FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural Affairs v Rajalingam [1999] FCA 719

MIGRATION – fact-finding by Refugee Review Tribunal - speculation as to the future –so-called "What if I am wrong?" test an aspect of determining whether an applicant has a well-founded fear of persecution

WORDS AND PHRASES: *"What if I am wrong?"*

Migration Act 1958 (Cth), ss 36(2), 48B, 65(1), 411(1), 412, 414(1), 415(1), 417, 420(2), 430(1), 431, 475(1), 476(1), 481(1), 485(1)

Migration Regulations 1994 (Cth), Sch 2

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, followed

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559, followed

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638, cited

Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, cited

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, cited

Minister for Immigration and Multicultural Affairs v Epeabaka (1999) 160 ALR 543, followed

Kopalapillai v Minister for Immigration and Multicultural Affairs, unreported, Full Federal Court, 8 September 1998, cited

Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe (1999) 162 ALR 1, discussed

Luu v Renevier (1989) 91 ALR 39, cited

Minister for Immigration and Ethnic Affairs v Singh (1997) 74 FCR 553, cited

Attorney-General (NSW) v Quin (1990) 170 CLR 1, cited

Wu v Minister for Immigration and Ethnic Affairs (1994) 48 FCR 294, cited

Wu v Minister for Immigration and Ethnic Affairs (No 2) (1994) 51 FCR 232, cited

Thanh Phat Ma v Billings (1996) 71 FCR 431 cited

Guo v Minister for Immigration and Ethnic Affairs (1996) 64 FCR 151, cited

Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280, cited

Eshetu v Minister for Immigration and Ethnic Affairs (1997) 71 FCR 300, cited

Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21, followed

Sun Zhan Qui v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71, cited

X v Minister for Immigration and Multicultural Affairs [1999] FCA 697, cited

Chand v Minister for Immigration and Ethnic Affairs, unreported, von Doussa, Moore, Sackville JJ, 7 November 1997, cited

Zuway v Minister for Immigration and Ethnic Affairs [1998] FCA 1738, cited

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, cited

Roads Corporation v Dacakis [1995] 2 VR 508, cited

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS v RAJALINGAM

VG 534 OF 1998

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v CORTEZ AND ANOR

VG 425 OF 1998

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v DEMIR

VG 610 OF 1998

SACKVILLE, NORTH, KENNY JJ

MELBOURNE

3 JUNE 1999

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 534 OF 1998 VG 425 OF 1998 VG 610 OF 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

VG 534 of 1998:

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Appellant
AND:	ARAVINTHAN RAJALINGAM Respondent

VG 425 of 1998:

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Appellant

AND: CLAUDIA MARIA CORTEZ

First Respondent

MARIA AMANDA ALVAREZ

Second Respondent

VG 610 of 1998:

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Appellant

AND: NILUFER DEMIR

Respondent

JUDGES: SACKVILLE, NORTH, KENNY JJ

PLACE: MELBOURNE

DATE: 3 JUNE 1999

THE COURT ORDERS THAT:

VG 534 of 1998:

1. The appeal be allowed.

2. The orders made by the primary Judge on 14 September 1998 be set aside.

3. The amended application of the respondent dated 21 October 1997, for an order of review of the decision of the Refugee Review Tribunal ("RRT") made on 16 June 1997, be dismissed.

4. The respondent pay the appellant's costs of the appeal, and of the proceedings before the primary Judge.

VG 425 of 1998:

5. The appeal be allowed.

6. The orders made by the primary Judge on 10 August 1998 be set aside.

7. The applications of each of the respondents dated 30 January 1997, for an order of review of the decision of the RRT made on 21 January 1997, be dismissed.

8. The respondents pay the appellant's costs of the appeal, and of the proceedings before the primary Judge.

VG 610 of 1998:

9. The appeal be allowed.

10. The orders made by the primary Judge on 19 October 1998 be set aside.

11. The amended application of the respondent dated 11 August 1997, for an order of review of the decision of the RRT made on 3 December 1996, be dismissed.

12. The respondents pay the appellant's costs of the appeal, and of the proceedings before the primary Judge.

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

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BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Appellant

AND: CLAUDIA MARIA CORTEZ

First Respondent

MARIA AMANDA ALVAREZ

Second Respondent

VG 610 of 1998:

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Appellant

AND: NILUFER DEMIR

Respondent

JUDGES:	SACKVILLE, NORTH & KENNY JJ
DATE:	3 JUNE 1999
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

SACKVILLE J:

The Proceedings

1 Three appeals by the Minister for Immigration and Multicultural Affairs ("the Minister") have been heard together. The appeals are from orders made by the same learned primary Judge in three separate proceedings. In each case, the primary Judge set aside the decision of the Refugee Review Tribunal ("RRT") and directed that the matter be remitted to the RRT, differently constituted, for reconsideration according to law.

2 The three appeals were listed together because they were thought to raise the same, or substantially the same, question. The question identified is whether the primary Judge was correct in concluding in each case that the RRT had erred in law, by failing to ask itself "What if I am wrong?" in relation to

its findings of fact. The primary Judge held in each case that the RRT's failure to ask that question flawed its consideration of whether the particular applicant had a "well founded fear of being persecuted" within Article 1A(2) of the *Convention Relating to the Status of Refugees* 1951*,* as amended by the *Protocol Relating to the Status of Refugees* 1967("the *Convention*"). As will be seen, one of the three appeals raises an additional question.

The Legislation

3 Section 36(2) of the *Migration Act* 1958 (Cth) ("*Migration Act*") provides that a criterion for the grant of a protection visa is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the *Convention.* Article 1A(2) defines a refugee as any person who,

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

4 Section 65(1) provides that if the Minister is satisfied that the criteria for a visa prescribed by the *Migration Act* or the *Migration Regulations* have been satisfied, the Minister is to grant the visa.

5 A decision by the Minister or the Minister's delegate to grant a protection visa is an "RRT-reviewable decision" which the RRT must review, should a valid application for review be made to it: *Migration Act,* ss 411(1)(c), 414(1). For the purposes of the review of an RRT-reviewable decision, the RRT may exercise all the powers and discretions that are conferred by the *Migration Act* on the person who made the decision: s 415(1).

6 The grounds of review of "judicially-reviewable decisions" (including those made by the RRT: s 475(1)(b)) are specified in s 476(1). They include:

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

Minister v Rajalingam

7 It is convenient to consider first the background to the appeal in *Minister v Rajalingam*. In the light of the conclusions reached on that appeal, the remaining two appeals can then be addressed.

The Claim

8 The respondent to this appeal ("Mr Rajalingam") is a citizen of Sri Lanka, born in 1968, who arrived in Australia on 25 March 1997. He had no entry visa and was detained by immigration officials at Melbourne airport. Mr Rajalingam thereafter applied for a protection visa, but his application was refused on 21 May 1997.

9 Mr Rajalingam applied for review of the delegate's decision by the RRT. On 16 June 1997, he attended a hearing before the RRT, assisted by a registered migration agent. On the same day, the RRT affirmed the delegate's decision not to grant Mr Rajalingam a protection visa.

10 The RRT summarised Mr Rajalingam's case as follows (Mr Rajalingam is referred to in the reasons as "the Applicant"):

"The Applicant claimed that he is a Tamil who was born in the same town on the Jaffna peninsula as the leader of the LTTE (Liberation Tigers of Tamil Elam]. He lived about 20 kilometres from Jaffna near the largest army base in the region and was often the subject of scrutiny and harassment by army personnel. In 1990, there was an attack on the base and the Applicant's family was forced to move, spending the next year in several houses as refugees. The family moved to Colombo in 1991 and the Applicant studied for his O- and A Levels at the Hindu College. He was only permitted to go out for school as his mother was concerned he would be harassed at checkpoints and in house to house searches. He sat for A Levels in 1994 but did not obtain the results he needed to enter university. However, he sat those exams again in 1995 and was admitted to the University of Colombo. He explained that this was a rare feat as the policies of higher education greatly favour Sinhalese students over Tamils.

Prior to sitting the exams a second time, he had been picked up during a security sweep around the time of the breakdown of the Peace Accord between the LTTE and the new People's Alliance (PA) government. He was detained for three days and then released after his landlord, a police inspector, intervened on his behalf. This experience of being arrested and questioned lead him to hating the Sri Lankan Security Forces (SLSF) and to start sympathising with the LTTE.

Soon afterwards, he met a former school friend – Kopan – whom he believes was a member of the LTTE and who recruited him as a helper of that organisation. The Applicant was introduced to two other men he believes were also members of the LTTE and they collected donations from designated people and on one occasion the Applicant stored a large sum of money for them at his house.

In November 1995, the Applicant's uncle passed away. He had been a long-term Member of Parliament for a pro-Tamil party and his son became a known member of the LTTE suicide squad, the Black Tigers. After his uncle's death the police and some members of anti-LTTE paramilitary groups severely questioned the Applicant about him and other LTTE members, although he was not detained or mistreated. Nevertheless, he continued to work for the LTTE.

In November 1996, the Applicant was detained at his home, taken to the local police station and then transferred to CID headquarters, where he was seriously

mistreated. After a few days, Kopan was brought in, having been obviously beaten, and he identified the Applicant. The latter then admitted he had raised money for the LTTE and was detained for a further two months, during which he was mistreated. He was only released when his landlord – the police inspector – paid bribes to four people. Even then, he was required to report to the police station every week.

He was advised to leave the country, so he arranged a passage out through an agent. He had already obtained a passport some time in 1994 and was able to leave through the normal channels, although he was accompanied by the police inspector and the agent. The latter accompanied him to Singapore and on to Hong Kong, where he took the Applicant's passport and gave him a boarding pass for a plane to Australia.

The Applicant fears that he will be questioned at the airport on his return and his past will be investigated and his links with the LTTE discovered. He believes he will then be detained tortured and killed. While his name was not on an alert list when he left, the fact that he has since breached his reporting conditions will have caused his name to be added to lists of wanted people. In addition, he fears that the policemen who took bribes for his release will harm him to avoid the possibility that he will disclose that they took bribes. In support of his claims, the Applicant's adviser submitted various materials regarding the treatment of Tamils in Sri Lanka and referred to other Tribunal decisions where young Tamil men were found to be refugees.

...

The Applicant's claims essentially flow from his affiliation with the LTTE. He claims the security services or other anti-LTTE military groups will persecute him because he has assisted the LTTE and is believed to be an active supporter or member of that group. Further, he claims that corrupt police will harm him because he may draw attention to their corrupt practice of accepting bribes for the release of prisoners."

The RRT's Reasons

> 11 The RRT accepted that Mr Rajalingam was a Tamil, who had been born on the Jaffna peninsula and had moved with his family to Colombo in 1991 to avoid the fighting in his home region. It also accepted that Mr Rajalingam had completed his secondary education and in 1995 had achieved the rare distinction of being a Tamil accepted into the University of Colombo.
>
> 12 The RRT made these comments on Mr Rajalingam's claims:

"While it is plausible that the Applicant may have been picked up during security sweeps in April 1995 (when the Peace Accord broke down) and in November 1996 (after a massive explosion at Colombo oil refinery), his story about how those incidents will lead to persecution, in the context of other information, does not really ring true. He claimed that being detained in April 1995, not long before he re-sat his A level exams, resulted in developing an antithesis to the SLSF as a consequence of

that detention. He had previously claimed he was constantly harassed near his home town, that he was forced to move and live as a refugee for a long period and was then impelled to move to Colombo, where he was in constant fear of being the subject of house to house and street security checks, yet none of this seemed to raise his ire at the SLSF. On the other hand, if the Applicant was the subject of SLSF harassment, he was in possession of a passport which he could have used to escape the country, yet he did not do so."

13 The RRT noted advice from the Department of Foreign Affairs and Trade ("DFAT"), prepared in 1993, to the effect that Sri Lankan passports were issued only on presentation of an application form accompanied by a national birth certificate and national identity card. These details were checked against a list of names against which the police and other authorities have issued instructions barring departure from the country. Passport holders were checked against a register held by passport control.

14 The RRT continued:

"The Applicant claims that it was possible to leave because he would not have been put onto an alert list until he breached his reporting conditions. The Tribunal concludes, however, that if he was known to be an active LTTE supporter, it is likely that he would have been included on an alert list and he would not have been able to freely leave.

He disclosed that he has a sister in Australia and that he was included on his mother's application for permanent residence in Australia which was rejected in 1995. In the same year, his mother also had a visitor visa application refused. In the circumstances, his chances of obtaining a genuine visa to come to Australia appeared to be very slight and it is understandable that he resorted to an agent to help him arrive here. However, the Tribunal does not accept that he resorted to the agent because he was on the run from the authorities or was in fear of being persecuted by them for the reasons he described. He already had a passport which he used to leave the country and it is apparent that he resorted to the agent to find a way to Australia because he was otherwise unable to get here. In light of other circumstances, the uncanny timing of his claim that he was identified as, and admitted to being, an active LTTE supporter – after his mother's applications were refused and just before his departure – support a conclusion that he has invented or at least exaggerated that aspect of his claim to help reinforce his efforts to be recognised as a refugee.

In summary, the Tribunal finds it plausible that the Applicant was detained for short periods in security sweeps, but it does not accept that he was detained on account of evidence that he was associated with LTTE members and was collecting money for the LTTE, nor does it find he was detained for any prolonged period. Nor does it accept that he was put on reporting conditions upon release or that he was of any interest to the authorities when he left the country. If, as he claimed, he had been a known supporter and active assistant of the LTTE, was identified as such by an LTTE member and was the subject of pursuit by anti-LTTE groups who supported the government, it is only a very remote possibility that he would have been released from prison and been able to leave the country unhindered, using his own

passport. To conclude, the Tribunal does not accept that the Applicant has ever been suspected of LTTE support or activities other than being picked up and then released in security sweeps."

