FEDERAL COURT OF AUSTRALIA

MIGRATION – appeals in one case by refugee-claimant, in other by Minister – application for judicial review of decisions of Refugee Review Tribunal failed in one case and succeeded in the other – substantially identical passage in Tribunal's Reasons for Decision in both cases – arrest, detention and interrogation of young Tamil males from areas in Sri Lanka controlled by Liberation Tigers of Tamil Eelam – subsequent torture in detention – Tribunal's approach of distinguishing between detention of such persons and what happened to them in detention – former, although discriminatory, held not "persecution" because motivated by need to combat terrorism – latter held not shown to be motivated by Convention ground – error of law arising from approach taken – failure to address question whether "real chance" of persecution – failure to address claims made in recent report supplied by refugee-claimants' solicitor to Tribunal.

Migration Act 1958 ss 430, 476 (1) (a), (e)

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, applied

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

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, considered

Minister for Immigration and Ethnic Affairs v Guo (1997) 144 ALR 567, considered

KIRUSHANTHAN PARAMANANTHAN v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 533 of 1998

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v VIJAYAKUMAR SIVARASA

NG 652 of 1998

WILCOX, LINDGREN, MERKEL JJ

21 DECEMBER 1998

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 533 of 1998
ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA	
BETWEEN: KIRUSHANTHAN PARAMANANTHAN APPELLANT AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT	
JUDGES: WILCOX, LINDGREN, MERKEL JJ	

DATE:	21 DECEMBER 1998
PLACE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made on 15 May 1998 in proceeding NG 533 of 1998 be set aside and in lieu thereof it be ordered that the decision of the Refugee Review Tribunal dated 7 January 1998 be set aside and the matter be remitted to that Tribunal, differently constituted, for consideration and determination in accordance with law, and that the respondent pay the costs of the appellant as applicant in that proceeding.

3. The respondent pay the appellant's costs of the appeal.

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	NG 652 of 1998
ON APPEAL FROM A JUDGE OF THE FEDERAL COUF	
BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS APPELLANT
AND:	VIJAYAKUMAR SIVARASA RESPONDENT

JUDGES:	WILCOX, LINDGREN, MERKEL JJ
DATE:	21 DECEMBER 1998
PLACE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

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	NG533 OF 1998 NG652 of 1998

	NG533 of 1998
BETWEEN:	
	KIRUSHANTHAN PARAMANANTHAN
	Appellant

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
	AND
	NG652 OF 1998
BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Appellant
AND:	VIJAYAKUMAR SIVARASA Respondent

JUDGES:	WILCOX, LINDGREN AND MERKEL JJ
DATE:	21 DECEMBER 1998
PLACE:	SYDNEY

REASONS FOR JUDGMENT

WILCOX J:: In his reasons for judgment, Merkel J sets out the pertinent facts of these two cases and explains how they come before the Court. I need not repeat that material. Also, I am in general agreement with what his Honour says about the merits of the appeals. However, in view of the conflict between the positions taken at first instance by Davies J and Burchett J, it is appropriate I state in my own words my reasons for concluding that both these matters should be remitted to the Refugee Review Tribunal for further consideration and redetermination.

In each of the subject cases, the Tribunal – which was constituted by the same person in each case – accepted that the relevant applicant feared persecution, for reasons of race or imputed political opinion, if he was returned to Sri Lanka. This acceptance satisfied the subjective element in the definition of "refugee" in the *Convention relating to the Status of Refugees*, as amended by the 1967 Protocol. Counsel for the Minister for Immigration and Multicultural Affairs do not suggest otherwise.

The contentious point in each case is whether the Tribunal relevantly erred in determining the fear of the applicant was not "well founded"; that is, the objective element was not satisfied.

It seems to me, in each case, the Tribunal did err in that determination, and in two major respects:

(i) in failing to make – or, at least, state – factual findings in respect of all the issues on which its decision turned; and

(ii) in treating "indiscriminate cruelty" to a predominantly Tamil pool of prisoners as necessarily falling outside the concept of persecution for reasons of race, membership of a particular social group or political opinion.

I will deal separately with these points.

