Rajanayake v Minister for Immigration & Multicultural Affairs

[2002] FCAFC 24

Rajanayake v Minister for Immigration & Multicultural Affairs [2002] FCA 143

NOTE: CHANGES TO THE MEDIUM NEUTRAL CITATION (MNC)

The Federal Court adopted a new medium neutral citation (FCAFC) for Full Court judgments effective from 1 January 2002. Single Judge judgments will not be affected and will retain the FCA medium neutral citation.

The transitional arrangements are as follows:

- All Full Court judgments delivered *prior* to 1 January 2002 will retain the FCA medium neutral citation.
- All Full Court judgments delivered *between* 1 January 2002 to 30 April 2002 have been assigned **parallel** medium neutral citations in both the FCA and FCAFC series.
- All Full Court judgments delivered *from* 1 May 2002 will contain the FCAFC medium neutral citation only.

FEDERAL COURT OF AUSTRALIA

Rajanayake v Minister for Immigration & Multicultural Affairs [2002] FCA 143

MIGRATION – appeal from decision of primary judge affirming decision of Refugee Review Tribunal – whether no evidence or other material to justify the making of the decision – whether decision based on facts that did not exist – whether Tribunal failed to address an issue raised by the material and evidence before it – whether Tribunal failed to address the issue of whether the appellant was considered by the police to hold a political opinion sympathetic or supportive of Tamils because of his association with Tamils, as opposed to sympathy or support for the Liberation Tigers of Tamil Eelam – whether appellant had a well-founded fear of persecution

PRECEDENTS – circumstances in which Full Court may decline to follow decision of earlier Full Court

Migration Act 1958 (Cth) ss 36, 425, 476(1) (g), 476(4) (b)

V v Minister for Immigration and Multicultural Affairs (1999) 92 FCR 355 cited

Minister for Immigration and Multicultural Affairs v Indatissa [2001] FCA 181; 64 ALD 1 followed

Jegatheeswaran v Minister for Immigration and Multicultural Affairs [2001] FCA 865 cited

Transurban City Link Ltd v Allan (1999) 95 FCR 553 discussed

Minister for Immigration and Multicultural Affairs v Rajalingam (1999) 93 FCR 220 cited

CECIL SYLVESTER RAJANAYAKE v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N449 OF 2001

SPENDER, GRAY& BRANSON JJ

26 FEBRUARY 2002

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N449 OF 2001
ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA	
BETWEEN:	CECIL SYLVESTER RAJANAYAKE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	SPENDER, GRAY & BRANSON JJ
DATE OF ORDER:	26 FEBRUARY 2002
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs.

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N449 OF 2001
ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA	

BETWEEN:	CECIL SYLVESTER RAJANAYAKE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	SPENDER, GRAY & BRANSON JJ
DATE:	26 FEBRUARY 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

SPENDER J

1 I have had the benefit of reading in draft form the reasons for judgment of Branson J. I agree that the appeal should be dismissed with costs, for the reasons which her Honour gives.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Spender.

Associate:

Dated: 26 February 2002

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N449 OF 2001
ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA	
BETWEEN:	CECIL SYLVESTER RAJANAYAKE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	SPENDER, GRAY & BRANSON JJ
DATE OF ORDER:	26 FEBRUARY 2002

WHERE MADE: SYDNEY

REASONS FOR JUDGMENT

GRAY J:

2 I have read the reasons for judgment of Branson J in draft form. I agree with the orders that her Honour proposes and with the reasons she gives.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 26 February 2002

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N449 OF 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: CECIL SYLVESTER RAJANAYAKE

APPELLANT

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	SPENDER, GRAY & BRANSON JJ
DATE OF ORDER:	26 FEBRUARY 2002
WHERE MADE:	SYDNEY

REASONS FOR JUDGMENT

branson j

INTRODUCTION

3 The appellant appealed to this Court from a decision of a judge of the Court which dismissed his application for review of a decision of the Refugee Review Tribunal ("the Tribunal"). The decision of the Tribunal had affirmed a decision of a delegate of the Minister not to grant the appellant, together with his family, a protection visa.

