

# FEDERAL COURT OF AUSTRALIA

**MIGRATION** – appeal – primary judge’s dismissal of application to Court by refugee-claimant for review of unfavourable decision of Refugee Review Tribunal – Sri Lankan Tamil – failure of Tribunal to deal with claims made by refugee-claimant of two instances of arrest, detention, interrogation and torture shortly before he left Sri Lanka – failure to comply with procedure laid down by s 430 of *Migration Act 1958* (Cth).

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

*Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402, referred to

selvarajah Logenthiran v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 532 OF 1998

wilcox, lindgren, merkel JJ

Sydney

21 DECEMBER 1998

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NG 532 of 1998

on appeal from a judge of the federal court of australia

BETWEEN: SELVARAJAH LOGENTHIRAN

Appellant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AFFAIRS

Respondent

JUDGES: WILCOX, LINDGREN, MERKEL JJ

DATE OF ORDER: 21 DECEMBER 1998

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. the appeal be allowed;
2. the order made on 15 May 1998 in proceeding NG 916 of 1997 be set aside and, in lieu thereof, it be ordered that the appellant's application for a protection visa be remitted to the Refugee Review Tribunal, differently constituted, for reconsideration and determination according to law and that the respondent pay the applicant's costs of that proceeding;
3. the respondent pay the appellant's costs of the appeal.

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

NG 532 of 1998

on appeal from a judge of the federal court of australia

BETWEEN: SELVARAJAH LOGENTHIRAN

AppELLANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AFFAIRS

Respondent

JUDGES: WILCOX, LINDGREN, MERKEL JJ

DATE: 21 decembER 1998

PLACE: SYDNEY

## REASONS FOR JUDGMENT

# WILCOX AND LINDGREN JJ: INTRODUCTION

The appellant (“Mr Logenthiran”) appeals from a judgment of a judge of the Court by which his Honour dismissed Mr Logenthiran’s application for an order of review in respect of a decision of the Refugee Review Tribunal (“RRT”) affirming a decision of a delegate of the respondent Minister (“the Minister”) not to grant Mr Logenthiran a protection visa.

## PROCEDURAL BACKGROUND

Mr Logenthiran, a citizen of Sri Lanka, arrived in Australia without documentation on 21 June 1997. On 2 July, through solicitors, he lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs (“the Department”). On 4 July his solicitor, Mr Karp, forwarded to the Department a

statutory declaration by Mr Logenthiran of that date. The Minister's delegate refused the application on 14 August.

On 18 August, Mr Logenthiran applied to the RRT for review of the delegate's decision. His solicitor made detailed written submissions to the RRT on 15 September. Mr Logenthiran gave evidence before the RRT on 26 September 1997, when he was accompanied by his solicitor. An interpreter in the Tamil language assisted. The RRT also had various documents before it, some of which are referred to below.

On 3 November, the RRT affirmed the delegate's decision. It concluded that Mr Logenthiran was not a person to whom Australia had protection obligations under the *Convention Relating to the Status of Refugees* done at Geneva on 28 July 1951, as amended by the *Protocol Relating to the Status of Refugees* done at New York on 31 January 1967 (compendiously, "the Convention"). Article 1A (2) of the Convention provides that a refugee is 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

Section 36 of the *Migration Act 1958* ("the Act") provides that a criterion for the grant of a protection visa is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Convention. Accordingly, the RRT's conclusion was that the applicant did not satisfy this criterion.

The primary judge dismissed Mr Logenthiran's application to this Court for review of the RRT's decision on 15 May 1998.

Mr Logenthiran's appeal proceeded on an amended notice of appeal which was filed with leave granted by consent on the hearing of the appeal.

## BACKGROUND FACTS

The RRT purported to set out Mr Logenthiran's claims in the "Claims and Evidence" section of its Reasons for Decision based on his statutory declaration dated 4 July 1997. The appeal relates, in particular, to certain events which occurred in 1997, not long before Mr Logenthiran departed Sri Lanka for Australia, to which the RRT

referred in the “Claims and Evidence” section of its Reasons but to which it did not return in the “Findings and Reasons” section.

