FEDERAL COURT OF AUSTRALIA

Sellamuthu v Minister for Immigration & Multicultural Affairs [1999] FCA 247

IMMIGRATION - refugee status claimed - applicant young male Sri Lankan Tamil - questions of possible persecution on account of race and/or perceived support of "Tamil Tigers" - applicant's claims of torture by Sri Lankan Army disbelieved by Refugee Review Tribunal - Tribunal did not accept that all Tamils liable to racial persecution - failure to deal with material not dependent on applicant's credibility - meaning of Tribunal's obligation to "review" primary decision - obligation to consider all substantial claims and relevant information in support of them - procedures required may be impliedly as well as expressly required - constructive failure to exercise jurisidiction - obligation of Tribunal to make as well as "set out" findings on material questions of fact - "reasonableness" of itself not a ground of review

Migration Act 1958 (Cth): ss 56, 57, 60, 414, 415, 423, 424, 425, 427, 428, 430, 476(1)(a), 476(1)(c), 476(1)(e)

Minister for Immigration and Multicultural Affairs v Guo (1997) 191 CLR 559

Sinclair v Maryborough Mining Warden (1975) 132 CLR 473

Paramananthan v Minister for Immigration & Multicultural Affairs (1998) 160 ALR 24

Logenthiran v Minister For Immigration & Multicultural Affairs [1998] FCA 1691

SELLAMUTHU v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 1269 OF 1998

WILCOX, HILL AND MADGWICK J

19 MARCH 1999

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY	NG 1269 OF 1998

ON APPEAL FROM A SINGLE JUDGE OF

THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	UTHAYACHANDRA SELLAMUTHU Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	WILCOX, HILL AND MADGWICK JJ
DATE OF ORDER:	19 MARCH 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal is allowed with costs.

2. Notice of appeal is to be taken to include the ground that the RRT did not deal with all relevant issues arising on the material before it.

3. The orders made by Hely J on 11 November 1998 be set aside and in lieu it be ordered that the matter be remitted to the Refugee Review Tribunal, differently constituted, for reconsideration and there is to be no order as to the costs of the hearing before Hely J.

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AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	WILCOX, HILL AND MADGWICK JJ
DATE:	19 MARCH 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

WILCOX AND MADGWICK JJ:

Nature of proceedings

1 This is an appeal from a decision of a judge of this Court dismissing an application for review of a decision by the Refugee Review Tribunal ("the RRT"). The RRT affirmed a decision of a delegate of the respondent Minister not to grant the appellant a protection visa.

2 The grounds of appeal included: (a) an alleged error by the primary judge in "holding that the RRT did not erroneously foreclose on reasonable speculation upon the chances of persecution emerging from consideration of the whole of the material before the Tribunal"; and; (b) an alleged error in "finding that the RRT did not err in failing to obtain [certain further evidence from a psychologist]".

Background facts

3 The appellant is a 27 year old Sri Lankan national of Tamil ethnicity. He arrived in Australia on 19 April 1998 without a passport or visa. He had, in the opinion of two psychologists, what one of them formally diagnosed as post-traumatic stress disorder. He claimed to have a well-founded fear of persecution for reasons of race and/or imputed political opinion and an inability or, owing to such fear, an unwillingness, to avail himself of Sri Lankan protection.

4 Since the early 1980s Sri Lanka has been more or less strife-torn. Between October 1995 and May 1996 the Sri Lankan army re-established and has since continued its control over much of the Jaffna Peninsula, the home of many Tamils and the erstwhile stronghold of the Liberation Tigers of Tamil Eelam (LTTE), the "Tamil Tigers".

5 The appellant's principal claims as to his history were these. His family lived in the Jaffna area and had (except during the Indian peace-keeping period in the late 1980s) endured bombing of civilian targets by Sri Lankan forces. His younger brother had joined the LTTE in the early 1990s. He himself was kidnapped by the LTTE and made to work for them for several months in 1995 until he escaped. He took refuge with other displaced people in a temple where his mother found and joined him. On 19 April 1996 he and his mother were arrested and interrogated by the Sri Lankan army. Under duress, his mother told the interrogators of her sons' involvement with the LTTE. Subsequently, the maltreatment of himself and his mother intensified. His mother was separated from him and raped. His own maltreatment was gross and continued for nearly two years until 3 April 1998. Among other things, he was forced, while masked, to identify LTTE cadres.

6 The appellant said he was released through bribery arranged by an uncle who currently resides in Canada. An 'agent' obtained a passport for him and accompanied him by air to India where he boarded a plane for Singapore. The agent departed at Singapore, taking the appellant's passport with him and leaving him with only a boarding pass for the flight to

Australia. He arrived here less than three weeks after his alleged release from detention. He was reliably observed by a lay person to be severely stressed.

7 Upon arriving in Australia the appellant applied for a protection visa. He asserted that he feared rearrest by Sri Lankan authorities and further maltreatment. He also feared persecution by the LTTE, which might presume that during his lengthy detention he had provided information to the government about the LTTE.