15 The RRT quoted from a DFAT cable of December 1995 entitled "Safety of Tamils in Colombo...". The DFAT summarised its assessment as follows:

"In conclusion, our assessment, based on our discussions, is that while Tamils may be more affected than non-Tamils by the security measures in Colombo designed to counter the LTTE security threat, this does not amount to officially-sanctioned discrimination or harassment of Tamil people as a group. Tamil people, like anyone else continue to have the protection of the law against unlawful activities by security services. The government's demonstrated willingness to prosecute members of the security services who breach the law is important here, as is the access detained persons and their families have to the government's own human rights task force (HRTF) and to the international committee of the red cross (ICRC)."

16 The RRT reached the following conclusions:

"This report is indicative of the situation for Tamils in Colombo, which Tribunal has discussed in other decisions.... The Tribunal also has the benefit of the submissions made by the Applicant's adviser, dated 12 and 30 May 1997, which refer to further information. While there is no doubt that some Tamils are subjected to severe abuse of their human rights, particularly young men from the north and east with little explanation for their presence in the capital city, those who live in Colombo with legitimate reason and have family contacts or friends who can assist them, do not face a real chance of persecution provided that they are not associated with the LTTE.

It may be the case that the Applicant could not safely return to the Jaffna peninsula, but his family lives in Colombo, his residence is registered there, he has completed his secondary education and he has been accepted into the University of Colombo. His landlord is an inspector of police, is close enough to the Applicant to be called "uncle" and has previously assisted the Applicant. The Applicant has previously been caught up in two security sweeps during his six or seven years in Colombo and has been released relatively quickly without suffering serious harm. He had the opportunity to flee after the first incident in April 1995 but chose not to utilise his passport, indicating that he did not fear persecution. He is not affiliated with the LTTE nor is he suspected of such affiliation, and if he has the misfortune of being caught up in any future security sweeps, there is no more than a remote chance that he will be persecuted.

On the basis of the acceptable evidence, the Tribunal is not satisfied that the Applicant has a well-founded fear of persecution because there is not a real chance [of] being persecuted for a Convention reason should he return to Sri Lanka. Therefore he is not a person to whom Australia has protection obligations under the Convention and Protocol and is not entitled to a protection visa."

The Judgment of the Primary Judge

17 The primary Judge, after recounting the facts and the RRT's decision, addressed an argument by Mr Rajalingam that the RRT had failed to act in accordance with "substantial justice and the merits of the case" as required by s 420(2)(b) of the *Migration Act.* Counsel for Mr Rajalingam contended that the RRT had not given Mr Rajalingam an opportunity to answer the allegation that the refusal of his mother's visa application had prompted him to invent a closer connection to the LTTE than he in fact had. Counsel also argued that the RRT had formed an adverse view of his credibility as a witness without pointing to any aspect of his demeanour and without identifying any inconsistency in his testimony.

18 The primary Judge referred to cases holding that the RRT is entitled to take account of the demeanour of a witness in assessing credibility and that a failure to make an express finding as to credit does not, of itself, constitute an error of law. His Honour conceded the "general application of those remarks", but observed that the absence of an express finding as to credit might have a bearing on whether the RRT had correctly asked itself "What if I am wrong?", as required by the principles stated in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, at 291. His Honour explained the significance of the absence of an express finding this way:

"If, for example, an applicant has been caught out telling barefaced lies, that would enable the Tribunal with more confidence to reject his or her evidence on other alleged facts which were not extrinsically demonstrated to have been true or false. On the other hand, the Tribunal could not reasonably be as adamant about the correctness of a view of credibility formed wholly on something as evanescent as 'the subtle influence of demeanour'."

19 The primary Judge accepted that the RRT had set out "in an unexceptionable way" the authorities governing what is required for a "well-found fear of persecution". However, the RRT had not referred to the possible need to ask "What if I am wrong?". His Honour acknowledged that there might be cases in which the RRT has such confidence as to its findings of fact that there is no occasion for the RRT, at the end of the fact-finding process, to go back and ask "What if I am wrong?". The question was whether the present case fell within this category.

20 The past events on which the RRT had been invited to base its prediction as to the chances that Mr Rajalingam would be persecuted in the future included the claim that he had been held in detention for about two months and that he had come to the notice of the authorities as an LTTE sympathiser and supporter. The RRT had ruled against Mr Rajalingam on each issue. However, according to the primary Judge

"it is not possible to infer from its reasons, or from anything said in the course of the [RRT] hearing, with what degree of confidence it did so".

21 The primary Judge held that, in the circumstances, the RRT had erred in law:

"The reasons advanced for the rejection of the applicant's assertions **are not objectively cogent enough to impute to the Tribunal a view that the probability of error in the rejection of each of them was insignificant**. As I have already noted there are no adverse comments about the applicant's demeanour and no demonstrated inconsistencies or untruths in his story. What was relied on, in rejecting the assertion that the applicant had come under notice as an LTTE supporter, was a perceived unlikely coincidence between the failure by the applicant's mother to obtain a visa, his claim to links with the LTTE and his departure for Australia. The refusal to find that the applicant had been detained for about two months in November 1996 seems to have been based solely on the Tribunal's perception that it was inherently unlikely that he would have allowed a period of that length to elapse before bribing his way out and would then have been placed on reporting conditions. Moreover, the Tribunal did not convey the impression that it regarded that perception as particularly cogent when it put it to the applicant, saying only:

> 'Apart from that last bit, your story sounds alright, but the last bit sounds a bit made up.'

As I have already indicated, the applicant advanced reasons by the Tribunal's perception in that respect was unfounded. However, the Tribunal did not subsequently indicate, in its reasons or elsewhere, why, or with what degree of confidence, it rejected the applicant's explanation. I do not regard the reference to the applicant's resort to a migration agent as supplying a basis from which to infer that the Tribunal had the requisite degree of confidence in rejecting each of the facts which I have identified. Moreover, I do not consider that the Tribunal's hypothesis that the applicant, after bribing his way out of detention, would have been placed on an 'alert list' and thereby have been prevented from leaving Sri Lanka, **to be sufficiently compelling to sustain the degree of confidence that it could not have been wrong** which is mandated by the principles enunciated in Guo and Wu.

...

In the result, particularly having regard to the absence from its reasons of any reference to that test, I am not persuaded that the Tribunal asked itself 'What if I am wrong?' or that it was so confident in its rejection of each of the facts critically relied on by the applicant that it considered it unnecessary to ask that question. The failure **which I have imputed to the Tribunal** amounts to an error of law in the sense in which that expression is used in s 476(1)(e) of the Migration Act." (Emphasis added.)

22 In view of these conclusions, the primary Judge considered it unnecessary to determine whether the RRT had failed to act in accordance with substantial justice and the merits of the case. His Honour also rejected

further arguments made on behalf of Mr Rajalingam. In the result, his Honour set aside the RRT's decision and remitted the matter for further consideration according to law.

Submissions

The Minister's Submissions

23 The Minister submitted that in *Rajalingam,* as in the two other appeals, the RRT had correctly applied the test as to whether an applicant has a "well-founded fear of persecution". The RRT's function is to make findings of fact and, on the basis of those findings, determine whether the applicant has a well-founded fear of persecution. A factual assertion by an applicant which has been rejected by the RRT cannot, as a matter of law or logic, provide a basis for a determination in the applicant's favour. The only qualification to this general principle is the case where the RRT finds that the past fact asserted probably did not occur, but does not make its finding with apparent confidence. In that situation, the RRT must take into account, in determining whether the applicant has a well-founded fear of persecution, that it may have been wrong in its findings.

24 The question in each of the three appeals was whether the RRT, in each case, had made its findings of fact, rejecting the applicant's account, with that degree of confidence that made it unnecessary to ask "What if I am wrong?". In each case, the primary Judge had asked, in substance, not whether the RRT displayed the requisite degree of confidence in its findings, but (in the words of the primary Judge in *Rajalingam*) whether the RRT's reasons were "sufficiently compelling to sustain the degree of confidence that it could not have been wrong". In effect, his Honour had asked whether the RRT should have had a doubt, rather than whether it in fact had a doubt. In taking this approach, his Honour had both given unwarranted scope to the so-called "What if I am wrong?" test and had impermissably intruded into a consideration of the merits of the RRT's decision.

25 The Minister submitted that, in any event, the primary Judge had imposed too high a standard on the RRT. All that was required was for the RRT to be confident in its findings of fact. His Honour (so it was argued) had said that the question was whether the RRT had exhibited (or should have exhibited) no real doubt about its findings.

The Respondents' Submissions

26 The respondents, although there were significant differences in emphasis among them, submitted that the primary Judge's approach was in accordance with the statement of principles articulated by the High Court in recent cases.

27 Mr Appudurai (Mr Rajalingam's counsel) contended that the degree of confidence the RRT had in its conclusions could not be determined without considering whether it had done everything it was required to do in order to be sufficiently confident. It was appropriate for the primary Judge in *Rajalingam* to take into account objective factors in deciding whether the RRT should have asked itself "What if I am wrong?".

28 Mr Flower, who appeared on behalf of the respondents in *Cortez and Alvarez,* submitted that the question of whether the RRT has sufficient doubt as to its findings to require it to ask "What if I am wrong?" is to be judged on an analysis of the reasons as a whole, not by "semantics". This test involved the application of "a degree of objectivity", since to do otherwise would not reflect the substance of the matter. However, unlike Mr Appudurai, Mr Flower accepted that it was not open to the Court to examine the evidence to determine whether it would have been unreasonable for the RRT to have expressed its findings confidently. The primary Judge had reached the correct conclusion in *Cortez and Alvarez* because, on a fair reading of the RRT's reasons, it did have doubts about its critical findings of fact. The RRT was therefore obliged, in determining whether the applicants (the present respondents) had a well-founded fear of persecution, to take into account that its factual findings might have been wrong.

29 Mr Niall, who appeared on behalf of the respondent in *Demir,* submitted that the primary Judge had correctly concluded that the RRT's reasons disclosed actual doubt on its part as to its findings of fact. While Mr Niall acknowledged that the RRT's reasons had not expressed any actual doubts, the paucity of its reasoning process supported that conclusion. In any event, having regard to the circumstances of the case, the RRT was obliged to state the degree of certainty with which it had made its findings of fact.

30 Mr Niall also contended that the RRT had erred in failing to make certain inquiries on critical factual questions. I shall return to that submission later.

Reasoning

The RRT's Task

31 The task confronting the RRT in each of the three cases was to determine whether it was satisfied that the criteria for a protection visa prescribed by the *Migration Act* had been satisfied: *Migration Act,* ss 65(1), 415(1). For this purpose, the RRT had to decide whether it was satisfied that each applicant was 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...is unable or, owing to such fear, is unwilling to avail himself of the protection of [the country of his nationality]."

Migration Act, s 36(2); *Convention,* Art 1A(2).

Fact-Finding in Civil Litigation

32 As a series of High Court decisions has made clear, a decision-maker determining whether an applicant has a well-founded fear of being persecuted must assess what is likely to occur in the future: *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, at 574 (joint judgment). In civil litigation, the approach a court takes in making findings about **past** events differs from the approach which it adopts when assessing the likelihood that particular events will occur **in the future**.

33 The difference was authoritatively stated, in the context of assessing damages for the future effects of physical injury or degeneration, in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, at 642-643, per Deane, Gaudron and McHugh JJ:

"A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high – 99.9 per cent – or very low – 0.1 per cent. But unless the chance is so low as to be regarded as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability."

These observations apply not only to the assessment of damages for personal injuries, but also, for example, to the assessment of damages for loss of a commercial opportunity: *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, at 350, per Mason CJ, Dawson, Toohey and Gaudron JJ.

Decision-Making in Migration Cases

34 It might seem that the principles governing fact-finding in civil litigation are appropriate to the fact-finding processes required to determine the chance that an applicant for refugee status will suffer the persecution he or she claims to fear. In deciding whether the applicant's fear of persecution is well-founded – that is, whether there is a "real substantial basis for it" (*Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, at 572) – the decision-maker must assess the likelihood that the applicant will be persecuted for a *Convention* reason if returned to his or her country of nationality. This process ordinarily involves making findings about whether all or part of the applicant's account of past events should be accepted. Otherwise, as was said in *Guo,* at 575, there might be no rational basis for assessing the chances that future persecution will occur. The process also requires the decision-maker, on the basis of all relevant information, to make an assessment as to the likelihood that a future event – feared persecution for a *Convention* reason – will actually occur.

35 If the principles stated in *Malec v Hutton* were to apply to this process of fact-finding, the decision-maker would make findings as to past events on the balance of probabilities. If an event is found on the balance of probabilities to have occurred, it would be treated as certainly having occurred. If the decision-maker finds that an alleged event probably did not occur, it would be treated as certainly having not occurred. The findings as to past events would then form the basis for assessing the risk of future persecution for a *Convention* reason. That risk would be assessed by reference to possibilities and probabilities, bearing in mind that even a ten per cent chance that an applicant will face persecution for a *Convention* reason may satisfy the relevant test: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, at 429, per McHugh J.

36 However, as the High Court has pointed out, the decision-making process governing applications for refugee status is not identical to fact-finding in civil litigation. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, the joint judgment rejected as "misguided" submissions that, in essence, equated the role of the Minister's delegates (who had made the relevant decisions in that case) with that performed by courts in civil litigation. Their Honours said this (at 282-283):

"Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law. The term 'balance of probabilities' played a major part in [the] submissions.... As with the term 'evidence' as used to describe the material before the delegates, it seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance....

The term ‘balance of probabilities’ is apt to mislead in the context of s 22AA [which provided that the Minister, if satisfied that a person was a refugee, could determine that the person was a refugee] even if it be used in reference to ‘what has already happened’.” (Citations omitted.)

