FEDERAL COURT OF AUSTRALIA

Nagaratnam v Minister for Immigration & Multicultural Affairs

[1999] FCA 176

MIGRATION - application for protection visa - judicial review of decision of Refugee Review Tribunal - appeal from decision of single Judge of Federal Court - torture of Tamil applicant in detention in Sri Lanka - whether detention for a Convention reason constitutes persecution when probable consequence of detention is torture of detainee - whether detention for a legitimate objective - obligation of Australia under UN Torture Convention not to return a person to another State where substantial grounds for believing he or she would be subject to torture.

Migration Act 1958 (Cth) par 476 (1)(e)

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts 1(1), 3(1), 3(2)

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, followed *Paramananthan v Minister for Immigration and Multicultural Affairs and Minister for Immigration and Multicultural Affairs v Sivarasa* (1998) 160 ALR 24, followed

Perampalam v Minister for Immigration and Multicultural Affairs [1999] FCA 165 (unreported, Burchett, Lee and Moore JJ, 1 March 1999), cited

Thirunavukkarasu v Canada (Minister of Employment and Immigration) [1994] 1 FC 589, cited

Ratnam v INS 154 F3d 990 (9th Circ, 1998), cited

Mutombo v Switzerland (1994) 15 Hum Rts LJ 164, cited

Khan v Canada (UN Doc A/50/44 (1995)), cited

Alan v Switzerland (UN Doc CAT/C/16/D/21/1995 (1996)), cited

Kisoki v Sweden (CAT Communication No 41/1996; adopted 8 May 1996), cited

Tala v Sweden (UN Doc CAT/C/17/D/43/1996 (1996)), cited

KRISHNAKUMAR NAGARATNAM v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

NG 903 of 1998

LEE, MOORE, KATZ JJ

SYDNEY

5 MARCH 1999

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 903 of 1998

On appeal from a judgment of a single Judge

of the Federal Court of Australia

BETWEEN:	KRISHNAKUMAR NAGARATNAM Appellant

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGES:	LEE, MOORE & KATZ JJ
DATE OF ORDER:	5 MARCH 1999
WHERE MADE:	SYDNEY

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the primary Judge on 17 August 1998 be set aside and in lieu thereof it be ordered that:

   (a) the decision of the Refugee Review Tribunal dated 9 February 1998 be set aside;

   (b) the matter to which the decision related be referred to the Tribunal for further consideration; and

   (c) the respondent pay the applicant's costs of the 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	
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On appeal from a judgment of a single Judge

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BETWEEN:	KRISHNAKUMAR NAGARATNAM Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	LEE, MOORE & KATZ JJ
DATE:	5 MARCH 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 **LEE & KATZ JJ:** On 21 November 1997, a delegate of the Minister for Immigration and Multicultural Affairs ("the delegate" and "the Minister" respectively) decided not to grant an application for a protection visa which had been made to the Minister by Mr Krishnakumar Nagaratnam. Mr

Nagaratnam sought administrative review of the delegate's decision by the Refugee Review Tribunal ("the Tribunal"), but, on 9 February 1998, the Tribunal affirmed the delegate's decision. Mr Nagaratnam then sought judicial review of the Tribunal's decision by this Court constituted by a single Judge, but, on 17 August 1998, the primary Judge dismissed Mr Nagaratnam's application for judicial review. The present proceeding is an appeal by Mr Nagaratnam from that decision of the primary Judge.

2 Mr Nagaratnam, who, it was accepted by the Tribunal, was a Sri Lankan national and a member of that country's Tamil community, had claimed before the Tribunal to be a "*refugee*" within the meaning of Art 1A(2) of the Refugees Convention as amended by the Refugees Protocol. His claim had been based upon his being outside Sri Lanka owing to well-founded fear of being persecuted for a Convention reason (race or political opinion) and upon his being unwilling, owing to such fear, to avail himself of the protection of that country. In substance, the Tribunal rejected Mr Nagaratnam's claim of refugee status because it was not satisfied that Mr Nagaratnam's fear of being persecuted for a Convention reason was well-founded.