The rejection of the applicant's creditworthiness

8 The appellant was examined by two psychologists. One described the appellant as a "credible history-giver" and both accepted the truth of his account. The RRT declined to give any special weight to the psychologists' acceptance of the appellant's testimony. Submissions were made that the RRT legally erred in this respect, but we do not think so. It was for the RRT to determine the facts. As it happened, the RRT member concluded, "I did not find the Applicant to be a credible witness". The RRT pointed to his apparent parroting of the contents of a statutory declaration he had made, to repeated failures to answer a question, to inconsistencies in accounts given at different times, to his failure to give any explanation for such variations, and to what the RRT member regarded as the absence of anything in the psychological evidence that might account for the "fabrication" at least of one of two detailed histories that were inconsistent.

The RRT's conclusions

9 The RRT's essential reasoning appears in the following passages:

"I accept for the purposes of this review that the Applicant is a national of Sri Lanka and that he is a Tamil. Having regard to my findings above with regard to the credibility of the Applicant's account, I do not accept that he was ever forced to work for the LTTE nor do I accept that his younger brother joined the LTTE in 1992. I likewise do not accept that the Applicant was ever detained and tortured by the Sri Lankan Army. Having regard to the differing accounts he has given, I am unable to find where the Applicant lived before his arrival in Australia in April 1998.

While I have referred above under 'Background' to evidence of the grave human rights abuses committed by the Sri Lankan security forces in the context of the continuing conflict with the LTTE, I do not accept that all Tamils in Sri Lanka have a well-founded fear of being persecuted merely by reason of their race. Indeed I do not understand this to be the case that the Applicant's representative is putting. Although he referred in his submission dated 3 June 1998 to the fact that the security forces were unable to distinguish LTTE cades from ordinary Tamils so that all Tamils were in effect treated as guilty of LTTE atrocities, in his submission dated 24 June 1998 he argued that there was a real chance that the Applicant would be detained and tortured if he returned to Sri Lanka on the basis that the Applicant had been detained and tortured by the army in the past. Since I do not accept that the Applicant was ever detained and tortured by the army, either because he was suspected of being a member of the LTTE or because they had discovered that his brother had joined the LTTE, it follows that I do not consider that there is a real chance that he will be arrested, detained or tortured by the Sri Lankan authorities if he returns to Sri Lanka now or in the foreseeable future.

…

Accordingly I am not satisfied on the basis of the evidence before me that the Applicant has a well-founded fear of being persecuted for a Convention reason if he

returns to Sri Lanka now or in the foreseeable future. In reaching this conclusion I have given due weight to the opinions of the two psychologists that the Applicant is suffering from post-traumatic stress disorder. In the light of my findings above, however, I am unable to shed any light on what particular traumatic experiences in his past may have caused this condition. I am unable to find on the evidence before me that any traumatic experiences which the Applicant may have suffered constitute persecution for the purposes of the Convention nor that the relevant causal nexus exists between those traumatic experiences and one of the Convention reasons."

Failure of the RRT to address important elements of the applicant's claim

10 In a section of his reasons for decision headed "Background", the RRT member gave a short historical account of the conflict between the LTTE and the Sri Lankan government and some of the atrocities committed by each side. The account included reference to renewed violence after May 1997, stronger LTTE resistance to a government offensive than had been anticipated, and a campaign of civilian terror-bombing by the LTTE. It included reference to torture and mistreatment of detainees by government security forces, most victims of such cruelty being Tamils suspected of LTTE membership or collaboration, and the detention of some Tamils without charge for up to four years. The Tribunal appeared to accept that little was done to punish the apparent murder of hundreds of persons by security forces, especially in areas where Tamil people lived.

11 From these references alone, inferences would have been available to the RRT that young male Tamils, capable of military pursuits and no doubt liable to passionate resentment of Singhalese excesses, would be at risk of undue detention and serious mistreatment on account of their race and/or the imputation to them of political opinions favouring support for the LTTE.

12 However, the relevant factual material was not limited to that referred to by the Tribunal. The applicant's solicitor, who had impressive knowledge of the situation in Sri Lanka, made a number of detailed submissions with references to supporting documentation. Most of that documentation would undoubtedly have been within the possession of, or readily accessible by, the RRT (some of it has been referred to in other cases concerning the RRT in this court). The submissions included suggestions that:

- the majority Singhalese have traditionally felt their culture threatened by minorities and have a history of violent repression of such minorities, including Tamils;
- the recent violence was likely to have exacerbated this social antagonism;
- this "ethnic divide" had manifested itself in the form of persecution of many Tamils;

- charges laid against an alleged “death squad”, comprised of government security forces’ personnel, of murdering 21 Tamils in Colombo, were aborted when neither prosecution nor the accused appeared before the magistrate;

- in general, the security forces harassed Tamils with impunity;

- masked informers are regularly used by the army to identify LTTE sympathisers and this has been publicly referred to;

- a British Refugee Council delegation had been told in December 1996 that, following a bombing atrocity by the LTTE in July 1996, an army general in Jaffna had “let his troops off the leash” and that many soldiers came “from areas where rape is routine”;

- the security forces were “conducting mass arrests, particularly of young Tamils”;

- the army seriously mistreats or tortures most people whom it detains in the north, and this was borne out by an Australian Government document, DFAT cable CL855 dated (as late as) 22/4/98;

- the Deputy Defence Minister in 1996 had publicly claimed that 50% of (the thousands of) Tamils who had settled in Colombo in the previous three years were spies.