Mr Logenthiran was born on 13 June 1977 in Manipay, near Jaffna, Sri Lanka. As a child he lived on the small island of Karainagar close to a camp of the Liberation Tigers of Tamil Eelam (“LTTE”). He and his family lived separately from his father who was an “Additional Government Agent” and worked “at Nedunkerni ... on Puliyanukulam Road”.

As a boy, Mr Logenthiran was coerced into undertaking sentry duty for the LTTE on three or four occasions. In 1990, he and his cousin were going to market when the town was bombed and the cousin killed. In 1991 the family evacuated to Jaffna.

In March 1995, during the ceasefire, Mr Logenthiran went to Colombo to lodge a “Special Assistance Category” application to migrate to Australia. He was seventeen years old at the time. He had to get a “pass” from the LTTE, for which purpose his mother sold her jewellery and paid one lakh of rupees (100,000 rupees) to the LTTE. On the way to Colombo, he was stopped by the Sri Lankan authorities at Thandikulam (which is just outside Vavuniya), interrogated and released.

In Colombo, he stayed with a friend of his aunt. The house was raided by the police and the army. He was arrested, taken to the police station, interrogated as to his reasons for being where he was, kicked and beaten with a stick, and released after 30,000 rupees was paid for the purpose. He claimed that this first incident of arrest, detention, interrogation and physical abuse occurred in March/April 1995.

While Mr Logenthiran was still in Colombo, the ceasefire terminated and security measures were stepped up. In the third week of April 1995, the house was again raided and Mr Logenthiran was again arrested. This time he was taken to a camp. He was again beaten. He was accused of having links with the LTTE. On this second occasion of arrest, detention, interrogation and beating, a friend of his father’s to whom he referred as “Sivarajah uncle” or “Siva uncle”, but to whom we will refer as “uncle Siva”, paid 20,000 rupees for his release. “Uncle Siva” told Mr Logenthiran that he must leave the area in Colombo where he had been living (Dehiwala), otherwise he (uncle Siva) would be in trouble. In fact, he chased Mr Logenthiran away and Mr Logenthiran moved to a house in Wellawatte, a different part of Colombo.

Again, however, he was arrested. This third arrest was in the first week of May 1995. He was interrogated as to whether he was from the LTTE. He was taken to another location. He and four other persons were lined up in front of a person wearing a balaclava. Mr Logenthiran was again questioned as to whether he was from the LTTE. Two of the five men detained were “identified”, but the other two and Mr Logenthiran were brought back to Wellawatte by jeep. Outside a Hindu temple

there, the jeep slowed down and Mr Logenthiran was pushed out. Mr Logenthiran left Colombo for Vavuniya, which is controlled by the Sri Lankan army.

At the end of May 1995, Mr Logenthiran was called for an interview at the Australian High Commission regarding his visa application. (The Department file confirmed Mr Logenthiran's claim that he had applied for a Sri Lanka (Special Assistance) visa which was rejected in November 1995 on the ground that he had not suffered ongoing discrimination.) After the interview he returned to Vavuniya and later to Jaffna.

Subsequently, Mr Logenthiran went to Nedunkerni and moved into his father's house there. He lived there until March 1996, when he contracted typhoid and was taken to Vavuniya hospital. After his release from hospital, he was accosted by five members of the People's Liberation Organisation of Tamil Eelam ("PLOTE", an organisation opposed to the LTTE), two of whom were former classmates of Mr Logenthiran, with whom he had studied at Karainagar. They interrogated him and beat him. He screamed that he was not with the LTTE. People gathered and some of them took him to hospital.

After his discharge from hospital, Mr Logenthiran was taken back to Nedunkerni where the LTTE approached him to join their auxiliary force. At an LTTE camp he was trained in treating wounded soldiers and providing assistance for fighters. He was also taught how to throw grenades. He was required to stand sentry for the LTTE about twice a week until April 1997.

At about this time (April 1997) the LTTE told Mr Logenthiran that they wanted him to join them full-time. He did not want to do so and went into hiding and fled to Vavuniya, guided by uncle Siva. En route, however, he was arrested by the Sri Lankan army. They took him to their camp. That night they strip-searched him and beat and kicked him during interrogation. The following morning he was taken to a refugee camp in an area held by the Government. At the refugee camp, he was questioned about his LTTE connections but was not beaten. He was held at the camp for three weeks. Uncle Siva spoke to the police officers and paid them money to let him leave the camp. The events of April 1997 described in this paragraph represent the fourth time Mr Logenthiran was arrested, detained, interrogated and assaulted by the authorities.