3 Central to Mr Nagaratnam's case before the Tribunal, both of his fear of being persecuted for a Convention reason and of that fear's well-foundedness, had been his account of his experiences in Colombo, the Sri Lankan capital, in July and August of 1997. Those months were two among many during which civil unrest continued in that country (including the capital), involving violent activities engaged in by Tamil separatists, in particular, by the group called the Liberation Tigers of Tamil Eelam (the "LTTE").

4 Before, however, turning to Mr Nagaratnam's account of his experiences in Colombo in July and August of 1997 (to the extent to which that account was accepted by the Tribunal and then dealt with by it in its statement of findings and reasons), we mention that the Tribunal accepted that: Mr Nagaratnam had been born and raised in Jaffna, in the north of Sri Lanka; he had subsequently lived in other centres in the north; and he had arrived in Colombo from the north shortly before mid-July 1997.

5 Turning now to Mr Nagaratnam's account of his experiences in Colombo in July and August of 1997, the Tribunal began by accepting that: in mid-July, Mr Nagaratnam had been taken into custody by the police under Emergency Regulations; he had appeared in Court towards the end of that month and been remanded; and he had appeared in Court again towards the middle of the following month and been released on bail. (It was, incidentally, shortly after his release on bail that Mr Nagaratnam had left Sri Lanka.)

6 The Tribunal also accepted Mr Nagaratnam's account that, while in custody, he "*had been continually threatened and slighted by remarks made by jailors [sic] and other inmates and that he* ***had been*** *beaten and* ***tortured in detention***" (emphasis added). Later in its statement of findings and reasons, the Tribunal continued (emphasis added),

"Having accepted … his claim to have been in detention for three weeks, mistreated during that time and then released on bail, the Tribunal now turns to consider whether this constitutes persecution and whether it gives rise to a well-founded fear of being persecuted on return to Sri Lanka.

The Tribunal has considered two possibilities….

…

The second possibility is that the applicant was detained because police … believe[d] him to be an LTTE agent. Sri Lanka is prosecuting a war against a separatist group, the LTTE, which is a recognised terrorist group….

The LTTE's many massive acts of terrorism, particularly in the capital, have taken many lives and caused great damage to the country's infrastructure….

Police detention of suspected LTTE agents in such a climate is, in the Tribunal's opinion, a legitimate security measure. McHugh J says in Applicant A [v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331; now also at (1997) 190 CLR 225] that 'the enforcement of laws designed to protect the general welfare of the State [is not] ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion … [or] nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race' (at 354 [now also at 190 CLR at 258]). Thus the Tribunal does not accept that the applicant's arrest and detention constitutes persecution. Nor does the Tribunal consider the period of detention excessive in the circumstances facing the Sri Lankan authorities. In the Tribunal's view, the fact that the applicant was allowed out on bail pending further investigation does not support a conclusion that the arrest and detention were persecutory and that the authorities were pursuing the applicant with 'enmity or malignity' (Applicant A per Gummow J at 592 [scil, 375; now also at 190 CLR at 284]).

(We interpolate here that Gummow J had not quite used the words attributed to him; he had been quoting the primary meaning in ordinary usage of the word "*persecution*", as it appeared in the *Oxford English Dictionary* (2d ed), which definition included the words "*pursuing with enmity **and** malignity*" (emphasis added).)

The fact that the applicant, according to his evidence, was … badly beaten is extremely distasteful, but in this case being abused in detention does not in itself constitute persecution. **While mistreatment of persons in detention in Sri Lanka has been well documented by Amnesty and others, there is no suggestion that such treatment was directed in a discriminatory way towards any particular group such as young Tamil males. Rather, it appears to have been a generalised failure to adhere to basic standards of human rights. As such, the mistreatment which the applicant suffered during detention cannot be regarded as persecutory in the Convention sense (see Applicant A per Gummow J at 334; Yan Xu & Anor v MIEA, unreported, 1997, per Olney J at 16).**

(We interpolate here that the reference to the reasons for judgment of Gummow J in the *Applicant A Case* at p 334 was incorrect. First, his Honour's reasons for judgment in 142 ALR, the report the Tribunal was using, do not begin until p 364. Secondly, no passage in his Honour's reasons for judgment in that case was directed to the matter which the Tribunal was discussing immediately before giving the incorrect reference. It appears that the Tribunal intended to refer instead to the reasons for judgment of Brennan CJ at p 334 of 142 ALR (now also at 190 CLR at 233), although it should be noted that Brennan CJ was in dissent in that case.)

