FEDERAL COURT OF AUSTRALIA

MIGRATION – Refugee – returning visa applicant to third country in which he had a right to permanent residence without assessing his status as a refugee – whether return would constitute a breach of Art 33 of the Convention.

Migration Act 1958 (Cth) s 36, s 65

Convention Relating to the Status of Refugees 1951, Arts 1E, 28, 31, 32, 33

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 151 ALR 685 (applied)

Re Attorney-General of Canada and Ward (1993) 103 DLR (4th) 1 (referred to)

KARTHIGESU RAJENDRAN (Applicant) **v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** (Respondent)

SG 61 of 1998

VON DOUSSA, O'LOUGHLIN, FINN JJ

ADELAIDE

4 SEPTEMBER 1998

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY	SG 61 of 1998

BETWEEN:	KARTHIGESU RAJENDRAN Applicant
AND:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGES:	VON DOUSSA, O'LOUGHLIN, FINN JJ
DATE OF ORDER:	4 SEPTEMBER 1998
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

The appeal be dismissed.

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

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REASONS FOR JUDGMENT

The appellant, Karthigesu Rajendran, a Sri Lankan national, left his home country in March 1985. After periods in India and England he went with his family to New Zealand in January 1987. On 21 July of that year he was granted permanent residence status in New Zealand, a status the entitlement to which he presently retains. After living for several years in that country, he travelled to the United States and then to Canada where he lived for several years. He returned to New Zealand in late 1994. While there he renewed his Sri Lankan passport. In November 1995, he entered Australia on a visitor's visa. On 23 January 1996 he applied for a protection visa under the *Migration Act* 1958 (Cth) ("the Act"). His failure to secure the grant of such a visa and his lack of success both in administrative appeal and judicial review proceedings have led to his present appeal to this court.

Mr Rajendran's claim to refugee status stemmed from persecution he alleges he suffered in Sri Lanka then in Canada and New Zealand, at the hands of both the Sri Lankan Army (in Sri Lanka) and the LTTE (in all three named countries), on account of his being a Tamil.

The matter that has proved fatal to his application both in the Refugee Review Tribunal ("the RRT") and at first instance in this court, has been the connection Mr Rajendran has with New Zealand. In the RRT that connection was viewed as being such as to satisfy the requirements of Art 1E of the 1951 *Convention Relating to the Status of Refugees* ("the Convention") and hence to exclude him from the scope of the Convention. In this court at first instance the trial judge found it unnecessary to consider the application of Article 1E, it being found that, consistent with its

Convention obligations under Art 33, Australia could return Mr Rajendran to New Zealand without the need first to consider his possible refugee status under Art 1. His Honour's decision was founded on the reasoning of the Full Court of this court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 151 ALR 685, a decision that was delivered after the Tribunal's decision, but before that of the trial judge.

To appreciate the varying approaches taken below, as also the submissions put to us by Mr Rajendran, it is necessary to refer briefly to the *Migration Act* and the Convention as also to the *Thiyagarajah* case.

The Act and the Convention

The scheme of the Act is to make the existence of protection obligations under the Convention the central criterion to be fulfilled if a protection visa is to be granted to a person claiming to be a refugee: see s 36, s 65, Pt 866 of the Migration Regulations and *Thiyagarajah's* case, above, at 693.

The Convention in Article 1 defines who is a refugee for its purposes. That definition contains both inclusionary and exclusionary criteria. Article 1E is of the latter kind. It provides:

"E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

It was in reliance upon this Article, that the Tribunal concluded that, in light of Mr Rajendran's right to permanent residence in New Zealand and the rights and obligations attaching to that status, the Convention did not apply to him.

Under international law the primary obligations imposed upon a Contracting State in relation to a refugee who seeks asylum are to be found in Arts 31, 32 and 33. Only the latter two are of present relevance. They provide:

"Article 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

Prohibition of expulsion or return

("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

As noted earlier, the trial judge found that the return of Mr Rajendran to New Zealand would not be in breach of Art 33 and that it was not necessary to assess his claim to refugee status before so doing.

For the sake of completeness given Mr Rajendran's submissions in this appeal it is appropriate to note the provisions of Art 28:

"Article 28

Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article."

Thiyagarajah's Case

This decision concerned a Sri Lankan Tamil who, though granted refugee status in France, came to Australia as a visitor and applied for a protection visa for himself and his family. France had accorded him permanent residence, a travel document (in the form required by Art 28 of the Convention), and the right to apply for French citizenship after a designated period.

In finding that Australia did not owe protection obligations to the visa applicant, von Doussa J (with whom Moore and Sackville JJ agreed) gave extended consideration to the rights and obligations that were in Article 33. For present purposes we would merely note a number of his Honour's conclusions:

(i) *"Article 33 imposes the principal obligation required by the Refugees Convention on a Contracting State. The Contracting State must not expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of a Convention reason*": at 698.

(ii) *"The obligations imposed by Art 33 fall short of creating a right in a refugee to seek asylum, or a duty on part of the Contracting State to whom a request for asylum is made, to grant it, even if the refugee's status as such has not been recognised in any other country"*: ibid.

(iii) *"It is not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status. It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee, and has accorded that person effective protection, including a right to reside, enter and re-enter that country"*: at 702.

(iv) *"The prohibition imposed by Art 33 is against returning a refugee 'to the frontiers of territories where …'. The territory may be to a country other than the refugee's country of nationality … but the prohibition extends also to a return to the frontiers of the country of nationality. Having regard to this possibility, it would be a very strange result if different standards for the threat of harm were to be applied under Arts 1A(2) and 33 respectively. This court should follow the decision of the House of Lords in [R v Secretary of State for the Home Department; Ex parte Sirakamaran [1988] AC 958], and hold that the same standard should apply under each Article"*: at 704-705.

von Doussa J concluded in the circumstances of that case that (a) subject to Art 33, Australia did not owe protection obligations to the visa applicant as he had been recognised as a refugee in France and been accorded the rights and obligations of a refugee under the Convention; and (b) on the Tribunal's findings of fact, effective protection was available to the applicant in France so that Art 33 had no application to him.