4 The entitlement of the appellant to be granted a protection visa is dependent on the satisfaction of the relevant decision maker (in this case the delegate of the respondent and subsequently the Tribunal) that the appellant is a person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;…"

(See the Convention relating to the Status of Refugees 1951 as amended by the Protocol relating to the Status of Refugees 1967 ("the Convention") and s 36 of the *Migration Act 1958* (Cth) ("the Act")).

claims of the appellant

5 The appellant and his wife are both citizens of Sri Lanka. They are ethnically Sinhalese. The appellant made a statement, more than seven pages long, in support of his application for a protection visa. The statement is dated 21 April 1998. The following summary of his claims is taken from that statement.

6 The appellant, who lived with his family in Colombo, has cousins who are ethnically Tamil. Since 1983 he has suffered assaults and abuse because of his public association with his Tamil cousins.

7 Between 1983 and 1989 the appellant worked in the travel industry and had many Tamil clients, who were introduced to him by his cousins and their friends. In 1986 he was threatened and assaulted by *"Sinhalese thugs and police officers in civil dress".* He was ordered to get them cheap tickets within a fortnight. The appellant's manager dealt with and resolved this problem.

8 The appellant became well known as a travel agent among the Tamil community throughout Colombo and his residence was visited by many Tamils outside of business hours. He started to face harassment by police officers who visited him at work and at home because of false rumours of his involvement with the Liberation Tigers of Tamil Eelam ("LTTE"). In May 1989 three of his Tamil customers were arrested while he was interviewing them. He was later questioned by the police who accused him of having dealings with LTTE cadres. His employer advised him to find another job. He did so.

9 In the latter part of 1991 he was taken with his wife's brother-in-law, who is Tamil, to the Nugegoda police station where they were questioned at length as to their connections with the LTTE. His brother-in-law was taken to prison but the appellant was released on the condition that he not move out of his residence or his workplace without permission. His wife and her sister, with help from senior officers, later arranged his brother-in-law's release on the condition that he should be send abroad. His brother-in-law left Sri Lanka in 1992.

10 After his brother-in-law had left Sri Lanka, the appellant commenced to associate, at the request of his wife's family, with a man named Suthesh who was the brother of his brother-in-law. In his new job he dealt directly with customers and other travel agents. When it became dangerous for the appellant to travel alone, Suthesh accompanied him to the private residences of his clients in the evenings. Suthesh also used the appellant's van in the evenings to visit his friends and relatives.

11 Between 1993 and 1996 the appellant had few problems. His director looked after his interests and when there were police interrogations his director dealt with them even to the extent of bribing the police.

12 When the 1996 Central Bank bombing took place, a concrete slab landed in the appellant's wife's office killing two of her workmates and injuring

many others. Thereafter the appellant and his wife were suspected of LTTE involvement. In February 1996 he and his wife were taken for questioning and the appellant was paraded in front of hooded men. He was identified as a LTTE supporter and beaten until he lost consciousness. He was kept nearly five days in a cell and urged to sign a document accepting his guilt. He refused to do so despite being starved and harassed. He was released with the help of his director on the condition that he would not leave the country until the completion of the investigation.

13 In May 1997 the appellant was taken again for interrogation. He saw Suthesh standing with other detainees and he identified him as a relative. He was kicked and punched and questioned as to Suthesh, their joint involvement in the travel industry and the appellant's connection with the LTTE. It came to light that Suthesh had helped LTTE militants to flee from Colombo by illegal means. The police officers accused the appellant of assisting Suthesh to get tickets issued to the escapees. The appellant's work files were checked but they did not reveal the names of escapees. He was released with his director's guarantee.

14 Thereafter the appellant was visited at his office frequently by CID officers and questioned as to his involvement with LTTE militants. When he went out he was followed. Police officers assaulted him on the streets and in public called him Kottiya (tiger). He feared that he would be abducted. With his sister's help he travelled to Australia for a holiday. He returned to Sri Lanka and to his job on his director's advice *"that there was no need to panic while everything was back to normal."* In February 1998, while visiting a Tamil client, he was again arrested by the CID. He was found to be in possession of five passports belonging to his clients. He was assaulted and accused of helping Tamils to flee the country and to evade arrest. He was kept in custody for a week and released on condition that he leave the country immediately.

reasons of the tribunal

15 The conclusions of the Tribunal are summarised in the following paragraph of its written reasons for decision:

"I do not accept the applicant's evidence to be truthful. I find, for the reasons which I give below, that the applicant has fabricated his claims in order to establish a well-founded fear of persecution for an imputed political opinion. I do not accept that the applicant genuinely fears Convention-related persecution should he return to Sri Lanka. I do not accept that the applicant has ever been arrested or imprisoned or even suspected of support for the LTTE. I do not accept that the applicant was ever subjected to any mistreatment due to an imputed political opinion. I am satisfied that if the applicant were to return to Sri Lanka he would not face a real chance of Convention-related persecution."

