FEDERAL COURT OF AUSTRALIA

Minister for Immigration& Multicultural Affairs v Kandasamy

[2000] FCA 67

ADMINISTRATIVE LAW – refugee – whether Tribunal erred in finding that there was effective protection in Denmark – whether failure to make finding of material facts.

Migration Act 1958 (Cth), ss 430, 476

State of Western Australia v Wardley Australia Ltd (1991) 102 ALR 213 referred to

Transurban City Link Ltd v Allan [1999] FAC 1723 referred to

Perampalam v Minister for Immigration and Multicultural Affairs (1999) 84 FCR 274 referred to

Australian Telecommunications Commission v Barker (1990) 12 AAR 490 referred to

Borsa v Minister for Immigration and Multicultural Affairs [1999] FCA 348 referred to

Logenthiran v Minister for Immigration and Multicultural Affairs unreported, Full Court 21 December 1998 referred to

Sellamuthu v Minister for Immigration and Multicultural Affairs [1999] FCA 247 referred to

Wang v Minister for Immigration and Multicultural Affairs [1999] FCA 1464 referred to

Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 160 ALR 24 referred to

Thevendram v Minister for Immigration and Multicultural Affairs [1999] FCA 182 referred to

Ahmed v Minister for Immigration and Multicultural Affairs [1999] FCA 811 referred to

Addo v Minister for Immigration and Multicultural Affairs [1999] FCA 940 referred to

Yelda v Minister for Immigration and Multicultural Affairs [1999] FCA 1841 referred to

Sivaram v Minister for Immigration and Multicultural Affairs [1999] FCA 1740 referred to

Direse v Minister for Immigration and Multicultural Affairs [1999] FCA 1626 referred to

Minister for Immigration and Multicultural Affairs v Prathapan (1998) 156 ALR 672 referred to

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 151 ALR 685 referred to

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

v KANDASAMY

N 958 of 1999

HILL, WHITLAM & CARR JJ

10 FEBRUARY 2000

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 958 OF 1999

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Appellant
AND:	PREMENDRA KANDASAMY Respondent

JUDGE:	HILL, WHITLAM AND CARR JJ
DATE OF ORDER:	10 FEBRUARY 2000
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The decision of the primary judge be set aside and in lieu thereof the decision of the Refugee Review Tribunal be affirmed.

3. The respondent pay the appellant's costs of the appeal and at first instance.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 958 OF 1999

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS APPELLANT

AND:	PREMENDRA KANDASAMY RESPONDENT

JUDGES:	HILL, WHITLAM AND CARR JJ
DATE:	10 FEBRUARY 2000
PLACE:	SYDNEY

REASONS FOR JUDGMENT

HILL J:

1 The respondent, Mr Premendra Kandasamy, is a citizen of Denmark. He arrived in Australia on 20 December 1997 with his wife and three infant children. Shortly after arrival, they lodged applications for a protection visa. The applications were unsuccessful. Mr Kandasamy and his children then applied to the Refugee Review Tribunal to review the decision of the delegate appellant Minister for Immigration and Multicultural Affairs refusing to grant them visas. The case for the wife and children depended upon the outcome of the case for Mr Kandasamy. It is presumably for this reason that he alone is the party to the litigation in this Court.

The Tribunal's decision

2 Although a Danish citizen, Mr Kandasamy was of Sri Lankan descent and was educated in that country for some 18 years. He went to Denmark to study and subsequently worked there. He was granted a Danish passport, it would seem, in 1996 as the result of an application for refugee status in that country.

3 Mr Kandasamy's time in Denmark was not happy. On his case, a representative of the Liberation Tigers of Tamils Eelam ("LTTE"), the militant army of the Tamil Tigers, collected money from him as they had done in Sri Lanka. A flatmate who refused to pay was, he said, stabbed. Mr Kandasamy refused the insistence of the LTTE that he work with them and not against them but was forced to drive a vehicle on one occasion when he was ordered to travel to Germany to transport some LTTE youths to Denmark, and he and his wife and children were assaulted.

4 Mr Kandasamy was threatened, should he complain to the authorities in Denmark, particularly about the stabbing incident. So too were, he said, his parents who at the time were in Sri Lanka.