Uncle Siva next took Mr Logenthiran to Colombo. There he was again arrested by the police and kept for a week in police custody. During that week he was again beaten. In his statutory declaration dated 4 July 1997, Mr Logenthiran stated that the date of this arrest was 10 June 1997 and that during his detention he was asked who had sent him and whether he had come to plant bombs. This time, uncle Siva paid 25,000 rupees for his release. On his release, the Sinhalese police officer spoke to him in broken Tamil and said that if he were to be arrested again, nobody should ask for his (the officer's) help in securing Mr Logenthiran's release.

The events described in the preceding paragraph represent the fifth and last occasion of arrest, detention, interrogation and physical abuse, which Mr Logenthiran claimed to have suffered.

Uncle Siva put Mr Logenthiran in touch with an agent who, on 19 June 1997, accompanied him from Sri Lanka to Hong Kong. In Hong Kong the agent gave him a boarding pass in an assumed name. With that pass he boarded the plane for Australia where he arrived on 21 June 1997.

Mr Logenthiran told the RRT that he feared that if he returned to Sri Lanka, he would, as a Tamil from Jaffna, be identified through the PLOTE and other groups. He said that he would be arrested and tortured and that his body would be dropped in the river or the ocean.

## FINDINGS AND REASONS OF THE RRT

The RRT accepted Mr Logenthiran's account of his life in Karainagar before 1995, "that is, before he was eighteen years old". The RRT stated that there was

"no evidence before the Tribunal as to whether [Mr Logenthiran's] treatment at the hands of the LTTE was markedly different to that experienced by other young Tamil men in his area,"

and concluded that it was not serious enough to amount to persecution.

This is a reference to the LTTE's practice of enforcing support from the local population, such as Mr Logenthiran's sentry duty during his boyhood. The RRT found that the Government of Sri Lanka had accepted that the Jaffna Peninsula had been under the de facto control of the LTTE, and would not pursue Tamils who had lived in the LTTE controlled areas and who had performed low level services for the LTTE.

The RRT continued:

**"The Tribunal finds credible the applicant's claim that while he was in Colombo he was taken by the authorities for questioning three times, and that he may have been ill-treated while in custody. ... DFAT cable CL463 Sri Lanka: Human Rights Update: Tamils in Colombo, 24/1/97 reports that 'as a consequence of the security threat coming from a Tamil Nationalist militant organisation, Tamil people in Colombo are subjected to a greater degree of surveillance and suspicion than non-Tamil people' but that 'provided that they are properly conducted, this does not**

amount to harassment or physical danger' and that 'this does not amount to officially sanctioned discrimination or harassment of Tamil people as a group'. It also commented that there had been 'very few reports of serious mistreatment in detention in Colombo' in 1996 owing to improved police practices and a greater demand for police accountability. **The Tribunal finds that given these recent improvements in police conduct, the chance that ill-treatment in custody will recur is remote.**" (emphasis supplied)

In this passage, the RRT referred to the three incidents of arrest, detention, interrogation and torture of 1995 then came forward by two years, to address, by reference to DFAT cable CL 463, "the chance of ill-treatment in custody" as at the times of Mr Logenthiran's departure from Sri Lanka in June 1997 and the RRT's decision.

The RRT next accepted Mr Logenthiran's evidence that after he arrived at Nedunkerni, he was made to join the LTTE auxiliary forces and that he left because he did not wish to join the LTTE as a fighting member. This occurred in the period from mid-1996 to April 1997. The RRT thought that on the information available to it, Mr Logenthiran would not be forced to return to an area held by the LTTE. It said that he could travel from Colombo to the town of Jaffna itself or elsewhere on the Jaffna Peninsula, because the Sri Lankan Government had regained control of these areas. The RRT found that Mr Logenthiran "would be able to relocate within his region in Sri Lanka".