Findings

Section 430 of the *Migration Act* 1958 imposes on the Refugee Review Tribunal an obligation to state its reasons for decision:

> "430(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:
>
> (a) sets out the decision of the Tribunal on the review; and
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based.

(2) The Tribunal must give the applicant and the Secretary a copy of the statement prepared under subsection (1) within 14 days after the decision concerned is made.

(3) Where the Tribunal has prepared the written statement, the Tribunal must:

(a) return to the Secretary any document that the Secretary has provided in relation to the review; and

(b) give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based."

I accept the submission of counsel for the Minister that this section does not impose on the Tribunal an obligation to make findings about every factual matter mentioned in an applicant's claim. Paragraph (c) of subs (1) refers to "findings on any **material** questions of fact". Findings need be stated only in relation to questions that are material to the ultimate decision. I also accept that such findings as the Tribunal does make should not to be construed in an over-critical way, "with an eye keenly attuned to the perception of error": see *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287, adopted in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272. On the other hand it is important that a reader be able to discern what conclusions the Tribunal reached about the issues relevant to the ultimate decision. One of the purposes of s430 is to ensure that unsuccessful applicants for a protection visa are told why their application has failed; if the reason, or one of the reasons, was that the Tribunal rejected a significant factual claim, the Tribunal must say so and indicate the factual material on which the adverse finding was based.

I do not think the Tribunal met this requirement in either of the subject cases. In order to justify that conclusion, it is necessary to refer to the Tribunal's reasons for decision. I will commence with the decision relating to Mr Paramananthan, which was given earlier (7 January 1998) than the decision in Mr Sivarasa's case (16 February 1998).

Mr Paramananthan made claims about mistreatment, at the hands of the Indian Peace Keeping Force and the Liberation Tigers of Tamil ("LTTE"), in the period before he fled the Jaffna peninsula in about April 1997. The Tribunal seems to have accepted the truthfulness of these claims, but to have regarded them as immaterial to the question whether the applicant faced a real chance of persecution if returned to Sri Lanka; presumably this was because he could reside in Colombo. I do not think the Tribunal is to be criticised for taking that approach.

Mr Paramananthan's critical claims related to events that were said to have occurred when he was en route to Colombo or after he arrived there. Mr Paramananthan said he travelled to Colombo with his mother "by the back way to Vanuniya". I gather they went "the back way" because they had no LTTE pass, which was apparently necessary if one was overtly to leave an LTTE controlled area. Mr Paramananthan claimed that, at Thandikulam, he and his mother were stopped by soldiers and separated; he was taken to Veppankulam camp where he was blindfolded and gagged, then taken to another place, interrogated and tortured. After two days, Mr Paramananthan was returned to Veppankulam camp where he was again mistreated. He was eventually released when an "agent" sent from Colombo by his mother (who had been earlier released and gone on ahead) negotiated a bribe.

In relation to this incident, the Tribunal member said:

"He made no claims that his association with the LTTE caused him to come to the notice of the authorities until this year, when in April he and his mother were attempting to leave the LTTE-held Vanni and were apprehended by the security forces on the approach to Thandikulam en route to Vavuniya. He stated that he was beaten, tortured and interrogated on this occasion, taken to Veppenkulam camp and from there 'taken to another location where I was questioned and beaten up'. A report by Hope for Human Rights, Colombo **The Vavuniya Situation**. January 1997 (CX22849) states that 'Screening of selected youth does take place at Thandikulam Checkpoint. It is not unusual for these people to be kept in the Thandikulam camp for up to four weeks. …there are inconsistencies in the way release procedures are being administered.' Of the Veppankulam camp, where the applicant states he was taken, the report states that 'Veppankulam Transit Camp, which had been established as a transit camp … is now also being used as a Welfare Centre.' It explains that Welfare Centres are used to hold people who had fled from Jaffna, and to be released for travel to Colombo a Jaffna Tamil must be vouched for by a person in Colombo. In the applicant's case this appears to have been arranged by an agent and he left the camp within a month of arriving at the camp, a period not unusual under the prevailing circumstances."

