MIGRATION - refugee status - review of Refugee Review Tribunal decision that it is not satisfied that applicant is a refugee - findings on credibility - whether rational and probative grounds for credibility findings - need for caution in making credibility findings - application of principles from *Chan.*

United Nations Convention relating to the Status of Refugees 1951

Protocol relating to the Status of Refugees 1967

Migration Act 1958 (Cth)

Emiantor v The Minister for Immigration and Multicultural Affairs (Federal Court of Australia, Merkel J, unreported, 3 December 1997) applied

Epeabaka v Minister for Immigration and Multicultural Affairs (Federal Court of Australia, Finkelstein J, unreported, 10 December 1997) considered

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

The Law of Refugee Status (Professor J C Hathaway, 1991, Butterworths)

KOPALAPILLAI v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

VG 470 of 1997

MERKEL J

MELBOURNE

24 DECEMBER 1997

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 470 of 1997

BETWEEN:	SUTHARSAN KOPALAPILLAI Applicant

AND:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	MERKEL J
DATE OF ORDER:	24 DECEMBER 1997
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's taxed costs of the proceeding.

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

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VICTORIA DISTRICT REGISTRY	VG 470 of 1997

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AND:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	MERKEL J
DATE:	24 december 1997
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

INTRODUCTION

The applicant is a young adult male citizen from Sri Lanka who is of Tamil origin. On his arrival in Australia on 8 April 1997 he applied for a protection visa on the ground that he was a refugee and therefore a person to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees* 1951 as amended by the 1967 *Protocol relating to the Status of Refugees* ("the Convention"). His application was refused and the refusal was affirmed by the Refugee Review Tribunal ("the RRT"). The applicant has applied to the Court for the review of the decision of the RRT under Part 8 of the *Migration Act 1958* (Cth) ("the Act").

THE APPLICANT'S CLAIM

The applicant claimed that he was a Tamil, from Jaffna and actively involved with the Liberation Tigers of Tamil Eelam ("the LTTE") before he fled Sri Lanka. In particular he claimed that he had performed official duties for the LTTE as a photographer at many of its functions between 1990-1995 and as a consequence would be considered by the Sri Lankan authorities to be an active member of three LTTE. The basis on which the applicant claimed refugee status was summarised by the RRT as follows:

"The Applicant fears that he cannot return to Sri Lanka without being detained, interrogated, tortured and possibly killed, because he is a Tamil who is also linked with the LTTE."

...

"The Applicant's claims essentially flow from his affiliation with the LTTE. He claims the security services will persecute him because he has assisted the LTTE and is believed to be an active supporter or member of that group. The Tribunal groups the

totality of his claims under the Convention reason of political opinion, although it recognises that there may be an overlap with aspects of race."

It is unnecessary for the purposes of the present application to outline the situation in Sri Lanka in so far as persons associated with LTTE are concerned. It is sufficient to say that the RRT appeared to accept that if the applicant's fear was well founded then he was entitled to succeed in his claim for refugee status on the ground of persecution for reason of political opinion or, possibly, race as those terms have been understood under the Convention. Accordingly, the real issue before the RRT was whether it was prepared to accept the applicant's version of his role and association with the LTTE.

THE RRT'S DECISION

The RRT summarised its findings and conclusions as follows:

"In summary, the Tribunal makes the following findings of material fact regarding the Applicant's expressed fears of persecution in Sri Lanka and his flight from that country. He is an educated Hindu Tamil from Jaffna. His father is a successful businessman and his uncle is a senior government official. His brother was killed by members of PLOTE in 1989, but that event had no adverse repercussions for the Applicant, other than the expected personal consequences. The Applicant worked in a photography studio and recorded lawful gatherings of the LTTE in 1994/5. Apart from that, he was not involved with the LTTE. The Applicant fled Jaffna along with the majority of the population when the LTTE ordered an evacuation in October 1995. He fled to Chavakachcheri and remained there until May 1996. In April 1996, he was detained by the SLSF and released, unharmed, after three days. The SLSF had no adverse interest in him for reason of association with the LTTE and he was not detained on any other occasion. He went to Killinochchi and remained there until February 1997, during which time he was ill. His uncle assisted him with medicine and hospitalisation. His uncle helped him get to Vavuniya and obtain a clearance to go to Colombo. The resort to contacts or bribes does not indicate that the Applicant was wanted by the security forces. He stayed in Colombo for a month, obtained a passport and then left via the Colombo airport using his own passport. He surrendered his passport to an agent who helped him find a passage to Australia and arrived in Australia after boarding the last leg of his journey with false documentation.