The Tribunal notes that 'safeguards to protect the welfare of detainees, introduced in 1995 ... [are] not fully adhered to' (Amnesty International Report 1997 on human rights abuses in Sri Lanka, p. 29). The Tribunal accepts that Tamils, like others in detention, face human rights abuses. However, independent evidence shows that Tamils are not the sole target of abuse: the United States State Department says that 'members' of the security forces mistreat 'detainees and other prisoners' (US Department of State Sri Lanka Country Report on Human Rights Practices for 1997, s.1c). The Tribunal is of the opinion that such abuse is due to … brutality by individual members of the police and armed forces.

Moreover, the abuses which have occurred are not condoned by the authorities. In reaching this conclusion the Tribunal has considered the following independent evidence:

- In a report released late last year on action by the authorities to curb 'disappearances' in war-ravaged Jaffna, Amnesty International, urged the Sri Lankan Government to act with 'serious determination and commitment' but acknowledged that the Government had taken 'positive initiatives ... amid difficult political and military circumstances' (Sri Lanka: Government's Response to Widespread 'Disappearances' in Jaffna, Amnesty International, 27/11/97, p. 5);

- In its latest report, the US State Department says: 'In positive developments, the [Sri Lankan] Government took steps to control [human rights] abuses. A permanent Human Rights Commission was instituted and began operations. A human rights office opened officially on January 8, 1998 in Jaffna. Prosecutions of security force personnel alleged to have engaged in human rights abuse continued in a few cases. In the Krishanti Kumaraswamy murder and rape case ... the Government ordered an expedited trial for the nine [soldiers] accused. There was no attempt, as in the past, to use the [Emergency regulations] to cover up security force misdeeds. Through its rulings, the judiciary continued to exhibit its independence and uphold individual rights' (preamble, US Department of State Sri Lanka Country Report on Human Rights Practices for 1997). The Government has ceased paying fines incurred by security force personnel found guilty of torture (Ibid, s.1c);

- DFAT reported that in September 1997 Sri Lanka's President, Mrs Kumaratunga, had issued a directive to the armed forces and the police not to violate the fundamental rights of persons taken into custody. The directive said that every arrest should be reported to the Human Rights

Commission by the arresting officer and that those who fail to do so would be dealt according to the law (DFAT cable 27/11/97, CX26459).

In the light of the above independent evidence, the Tribunal finds that abuses in detention, such as the applicant experienced, are not officially tolerated in Sri Lanka and are not in themselves evidence of persecution."

7 It will be noted that there is one passage in the lengthy quotation which we have just set out from the Tribunal's statement of findings and reasons to which we have added emphasis. It was that emphasised passage which constituted the main focus of Mr Nagaratnam's arguments made before this Court of legal error on the Tribunal's part. We set out in the following paragraph of these reasons for judgment the circumstances in which Mr Nagaratnam made that emphasised passage the main focus of his arguments.

