicant had been consulting him for over a year with symptoms of memory loss, frequent regular headaches and nightmares, and that the applicant has been experiencing these symptoms since his arrest and torture in the hands of Sri

Lankan armed forces. He further stated that the applicant is therefore suffering from 'post traumatic stress disorder' arising from his treatment in Sri Lanka. The Tribunal notes that Dr Karalasingham had made a professional assessment. However, his assessment is based on the applicant ***as the informant****. In light of the Tribunal's findings above with regard to the applicant's lack of credibility and unreliability as a witness, it cannot give weight to the report given that it is based solely on the applicant."*

15. The applicant argues that there are two aspects to the doctor's report. The first is the history. I am of the view that if the Tribunal has concluded that the history given by the applicant is not credible, then it is entitled to give little weight to the conclusions concerning that history found in the doctor's report. The second constituent of the doctor's report is his diagnosis. This is a different matter. The doctor, who had been treating the applicant for over a year, gave a diagnosis of

> "i) Head injury causing memory loss. Head injury was from trauma [he received at the hands of the Sri Lankan Armed Forces]
>
> ii) Head injury causing frequent headaches
>
> iii) Post traumatic stress disorder."

The symptoms described by the applicant through his doctor were memory loss, frequent regular headaches and nightmares. It is quite permissible for the Tribunal to exclude the reference to the fact that the head injury was from trauma received at the hands of the Sri Lankan armed forces. But is it able to disregard the other parts of the diagnosis and not to consider whether the diagnosed memory loss, from whatever cause it may have arisen, could be genuine and could be part of the reason why the applicant was unable to recollect some of the details about his three colleagues? There is no discussion of the statement from the doctor in the transcript.

16. The statement from the applicant's uncle was discussed. The conversation extracted at [9] of these reasons took place. The third statement is that of the applicant's mother about which there is no discussion in the transcript.

17. The Tribunal's conclusions about these pieces of corroborative evidence is found at [CB 186]:

> *"With regard to the documents submitted by the applicant at hearing, namely a statement from the applicant's maternal uncle and the applicant's mother – both dated 11 July 2006. The Tribunal finds it strange that the applicant waited until the Tribunal hearing in July 2006 to obtain these documents. Further, the Tribunal notes that the applicant's uncle has not claimed and there is no evidence to suggest that he made contemporaneous notes in 1999, and the Tribunal finds it goes somewhat beyond the bounds of plausibility that the applicant's uncle could remember – almost word for word – a conversation he had with a police officer some seven years ago.* ***In any case, the Tribunal cannot give weight to either of these statements, because in the Tribunal's view it would have been a relatively straightforward matter for the applicant to contrive this letter by giving his uncle and mother instructions in relation to what they should write and secondly, because there is no definitive evidence to support a claim that this uncle or mother are actually the authors of these documents.*** *Finally, as the tribunal cannot put any weight on the applicant's own evidence, concerning the alleged arrests, detention, and mistreatment having found the applicant to be an unreliable witness, it cannot accept these statements as credible either**, but finds, rather that they are a self-serving fabrication written expressly for the purpose of enhancing the applicant's claim to be a refugee."*** *[emphasis added]*

18. The parties agree that given the date upon which this application was first made the common law rules regarding procedural fairness apply. The applicant also relies on the provisions of s.425(1) of the *Migration Act 1958* (the "Act"):

> "**Tribunal must invite applicant to appear**
>
> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review."

19. The starting point for consideration of the Tribunal's obligations to provide procedural fairness is found in the quotation from *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Limited* (1994) 49 FCR 576 approved at [29] in *SZBEL v Minister for Immigration* [2007] 231 ALR 592:

> "Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is

> made. **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.** Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question." (emphasis added)

The court, after noting that it was not necessary for a Tribunal to put to an applicant in so many words that he or she is lying or may not be a witness of truth, said at [57]:

> "But where, as here, there are specific aspects of an applicant's account [document], that the tribunal considers *may* be important to the decision and may be open to doubt, the tribunal must at least ask the applicant to expand upon those aspects of the account [document] and ask the applicant to explain why the account [document] should be accepted."

20. At the request of the applicant I have placed in square brackets next to the word "account" the word "document" because, he argues, they are not different. A document is merely a written part of an account. In regard to the doctor's report it is argued that the Tribunal's rejection of the diagnosis does not follow naturally from the rejection of the history and therefore the applicant should have been asked some questions about the diagnosis, because the applicant's failure of memory from whatever cause might have prevented the adverse credibility findings that were made purely on the basis of the applicant's alleged lack of recollection. I think there is considerable force in that argument because it cannot be eliminated by the "poisoned well" response found at *Re MIMA; Ex Parte S20/2002* (2003) 198 ALR 59 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 rational 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 that case comprises lies by the 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."

21. In this case what was not believed was the applicant's history. The lack of credibility came about because of the responses to the questions about his friends. If the responses to the questions were influenced by a

diagnosis of memory loss from whatever cause then there was a possible genuine ground for the applicant's failure to provide these details. I do not think a Tribunal can say *"I do not accept the corroborative evidence because it is poisoned by the applicant's untruthfulness*" when the corroborative evidence itself points to a reason for that untruthfulness independent of any responses given by the applicant.