5 Ultimately Mr Kandasamy left Denmark, came to Australia and applied to remain in Australia as a refugee.

6 The Tribunal's reasons were relatively brief. Apart from the conclusion which the Tribunal said emerged from these findings, the reasons and findings are contained in six paragraphs. The Tribunal was of the view that the essential issue for it to apply in determining whether it was satisfied that Mr Kandasamy was a refugee, as that expression is defined in the 1951 *United Nations Convention Relating to the Status of Refugees* as amended by the 1967 *Protocol Relating to the Status of Refugees* (compendiously "the Convention"), was whether State protection was available and effective in Denmark. The Tribunal said:

"I am prepared to accept, for the purposes of this decision, that the applicant's essential claims in relation to Denmark are true in that he was asked for and paid monthly 'donations' to the LTTE of about fifty Australian dollars, and that he was harassed by and on occasion assaulted by members of the LTTE. I also accept his statement that he never complained to the authorities. I do not accept that this was because he didn't know how to complain or did not know what his rights were. I am prepared to accept that he did not complain because he was scared, and did not, as he told the Tribunal, want to be involved in any court cases."

The Tribunal pointed out that there was nothing in the independent evidence which would suggest that effective state protection was not available in Denmark.

7 For his part, Mr Kandasamy said that he never sought protection from the authorities in Denmark in relation to the problems he had had concerning extortion and assault. The Tribunal did not accept that Mr Kandasamy's failure to look to the Danish authorities for protection was a reasonable response to a situation where his life and that of his family was being threatened.

8 The Tribunal concluded:

"Significant in the applicant's case is that he has never sought the protection of the state in Denmark. Hathaway J, in The Law of Refugee Status, Butterworths 1991, page 130, makes the logical comment 'obviously, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming.

I find that the applicant's failure to seek state protection is not reasonable in all the circumstances. I find that there has been no failure of state protection in Denmark, and that if the state was asked for protection that such would be available and effective."

9 Mr Kandasamy then sought judicial review of the decision of the Refugee Review Tribunal in this Court.

The proceedings before the trial judge

10 Three submissions were put to the learned primary judge on behalf of Mr Kandasamy. First, it was said that the Tribunal had failed to make a finding on the question whether Mr Kandasamy's flatmate in Denmark had indeed been stabbed. This ground of review proceeded on the basis that a failure to make a finding on a material fact enlivened s 476(1)(a) of the *Migration Act 1958* ("the Act") and was thus a ground for review. Under s 476(1)(a) the obligation to make findings on material of facts was, it was submitted, a failure to observe procedures required by the legislation.

11 Second it was complained that the Tribunal had failed to deal with evidence concerning the operations of the LTTE in Denmark and elsewhere and of the *modus operandi* of the LTTE. Finally, it was said that the Tribunal had not in its reasons dealt with a specific contention of the applicant concerning threats that had earlier been made to his wife and his apprehension that threats would be made to siblings of his wife.

12 The learned primary judge accepted the first of the three submissions. His Honour found not merely that the Tribunal had failed to deal with the stabbing of Mr Kandasamy's flatemate but also that, had it done so, it would have been open for the Tribunal to find as a matter of fact that the flatemate had been stabbed. It was, so the learned primary judge said, an incident of some significance and the failure of the Tribunal to address it in the context of whether the issue of protection was effective, was a failure to comply with s 430(1)(c). The primary judge rejected the second of the three submissions, being satisfied that the Tribunal had in fact dealt with the *modus operandi* of the LTTE.

13 The reasons of the primary judge did not deal with the third of the submissions. From this decision the Minister appealed to a Full Court of this Court.

The submissions on appeal

14 When the matter was called on for appeal, counsel for Mr Kandasamy conceded that so far as the ground of appeal concerning the failure to make a factual finding on the stabbing of the flatmate, the appeal should be successful. It was conceded for Mr Kandasamy that the only matter for the Court to decide was contained in a notice of contention lodged on behalf of Mr Kandasamy, namely that the Tribunal in its decision had erred by failing to address the evidence about the nature of the risk posed by the LTTE's operations in Denmark and, more particularly, internationally. It will be noted that this ground too depends upon the question whether a failure to make factual findings concerning a material issue, as required by s 430(1) of the Act,

gives rise to a ground of judicial review under s 476(1)(a) on the basis that procedures required by the Act had not been complied with.