In relation to Mr Logenthiran's fear of what would happen to him if he were to return to Sri Lanka, the remaining paragraphs of the Reasons for Decision are as follows:

"The applicant claimed that if he were to be returned to Sri Lanka he would be 'arrested and tortured and his body dumped into the river or the ocean'. I assume that this is a reference to the discovery, in 1995, of 31 bodies of young Tamils, allegedly killed while in detention, in Bolgoda lake south of Colombo: British Refugee Council, February 1997, Sri Lankan Tamils, the Home Office and the forgotten civil war. The Danish Immigration Service Report on the fact-finding mission to Sri Lanka, Copenhagen, April 1997 interviewed the Sri Lankan Inspector-General of Police and the Attorney General about this case. The former had said that he had 'asked the CID to investigate the case with the utmost vigour and had been extremely pleased to see arrests made in the case and the murders then stop'. **The Attorney General had said in reference to this case that the prosecution service was firmly resolved to prosecute any case of malfeasance if there was the slightest foundation for it. Alluding to the fact that the case had not, at the time of the interview, come to court, he noted that it was in the nature of things for such malfeasance and human rights violation cases, which were often highly complex, to require lengthy preparation. The implication which can be drawn from these statements is that the government is concerned at such human rights abuses and is taking measures to prevent them.**

The applicant also claimed that if he returned the airport authorities would know who he was through PLOTE and other groups. There is no evidence that PLOTE informs



on people with suspected LTTE involvement in Colombo, although it does act in this way at Vavuniya. The Eelam People's Democratic Party (EPDP) is known to work with the police and the armed forces in identifying people belonging to the LTTE: Fact finding mission to Sri Lanka, op. cit. p.27. Given the applicant's comparatively low-level involvement with the LTTE, I do not consider that he would come to the attention of such groups on arrival in Sri Lanka.

The Tribunal also addressed the question of on-arrival treatment of returnees. Among recent reporting on the procedures at Colombo airport when a Tamil deportee arrives is the Report on the fact-finding mission to Sri Lanka mentioned above which addressed entry control at Colombo airport, and noted that the Sri Lankan authorities maintain a constantly updated list of wanted and expelled persons at the airport. The report considered the situation of some 550 rejected asylum seekers expelled from Switzerland since the beginning of 1995. Twenty-seven of the 550 expelled were arrested either on entry or shortly afterwards, at check points or boarding houses. The majority were detained for 24 to 48 hours for identity checking. The detainee was as a rule released (Section VI, p. 70). According to the Migration News Sheet, September 1996, the Swiss Federal Refugee Office had not received information of maltreatment suffered by repatriated asylum seekers at the hands of the police. (CX21306) The UNHCR in its Information Note of March 1997 UNHCR Position Concerning the return of Rejected Asylum seekers in Sri Lanka noted the need for rejected asylum seekers to have valid travel documents. DIMA has advised the Tribunal that it obtains the necessary documentation for returnees. On this evidence and the applicant's claims of relatively limited LTTE involvement the tribunal finds that in the applicant's case his profile is not such as to be of interest to the Sri Lankan authorities and that his fear of persecution by the authorities on arrival at Colombo airport is not well founded." (emphasis supplied)

## REASONING OF THE TRIAL JUDGE

Before the trial judge, Mr Logenthiran relied on the grounds of review described in s 476 (1) (a) and (e) of the Act which are as follows:

“(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed”;

“(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision”.

The trial judge identified “the crux of the Tribunal's finding” as being that,

“the applicant was not at risk of persecution from the Sri Lankan Armed and Security Forces provided he remained outside the areas controlled by the LTTE”.

His Honour noted that the RRT had accepted the view expressed in a cable from the Department of Foreign Affairs and Trade (“DFAT”) dated 24 January 1997 (DFAT CL 463) “that Tamil people were not at risk of persecution in Colombo though they were subjected to a greater degree of surveillance and suspicion than non-Tamil people”. He said that “[t]his was a decision of fact which the Tribunal was entitled to come to on the material before it”. Then his Honour continued:

“For my own part, I would have thought that the finding of the Tribunal that: ‘Chance that ill-treatment in custody will occur is remote.’, in relation to a young Tamil such as the applicant, was unjustified. There was much in the material before the Tribunal in addition to the evidence of the applicant to show that the detentions, beatings, torture and other violations of human rights still occur in Sri Lanka, including in Colombo. The risk increases for persons such as the applicant who, in Colombo, has no relatives with whom he could be safely identified, no employment and no home.”

