FEDERAL COURT OF AUSTRALIA

NACB of 2002 v Minister for Immigration & Multicultural Affairs [2002] FCAFC 140

MIGRATION – Refugee Review Tribunal not satisfied that the risk of persecution was so remote as to be fanciful – whether RRT addressed the correct question – whether the RRT affirmatively satisfied that the appellant's fear of persecution was well-founded.

Convention relating to the Status of Refugees, Arts 1A(2), 31, 32, 33

Protocol relating to the Status of Refugees

Migration Act 1958 (Cth), ss 22AA, 36, 65, 476

Migration Regulations 1994 (Cth), Sched 2, Subclass 866 [221]

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

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 61, followed.

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

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

Chen v Minister for Immigration and Ethnic Affairs (1995) 58 FCR 96, cited.

NACB OF 2002 v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

N 94 of 2002

BEAUMONT, CARR & SACKVILLE JJ

21 MAY 2002

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 94 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NACB OF 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	BEAUMONT, CARR & SACKVILLE JJ
DATE OF ORDER:	21 MAY 2002
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 94 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NACB OF 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	BEAUMONT, CARR & SACKVILLE JJ
DATE:	21 MAY 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BEAUMONT J:

1 I agree with Sackville J.

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

Associate:

Dated: 21 May 2002

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N94 OF 2002

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NACB of 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	BEAUMONT, CARR & SACKVILLE JJ
DATE:	21 MAY 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

CARR J:

INTRODUCTION

2 This is an appeal from a judgment setting aside a decision of the Refugee Review Tribunal that it was satisfied that the appellant was a person to whom Australia had protection obligations under the Refugees Convention. On 7 September 2001 the Tribunal remitted the appellant's application for a protection visa to a delegate of the respondent for reconsideration, with a direction that the appellant was a person to whom Australia had protection obligations under the Refugees Convention. The respondent sought judicial review of that decision. On 18 January 2002 the learned primary judge set aside the Tribunal's decision and remitted the matter to it for reconsideration and determination according to law.

factual background

3 The appellant is a 36 year old Sri Lankan citizen. He left Sri Lanka on 23 February 2001 and arrived at Christmas Island by boat from Indonesia on 22 April 2001.

4 The appellant's claims, which, so it seems to me, were accepted by the Tribunal, were, in summary, as follows:

- He was born on 6 July 1965. His father is Tamil and his mother Singhalese. His national identity card characterises him as a Tamil from Kandy;

- He was a supporter of the UNP, an opposition party, in the elections in 2000. He acted as a bodyguard for a local UNP candidate in Kandy. The other bodyguards used by that candidate had been coached or trained in martial arts by the appellant. The appellant was well known in Kandy as a teacher of martial arts;

- The appellant became embroiled in electoral violence in Kandy during the 2000 election campaign. He was threatened by the son of a senior government minister (the local incumbent) and some of his thugs in an effort by them to seize his electoral card. During this incident the appellant and a friend assaulted the thugs. The police, initially, took the side of the senior minister's son and thugs, but eventually arrested them when neighbours intervened and confirmed that their electoral cards had been taken by force by those persons; and

- The appellant fled from Kandy to Colombo and feared harm at the hands of those political opponents or the police.

the tribunal's reasons

5 As is almost standard practice, the Tribunal, at the beginning of its reasons, set out the relevant law. In my view it did so accurately. The respondent has certainly made no complaint about that part of the Tribunal's reasons.

6 The Tribunal then reviewed the appellant's claims and evidence. It also referred to some independent country information, in particular, information relating to treatment of Tamils in Colombo.

7 I set out below the findings and reasons of the Tribunal in full. I have added numbers to facilitate later references:

"(i) I am satisfied that the Applicant is a Sri Lankan citizen. His father was Tamil and his mother Singhalese. His National Identity Card identifies him as a Tamil from Kandy.

(ii) I am satisfied that the Applicant was a supporter of the UNP in the elections in 2000. He acted as a bodyguard for a local UNP candidate. The other bodyguards used by the candidate had been coached or trained in martial arts by the Applicant. The Applicant was a (sic) well known in Kandy as a teacher of martial arts.

(iii) I am satisfied that the Applicant became embroiled in electoral violence during the 2000 campaign. He was threatened. He and his friend assaulted the thugs or bodyguards of another political figure. The police took the side of this man because his father is a senior minister. The Applicant and his friend fled and continue to fear harm at the hands of their political opponents or the police.

(iv) I note that there is evidence that the 2000 election was violent. There was also evidence that the police took action and arrested the son of a senior minister who had been involved in political violence.