15 Counsel for the Minister sought leave to submit that failure to comply with the requirement to make findings and give reasons contained in s 430(1) did not give rise to a ground of review under s 476(1)(a). The application for leave was noted against the background that at least one case dealing with that issue specifically had been argued in a Full Court of the Federal Court and further that an application for special leave to the High Court from another decision, in which the question was raised, was pending. The Court did not deal directly with the application for leave but indicated that, in the event that a Full Court of this Court decided that failure to make findings on material facts did not constitute a ground of judicial review and the question was still of significance, further submissions could be required to be given by the parties on the matter.

Should leave be granted?

16 In the circumstances to the present case I am of the view that leave should not be granted to the Minister to rely upon the matter that was not argued below, namely, whether failure to comply with s 430(1) constituted a ground of review under s 476(1)(a) of the Act.

17 Since the appeal was argued two decisions of Full Courts of this Court have been given. In the first, *Minister for Immigration & Multicultural Affairs v Yusuf* [1999] FCA 1681 (unreported, Heerey, Merkel and Goldberg JJ) it was held that the ground of review to be found in s 476(1)(a) of failure to observe procedures comprehended failure to comply with the provisions of s 430(1) including the obligation to give reasons and make findings on material questions of fact. In coming to this conclusion that Full Court was influenced by what it referred to as a uniform line of Full Court authority conclusive against the argument of the Minister.

18 Subsequently, another Full Court comprising Whitlam, RD Nicholson and Gyles JJ handed down judgment in *Xu v Minister for Immigration & Multicultural Affairs* [1999] FCA 1741. By majority, Whitlam and Gyles JJ held that failure to comply with s 430 fell outside the permissible grounds of review in s 476(1)(a) of the Act. Nicholson J was of the view that the appeal could be resolved without deciding that issue and specifically did not join with the other members of the Court in deciding whether a failure to comply with s 430 of the Act gave rise to a ground of review pursuant to s 476(1)(a) of the Act. In his Honour's view more thorough argument was necessary before that question should be decided.

19 The majority in *Xu* noted that, after its reasons had been substantially prepared, a copy of the decision in *Yusuf* had been received. No reference was made to the important rule that a Full Court should as a matter of comity follow the decision of another Full Court unless convinced that the other decision is clearly wrong: *State of Western Australia v Wardley Australia Ltd* (1991) 102 ALR 213 and see *Transurban City Link Ltd v Allan* [1999] FCA

1723. However a reading of the judgment makes it clear that their Honours were convinced that it was.

20 The matter is of some considerable importance given that it is substantial point in the appeal, although not the only one. I would, thus, be of the view that if, as the learned primary judge held, there was a failure to comply to s 430 of the Act, the question of whether failure to comply with s 430 was a ground of review would need to be dealt with once more by a Full Court of this Court. This would mean that the whole question would need to be re-argued and a decision made whether to follow *Xu* or to follow *Yusuf*.

21 Accordingly, I propose to consider the grounds of appeal on the assumption that failure to comply with s 430(1) is a ground of review. Failure on the part of Mr Kandasamy to succeed on that point makes the question whether failure to comply with s 430 constitutes a ground of review entirely academic and leads to the conclusion that leave to raise the matter should be refused.

Was there a failure to make findings concerning the nature of the risk posed by the LTTE's operations in Denmark and internationally?

22 It was part of the case of Mr Kandasamy before the Tribunal that in Denmark LTTE militants extorted money and beat those who refused to pay, threatening relatives in Denmark or elsewhere and threatening the person who refused to pay with abduction or death. This pattern of extortion proceeded against the threat not to expose to police what was happening. Supportive information of this kind was to be found in country material before the Tribunal which indicated that the LTTE and Tamil groups had an international network which used, *inter alia*, extortion in fund raising.