The reference to "this year", in the opening sentence of the passage, was obviously intended to be a reference to 1997.

The picture that emerges from the member's citations – "screening of selected youth" at Thandikulam check point and a "transit camp" at Veppankulam welfare centre – conflicts with the impression conveyed by Mr Paramananthan's claims. The Tribunal did not attempt to resolve the conflict. The member contented herself with saying that, while she had "reservations as to whether the applicant during his various periods of detention suffered mistreatment to the extent he has alleged" (she did not

say why), “in the absence of contrary evidence”, she was “prepared to give him the benefit of the doubt.”

The next incident claimed by Mr Paramananthan occurred in Colombo. He said he was “rounded up” (apparently from the lodge where he was staying with his mother) by the police on 23 May, questioned and mistreated. He was kept in the police station for five days and released after the agent bribed a police officer. After this incident, Mr Paramananthan went into hiding in a house owned by a Muslim woman until his first attempt to leave Sri Lanka in September 1997. He reached Singapore but was returned to Colombo. On arrival he was detained at the airport, beaten and questioned, but released after payment of another bribe. Mr Paramananthan returned to the Muslim house but, after an arms cache was found in the area, he was taken into custody by police, blindfolded, beaten and interrogated. He was held from 16 September to 20 September, before being released, following intervention by the agent. The agent obtained an airline ticket and Mr Paramananthan left Sri Lanka the following day.

The Tribunal accepted Mr Paramananthan’s claims of detention in May and September and that he was mistreated. The previously mentioned reservations as to the extent of Mr Paramananthan’s mistreatment apparently apply, but so does the “benefit of the doubt”. That means the Tribunal purported to evaluate the claim on the basis that, during the six months immediately preceding his final departure from Sri Lanka, Mr Paramananthan was on four occasions detained, three times over a period of some days. During at least three of the detentions, he was beaten and/or tortured.

Despite this factual background, the Tribunal determined there was no real chance of persecution if Mr Paramananthan was returned to Sri Lanka. The Tribunal gave two reasons. First, “there is no suggestion that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males”. I will return to that reason. The second reason was “the recent improvement in human rights referred to in the Amnesty 1996 report on Sri Lanka cited above”. This was a reference to the 1996 *Amnesty International Country Report* for Sri Lanka supplied to the Tribunal by Mr Paramananthan’s solicitor, along with other documents including the British Refugee Council’s Paper *Sri Lankan Tamils, the Home Office and the Forgotten War*, dated February 1997. Both these documents are in evidence.

It is difficult to see how the Tribunal drew comfort from the Amnesty document. Its flavour may be gauged from the portion of the Introduction dealing with human rights abuses by government functionaries, as distinct from LTTE.

“On 7 March 1996 Kanapathipillai Satheesh Kumar, a young Tamil man originally from Jaffna, northern Sri Lanka, who had recently returned to Sri Lanka from Saudi

Arabia, ‘disappeared’ after he was arrested by the army from his home in Colombo. His ‘disappearance’ coincided with an Amnesty International visit to Sri Lanka during which the delegates expressed concern about continuous human rights violations, including torture and ‘disappearances’ taking place in the country. Fortunately, Satheesh Kumar was released two weeks later, on 23 March. At least 60 others arrested in a similar way since April 1995, however, remain ‘disappeared’ in the custody of the security forces.

The People’s Alliance (PA) government has repeatedly proclaimed its commitment to human rights since it came to power in August 1994 and has introduced a number of safeguards to prevent torture and ‘disappearances’. However, the **Amnesty International delegation found that these grave violations of human rights are continuing**. Most of them have occurred in the context of renewed fighting since April 1995 between the security forces and members of the Liberation Tigers of Tamil Eelam (LTTE), the main armed Tamil opposition group fighting for an independent state in the north and east of the country.