> 37 A Full Court of this Court has recently considered those remarks: *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 160 ALR 543 (FC). The Court (Black CJ, von Doussa and Carr JJ) referred (at 550) to the difficulties of proof which beset asylum seekers, which were recognised in *Chan,* at 413, per Gaudron J. Their Honours also pointed out that findings about past events affecting asylum seekers will be necessary in most cases and that, unless the RRT is required to apply some standard of proof, it is not easy to see how the RRT should direct itself in determining whether the evidence before it permits a particular finding to be made. They referred to the following passage from the judgment of Kirby J in *Wu Shan Liang,* at 294:

“There is no suggestion in Chan that this Court intended that the evaluation of past facts (as distinct from the speculation on future possibilities) would be based otherwise than on likelihood. The process of determination involves the delegate’s making findings as to primary facts, identifying the inferences which may properly be drawn from the primary facts, as so found, and then applying those facts and inferences to an assessment of the ‘real chances’ affecting the treatment of the applicant if he or she were to be returned to China.”

The Court in *Epeabaka* continued (at 551):

“Findings of fact based on likelihood will usually be findings made on the balance of probabilities arising from the available information before the decision-maker. However, when dealing with the claims of an asylum seeker, the available evidence might not imbue findings so made with the degree of confidence that justify the conclusion that an asylum seeker does not have a well-founded fear of being persecuted. It is for this reason that the civil standard cannot be universally applied to the fact finding process in claims of this kind. It is necessary to recognise the risk of error in adopting such a fact finding process, and to make allowance for it.”

This explanation of the comments in *Wu Shan Liang,* although pointing out that findings of fact may be based on likelihood,does not detract from the proposition that the fact-finding process to be followed by the RRT differs from that applied in civil courts.

> 38 As the extract from the joint judgment in *Wu Shan Liang* implies, the determination of refugee status is made by an **administrative** decision-maker, not by a Judge exercising judicial power. The process was recently explained by the Full Court in *Kopalapillai v Minister for Immigration and Multicultural Affairs,* unreported, 8 September 1998, at 14:

“[T]he crucial criterion for the grant to the appellant of a protection visa [is] that the Minister, or on review the RRT, is ‘satisfied’ that the appellant is a person to whom

Australia has protection obligations under the Refugee Convention. A decision as to 'satisfaction' is not immune from review.... However, it is not to be overlooked that the criterion reflects a decision to make the satisfaction of an administrative decision maker, and not the satisfaction of a judge or a court, the determinant of eligibility for the grant of a protection visa. That is, it is part of the test of eligibility that such satisfaction be entertained by a decision maker who may not be legally trained, does not enjoy security of tenure, will not ordinarily conduct a public hearing and may involve himself or herself in the process of obtaining and elucidating evidence."

The RRT, which performs the functions of an administrative decision-maker in refugee cases, must act in accordance with the requirements of Part 7 of the *Migration Act* and may exercise all the powers and discretions of the original decision-maker (s 415(1)). Unlike civil litigation, the applicant seeking review of the delegate's decision by the RRT, bears no onus of proof (*Abebe v The Commonwealth* (1999) 162 ALR 1, at [83], per Gleeson CJ and McHugh J). Similarly, while the RRT is not obliged to make out the applicant's case, in certain limited circumstances it may be required to undertake its own inquiries on critical factual issues: *Luu v Renevier* (1989) 91 ALR 39 (FC), at 49-50; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553 (FC), at 558.

> 39 Just as administrative decision-making is different from civil litigation, so the role of a court reviewing an administrative decision is different from its role in civil litigation in which it assesses evidence and makes findings of fact. Brennan J explained the limitations in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, at 35-36:

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

More specifically, the only jurisdiction this Court now has to review decisions made under the *Migration Act* is that conferred by Part 8 of the *Act.* The jurisdiction of the Court is, generally speaking, narrower than that conferred on the High Court by s 75(v) of the *Constitution* and narrower than the scope for judicial review of administrative decisions pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("*ADJR Act*"): *Abebe,* at [21], per Gleeson CJ and McHugh J, at [158-160], per Gummow and Hayne JJ. (The *ADJR Act* does not apply to "judicially-reviewable decisions" under the *Migration Act*: *Migration Act,* s 485(1).)

> 40 It is within this context of administrative decision-making and judicial review that the High Court has addressed the approach that should be taken by decision-makers required to perform the task confronting the RRT in each of these cases.

Minister v Wu Shan Liang

41 In *Wu Shan Liang* itself, the application for review was made under the *ADJR Act* and s 39B of the *Judiciary Act* 1903 (Cth), since the proceedings were commenced prior to Part 8 of the *Migration Act* coming into force: see at first instance *Wu v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 294; *Wu v Minister for Immigration and Ethnic Affairs (No 2)* (1994) 51 FCR 232. It was argued before the High Court that the Minister's delegates had failed to apply the test laid down in *Chan,* because (so it was said) they had failed to engage in the necessary speculation as to the chances that the applicants would experience future persecution by reason of their imputed political opinion. The joint judgment (Brennan CJ, Toohey, McHugh and Gummow JJ) rejected this argument, holding (at 277, 281) that the delegates had correctly assessed the future chances of persecution and had not improperly adopted a balance of probabilities test.

42 The joint judgment made observations on the approach to be taken where past facts cannot be ascertained with certainty (at 281).

"When conflicting information available to the Minister's delegate relates to some past event – in this case, the treatment that had been accorded to previous returnees to the PRC [People's Republic of China] – the attribution of greater weight to one piece of information as against another or an opinion that one version of the facts is more probable than another is not necessarily inconsistent with the correct application of the Chan test. The chance of persecution is not a fact to be inferred solely from facts that are found to have existed: the very uncertainty of what has happened in other cases is itself material to the assessment of the chance of persecution in the instant case. As a matter of ordinary experience, it is fallacious to assume that the weight accorded to information about past facts or the opinion formed about the probability of a fact having occurred is the sole determinant of the chance of something happening in the future: the possibility that a different weight should have been attributed to pieces of conflicting information or the possibility that the future will not conform to what has previously occurred affects the assessment of the chance of the occurrence of a future event."

43 The facts in *Wu Shan Liang* need to be borne in mind in interpreting this passage. The applicants (the respondents to the appeal in the High Court) had arrived in Australia on board a vessel called the "*Labrador*". They claimed that, by reason of their illegal departure from the PRC and their activities in Australia, they would face persecution on their forced repatriation. The delegates analysed case studies of "returned illegal departees" who had left the PRC on other vessels. The delegates found that the position of those who had left the PRC on the "*Jeremiah*" was very similar to the *Labrador* group and that the *Jeremiah* returnees had not been persecuted on their return to the PRC.

44 In the passage I have quoted, the joint judgment addressed the significance of the fact that **the fate of other returnees** was uncertain when assessing the chances that the *Labrador* group would suffer persecution on their return**.** Their Honours were not concerned with uncertainty as to whether the claims of the *Labrador* group relating to their own past conduct or experiences were true. Their Honours were making the point that, if the fate of

other returnees whose position was similar to that of the *Labrador* group was uncertain, that very uncertainty was material to an assessment of the latter's chances of experiencing persecution on their return to the PRC.

45 The joint judgment illustrates that, as was suggested in *Epeabaka,* there may be cases where the available evidence does not allow findings as to past events to be made with confidence. For example, the decision-maker may consider that the best guide as to the likely fate of "returning illegal departees" is the actual fate of a group of similar departees who have already been returned to their country of nationality. The available information as to the fate of the latter group may be limited, and the decision-maker might not be able to conclude that any had received punishment by reason of their actual or imputed political opinions. But if the decision-maker considers that there is uncertainty about the fate of the first group, the chance that they had indeed been severely punished as political dissenters would support the claim of the current group of applicants to have a well-founded fear of persecution. After all, if the members of the first group were in fact persecuted for this reason, it would seem inevitable (in the absence of other evidence) that members of the second group have at least a "real substantial basis" for their fear of persecution.

46 Kirby J delivered a separate judgment in *Wu Shan Liang.* His Honour stated (at 291-293) eight principles for the guidance of courts undertaking judicial review of decisions under the *Migration Act.* The eighth point confirmed (at 293) that if the Minister's delegate put all speculation out of account in determining whether there was a real chance of persecution, legal error would be demonstrated. His Honour added these comments:

"First, it is not erroneous for a decision-maker, presented with a large amount of material, to reach conclusions as to which of the facts (if any) had been established and which had not. An over-nice approach to the standard of proof to be applied here is undesirable. It betrays a misunderstanding of the way administrative decisions are usually made. It is more apt to a court of law conducting a trial than to the proper performance of the functions of an administrator, even if the delegate of the Minister and even if conducting a secondary determination. It is not an error of law for such a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, so long as, in the end, he or she performs the function of speculation about the 'real chance' of persecution required by Chan.

Secondly, the decision-maker must not, by a process of factual findings on particular elements of the material which is provided, foreclose reasonable speculation upon the chances of persecution emerging from a consideration of the whole of the material. Evaluation of chance, as required by Chan cannot be reduced to scientific precision. That is why it is necessary, notwithstanding particular findings, for the decision-maker in the end to return to the question: 'What if I am wrong?' (Guo Wei Rong v Minister for Immigration and Ethnic Affairs (1996) 135 ALR 421, at 441, per Einfeld J). Otherwise, by eliminating facts on the way to the final conclusion, based upon what seems 'likely' or 'entitled to greater weight', the decision-maker may be left

with nothing upon which to conduct the speculation necessary to the evaluation of the facts taken as a whole, in so far as they are said to give rise to a 'real chance' of persecution."

47 These comments perhaps go further than the joint judgment, because they envisage that a decision-maker who makes findings adverse to an applicant's claims concerning his or her **own experiences,** must consider the possibility that the findings are wrong, if to do so would foreclose "reasonable speculation" upon the chances of persecution emerging from the material as a whole. His Honour did not have occasion to explore how this might work in practice consistently with his subsequent observation (quoted earlier), which suggests that the decision-maker must assess the chances of future persecution by reference to the primary facts found as a matter of likelihood. The Full Court in *Epeabaka,* although quoting Kirby J's analysis, also did not need to consider the manner in which his comments might be applied in practice.

48 In *Thanh Phat Ma v Billings* (1996) 71 FCR 431, Drummond J expressed the view (at 436) that all Kirby J was concerned to explain was that

"unless the decision-maker can dismiss as unfounded factual assertions made by the applicant, the decision-maker should be alert to the importance of considering whether the accumulation of circumstances, each of which possesses some probative cogency, is enough to show, as a matter of speculation, a real chance of persecution, even though no one circumstance, considered by itself, is sufficient to raise that prospect."

49 On this analysis, Kirby J was directing attention to a case where the decision-maker finds that none of a series of claims is established, yet the evidence taken as a whole justifies or might justify the conclusion that the applicant has a well-founded fear of persecution. In theory, such a case can readily be imagined. An applicant might rely, for example, on three separate acts of persecution directed at her by reason of imputed political opinion. Each act of persecution, if it had occurred, would strongly suggest that she is at serious risk of a further act of persecution for the same reason. In theory (although it is difficult to imagine in practice), each of the factual allegations might be entirely independent of the others. The decision-maker might assess the probability of each alleged act of persecution having occurred as, say, 0.4 (two chances in five). While the probability of any given act of alleged persecution having occurred is less than 0.5, the probability of **any one** of the three alleged acts having occurred is 0.784 (nearly eight chances in ten). (The example is derived from Mr Justice D H Hodgson, "The Scales of Justice: Probability and Proof in Legal Fact-Finding" (1995) 69 *ALJ* 731, at 746-747. The formula is $1-(0.6)^3$.) Even if the probability of each alleged act of persecution having occurred is a mere 0.1 (one in ten), the probability of any one of the three alleged acts having occurred is 0.271 ($1-(0.9)^3$).

50 With respect, Drummond J's observations are helpful because they identify a second class of case in which, although the decision-maker finds

that alleged past events have not occurred, the chance that they might have occurred could provide a rational foundation for finding that the applicant has a well-founded fear of persecution. A practical difficulty is that factual assertions made by applicants for refugee status concerning their own experiences can rarely be assessed independently of each other. The findings will usually depend on the decision-maker's assessment of the reliability of the applicant's account and of other factors common to all claims. It may therefore not be easy for the RRT to identify those cases where the findings cannot be made with sufficient confidence to foreclose reasonable speculation. Perhaps that is the reason why Gummow and Hayne JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe* (decided at the same time as *Abebe v Commonwealth*) described the RRT's inquiry as "attended by very great difficulties" ([190]).

Minister v Guo

51 In *Guo,* the applicant (respondent to the appeal in the High Court) had been deported to the PRC in 1992, after having arrived in Australia on the *Jeremiah.* Undeterred, he arrived in Australia on a second occasion, in December 1993, on board the "*Quokka*", and applied for refugee status. The applicant, claimed, *inter alia,* that he had been imprisoned and mistreated when he returned to the PRC in 1992, by reason of his political opinions (as distinct from being punished for the criminal offence of illegal departure).

52 A Full Court of this Court concluded that the RRT had failed to ask itself the correct question, because it had determined, on the balance of probabilities, that there was no real chance that the applicant would suffer persecution if he were again returned to the PRC: *Guo v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 151. The High Court unanimously reversed the decision of the Full Court, holding that the RRT had not applied a balance of probabilities test, but had adopted the correct approach to assessing the applicant's chances of being persecuted if he were to be returned to the PRC.

53 The joint judgment (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) pointed out (at 574) that past events are not a certain guide to the future, but often provide a reliable basis for determining the probability – high or low – of their recurrence. Their Honours continued (at 575):

"In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events. In the present case, for example, the Tribunal correctly relied on what it found had happened to Mr Guo and others to make a finding that he was not 'differentially at risk for a Convention reason'. Without making findings about the policies of the Chinese authorities and the past relationship of Mr Guo with those authorities, the Tribunal would have had no rational basis from which

it could assess whether there was a real chance that he might be persecuted for a Convention reason if he were returned to the PRC."