16 The Tribunal identified four bases for the above findings. First, it found that there was no evidence that Sinhalese people support, or are imputed by the security forces with support of, the LTTE or its

methods. Secondly, it considered that the appellant had made significant new claims at the hearing, or significantly altered earlier claims. Thirdly, it found that the appellant's claims were in significant respects inherently contradictory and in several respects illogical. Fourthly, it placed weight on the appellant's failure to seek protection when he first travelled to Australia, concluding that he did not have any fear of Convention-related harm when he returned to Sri Lanka in September 1997. It also placed significance on its following finding:

"… the applicant only applied for a protection visa on 22 April 1998, which was the day after his multiple entry visa expired, notwithstanding that he had arrived in Australia a month before, having just come from being in hiding in fear of persecution, and presumably [knowing] when he arrived that his visa would expire within the next month."

application for an order of review

17 The appellant's further amended application for an order of review identified three grounds of review. First, that there was no evidence or other material to justify the making of the decision. The particulars in support of this alleged ground identified eight separate "particular facts"upon which the decision of the Tribunal was said to be based and which were said not to exist. Secondly, that the Tribunal erred in law by failing to address an issue raised by the material and the evidence before it, namely whether the appellant was considered by the police to hold a political opinion sympathetic or supportive of Tamils because of his association with Tamils ("ground 2(a)"), and by misinterpreting the function and purpose of a hearing under s 425 of the Act. Thirdly, that the Tribunal failed to observe procedures that it was required by the Act to observe.

reasons of the primary judge

18 In the section of the reasons for judgment of the learned primary judge headed *"The Reasons for Decision of the RRT",* under the subheading *"claims and evidence",* his Honour recorded:

"Mr Rajanayake is Singhalese and his claim was that he had a well-founded fear of persecution by reason of the fact that the Sri Lankan authorities imputed to him support for the Liberation Tigers of Tamil Eelam ("LTTE"), a Tamil organisation which seeks the establishment of a separate, independent Tamil state and which is in violent conflict with the Sri Lankan authorities."

19 In the section of his Honour's reasons for judgment headed *"Reasoning on Present Application for Order of Review",* his Honour set out the grounds of review and the particulars from the appellant's further amended application for an order of review. However, perhaps because of his Honour's understanding of the appellant's claim (see [16] above), his Honour did not expressly notice that ground 2(a) was drawn in terms of sympathy and support for Tamils, not sympathy and support for the LTTE.

20 After referring to the submission made on behalf of the appellant that the appellant's claim before the Tribunal was that the police knew that he was not an LTTE supporter but nonetheless exploited his association with Tamils to engage in extortion, his Honour concluded as follows:

"The way in which counsel for Mr Rajanayake puts his case demonstrates some ingenuity, but ultimately I do not think it succeeds. The finding of the RRT which Mr Rajanayake cannot, and does not, seek to escape is that there is no evidence that Singhalese persons support, or are thought by the authorities to support, the LTTE or its methods. But counsel says that his client's case before the RRT was not that he supported, or was thought by the authorities to support, the LTTE or its methods. He says that Mr Rajanayake's case was a different one with which the RRT did not grapple. This was that while the police did not at all believe that Mr Rajanayake supported the LTTE or its methods, they said they suspected him of doing so with a view to extorting money from him.

…

The RRT's acceptance of the fact that Singhalese are not suspected of sympathising with the LTTE (based on documentary evidence from DFAT) seems to me to be an answer to the claim as formulated by counsel for Mr Rajanayake. As so formulated, the claim seems to be that the police were practising extortion on Mr Rajanayake. On this view of matters, what they were doing was not persecution for reason of political opinion at all.