This document reviews the human rights situation in Sri Lanka since the PA government came to power. **While noting and welcoming a marked improvement in comparison with the widespread pattern of gross and systematic violations than in previous years, Amnesty International is concerned that the government is not living up to its stated commitment to human rights.** Despite lobbying by local and international human rights organizations, including the Human Rights Committee and the United Nations (UN) Working Group on Enforced or Involuntary Disappearances, **the government refuses to amend provisions in several laws which fall far short of international standards and continue to facilitate torture, death in custody, ‘disappearances’ and extrajudicial executions.**

Moreover, there are signs that the government may be reneging on its commitment to bring to justice the perpetrators of past human rights violations. In June 1996, two of the three commissions of inquiry into ‘disappearances’ and related human rights violations (those dealing with cases in areas outside the north and east) were asked to finalise their work by the end of that months despite having heard no evidence in relation to more than half the complaints put before them. Amid widespread protest, they were given a further extension till the end of September 1996.

Impunity for those responsible for human rights violations remains a serious concern. Progress in a few court cases against members of the security forces charged in connection with ‘disappearances’ and extrajudicial executions is slow: as are investigations into many other cases. Relatives of tens of thousands of people who were killed or ‘disappeared’ over the last 13 years or so are still waiting for justice to be done.

The evidence gathered during the Amnesty International visit clearly indicates that **since April 1995 the security forces have arbitrarily detained thousands of Tamil people and have been responsible for torture as well as dozens of 'disappearances' and extrajudicial executions**. Several of the 'disappearances' and extrajudicial executions have been attributed to armed Tamil groups opposed to the LTTE, in particular to members of the People's Liberation Organization of Tamil Eelam (PLOTE) and Tamil Eelam Liberation Organization (TELO), who seem to be allowed to operate in some areas with almost total impunity.

Some safeguards put in place by the government in mid-1995, particularly directives issued by President Chandrika Bandaranaike Kumaratunga in July to protect the welfare of detainees, are not being fully adhered to. Moreover, in Amnesty International's view, the government, by refusing to amend the Prevention of Terrorism Act (PTA) and the Emergency Regulations (ERs), which give the security forces wide powers to arrest and detain, is not tackling the underlying causes for the continuing high incidence of torture, death in custody and 'disappearances' reported in the country." (Emphasis added)

The British Council report was based on a visit to Sri Lanka in December 1996 by two senior officers. The report deals at length with the situation of Tamils, both in their traditional areas (the north and east of the island) and in Colombo. In the chapter headed "Life in the City", the report recounts estimates that, in 1995, "over 600 Tamils were being held illegally in Colombo jails or police stations, often in overcrowded and unsatisfactory conditions with no access to their relatives or legal representation". The report went on:

"It has also been estimated that more than 800 Tamils have been held for more than four years in Magazine and Kalatura prisons outside Colombo. A year later, Tamils continued to be held indefinitely in detention. According to the Tamil MP, Joseph Pararajasingham, 76 youths have been detained by police for over three months. One human rights activist told the Refugee Council that between 500 and 1,000 Tamils are detained every month."

Under the sub-heading "Continuing abuses", the report went on:

"In June 1995, the emaciated and decomposing bodies of young Tamils began surfacing in Bolgoda lake, south of Colombo. In the weeks that followed, others mysteriously surfaced in rivers and culverts around the capital. Most of the 31 bodies had been strangled or drowned. All, whether male or female, had their heads shaven. Most of them had been killed in the Special Task Force headquarters in Colombo. One student was fortunate to escape. He had been snatched by the police opposite the railway station before being detained, where his head was

shaven and he was locked up, naked and blindfolded, with three other young Tamils. Fortunately, he was released. The others were all tortured.

In November 1996, the Supreme Court judge, Mr P Ramanathan, **stated that**, 'the court had made a number of judicial pronouncements against the use of torture and inhuman treatment by law enforcement officers, but regardless**, torture in police stations continues unabated**'. This was confirmed by a number of people the Refugee Council delegation met in Colombo. One high-ranking western diplomat confirmed that 'everyone' who is taken into custody gets roughed up a bit." (Emphasis added)

After dealing with what it called "a culture of impunity", in which it contrasted Sri Lankan government assurances of improvement of human rights with the lack of action against offending officers, the report concluded with these observations:

