FEDERAL COURT OF AUSTRALIA

Kanagasabai v Minister for Immigration & Multicultural Affairs [1999]

FCA 205

MIGRATION – *Migration Act 1958* (Cth) – review of decision of Refugee Review Tribunal ("the Tribunal") – whether Tribunal erred in its interpretation of "persecution" in the Refugees Convention – whether Tribunal complied with requirement to provide written reasons for its decision – whether extortion may be persecution when an applicant is selected as a target for extortion by reason of her race or political opinion – use of the Handbook on Procedures and Criteria for Determining Refugee Status

Migration Act 1958 (Cth), ss 36, 430(1), 476(1)(a),(e)

Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 160 ALR 24, considered

Okere v Minister for Immigration and Multicultural Affairs (1998) 157 ALR 678, cited

Prahastono v Minister for Immigration and Multicultural Affairs (1997) 77 FCR 260, considered

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, considered

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, considered

Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, considered

Minister for Immigration and Ethnic Affairs v Guo (1997) 144 ALR 567, considered

Handbook on Procedures and Criteria for Determining Refugee Status (Office of the UNHCR, 1992)

PARASAKTHY KANAGASABAI v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 858 of 1998

BRANSON J

SYDNEY

10 MARCH 1999

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 858 OF 1998

BETWEEN:	PARASAKTHY KANAGASABAI Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	BRANSON J
DATE OF ORDER:	10 MARCH 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal be set aside.

2. The matter be referred to the Refugee Review Tribunal for further consideration according to law.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGE:	BRANSON J
DATE:	10 MARCH 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

Introduction

1 This is an application for review of a decision of the Refugee Review Tribunal ("the Tribunal") whereby the Tribunal found that the applicant is not a refugee and affirmed the decision of the respondent not to grant her a protection visa.

2 Section 36 of the *Migration Act 1958* (Cth) ("the Act") provides as follows:

"36(1)There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

3 Australia will have protection obligations to the applicant under the Refugees Convention as amended by the Refugees Protocol (together hereafter referred to as the "Refugees Convention") if the applicant:

"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [her] nationality and is unable or, owing to such fear, is unwilling to avail [herself] of the protection of that country…" (Article 1A(2) of the Refugees Convention).

Facts

4 The applicant is a national of Sri Lanka who arrived in Australia in 1996. She is a Tamil and was seventy-six years of age at the time of the hearing before the Tribunal.

5 The applicant originally lived near Jaffna in the north of Sri Lanka. She has been a widow since 1970. She has raised seven children all of whom now live outside of Sri Lanka. From 1983 the applicant has been affected by the conflict between the LTTE and the Sri Lankan authorities.

6 In October 1995, the applicant, along with thousands of others, left the Jaffna area. They sought to escape the fighting between the Sri Lankan army and the LTTE. Her evidence was that she arrived in Colombo in March 1996. She was issued in Colombo with a Sri Lankan passport on 28 February 1996.

7 The Tribunal found that members of the Sri Lankan security forces came to the lodge where she was staying in Colombo on more than one occasion and harassed her, took her to the police station and extorted money from her.

8 The applicant arrived in Australia on a visitor visa on 28 May 1996. Since her arrival in Australia she has lived with her daughter and son-in-law in Campsie, New South Wales. A clinical psychologist who has undertaken a psychological assessment of the applicant has concluded that she is suffering from Post Traumatic Stress Disorder and that, if she is not permitted to remain in Australia with her daughter and family, irreparable psychological harm will be done to her.

Reasons of the Tribunal

9 The applicant gave evidence before the Tribunal. She has at all times had the benefit of legal representation in respect of her application for a protection visa.

10 The Tribunal in its reasons for decision stated:

"The Applicant believes she is at risk of harm from the Sri Lankan police, army, and air force, as a suspected supporter of the LTTE. She believes that their suspicion would be based on the following. She is a Tamil from the north. Her son deserted from the air force in 1984. Her home is empty, so the authorities may presume that the occupants have left to join the LTTE. They may presume that she joined the LTTE because her son deserted.