8 The emphasised passage had also appeared in materially identical form (including even the incorrect statement "*see* Applicant A *per Gummow J at 334*") in the statements of findings and reasons of the Tribunal (differently constituted than it had been in Mr Nagaratnam's case) in two other cases, one concerning a Mr Paramananthan and the other concerning a Mr Sivarasa. Both of those refugee claimants were also Sri Lankans from the Tamil community whose accounts of official detention and consequential physical mistreatment in Colombo in recent times had been accepted by the Tribunal, but who had been found by the Tribunal nevertheless not to have a fear of persecution which was well-founded. The Tribunal's decisions in both of those cases had been made at about the same time as it made its decision in Mr Nagaratnam's case and its decisions in both of those cases had provoked litigation which ultimately reached a Full Court of this Court. The appeals in those cases were heard on consecutive days by the same Full Court (Wilcox, Lindgren and Merkel JJ), with each member of that Full Court producing only one set of reasons for judgment in the two appeals, those appeals being styled respectively, *Paramananthan v Minister for Immigration and Multicultural Affairs* and *Minister for Immigration and Multicultural Affairs v Sivarasa* ("*Paramananthan's Case*") (1998) 160 ALR 24. In those reasons for judgment, the passage in the Tribunal's statements of findings and reasons in the cases of Messrs Paramananthan and Sivarasa which was materially identical to the emphasised passage in the Tribunal's statement of findings and reasons in Mr Nagaratnam's case was the subject of criticism by the members of the Full Court.

9 We propose soon to turn in these reasons for judgment to that criticism, but, before we do so, we wish to point out three matters.

10 First, the primary Judge in the present matter did not have the benefit of the Full Court's reasons for judgment in *Paramananthan's Case* at the time he dismissed Mr Nagaratnam's application for judicial review, the judgment of the Full Court being given some months later. It is for that reason that we do not tarry in these reasons for judgment over the primary Judge's reasons for judgment in the present matter, but instead proceed directly to a discussion of the reasons for judgment of the Full Court in *Paramananthan's Case*.

11 Secondly, although the emphasised passage in the Tribunal's statement of findings and reasons in Mr Nagaratnam's case had also appeared in materially identical form in the Tribunal's statements of findings and reasons in the cases of Messrs Paramananthan and Sivarasa, the material from the Tribunal's statement of findings and reasons in Mr Nagaratnam's case which we have set out above following the emphasised passage had not appeared in the Tribunal's statements of findings and reasons in the cases of Messrs Paramananthan and Sivarasa. The presence of that additional material in the Tribunal's statement of findings and reasons in Mr Nagaratnam's case means that the Full Court's criticism in *Paramananthan's Case* of the passages materially identical to the emphasised passage is not necessarily applicable in its entirety to the emphasised passage.

12 Thirdly, some of the Full Court's criticism in *Paramananthan's Case* of the passages materially identical to the emphasised passage was related to that part of those passages in which the Tribunal had stated that there was "*no suggestion*" that mistreatment of persons in detention in Sri Lanka was directed in a discriminatory way towards any particular group, such as young Tamil males. The view was taken by the members of the Full Court in *Paramananthan's Case* that there had in truth been (to say the least) a suggestion in the evidentiary material before the Tribunal in each of the two cases that such mistreatment did discriminate against young Tamil males. The members of the Full Court therefore discussed the legal consequences of the Tribunal's denials of the existence of such suggestion. We do not propose in these reasons for judgment to deal with the equivalent issue so far as the present matter is concerned. We propose to proceed instead on the basis that that statement by the Tribunal in the present matter was accurate and then deal only with an important point of principle which arises from the Tribunal's approach in the emphasised passage. The members of the Full Court in *Paramananthan's Case*, as well as dealing with the accuracy of the "*no suggestion*" statement, also dealt with that important point of principle, criticising the passages materially identical to the emphasised passage in that respect as well. If their Honours' criticism of the passages materially identical to the emphasised passage on that important point of principle was justified, then it must follow that Mr Nagaratnam's appeal to this Court, based, in substance, upon that criticism, succeeds. Such success will follow, irrespective of the fact that certain additional material followed the emphasised passage in the Tribunal's statement of findings and reasons in Mr Nagaratnam's case, but did not appear in the Tribunal's statements of findings and reasons in the cases of Messrs Paramananthan and Sivarasa and irrespective of any differences between the state of the evidentiary material in Mr Nagaratnam's case, on the one hand, and in the cases of Messrs Paramananthan and Sivarasa, on the other.

13 Those three preliminary matters out of the way, we go first to the reasons for judgment of Wilcox J in *Paramananthan's Case*.