"Despite the attempts by the government to promote human rights, **the culture within the Sri Lankan security forces remains suspicious of Tamils – in particular young males, although all Tamils, whether male or female, young or old, are at risk**. That Tamils should come under suspicion because of the actions of the LTTE is understandable. What is concerning is the continued use of detention without trial, and in contravention of the Emergency Regulations; **of torture to extract confessions**, often in a language not understood or spoken by the signatory; **and of extrajudicial executions which are linked to the security forces.** While there has been a systematic reduction in human rights violations, particularly against the Sinhalese population, **there continues to be human rights violations in Colombo, particularly against Tamils, which the government appears to be unwilling or unable to prevent. It is for this reason that Colombo should not be assumed to be safe for Sri Lankan Tamils.**" (Emphasis added)

The Tribunal was not, of course, bound to accept the information or opinions contained in this report. But the report was a recent, comprehensive, and carefully compiled analysis of the position of Tamils in Sri Lanka, including Colombo. It bore directly upon the matters in relation to which Mr Paramananthan expressed fears and spoke of mistreatment that included the type of mistreatment which, the Tribunal accepted, he had suffered. The matters of fact alleged in the report were clearly material. But the Tribunal member gave no inkling as to her reaction to them. Did she accept the report to be factually correct? If not, why not? If it was factually correct, how could it be an answer to Mr Paramananthan's claim of a real fear of persecution to refer to the (earlier) Amnesty comment that abuses were not so widespread as before? There may be persecution at a particular time notwithstanding there was more widespread persecution at an earlier time. Although it was for the Tribunal to decide what finding to make about the matters stated in the British Council report, it was obliged, by s430(1)(c) of the Act, to set out its findings and, by s430(1)(d), to refer to the evidence on which they were based. The Tribunal did not do this. Apart from acknowledging its receipt, the Tribunal made no reference to the report anywhere in its reasons.

The situation is similar in relation to Mr Sivarasa. After the Tribunal hearing, but before its decision, Mr Sivarasa's representative submitted a number of documents relating to the position in Sri Lanka. The Tribunal referred to only one of them in its reasons for decision. This was a Department of Foreign Affairs and Trade ("DFAT") cable dated 15 December 1995, reporting on the situation that occurred after October 1995 LTTE attacks on oil and gas storage installations in Colombo and two November 1995 suicide attacks. The cable included these excerpts:

"Of the security measures taken by the government, it is the sweep and search (or rounding up) patrols and the resulting detentions which have raised some concern among members of the Tamil community. Most Tamils and human rights observers to whom we have spoken acknowledge that the government's response to the very serious LTTE security threat is understandable. But they claim that such operations can cause hardship to innocent Tamil people. They claim that the round up operations do not discriminate sufficiently between likely suspects and obviously innocent persons and that many innocent people are taken in and detained. However, they also acknowledge that the vast majority of persons are only held for a couple of days and then only so long as it takes for identification and bona fides to be established. We have heard almost no recent allegations of ill treatment while in detention, and this is supported by anecdotal evidence. The overall assessment of local and international human rights observers is that while these operations cause inconvenience, and possibly anxiety or even a degree of humiliation, provided they are properly conducted, they do not amount to harassment.

According to police sources, and confirmed by our other contacts, the typical profile of persons who would fall under scrutiny by security forces would be young Tamils from the north or east, but particularly those from the Jaffna Peninsula or LTTE-controlled mainland areas. The main 'tool' authorities use for identification is the national identity card (NIC). When a sweep is conducted, only Tamil people will be stopped for detailed questioning. If a person has an NIC showing a birthplace and/or residence in the north or east they will be asked to explain their presence in Colombo. If they are unable or unwilling to explain their presence in Colombo, or if their explanation is considered implausible, they will be brought to a detention centre for further questioning or to allow relatives or business contacts to establish their bona fides.

In most cases (estimated 90 per cent), people are released within a couple of days. In a small number of cases, people are charged under the Prevention of Terrorism Act (PTA), brought before a magistrate and formally remanded into custody for two weeks. In these cases, the majority are released after the two weeks expire. There are a very small number of persons who are held under the PTA for a longer period. Bail is not granted under the PTA. Under directives issued by the President, police and other security services making detentions are supposed to issue receipts to the next of kin of detainees. However, this procedure does not appear to be followed in practice.