(v) I also note that the Applicant came to no harm in the months between the election and his departure for Australia. I am not satisfied that it is likely that the Applicant would be persecuted by the police or his political opponents, or that the Sri Lankan authorities would be unable or unwilling to protect him. Nevertheless, I note that there seems to be a culture of political violence and I am satisfied that there is some risk that this may happen. I am satisfied that the Applicant is at greater risk in Kandy and his decision to leave the city seems justified.

(vi) I am satisfied that if the Applicant did suffer any such harm it would be, at least in part, because he is seen as a UNP supporter. That is, for reasons of his political opinion or a political opinion imputed to him.

(vii) I also note that the Applicant fears that if he were to relocate to Colombo he would be at risk of arrest and detention as Tamil from outside Colombo. If he is detained he believes that he would be at risk of torture and mistreatment.

(viii) I am not satisfied that this is likely. The Applicant is fluent in Singhalese. He is from Kandy not Jaffna, he is not a youth, and he was not harmed in the months leading up to his departure for Australia. Again, I am satisfied that there is however some chance that the Applicant could be detained, arrested and mistreated. He states that he was able to avoid harm because he was moving about in way (sic) which he could not sustain long term.

(ix) I am satisfied that any such harm the Applicant faced would be because he is seen as a Tamil and a possible supporter of the LTTE. That is for reasons of his race, nationality, membership of a particular social group or political opinion imputed to him.

(x) While I do not consider it likely that the Applicant would suffer persecution from either of the sources he fears, I am not satisfied that the chance that the Applicant would suffer such persecution is so remote as to be fanciful. It follows that I am satisfied that he has a well founded fear of persecution for Convention reasons.

CONCLUSION

(xi) The Tribunal is satisfied that the Applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the Applicant satisfies the criterion set out in s 36(2) of the Act for a protection visa."

the decision at first instance

8 Having summarised the factual and procedural background and the applicant's claims, the primary judge focussed on the first ten paragraphs of the Tribunal's reasons which I have set out above.

9 His Honour noted that in paragraph (v) the Tribunal had only found "some risk" and in paragraph (viii) "some chance" of conduct amounting to persecution for Convention reasons. He observed that if that was how the reasons had rested, they would have revealed a failure, in his Honour's opinion, to deal with the relevant question – whether the subjectively entertained fear was "well-founded". That was because, as his Honour reasoned, "some" chance might be "real", "fanciful", "speculative", "unlikely in the extreme", "ludicrous" or "material". His Honour commented that any number of qualifying terms to elucidate the nature or quantum of the risk or chance might be given as encompassed by the word "some".

10 The essence of the primary judge's reasoning can be seen from the following five paragraphs:

"15. I will come to State protection in a moment. It is clear that the Tribunal was using the "real chance" test referred to by McHugh J in Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 429. However, as the High Court said in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 572, to use the "real chance" test as a substitute for the Convention term "well-

founded fear" is to invite error. A fear is well-founded when there is a "real substantial basis for it": Guo, supra, at 572. No fear of persecution can be well-founded unless the evidence indicates a real ground for believing that the person is at risk of persecution: Ibid.

16. Here, it seems to me that a formulaic and flawed approach has been adopted by the Tribunal and that the Tribunal has not grappled with the need to reach a state of satisfaction about whether the risk is real from available evidence. First, the Tribunal stated that it was not satisfied that the risk of harm was likely. Next, it was satisfied that some risk of harm was present. That risk, "some" risk, covered the totality of risk from infinitesimal to just short of likely. Next, it was not satisfied that such risk was so remote as to be fanciful. Next, it thereby concluded that the fear was well-founded. However, not to be satisfied that the risk was so remote as to be fanciful does not mean that on the evidence the Tribunal was satisfied that there was a real ground for, or that there was a real substantial basis for, the fear of persecution. The essaying of the task of assessing the evidence as to whether it is sufficient to bring the Tribunal to a positive state of satisfaction about such a degree of risk is not completed (though it may be part of the task) by stating a lack of satisfaction that the risk is so remote as to be fanciful. Nor does a lack of satisfaction on the available material that the risk of persecution is so remote as to be fanciful logically lead to the bringing about of a state of satisfaction of the kind referred to in Guo. It is a state of satisfaction which is to be reached assessing the evidence directed by that question.

17. The last sentence of para (x) indicates to me that the Tribunal approached the task formulaically using the integers "real" (A) and "so remote as not to be fanciful" (B) as covering the totality of the universe of "some chance" (A+B). In finding a lack of satisfaction of B, a positive state of satisfaction about A was assumed in the conclusion of well-founded fear, without any expressed assessment of the material to justify that conclusion. Rather, the conclusion was said, in effect, to flow from the lack of satisfaction that the risk was remote.