13 Having presented these submissions it was argued that the applicant’s “claims of detention and torture at the hands of the army make sense in this context”.

The appellant's case

14 The appellant's solicitors submitted to us that, not withstanding its rejection of his client as a person worthless of credit, indeed as a liar, the RRT was still faced with the following issues:

(1) Despite the appellant’s unreliability, was the more or less objective circumstantial evidence sufficient to satisfy the RRT that he nevertheless had been mistreated by the Sri Lankan authorities and might therefore fear more mistreatment? This circumstantial evidence included: the applicant’s arrival in Australia without travel documents and with distinct psychological impairment; the consistency of his psychological difficulties with those to be found following traumatic events; that as a young adult male Tamil from the North, he would appear to be a prime target for governmental interest; the penchant of some elements of the security forces for persecution of Tamils; the likely governmental lack of interest in punishing such excesses.

(2) If the appellant had indeed suffered *no* actual harm in the past, what nevertheless would be his future on account of his race and/or the possible imputation to him of a political opinion supporting the LTTE? This was the key

and ultimate question. All others were subsidiary to it and, as it appears, capable of distracting from it.

15 Neither of these questions was answered by the Tribunal. The reason for this seems to be that the RRT was of the view that:

(i) the real case of the appellant, as orally presented by his solicitor, was that there was "a real chance that the appellant would be detained and tortured if he returned to Sri Lanka *on the basis* that the appellant had been detained and tortured by the Army in the past" (emphasis added);

(ii) it did not accept past mistreatment of the appellant because of his unreliability; and

(iii) it did not accept "that *all* Tamils in Sri Lanka have a well-founded fear of being persecuted merely by reason of their race" (emphasis added).

The RRT concluded that, "it follows that I do not consider that there is a real chance that he will be arrested, detained or tortured" if the appellant returned.

16 With respect, no such thing follows. In the first place, it does not appear (and the RRT did not suggest) that the appellant's solicitor abandoned any of his detailed earlier submissions. It is true that regard may be had to the way a case is presented, but not so as to relieve the Tribunal of the burden of considering the entire case (this is discussed in greater detail below). In the second place, there were particular things about *this* Tamil in Sri Lanka that might mark him out as being more exposed to a real chance of persecution than some others. Such persecution might be by reason of an imputed political opinion, as well as, or instead of, his race.

17 In the result, important elements of the appellant's claims requiring consideration by the RRT were not considered. This, in our view, constitutes reviewable legal error in a number of ways.

18 Firstly, s 414 requires that the RRT must "review" the primary decision. It must in the first place consider, among other things, any "written arguments relating to the issues arising in relation to the decision under review" (ss 423 and 424). It must, if not thereupon favourably inclined towards the applicant, continue the review process with the aid of any additional evidence given by the applicant (s 425(1)(a)) and any other evidence the RRT considers necessary to obtain (s 425(1)(b)). The Tribunal is given far-reaching powers to obtain such evidence under ss 427 and 428 (see also ss 56, 60 and 415). The Minister's (or his/her delegate's) decision under review must itself have been made after having "regard to *all* of the information in the application" (emphasis added) by the visa applicant (s 54), and after the application of an impressive statutory requirement intended to ensure that an applicant understands and has a chance to deal with the case against him or her (s 57 and especially s 57(1)(b): these go well beyond the requirements of the common law of procedural fairness). In a context like this, the ordinary meaning of "review" would be to carefully re-examine the primary decision,

with a view to amending or improving it: see the *Shorter Oxford English Dictionary* definitions of “review” and “revision”. Let it be assumed that, in this context, the word "review" does not require more than this. (As Hill J points out, the RRT actually exists to do again what the primary decision-maker did in order to arrive at the correct or preferable decision; this, as Hill J notes, reinforces our point.)

19 It follows that *all* of the substantial claims, and information in support of them, put forward by an applicant must be considered. In the course of doing so, the RRT must also, of course, bear in mind whether it should exercise any of its impressive ancillary powers to supplement the information put before it by either the Department or the applicant. In this case, the RRT did not consider all the available information. This constitutes, in our opinion, an “error of law being an error involving an incorrect interpretation of the applicable law” within the meaning of s 476(1)(e). It could only be by virtue of an incorrect interpretation of the Act as to the RRT’s duties that the Tribunal member could have considered it unnecessary to consider the applicant’s claims, and the available information, more thoroughly than he did.

20 This error may also have amounted to non-observance of a “procedure” required by the Act in connection with the making of the decision, within the meaning of s 476(1)(a). Procedures may be “required” by a statute by clear implication as well as by express provision.