In sum, once the case made on behalf of Mr Rajanayake is reformulated so as not to be a claim of fear of persecution for actual or imputed political opinion, it is reformulated so as to take it outside the Convention definition. But as I said earlier, I think that the better view is that Mr Rajanayake's true claim was one of imputed political opinion within the definition which the RRT effectively rejected for the reasons it gave."

21 The primary judge rejected the submission that the Tribunal had stated or assumed that the appellant was required to set out all of his claims in support of his application for a protection visa prior to his Tribunal hearing. His Honour also rejected the submission that the Tribunal misinterpreted the function and purpose of a hearing pursuant to s 425 of the Act. He pointed out that it was common for decision-makers when weighing credibility to give consideration to the fact that a witness has belatedly made an allegation which the witness could reasonably be expected to have made much earlier.

22 As to the "no evidence" ground, the primary judge, after giving consideration to each of the "particular facts"said not to exist, turned to consider whether there was *"evidence or other material to justify the making of the decision"* within the meaning of par 476(1)(g) of the Act. His Honour concluded:

"In the present case, the RRT declared itself not to be satisfied that Mr Rajanayake was a person to whom Australia had protection obligations under the Convention. I do not see how it can be said, in terms of par 476(1(g), that there was no evidence

before the RRT justifying its not being satisfied of that matter. The RRT relied on numerous factors, independent of the facts referred to in particulars 1(b) to (i), which led it to find Mr Rajanayake not creditworthy (cf Curragh Queensland Mining Ltd v Daniel (1992) 34 FCR 212 (FC) at 220-222). For example, it relied on the inconsistent independent country information, the making of new or significantly varied claims, the implausibility of various claims and the failure to seek protection on the occasion of the first visit to Australia."

grounds of appeal

23 The appellant's further amended notice of appeal contains the following grounds of appeal:

"2. The Court erred in finding that,

(a) The applicant's statement supporting his application for a Protection Visa "…clearly conveys the claim that the police officers' suspicion of Mr Rajanayake [as a Singhalese person who sympathised with or supported the LTTE] was genuine", and

(b) The claim that the police were practicing extortion on Mr Rajanayake takes it outside the Convention definition.

3. The Court erred in failing to find that:

a. The Refugee Review Tribunal (the Tribunal) had failed to ~~make findings on material questions of fact~~ take into account relevant considerations, being whether

i. The applicant was harassed and vilified by Singhalese Sri Lankans because of his relationship to and contact with Tamils.

ii. The applicant was arrested and assaulted in 1983 because he entertained Tamils in his house.

iii. In 1986 the applicant was assaulted and threatened for assisting Tamil customers of his employer's travel agency.

and that,

b. there was a consequent error in failing to find that the Tribunal had failed to address an issue that was raised by the material and evidence before it, being whether the applicant was considered by the police to hold a political opinion sympathetic to or supportive of Tamils because of his association with Tamils.

4. The Court erred in failing to find that the Tribunal had approached the case on the basis that the appellant was required to present all his claims prior to the hearing held under s 425 of the Migration Act.

5. The Court erred in finding that the ground of judicial review specified in s 476(1)(g) and 476(4)(b) Migration Act was not made out in circumstances where his Honour found that the Tribunal had made eight findings of fact in circumstances where the alleged facts did not exist.

Particulars

a. Error in failing to find that,

i The errors of fact found did not permeate the whole of the decision, so that the decision was relevantly based on those facts found by the Court not to exist.

ii The Tribunal's findings of facts that remained after the exclusion of those found not to exist objectively justified the Tribunal's decision within the meaning of s 476(1)(g) Migration Act.

6. The Court erred in failing to address ground 2 particular (a) of the appellant's further amended application dated 2 March 2001"

24 The appellant's written outline of submissions identified the issue on the appeal as follows:

"(a) The proper construction of the appellant's claims as put to the Refugee Review Tribunal (paragraph 2 amended notice of appeal). This involves a consideration of,

(b) (i) whether the matters particularised in paragraph 3 of the amended notice of appeal are relevant considerations, and if so,

(ii) whether the Tribunal failed to take these into account in making its decision.