14 Wilcox J began (relevantly) (at 33) by drawing attention to the well-accepted rule that, for a person to be a "*refugee*" within the meaning of Art

> 1A(2) of the Refugees Convention as amended by the Refugees Protocol, the persecution feared by that person need not be official persecution; the persecution feared may be unofficial, provided it is either officially tolerated or officially uncontrollable. Then (at 34), his Honour hypothesised that, not only were Tamils who were held in official custody in Sri Lanka beaten and tortured, but non-Tamils who were held in such custody were beaten and tortured as well. He then continued (at 34; emphasis in original),

"However, even if this is so, the only reason the two applicants for protection came to be in police or army custody was because of their ethnicity and perceived political opinion. They were detained because they were Tamils and suspected of being sympathetic to [the] LTTE. I do not suggest it is an act of persecution, within the meaning of the Convention, for the Sri Lankan police or army to select people for questioning about the LTTE on the basis of their perceived Tamil ethnicity – after all, [the] LTTE is a **Tamil** nationalist organisation – and to detain them for that purpose for a reasonable time. But the fact that people have been **selected** for detention **on the basis of their ethnicity or perceived political opinion** makes it important for a government to ensure there is no abuse of the power of detention. The people who are at risk of 'indiscriminate cruelty' have been selected on a basis mentioned in the Convention. McHugh J made the point in Applicant A at 258-259:

> 'Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race.
>
> However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. In cases coming within the categories of race, religion and nationality, decision-makers should ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution.'

For the above reasons, it was legally incorrect for the Tribunal to reject the claims of Mr Paramananthan and Mr Sivarasa on the ground that the mistreatment they had suffered amounted to 'indiscriminate cruelty' falling short of 'persecution'. In each

case, the Tribunal should have entered upon the questions whether there was a causal connection between the cruelty the applicants had suffered and their Tamil ethnicity and/or perceived sympathy for the LTTE and, if so, whether the cruelty was something the Sri Lankan government tolerated or was unable to control. The Tribunal's failure to take this course constituted an error of law involving an incorrect application of the law to the facts as found by the Tribunal, within the meaning of s476(1)(e) of the Migration Act."

15 There are two comments which we wish to make arising from that passage in the reasons for judgment of Wilcox J.

16 First, we draw attention to his Honour's reliance upon the reasons for judgment of McHugh J in the *Applicant A Case*. (It will be recalled from par 6 of these reasons for judgment that the Tribunal had also relied upon those reasons for judgment in making its decision in Mr Nagaratnam's case.) We must confess to some doubt as to whether, when saying that a law (by which we take his Honour to have meant the enforcement of a law) "*providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution, even though that law affects only members of that race*", his Honour had in mind detention of the type in issue presently, which, as we understand it, was detention for the purpose of interrogation. We note that, after making the statement from which we have just quoted, McHugh J added a footnote in which he said,

"cf Korematsu v United States (1944) 323 US 214. But the sanction must be appropriately designed to achieve some legitimate end of government policy. Thus while detention might be justified as long as the safety of the country was in danger, lesser forms of treatment directed to members of that race during the period of hostilities might nevertheless constitute persecution. Denial of access to food, clothing and medical supplies, for example, would constitute persecution in most cases."

We suspect, as a result of that footnote and, in particular, as a result of his Honour's reference to *Korematsu's Case*, a World War II case involving the temporary exclusion from certain areas and internment of persons of Japanese ancestry, that the type of detention which McHugh J had in mind when making the statement from which we have quoted was not detention for the purpose of interrogation, but rather simple internment. However, even if that be so, we can see no reason why, as Wilcox J obviously thought, his Honour's analysis would not be equally applicable to detention for interrogation. In any event, Mr Nagaratnam did not challenge in the present case the Tribunal's finding that his "mere" detention had not been an act of persecution; his challenge was instead to the finding of the non-persecutory character of the physical mistreatment which was consequential upon that detention.

17 Next, we draw attention to the statement by Wilcox J that,

"… the Tribunal should have entered upon the questions whether there was a causal connection between the cruelty the applicants had suffered and their Tamil ethnicity and/or perceived sympathy for the LTTE and, if so, whether the cruelty was something the Sri Lankan government tolerated or was unable to control".