His Honour set out the following extract from a report of the British Refugee Council of February 1997:

**“Despite the attempts by the government to promote human rights, the culture within the Sri Lankan security forces remains suspicious of Tamils – in particular young males, although all Tamils, whether male or female, young or old, are at risk. That Tamils should come under suspicion because of the actions of the LTTE is understandable. What is concerning is the continued use of detention without trial, and in contravention of the Emergency Regulations of torture to extract confessions, often in language not understood or spoken by the signatory and of extrajudicial executions which are linked to the security forces. While there has been a systematic reduction in human rights violations, particularly against the Sinhalese population, there continues to be human rights violations in Colombo, particularly against Tamils, which the government appears to be unwilling or unable to prevent. It is for this reason that Colombo should not be assumed to be safe for Sri Lankan Tamils.”** (emphasis supplied by trial Judge).

His Honour said that he could not conclude from the RRT’s findings of fact mentioned that it had erred in its interpretation of the applicable law or in its application of that law to the facts as found by it. In relation to the issue whether Mr Logenthiran’s fear of persecution was well founded, he thought it open to the RRT to consider the matter “basically having regard to the facts as set out in [the DFAT cables] without considering the likelihood of persecution based upon the individual experience of the applicant”.

His Honour dealt with the s 476 (1) (a) ground as follows:

“Miss Wilkins [counsel for Mr Logenthiran at first instance] also raised a number of procedural points arising under s 476(1)(a) of the Migration Act. It was said that the procedure was not fair and just and was in breach of s 420 of the Migration Act in that the Tribunal did not make the applicant aware of the conditions in Sri Lanka by drawing his attention to this material and giving him an opportunity to respond. However, the applicant in the present case was represented by Mr Leonard Karp, a solicitor who was fully familiar with the issues to be dealt with and who himself supplied the Tribunal with a great deal of information bearing upon the issue as to whether or not there was persecution of Tamils by the Armed and Security Forces in Sri Lanka. I do not see any unfairness in the manner in which the proceedings were conducted.

Mr Karp has deposed on affidavit that he was not aware of certain material referred to in the Tribunal’s decision and that, had he been aware of it, he would have given answers to the Tribunal with respect to matters raised therein. I have looked at the material referred to by Mr Karp in his affidavit. It seems to me that none of the material referred to was of any special significance but rather formed part of the general body of material in which different people have expressed different views. The most important information relied upon by the Tribunal, Cable CL463 from the Department of Foreign Affairs & Trade was not one of the cables of which Mr Karp was unaware. I do not consider that the Tribunal was bound to bring to Mr Karp’s attention every piece of material to which it had regard or, indeed, that any of the answers which Mr Karp said he would have made would have affected the result.

It was finally submitted that the Tribunal failed to give adequate reasons for its decision. However, the Tribunal did make its findings clear and it supported its findings by referring to material it relied upon. For example, although in the paragraph in which it found that the chance of ill-treatment of the applicant in custody was remote there was little support for that finding, the Tribunal later referred to other material on the point such as a report which considered the situation of the 550 persons who had been expelled from Switzerland since 1995. The report disclosed that only 27 of the 550 persons had been arrested on entry to Sri Lanka or shortly afterwards and that the majority had been detained for only 24 to 48 hours for identity checking. The Tribunal also noted that the Swiss Federal Refugee Office had not received information of maltreatment suffered by repatriated asylum seekers at the hands of the Police. In my opinion, the Tribunal made the basis of its findings clear. The Tribunal was not required to discuss every piece of evidence for or against the issue. In my opinion, the reasons complied with the requirements of s 430 of the Migration Act.”

## GROUND OF APPEAL

Mr Logenthiran’s amended notice of appeal set out eight grounds, of which we need note only the following:

- “6. The Court erred in failing to find that the Tribunal had erred in law by failing to address the issue raised before it in oral and written submissions and other evidence as to whether the appellant had a well founded fear of persecution by reason of his race.
7. The Court erred in finding that the Tribunal’s reasons for its decision complied with s 430 of the Migration Act 1958.
8. ....  
...
9. The Court erred in failing to hold that the Tribunal had failed to act according to substantial justice and the merits of the case in not informing the applicant or his solicitor, and/or seeking a response from them about information contained in documents which were relied upon by the Tribunal in connection with the making of the decision under review.”