(c) Whether the appellant's claim to have been arrested for the purpose of extortion take his claims outside the definition of a refugee in Article 1A(2) of the Refugee Convention (paragraph 2 amended notice of appeal).

(d) Whether the Tribunal approached the evidence on the basis that the appellant was required to present all his claims prior to the hearing? (paragraph 4 amended notice of appeal).

(e) Were the eight facts found by his Honour not to exist sufficient to make out the ground of review in s 476(1)(g) and s 476(4)(b) Migration Act? (paragraph 5 amended notice of appeal)."

25 During the course of argument on the appeal the appellant was granted leave to amend his amended notice of appeal to add the additional ground which became ground 6 of the further amended notice of appeal.

consideration

26 It is convenient to consider grounds 2, 3 and 6 together as each of them is concerned with the issue of the proper construction of the appellant's claims before the Tribunal. Mr Karp, counsel for the appellant, argued that both the Tribunal and the primary judge overlooked the distinction between actual or imputed sympathy and support for the LTTE and actual or imputed sympathy and support for Tamils. In the course of argument before this Court Mr Karp agreed that the distinction which he sought to draw between support for the LTTE and support for Tamils was analogous to the distinction between support for the IRA or the Real IRA and support for the Republican cause in Northern Ireland.

27 It is plain that Mr Karp, who also appeared for the appellant at first instance, did press ground 2(a) before the primary judge. At p 10 of the transcript of the hearing at first instance, Mr Karp is recorded as saying:

"…also what wasn't addressed, which was the foundation of the issue, where [were?] the claims that he made between pages 64 and 66 of the Court Book to the effect that in the 1980s his problems were simply that he associated with Tamils and that he was vilified assaulted and extorted because of that association. Now, in my submission, those individual claims are material questions of fact…."

28 At pages 64-66 of the Court Book at first instance appear pages of the appellant's statement referred to in [5] above. The pages there reproduced contain claims that the appellant was branded a Tamil because of his association with his Tamil cousins and that police officers and local thugs assaulted him during minor racial attacks while he was accompanying his Tamil cousins. They further contain claims that after the riots in 1983 he was arrested and assaulted for entertaining Tamil youths in his residence and threatened with imprisonment if he continued to move with his Tamil cousins. In addition they can be understood to contain claims that in May 1989 he was warned by the police that they had information about his dealings with Tamil customers and that he should be prepared to answer inquiries, presumably by the police, about his Tamil customers.

29 It seems likely that the primary judge did overlook the relevance placed by the appellant on his claim that the Sri Lankan authorities considered him to be sympathetic or supportive of the Tamil cause, as opposed to the LTTE, because of his association with Tamils. His Honour's judgment contains no express reference to this claim and appears to proceed throughout on the basis that the political opinion which the appellant claimed was imputed to him was support for the LTTE.

30 Both parties invited the Court, if it formed the view that the primary judge overlooked the reliance placed by the appellant on ground 2(a), to consider the ground itself rather than to remit the matter to the primary judge for further consideration. I turn therefore to consider the Tribunal's written reasons for decision as far as the issue raised by ground 2(a) is concerned.

31 The written reasons for decision of the Tribunal refer explicitly to the appellant's claims to have been visited and assaulted in 1983 while associating with his Tamil cousins, and further to have been threatened with imprisonment if he did not cease to associate with his Tamil relatives. The written reasons for decision also refer to the appellant's claim that in 1986 he was threatened and assaulted by Sinhalese thugs and police officers in civilian dress because he assisted Tamil customers in his travel agency, and to his claim concerning the interest which the police took in him in 1989 after they arrested his three Tamil customers.

32 Importantly, however, the tribunal concluded that notwithstanding the occurrence of the above, and other incidents, the appellant had no fear of any Convention-related harm befalling him when he returned to Sri Lanka from Australia in September 1997.