18 It was submitted by counsel for the Minister in the present matter that the Tribunal had in truth entered upon the first of Wilcox J's two questions, namely, whether there had been a causal connection between the physical mistreatment Mr Nagaratnam had suffered in detention and his race or political opinion, and, having done so, had concluded that there had been no such causal connection. Such conclusion was said to have been open in law to the Tribunal, so that it had been relieved of the necessity to enter upon the second of Wilcox J's two questions, namely, whether Mr Nagaratnam's physical mistreatment had been something the Sri Lankan government either tolerated or was unable to control. However, it became clear during the course of the development of that submission in argument that counsel for the Minister was glossing Wilcox J's first question, by treating it as a question of whether there had been a **direct** causal connection between the physical mistreatment Mr Nagaratnam had suffered in detention and his race or political opinion, that is, as a question of whether those very persons who had applied physical force to Mr Nagaratnam in detention had done so because of his race or political opinion. During argument, counsel for the Minister conceded that that was so and ultimately submitted that the Minister's case stood or fell on the proposition that Wilcox J's first question was properly to be understood as being whether there had been a direct causal connection. That being so and assuming that Wilcox J's two questions represent the correct approach to the issue, then, in our view, the Minister's case must fall. It appears to us to be plain beyond any real doubt that Wilcox J did not have in mind in formulating his first question a necessity for a direct causal connection between any physical mistreatment and a Convention reason, as is apparent from his statement that "*it [is] important for a government to ensure there is no abuse of the power of detention*".

19 We go next to the reasons for judgment of Lindgren J in *Paramananthan's Case*.

20 Lindgren J approached the matter on the basis that the physical mistreatment of Messrs Paramananthan and Sivarasa, consequent upon their official detention in Colombo, had potentially amounted to persecution for the Convention reason of membership of a particular social group, namely, young Tamil males from LTTE-controlled areas, rather than having potentially amounted to persecution for either of the Convention reasons of race or political opinion (as was claimed by Mr Nagaratnam). For present purposes, that difference in the Convention reason being considered is immaterial.

21 Lindgren J said (at 37-38; emphasis in original),

"I do not think that the two-stage approach taken by the Tribunal, at least in the way in which the Tribunal implemented it, was a permissible one. Let it be assumed that these refugee-claimants have a well-founded fear that they would, upon return to Sri Lanka, be detained, and, during detention, be tortured, not because their tormentors wished to persecute young Tamil males from LTTE-controlled areas, but because they derived perverse pleasure from their mistreatment of detainees (whether Sinhalese or Tamil)…. In such a case, 'the authorities' **regarded as a whole**, would be engaged in persecution for a Convention reason, in my opinion.

This conclusion would flow from the fact that the initial arrest and detention would be on account of membership of a particular social group and from the hypothesised fact that the mistreatment was not the isolated and unforeseeable act of an individual member of the security forces, but was sufficiently common for it to be said that there was a well-founded fear of its occurrence. In such a case, the authorities' otherwise permissible initial act of arrest and detention for questioning and pending completion of inquiries would be coloured by the well-founded fear of the mistreatment to follow. The authorities would be committing the refugee-claimants to a detention during which there was a well-founded fear they would in fact be mistreated.

In the present cases, the refugee-claimants were arrested and detained by the authorities because of their membership of the particular social group, young Tamil males from LTTE-controlled areas. This reason makes suspect the nature and incidents of the detention for questioning and pending completion of inquiries, and makes it incumbent on the authorities to ensure that the detention, on its face non-persecutory, is not made something else by reason of the sufficiently common unauthorised acts of individual members of the security forces.

(His Honour then quoted, describing it as "*pertinent*", the same passage from the reasons for judgment of McHugh J in the *Applicant A Case* as had been quoted by Wilcox J and which we have discussed above; he then continued as follows.)

The Tribunal was bound to scrutinise the nature of the treatment in detention to which the authorities committed the refugee-claimants, and might again commit them if they were to return to Sri Lanka. It did not do so. This obligation of the Tribunal is not shown to have been discharged by its statements that according to the Amnesty International Country Report: Sri Lanka, 1996, there had been 'recent improvement in human rights' and that abuses of human rights in detention 'are no longer so widespread as before'.