23 The submission on behalf of Mr Kandasamy was that s 430(1) required the Tribunal to address the obvious implications that this *modus operandi* both in Denmark and overseas had for the capacity of Denmark to provide effective protection. It was submitted that the Tribunal had failed to make findings about the extortion attempts and threats of violence and further no finding was made as to how Denmark would provide effective protection against the sophisticated terrorist organisation which existed. Case law on s 430 established, so it was said, that the Tribunal had erred where it failed to make findings on evidence of obvious significance to a material issue and gave no reasons for so doing. Hence, it was submitted that if the Tribunal had in fact rejected the evidence on the nature of the LTTE's operations, it was bound to give reasons why it did so. If it accepted that evidence, it was bound to make findings about the nature of the risk posed by the LTTE in Denmark and elsewhere in determining whether effective protection was available in Denmark against what was said to be persecution.

24 It is unnecessary to consider the cases to which we have been referred. They include among others, *Perampalam v Minister for Immigration and Multicultural Affairs* (1999) 84 FCR 274; *Australian Telecommunications Commission v Barker* (1990) 12 AAR 490 at 493-4; *Borsa v Minister for Immigration and Multicultural Affairs* [1999] FCA 348 (unreported, Full Court 31 March 1999); *Logenthiran v Minister for Immigration and Multicultural Affairs* (unreported, Full Court 21 December 1998) and cf *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247.

25 As already indicated, the Tribunal accepted the LTTE's history of extortion, harassment and assault. It is no doubt true to say that the Tribunal did not go into any detail on the question of the overall operations of the LTTE but, in my opinion, the Tribunal was not required to do so. There was nothing to suggest that effective state protection was not available in Denmark to deal with matters such as extortion, harassment and assault, such as Mr Kandasamy had complained of.

26 A person is a refugee within the meaning of Article 1A(2) of the Convention if, but only if in a case such as the present, where the alleged persecution arises not from the State itself but from some other group in the State and there is no effective protection in the State against the persecution inflicted. The Tribunal in its reasons quoted Hathaway J in the *Law of Refugee Status*, Butterworths 1991, at 130 as saying:

"obviously, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming."

27 The Tribunal was of the view that the failure to seek state protection in all the circumstances on Mr Kandasamy's part was unreasonable and that there had been no failure of state protection in Denmark and, if the state had been asked for it, protection would have been both available and effective.

28 While that matter may deal with the failure of the Tribunal to deal specifically with the risk posed by the LTTE in Denmark, it does not directly deal with the question of the failure of the Tribunal to make findings concerning the threat posed by the LTTE to relatives of the applicant outside Denmark and in other countries. If this is a material issue in the relevant sense, then failure to deal with it would no doubt offend the provisions of s 430(1).

29 There have been a number of attempts at defining what constitutes a material question of fact. Some of these are discussed and dealt with in the judgment of the Full Court in *Xu.* It is unnecessary to repeat that discussion here or determine whether an adequate definition of materiality can be found. At the least for a fact to be material, that fact must be one that bears upon the issue to be decided so that a finding in a way favourable to an applicant might affect the outcome: *Wang v Minister for Immigration & Multicultural Affairs* [1999] FCA 1464 (unreported). Let it be assumed for present purposes that the LTTE also engaged in extortion outside the place of

residence of the applicant against persons who were relatives and threatened violence which, on one view of the matter, might be carried out. Would it be correct to say, as counsel for Mr Kandasamy says, that in such a case no effective protection would be available in Denmark with the consequence that it would be open to the Tribunal to find that he had a well-founded fear of persecution?

30 No doubt threats against relatives of a person are capable of constituting persecution in the relevant sense and, if undertaken for a Convention reason, might permit an applicant to satisfy the Convention test. In my view, however, the words *"the protection of that country"* in the Treaty are concerned with such protection as the country can give in its borders. While a country could punish those who threaten extortion within their own borders and/or carry out those threats, it has no jurisdiction to punish those who extort others in other countries and carry out threats against them. But that does mean where that happens that a person becomes a refugee in the country which is unable to deal with matters happening outside its boundaries. *"By protection"* in the Treaty means such protection as the country could reasonably provide rather than protection against which the country could not itself act. Once the Tribunal found, as it did, that the Danish Government not only generally accepted human rights for its citizens but also through its legal system provided effective means of dealing with instances of individual abuse or violence, the conclusion that state protection is available cannot be assailed by referring to continuing extortion and harassment that may occur outside the borders of Denmark as being acts which neither Denmark nor any other country could deal with jurisdictionally. If the claim that inability to protect a person in other countries because of the mode of operation of Tamils were to operate to permit refugee status to be granted, it would be likely that Australia itself would have to refuse refugee protection on the basis that it likewise could not afford to Mr Kandasamy the effective protection which he desires.