The Applicant claims that he cannot return to Sri Lanka because he is wanted by the security forces and will be interrogated on arrival at the airport because he does not have a passport. The Tribunal does not accept that he is wanted by the security forces as a consequence of an association with the LTTE. It is satisfied that he has had a genuine passport and that he can retrieve that if he wants to. In any event, if he returns without a passport and is questioned at the airport, such action is unrelated to the Convention, but is connected to breaches of regulations about exit from and entry to Sri Lanka."

The RRT then considered whether the applicant faces persecution in Sri Lanka because he is a Tamil and concluded that:

"... while the Tribunal is sympathetic to the Applicant's desire not to return to such a situation, it does not alter the conclusion that his fears of persecution for a Convention reason are not well-founded. There is not a real chance that he faces serious harm because of an association with the LTTE or for any other real or imputed political opinion. Nor is there a real chance he faces persecution on account of his race or for any other Convention reason."

Finally the RRT said:

"On the basis of the acceptable evidence, the Tribunal is not satisfied that the Applicant faces a real chance of persecution for a Convention reason should he return to Sri Lanka and therefore he is not a person to whom Australia has protection obligations under the Convention and Protocol and is not entitled to a protection visa."

Accordingly, the RRT affirmed the decision not to grant a protection visa to the applicant.

In the course of explaining its reasons for rejecting the applicant's version of his association with the LTTE, the RRT made fairly strong findings against him on credit primarily relying on:

- the denial by the applicant of his alleged association with the LTTE upon arrival in Australia;
- the failure of the Sri Lankan authorities to recognise or perceive that the applicant was associated with the LTTE by unconditionally releasing him from custody after three days and thereafter issuing him with a passport and allowing him to leave the country;
- its rejection of the explanations proffered by the applicant for the inconsistencies between his earlier and later reasons for claiming refugee status.

The RRT's adverse findings in respect of the applicant's version of events included:

- the explanations the applicant proffered for not mentioning his association with the LTTE on his arrival were "far fetched" and not acceptable;
- the applicant's later claims about links with the LTTE were only made after he recognised his initial claims may be inadequate and were "contrived or embellished for the purpose of shoring up a refugee claim he believed was weak";

- the applicant's first detention by the military and early release is "strong evidence that he was not suspected of being an active LTTE supporter" or was of "any ongoing interest to the security forces".

- the applicant's second claim of detention and mistreatment has been contrived;

- the functions of the LTTE which were attended by the applicant were held during a peace and negotiation period, he attended them because it was lawful to do so and was given proper accreditation for that purpose;

- the RRT did not accept that the applicant had the close links to, or was an active supporter of, the LTTE as claimed by him and did not accept that it is any more than a remote possibility that his attendance at lawful functions of the LTTE has led to a perception on the part of the authorities of any such association;

- the applicant's ability to obtain a passport and his lawful departure from Sri Lanka occurred because "he was of no adverse interest to the authorities".

THE LAW

Recently in *Emiantor v The Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Merkel J, unreported, 3 December 1997) at 12-14 I set out the relevant legal principles applicable to a case such as the present. Like the present case, *Emiantor* was a case in which the RRT's adverse findings as to the applicants' credit were fatal to their application for refugee status. Neither counsel in the present case disputed any of the statements of principle enunciated by me in *Emiantor.* Accordingly, I adopt and apply those for the purposes of the present case.