54 The joint judgment then rejected the criticism made by Einfeld J, in the Full Court, of the RRT's reasons. Einfeld J had said this (at 179):

"Only after it had weighed the evidence and made its findings did the Tribunal engage in any consideration of whether or not Mr Guo's fear of persecution on a Convention ground was well-founded. However, no consideration was given by the Tribunal to the possibility that any of its findings were inaccurate, and that there was in fact a possibility that the prior punishment had been Convention-related."

The joint judgment said (at 575-576) that this criticism was wrong:

"For the reasons that we have given, the Tribunal was entitled to weigh the material before it and make findings before it engaged 'in any consideration of whether or not Mr Guo's fear of persecution on a Convention ground was well-founded'. Moreover, given the strength of some of the Tribunal's findings – for example, 'the treatment the Applicant received on return to the PRC in October 1992 [is] reflective of punishment for illegal departure and not because of his political activities, application for refugee status or contact with Australian officials', 'the Applicant's illegal departure in 1993 will not result in an imputed political profile', 'these matters will not result in persecution to the Applicant for Convention reasons if returned to China' – the Tribunal was not bound to consider the possibility that its findings were inaccurate or that the punishment was Convention based.

It is true that, in determining whether there is a real chance that an event will occur or will occur for a particular reason, the degree of probability that similar events have or have not occurred or have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future. If, for example, a Tribunal finds that it is only slightly more probable than not that an applicant has not been punished for a Convention reason, it must take into account the chance that the applicant was so punished when determining that there is a well-founded fear of future persecution.

In the present case, however, the Tribunal appears to have had no real doubt that its findings both as to the past and the future were correct. That is, the Tribunal appears to have taken the view that the probability of error in its findings was insignificant. Once the Tribunal reached that conclusion, a finding that nevertheless Mr Guo had a well-founded fear of persecution for a Convention reason would have been irrational. Given its apparent confidence in its conclusions, the Tribunal was not then bound to consider whether its findings might be wrong."

55 It can be seen from this passage that if the RRT **finds** that it is only slightly more probable than not that an alleged relevant event has not occurred, it **must** take into account the chance that it did occur when determining whether there was a well-founded fear of persecution. It is clear that the comment in the joint judgment is not confined to a past event (as in *Wu Shan Liang*) involving persons other than the applicant. Their Honours

give as an example a finding that it was slightly more probable than not that **the applicant** had not been punished for a *Convention* reason.

56 If, on the other hand, it **appears** that the RRT had no "real doubt" that its findings were correct, it is not bound to consider whether those findings might be wrong. Nothing in the reasoning of the joint judgment suggests that if the RRT, although apparently having no real doubt as to its findings, **should** have had doubts, it is bound to consider the possibility that the relevant event might have occurred. Doubtless, this is because an objective test of this nature would require the Court to transgress the boundaries of judicial review, by considering the merits of the RRT's decision. The passage does not explicitly address the approach that should be taken by the Court where the RRT does not make it clear whether it had no real doubt about its findings as to past events (or non-events), or whether it made the findings on the bare probabilities.

Re Minister; Ex parte Abebe

57 In *Re Minister; Ex parte Abebe* (decided at the same time as *Abebe v The Commonwealth*), the High Court considered an application for prerogative relief under s 75(v) of the *Constitution* in the original jurisdiction of the Court. The prosecutor's principal complaint was that the RRT had fallen into jurisdictional error by failing to examine her claim that she had been raped in Ethiopia by government officials while she was held in custody for reasons of her political affiliation and racial background.

58 Only Gleeson CJ and McHugh J made any reference to a decision-maker being uncertain about findings relating to past events. Their Honours (at [82]) said that the logical starting point for determining whether the prosecutor had a well-founded fear of persecution for a *Convention* reason, was whether she and her husband had been detained in custody, as she claimed. If so, the next step was whether she or her husband had been detained by reason of their political opinions. Their Honours said this (at [83]):

"the fact that she might fail to make out an affirmative case in respect of one or more of the above steps did not necessarily mean that her claim for refugee status must fail. As Guo makes clear, even if the Tribunal is not affirmatively satisfied that the events deposed to by an applicant have occurred, the degree of probability of their occurrence or non-occurrence is a relevant matter in determining whether an applicant has a well-founded fear of persecution. The Tribunal 'must take into account the chance that the applicant was so [persecuted] when determining whether there is a well-founded fear of future persecution.' However, given the nature of the prosecutor's claim, the Tribunal was entitled – indeed bound – to start its inquiry by considering her claim that she had been arrested by government officials for political reasons."

The RRT had rejected the prosecutor's claim because of inconsistencies and admitted lies in her various accounts. Their Honours considered (at [85]) that, once the RRT made the finding which was plainly open to it, the further claims of detention and rape became logically irrelevant. Further,

"given the nature of her claim and the tribunal's finding that she was not a credible witness was it required, as it might have been in other circumstances, to determine whether there was a real chance that she had been arrested as she claimed."

Gleeson CJ and McHugh J did not elaborate further on the issues raised by *Guo* and *Wu Shan Liang.*

> 59 Gummow and Hayne JJ, with whom Gaudron and Kirby JJ agreed on this point, rejected the prosecutor's claim, but did not address the circumstances, if any, in which the RRT would have to take into account the possibility that its findings of primary fact were wrong. Callinan J's approach was similar.

The Principles

> 60 It follows from the observations of the High Court in *Wu Shan Liang* and *Guo* that there are circumstances in which the RRT must take into account the possibility that alleged past events occurred even though it finds that those events probably did not occur. This result, perhaps surprising at first glance, comes about because the ultimate question before the RRT is whether it is satisfied that the applicant has a well-founded fear of **future** persecution, in the sense of having a "real substantial basis" for the fear. The RRT must not foreclose reasonable speculation about the chances of the hypothetical future event occurring.
>
> 61 The RRT performs its fact-finding task as an administrative decision-maker. Although the civil standard of proof is not irrelevant to the process, the RRT cannot simply apply that standard to all fact-finding. Moreover, the RRT must frequently make its assessment on the basis of fragmented, incomplete and confused information. It has to assess the plausibility of accounts given by people who may be understandably bewildered, frightened and, perhaps, desperate and who often do not understand either the process or the language spoken by the decision-maker/investigator. As Gummow and Hayne JJ remarked in *Ex parte Abebe* (at par 191):

"[i]t is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself."

Even applicants with a genuine fear of prosecution may not present as models of consistency or transparent veracity.

> 62 In this context, it is not always possible for the decision-maker to be satisfied as to whether alleged past events have occurred with certainty or even confidence. When the RRT is uncertain as to whether an alleged event

occurred, or finds that, although the probabilities are against it, the event might have occurred, it may be necessary to take into account the possibility that the event took place in considering the ultimate question. Depending on the significance of the alleged event to the ultimate question, a failure to consider the possibility that it occurred might constitute a failure to undertake the required reasonable speculation in deciding whether there is a "real substantial basis" for the applicant's claimed fear of persecution. Similarly, if the non-occurrence of an event is important to an applicant's case (for example, the withdrawal of a threat to the applicant) the possibility that the event did not occur may need to be considered by the decision-maker even though the latter considers the disputed event probably did occur.

63 Although the "What if I am wrong?" terminology has gained currency, I think, with respect, that it is more accurate to see the requirement discussed in *Wu Shan Liang* and *Guo* as simply an aspect of the obligation to apply correctly the principles for determining whether an applicant has a "well-founded fear of being persecuted" for a *Convention* reason. The reasonable speculation in which the decision-maker must engage may require him or her to take account of the chance that past events might have occurred, even though the decision-maker thinks that they probably did not. In the language of s 476(1)(e) of the *Migration Act,* a failure to do so may constitute "an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found".

64 In my view, there is no reason in principle, and nothing in the reasoning of the High Court, supporting a general rule that the RRT must express findings as to whether alleged past events actually occurred in a manner that makes explicit its degree of conviction or confidence that the findings are correct. In *Guo* itself, the findings were not expressed this way, yet the joint judgment considered it was enough that the RRT **appeared** to have no doubt that the probability of error was insignificant. Moreover, had the Court intended to impose such an extraordinary burden on the RRT, it might have been expected to say so.

65 Nor do I think that there is anything in the reasoning of the High Court which permits a court exercising powers of judicial review to "impute" to the RRT (or other administrative decision-maker) a lack of conviction or confidence in its findings of fact, such as to warrant a holding that the RRT should not or could not have relied on those findings to hold that the applicant's fear of persecution was not well-founded. To take this course on the basis of the court's own assessment of the evidence before the RRT, is to enter the territory of merits review. It is one thing to find error in a decision-maker's failure to apply the correct legal test or to comply with statutory obligations (for example, to set out findings on material questions of fact as required by *Migration Act,* s 430(1)(c)). It is another to decide what factual findings the RRT should or should not have made.

66 None of this is to deny that there may be cases in which a failure by the RRT to consider whether an alleged event **may have** occurred constitutes a ground of review, even though the RRT considers it likely that the event did

not occur. To take an example from *Guo,* the applicant may rely on the experiences of previous groups of boat people who had been returned to their country of origin. The RRT may find that it is unlikely (in the sense of less rather than more likely on the balance of probabilities) that the previous group had been persecuted for a *Convention* reason. But the RRT's reasons may show that no consideration was given to the possibility (albeit not a likelihood) that such persecution had occurred, a possibility left open by the RRT's findings. If the RRT's reasons demonstrate that the experiences of the earlier groups materially bear on the chances that the applicant will be persecuted, a finding that there is a substantial chance (although not a likelihood) that previous groups were in fact persecuted might have to be taken into account if the RRT is to undertake the reasonable speculation required of it. Again, if an applicant relies on the possibility that a particular event occurred as supporting his or her claim to a well-founded fear of persecution, a failure by the RRT to make a finding as to that possibility might constitute non-compliance with s 430(1)(c) of the *Migration Act.*

67 In general, however, the question of whether the RRT should have considered the possibility that its findings of fact might not have been correct is to be determined by reference to the RRT's own reasons. If a fair reading of the reasons as a whole shows that the RRT itself had "no real doubt" (to use the language in *Guo*) that claimed events had not occurred, there is no warrant for holding that it should have considered the possibility that its findings were wrong. Reasonable speculation as to whether the applicant had a well-founded fear of persecution does not require a possibility inconsistent with the RRT's own findings to be pursued. A "fair reading" of the reasons incorporates the principle that the RRT's reasons should receive a "beneficial construction" and should not be "construed minutely and finely with an eye keenly attuned to the perception of error": *Wu Shan Liang,* at 271-272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 (FC), at 287. Only if a fair reading of the reasons allows the conclusion that the RRT had a real doubt that its findings on material questions of fact were correct, might error be revealed by the RRT's failure to take account of the possibility that the alleged events might have occurred (or the possibility that an event said not to have occurred did not in fact occur). If the fair reading allows of such a conclusion, the failure to consider the possibilities might demonstrate that the RRT had not undertaken the required speculation about the chances of future persecution.

Application of Principles to *Minister v Rajalingam*

68 There is nothing in the reasons of the RRT, which were given only three days after the High Court decided *Guo,* that suggests it had any real doubt as to its findings of fact. It stated in clear terms it did **not accept** that the applicant had

- been on the run from the authorities when he resorted to an agent to help him gain entry to Australia;

- been detained for associating with members of the LTTE or for collecting funds for the LTTE;

- been detained, otherwise than for short periods in security sweeps; or

- ever been suspected of LTTE support or activities.

These findings were made by the RRT after a detailed consideration of the facts and were stated without qualification or reservation. As in *Guo,* the RRT appears to have had no real doubt that its findings as to past events were correct. In these circumstances, there was no occasion for the RRT to have considered the applicant's chances of persecution by reference to possibilities it did not accept. Nor was there anything to show that it had failed to address the question it was required to consider.

> 69 In my respectful opinion, it was not open to the primary Judge to hold that, because the reasons advanced for the rejection of the applicant's assertions were not "objectively cogent enough", the RRT could not be taken as having concluded that the probability of error in each of its findings was insignificant. As I have explained, to take this approach was to intrude impermissibly into the merits of the RRT's decision. The issue on the application for judicial review was not whether the RRT's reasoning process in relation to its findings of fact was "cogent" or "compelling", but whether the RRT's reasons, on a fair reading, allowed the conclusion that it had a real doubt as to whether its findings were correct. Given the RRT's clear and unequivocal findings, no such conclusion could be shown.
>
> 70 Since Mr Rajalingam relied on no other ground of appeal, the Minister's appeal must be allowed, with costs.

Minister v Cortez and Alvarez

The Proceedings

> 71 The respondents to this appeal are citizens of El Salvador, now aged seventy-five and seventeen, respectively. The first respondent, Ms Cortez, is the granddaughter of the second respondent, Ms Alvarez, who has cared for her since she was very young. They arrived in Australia on 17 May 1995, on visitors' visas issued in Mexico City on 2 May 1995. At that time, Ms Alvarez's youngest son, Edgardo, had been living in Australia for eight years. Edgardo is not Ms Cortez's father. Her father is Pedro, Ms Alvarez's oldest son.
>
> 72 The respondents each applied for a protection visa in June 1995. They each claimed to fear persecution on the ground of imputed political opinion. In particular, they claimed to have been targeted by death squads, by reason of their association with Pedro, who was said to be a member of a sub-group within the main left-wing guerilla group in El Salvador, the Farabundo Marti Front for National Liberation ("FMLN"). The most recent incident was said to have occurred on 10 May 1995, when shots were fired at

their home and the slogan “Death to the Communists, Black Shadow” painted on a wall.