21 Secondly, because the RRT did not apply itself to all the substantial matters which might bear on whether the applicant met the Convention requirements of a refugee, the RRT did not consider the “real question which it was its duty to consider” and this was a constructive failure by the Tribunal to exercise its jurisdiction: *Minister for Immigration and Multicultural Affairs v Guo* (1997) 191 CLR 559 at 577, per Brennan CJ, Dawson, oohey, Gaudron, McHugh and Gummow JJ, implicitly endorsing the legal analysis (though not the factual conclusions) of Beaumont J at first instance (1996) 64 FCR 151 at 165. See also *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 480 and 483. A decision based on the RRT’s constructive failure to exercise its jurisdiction is one “not authorised by the Act” within the meaning of s 476(1)(c). It also involves an “error of law, being an error involving an incorrect interpretation of the applicable law” within s 476(1)(e). Further, it may involve an “error of law, being an error involving … an incorrect application of the law to the facts as found” within s 476(1)(e) because, although the facts as found were that the appellant was not credible, the Act was incorrectly applied to that fact so as to result in the application being dismissed. The correct application of the law (in the circumstances of this case) required a determination, despite the appellant’s lack of credit-worthiness, as to whether, on *all* of the relevant information obtained (including any which reasonably could and should have been obtained), he was a refugee, albeit an untruthful one.

22 Thirdly, s 430(1)(c) requires that the Tribunal “set out the findings on any material questions of fact”. The two questions we have identified are factual ones and, in our view, undeniably material. Moreover, the applicant’s

submissions and the Tribunal's own short findings on the situation in Sri Lanka, to which we have referred, themselves raised a number of "material" questions of fact in the sense that they were critical or crucial to a proper determination of the matter. But no such findings were "set out" in the written statement of the Tribunal's reasons. The requirements imposed by s 430 may aptly enough be described as "procedures". Alternatively, it is clear that the requirement that "the findings on any material questions of fact" be "set out" is meaningless unless the Act, on its proper construction, implicitly requires that such findings be made. In *Paramananthan v Minister for Immigration & Multicultural Affairs* (1998) 160 ALR 24 Lindgren J treated s 430(1)(c) as requiring the Tribunal to "make" a finding on a material question of fact. The making of such a finding may itself be considered to be a "procedure". In *Logenthiran v Minister For Immigration & Multicultural* [1998] FCA 1691, Wilcox, Lindgren and Merkel JJ jointly allowed the appeal "because the RRT failed to deal with, *or make* any findings in relation to, two [factual] claims of importance" (emphasis added) in the applicant's case. Hence, one or more "procedure(s) … required by [the] Act to be observed in connection with the making of the decision" within the meaning of s 476(1)(a) was/were not observed, and this is a reviewable error.

23 Generally, we agree with the separately expressed but common approaches of Wilcox and Lindgren JJ in *Paramananthan* and, at first instance Burchett J, one of the two primary judges whose decisions were there under review. We adopt the following conclusions (authorities omitted), conveniently and aptly stated by Merkel J in *Paramananthan* at 56-57, although not necessarily with each step of his Honour's reasoning supporting them:

"In general, an administrative tribunal is entitled to be guided by the issues that the parties choose to put before it for its consideration … and is entitled to have regard to the case put. However, ultimately the RRT is under a duty to fulfil its statutory obligation to 'review the decision' before it and to do so according to s 420(2), which requires it to act according to the 'merits of the case'. Unlike an adversarial proceeding, parties do not appear and put a case, as such, to the RRT. As stated above, the RRT is required to determine whether it is 'satisfied' that the applicant is a person to whom Australia has protection obligations under the Convention.

Material and evidence, as well as arguments, may be presented to the RRT but its inquisitorial procedures or enquiries are not limited to or by the materials, evidence, or arguments presented to it. In an appropriate case the RRT may undertake its own enquiries and, in some instances, may be obliged to do so. … Similarly, the RRT is not to limit its determination to the 'case' articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant. That obligation arises by reason of the nature of the inquisitorial process and is not dependent upon whether the applicant is or is not represented. … Representation can be relevant to the content of a duty to act according to 'substantial justice' or fairly in a particularly case, but cannot affect the fundamental duty of the RRT, acting inquisitorially, to review the decision before it according to the 'merits of the case'.

In my view the inquisitorial function of the RRT and the combined effect of the provisions to which I have referred, is such that the RRT is required to determine the substantive issues raised by the material and evidence before it. That duty, which was recognised by Brennan J in **Bushell**, is a fundamental incident of the inquisitorial function of an administrative tribunal such as the RRT.

I would arrive at the same conclusion based on s 420, the nature, scope and requirements of which have been the subject of much judicial attention in the Court… Although that issue is before the High Court, in my view, at the least,

s 420 imposes a duty to determine the 'merits of the case' and in doing so make finding on the questions central to that determination … As Foster J observed …, s 420:

> **'is concerned with the decision of the issues raised in the case … Whatever else 'substantial justice' may require it certainly demands, in my view, that a decision actually be made in respect of the significant issues posed in the case.'**

Closely related to that duty arising under s 420 is the duty of a decision-maker or tribunal to give the questions before it for its determination 'proper, genuine and realistic consideration upon the merits'."

24 We should emphasise that our conclusions depend on the circumstances of this case. In many other cases the sole substantial basis for judging whether a person falls within the Convention criteria for a "refugee" will be the information as to his/her supposed history and background furnished by an applicant. Upon legally proper rejection of the credibility of an applicant in such a case, there will be no basis for requiring that the RRT do more than forthwith reject the claim for refugee status.