After her son deserted, the air force made enquiries of the Applicant as to his whereabouts. The Tribunal noted that the Sri Lankan authorities had eleven years to take action against the Applicant if they suspected the Applicant of being LTTE on

the basis of her son's desertion. As they had not, then surely there was no real chance that they would take action on that basis in the future.

The Applicant responded that they had come and threatened to take her instead of her son. They had come and questioned. In 1995 the authorities took possession of her house, they now have hold of her photo albums, and they are asking questions of the neighbours as to the whereabouts of the Applicant and her son.

The Tribunal noted that it was after the authorities took possession of her house that the Applicant was issued with a passport."

11 The Tribunal also observed as follows:

"The Applicant firmly believes that her life would be in danger if she returns to Sri Lanka. She was forced to leave Jaffna along with thousands of others. She travelled to Colombo where she stayed at a Tamil lodge. Members of the security forces came to the lodge, harassed her, and took her to the police station and extorted money [from] her in return for her release. This happened on several occasions."

12 The Tribunal was not satisfied that the arrests and extortions to which the applicant had been subjected have caused her such serious or significant harm as to amount to persecution. Nor was the Tribunal satisfied that the applicant had been arrested or suffered extortion by reason of her *"race, religion, nationality, membership of a particular social group or political opinion"*. The Tribunal concluded that the motivation of those who harassed the applicant was to obtain money rather than to cause the applicant harm for a Refugees Convention reason.

Contentions of the Applicant

13 The grounds of the applicant's amended application are as follows:

"1. The Tribunal erred in law, being an error in the interpretation of the word "persecution" in the context of the Convention.

2. The Tribunal erred in law and failed to act according to substantial justice and the merits of the case in that it failed to address a significant issue raised by the facts, being the danger to the applicant in the north of Sri Lanka for reason of her race.

3. The Tribunal erred in law and failed to act according to substantial justice and the merits of the case in that it did not consider the applicant's claims on the basis of all relevant evidence before it.

4. The Tribunal erred in law in that it failed to address the issues of whether the applicant could be expected to return to the area of Jaffna, and/or whether it was reasonable in the circumstances to expect the applicant to relocate to Colombo.

5. The Tribunal failed to observe procedures which it was required by law to observe.

6. There was no evidence or other material to justify the making of the decision."

(particulars omitted).

Consideration

14 Early in its reasons for decision the Tribunal finds that:

"The Applicant believes she is at risk of harm from the Sri Lankan police, army, and air force, as a suspected supporter of the LTTE."

Subsequently the following findings are recorded:

"The Applicant also fears that because she and her family have helped the LTTE they will be harmed.

The Applicant firmly believes that her life would be in danger if she returns to Sri Lanka …"

15 Although the Tribunal made no express finding that the applicant fears persecution by reason of her race or political opinion imputed to her if she returns to Sri Lanka, it seems to me that, having regard to the above findings, the Tribunal is to be understood as having found that the applicant satisfies the subjective element of the definition of refugee in the Refugees Convention.

16 It also appears that the Tribunal accepted the applicant's evidence that she was harassed by the security forces in Colombo, taken to the police station and suffered extortion before being released. Although the Tribunal initially merely *"notes"* the applicant's evidence on these topics it then concluded that:

"The Tribunal is not satisfied that the arrests and extortions to which the Applicant has been subject have cause[d] *her such serious or significant harm as to amount to persecution"*.

17 The Tribunal does not in its reasons explicitly acknowledge the applicant's claim made by statutory declaration that:

"26. It was not just the police, but other groups also who were giving me trouble while I stayed at the lodge in Colombo. People from EPRLF and ENDP and PLOTE and suchlike Tamil political groups would come to the lodges and demand money from me, by accusing me of supporting the Tigers.