The Tribunal's bifurcation of the experiences of the present refugee-claimants into 'detention' and 'treatment in detention' led the Tribunal into committing an error of law, being either an incorrect interpretation of the Convention definition of "refugee" or an incorrect application of that definition to the facts as found by it (cf s 476 (1) (e) of the Act)."

22 Finally, we go to the reasons for judgment of Merkel J in *Paramananthan's Case*.

23 Merkel J referred (at 61; emphasis in original) to the Tribunal's,

"… purported distinction between arrest and detention as a legitimate counter terrorist activity and mistreatment which it said cannot be accepted as a legitimate counter terrorist activity but rather, 'indiscriminate cruelty' and 'a generalised failure to adhere to basic standards of human rights'"

and said that he agreed with Burchett J (who had been the primary Judge in Mr Sivarasa's application for judicial review),

"… that the distinction drawn between the legitimate conduct of the 'authorities' and the illegitimate conduct of individual police or army personnel failed to address the issue for determination being the fear founded on a real chance that officers investigating LTTE atrocities would torture [the applicant] for reasons of race or imputed political opinion, and that the government would be unable or unwilling to protect him from them, as it had proved to be in the past".

24 While there were obviously differences in emphasis as among the three members of the Full Court in *Paramananthan's Case* in the passages from their reasons for judgment to which we have referred above, to our mind, those passages all tend toward the same conclusion, which we will endeavour now to express in our own words.

25 When, in accordance with some law or government policy, persons are selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons may or may not amount to persecution for a Convention reason, depending upon the circumstances in which the law or government policy is being implemented. It may be implemented, for instance, in circumstances of war, whether foreign or domestic. If so and the criterion of selection of persons for detention is seen as appropriate and adapted to the successful prosecution of that war, then the act of detention will not be persecution for a Convention reason. However, when those who detain such persons in accordance with such law or government policy are aware that the probable consequence of such detention will be the physical mistreatment of those detained, even though those detained will not be selected for such physical mistreatment by those who administer that physical mistreatment upon a ground which equates to one of the Convention reasons and even though those selecting the detainees are unwilling that such physical mistreatment should occur, then those who detain such persons will be taken to have caused such physical mistreatment. As such persons have been selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons will amount to persecution for a Convention reason.

26 We accept the correctness of the approach outlined in the preceding paragraph, which, as we have already said, we understand to flow from the reasons for judgment of the members of the Full Court in *Paramananthan's Case*. Further, another Full Court of this Court (Burchett, Lee and Moore JJ) of which one of us was a member, has also, in *Perampalam v Minister for Immigration and Multicultural Affairs* [1999] FCA 165 (unreported, 1 March 1999), recently accepted the correctness of *Paramananthan's Case* in the respect presently under discussion. (Also, we mention a decision of the

Canadian Federal Court of Appeal (Heald and Linden JJA and Holland DJ), *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 FC 589 at 600-01, in which a broadly similar approach was taken; and see also *Ratnam v INS* 154 F3d 990, 996 (9th Circ, 1998).)

27 We have already mentioned in par 12 above that Mr Nagaratnam relied primarily in this appeal on the correctness in the respect we have been discussing above of the Full Court's decision in *Paramananthan's Case*. As we have accepted that that decision was correct in that respect, we consider it unnecessary to deal in these reasons for judgment with Mr Nagaratnam's other arguments why his appeal should be allowed. In our view, the appeal must be allowed and Mr Nagaratnam's application for a protection visa be referred to the Tribunal for further consideration. The ground of review made out on the appeal was that the Tribunal's decision involved an error of law, being an error involving an incorrect application of the law to the facts as found by the Tribunal: see par 476 (1)(e) of the *Migration Act 1958* (Cth) and the reasons for judgment of Wilcox J (par 14 above) and of Lindgren J (par 21 above) in *Paramananthan's Case.*

28 Before, however, we conclude these reasons for judgment, there is one other matter to which we wish to refer.

29 A striking feature of the present case and one which differentiates it, for instance, from the cases of Messrs Paramananthan and Sivarasa, is the Tribunal's acceptance of Mr Nagaratnam's claim to have been, not merely physically mistreated while in custody, but "*tortured*".