33 The only incident subsequent to September 1997 upon which the appellant relied in support of his claim that he has a well-founded fear of persecution should he return to Sri Lanka, was the claimed arrest which he asserted triggered his departure from Sri Lanka in March 1998. The appellant claimed in his written statement of 21 April 1998 that he was arrested by the CID in February 1998 and accused of helping Tamils flee the country and evade arrest. He said that at this time he was accused of doing the same business as Suthesh. For the following reasons it seems plain that the Tamils that he was accused of helping at this time were LTTE militants. First, the relevant business of Suthesh was, according to the appellant's statement of 21 April 1998, helping LTTE militants to flee from Colombo by illegal means and secondly, the Tamils who needed to flee the country to evade arrest may be assumed to be Tamils with a connection with the LTTE.

34 Before the Tribunal, but not in his written statement of 21 April 1998, the appellant stated, in respect of his claimed arrest in February 1998, that his employer had paid a large bribe to secure his release, and that the police had arrested him in order corruptly to extort money.

35 The Tribunal concluded that the appellant was not in truth arrested in February 1998. Among the reasons which it gave for not believing the

appellant's evidence in this regard were the facts that he claimed for the first time before the Tribunal that a bribe was paid for his release from arrest in February 1998, and the fact that he also claimed for the first time before the Tribunal that on his release from arrest he went into hiding until his departure from Sri Lanka. Although the appellant has complained, both before the primary judge and before this Court, that the Tribunal proceeded on the basis that the appellant was required to set out all of his claims for a protection visa prior to his Tribunal hearing (as to which see [41] below), he has not otherwise sought to attack the finding of the Tribunal that he was not arrested in February 1998.

36 Having regard to the findings made by the Tribunal, identified in [32] and [35] above, it seems to me that the Tribunal did not fail to address the relevant issue, namely the issue of whether the appellant had a well-founded fear of persecution for a Convention reason because he was considered by the police to hold a political opinion sympathetic or supportive of Tamils because of his association with Tamils. Rather, the Tribunal gave consideration to the claims of the appellant that he suffered harm at the hands of the authorities and Sinhalese thugs because of his association with Tamils. It concluded that his decision to return to Sri Lanka in September 1997, notwithstanding his having suffered the claimed harm, revealed that he did not at that time have a genuine fear of Convention-related harm arising from his association with Tamils. It further concluded, as I understand the reasons of the Tribunal, that nothing happened thereafter which altered this position. The only later incident relied on by the appellant was an incident which the Tribunal found that the appellant had fabricated.

37 The appellant did not contend before the Tribunal that anything happened after September 1997 which caused him to develop a fear that he did not have in September 1997 of persecution simply because of an imputed political opinion supportive of the Tamil cause. In the circumstances it was not necessary for the Tribunal to address the issue of whether the appellant was considered by the police to hold a political opinion sympathetic to or supportive of Tamils. The conclusion of the Tribunal that he did not have a relevant fear of persecution rendered that issue irrelevant.

38 I conclude that ground 2(a) was without merit, and nothing now turns on the fact that the primary judge may have overlooked the reliance that the appellant placed on it (ground 6 of the further amended notice of appeal). Further, in my view, nothing turns on the alleged failure of the Tribunal to address the issue of whether the appellant was considered by the police to hold a political opinion sympathetic to or supportive of Tamils because of his association with Tamils (ground 3(b) of the further amended notice of appeal).

39 For the present purposes the accuracy of the conclusion drawn by Hathaway in *The Law of Refugee Status* (1991) that:

"Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of political opinion."

may be accepted (see *V v Minister for Immigration and Multicultural Affairs* (1999) FCA 428; 92 FCR 355 (FC) per Wilcox J at [14] and Hill J at [33]). On this basis, actions perceived by the governmental authorities of Sri Lanka to be supportive of the aspirations of the Tamil minority may be considered to be the expression of political opinion. That is, evidence that the police were subjecting the appellant to serious harm, such as the deprivation of his liberty and serious assault, for the purpose of extorting money from him or those connected with him for reason of their perception that he was supportive of the aspirations of the Tamil minority could well amount to evidence of persecution for a Convention reason. I do not consider that the primary judge sought to suggest to the contrary. His Honour did, however, as I understand his reasons for judgment, indicate (rightly, in my view) that where extortion is practiced against a person in circumstances in which he or she neither has, nor has imputed to him or her, any relevant political opinion, the extortion cannot logically be regarded as persecution for reason of his or her political opinion. If the person against whom the extortion is perceived is particularly vulnerable to extortion by reason of some other characteristic protected by the Convention (ie race, religion, nationality or membership of a particular social group), it may be that he or she is being persecuted for reason of that characteristic. However, understandably, no such claim was advanced in this case. It could not have been seriously contended that the appellant had a well-founded fear of persecution by reason of being Sinhalese, and there was no evidence before the Tribunal that Sinhalese in Sri Lanka who associate with Tamils comprise a particular social group in that country.