18. The necessity for the Tribunal to deal with what it is satisfied of is highlighted by the second ground of the application. [The second ground of the application alleged error on the Tribunal's part in finding that Australia had protection obligations to the appellant in circumstances in which it was said to have been not satisfied that the Sri Lankan authorities would be unable or unwilling to protect him and was said to have made no finding that it was unreasonable in all the circumstances for the appellant to avail himself of that protection]. The question of state protection is not mentioned in para (viii). That may be because that paragraph is dealing with the risk of activities by state agencies. However, until one knows what the Tribunal is satisfied of concerning the risk of harm it is difficult to know what has been dealt with. This highlights, it seems to me, the flaw in the approach of the Tribunal in concluding, from a lack of satisfaction about the remoteness of the risk, something positive about the reality of the risk, without basing any such conclusion on a positive state of satisfaction from the material before it.

19. For the above reasons the Tribunal failed to complete its task mandated by the Act and the Convention and so made orders without jurisdiction or authorisation for the purposes of paras 476(1)(b) and (c). The decision of the Tribunal should therefore be set aside."

the ground of appeal

11 There was only one ground of appeal. It read as follows:

"The Court erred in finding that the Refugee Review Tribunal had failed to correctly address the issue of whether the appellant had a well founded fear of persecution for a Convention reason."

the appellant's contentions

12 The appellant referred to the last sentence of paragraph numbered (v) of the Tribunal's reasons above – "I am satisfied that the applicant is at greater risk in Kandy and his decision to leave the city seems justified" as amounting to more than simply a finding of "some risk" of persecution without making a finding (as the primary judge had stated) on the objective nature of the risk. The appellant submitted that the primary judge had failed to consider the totality of the Tribunal's reasons in context.

13 The same applied, so the appellant contended, in relation to his Honour's analysis of the Tribunal's assessment of the risk of persecution of the appellant in Colombo by reason of his race.

14 The appellant submitted that the Tribunal's conclusion that the appellant's fear was "well-founded", followed, not from the use of a formula, but from a weighing of evidence leading to the assessment in paragraphs (viii) and (x) of the degree of risk faced by the appellant. In consequence of the totality of its findings on the issue of whether the fear was well-founded, it did in fact express its satisfaction. That was in the last sentence of paragraph (x). The words "it follows" referred to the whole of the findings on that issue and not just the previous sentence.

15 The appellant submitted that the Tribunal had, in assessing the degree of objective risk to the appellant, used terminology previously used by the High Court of Australia in *Chan* at 389 and by this Court in *Chen v Minister for Immigration and Ethnic Affairs* (1995) 58 FCR 97 at 102 – a passage quoted by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 280.

respondent's contentions

16 In relation to the Tribunal's reasoning on the question whether the appellant's fears were well-founded, the respondent contended that the Tribunal had erred, essentially for the reasons given by the primary judge.

17 The respondent filed written submissions on the question of State protection. In essence these were as follows:

- Australia had no protection obligations to the appellant under the Convention unless either:

  (a) State protection was not available to the appellant in Sri Lanka; or

  (b) If State protection was available, it was reasonable in all the circumstances for the appellant not to avail himself of that protection.

- The Tribunal was not satisfied that it was likely that the Sri Lankan authorities would be unable or unwilling to protect the appellant, i.e. the first of the above tests was not found in favour of the appellant because State protection was available.

- The Tribunal had failed to deal with the question why it would not be reasonable for the appellant to avail himself of the State protection that was found to be available. That is, the question arising from the second test above had not been addressed by the Tribunal.

my reasoning

well-founded fear

18 At pages 3-4 of its reasons, the Tribunal said this:

"… an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent."

19 In that passage the Tribunal can be seen to have attempted (in my view successfully) a synthesis of the guidance provided by the High Court of Australia in cases such as *Chan* and *Guo*. In fact, the Tribunal had earlier in its reasons cited those decisions (amongst others).

20 In those circumstances, in my opinion, the Tribunal should be taken to have understood the applicable law and to have had that law in mind when it reached its decision, unless something later in its reasons suggests to the contrary. There is no need for the Tribunal to set out its understanding of the relevant law more than once.

21 When the Tribunal said (at paragraph (v)) that it was not satisfied that it was likely that the applicant would be persecuted by the police or his political opponents, or that the Sri Lankan authorities would be unable or unwilling to protect him, and when it made similar statements in paragraphs (viii) and (x), I think that a fair construction would be that it was (temporarily) applying the balance of probabilities test. That is, it was making a predictive assessment based on a probability of a likelihood of more than 50 per cent. The Tribunal knew that that was not the test to be applied in respect of predicting what might happen to the appellant. It can thus be seen to have had in mind the last sentence of the passage earlier in its reasons, which I have set out above.