The decision of the primary judge

25 His Honour dealt with the relevant alleged error in the following way. He noted the RRT's non-acceptance of the proposition that "all Tamils" in Sri Lanka have a well-founded fear of persecution "merely by reason of their race" and continued:

"Accordingly something more than being of Tamil ethnicity in the circumstances presently existing in Sri Lanka is required in order to establish a well-founded fear of persecution on a convention ground.

That 'something more' was sought to be supplied by the applicant's account of his treatment at the hands of the Sri Lankan security forces, and the probable reasons for that treatment. But that account was not accepted by RRT. There is no legal rule that in all cases the RRT must consider whether findings which it has made might be wrong."

26 Having cited a number of legal authorities in support of the last mentioned proposition (which we find unexceptionable), his Honour continued:

"Here, RRT concluded that the applicant's account of his past experiences 'is a fabrication and cannot be believed'. Having regard to the unequivocal nature of that finding, and the reasons for it, in my opinion there is simply no rational basis on which the applicant's account of his past experiences could have any continuing part to play in the RRT's assessment of whether the
applicant has a well-founded fear of persecution for a Convention reason if he returns to Sri Lanka now or in the foreseeable future.

Accordingly in my opinion, the first ground on which an Order of Review is sought has not been made out."

27 With respect, the logically correct conclusion that "there was no rational basis on which the applicant's account of his past experiences could have a continuing part to play in the RRT's assessment" does not meet the need that we see for the two other questions we have identified to be answered by the RRT. Each of those questions assumes that no regard should be had to the applicant's own account of his history. The RRT did not conclude that, subjectively, the applicant did not fear persecution. In fairness to his Honour, it seems that those questions and the circumstances that made them real and substantial were not put before him.

28 Nevertheless, errors of law on the part of the RRT have been shown which fall within the first ground of the application for judicial review which was before his Honour. That ground was that:

"the RRT made an error of law in terms of s 476(1)(e) of the Act in that it failed properly to apply the 'real chance' test by failing to engage in reasonable speculation based on the whole of the evidence before it as to whether the applicant had a 'well-founded fear' of persecution within the meaning of the Refugee Convention."

Conclusion

29 The appeal should be allowed with costs. However, there should be no order as to the costs of the proceedings at first instance, the appellant not having then clearly raised the matters on which he has had substantial success. The matter will be remitted to the RRT, differently constituted, for reconsideration.

I certify that the preceding twenty nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice The Court.

Associate:

Dated: 19 March 1999

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY	NG 1269 OF 1998

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN:	UTHAYACHANDRA SELLAMUTHU Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	WILCOX, HILL AND MADGWICK JJ
DATE:	19 MARCH 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

HILL J:

30 The Appellant, Uthayachandra Sellamuthu, ("the Appellant") appeals from the judgment of a judge of this Court dismissing his application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal had affirmed the decision of a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister")not to grant the Appellant a protection visa pursuant to the provisions of *Migration Act 1958* ("the Act").

The Tribunal's Decision

31 The Appellant is a citizen of Sri Lanka of Tamil ethnicity. He was born in August 1971. He claimed to satisfy the criteria prescribed by the Act for a

protection visa on the basis that he was a non-citizen of Australia to whom Australia had protection obligations under the 1951 *United Nations Convention Relating to the Status of Refugees* as amended by the 1967 *Protocol Relating to the Status of Refugees*. In these reasons I shall refer to the Convention as amended by the Protocol compendiously as "the Convention". He claimed, in accordance with the terms of the Convention that he had a *"well-founded fear"* of being

persecuted for reasons of *"race, religion, nationality, membership of a particular social group or political opinion".*

32 In the evidence he gave to the Tribunal the Appellant claimed that his life was in danger if he returned to Sri Lanka from the Liberation Tigers of Tamil Eelam ("the LTTE")and the Sri Lankan Army. The army had, he claimed, detained him on two occasions as a suspected member of the LTTE, interrogated him, tortured and assaulted him. He claimed also that his family had been threatened and his mother assaulted.

33 The Tribunal rejected the Appellant's claim. It was of the view that the Appellant was not a credible witness. The Tribunal took this view as a result of what it perceived to be a failure on the Appellant's part to respond to questions as well as inconsistencies between what the Appellant had said in an original application, what had been said by him in a statutory declaration and what he said at the hearing. The Tribunal said:

"Having regard to the inconsistency between the details which the Applicant provided in his original application and the account which he gave in his statutory declaration and at the hearing before me, and to the impression I formed of his credibility at the hearing, I am unable to accept that the account which the Applicant gave in his statutory declaration and at the hearing before me is true. … I have referred already to the impression I had in the course of the hearing before me that the Applicant was simply repeating word for word passages from his statutory declaration … I conclude that the account of his past experiences which the Applicant has given in his statutory declaration and at the hearing before me is a fabrication and cannot be believed.

… I note that the Applicant himself conceded that the detailed history of his movements which he had given in his original application was not true. I therefore find that these details likewise were a fabrication and cannot be believed. … I am equally unable to accept the truth of what the Applicant said in the interview with an Immigration Inspector at the airport.

I accept for the purposes of this review that the Applicant is a national of Sri Lanka and that he is a Tamil. Having regard to my findings above with regard to the credibility of the Applicant's account, I do not accept that he was ever forced to work for the LTTE nor do I accept that his younger brother joined the LTTE in 1992. I likewise do not accept that the Applicant was ever detained and tortured by the Sri Lankan Army. Having regard to the differing accounts he has given, I am unable to find where the Applicant lived before his arrival in Australia in April 1998."