## REASONING ON THE APPEAL

We would allow the appeal because the RRT failed to deal with, or make any findings in relation to, two claims of importance in Mr Logenthiran’s case. These were the claim that in April 1997, when he was en route to Vavuniya, Mr Logenthiran was arrested, detained, interrogated and beaten by the Sri Lankan army, and, more importantly, that in mid-June 1997, just a few days before he left Sri Lanka, the police in Colombo arrested him, detained him for a week, interrogated him and beat him. These claims, if believed, may have led the RRT to a different conclusion as to whether Mr Logenthiran’s fear of a repetition of such ill-treatment, if he were to return to Sri Lanka, was well-founded. The RRT would have had to weigh up Mr Logenthiran’s evidence of what had happened to him in these two incidents in 1997 against the more general material in the various documents to which it referred. One certainly cannot assume that if it had considered this evidence, the RRT would have adhered to its view that “the chance that ill-treatment in custody will recur is remote”.

Although the RRT referred to both incidents when giving its account of Mr Logenthiran’s “Claims and Evidence”, it did not question Mr Logenthiran about them, although it did about the first, second and third incidents in Colombo to which we have referred.

These two instances of mistreatment by the authorities in 1997 are particularly significant because of their proximity to Mr Logenthiran’s departure from Sri Lanka on 19 June 1997 and to the RRT’s decision on 3 November 1997. They suggest a different picture from that portrayed in the DFAT cable CL 463 dated 24 January 1997, “Sri Lanka: Human Rights Update: Tamils in Colombo” on which the RRT relied as to the chance of persecution if Mr Logenthiran were to return to Sri Lanka.

In lengthy pre-hearing submissions to the RRT dated 15 September 1997, Mr Logenthiran's solicitor, Mr Karp, addressed the issue of the current situation in Colombo by responding to DFAT cables dated 15 December 1995, 24 January 1997 and 8 August 1997. Mr Karp referred to several published claims to the effect that notwithstanding official denials, torture in police stations was a continuing issue of concern. He put in issue whether statements of the kind that the RRT was later to rely upon, were sound. This emphasises the importance of Mr Logenthiran's evidence of what actually happened to him in April and June 1997.

The RRT's finding on the present issue was based substantially on DFAT cable CL 463 and was expressed in the following sentence:

"The Tribunal finds that given these recent improvements in police conduct, the chance that ill-treatment in custody will recur is remote."

As we observed earlier, in the paragraph of which this sentence is the last, the RRT moved from finding "credible" Mr Logenthiran's account of the three instances of arrest, detention, interrogation and beating in Colombo in 1995 to dealing with the prospect of repetition if he were to return, without referring at all to the intervening events of April and June 1997. The primary judge said that for his part he would have thought that the RRT's conclusion was unjustified in that there was much in the material before the RRT, "in addition to the evidence of the applicant" to show that the detentions, beatings, torture and other violations of human rights still occurred in Sri Lanka, including Colombo, in relation to young Tamil males such as Mr Logenthiran. It is not clear, however, that even in saying this his Honour appreciated that the evidence of Mr Logenthiran included evidence of the recent events of 1997 which were not addressed in the "Findings and Reasons" of the RRT. His Honour may have had in mind only the three incidents in Colombo in 1995 to which the RRT had referred earlier in the paragraph.

We do not accept the Minister's submission that it was sufficient, in relation to such an important matter, that the RRT referred to these important events in the "Claims and Evidence" section of its Reasons. What did the RRT make of Mr Logenthiran's claim that in mid April 1997, while fleeing from the LTTE camp apparently at or near Nedunkerni to Vavuniya, he was arrested by the Sri Lankan army and beaten during interrogation? What did it make of his claim that in June 1997 in Colombo, he was arrested by the police and kept in custody for a week, during which time he was beaten? What did it make of Mr Logenthiran's claim that on each of these two occasions, uncle Siva paid substantial money for his release? What did the RRT perceive to be the relationship between these events and the general information that police practices have improved, there is a greater demand for police accountability and there were few reports of serious mistreatment in detention in Colombo in 1996? Answers to these questions are not to be found in the RRT's Reasons for Decision.

The learned primary judge thought that the RRT had complied with s 430 (1) of the Act which is as follows:

“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.”