22 I think that it is reasonable, in those circumstances, to infer, as I do, that the Tribunal then moved on to make its predictive assessment of the degree of risk.

23 Counsel for the respondent conceded that if the Tribunal had described that risk in terms of a "real chance", then the respondent would not have any complaint. I pause here to note that his Honour said (at paragraph [15] of his reasons) that it was clear that the Tribunal had used the "real chance" test referred to by McHugh J in *Chan.*

24 In relation to what might happen to the appellant if he were returned to Kandy the Tribunal (in paragraph (v)) said that it was satisfied that there was some risk that the applicant would be persecuted by the police or his political opponents or that the Sri Lankan authorities would be unable or unwilling to protect him. It also said that it was satisfied that the applicant is at greater risk in Kandy and that his decision to leave the city "seems justified".

25 In my view, it is sufficiently clear that the reference in paragraph (x) to "either of the sources" which the appellant fears, is a reference to persecution by the police or political opponents in Kandy and a reference to detention arrest and mistreatment (see paragraph (viii)) by Sri Lankan authorities in Colombo.

26 I also think that a fair construction of paragraph (v) when read with paragraph (x) is that the Tribunal was weighing up the risk of danger to the appellant from the police and his political opponents in Kandy and the risk that the police might not protect him. I think it is reasonable to construe the phrase used by the Tribunal "…at greater risk in Kandy …", as meaning that the appellant was at greater risk in Kandy than in Colombo. It was also weighing up risk when it added that the appellant's decision to leave Kandy "seems justified".

27 When the Tribunal drew in its conclusions in paragraph (x) in relation to Kandy and said that it was not satisfied that the chance that the appellant would suffer such persecution was so remote as to be fanciful, I think that a beneficial, but not over beneficial, construction of what it was saying was that there was a real substantial basis for the appellant's fear.

28 I think that the same applies in relation to the Tribunal's assessment of the degree of risk to the appellant if he were returned to Colombo.

29 In paragraph (viii) the Tribunal can be seen to have taken into account the independent information (which it set out at pp 6-8 of its reasons, immediately before its "Findings and Reasons") about the risks to Tamils in Colombo. It assessed the risk of persecution as being, again, less than a 50 per cent probability. However, it found, on that independent evidence, that there was some chance that the appellant could be detained arrested and mistreated. The Tribunal took into account the appellant's statement that he was able to avoid harm because he had been moving about in a way which he could not sustain long term. It also said [see paragraph (ix)] that it was satisfied that any such harm would be because he would be seen as a Tamil and a possible supporter of the LTTE, i.e. for reasons of his race, nationality, membership of a particular social group or political opinion imputed to him. The Tribunal was not prepared to rule out the risk that the appellant might be detained. The Tribunal understood that detention on its own might not amount to persecution. It proceeded to make an assessment of what might happen if the appellant were detained in Colombo. It cited independent evidence from human rights groups to the effect that around 40 per cent of those detained under the Emergency Regulations and the *Prevention of Terrorism Act* in Colombo complain of being tortured or show signs of being tortured and that the overwhelming majority of people arrested are Tamils detained in connection with LTTE activities.

30 In my view, in those circumstances when the Tribunal revisited this second source of fear and said that it was not satisfied that the chance that the appellant would suffer such persecution was so remote as to be fanciful, it showed an understanding of the relevant law which it had earlier sought to synthesise and was not, as the respondent contended, falling foul of the strictures or guidance of the High Court expressed in *Guo* at 572-573. It was not, in my opinion, engaging in conjecture or surmise. Its assessment can be seen to have been rooted in the evidence which, to the Tribunal, indicated a real ground for believing that the appellant was at risk of persecution even though that evidence did not show that persecution was more likely than not to eventuate.

31 I acknowledge that it is reasonably open to construe the Tribunal's reasons in a manner different from my above construction. However, with the greatest of respect to the primary judge, my impression is that the Tribunal did not bring a formulaic or flawed approach to its task.

32 It would have been perhaps preferable if the Tribunal had expressed its satisfaction of the degree of risk in a positive tense and actually used the

word “substantial”. But, in my view, in substance it was assessing the risk as “not insubstantial” which amounts to much the same thing. It switched to an expression of positive satisfaction in paragraph (xi) of its reasons set out above, which I think is another, perhaps small, factor to be credited to it when assessing its decision-making process. In that paragraph, the Tribunal expressed its satisfaction that the appellant was a person to whom Australia had protection obligations under the Convention. That is the relevant decision, and it is a subjective one – see *Wu* at 277. The Tribunal reached that decision after correctly summarising the relevant law and weighing up the facts. In my opinion, the Tribunal, in reaching its decision, neither erred in law nor fell into jurisdictional error.

state protection

33 As to the respondent’s submissions on the question of State protection, the appellant argued that he (the respondent) was not entitled to raise this matter as he had not filed a notice of contention. The respondent argued that these issues had been decided by the primary judge.