22. The Tribunal did raise, in the manner extracted, the statement from the uncle. Had it restricted itself to finding that the statement could be given little weight because of the implausibility of the uncle being able to recall in as much detail as he did a conversation alleged to have occurred over seven years prior, I am satisfied that the glancing references to that fact contained in the transcript would have been sufficient to put the applicant on notice that concerns were held about the value of the document. But the Tribunal went much further than this. It suggested that the applicant had contrived the letter by giving his uncle instructions in relation to what he should write and suggested that his uncle was not the author of the document. The Tribunal concluded that the document was a self-serving fabrication written expressly for the purpose of enhancing the applicant's claim. The applicant argues that this is effectively an allegation of forgery. But I cannot agree with that:

> "Forgery is the making of an instrument purporting to be that which it is not, it is not the making of an instrument which purports to be what it really is but which contains false statements: *R v Windsor* [1865] Cox CC 118 at 123 per Blackburn J.

23. I do not think this matters because the applicant relies heavily on the decision of the full Federal Court in *WACO v Minister for Immigration* [2003] FCAFC 171 in which certain letters were tendered to corroborate critical elements of the applicant's claim. In relation to those letters the Tribunal stated (extracted at [19] of the judgment):

> "The Tribunal has closely examined and considered the translations. [in] view of the Tribunal's firm findings against the applicant in respect of his [sic] religious association with Ayatollah Shirazi, the Tribunal is not prepared to accept either of these documents as genuine. The Tribunal is not satisfied that the contents of the letters regarding [the Applicant's] claimed status as a follower and close associate of Ayatollah Shirazi are genuine and finds that they have been prepared to seek to bolster his claims."

This is not a finding of forgery either, although that word is used throughout the Full Court judgment. At [53] the Full Court 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."

24. I accept that the same Full Bench also found at [41] that direct evidence of a forgery would not always be necessary: *Minister for Immigration & Multicultural Affairs v Djajal* (1998) 51 ALD 567 and that it would not involve an error of law for the Tribunal to reject corroborative evidence on the basis of its view of an applicant's credit: *S20/2002*, and I also note that the respondent seeks comfort from the views of the Full Bench in *WAKK v Minister for Immigration* [2005] FCAFC 225 at [71]:

> "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."

But I would distinguish *WAKK* on the basis of the very positive finding made here that the document was a "self-serving fabrication". Even though the Tribunal declined to give the document weight rather than dismissing it entirely, this seems to me to be a distinction without a difference in the context of this decision. This case bears distinct similarities to *WAIJ v Minister for Immigration* [2004] FCAFC 74. In that case, the appellant had provided two documents to the Tribunal: a letter written by the appellant's sister and a letter of dismissal which she stated her sister had obtained. The Tribunal in its findings and reasons at [12], said that it:

> *" … would have been a straightforward matter for the applicant to either write the letter herself, or to ask her sister to write the letter for her. I am also of the view that the letter of dismissal would have been an easy letter to manufacture".*

Lee and Moore JJ said of this finding at [44]:

> "No objective basis was identified for suggesting that the appellant wrote the letter or directed her sister to do so. Such grounds might be provided by surrounding circumstances (opportunity, timing or the like) identified and explained by the Tribunal; or from some for of admission made by the appellant if the possibility that she wrote it, or that her sister wrote it at her direction, had been put to her, or from examination of the letter … The Tribunal, however, did not engage in such analysis of the material. There was no finding of fact made by the Tribunal that could ground a conclusion that the appellant wrote, or had arranged for the letter to be written."

At [52] their Honours concluded:

> "The reasons provided by the Tribunal in relation to its rejection of the documents revealed that the Tribunal failed to act judicially in respect of that material. The Tribunal appears to have considered that it could disregard documents that it was otherwise bound to consider if it surmised that it was possible that the documents could have been fabricated. That was not a course open to a tribunal acting judicially. There was no material before the Tribunal that permitted it to so dispose of the documents, and, thus, of the tendency of the documents to corroborate the appellant's account."

I am of the opinion that the Tribunal failed to give the applicant procedural fairness in the *Alphaone* sense by not raising with him its concerns that the uncle's statement was a fabrication engineered by the applicant.

25. The letter from the mother was equally described as a self-serving fabrication. There was no mention whatsoever of it at the hearing. I am satisfied that the Tribunal was duty bound to provide the applicant with procedural fairness by raising with him the concerns which it had that the letter was a fabrication and asking him to comment upon it. I am of the view that that right would arise both at common law and under s.425(1). The respondent says that the Tribunal's opening remarks extracted at [5] of these reasons were sufficient to ensure that the applicant knew that everything was in issue and that would include the veracity of the statements. But those statements were not before any earlier Tribunal or the delegate and what the Tribunal was there making clear was that all issues that were before those fori were in issue. That

would not automatically include documents that had been produced for the purposes of the third Tribunal hearing.

26. I am of the view that the Tribunal fell into jurisdictional error in the manner in which it dealt with the three pieces of corroborative evidence by failing to put to the applicant the nature of its concerns about those documents as set out in these reasons. I would therefore grant the applicant the constitutional writs requested and order that the matter be referred back to the Refugee Review Tribunal differently constituted to be heard and determined according to law. I would order that the respondent pay the applicant's costs which I assess in the sum of $5,000.00.

I certify that the preceding twenty-six (26) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 19 November 2007