27. Again I tried to argue, but had no choice, I had to get on the phone to my son in Canada to send money, to give to these people. They threatened to have the police come and arrest me as a donor to the Tigers, if I didn't give money to them. There was no use complaining to

the police; the police worked hand in hand with these Tamil pro-government groups. If I had gone to the police, they would just have extorted more money themselves, and they would inform the groups about my complaint, and then it would be much worse for me."

18 It may be that the Tribunal considered the above evidence under the headings of harassment and extortion. However, if it did, it is curious that the Tribunal was able to conclude, without mentioning the above evidence, that it was not satisfied *"that the harm that* [sic] *the arrests and extortions have been for reason of the Applicant's race, religion, nationality, membership of a particular social group or political opinion."* The plain inference to be drawn from the above paragraphs of the applicant's statutory declaration is that the applicant considered that the Tamil political groups approached her because she was Tamil and that she was peculiarly vulnerable to harassment and extortion from pro-government Tamil groups by reason of being Tamil. That is, that as a Tamil, she could more readily be accused of supporting the LTTE than a non-Tamil.

19 The Tribunal was not, of course, bound to accept the above evidence. However, the Tribunal did not in its reasons indicate whether it did or did not accept the evidence. If it did accept it, it did not by its reasons explain why it nonetheless formed the view that she had not suffered the harms of *"arrest and extortion"* by reason of her race or political opinion. It is to be noted that the Tribunal made no separate reference to whether the applicant had suffered *"harassment"* by reason of her race or political opinion. In these regards the reasons of the Tribunal, in my view, fail to satisfy the requirements of s 430(1) of the Act which impose a duty on the Tribunal to set out in its written reasons for decision its findings on any material questions of fact and to refer to the evidence or other material on which its findings of fact were based. In *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24, each of Wilcox, Lindgren and Merkel JJ appear to have treated a failure to comply with s 430(1) as a failure to observe a procedure that was required by the Act to be observed in connection with the making of the decision within the meaning of s 476(1)(a) of the Act. Even if the approach taken by the members of the Full Court to s 476(1)(a) of the Act is not part of the *ratio decidendi* of *Paramananthan's* case, I consider that I am obliged in the circumstances to follow their approach. I therefore find that the ground of review provided for by s 476(1)(a) has been made out in this case.

20 I further consider it appropriate to note that, for the reasons discussed by me in *Okere v Minister for Immigration and Multicultural Affairs* (1998) 157 ALR 678, the Tribunal's finding that the motivation of those who harassed the applicant was to obtain money is not necessarily inconsistent with a finding that the applicant was harassed for reasons of her race or political opinion. It is, of course, the case that extortion based on a perception of the victim's personal wealth, or otherwise aimed at the victim as an individual, will not

amount to persecution for a Refugees Convention reason (*Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568-9). However, in this case there was material before the Tribunal capable of supporting a finding that the applicant was selected as a target for extortion by reason of her race or political opinion. That is, it was open to the Tribunal to find that whilst the aim of the harassers was to obtain money from the applicant, the true reason why she was selected for harassment was her race or political opinion.

21 The Tribunal also concluded that it was not satisfied:

"that the arrests and extortions to which the Applicant has been subject have caused her such serious or significant harm as to amount to persecution. The harm suffered by the Applicant has caused her to be frightened, inconvenienced and intimidated, but the Tribunal does not consider that the harm suffered would amount to persecution."

22 The Tribunal gave no further reasons to support its conclusion that, in the circumstances of the applicant's claim, the acts of *"arrest and extortion"* which caused her fright and intimidation (questions of inconvenience can be put to one side) were insufficiently serious or significant to amount to acts of persecution. Again the reasons of the Tribunal make no explicit reference to its finding concerning *"harassment"*, but I am prepared to assume that the Tribunal considered the acts of harassment together with, and possibly as part of, the acts of arrest and extortion.