34 It is not necessary for me to resolve this essentially procedural dispute, because I do not think there is any substance in the respondent’s submissions.

35 At page 4 of its reasons the Tribunal said this:

“In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality. Whenever the protection of the applicant’s country is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.”

36 In my view, it was implicit in the Tribunal’s reasoning that if the persecution which the appellant feared became a reality, it would take the form of persecution by the police (i.e. an agency of the Sri Lankan Government) or his political opponents in Kandy and the Sri Lankan authorities would be unable or unwilling to protect him. This can be seen from its reasoning in paragraph (v) in relation to Kandy. In relation to the risk in Colombo, the only risk identified was from the activities of the Sri Lankan police or security forces.

37 In each case (i.e. Kandy and Colombo) the relevant persecution which the Tribunal identified included persecution by the State or its own agents. Accordingly, the question of internal protection did not, in my opinion, arise for consideration: see *Horvath v Secretary of State for the Home Department* [2001] AC 489 at 497 cited with apparent approval by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14 at [19]; see also in *Khawar* Gleeson CJ at [22], and McHugh and Gummow JJ at

[66]. In those circumstances, I do not think that the Tribunal can be criticised for not taking the matter any further than it did.

conclusion

38 For the foregoing reasons, I would allow the appeal, set aside the orders made at first instance and substitute an order that the respondent's application for judicial review be dismissed with costs. The respondent should pay the appellant's costs of the appeal.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Carr.

Associate:

Dated: 21 May 2002

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 94 OF 2002

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NACB of 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	BEAUMONT, CARR & SACKVILLE JJ
DATE:	21 MAY 2002
PLACE:	SYDNEY

SACKVILLE J:

REASONS FOR JUDGMENT

39 I gratefully adopt Carr J's analysis of the facts and his account of the decisions of the Refugee Review Tribunal ("RRT") and the primary Judge. I shall use the same paragraph numbers to refer to the RRT's reasons as does his Honour.

40 The primary Judge held that the RRT had failed to complete the task mandated by the *Migration Act 1958* (Cth) ("*Migration Act*"). His Honour said that it followed that the RRT "did not have jurisdiction to make the decision" (s 476(1)(b)) and that "the decision was not authorised by the Act or the regulations" (s 476(1)(c)). These were not the grounds particularised by the Minister in his application for review, which identified the relevant ground as "error of law" (s 476(1)(e)). No point has been taken about this apparent disparity and the appellant has been content to argue the appeal on the basis that his Honour's conclusions were in conformity with the application.

41 The appellant's principal argument was that the primary Judge had failed to pay due regard to the totality of the RRT's reasons and the need to accord those reasons a "beneficial construction", as required by the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, at 271-272, per Brennan CJ, Toohey, McHugh and Gummow JJ. Mr Karp, who appeared for the appellant, contended that on a proper reading of the RRT's reasons, it was affirmatively satisfied that the appellant had a well-founded fear of persecution for a *Convention* reason from two sources:

- violence from the appellant's political opponents or their supporters in the Sri Lankan police in Kandy, in response to the appellant's political opinions or activities; and
- mistreatment, including torture, at the hands of the authorities by reason of the appellant's Tamil ethnicity or his suspected affiliation with the Liberation Tigers of Tamil Elam ("LTTE") should he return to Colombo.

Before addressing the appellant's argument, it is necessary to explain the nature of the task the RRT was required to perform.

42 Section 36(1) of the *Migration Act* provides for a class of visas to be known as "protection visas". By s 36(2):

“A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.”

43 Section 65(1) of the *Migration Act,* described by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 61, at 647, as of “central importance”, provides as follows:

“(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) …;

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

…

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa”.

The reference in s 65(a)(ii) to “other criteria” embraces the criterion in s 36(2): *Minister v Eshetu,* at 647. In addition, Item 221 of subclass 866 of Sched 2 to the *Migration Regulations 1994* specifies as a criterion to be satisfied at the time of the decision:

“The Minister is satisfied the applicant is a person to whom Australia has protection obligations under the Refugees Convention”.

44 Article 1A(2) of the *Convention* relating to the *Status of Refugees* as amended by the *Refugees Protocol* (the “*Convention*”) defines a refugee as any person who

“owing to a 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.”

See also Arts 31 (refugees unlawfully in the country of refuge), 32 (non-expulsion of refugees lawfully in the territory of a Contracting State) and 33 (prohibition on refoulement of a refugee).