73 On 28 June 1996, the Minister’s delegate refused each application. On 21 January 1997, the RRT affirmed the primary decisions made by the delegate. The RRT did so after holding a hearing at which the respondents were legally represented. In order to minimise trauma to Ms Alvarez (whose claims included that she had been raped in 1981 and threatened with oral rape in 1989), the RRT Member, interpreter and hearing attendant were all female.

74 By separate applications, the respondents applied for judicial review of the RRT’s decision. The hearing took place on 26 August 1997 and judgment was given on 10 August 1998. The primary Judge held that the decision of the RRT should be set aside in each case and that the matters should be remitted for rehearing.

75 It was accepted before the primary Judge that the result in Ms Cortez’s case would abide the result in Ms Alvarez’s case. The same position applies on the appeal. Therefore it is necessary only to consider the appeal in Ms Alvarez’s case.

Ms Alvarez’s Claims

76 Ms Alvarez’s principal claims were as follows:

- Pedro had been arrested by government forces in 1981 and then released in a prisoner exchange and left El Salvador. Shortly afterwards, Ms Alvarez was raped by government soldiers searching her house for weapons or Communist propaganda.

- Ms Cortez was born in 1982, after her father had left the country. She was left by her mother in the care of Ms Alvarez.

- In 1986 Edgardo, a member of a youth movement, was wounded and left El Salvador for Australia.

- In 1989 soldiers interrogated and assaulted Ms Alvarez, seeking information about her sons. She was threatened with oral rape and as a result gave the address of her second son, Victor. He was subsequently assaulted.

- For about a year Ms Alvarez and her granddaughter stayed with friends, out of fear of remaining at the house. She moved back to her home in about late 1989, but had problems with her neighbour, a member of the police force.

- From about this time, Ms Alvarez received repeated death threats over the telephone.

- In March 1995, Ms Cortez was threatened with kidnapping by an armed man.

- On 10 May 1995, the shooting incident occurred.

- In October 1996, after her arrival in Australia, Ms Alvarez received a letter from her daughter in the United States, saying that Pedro had returned to El Salvador and had been shot outside Ms Alvarez's home. This claim was supported by a medical report purporting to verify Pedro's injuries.

The RRT's Reasons

77 The RRT noted that there were many discrepancies between what Ms Alvarez said at the hearing and the claims made in her application. It accepted that while the rape and threatened rape allegations were extremely traumatic for her to describe, it was difficult to understand why she had not mentioned in her application other claims on which she subsequently relied.

78 The RRT discussed the evidence in some detail. It expressed the view that it was an "unlikely coincidence" that Pedro, who had not been back to El Salvador since 1981, should return at the time he was alleged to have done so. The RRT also referred to a number of inconsistencies in Ms Alvarez's account concerning the threatening telephone calls she claimed to have received. However, the RRT accepted Ms Alvarez's claims that she had been raped in 1981 and threatened with rape in 1989. These incidents had occurred during times of increased guerilla and anti-guerilla activity and the claims were not inherently incredible.

79 Advice from DFAT stated that persecution of people with a perceived Communist profile had ceased and that an "Ombudsperson" was charged with ensuring their full protection under law. DFAT had also advised that the death squads no longer operated in El Salvador and that FMLN had become a legitimate political party. Since the 1992 peace accord between the Government and guerilla groups, the human rights situation in the country had "vastly improved". The RRT did not accept that Ms Alvarez or her granddaughter had profiles that would place them at risk in 1996.

80 The RRT recorded its findings as follows:

"The applicant was not a credible witness.

I accept that she was raped by a soldier in 1981, and that she was again threatened with rape in 1989. I accept that these were very traumatic events, and that they have impacted on her thoughts and fears for the future of her herself and her granddaughter. I therefore accept that the applicant had and has a genuine subjective fear of persecution.

I do not accept that the applicant and her granddaughter were threatened by Black Shadow in 1995.

I do not accept that the applicant's eldest son returned to El Salvador in 1996 and was shot by some men. As stated above, coincidences do happen, but it is not a reasonable hypothesis that the applicant's eldest, who left El Salvador in 1981 returned there in 1996. The evidence for this has come from the applicant's daughter in San Francisco, including the medical certificate. I do not accept any of this as genuine.

The applicant's neighbour may have harassed the applicant in the past, however I do not accept that this amounted to persecution. However, if it did, the applicant could move to another area of El Salvador. She stated in her evidence that she had friends in different areas, and while possibly difficult and unsettling, it would not be unreasonable for her to move to another part of the country.

I have not accepted the evidence provided by the applicant that she has in fact been threatened. Nor are the applicant and her granddaughter the type of people who are still at risk from the vigilante groups currently operating.

As I have not accepted that the applicant is in fact a target of a vigilante group, the issue of State protection does not arise."

For these reasons, the RRT affirmed the delegate's decision not to grant Ms Alvarez a protection visa.

The Primary Judge's Reasons

81 The primary Judge recounted the reasoning process of the RRT and made some criticisms of its findings of fact. In particular, he criticised the RRT's failure to evaluate the chance that the purported medical report on Pedro's condition might have been authentic. His Honour found that the RRT had never adverted to the possibility that it might have been wrong in relation to the alleged incident of 10 May 1995 and the alleged shooting of Pedro in 1996.

82 The primary Judge said this (at 16-17):

"I am not able to infer that the RRT had no real doubts that its findings as to the non-occurrence of the past events which I have identified were correct. Indeed, I consider on the state of the evidence before the RRT that **it would have been unreasonable for it to have attained such a degree of conviction** of its own correctness....whether or not the RRT was obliged to make its own inquiries as to the authenticity of the purported medical certificate related to Pedro Armando, the fact that it had not done so reinforces the inference that it did not regard its conclusion that he had not been shot as so strong that 'the Tribunal was not bound to consider the possibility that its findings were inaccurate'; (Guo per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ at 579)." (Emphasis added.)

For these reasons his Honour concluded that the RRT's conclusions were vitiated by an error of law.

Reasoning

83 Mr Flower did not attempt to support the primary Judge's analysis, insofar as he concluded that, on the evidence, it would have been unreasonable for the RRT to have had no real doubts as to its own findings as to the non-occurrence of alleged past events. Mr Flower accepted that this part of his Honour's reasoning encroached into impermissible merits review. However, he submitted that on a fair reading of the RRT's reasons, it could be inferred that the RRT had real doubt about the findings it made. According to Mr Flower, it was therefore incumbent on the RRT to assess whether Ms Alvarez's fear of persecution was well-founded on the basis that its critical findings of fact may have been wrong.

84 In my opinion, it would be reconstructing the RRT's reasons to read them as suggesting that the RRT had any real doubt that its critical findings, that the incidents alleged to have occurred in 1995 and 1996 had not taken place, were correct. It may be that other decision-makers would not necessarily have assessed the evidence in the same way as did the RRT. That, however, is not the point.

85 The fact is that the RRT, although accepting that Ms Alvarez had a subjective fear of persecution arising from the events of 1981 and 1989, found her not to be a credible witness. The reasons analyse at some length the inconsistencies in her various accounts. The RRT sympathised with her willingness to do anything to improve her granddaughter's life chances, including, if necessary, exaggerating or fabricating events. The RRT also found that the documentary material purporting to support her claim that Pedro had been shot was not genuine.

86 There is nothing in the RRT's reasons to lend support to the proposition that it had real doubts about its findings rejecting critical aspects of Ms Alvarez's claims. No such doubt is expressed and, indeed, the RRT's analysis, if anything, is striking for the apparent confidence with which the relevant findings are made. In these circumstances, there was no occasion for the RRT to take into account the possibility that its findings were wrong, when assessing whether Ms Alvarez's fear of persecution was well-founded.

87 Mr Flower abandoned all other grounds of appeal. Accordingly, in my opinion, the Minister's appeal against the primary Judge's decision in the cases of Ms Alvarez and Ms Cortez must also be allowed, with costs.

Minister v Demir

The Pleadings

88 The respondent to this appeal ("Ms Demir") is a national of Turkey, born on 19 October 1974. She is a Kurd and Alevi (that is, a member of Turkey's Alevi Muslim minority). She arrived in Australia on 10 August 1995, on a three month visitor's visa granted to her in Ankara on 25 July 1995. On 30 October 1995, she applied for a protection visa.

89 The Minister's delegate refused Ms Demir's application for a protection visa on 22 July 1996. She applied for review of that decision by the RRT. The RRT conducted a hearing at which Ms Demir was represented by a representative from the Refugee Advice and Casework Service. The representative filed very lengthy submissions on her behalf after the hearing. These addressed, *inter alia,* the authenticity of two key documents, a Turkish arrest warrant and charge sheet, on which Ms Demir relied to support her case. On 3 December 1996, the RRT affirmed the delegate's decision, finding that the key documents had been fabricated.

90 By an application filed on 2 January 1997, amended on 16 May 1997 and 11 August 1997, Ms Demir applied for review of the RRT's decision pursuant to Part 8 of the *Migration Act.* The amended application sought review on a large number of grounds, including the alleged failure of the RRT to make appropriate inquiries as to the authenticity of the challenged documents.

91 The primary Judge gave judgment on 19 October 1998. His Honour held that the RRT had erred in law in concluding that Ms Demir did not have a well-founded fear of persecution without considering whether its findings of fact were wrong. He made orders setting aside the RRT decision and remitting the matter for further determination according to law.

Ms Demir's Claims

92 Ms Demir completed high school in June 1992 and commenced University in September 1994 in Antakya, some 450 kilometres from her home town, Kayseri. She apparently attended the Faculty of Agriculture at Mustafa Kemal University. At the end of her first year at University she decided to visit Australia, where she had relatives. Her intention was to remain in Australia for two months and to re-enrol at the University.

93 Ms Demir claimed that, while in Australia, she heard that the police were searching for her in Turkey, not merely in Kayseri but also in Antakya. She claimed that when she lived in Kayseri she had attended meetings about once per month at which the pressures placed on Kurdish people were discussed. She also claimed to have arranged accommodation for Kurdish families escaping the eastern provinces.

94 Ms Demir said that initially she kept her Kurdish origins secret at University, but that later she joined a group of Kurdish students. In consequence, she was verbally abused from time to time at University and suffered other forms of harassment. Nonetheless, she intended when leaving Turkey to return in order to complete her studies.

95 According to Ms Demir, she resolved to apply for refugee status when told by her mother that the police were searching for her. She told her mother that she needed proof that the police were in fact searching for her. In response to this request, Ms Demir's mother sent two documents to Australia. One was a warrant for arrest dated 15 September 1995 (that is, after Ms Demir had left Turkey), purportedly issued by the Kayseri Criminal Court No 1. This stated (in translation) that Ms Demir had been charged with being a member of and helping an illegal organisation and that the warrant had been issued because of the "possibility that the accused may abscond". The second document was a charge sheet purportedly issued by the same Criminal Court. This document alleged that Ms Demir had "been involved with the illegal organisation PKK [Kurdish Workers' Party]", that she had recruited and provided logistical support for the organisation and that she had been a student leader making speeches promoting the organisation.

96 Ms Demir gave evidence that her mother had not revealed where she had obtained the documents. She explained her mother's reluctance as due to the fact that the documents had been obtained illegally and that her mother did not wish to cause trouble for the person who had obtained them.

RRT's Reasons

97 The RRT recorded that it had sent the documents supplied by Ms Demir in support of her claim to the Document Examination Unit in Melbourne. The report, which had been made available to Ms Demir and her representative at the RRT hearing, urged caution in accepting the documents as genuine, in the absence of further substantiation.

98 The RRT found that Ms Demir, on her own account, did not have a well-founded fear of persecution at the time she left Turkey. The question was, therefore, whether she had become a refugee *sur place* since her arrival in Australia as a result of events in Turkey post-dating her departure.

99 The RRT accepted that Ms Demir had been involved in discussion groups in Turkey; that she had assisted people fleeing from war zones with accommodation; and that she had suffered minor harassment, not amounting to acts of persecution, at University. There was nothing in her history, however, that led the RRT to expect that she would have been charged with offences in Turkey.

100 While the report from the Document Examination Unit was inconclusive, the RRT did not accept that Ms Demir was wanted for offences

in Turkey or that the arrest warrant and charge sheet were genuine. The RRT took this view for four reasons:

- the alleged charges against Ms Demir were recorded in detail, but the other co-accused had merely been charged with being a militant of the PKK;
- the warrant had been issued after Ms Demir's departure for Australia, yet was said to have been issued because of the possibility she would abscond;
- the alleged charges bore so little resemblance to Ms Demir's history that the form of the documents suggested they had been fabricated; and
- if the documents had been genuine Ms Demir's mother would not have been reluctant to reveal their source.

101 The RRT then considered country information relating to discrimination against Kurdish and Alevi people in Turkey. While there had been some discrimination against these groups outside the war zone in the south east, it generally did not amount to persecution. Ms Demir had not suffered any harm that could be said to amount to persecution by reason of her Kurdish ethnicity or her Alevi background. She had no actual or imputed association with the PKK that placed her at risk of persecution. The RRT was satisfied that she could return to Turkey and resume her studies without facing any real chance of persecution.

The Primary Judge's Reasons

102 The primary Judge, after recording the background to the proceedings, noted that Ms Demir had sought leave to rely on evidence not adduced before the RRT. The evidence included what Ms Demir deposed to be a confidential internal police memorandum identifying persons on a wanted list, of whom Ms Demir was one. This document, on its face, post-dated the decision of the RRT. The proffered evidence also included an affidavit from a former Turkish police officer asserting that the document relied on by Ms Demir in her affidavit seemed to bear the signature of an officer in charge of the Avcilar police station in Turkey and appeared to him to be genuine.