The Present Appeal

The trial judge in this matter concluded, correctly in our view, that where an applicant for a protection visa has already secured rights and entitlements in a third country the operation of *Thiyagarajah* ought not be restricted to cases where those rights and obligations result from that country's grant of refugee status to that person. His Honour concluded that it should extend at least to cases where the visa applicant is entitled to permanent residence, and, in time, to become a citizen, and has been accorded that "effective protection" referred to in *Thiyagarajah* in proposition (iii) above, by the third country to which it is proposed to return the applicant. And in light

of the Tribunal's findings his Honour concluded that New Zealand offered such entitlements and protection and that, in consequence, the principles of international law did not preclude Australia as a Contracting State from returning Mr Rajendran to New Zealand. We would note specifically that his Honour considered that the Tribunal did not regard Mr Rajendran as being exposed to any real risk or real chance of being returned by New Zealand to Sri Lanka.

Subject to noting a non-material error of fact, we agree with his Honour's reasoning and conclusions and that without more would be sufficient to dispose of this appeal. It is out of deference to Mr Rajendran that we think it appropriate to consider briefly the principal submissions he made in support of his appeal.

Mr Rajendran considers he currently has indeterminate civil status, not being either an assessed refugee or a New Zealand national. And though he may have a right to return to New Zealand, he does not have the travel documents the Convention would allow under Art 28, but only a Sri Lankan passport that could be cancelled.

These, essentially, are the background considerations upon which he relies to inform his more specific challenges to the trial judge's reasons.

The first, and what he regards as the critical, error the trial judge is said to have made is the statement in his Honour's reasons that Mr Rajendran travelled to Australia on "travel documents issued by New Zealand" that contain a right of re-entry to New Zealand.

While his Honour was clearly mistaken in this, the statement was made in a context where, though recognising Mr Rajendran did not have Art 28 travel documents containing a right of re-entry into New Zealand, he nonetheless had a right of re-entry into New Zealand. The real matter of concern was with the right of re-entry not the documents evidencing it. This error had no material bearing on any issue his Honour decided and provides no basis for impugning the judgment under appeal. We nonetheless acknowledge the significance the error has to Mr Rajendran because he considers that without Art 28 travel documents his freedom of international movement is not secure as Sri Lanka might cancel his passport. We note in passing without further comment that in 1994 – 9 years after leaving Sri Lanka – Mr Rajendran sought and obtained the renewal of his Sri Lankan passport: cf Goodwin-Gill, *The Refugee in International Law*, 81. Whatever Mr Rajendran's apprehensions in relation to cancellation, they have no bearing on the question whether in returning him to New Zealand Australia would be in breach of Art 33.

Secondly, it is claimed that the trial judge erred in concluding Mr Rajendran had permanent residence status in New Zealand. However, it is quite clear that both his Honour and the Tribunal correctly understood the workings of New Zealand's immigration law. As the holder of an unexpired Returning Resident's Visa, Mr Rajendran was entitled to the grant of a residence permit. That his residence permit expired each time he left the country is of itself of no present significance. The right to re-enter and to reside permanently is tied to the Returning Resident's Visa.

Thirdly, it is claimed that, as he was lawfully in Australia, Article 32 prevented his expulsion (if he was a refugee). It is unnecessary here to consider the burden of this Article in any detail: cf Goodwin-Gill, above, at 307-308; Crawford and Hyndman, "Three Heresies in the Application of the Refugee Convention" (1989) 1 IJRL 155 at 176-177. In the present case Mr Rajendran entered the country on a visitor's visa. He now holds a bridging visa. If his application for a protection visa is ultimately unsuccessful (notwithstanding application for judicial review etc) that visa will cease to have effect at the time stipulated in the relevant Migration

Regulations: see eg Sch 2, Subclass 051, para 051.5; whereupon he will cease both to be lawfully in Australia and to be able to invoke, Art 32.

Finally, Mr Rajendran considers that he is in a situation in which there is a real chance of his being returned to Sri Lanka from New Zealand. We have already noted the trial judge's conclusion on the effect of the Tribunal's findings and of their being inconsistent with such a chance. We agree with his Honour's conclusion but consider it appropriate to add this much. Because the issue before the Tribunal was limited to the application of Art 1E the Tribunal did not, as such, address the question of the chance of Mr Rajendran's possible return to Sri Lanka. Nonetheless its finding that he was entitled to reside in New Zealand is itself inconsistent with there being the chance he apprehends. It was in consequence proper for the trial judge to attribute to the Tribunal's findings the effect he did. Moreover, it was not impermissible for him to advert to the responsibility New Zealand had as a signatory to the Convention and to assume that it would honour its obligations thereunder including its Art 33 obligation: cf *Re Attorney-General of Canada and Ward* (1993) 103 DLR (4th) 1 at 23-24.

Distinct from Art 33, appeal was also lodged and submissions made against the trial judge's brief conclusions on Art 1E. In light of the view we have taken of Art 33 it is unnecessary for us to consider Art 1E and we refrain from so doing.

The appeal should be dismissed.

I certify that this and the preceding seven (7) pages are a

true copy of the Reasons for Judgment of the Court.

Associate:

Dated: 4 September 1998

Applicant appeared in person	
Counsel for the Respondent:	Mr J Basten QC with Ms S Maharaj
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	31 August 1998
Date of Judgment:	4 September 1998