34 Prior to the Tribunal hearing the Appellant's solicitor had written to the Tribunal advising it that the Appellant was severely traumatised. He had, it was submitted, a poor attention span and difficulty in focusing on questions. The letter requested that the Tribunal exercise its powers under s 427(1)(d) of the Act to arrange for a psychological assessment of the Appellant by a clinical psychologist or psychiatrist experienced in torture and trauma cases.

35 The Tribunal acquiesced and in the result a psychologist, Dr Varigona, interviewed the Appellant and provided a report. Dr Varigona said that, when interviewed, the Appellant had looked depressed and had difficulties concentrating on the task in hand. The Appellant had used notes as he felt, so he said, that he would not remember everything. The history which Dr Varigon's records (a precis of what she had been told) coincided with the Statutory Declaration which the Appellant had sought to rely on in the hearing. Apart from recording the Appellant's history as he had narrated it, Dr Varigona expressed the opinion that the Appellant felt hopeless and helpless. Particularly, she said:

"Recent experiences in his life have caused distress and impairment in social, occupational and other areas of functioning in his life. He should be given an opportunity to explore [sic] other side of his life"

36 The Appellant's solicitor arranged for a consultant psychologist, Mr O'Sullivan, contracted to the company running the Detention Centre in which the Appellant was then detained, to see the Appellant and to indicate whether the symptoms which the Appellant displayed were genuine, and his conclusions. Mr O'Sullivan's report details the symptoms which the Appellant described and continued:

"Based on my experience of interviewing clients for both clinical and forensic purposes, it is my opinion that Mr Sellamuthu's account of his symptoms is entirely genuine. The account is not presented in such a way as to denote exaggeration or embellishment. When offered opportunities in questioning to enhance his descriptions, Mr Sellamuthu did not do so. His demeanour at interview was quietly agitated in a way which characterises those clients dealing with a combination o f anxiety-provoking thoughts and hopelessness.

He mentioned two cognitive features, impaired concentration and perceived memory loss. While the significance of these as sequelae of trauma is well known to professionals, it would not necessarily be known to a person without specialised knowledge.

I conclude that Mr Sellamuthu is a credible history-giver."

37 The Tribunal took account, so it said, of the two reports as part of the materials before it as opinions of persons with expertise. It rejected, rightly in my view, a submission that the Tribunal was bound, as a result of these reports to conclude that the Appellant was telling the truth and said, and it is true, that there was nothing in the reports which would suggest that a

fabrication of history was a symptom of the psychological condition which the psychologists had diagnosed. The view the Tribunal took of this evidence is reflected in the following passage:

"In reaching this conclusion I have given due weight to the opinions of the two psychologists that the Applicant is suffering from post-traumatic stress disorder. In the light of my findings above, however, I am unable to shed any light on what particular traumatic experiences in his past may have caused this condition. I am unable to find on the evidence before me that any traumatic experiences which the Applicant may have suffered constitute persecution for the purposes of the Convention nor that the relevant causal nexus exists between those traumatic experiences and one of the Convention reasons."

The Decision Appealed from

38 The Appellant submitted at first instance that the Tribunal had erred in law in failing to apply the *"real chance"* test, derived from what was said by Kirby J in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 293, to the effect that the Tribunal should ask itself the question: "*What if I am wrong?"*, before rejecting claims of a well-founded fear of persecution. This submission was rejected and was not repeated before us.

39 The second submission rejected by the learned primary judge and the latter part of this submission were repeated before us. The Tribunal was either bound to conclude that the Appellant was truthful or obtain a further psychological assessment to ascertain whether the detailed but inconsistent accounts which the Appellant had given of his history were explicable on the basis of post traumatic stress disorder. His Honour held, and I agree, that there was no duty on the Tribunal to obtain a further psychological report in the circumstances of the case.

40 Then it was submitted that the Tribunal was not acting rationally or reasonably in rejecting the whole of the Applicant's evidence based on the discrepancy in different versions of evidence. In his Honour's view, and with this I likewise agree, the Tribunal is not bound to accept uncritically and at face value, a version of events which is asserted by an applicant before it. Quite clearly as his Honour said demeanour and consistency (at least where the inconsistencies are more than minor and significant) are all important in determining credibility. One discrepancy upon which the Tribunal seized was regarded by the primary judge as not material. However his Honour concluded that he should not set aside the Tribunal's decision merely because one discrepancy was immaterial.

The Grounds of Appeal

41 The Appellant's grounds of appeal to this Court raised two matters. The first was expressed with some generality and it might be said

obscurity. I will deal with the terms of the notice later. Suffice it to say here that, read generously, it was concerned with an error in the interpretation of law, or the application of the law to the facts said to have been made by the Tribunal. The second ground of appeal claimed that his Honour should have held that the Tribunal erred in not obtaining further psychological evidence.