103 The primary Judge rejected a submission that the matter should be remitted to the RRT to consider the further evidence. His Honour took the view that an order remitting the matter pursuant to s 481(1)(b) of the *Migration Act* could be made only in consequence of an exercise of the power in s 481(1)(a) to quash or set aside the RRT's decision. He inferred from the provisions of the *Migration Act* that a refusal of an application for a protection visa, once finally determined, should be conclusive in respect of all evidence considered in determining the application. There is no challenge to this aspect of his Honour's reasons.

104 Nonetheless, the primary Judge considered that the proffered evidence was admissible where the basis of the application for review was that

the RRT had failed to make proper inquiry. The evidence was not admissible as going to the truth of the matter which it is said the proper inquiry would have revealed. Rather, it went to the reasonableness or propriety of the inquiry which the RRT should have made.

105 The primary Judge noted that Ms Demir's counsel had submitted that the RRT, in omitting to make further inquiries as to the authenticity of the documents, had failed to act in accordance with substantial justice to Ms Demir, as required by s 420(2)(b) of the *Migration Act.* However, his Honour considered that the "critical question" was whether the RRT made its findings of fact with that degree of certainty which made it unnecessary to ask "What if I am wrong?".

106 The primary Judge held that the RRT had not made its finding that the documents were not authentic with the requisite degree of certainty. He said this (at 20-24):

"[T]he RRT seems to have been influenced not only by matters internal to the two documents but also by the alleged unwillingness of the applicant's mother to reveal where the documents came from. However, the internal evidence to which the RRT referred was not, in my view, inconsistent with the authenticity of the arrest warrant and the charge sheet. The absence of any other evidence before the RRT tending to suggest that the applicant was not on a 'wanted list' in Turkey therefore makes it difficult to **impute to the RRT** that it had no real doubt of the correctness of its findings adverse to the applicant....

...

In that context the finding as to the authenticity of the challenged documents was not merely one of a multitude of findings of fact, the rest of which had been made with a high degree of certitude. Rather, it was the single finding on which the RRT's conclusion turned. I do not regard the RRT's reasons, considered as a whole, as indicating that it had no real doubt that its finding on that central question was correct. **I am reinforced in this interpretation by the failure of the RRT to make further enquiries** about the authenticity of the arrest warrant and the charge sheet from sources in Turkey or otherwise available through the Department of Foreign Affairs and Trade.

...

Had the RRT established, after making enquiries of the kind that I have indicated, that the contents of the arrest warrant and charge sheet differed from what the standard forms of those documents as issued in Turkey usually contained, or that there were other features tending against their authenticity, I would have been more inclined **to impute to** it a lack of any real doubt about its finding that they were 'concocted'. However, in the absence of such further enquiries, I am unable to interpret the RRT's reasons as exhibiting that degree of certainty which would have absolved it from asking "What if I am wrong?". Since it is clear that the RRT did not apply that test before concluding that the applicant did not have a well-founded fear

of persecution, it was guilty of an error of law and its decision must be set aside." (Emphasis added.)

Reasoning on So-called "What if I am Wrong?" Issue

107 The primary Judge's approach relied on matters other than the RRT's reasons to conclude that the RRT had some doubt about its finding that the key documents were not authentic. In my opinion, for reasons that have been explained, this question must be resolved on the basis of a fair reading of the RRT's reasons. To "impute" doubt to the RRT by reason of its failure to make inquiries, or because of the absence of other evidence suggesting that Ms Demir was not on a "wanted" list, was to transform the inquiry into one as to whether the RRT should have had real doubts about its conclusion.

108 In my view, a fair reading of the RRT's reasons indicates that it had no real doubt about the conclusion that it had reached. It specifically found that the critical documents had been "fabricated" for the purpose of assisting Ms Demir's application for refugee status. The RRT expressed this conclusion in unequivocal terms and gave no indication in its analysis that it thought that there was room for doubt. I do not think that much assistance is derived from an examination of the transcript of the hearing in determining the RRT's apparent degree of confidence in its finding. However, a reading of the transcript reinforces the view that the RRT member regarded the circumstances in which the documents were produced as making it highly implausible that they could be genuine.

109 Whether the RRT was right or wrong to be so confident in its finding is not to the point on this aspect of the case. A fair reading of its reasons shows that it had no real doubt that its finding was correct. There was therefore no occasion for it to consider the chances that the documents were genuine and that Ms Demir was in truth being sought by the Turkish authorities by reason of an assumed association with the PKK.

110 It is true that this appeal differs from the other two, in that the RRT's findings that the documents had been fabricated did not rest on a view that Ms Demir's evidence lacked credibility. The documents were said to have come into existence after Ms Demir had left Turkey and she claimed to have had no knowledge of the arrest warrant or charge sheet save through her mother. The RRT found that Ms Demir's account of events was accurate, although falling short of establishing that she had suffered persecutory conduct in the past.

111 Even so, in my opinion, the RRT was not required to make a determination by reference to the chances that the documents were genuine or not. If it had concluded that it could not resolve the issue of authenticity, or that it was only slightly more probable than not that the documents were fabricated, the RRT would have been bound to take into account the possibility that the documents were authentic when assessing whether Ms Demir had a well-founded fear of being persecuted if she were to return to Turkey. To do

otherwise would have constituted a failure to apply correctly the test for determining whether a person satisfies the definition of "refugee".

112 Once again, the issue is not whether other decision-makers would have evaluated the material in the same way as the RRT did in this case. As Brennan J stated firmly in *Attorney-General (NSW) v Quin,* in the passage previously cited, the merits of administrative action, including fact-finding, rest with the decision-maker. There is nothing in the RRT's reasons which shows that it misunderstood or misapplied the test for determining whether Ms Demir had a well-founded fear of persecution for a *Convention* reason on her return to Turkey.

The RRT's Failure to Inquire

113 This is not, however, an end to the issues raised on the appeal. Mr Niall submitted in the alternative that the RRT had erred by failing to make an inquiry that would have been likely to establish whether or not the arrest warrant purportedly issued in respect of Ms Demir was authentic. Mr Niall suggested that an inquiry could readily have been made through the Australian Embassy in Ankara to ascertain whether the arrest warrant was typical of those issued by regional authorities in Turkey. Consistently with the way the matter was conducted before the primary Judge, Mr Niall did not argue that the RRT should have made inquiries, through the Australian Embassy, of the Criminal Court in Kayseri, as to whether the **particular** warrant was genuine. Although the written submissions filed on behalf of Ms Demir barely mentioned this argument and no notice of contention was filed, Mr Gunst QC, who appeared with Mr Mosley for the Minister, raised no objection to the point being considered.

114 Mr Gunst accepted in argument that, unless and until the High Court took a different view, it followed from *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 71 FCR 300 (FC), that a failure to act according to substantial justice, as required by s 420(2)(b) of the *Migration Act,* constituted a failure to observe a procedure required by the *Migration Act* to be observed by the RRT in connection with the making of its decision within the meaning of s 476(1)(a) of the *Migration Act.* Such a failure therefore provided a ground for review of the RRT's decision.

115 The foundation for Mr Gunst's concession has now been removed. The effect of the recent High Court decision in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21 is that s 420(2)(b) does not prescribe procedures the RRT is required to observe: see at [77], per Gaudron and Kirby JJ (dissenting, but not on this point); at [106], [108], per Gummow J; at [179], per Callinan J. Given the "procedural bifurcation" (at [154], per Gummow J) that now attends judicial review of migration decisions (that is, the fact that the High Court's jurisdiction under s 75(v) of the *Constitution* is wider than the Federal Court's jurisdiction under Part 8 of the *Migration Act*), and the possibility of an application being made in the original jurisdiction of the High Court, there may nonetheless be some

utility in considering whether Ms Demir's "failure to inquire" argument would have succeeded but for the decision in *Eshetu.* I take into account that the issue was fully debated on the appeal.

116 Mr Gunst acknowledged, on the assumption that the decision of the Full Court in *Eshetu* was good law, that there are circumstances in which the RRT will be required to make inquiries if it is to comply with the obligation to act according to substantial justice. As I understood him, Mr Gunst accepted that, on the present authorities, Wilcox J stated the position correctly in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 (FC) at 119:

"It is now established that a failure by a decision-maker to obtain important information, on a central issue for determination, that the decision-maker knows to be readily available may result in the decision being branded an exercise of power so unreasonable that no reasonable person could so exercise the power: see Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155, at 169; Luu v Renevier (1989) 91 ALR 39, at 50 and Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, at 290. Because of the exclusion effected by s 476(2)(b) of the Migration Act, the decision is not judicially-reviewable on the ground of manifest unreasonableness, but Eshetu establishes this circumstance does not exclude the application to it of any ground listed in s 476(1). It seems to me that, if the Tribunal's treatment of the issues is so unreasonable that it must be said the decision could not have been made by a reasonable person, there has not been 'substantial justice'."

117 In the present case, it is clear that the authenticity of the two documents relied on by Ms Demir in her review application to the RRT was the central issue for determination. Mr Gunst conceded as much. This is not, however, sufficient of itself, to oblige the RRT to make further inquiries, assuming the general principles stated in *Sun Zhan Qui* apply. As was said in the joint judgment of four members of this Court in *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553 (Black CJ, von Doussa, Sundberg and Mansfield JJ), at 561:

"[w]e are respectfully unable to agree with the primary judge's general proposition that where an applicant produces a document which purports to be an official document issued in a foreign country, its disputed authenticity is a matter appropriate for verification by the tribunal through official channels, if by that her Honour intended to convey (as the respondent suggested) that the Tribunal was under a duty to verify in such cases. In a particular case the Tribunal may indeed be obliged to verify a document in this fashion, but there is no general rule to that effect."

Their Honours observed that the circumstances in which the RRT could be found to be under an obligation to make a particular inquiry "will no doubt be rare".

118 In the present case, the RRT, on its own initiative, had sought advice from the Document Examination Unit as to the authenticity of the key documents. Had the Unit expressed a clear view on the question of authenticity, there is little doubt that the RRT could properly have acted on that view. However, while the Unit's report counselled caution before accepting

the documents as genuine, it was inconclusive on the question of authenticity. The RRT was therefore left in a position of some uncertainty in relation to this question.

119 In many instances in which the decision-maker has to determine whether documents are authentic, the issue might be resolved by determining whether the applicant is a credible witness whose account of events should be accepted. This approach was not open to the RRT in the present case since, as I have explained, on Ms Demir's version of events, the warrant and charge sheet had been issued by the Turkish authorities **after** she had left the country and she knew no more about them than she had been told by her mother. Furthermore, the RRT accepted Ms Demir's account of her experiences in Turkey and relied on that account (in particular, the absence of any claim to membership of the PKK) as one reason for concluding that the arrest warrant and charge sheet could not have been genuine.

120 It is clear enough that the RRT member was conscious of these difficulties. At the hearing, he raised the possibility of making inquiries through the Australian Embassy in Turkey to see whether a copy could be obtained of the genuine arrest warrant. Ms Demir's representative warned about possible bureaucratic difficulties in Turkey, but did not dissent from such a course being followed. The RRT member stated that he would think further about the possibility of making inquiries.

121 As I have noted, during the course of the hearing the RRT member expressed very serious reservations about the authenticity of the documents. Ms Demir's representative addressed those reservations in subsequent written submissions. In the course of those submissions, the representative suggested that the

"only possible 'further substantiation' which may be appropriate is the suggestion by the Tribunal at Hearing that it contact the Australian Embassy with a view to obtaining confidentially from the police an example of an arrest warrant. The applicant is willing for the Tribunal to make such inquiries, but we would also repeat our caveat that those documents used by the authorities may not be uniform throughout Turkey, and may be different from those used in Kayseri in particular. To expect bureaucratic consistency in a country such as Turkey is, we submit, not necessarily appropriate."

The submission went on to say that Ms Demir should be given the benefit of the doubt and that the RRT should only require some form of confidential corroboration from the Turkish authorities if it intended to make an adverse finding as to the genuineness of the documents.

122 Ms Demir's representative was thus prepared to contemplate that confidential inquiries should be undertaken through the Australian Embassy in order to obtain examples of arrest warrants issued in Turkey, so that comparisons could be made with the arrest warrant relied on by Ms Demir. For reasons of confidentiality, however, Ms Demir was apparently not prepared to consent to a course which might have revealed her identity to the Turkish authorities. She was therefore apparently not willing for the RRT to

undertake inquiries from the Kayseri Criminal Court specifically designed to confirm or disprove the authenticity of the critical documents themselves.

123 Given the approach taken by Ms Demir's representative (and maintained since), the only further inquiry open to the RRT was to request the Australian Embassy to obtain examples of arrest warrants or charge sheets from the Turkish authorities. It is difficult to see that an inquiry of this kind would have advanced the issue very much further. The concerns the RRT had about the authenticity of the documents simply would not have been addressed by the production of standard form arrest warrants or charge sheets. Even if they had been similar in form to the impugned documents, that fact would not have established the authenticity of those documents.

124 In these circumstances, on the assumptions outlined earlier, Ms Demir could not have made out her claim that the RRT was obliged to make further inquiries.

125 The Minister's appeal in Ms Demir's case must be allowed, with costs.

Further Evidence

126 The Minister contended that the primary Judge should not have admitted the evidence tendered on the application before him. Since the documents tendered postdated the RRT's decision and were different inform to the arrest warrant and charge sheet relied on by Ms Demir before the RRT, they appear not to have been relevant to any issue that was before his Honour. However, it is not necessary to make a ruling on the evidentiary question, since their reception into evidence does not affect the conclusions I have expressed.

Conclusion

127 The Minister's appeal in each case should be allowed, with costs. The orders made by the primary Judge in each case should be set aside and in lieu thereof it should be ordered that each application be dismissed and that the applicant pay the Minister's costs.

128 I should add this comment. Since preparing these reasons, I have had the opportunity of reading in draft the judgment of the Court in *X v Minister for Immigration and Multicultural Affairs* [1999] FCA 697 (FC). I think that the approach taken by their Honours to the so-called "What if I am wrong?" test is consistent with the approach I have taken.