31 Additionally, I have read in draft form the reasons of Carr J and agree with respect with his Honour's reasons.

32 In my view the appeal should be allowed with costs and the orders made by the learned primary judge set aside and in lieu thereof it be ordered that the decision of the Refugee Review Tribunal be reinstated.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill.

Associate:

Dated: 10 February 2000

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 958 OF 1999

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS Appellant
AND:	PREMENDRA KANDASAMY Respondent

JUDGE:	HILL, WHITLAM & CARR JJ
DATE:	10 FEBRUARY 2000
PLACE:	SYDNEY

REASONS FOR JUDGMENT

WHITLAM & CARR JJ:

Introduction

33 This is an appeal from the decision of a Judge of this Court, on 12 August 1999, setting aside a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal had, on 29 March 1999, affirmed a decision by a delegate of the appellant (made on 11 April 1998) not to grant the respondent and members of his family a protection visa under the *Migration Act 1958* (Cth) ("the Act").

34 When the appeal was called on, the respondent conceded the grounds of the appeal on the point raised by the appellant. That point was that the learned primary judge had erred in finding that the Tribunal had failed to set out in its reasons a material finding of fact as to whether a certain incident, involving a stabbing, had taken place. In our view, for the reasons given by the respondent's counsel for conceding the point, it was appropriate to allow the appeal and we indicated that we would do so in relation to that point.

35 Accordingly, the matter proceeded before us as a hearing of two matters raised in the respondent's notice of contention, namely that the Tribunal had, in two respects, failed to produce a statement which accorded with the requirements of s 430 of the Act in relation to two related factual matters to which we refer in detail later in these reasons.

Factual Background

36 The respondent was born in Sri Lanka and is of Tamil ethnicity. He was educated in Sri Lanka and worked there for about three years, but is now a citizen of Denmark. He arrived in Australia with his family in December 1997.

37 The following further factual background is taken largely from the reasons for judgment of the learned trial judge:

"In 1986, following years of problems with the Liberation Tigers of Tamils Eelam ("LTTE") and the Sri Lankan authorities, the [respondent] travelled to Denmark where he was granted refugee status and ultimately Danish citizenship. He found there were LTTE militants and supporters in Denmark who extorted money from Tamils who lived there. Those who refused to pay were severely beaten and their relatives in Jaffna were threatened with abduction or death. The LTTE militants threatened to hurt or kill anyone who acted against their interests. The [respondent] paid money to the LTTE every month. After one of the [respondent's] Tamil flatmates lost his job, he refused to pay money to the LTTE. In response to threats from a LTTE militant, the flatmate threatened to report the militant to Danish authorities. The militant lost his temper, stabbed the flatmate in the stomach and told him that he would be murdered if he attempted to inform the authorities. The militant told the [respondent] that his family would suffer the same consequences if he ever testified against him. The flatmate obtained medical treatment but concealed how he had sustained the injuries. The day after the stabbing the [respondent] and his other Tamil flatmates were summoned to a meeting with senior LTTE leaders. They were told they would be killed if they attempted to let the LTTE down. After the meeting, the [respondent] was told his family members would be killed if he attempted to act against the LTTE's orders. The militant who stabbed his flatmate warned the [respondent] frequently to stay away from the authorities and not to have private discussions about the stabbing with anyone.

> After the [respondent] lost his job he was forced by the militant to be his driver when he went to Tamil houses to collect money. The [respondent] was encouraged to join the LTTE. In July 1992, the [respondent] married in order not be dragged into LTTE activities. The militant seldom visited the [respondent] following the marriage. In 1993 the [respondent] completed a fork lift certificate course and obtained a heavy vehicle license. In 1995 the [respondent] started to drive buses and vans for private Tamil occasions. Knowing he had a heavy duty license, the LTTE militants forced him to transport people on the LTTE's "heroes day". Initially he refused but they assaulted and harassed him and he agreed to drive for them because he feared for his family.