30 Australia is a party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Torture Convention") (as, incidentally, is Sri Lanka): see http://www.unhchr.ch/html/menu3/b/h_cat39.htm (as of 17 February 1999) for the terms of the Torture Convention and for a link to a further document showing the parties to the Torture Convention and (relevantly) those parties thereto which have recognised the competence of the Committee Against Torture established under Art 17 of the Torture Convention to receive and consider communications from individuals subject to their jurisdiction who claim to be victims of a violation of the Torture Convention by a party thereto. On 8 August 1989, Australia ratified the Torture Convention and, on 28 January 1993, it recognised the competence of the Committee against Torture to receive and consider communications of the type to which we have just referred: see the linked document to which we have just referred.

31 Among Australia's obligations under the Torture Convention is that imposed by Art 3(1), "*No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*". In order to understand the content of that obligation, it is necessary to refer to two other provisions of the Torture Convention. First, Art 3(2) provides that, for the purpose of determining whether there are substantial grounds for believing that a person would be in danger of being subjected to torture if that person

were expelled, etc, to another State, "*the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights*". Secondly, Art 1(1) defines "*torture*" for the purposes of the Torture Convention as meaning,

"… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

32 It will be seen that the obligation under Art 3(1) on parties to the Torture Convention is not dependent upon the apprehended torture's being inflicted on a discriminatory ground. If the Tribunal's decision in Mr Nagaratnam's case had been legally unassailable, that would have meant that Mr Nagaratnam would not have been entitled to a protection visa under Australian law, but that for Australia to return him to Sri Lanka could well have brought it into breach of its international obligations under Art 3(1) of the Torture Convention.

33 Furthermore, the Committee Against Torture would have considered any complaint by Mr Nagaratnam about such threatened breach of Art 3(1) and his prospects of success before the Committee on any such complaint would appear to have been high, assuming that the Committee found the facts to be as the Tribunal had found them to be: compare the Committee's views in *Mutombo v Switzerland* (1994) 15 Hum Rts LJ 164 at 167 that Switzerland, having rejected a claim of refugee status by Mr Mutombo, a Zairian, nevertheless had an obligation to refrain from expelling him to Zaire, because his return there "*would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured*". The Committee has subsequently expressed similar views in: *Khan v Canada*, involving a Pakistani who had been denied refugee status in Canada (UN Doc A/50/44 at 46 (1995)); *Alan v Switzerland*, involving a Turk who had been denied refugee status in Switzerland (UN Doc CAT/C/16/D/21/1995 (1996)); *Kisoki v Sweden*, involving a Zairian who had been denied refugee status in Sweden (CAT Communication No 41/1996; adopted 8 May 1996); and *Tala v Sweden*, involving an Iranian who had been denied refugee status in Sweden (UN Doc CAT/C/17/D/43/1996 (1996)).

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons

for Judgment herein of the Honourable Justices Lee & Katz.

Associate:

Date: 5 March 1999

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 903 OF 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	KRISHNAKUMAR NAGARATNAM Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	LEE, MOORE & KATZ JJ
DATE:	5 MARCH 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

MOORE J

34. I have had the benefit of reading the reasons for judgment of Lee and Katz JJ in a draft form. I agree, for the reasons given, that the application of the principles discussed by the members of the Full Court in *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24 to the circumstances of this case, leads to the conclusion that the Tribunal incorrectly applied the law to the facts as found: see s 476(1)(e).

35. The appeal should be allowed with costs.

34 I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 5 March 1999

Counsel for the Appellant:	Elizabeth Wilkins
Solicitor for the Appellant:	McDonells Solicitors
Counsel for the Respondent:	Garry Downes QC with Peter Braham
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	9 February 1999
Date of Judgment:	5 March 1999