23 As Hill J pointed out in *Prahastono v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 260 at 264, a useful starting point for any discussion on the concept of persecution is the judgment of McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 429-431, in which his Honour said:

"The term "persecuted" is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes "being persecuted". The notion of persecution involves selective harassment. … As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or a member of a class, he or she is 'being persecuted" for the purposes of the Convention. … Moreover, to constitute "persecution" the harm threatened need not be that of loss of life or liberty. Other forms of harm short of inference with life or liberty may constitute "persecution" for the purposes of the Convention and Protocol. Measures "in disregard" of human dignity may, in appropriate cases, constitute persecution … persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to

the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason …."

24 In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258 McHugh J said:

"Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group."

25 In *Ram's* case Burchett J, at p 568, with whom O'Loughlin and RD Nicholson JJ agreed, expressed what I understand to be the same concept when he said:

"Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm."

26 It is to be noted that none of the above quoted passages is the expression "harm" qualified by reference to severity. However, in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 144 ALR 567 at 575 the High Court referred with apparent approval to the statement by Mason CJ in *Chan's* case at 388 that:

"[the] Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns."

27 I assume that the Tribunal's statement in its reasons for decision that *" 'persecution' means serious or significant harm"* is based upon this passage from Mason CJ's reasons for decision in *Chan's* case. However, in my view, the Tribunal's formulation does not accurately reflect the tenor of the observations of Mason CJ. In particular, there is, in my view, a real difference between the concepts of *"serious punishment or penalty"* and *"significant detriment or disadvantage"* to which Mason CJ referred and *"serious or significant harm"* in the sense in which that phrase is used by the Tribunal. Nothing in the reasons for decision of the High Court in *Guo's* case suggests that the High Court intended in that case to reconsider established authority on the meaning of *"persecution"*. It rather intended, as I read the case, to make explicit what had in earlier authority been implicit, namely, that the type of harm which can constitute persecution cannot be trivial or insignificant harm but rather must be harm of significance.

28 In particular, I do not consider that the High Court in *Guo's* case by its reference to Mason CJ's reasons for decision in *Chan's* case intended to suggest that the *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), published by the Office of the United Nations High Commission for Refugees (*"the Handbook"*) inappropriately deals with the issue of the type of conduct which may amount to *"persecution"* for the purposes of the Refugees Convention. Indeed, in *Chan's* case Mason CJ, at 392, whilst noting that he had not found the Handbook *"especially useful in the interpretation of the definition of refugee"* went on to say that he regarded the Handbook more *"as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention"*. I am aware of no Australian authority which suggests against the Handbook being utilised by decision makers as a practical guide.

29 The Handbook, after considering serious violations of human rights, says:

"52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (eg discrimination in different forms), in some cases combined with

other adverse factors (eg general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds'. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

…

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all of the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved."

30 I recognise that the question of when harm or discrimination will amount to *"persecution"*, within the meaning of the Refugees Convention involves issues of fact and degree (see *Prahastono's* case at 268). However, having regard to the Tribunal's misstatement of the observations of Mason CJ in *Chan's* case, coupled with its having adopted an approach to the determination of whether the applicant had suffered *"persecution"* in Sri Lanka which is far from that suggested by the Handbook, I feel compelled to conclude that the Tribunal acted on the basis of an incorrect interpretation of the applicable law in that it failed to act on the basis of the proper interpretation of "persecution" in Article 1A(2) of the Refugees Convention (see s 36(2) of the Act).

31 For completeness I record that I am not satisfied that the Tribunal erred in approaching the applicant's claim for a protection visa on the basis, as with some hesitation I conclude that it did, that the applicant had come to Australia from Colombo and, if she were refused a protection visa, could be expected to return to Colombo. That is, I accept that in the particular circumstances of this case, the Tribunal was not under an obligation to give consideration to the possibility of the applicant's internal relocation in Sri Lanka.

32 The decision of the Tribunal will be set aside and the matter referred to the Tribunal for further consideration according to law.

I certify that the preceding thirty-two (32) numbered paragraphs

are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 10 March 1999

Solicitor (Advocate) for the Applicant:	Mr L. Karp of McDonnells Solicitors
Counsel for the Respondent:	Mr T. Reilly
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	5 February 1999
Date of Judgment:	10 March 1999