I certify that the preceding one hundred and twenty-eight (128) numbered paragraphs are a true copy of the Reasons for

Judgment herein of the Honourable Justice Sackville.

Associate:

Dated: 3 June 1999

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 534 OF 1998 VG 425 OF 1998 VG 610 OF 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

VG 534 of 1998:

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Appellant
AND:	ARAVINTHAN RAJALINGAM Respondent

VG 425 of 1998:

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Appellant

AND: CLAUDIA MARIA CORTEZ

First Respondent

MARIA AMANDA ALVAREZ

Second Respondent

VG 610 of 1998:

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Appellant

AND: NILUFER DEMIR

Respondent

JUDGES: SACKVILLE, NORTH, KENNY JJ

PLACE: MELBOURNE

DATE: 3 JUNE 1999

REASONS FOR JUDGMENT

NORTH J:

129 I agree with the orders proposed by Sackville J and with the reasons expressed by him for those orders.

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

Associate:

Dated: 3 June 1999

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 534 OF 1998 VG 425 OF 1998 VG 610 OF 1998

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Appellant

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Respondent

JUDGES: SACKVILLE, NORTH, KENNY JJ

PLACE: MELBOURNE

DATE: 3 JUNE 1999

REASONS FOR JUDGMENT

KENNY J:

130 The circumstances relied on by each of the respondents in support of an application for a protection visa and the reasons given by the Refugee Review Tribunal ("the RRT") for affirming the decision made by a delegate of the appellant not to grant such a visa are set out by Sackville J. It is sufficient for my purposes if I refer merely to those matters that seem to me to be critical.

THE ROLE OF THE RRT

131 Subject to a matter that is not presently relevant, the RRT is required, by s 414(1) of the *Migration Act 1958* ("the Act"), to review a decision to refuse a protection visa when a valid application is made under s 412. By virtue of s 415, the Tribunal may exercise all the powers and discretions that are conferred by the Act on the person who made the decision under

review. Within this legislative scheme, the RRT is called on to decide whether an applicant for a protection visa has a well-founded fear of being persecuted for a Convention reason (ie., a reason referred to in Article 1A(2) of the Convention Relating to the Status of Refugees 1951, as amended by the Protocol Relating to the Status of Refugees 1967 (together, "the Convention")). That criterion must be satisfied before a protection visa can be granted: see the Act, s 36(2), s 65 and Migration Regulations 1994, Schedule 2, clause 866.221.

132 In determining whether an applicant has a well-founded fear of persecution, the RRT must form an opinion as to what is likely to occur to him or her if returned to the country of his or her nationality: see *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; *Abebe v The Commonwealth; re Minister for Immigration and Multicultural Affairs* (unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 14 April 1999) (1999) 162 ALR 1 per Gleeson CJ and McHugh J.

133 Applicants for protection visas may rely on what has happened to them in the past in their country of nationality to support a claim that they fear persecution on Convention grounds and that the fear is well founded. As Gummow and Hayne JJ (with whom Gaudron and Kirby JJ agreed) said in *Abebe*, at para 192, whilst "proving persecution in the past is not an essential step in an applicant demonstrating that he or she has a well-founded fear of persecution", "[i]f a person has been persecuted in the past for a Convention reason, this history may ground an inference that the person subjectively fears repetition of persecution and an inference that this fear is well founded". See also *Abebe*, at para 82 per Gleeson CJ and McHugh J, and *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 415 per Gaudron J.

134 The RRT is not, of course, bound to accept the applicant's claim uncritically. If an applicant relies on past experience, then the RRT must evaluate what he or she says about that experience. In such a case, such an evaluation is, it seems, the logical starting point for the Tribunal's deliberation: cf *Chan* 169 CLR at 387 per Mason CJ, 399 per Dawson J, 406 per Toohey J and 415 per Gaudron J; and *Abebe* at para 82-3 per Gleeson CJ and McHugh J.

135 The applicants in the cases under appeal relied upon their experiences in their countries of nationality in support of their applications. As was to be expected, in each case, the information before the Tribunal that was relevant to each applicant's history was not all to the same effect, of the same kind, or from the same source. The difficulties presented in the assimilation of different items of information are commonplace for almost any body engaged in a fact-finding process. The differences between items of information (including their effects, provenances and forms) must be taken into account in assessing their relevance, significance and reliability. It is only by so doing that the fact-finder can evaluate and determine what weight to give the various items of information before it. Only when that is done can the fact-finder (here, the RRT) reasonably reach relevant findings (in these cases, about the

applicants' experiences in their countries of nationality). As the High Court has said on a number of occasions, the RRT is entitled (indeed, must) weigh the material before it and make findings of relevant facts before it turns to consider the ultimate question, whether it is satisfied that an applicant has a well-founded fear of persecution on a Convention ground: see *Guo* 191 CLR at 576; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 280-1 per Brennan CJ, Toohey, McHugh and Gummow JJ, 292 per Kirby J; and *Chan* 169 CLR at 413 per Gaudron J.

136 Whether or not the RRT can, by reference to an applicant's claimed experience, infer that a fear of persecution, on a Convention ground, is well founded depends partly on its assessment of the degree of probability that claimed past events actually occurred or occurred for a Convention reason. As the joint judgment in *Guo* notes at 576:

"It is true that, in determining whether there is a real chance that an event will occur or will occur for a particular reason, the degree of probability that similar events have or have not occurred or have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or that reason will occur in the future."

Further, as Brennan CJ, Toohey, McHugh and Gummow JJ said in *Wu Shan Liang* at 281:

"As a matter of ordinary experience, it is fallacious to assume that the weight accorded to information about past facts or the opinion formed about the probability of a fact having occurred is the sole determinant of the chance of something happening in the future: the possibility that a different weight should have been attributed to pieces of conflicting information or the possibility that the future will not conform to what has previously occurred affects the assessment of the chance of the occurrence of a future event."

See also *Abebe*, at paras 83 and 85 per Gleeson CJ and McHugh J. Once the claimed past events have been evaluated, in many cases, "the probability that an[other] event will occur may border on certainty. In other cases, the probability that an[other] event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur": see *Guo* at 574.

137 In deciding whether or not it is satisfied that an applicant has a well-founded fear of persecution for a Convention reason, the RRT may well, it seems to me, consider a range of matters, depending on the circumstances of the particular case. After consideration of the material before it, the RRT may be of the view that a claimed event relied on by the applicant did not occur (or not for the reason alleged), although it is "only slightly more probable than not" that it did not occur as alleged. In that case, the Tribunal must take account of that uncertainty in considering whether it is satisfied, having regard to all the material before it, that the applicant has a well-founded fear of persecution. On the other hand, if the Tribunal is of the view that a claimed event did not occur and that it is unlikely to be wrong in that view, then the

Tribunal must exclude that event from its consideration of whether it has the relevant satisfaction. Nor can the Tribunal, in the latter circumstance, be required to take into account any remaining uncertainty, albeit slight, that it might have about the happening of the claimed event, because it would have none that mattered. See *Guo*, at 576; *Chand v Minister for Immigration and Ethnic Affairs* (unreported, von Doussa, Moore, Sackville JJ, 7 November 1997) [1997] FCA 1198; *Zuway v Minister for Immigration and Ethnic Affairs* (unreported, Katz J, 31 December 1998) [1998] FCA 1738.

138 Moreover, whether or not the RRT can, by reference to an applicant's experience in his or her country of nationality, infer that he or she has a fear of persecution that is well founded will also partly depend upon "the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity": see *Guo* at 574.

139 Even if the RRT is satisfied that the claimed past events relied on by an applicant did not occur and is untroubled by any uncertainty on that score, the applicant's claim does not necessarily fail. There remains for consideration any other basis upon which it is said that his or her fear of persecution is well founded: *Abebe* at para 193 per Gummow and Hayne JJ.

140 There is, however, nothing in the judgments of the majority in *Guo* or *Wu Shan Liang* to require the RRT to address the specific question "What if I am wrong?" after it has made findings of fact and in the course of determining whether it is satisfied that the applicant has a well-founded fear of persecution. Indeed, I doubt that Kirby J intended to be understood as requiring that: see *Wu Shan Liang* at 293. In deciding whether it has a relevant satisfaction for grant of a protection visa, the Tribunal is required to bear in mind the totality of the case. That, as we have seen, includes any relevant uncertainty that it entertains as to whether claimed events in the applicant's past may ground a fear of persecution for a Convention reason. In that respect, the Tribunal is required to do no more than to satisfy itself in accordance with commonsense and the ordinary experience of mankind.

THE ROLE OF THE COURT

141 The occasions upon which this Court may set aside a decision by the RRT in relation to a protection visa are limited to those errors of law specified in s 476(1) of the Act. The Court has no power to inquire into the merits of the decision. In many cases, the only way to ascertain whether there has been a reviewable error of law is by reading and considering the reasons for a decision which have been written and published by the RRT under s 430 and s 431 of the Act. Those reasons are, of course, to be read fairly, bearing in mind that they are the reasons of an administrative decision-maker and that the Court must not inquire into the merits of the decision. See *Wu Shan Liang* at 271-272 and the authorities referred to there. As Brennan CJ, Toohey, McHugh and Gummow JJ said in *Wu Shan Liang* at 272, "the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon a over-zealous judicial review by seeking to discern whether some

inadequacy may be gleaned from the way in which the reasons are expressed. … [A]ny court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision". See also *Wu* at 291 per Kirby J and *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J.

MR RAJALINGAM'S CASE

142 In *Rajalingam*, the learned primary judge held that the RRT erred in law in failing to ask itself "What if I am wrong?". As I have indicated, for my own part, I do not consider that it was incumbent on the Tribunal to ask itself that particular question. Is his Honour's decision to be supported, however, on the basis that the Tribunal erred in failing to consider any uncertainty it entertained about Mr Rajalingam's experience in Sri Lanka and the circumstances in which he came to leave the country?

143 Mr Rajalingam, who was born on 28 January 1975, is a Tamil citizen of Sri Lanka. He claimed that, at the end of November 1996, some four months before he left Sri Lanka, he had been forcibly taken from his home to local police headquarters where he had been assaulted and kept in detention. His case turned very largely on his claim that whilst in detention he was identified to police by an associate and that, in consequence, he admitted to police that he had been collecting funds for an insurgent group, the Liberation Tigers of Tamil Eelam ("the LTTE"). After that admission, so Mr Rajalingam said, he was detained for two further months and he was only released when a bribe was paid by his family. Even then, according to Mr Rajalingam, he was required to report weekly to police. He was advised to leave Sri Lanka by a person who had, it seems, been an inspector of police. He held a passport and was able to leave the country through normal means, although he received some assistance from a third (unnamed) party to come to Australia. Mr Rajalingam stated that if he were returned to Sri Lanka, then he would be questioned by police and his links with the LTTE would be discovered. He stated that, if that happened, he believed he would be killed.

144 The RRT did not accept that Mr Rajalingam was detained for any prolonged period; that he was placed on reporting conditions on release from detention; that he was of any interest to the authorities when he left Sri Lanka; that he was affiliated with the LTTE and had been suspected of LTTE support; that he had resorted to an agent to get to Australia because he was on the run from the authorities; or, indeed, that he was in fear of being persecuted. The Tribunal found that if Mr Rajalingam was known to be an active LTTE supporter, it was likely that he would have been included on an alert list and he would not have been able to leave Sri Lanka freely.

145 Of these reasons, the judge at first instance said:

"The reasons advanced for the rejection of the applicant's assertions are not objectively cogent enough to impute to the Tribunal a view that the probability of error in the rejection of each of them was insignificant."

His Honour added:

> *"The Tribunal did not subsequently indicate, in its reasons or elsewhere, why, or with what degree of confidence, it rejected the applicant's explanation. … Moreover, I do not consider that the Tribunal's hypothesis that the applicant, after bribing his way out of detention, would have been placed on an "alert list" and thereby have been prevented leaving Sri Lanka, to be sufficiently compelling to sustain the degree of confidence that it could not have been wrong which is mandated by the principles in* Guo *and* Wu*."*

146 The above observations concern the sufficiency of the Tribunal's explanation for its opinion about the circumstances in which Mr Rajalingam came to leave Sri Lanka. A concern of that kind can, however, rarely form the basis for a finding of error of law. A tribunal such as the RRT does not commit an error of law merely because it finds facts wrongly or upon a doubtful basis, or because it adopts unsound or questionable reasoning. See *Minister for Immigration and Multicultural Affairs v Eshetu* (unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 13 May 1999) [1999] HCA 21 at paras 40, 44-45 per Gleeson CJ and McHugh J, 138 per Gummow J and cf para 159 per Hayne J; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ with whom Brennan J at 365, Deane J at 369 and Toohey and Gaudron JJ at 387 agreed; *Roads Corporation v Dacakis* [1995] 2 VR 508 at 517-520; *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 160 ALR 543 (FC). In my view, the effect of his Honour's judgment was to turn what his Honour saw as doubtful fact-finding into an error of law. What his Honour did, I think, was erroneously attribute to the RRT the doubts his Honour had about the facts the RRT had found. Once that step was taken, his Honour treated the RRT's failure to address those doubts as indicative of a failure to take them into account in reaching its ultimate decision, as the decisions in *Guo* and *Wu Shan Liang* indicated it should have done. I agree with the remarks of Katz J in *Zuway* (unreported, 31 December 1998) [1998] FCA 1738 that a search by the Court for objective cogency in the reasons of the RRT creates a real risk that the Court will substitute its own view of the merits of the case for that of the Tribunal.