40 Grounds 2, 3 and 6 of the further amended notice of appeal must all, in my view, fail.

41 Ground 4 of the further amended notice of appeal challenges the conclusion of the primary judge that the Tribunal did not state or assume that the appellant was required to make all of his claims at the outset when he applied for his visa. His Honour said [68]:

"It was for the RRT to form a view as to whether it was reasonable to expect Mr Rajanayake to have made the claims in question which he made in response to her questions on the hearing, at the outset. It was the onerous responsibility of the presiding Member to determine, taking a realistic view of all the circumstances, the significance of his omission to make the claims in the form in which he made them at the hearing, in his earlier written statement. These are not matters for me upon a review of the RRT's decision on the limited grounds allowed by subs 476(1) of the Act."

In my view the approach which his Honour took to this issue was plainly correct. Ground 4 of the further amended notice of appeal is, in my view, without merit.

42 Finally, by ground 5 of the further amended notice of appeal, the appellant argued that the primary judge erred in failing to find that the "no evidence"ground of review found in pars 476(1)(g) and 476(4)(b) was not made out. As Mr Karp acknowledged that for the ground of appeal to succeed, the Court must conclude that at least two previous decisions of Full Court of this Court are wrongly decided. Mr Karp referred to *Minister for Immigration and Multicultural Affairs v Indatissa* [2001] FCA 181; 64 ALD 1 ("*Indatissa*") and *Jegatheeswaran v Minister for Immigration and Multicultural Affairs* [2001] FCA 865.

43 Paragraph 476(1)(g) of the Act provides that the following is a ground upon which the Court may review a decision of the Tribunal:

"That there was no evidence or other material to justify the making of the decision."

However, the ground of review specified by par 476(1)(g) is qualified by par 476(4)(b) which provides:

"The ground specified in paragraph (1) (g) is not to be taken to have been made out unless:

(a) …

(b) The person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

44 Mr Karp contended that on the proper construction of par 476(1)(g) it is a question of fact and degree whether the evidence or other material before the Tribunal justified the making of the decision. He submitted that *"it will almost inevitably be necessary for the Court to engage in a qualitative assessment of the remainder of the evidence".*

45 However, in *Indatissa* the Court (Sundberg, Emmett and Conti JJ) at [26]-[29] said:

"There are three requirements for establishing the ground of s 476(1)(g), as qualified by s 476(4)(b). The first requirement, to be found in s 476(1)(g) itself, is that there was no evidence or other material to justify the making of the decision. The second requirement, as found in the first limb of s 476(4)(b) is that the decision under review is based on the existence of a particular fact. The third requirement, found in the second limb of s 476(4)(b), is that that fact did not exist. Unless each of those requirements is satisfied, the ground is not be [sic] made out.

It is not sufficient simply to establish the two matters referred to in s 476(4)(b). That paragraph qualifies s 476(1)(g). It does not constitute a definition of what will amount to there being no evidence or other material to justify the making of the relevant decision. That is to say, it is not sufficient to show that a decision was based on the existence of a particular fact and that that fact did not exist. If that was sufficient, any

decision of a Tribunal based on the existence of a particular fact could be challenged in the Federal Court by adducing evidence designed to persuade the Federal Court to reach a different conclusion concerning the existence of that fact. Such an approach is demonstrably unsound. It is beyond question that the power of the Court under s 476(1) generally and s 476(1)(g) in particular does not extend to a re-examination of any of the factual matters ventilated before the Tribunal.

In other words, it is only if it can be shown that there was no evidence or other material to justify a decision that it is necessary to consider s 476(4). If there is before the Tribunal any evidence or material capable of supporting the particular fact on the existence of which the decision is based, the ground cannot be made out.