45 It will be seen that s 65 of the *Migration Act* speaks in terms of the Minister (or the RRT on review) being satisfied, relevantly, that the appellant is a non-citizen to whom Australia has protection obligations under the *Refugees*

Convention. Before 30 June 1992, s 47(1)(d) of the *Migration Act* provided that a permanent entry permit was not to be granted to a non-citizen unless the Minister had determined, *inter alia,* that the non-citizen had the status of a refugee within the meaning of the *Convention.* Section 22AA of the *Migration Act,* which came into force on 30 June 1992, provided as follows:

"If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee".

46 In *Minister v Wu,* the joint judgment pointed out (at 274) that the enactment of s 22AA changed the nature of the decision to be made. In contrast to the previous position, the Minister's power to make a refugee status determination was now expressly conditioned upon the Minister being "satisfied" that a person was a refugee as defined. Their Honours had earlier observed in the judgment (at 263) that *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, had established that the definition of "refugee" in Art 1A(2) of the *Convention*

"would be satisfied if an applicant could show genuine fear founded on a 'real chance' of persecution for a Convention stipulated reason".

They then said this (at 274-275):

"The grafting of what might be seen as the Chan test onto the new statutory power to make refugee status determinations reveals the true nature of the Minister's decision-making function in the present case. This is, that if the Minister is satisfied that a person has a genuine fear founded upon a real risk of persecution, then the Minister may determine in writing that the person is a refugee. A condition of determination is the Minister's satisfaction. Accordingly, it is inappropriate to describe a decision refusing refugee status as a decision not to determine that the person is a refugee. Rather, it is a decision that the Minister is not satisfied that the person has a genuine fear founded upon a real risk of persecution. This is the 'decision' for which provision is made by the Act."

It follows from this passage that the decision contemplated by s 22AA was whether the Minister was "satisfied that the [applicant] ha[d] a genuine fear founded upon a real risk of persecution". Only if the Minister was affirmatively so satisfied was his or her power to determine that the applicant was a refugee enlivened.

47 The structure of s 65 of the *Migration Act* is somewhat different from that of the now-repealed s 22AA. The effect of s 65 is that the Minister (and, on review, the RRT) is **obliged** to grant a visa if satisfied that the relevant criteria have been met. If not so satisfied, the decision-maker must refuse to grant the visa: *Minister v Eshetu,* at 617, per Gleeson CJ and McHugh J (with whom Hayne J agreed); at 647, per Gummow J. But it remains the case that the Minister or the RRT cannot grant a protection visa unless affirmatively satisfied on the available material that the applicant has a well-founded fear of persecution for a *Convention* reason.

48 In the present case, the RRT explicitly stated that it was not satisfied that it was likely that the applicant would be persecuted either by his political opponents and their police associates or by the authorities in Colombo. This lack of satisfaction, as the RRT appreciated, was not fatal to the appellant's claim. The authorities make it clear that a person can have a well-founded fear of persecution even if the chances of that person being persecuted are well below 50 per cent: *Chan v Minister,* at 389, per Mason CJ; at 398, per Dawson J; at 429, per McHugh J; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, at 572, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. It is the next part of the RRT's reasoning that requires careful attention.

49 In *Minister v Guo,* the joint judgment (at 572) stressed the dangers of treating a particular word or phrase as synonymous with a statutory term. Their Honours then commented (at 572) that a

"fear is 'well-founded' when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate. **But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation**. In this and other cases, the Tribunal and the Federal Court have used the term 'real chance' not as epexegetic of 'well-founded', but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate". (Emphasis added.)

In conformity with this approach, the question for the RRT was whether it was affirmatively satisfied on the material before it that the appellant's fear of persecution was well-founded, bearing in mind that the appellant's fear could not be well-founded unless the evidence indicated a real ground for believing that he was at risk of persecution.

50 The RRT's approach in the present case was to express itself satisfied that there was "some risk" that the appellant might suffer harm by reason of his political opinions or actions (par (v)) and "some chance" that he could be detained and maltreated in Colombo by reason of his Tamil ethnicity or imputed LTTE associations (par (viii)).

51 Mr Karp accepted that if the RRT had gone no further than this, it would not have addressed the correct question, namely whether on the evidence it was affirmatively satisfied that the appellant's fear of persecution for a *Convention* reason in Sri Lanka was well-founded. That concession was appropriate because, as the primary Judge explained, a finding that there was "some risk" or "some chance" of persecution for a *Convention* reason could mean anything from a "real chance" (in the sense used in *Chan v Minister*) to a purely speculative possibility.