THE CREDIBILITY ISSUES

A substantial part of the applicant's case related to the RRT's findings against him on credit. The submissions were put in various ways but ultimately came down to the following propositions - the findings were not rational, were not based on any or any probative evidence, evidence a closed mind on the part of the RRT and must have been derived from preconceptions held by the RRT from other cases. For present purposes I have no difficulty in assuming in the applicant's favour that if the submission is substantiated as a matter of fact that affords a basis for the decision being vitiated under ss 476(1)(a) and 420(2)(b) on the ground of the failure of the RRT to act according to the substantial justice of the case: see

Epeabaka v Minister for Immigration and Multicultural Affairs (Federal Court of Australia, Finkelstein J, unreported, 10 December 1997) at 12.

In *Emiantor* I commented on the concern I had as to the ability of the RRT, in that case, to disbelieve comprehensively the key aspects of the applicants' claims in the course of a one to two day hearing. Yet notwithstanding that concern I found that:

"The approach of the RRT to the credibility issues was open to it on the material, was based on rational grounds and was arrived at after consideration of matters that were logically probative of the issue of credibility. In these circumstances I do not accept the contentions of the applicants that the RRT erred in law in relation to these findings or that the findings were open to challenge on any other reviewable ground. That conclusion is important to the outcome of the review as it must follow that the findings of the RRT as to the past events relied upon to support the claims for refugee status must be accepted as the starting point for the application of the 'real chance' test." (at 22)

Notwithstanding the submissions to the contrary by the applicant's counsel, in my view precisely the same observations can be made as to the RRT's approach to the credibility issues in the present case. The applicant first denied but later claimed an association with LTTE. The RRT had to determine which of the two inconsistent versions was correct. The applicant proffered explanations for the inconsistency. It was open to the RRT to accept or reject those explanations. The RRT, as the arbiter of fact, chose to reject the explanations. It did not commit any error of law in doing so. Likewise the RRT was required to make other findings of fact based upon its view of the applicant's version of events in the context of all of the material before it. It did not commit any error of law in doing so.

Accordingly, I do not accept that the applicant has made out his primary ground for relief that the RRT did not rationally consider the material before it or failed to bring an open mind to the assessment of the applicant's case. Similarly, in so far as a "no evidence" ground is put forward there was no basis for it in law or fact. The central issue to be resolved was one of credit. If the applicant's credit was accepted it was open to the RRT to conclude that there was adequate material to support his claim. If his credit was rejected on the key aspects of his claim it was open to the RRT to conclude that there was inadequate material to support his claim. It was also suggested by the applicant's counsel that a finding as to credit requires some finding as to the applicant's demeanour which was not made. As the applicant gave evidence through an interpreter the absence of such a finding is hardly surprising. In any event the basis for credit findings are many and varied and may or may not include demeanour.

THE CHAN TEST

The other major ground of challenge was that the RRT failed to correctly apply the test from *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. The submission was put in various ways including a suggestion that it was incumbent upon the RRT to apply a *Briginshaw* standard of proof in the applicant's favour.

In *Emiantor* at 12-14 I outlined the approach that can now be taken to be established by recent decisions of the High Court. The substantive contention put forward by the applicant is that the RRT did not correctly apply the *Chan* test as it failed to consider whether its fact findings against the applicant might be wrong. In *Emiantor* I said at 22-23:

"In particular the [High] Court [in Guo (1997) 144 ALR 567] made it clear that the "What if I am wrong?" approach to fact finding:

- is relevant to facts found on the basis that they are "slightly more probable than not";
- is neither rational nor necessary when the RRT has no real doubt that its findings are correct;
- has a varying applicability in cases lying between the two situations stipulated above."