With respect, we agree with his Honour that on the question whether Mr Logenthiran’s current fear of persecution is “well-founded” the RRT was entitled to weigh up information of a general nature as to the circumstances prevailing in Sri Lanka in 1997 against Mr Logenthiran’s own claims and evidence, and, in the case of conflict and approaching the matter properly, to prefer one to the other. But, we do not think that it was open to the RRT in carrying out that exercise, not to address, or make findings in respect of, Mr Logenthiran’s claims as to what allegedly befell him from the Sri Lankan Army and the Colombo police in April and June 1997 respectively, shortly before his departure from Sri Lanka, having regard to the obvious relevance of those claims to the issue whether his fear was well-founded (cf *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402 (FC) at 415 per Sackville J).

There is another aspect of failure to comply with s 430 of the Act; the failure of the RRT to deal with the information contained in the British Refugee Council report, *Protection denied: Sri Lankan Tamils, the Home Office and the forgotten war*, discussed, in a different context, in judgments delivered today in two other cases involving young Tamil males from LTTE-controlled areas in the north or east of Sri Lanka: *Minister for Immigration and Multicultural Affairs v Sivarasa* and *Paramananthan v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Wilcox, Lindgren and Merkel JJ, 21 December 1998). There is no finding about the claims made in this document which appears to be a carefully prepared and comprehensive report dealing directly with the situation in Colombo in 1997 of young Tamil males from LTTE-controlled areas in the north and east, and which Mr Logenthiran, through his solicitor, supplied to the RRT. While it was open to the RRT, as a tribunal of fact, to reject the claims made in the report, it was not open to it to do so without setting out its own findings in respect of the situation claimed by the report and the evidence or other material on which those findings were based. The RRT’s non-compliance with s 430 of the Act activates the ground of review provided for in s 476 (1) (a).

For the above reasons the appeal should be allowed and the matter should be remitted to a differently constituted RRT for reconsideration and determination according to law.

## CONCLUSION

The orders of the Court will be that:

1. the appeal be allowed;
2. the order made on 15 May 1998 in proceeding NG 916 of 1997 be set aside and, in lieu thereof, it be ordered that the appellant's application for a protection visa be remitted to the Refugee Review Tribunal, differently constituted, for reconsideration and determination according to law and that the respondent pay the applicant's costs of that proceeding;
3. the respondent pay the appellant's costs of the appeal.

I certify that this and the preceding thirteen (13) pages are a true copy of the Reasons for Judgment herein of the Honourable Justices Wilcox and Lindgren.

Associate:

Dated: 21 December 1998

IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY NG 532 of 1998

BETWEEN: SELVARAJAH LOGENTHIRAN  
AppELLANT

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
	Respondent

JUDGES:	WILCOX, LINDGREN AND MERKEL JJ
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DATE:	21 DECEMBER 1998
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PLACE:	MELBOURNE
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### REASONS FOR JUDGMENT

MERKEL J:

I have had the advantage of reading the reasons for judgment prepared by Wilcox and Lindgren JJ. I agree with the orders proposed by their Honours for the reasons given by them.

In my view, in addition to the failure to comply with s 430 of the Act being reviewable under s 476(1)(a) of the Act, there is a further ground of review under that subsection arising out of the failure of the RRT to comply with s 420(2)(b).

In a particular case the content of the duty imposed on the RRT under s 420(2)(b) of the Act to act "according to substantial justice and the merits of the case" may be a matter of contention. However, what is uncontentious is that the RRT, in complying with its duty under s 420(2)(b), is required to make findings on the questions which are central to the case raised on the material and evidence before it: see *Calado v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Moore, Mansfield and Emmett JJ, 2 December 1998) at 21-22 and *Franjo Buljeta v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Katz J, 4 December 1998) at 13-14 and the authorities there cited. The cumulative effect of the omissions of the RRT identified by Wilcox and Lindgren JJ is that there was a failure by the RRT to make findings on questions which were central to the case raised by the material and evidence before it. That failure in my view, constitutes an additional ground of review under s 476(1)(a).



I certify that this and the preceding one (1) page is a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel

Associate:

Dated: 21 December 1998

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Solicitors for the Respondent:	Australian Government Solicitor
Date of Hearing:	13 November 1998
Date of Judgment:	21 December 1998