Whenever the [respondent] refused to oblige the LTTE he received phone calls or letters from his parents stating that the LTTE militants were coming to their home and threatening them. He advised his parents to leave Sri Lanka permanently. They went to Canada where the LTTE extracted money from them.

In May 1997 LTTE militants ordered the [respondent] to transport Tamil youths from Germany to Denmark. When he refused he was assaulted in front of his wife and children. He was given time to reconsider his decision. He then told the militants he had lost his passport and could not travel. On 14 September 1997 four militants came and ransacked his home looking for his passport. The passport was with a friend. The [respondent] and his family were assaulted and the militants took the [respondent's] eldest child with him into their car. The [respondent] pleaded with them and his wife screamed. The militants said they would take the child forever, if the [respondent] refused to help them transport refugees from Germany. The [respondent] asked for time to apply for a new passport. He then arranged to come to Australia. He feared he would suffer the same treatment as his flatmate and was worried for his family. The LTTE had opened an office in Denmark with government approval and the [respondent] said that this was used as an excuse by them to do whatever they wanted."

The Proceedings before the Tribunal

38 The question before the Tribunal was whether the respondent fell within the definition of a refugee in Article 1A(2) of the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees* ("the Convention") as being a person who:

"owing to 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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…".

39 The principal issue, as seen by the Tribunal, was whether the respondent was a person to whom Australia had protection obligations having

regard to his experiences in Denmark, and whether Denmark was able and willing to afford the respondent protection sufficient to establish that the respondent did not have a well-founded fear of persecution were he to return to that country. The Tribunal did not distinguish between inability and unwillingness on the respondent's part, to avail himself of the protection of Denmark, a matter to which we refer below.

40 The Tribunal accepted the respondent's essential claims in relation to Denmark, that he was asked for and that he paid monthly 'donations' to the LTTE, that he was harassed and on occasion assaulted by members of the LTTE, and that he had been scared of complaining to the authorities and becoming involved in court proceedings. However, the Tribunal affirmed the delegate's decision to refuse the respondent's application for a protection visa. Its conclusion was that the respondent could not have a well-founded fear of persecution were he to return to Denmark, having regard to the likely existence of available and effective protection in that country.

The Decision at First Instance

41 The learned primary judge did not accept the respondent's submission (in respect of the first of two grounds of review) that the Tribunal had failed to consider whether State protection in Denmark would be available and effective, and had thereby made an error of law. His Honour held that the Tribunal found there had been no failure of State protection, and that if the State were asked for protection, it would be available and effective. His Honour said that the Tribunal had referred to independent evidence concerning the effectiveness of State protection in Denmark and concluded that the respondent could not have a well-founded fear of persecution were he to return to Denmark, having regard to the likely existence of available and effective protection.

42 The second ground of review was that the Tribunal had failed to comply with s 430(1)(c) of the Act, which provides:

"430(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based."

43 The respondent contended that the Tribunal did not deal with the respondent's concerns regarding threats made to his parents and the possibility of threats being made to siblings of his wife. His Honour rejected that contention and found that, while the Tribunal did so in summary form, it had indicated that it accepted that the respondent had been harassed by the LTTE and the threats to his parents were plainly part of that harassment process.

44 The respondent submitted that the Tribunal had not dealt adequately with the evidence concerning the modus operandi of the LTTE. His Honour was satisfied that the Tribunal had not erred in that regard. He said:

"Its only relevance was how it might impact upon the risk the [respondent] might be exposed to in Denmark and what protection the Danish authorities might provide having regard to that risk. The Tribunal's conclusion that the protection likely to be provided will be effective necessarily assumes an acceptance on the Tribunal's part that there was a risk. There is nothing in its reasons to suggest that it was not mindful of the material before it concerning the modus operandi of the LTTE and indeed refers to it in its decision."

The Notice of Contention

45 In his Notice of Contention, the respondent contended that the trial judge erred:

- in holding that the Tribunal had dealt adequately with his concerns about the threats made against relatives in Sri Lanka; and

- in holding that the Tribunal had dealt sufficiently with the nature and extent of the LTTE's operations and capacity to target people in Denmark and elsewhere.