42 The first ground may be said to have received some elucidation from written submissions filed with the Court which referred to the failure on the part of the Tribunal to refer to evidence which the Appellant's solicitor had given about the Appellant's hesitancy and his lack of concentration. The solicitor had also given evidence that the solicitor was not sure, even after careful questioning, that the Appellant had understood the questions he was asked. So, it was submitted, if this information had been taken into account, and in the absence of further evidence of the effect of trauma upon memory, it was difficult to see how the Tribunal could have come to unequivocal conclusions.

43 The Appellant also submitted that the Tribunal had failed to have regard to special considerations inherent in refugee matters. *Kopalapillai v Minister for Immigration and Multicultural Affairs* (O'Connor, Branson and Marshall JJ, 8 September 1998, unreported) was referred to. Then it was said that there was a question whether the Tribunal could ***reasonably*** have come to the conclusions which it reached, at least as firmly as it did. There is little doubt in my mind that the decision of the Tribunal has an element of unreasonableness about it, but it is difficult to see that reasonableness can on its own be a ground of judicial review having regard to the specific provisions of s 476(2) which is expressed in the following terms:

"The following are not grounds upon which an application may be made under subsection (1):

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."

Failure to Address important elements of Appellant's claim

44 In the course of oral argument the solicitor for the Appellant argued that the Tribunal had not properly addressed the issues before it or some of the submissions made to it.

45 It must immediately be said that there had been written submissions made to the Tribunal which contained extensive reference to literature concerning violence endemic in Sri Lanka and especially the mistreatment of Tamils in particular, but not necessarily limited to those suspected of LTTE membership or collaboration. As the joint judgment of Wilcox and Madgwick JJ, which I have had the opportunity to read in draft form, observes, some of the material referred to is extracted in judgments in other cases.

46 Shortly before the hearing was to commence the solicitor for the Appellant lodged with the Tribunal a lengthy submission. The claim made in that submission was that the Appellant feared persecution by reason of his race and a political opinion that was imputed to him by the Sri Lankan security forces. The submission stated:

"We submit that the result, as far as Tamil civilians are concerned, is that they are all tarred with the same brush. Putting this another way, the 'security forces' cannot distinguish LTTE cadres from ordinary Tamils, and so that in a great many cases all Tamils are treated as guilty of LTTE atrocities, and are vicariously punished for the crimes of the LTTE."

47 The Tribunal in its reasons dealt with the situation in Sri Lanka relatively briefly. Indeed it dealt with the difficulties in that country only in the context of persecution of Tamils who were members of the LTTE, rather than in the broader way in which the Appellant's solicitors had posed the question, namely whether there was a real chance of the Applicant being persecuted by reason of being of Tamil ethnicity. This was not accidental. It was deliberate. The Tribunal said:

"While I have referred above under 'Background' to evidence of the grave human rights abuses committed by the Sri Lankan security forces in the context of the continuing conflict with the LTTE, I do not accept that all Tamils in Sri Lanka have a well-founded fear of being persecuted merely by reason of their race. Indeed I do not understand this to be the case that the Applicant's representative is putting. Although he referred in his submission dated 3 June 1998 to the fact that the security forces were unable to distinguish LTTE cadres from ordinary Tamils so that all Tamils were in effect treated as guilty of LTTE atrocities, in his submission dated 24 June 1998 he argued that there was a real chance that the Applicant would be detained and tortured if he returned to Sri Lanka on the basis that the Applicant had been detained and tortured by the army in the past…"

48 The submission of 24 June to which the Tribunal made reference was largely taken up with the evidence of the psychologists and its significance to the Appellant's apparent memory lapses and inconsistency of testimony. It is true that there is reference in that submission to the LTTE, but nothing in it would suggest that the Appellant intended to confine his case to fear of persecution by virtue of being both a Tamil and LTTE connected, whether personally or through the connections he said his bother had had. Nor could it be taken as an admission that the Appellant had no fear of persecution by virtue of being a young Tamil male.

49 The Appellant's solicitor rejected before us the suggestion that he had abandoned the submission that the Appellant had a well-founded fear of persecution based on ethnicity as a Tamil. Accepting that this was the case it clearly follows that the Tribunal has simply not addressed itself to the issue which was posed to it. It is no answer to this proposition to say that the Tribunal did not accept the evidence of the Appellant so far as that evidence related to events which the Appellant deposed had taken place in Sri Lanka and which involved him and his family. The Tribunal accepted expressly that

the Appellant was a Tamil male. But, it made no finding of the existence or lack of subjective fear of persecution by reason of his ethnicity. Nor did it make any finding by reference to background materials before it, or to other materials to which the Appellant's submissions referred, which presumably were available to it, as to whether such a fear would be well-founded.

50 The question which then arises is the foundation of this Court's jurisdiction to set aside the Tribunal's decision in these circumstances. The joint judgment of Wilcox and Madgwick JJ discusses a number of possible bases which could found jurisdiction in the Court having regard to s 476 of the Act. There can be no doubt that failure to address a fundamental issue put forward by an applicant as the foundation for administrative review is a matter so critical that it would involve an error of law. There is, however, some difficulty in bringing it within the limited area of judicial review of legal error set out in s 476(1)(e) of the Act. I am inclined, however, to agree with the view proposed by their Honours that a decision in which the Tribunal does not address the arguments which are put to it might properly be characterised as one not authorised by the Act: s 476(1)(c).