In my view the summary of and extracts from the RRT's decision which I have set out above demonstrate that the RRT appears to have had no real doubt that its findings as to the past and the future were correct. Although the applicant's counsel made extensive submissions as to why the confidence of the RRT in that regard was misplaced the submissions assumed that I was engaged either in a review on the merits or an appeal on the facts, neither of which is available under Part 8 of the Act. In rejecting a similar submission in relation to the *Chan* test in *Emiantor* at 25 I said:

"Finally, there is nothing in the description by the RRT of its understanding of the Convention or the manner in which it applied the Chan test to the facts that suggests that it erred in law in applying the test. Indeed its approach to and analysis of the facts was analogous to that of the RRT in Guo. In Guo, and in the present case, the RRT:

- made findings in relation to the material facts relied upon to establish a real chance of political persecution on the applicants' return to their country and made an assessment that, on the basis of those findings, there was no real chance of political persecution if they return to their country; and
- had no real doubt that those findings both as to the past and present were correct."

For the same reasons I am of the view that there is no substance in the applicant's submissions that the RRT failed to apply the *Chan* test correctly.

OTHER MATTERS

Counsel for the applicant referred to extracts from the transcript and parts of the evidence and material to demonstrate, in general, that the RRT either acted irrationally or closed its mind in its approach to fact finding. I am not satisfied that the extracts relied upon establish either proposition. A proceeding before the RRT is inquisitorial rather than adversarial; that still requires the RRT to have regard to all of the material before it, including that which it is entitled to place before itself and make the correct or preferable decision on that material: see *Epeabaka* at 2. When understood in that context the extracts and evidence relied upon do not demonstrate a breach of duty by the RRT.

It was also said that the RRT failed to observe the following cautions proffered by Professor Hathaway in *The Law of Refugee Status* (1991, Butterworths) at 84-86 in relation to the testimony of refugee claimants:

"First, the decision-maker must be sensitive to the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority. They may thus be less than forthright in their dealings with immigration and other officials, particularly soon after their arrival in an asylum state. The past practice of the [Immigration Appeal] Board of assessing credibility on the basis of the timeliness of the claim to refugee status, compliance with immigration laws, or the consistency of statements made on arrival with the testimony given at the hearing is thus highly suspect, and should be constrained in the contextually sensitive manner discussed previously in Chapter 2.

Second, it is critical that a reasonable margin of appreciation be applied to any perceived flaws in the claimant's testimony. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution. Because an understandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment, only significant concerns about the plausibility of allegations of direct relevance to the claim should be considered sufficient to counter the presumption that the sworn testimony of the applicant is to be accepted as true. As stated in Francisco Edulfo Valverde Cerna [Immigration Appeal Board Decision, 7 March 1988]:

> The Board does not expect an applicant for Convention refugee status to have a photographic memory for details of events and dates that happened a long time ago, but it is reasonable to expect that important events that happened as a consequence of other events should be found to have taken place in some consistent and logical order.

Ultimately, however, even clear evidence of a lack of candour does not necessarily negate a claimant's need for protection:

> Even where the statement is material, and is not believed, a person may, nonetheless, be a refugee. 'Lies do not prove the converse.' Where a claimant is lying, and the lie is material to his case, the [determination authority] must, nonetheless, look at all of the evidence and arrive at a conclusion on the entire case. Indeed, an earlier lie which is openly admitted may, in some circumstances, be a factor to consider in support of credibility." (footnotes omitted)

The cautions of Professor Hathaway offer sound and sensible advice to and guidelines for decision-makers but are not of themselves rules or principles of law. However, it is important to reiterate the wisdom of that advice particularly when one has regard to:

- the extent to which RRT decisions, in a practical sense, are becoming less prone to review and therefore final; and

- the caution the RRT should exercise in stating its findings of fact to avoid expressing them with greater confidence than the circumstances of a particular case may warrant.

CONCLUSION

For the above reasons the grounds of review which were the subject of the applicant's submissions to the Court at the hearing have not been made out. Accordingly, the application is dismissed with costs.

I certify that this and the preceding eight (8) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel

Associate:

Dated:

Counsel for the Applicant:	Mr R Appudurai

Solicitor for the Applicant:	Wisewoulds
Counsel for the Respondent:	Mr W Mosley
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	18 December 1997
Date of Judgment:	24 December 1997