Assuming, for present purposes, that the Tribunal's decision was based on the existence of a particular fact, namely, the discrepancy between the evidence of Mr Indatissa and the evidence of his father's letter, there was in the present case evidence capable of supporting the existence of such a fact. That was the evidence tendered by Mr Indatissa himself, namely, Mr Jayakody's translation of his father's letter. The first enquiry should have been whether there was any evidence or material capable of supporting the so-called particular fact. Once that enquiry established that there was such evidence, that should have been an end of the matter. It was impermissible to take account of further evidence designed to contradict evidence before the Tribunal upon which the Tribunal based its decision."

> 46 A Full Court comprised of five judges considered the issue of circumstances in which one Full Court of this Court should embark on a reconsideration of a previous Full Court decision in *Transurban City Link Ltd v Allan* (1999) FCA 1723; 95 FCR 553. The Full Court at [27]-[31] said:

"It is not in doubt that a Full Court of this Court has power to decline to follow the previous decision of a differently constituted Full Court. The Court is not bound to perpetuate error if error there be. Nor is it in doubt that while the Court has that power, it is a power which should be exercised with great care. The doctrine of precedent, which is fundamental to the common law, brings with it the consequence that decisions of an intermediate court of appeal will be binding on single judges within the same court hierarchy. They will be relied upon by the broader community and the profession. Decisions of a Full Court of this Court are entitled to due respect and will not be lightly departed from.

In Nguyen v Nguyen (1990) 169 CLR 245, at 268-269, Dawson, Toohey and McHugh JJ, observed that the extent to which the appellate court of the Supreme Court of a State regards itself as free to depart from its own previous decisions must be a matter of practice for the court to determine for itself, citing the judgment of Bowen CJ and Forster J in Chamberlain v The Queen (1983) 72 FLR 1 at 8-9, and noted also that the Full Court of the Federal Court will depart from a previous decision if convinced that it is wrong. Their Honours then said:

> 'Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent

> and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law ...'.

See also Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485 at 492.

A differently constituted Full Court would, of course, decline to follow the decision of another Full Court if it concluded that the previous decision was clearly erroneous. It would be wrong to do this merely because the matter was one on which minds might differ: cf Magman International v Westpac (1991) 32 FCR 1 at 20 per Hill J.

What their Honours said in Nguyen must be read in the context of their previous remarks. The statement of principle in Chamberlain v The Queen, cited with evident approval by their Honours, was qualified by the word "normally". The use of expressions of this nature leaves the way open for an approach that is appropriate to the circumstances of a particular case: see La Macchia v Minister for Primary Industries and Energy (1992) 110 ALR 201 at 204. Towards the conclusion of their joint judgment in Nguyen, Dawson, Toohey and McHugh JJ, noting that appeals to the High Court were now by special leave only, and that the appeal courts of the Supreme Courts of the States and of the Federal Court were, in many instances, courts of last resort for all practical purposes, observed (at 269-270):

> 'In these circumstances, it would seem inappropriate that the appeal courts of the Supreme Courts and of the Federal Court should regard themselves as strictly bound by their own previous decisions. In cases where an appeal is not available or is not taken to this Court, rigid adherence to precedent is likely on occasion to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty.'

Beyond this principle, we do not think it possible, or even desirable, to formulate exhaustive criteria upon which this Court should act when asked to reconsider an earlier decision, for so much will depend upon the nature of the controversy, the strength of the arguments and the particular circumstances attendant upon the case. …"

47 In my view, it cannot be said that the decision of the Full Court in *Indatissa* is clearly erroneous. It is consistent with long established authority that an administrative body such as the Tribunal does not commit an error of law merely because it finds fact wrongly or on a doubtful basis, or because it adopts unsound or questionable reasoning (see *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) FCA 719; 93 FCR 220 per Kenny J at [146]). I consider that it would be wrong for the Court to decline to follow *Indatissa.* As Mr Karp acknowledged, the adoption of this view means that ground 5 of the further amended notice of appeal must fail.

48 The appeal, in my view, should be dismissed with costs.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson

Associate:

Dated: 26 February 2002

Counsel for the Appellant:	Mr L Karp
Solicitor for the Appellant:	Dominic David Stamfords
Counsel for the Respondent:	Mr G T Johnson
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	14 August 2001
Date of Judgment:	26 February 2002