51 But it is unnecessary in this case to look further than s 476(1)(a) as the foundation of jurisdiction. That section empowers the Court to review a decision of the Tribunal where procedures required by the Act to be observed in connection with the making of the decision were not observed. A fundamental *"procedure"* which the legislature directs the Tribunal to comply with in its decision making role is that set out in s 430(1) of the Act. That subsection provides:

"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,"

On any view of the matter, in the present case, both the question whether the Appellant had a fear of persecution on the basis of his ethnicity and the question whether in the light of circumstances in Sri Lanka that fear was well-founded were material questions of fact which had been placed before the Tribunal for resolution. Yet no findings were made in respect of them. I agree completely with Lindgren J in *Kirushanthan Paramananthan v Minister for Immigration & Multicultural Affairs* (1998) 160 ALR 24 that s 430(1)(c) requires the Tribunal to make findings on material questions of fact. The Tribunal breached the obligation imposed upon it by s 430(1)(c) in failing to do so. That breach is a failure to comply with a fundamental procedure which the legislature has laid down.

52 A perusal of the reasons of the learned primary judge make it clear that his Honour did not really deal at all with the argument as outlined above. This is not surprising. In fairness to his Honour the Amended Application for review filed by the Appellant did not raise it at all.

53 Only two grounds were raised. Nor, so far as apears, was it raised in submissions before the learned primary judge. The first ground of review was expressed in terms of subs 476(1)(e) of the Act . As particularised this was that:

"The Tribunal failed to properly apply the 'real chance' test, by failing to engage in reasonable speculation based upon the whole of the evidence before it, as to whether the applicant had a 'well-founded fear' of persecution within the meaning of the Refugee Convention."

54 The second ground of review raised was expressed in terms of s 476(1)(a) and s 420(2)(b) of the Act. However, as particularised this ground concerned:

"(a) The findings on the credibility of the applicant were not rationally supported by probative evidence, failed to rationally consider the probative evidence that was before the Tribunal, and they were not open to it on the material.

(b) The Tribunal failed to properly inquire into the applicant's case. Having accepted that the applicant was suffering from post traumatic stress disorder, the Tribunal had a duty to seek further psychological evidence as to the effect that the post traumatic stress disorder inhibited the applicant's ability to recall events.

(c) The Tribunal failed to act in accordance with substantial justice and the merits of the case in that it rejected the opinion of two psychologists to the effect that the applicant had been tortured in favour of his lay opinion that the applicant had not been tortured."

55 These, indeed were the matters which the learned primary judge dealt with. It is clear enough that the matters discussed above and debated during the present appeal were never raised for decision by his Honour. Likewise they were not matters raised by the notice of appeal which instigated the appeal to us. That notice was confined, in the same way as the Application before his Honour was confined, to the applicability of the *"real chance"* doctrine and the relationship between the psychologists evidence and credibility.

56 The point being an issue clearly not raised before the learned primary judge, in my view, requires leave to be raised on the appeal. Given the limited nature of judicial review it is difficult to see what prejudice there could be to the Minister if such leave be given. The prejudice to the Appellant of leave not being granted is, on the other hand, immense.

57 I would, therefore, grant leave to the Appellant to amend both the amended Application for review and the notice of appeal to raise the issues agitated on the appeal, and allow the appeal. In the circumstances, there should be no order as to costs of the proceedings at first instance.

58 Before concluding this judgment I would wish to comment on one matter which is raised in the joint judgment of Wilcox and Madgwick JJ. Their Honours under the heading *"Reasoning"* discuss the requirement that the Tribunal *"review"* the primary decision in the context of a conclusion that the Tribunal is obliged to consider the claims which an applicant makes.

59 I should not like it to be concluded from that discussion that the task of the Tribunal is merely to examine the primary decision. The task of the Tribunal is much wider than that. The Tribunal, for the purposes of the review it is to undertake, is empowered to exercise all the powers and discretions conferred by the Act on the original decision maker: s 415(1). It exists, like the Administrative Appeals Tribunal or the Immigration Review Tribunal among others, to do over again that which the primary decision maker has done before so as to arrive at the correct or preferable decision: cf in the context of the Administrative Appeals Tribunal, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419, 429-430; *Casarotto v Australian Postal Commission* 86 ALR 399 at 402; *Secretary, Department of Social Security v Hodgson* 37 FCR 32 at 40; *Shell Company of Australia Limited v Federal Commissioner of Taxation* [1931] AC 275 at 298; *Fletcher v Commissioner of Taxation* 19 FCR 442 at 453-454. So, the issue before the Tribunal in a case such as the present will not be whether the decision maker has made some error in failing to be satisfied that the applicant for a protection visa had a well-founded fear of persecution for a Convention reason, but whether the Tribunal itself is or is not satisfied that the applicant has a well founded fear of persecution.

60 This does not detract in any way from what their Honours have said. To the contrary, it reinforces what they Honours say. For it is the special nature of the process of administrative review which points up the necessity for the Tribunal to consider the submissions that are put before it.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill

Associate:

Dated: 19 March 1999

Counsel for the Applicant:	L Karp
Solicitor for the Applicant:	McDonnells Solicitors
Counsel for the Respondent:	F Backman
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	8 February 1999
Date of Judgment:	19 March 1999