46 In short, the respondent contended that the Tribunal failed to give adequate reasons for its decision as required by s 430(1)(b) and failed to set out its findings on material questions of fact in accordance with s 430(1)(c).

47 The respondent's case was that it was not sufficient for the Tribunal merely to accept the claim in respect of relatives and to be mindful of the LTTE's modus operandi. The respondent submitted that the Tribunal had to address what it described as "the obvious implications" those matters had for Denmark's capacity to provide effective protection for him. The Tribunal had

not, so it was put, given any inkling of how Denmark would provide effective protection against a sophisticated terrorist organisation like the LTTE. Nor had it given any indication of how Denmark would provide effective protection against the threats to harm relatives in Sri Lanka. These were said to be issues that were crucial to an assessment of the effectiveness of protection in Denmark.

48 The respondent relied on a line of authority for the proposition that s 430 required the Tribunal in this matter, if it rejected the evidence about the nature of the LTTE's operations, to explain why it did so. If it accepted that evidence, the respondent contended that the Tribunal was bound to make findings about the nature of the risk posed by the LTTE in Denmark and explain why, despite that risk, it nevertheless found effective protection was available there. That line of authority included: *Perampalam v Minister for Immigration and Multicultural Affairs* (1999) 84 FCR 274; *Australian Telecommunications v Barker* (1990) 12 AAR 490 at 493; *Borsa v Minister for Immigration and Multicultural Affairs* [1999] FCA 348 at par 26; *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24 at 56 and 63; *Logenthiran v Minister for Immigration and Multicultural Affairs* [1998] FCA 1691; *Thevendram v Minister for Immigration and Multicultural Affairs* [1999] FCA 182 and *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247. The respondent submitted that the two Full Court decisions of *Ahmed v Minister for Immigration and Multicultural Affairs* [1999] FCA 811 and *Addo v Minister for Immigration and Multicultural Affairs* [1999] FCA 940, where it was held that the Tribunal had only to refer to the evidence on which its findings of fact **were** based and did not have to give reasons for rejecting evidence, were contrary to the preponderance of authority for the broader view and should not be followed, the broader view being not clearly erroneous.

Our Reasoning

49 The relevant portions of the Tribunal's reasons are not extensive, nor in our view did they need to be, in this matter. We think that it would be helpful in understanding our reasoning to set out the full text of those portions. They were as follows:

"FINDINGS AND REASONS

The applicant and his family are citizens of Denmark. The Tribunal notes that in the case of the applicant husband that such arose from a refugee application, and that he formerly resided in Sri Lanka. Whilst the applicant has made claims in relation to both Sri Lanka and Denmark, the Tribunal notes that the country of reference for this decision is Denmark (in accordance with Article 1A(2) of the Convention), and the essential issue is whether state protection is available. It is only if such is not available and effecvtive (sic) that the issue of

whether or not the applicant has a well-founded fear in relation to Denmark need be considered.

I am prepared to accept, for the purposes of this decision, that the applicant's essential claims in relation to Denmark are true in that he was asked for and paid monthly "donations" to the LTTE of about fifty Australian dollars, and that he was harassed by and on occasion assaulted by members of the LTTE. I also accept his statement that he never complained to the authorities. I do not accept that this was because he didn't know how to complain or did not know what his rights were. I am prepared to accept that he did not complain because he was scared, and did not, as he told the Tribunal, want to be involved in any court cases.

The Tribunal accepts that a person can be scared and intimidated by criminal groups or persons within their community and perhaps not want to be involved in court cases, however where such occurs it is for the state to offer protection to that person. It is only where a person is unable or unwilling to seek protection that the possibility of international protection arises. That position by a person must be reasonable and is a question of fact. In the applicant's case he and his family are citizen's (sic) of Denmark. It is from that country that they must first seek protection. That protection may not be absolute. There is nothing in any of the independent evidence considered by the Tribunal to indicate that effective state protection would not be available in Denmark. That information was put to the applicant at hearing. The applicant stated at hearing that he never sought protection from the authorities in Denmark in relation to problems he had about extortion and assault. This seems contradictory to his earlier preparedness to seek protection from that country in relation to his fears from the LTTE in Sri Lanka. I do not accept that not seeking protection from the authorities in Denmark is a reasonable response to a situation where a persons (sic) life and family are being threatened. The independent evidence states that "the law and judiciary provide effective means of dealing with instances of individual abuse" (US StateDepartment Report). It is also apparent that the authorities investigate and report police violence which may be racially motivated (Amnesty International Report).