147 As Katz J observed in *Zuway*, nothing in the joint judgments in *Guo* or *Wu Shan Liang* requires the RRT to use any particular language in expressing its satisfaction with regard to an applicant's past experience. Nothing in the joint judgments requires the Tribunal to say expressly that it entertained no real doubt as to its findings or else to provide reasons that logically compel its factual conclusions. Unless those are requirements (and they are not), a statement of reasons cannot be construed as implying that the RRT entertained a real doubt about the facts as it has found them when no such doubt is admitted. The analysis made by the judge at first instance is, it seems to me, essentially a criticism of the RRT's findings of fact, of the weight that it attributed to the different items of information before it, and of the reasoning process adopted by it in reaching it factual conclusions. For present purposes (and certainly under the present statutory regime) a criticism of that kind, no matter how sound, does not establish an error of law: cf *Abebe* at

para 197 per Gummow and Hayne JJ and para 296 per Callinan J; *Eshetu* paras 40, 44-45 per Gleeson CJ and McHugh J, 138 per Gummow J; and cf para 159 per Hayne J and para 184 per Callinan J.

148 The fact is that the RRT did not express any uncertainty about the critical facts relating to Mr Rajalingam's experience in Sri Lanka. Nothing in the RRT's reasons indicates that it entertained any real doubt about the facts as it found them to be. There was no occasion for the Tribunal to take into account any doubts that it entertained about the happenings to which Mr Rajalingam referred because the Tribunal apparently had none.

149 Counsel for the respondent submitted that if it were not open to the Court to evaluate the objective cogency of the RRT's reasons, then the strength of the language used by it might conceal the weakness of its findings. That may be so. I do not think the Act and, to the extent it applies, the common law, dictate a different result. In so far as the observations in the joint judgments in *Guo* and *Wu Shan Liang* concern how the RRT is to go about finding facts, the observations will not ordinarily constitute a basis for challenging a Tribunal's decision for error of law. In so far as the observations in those cases relate to the matters that are to form the subject of consideration in determining whether the RRT has the relevant satisfaction, the reviewing court is almost invariably constrained by the reasons for decision that the RRT publishes. That constraint is an ordinary concomitant of the jurisdiction that the reviewing court is called upon to exercise.

THE CASE OF MRS ALVAREZ AND HER GRANDDAUGHTER

150 Maria Amanda Alvarez, who was born on 25 September 1923, and Claudia Maria Cortez, who was born on 13 January 1982, are citizens of El Salavador. Claudia Cortez has lived with Mrs Alvarez, who is her grandmother, since she was about nine months old. Both failed in their applications for protection visas, first before the Minister's delegate and, then, before the RRT.

151 Mrs Alvarez has four adult children, including three sons who supported, to varying degrees, the Ferrabundo Marti Front for National Liberation ("FMLN"), the main left wing guerilla and political group in El Salvador. In consequence, they were, it appears, practically compelled to leave the country, the first in 1981, a second in 1987, and a third in 1995. Mrs Alvarez stated, and the RRT accepted, that she had suffered greatly in 1981 and 1989, during the course of interrogations by the authorities as to her sons' whereabouts. There had, however, been no other major incident of persecution until, so the respondents said, 1995 (although in 1990 Mrs Alvarez and Claudia had, it seems, lived with friends).

152 The case for Mrs Alvarez and her granddaughter rested, in large part, on two alleged events: first, late one night in May 1995, not long after an attack upon the last of Mrs Alvarez's sons to remain in El Salvador, a machine gun was fired at Mrs Alvarez's house while she and her granddaughter were asleep and the slogan "Death to Communists, Black Shadow" applied to the

house wall; and secondly, her eldest son, who had left El Salvador in 1981, was wounded by gunshot when he paid a return visit to El Salvador in 1996.

153 Whilst the RRT accepted that Mrs Alvarez (and, it seems, her granddaughter) had a "genuine subjective fear of persecution", it held that Mrs Alvarez was "not a credible witness"; and that her granddaughter "did not appear to be a totally credible witness" and had been "strongly influenced by her grandmother in the story she told the Tribunal". The Tribunal did not accept (1) that Mrs Alvarez and her granddaughter "were threatened by Black Shadow in 1995"; (2) that one of Mrs Alvarez's sons "returned to El Salvador in 1996 and was shot by some men" (or that the documents relating to the claim were genuine); or (3) that Mrs Alvarez and her granddaughter are "the type of people who are still at risk from the vigilante groups currently operating". (The Sombre Negra, or Black Shadow, was the name of a vigilante group associated with "political" murders.) Specifically, the RRT said that Ms Cortez and her grandmother "do not have the sort of profile of those who are among the latest targets of the vigilante groups. I do not accept that people with profiles such as theirs would be at risk in 1996, especially as they appeared to have virtually no problems from 1990 until mid 1995". The RRT held that it was not satisfied that Mrs Alvarez and her granddaughter had a well-founded fear of persecution.

154 The judge at first instance set aside the decisions of the RRT regarding Mrs Alvarez and Claudia Cortez. His Honour held that the Tribunal had failed in its duty to consider the possibility that its findings were wrong in concluding either that "the alleged incident on 10 May 1995 did not happen or that [Mrs Alvarez's son] had not been shot in El Salvador at the end of September 1996". His Honour said:

"I am not able to infer that the RRT had no real doubts that its findings as to the non-occurrence of the past events which I have identified were correct. Indeed, I consider on the state of the evidence before the RRT that it would have been unreasonable for it to have attained such a degree of conviction of its own correctness. … [W]hether or not the RRT was obliged to make its own inquiries as to the authenticity of the purported medical certificate related to [Mrs Alvarez's son], the fact that it had not done so reinforces the inference that it did not regard its conclusion that he had not been shot as so strong that 'the Tribunal was not bound to consider the possibility that its findings were inaccurate' …".

155 In my view, the Tribunal's findings, particularly concerning the incident of 10 May 1995 and the alleged shooting in 1996, were clear and unequivocal. They turned in part on the Tribunal's assessment of the credibility of Mrs Alvarez and her granddaughter. That assessment was for the Tribunal to make and no error is shown in the process by which the assessment was made. It was not, I think, open to his Honour to rely upon his own evaluation of "the state of the evidence before the RRT" in order to conclude that he was unable to "infer" that the Tribunal had no real doubts about its findings. In relying on that evaluation, it seems to me that his Honour strayed into the forbidden field of merits review. Nothing in the joint judgments

in *Guo* or *Wu Shan Liang* warrants a court of judicial review engaging in a process by which it draws or seeks to draw inferences as to the doubts that the RRT had or did not have about its findings of fact. It was not, I think, open to his Honour to treat the Tribunal's failure to make inquiries as to the authenticity of the medical certificate concerning Mrs Alvarez's allegedly wounded son as indicative of a lack of certainty on the Tribunal's part about the alleged attack. The absence of further inquiries might just as easily have been indicative of a confidence in its finding that made further inquiries unnecessary.

THE CASE OF MS DEMIR

156 Nilufer Demir, who was born on 19 October 1974, is a citizen of Turkey. She also claims to be a Kurd and an Alevi (ie. a member of an off-shoot group of Shi'ite Islam). Ms Demir's case is that since arriving in Australia in August 1995, she has become a refugee sur place, because a warrant for her arrest has been issued in Turkey for the offence of being a member of and helping an illegal organisation (namely, the PKK, or Kurdish Workers' Party). Details of her alleged involvement were said by her to be set out in a document which, for present purposes, I call a charge sheet. Ms Demir purported to produce both the arrest warrant and the charge sheet to the Tribunal in support of her application for a protection visa. Apparently at the request of the Department of Immigration and Multicultural Affairs, the Document Examination Unit, with a view to establishing the authenticity of those documents, examined them both. A member of the Unit "urged caution in accepting these documents as evidence in the absence of further substantiation".

157 The RRT did not accept that the documents were genuine or that Ms Demir was wanted by police in Turkey. It followed, so the RRT held, that she was not a refugee sur place. The Tribunal gave a number of reasons for not accepting the authenticity of the alleged arrest warrant and charge sheet. They were: (1) the charge sheet gave disproportionately more details about Ms Demir than about her co-accused, indicating, so the RRT said, that it had been prepared for the purpose of Ms Demir's protection visa application; (2) the arrest warrant stated that it was issued on account of "the possibility that the accused may abscond", although by the date the warrant was issued Ms Demir was already in Australia; (3) the charges, on the face of the warrant, bore "so little resemblance to the history of the applicant that in the Tribunal's view the documents have been fabricated for the purpose of furthering a claim for refugee status"; and (4) Ms Demir's mother's "reluctance to reveal where the documents came [from] confirms that they were created to assist in [Ms Demir's] application for refugee status". The Tribunal did not accept that Ms Demir had either an actual or imputed association with the PKK. It found that there was no other basis upon which it could be satisfied that she had a well-founded fear of persecution.

158 The primary judge heard not only an application for judicial review of that decision but also a motion, on the applicant's part, for leave to refer to further evidence. That evidence was to the effect that Ms Demir's name had

been placed on a list of persons wanted by police. His Honour held that that evidence was "not admissible as going to the truth of the matter which it is said the proper inquiry would have revealed" but it was admissible as going to "the reasonableness or propriety of the inquiry which it is suggested that the decision-maker should have made". If it mattered, I would accept the appellant's submission that the additional material on which Ms Demir sought to rely was simply fresh material that had come into her possession after the RRT's decision. As such, the material was not admissible on any question before his Honour, although it might be relevant to an exercise of power under s 48B or s 417 of the Act.

159 On appeal, counsel for Ms Demir submitted that the RRT erred by failing to make an inquiry that would have been likely to establish whether or not the arrest warrant was authentic. The error amounted, in counsel's submission, to a failure to act according to substantial justice for the purposes of ss 420 and 476(1)(a) of the Act. The decision of the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu* (unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 13 May 1999) [1999] HCA 21 establishes, however, that s 420 does not create a ground of review additional to those given in s 476. The submission made by counsel must, therefore, fail.

160 The primary judge held that the critical question for the resolution of Ms Demir's judicial review application was "whether the RRT made its findings of fact with that degree of certainty which made it unnecessary to ask 'What if I am wrong?'". After referring to the report from the Document Evaluation Unit and the Tribunal's finding that neither the arrest warrant nor the charge sheet were genuine, his Honour said:

"[T]he RRT seems to have been influenced not only by matters internal to the two documents but also by the alleged unwillingness of [Ms Demir's] mother to reveal where the documents came from. However, the internal evidence to which the RRT referred was not, in my view, inconsistent with the authenticity of the arrest warrant and the charge sheet. The absence of any other evidence before the RRT tending to suggest that the applicant was not on a "wanted list" in Turkey therefore makes it difficult to impute to the RRT that it had no real doubt of the correctness of its findings adverse to the applicant."

The finding that the documents were not genuine was, his Honour considered, "the single finding on which the RRT's conclusion turned". His Honour went on:

"I do not regard the RRT's reasons, considered as a whole, as indicating that it had no real doubt that its finding on that central question was correct. I am reinforced in this interpretation by the failure of the RRT to make further inquiries about the authenticity of the arrest warrant and the charge sheet from sources in Turkey or otherwise available through the Department of Foreign Affairs and Trade."

161 The Tribunal's statement that it did "not accept that [the arrest warrant and the charge sheet] are genuine" was specific and clear. That conclusion

flowed very largely from the Tribunal's view (contrary to that of his Honour) that there were matters within the documents themselves that indicated they were not genuine. The Tribunal betrayed no doubt on this score. On the contrary, the tenor of the RRT's reasons indicate that it was reasonably confident that it was correct. Contrary to his Honour, I do not think that the RRT's failure to enlist the help of, for example, Australian Embassy staff to make further inquiries militates against that conclusion. The Tribunal was plainly aware that, if it had any doubt as to whether or not the documents were genuine, it might make an inquiry of that kind, because it specifically raised that possibility with Ms Demir's representative at the hearing. Its failure to do so may as readily be regarded as indicative of the fact that it entertained no real doubt that it should not accept the documents as genuine. Whether or not the Tribunal was satisfied as to the authenticity of documents relied on by Ms Demir was essentially a matter for it. If it were open to the Court to review the merits of the RRT's decision and, in so doing, to determine what, if any, doubts about its findings the RRT ought to have had, then it would be open to the Court to attribute to the RRT any such doubts, even though the RRT did not itself acknowledge them, either expressly or impliedly. It is not, of course, open to the Court to conduct a merits review. In my view, the path his Honour trod in this case (in the course of which he made a different assessment of the significance of the matters relied on by the Tribunal) led him to trespass into that field.

OBSERVATIONS ON THE APPEALS

162 For the reasons given, I would allow these appeals. It should be borne in mind, however, that the borders of review for error of law, which is permissible, and review on the merits, which is not, are often indistinct. Minds can, and do, reasonably differ as to where those borders are. Mapping the borders is made more difficult by Parliament's decision to constrain the review jurisdiction of the Court to the errors of law specified in s 476(1) of the Act. There is the further consideration, too, that, in the circumstances of the cases under appeal, one might well understand if the appellant were ultimately to decide to exercise his discretionary powers in favour of some, at least, of the respondents.

163 I note that I have had the advantage of reading in draft part of the reasons for judgment in *X v Minister for Immigration and Multicultural Affairs* (unreported, Hill, Whitlam, Kiefel JJ, also delivered this day) [1999] FCA 697. I have read that part of their Honours' reasons that, under the heading "What if I was wrong?", discusses, in a dozen or so paragraphs, the legal status of such an inquiry, having regard to the recent decisions of the High Court and this Court. There is not, I think, any inconsistency between my approach in these reasons and the approach adopted in *X v Minister for Immigration and Multicultural Affairs* in the paragraphs that I have read.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons

for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated: 3 June 1999

VG 534 of 1998:

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VG 610 of 1998:

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Solicitor for the Respondent Erskine Roden & Associates

Date of Hearing: 10 February 1999

Date of Judgment: 3 June 1999