52 The RRT did not, however, stop there. The next step in its reasoning, leaving for the moment the last sentences in pars (v) and (viii) to one side, is contained in par (x):

"(x) While I do not consider it likely that the Applicant would suffer persecution from either of the sources he fears, **I am not satisfied that the chance that the applicant would suffer such persecution is so remote as to be fanciful. It follows that I am satisfied that he has a well founded fear of persecution for Convention reasons**." (Emphasis added.)

53 The difficulty with this reasoning, in my opinion, is that the RRT did not express itself affirmatively satisfied on the evidence that the appellant had a well-founded fear of persecution for a *Convention* reason. Rather, the ultimate conclusion, that the appellant had a well-founded fear of persecution for *Convention* reasons, was said to follow from the RRT's **lack of satisfaction** that the chance that the appellant would suffer such persecution is "so remote as to be fanciful".

54 As the primary Judge pointed out, the RRT appears to have assumed that a risk of persecution for a *Convention* reason can be only characterised as either

- well-founded; or
- so remote as to be fanciful.

In other words, the RRT assumed these two concepts are the opposite sides of the same coin and, between them, exhaust the relevant universe.

55 Even if the RRT's assumption is correct, it does not follow that it addressed the correct question. Not being satisfied that a risk of persecution for a *Convention* reason is not well-founded is not the same thing as being affirmatively satisfied, on the basis of the material before the RRT that the fear of persecution for such a reason is well-founded. I agree with the primary Judge that the flaw in the RRT's approach is that it concluded (at [18])

"from a lack of satisfaction about the remoteness of the risk, something positive about the reality of the risk, without basing any such conclusion on a positive state of satisfaction from the material before it".

56 In any event, I would not agree that the expressions "well-founded" and "so remote as to be fanciful" necessarily exhaust the relevant universe. Doubtless a fear of persecution that is "so remote as to be fanciful" is not a well-founded fear of persecution. But a decision-maker who is satisfied that a risk is not "fanciful" is not necessarily satisfied that the risk is well-founded for the purposes of the *Convention.*

57 It is true, as Mr Karp pointed out, that the High Court has referred to a risk of persecution being "so remote as to be fanciful". In *Minister v Wu,* the joint judgment quoted (at 280) an extract from the decision of the Full Court of

the Federal Court in *Chen v Minister for Immigration and Ethnic Affairs* (1995) 58 FCR 96, at 102, as follows:

"[T]he task of the Minister, or the Tribunal, is not to weigh the prospect of occurrence of the persecution as a matter of likelihood, or probability, but to assess whether the fear of persecution is well-founded in the sense that there is a real chance of the occurrence of persecution, not being a chance that is so remote as to be fanciful or far-fetched".

However, the joint judgment in *Minister v Wu* did not express approval of this passage, since it was concerned with a different question, namely whether the Full Court had correctly attributed a particular process of reasoning to the RRT. The joint judgment certainly did not endorse the proposition that a risk of persecution is either well-founded or so remote as to be fanciful. Kirby J in the same case (at 294) referred to a test of what the 'real' as distinct from 'fanciful', chances would bring if the applicant were returned to China". I do not read his Honour as intending to suggest that a "real chance" of persecution is simply one that is "not fanciful".

> 58 In *Minister v Guo,* in the passage already quoted, the joint judgment warned against using expressions such as "real chance" as a replacement or substitute for the expression "well-founded". Their Honours pointed out that decision-makers will be on safer ground if they apply the language of the *Convention.* It follows that decision-makers will be on very dangerous ground indeed if they employ an expression not found in the *Convention* ("so remote as to be fanciful") and assume that the negative ("not so remote as to be fanciful") is equivalent to the expression that is found in the *Convention* ("well-founded").
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> 59 The remaining question is whether the RRT's reasons, read as a whole and given a beneficial construction, should be understood as expressing the RRT's affirmative satisfaction, on the evidence, that the appellant had a well-founded fear of persecution in Sri Lanka. Mr Karp argued that the reasons should be so understood. He pointed out that the RRT, in its survey of the law, referred to s 65 of the *Migration Act* and cited principles derived from *Chan* and *Guo.* He also relied on the RRT's finding in par (v) that it was satisfied that the appellant was "at greater risk in Kandy and his decision to leave the city seems justified" and its reference in par (viii) to the appellant's statement that he was able to avoid harm in Colombo because he was moving about in a way he could not sustain in the long term. The RRT's comments in pars (v) and (viii) were said to indicate that the RRT intended, albeit in a somewhat oblique manner, to express its satisfaction on the material before it that the appellant's fear of persecution was well-founded. That construction was supported, so Mr Karp argued, by the ultimate conclusion expressed in par (x), that the RRT was satisfied that the appellant had a well-founded fear of persecution for a *Convention* reason.
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> 60 In my opinion, the difficulty with this analysis becomes apparent when considering the RRT's reasons for concluding that the appellant had a well-

founded fear of persecution in Colombo (if he were to relocate there). At the risk of repetition I shall summarise the RRT's reasoning.