Significant in the applicant's case is that he has never sought the protection of the state in Denmark. Hathaway, J., in The Law of Refugee Status, Butterworths 1991, page 130, makes the logical comment "obviously, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming".

I find that the applicant's failure to seek state protection is not reasonable in all the circumstances. I find that there has been no failure of state protection in Denmark, and that if the state was asked for protection that such would be available and effective."

> 50 As Sackville J recently observed in *Yelda v Minister for Immigration and Multicultural Affairs* [1999] FCA 1841, the preponderance of recent authority is to the effect that s 430(1) merely obliges the Tribunal to refer to evidence on which findings of fact **are** based, not to evidence inconsistent with its findings. In addition to the two authorities cited immediately above,

Sackville J cited *Sivaram v Minister for Immigration and Multicultural Affairs* [1999] FCA 1740 (a Full Court decision) and *Direse v Minister for Immigration and Multicultural Affairs* [1999] FCA 1626 (Hely J). We do not think that it is necessary to choose between the two lines of authority in order to decide this appeal. That is because the reason for the Tribunal's decision fell within a narrow compass i.e. that Denmark could and would provide the respondent with effective protection. The evidence was really all one way in that regard. There was no rejection by the Tribunal (as the respondent contended) of evidence concerning the nature of the LTTE's operations. The Tribunal accepted the respondent's evidence. In those circumstances, the Tribunal can be seen to have been well aware of the risks to which the respondent was exposed. In our opinion, the Tribunal was not required to make formal findings about the nature of that risk before assessing the evidence about Denmark's willingness and ability to provide effective protection to the respondent. The material to which counsel for the respondent took us during the hearing of the appeal did not, in our view, even begin to suggest that state protection in Denmark was ineffective to the extent that there was a real chance that the respondent would be persecuted by the LTTE even if he sought the protection of the Danish authorities.

51 In terms of Article 1A(2) of the Convention, if the Tribunal were to find as a fact (as it did) that Denmark could and would provide the respondent with effective protection, then:

(a) it could not be said that the respondent was, in the relevant sense, "unable" to avail himself of the protection of Denmark. He had a realistic choice of availing himself of that protection and reliance on Denmark would have been of practical utility – see the discussion on this point by Lindgren J (with whom Burchett and Whitlam JJ agreed) in *Minister for Immigration and Multicultural Affairs v Prathapan* (1998) 156 ALR 672 at 674; and

(b) any fear of persecution on the respondent's part would not be well-founded; his unwillingness to avail himself of Denmark's protection could not be said to be "owing to such fear".

52 The material question of fact was whether there was effective protection in Denmark. There was evidence before the Tribunal from which it was open to it to find as a fact that Denmark could and would provide the respondent with effective protection. The Tribunal set out its finding on that material fact. It referred to the evidence and other material on which that finding of fact was based. It gave as its reason for the decision (to affirm the delegate's decision) the availability and effectiveness of State protection in Denmark. In doing so, in our opinion, it complied with s 430 of the Act in all relevant respects. Accordingly, it is not necessary to consider whether a failure to comply with s 430 constitutes a ground of review under s 476 of the Act. The appellant's application for leave to raise that matter, which we adjourned, does not in our opinion, need to be re-visited.

53 In our view, by his Notice of Contention, the respondent is seeking to re-agitate questions of fact in much the same manner as did the respondents in *Prathapan* and in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 151 ALR 685.

Conclusion

54 For the foregoing reasons, we would allow the appeal, set aside the decision at first instance and order that the application be dismissed with costs. The respondent should pay the costs of the appeal.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment of Justices Whitlam & Carr.

Associate:

Dated: 10 February 2000

Counsel for the Appellant:	Mr R Beech-Jones
Solicitor for the Appellant:	Australian Government Solicitor
Counsel for the Respondent:	Mr C Colborne
Solicitor for the Respondent:	Mr S Logan
Date of Hearing:	26 November 1999
Date of Judgment:	10 February 2000