61 The RRT identified the appellant's fear as that of being arrested, detained and mistreated in Colombo by reason of being a Tamil from outside Colombo (par (vii)). The RRT was **not** satisfied that this was likely, bearing in mind that the appellant was fluent in Singhalese, was from Kandy not Jaffna, was not a youth and was not harmed in the months leading up to his departure (par (viii)). (The RRT had earlier referred to material concerning the general security situation in Colombo which showed that the "high risk profile" comprised Tamils residing in the north or east of the country, particularly Jaffna, and Tamils in the 16 to 25 year age group). It was, however, satisfied that there was **some** chance that the appellant could be detained, arrested and mistreated (par (viii)). The appellant had **stated** that he was able to avoid harm by moving around (par (viii)). The RRT was satisfied that **any** harm the appellant faced was for a *Convention* reason, that is because he would be seen as a Tamil and a possible supporter of the LTTE (par (ix)). While the RRT did not consider it likely that the appellant would suffer persecution from either source mentioned (including from the authorities in Colombo), the RRT was **not satisfied** that the chance that the appellant would suffer such persecution was so remote as to be fanciful. It **followed** that he had a well-founded fear of persecution.

62 It will be observed that nowhere in this process of reasoning did the RRT state that it was positively satisfied that the appellant had a well-founded fear of persecution for a *Convention* reason in Colombo. The ultimate conclusion in par (x) was said to follow from the RRT's **lack of satisfaction** that the chance that the appellant would suffer persecution was so remote as to be fanciful. As I have explained, not being satisfied that the chance of persecution was so remote as to be fanciful is different from being affirmatively satisfied that the risk of persecution is well-founded.

63 Mr Karp placed considerable reliance on the last sentence in par (viii). But that merely recorded a statement by the appellant that he had avoided harm in Colombo by moving around. It is not clear whether the RRT intended to accept that statement. Even if it did, I do not think that the sentence can be construed as a finding by the RRT that the appellant's fear of persecution in Colombo was well-founded. The question was not whether the appellant moved about Colombo because of his subjective fear. It was whether the RRT was satisfied that the objective basis for the fear was such that it could be said to be well-founded.

64 In my opinion, the RRT said what it meant. Paragraph (x) makes it clear that the RRT reached its ultimate conclusion only because it was not satisfied that the chance it had identified, but not assessed as well-founded, was so remote as to be fanciful. Had the RRT intended the last sentence in par (viii) to convey that it was affirmatively satisfied that the appellant had a well-founded fear, par (x) would have been expressed differently. A fair reading of the reasons suggests that the RRT took the approach it did because the appellant's circumstances made it difficult to be satisfied

affirmatively that his fear was "founded upon a real risk of persecution". In short, I agree with the primary Judge that the RRT did not address the question it was required to consider.

65 Since the RRT was bound to consider whether the appellant could relocate to Colombo, its failure to address the correct question in relation to his fear of persecution in that city justifies dismissal of the appeal. There was no suggestion that the RRT intended to find that the appellant's fear of persecution by reason of his political activities in Kandy would be well-founded if he were to relocate to Colombo. Indeed, it does not appear that the appellant claimed that he had a well-founded fear of persecution in Colombo by reason of his political activities in Kandy. His fear of persecution in Colombo was based on the risk that he would be mistreated as a Tamil perceived to be sympathetic to the LTTE cause.

66 In any event, I would apply much the same analysis to the RRT's consideration of the appellant's fear of persecution as a Tamil sympathetic to the LTTE cause. It is difficult to know what the RRT intended to convey by the last sentence of par (v). The fact that the appellant was "at greater risk in Kandy" (than, presumably, in Colombo) did not establish that his fear was well-founded. Nor did the observation that his "decision to leave the city seems justified". The sentence did not address the question the RRT was bound to consider.

67 Mr Karp's submission might have had more force but for par (x) of the RRT's reasons. The RRT explained its ultimate conclusion in relation to **both** possible sources of persecution as resting on its lack of satisfaction that the chance of persecution was so remote as to be fanciful. In other words, its reasoning in relation to both sources of persecution was the same. In neither instance did the RRT address the question it was required to consider. To interpret its reasons in the manner suggested by Mr Karp, in my view, would go beyond a beneficial construction and amount to a reformulation of the reasons.

68 In my opinion, the appeal should be dismissed, with costs.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice SACKVILLE.

Associate:

Dated: 21 May 2002

Counsel for the Appellant: Mr L Karp

Counsel for the Respondent:	Mr R Bromwich
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	13 May 2002
Date of Judgment:	21 May 2002