…

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 (HRTE) and to the International Committee of the Red Cross (ICRC)." (Emphasis added)

The Tribunal made no reference to the *Amnesty International Country Report* or British Council report, both of which had been put before it by Mr Sivarasa's representative, notwithstanding they provided more recent and more comprehensive descriptions of the situation in Sri Lanka than the DFAT cable.

I need not detail the Tribunal's findings about Mr Sivarasa's claims. Using wording identical to that which she had used in Mr Paramananthan's case, the Tribunal member expressed reservations about the extent of the mistreatment he claimed to have suffered (without explaining the reason for her reservations) but gave him "the benefit of the doubt". She thought the relative shortness of Mr Sivarasa's detentions (two days in February 1995, one week in April 1995, an unspecified period in January 1997, one day in June 1997 and two days in October 1997) indicated he "was not considered a security threat and was therefore of no real interest to the authorities". But this was not the reason she rejected his claim of well-founded fear of persecution. The Tribunal member took that course because the mistreatment was "indiscriminate cruelty" and, moreover, "the evidence suggests that such abuses are no longer as widespread as before". The Tribunal member did not cite any basis for either finding. Instead, she went on:

"Therefore, although the applicant may be subjected to detentions in the foreseeable future as he has been in the past, these detentions do not give rise to a well-founded fear of being persecuted by the authorities for reasons of race, imputed political opinion or any other Convention reason should he return to Sri Lanka."

In other words, although Mr Sivarasa might be detained, beaten and tortured in the future, as in the past, the fact that these would be acts of "indiscriminate cruelty" would mean they would not amount to persecution within the meaning of the Convention. This brings me to the second point.

Indiscriminate cruelty

Merkel J sets out the passage in the two reasons for decision in which, in identical terms, the member made the perplexing statement "there is no suggestion that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males. Rather, it appears to have been a generalised failure to adhere to basic standards of human rights". The statement is perplexing because (as Burchett J pointed out) there was ample suggestion to that effect; this was a major thrust of both the 1996 *Amnesty International Country Report* and the British Council Report. It was at least implicit in the claims of each of the applicants for refugee status. Perhaps the member merely meant the mistreatment of young Tamil males was not **official** government policy. This is consistent with her subsequent statement that the "detentions do not give rise to a well-founded fear of being persecuted **by the authorities** for reasons of race, imputed political opinion or any other Convention reason should he return to Sri Lanka"; a distinction apparently being made between **persecution as an act of government policy** and **unauthorised persecution by government functionaries** (police and army). However, even if there was evidence to support the making of such a distinction – none was cited by the Tribunal – the fact that the persecution was unauthorised would not necessarily take it out of the definition of "persecution" in Article 1A(2) of the Convention. That definition refers to a "well-founded fear of being persecuted for reasons of race" etc but does not specify the identity of the persecutor. It is enough that the government of the relevant country is unable or unwilling to prevent acts of persecution. Brennan CJ expressed this notion in *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 when he said at 233 the definition was "speaking of a fear of persecution that is official, or **officially tolerated** or **uncontrollable** by the authorities of the country of the refugee's nationality" (emphasis added). In the same case at 257-258 McHugh J said:

"The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee **unless the State either encourages or is or appears to be powerless to prevent that private persecution**. The object of the Convention is to provide refuge for those groups who, having lost the de jure or de facto protection of their governments, are unwilling to return to the countries of their nationality." (Emphasis added)

The material before the Tribunal in the present cases suggested that official Sri Lankan government policy was opposed to mistreatment – by which I mean beatings and torture, as distinct from interrogation – of Tamils held in custody. But there was abundant evidence that such mistreatment occurred. Not only did the Tribunal accept the claims of both these applicants that they had suffered such mistreatment on several occasions, the "country material" suggested this was commonplace. If that was so, it must have been because such treatment of prisoners was "officially tolerated" or, at least, because the authorities were powerless to prevent it. It was insufficient for the Tribunal to brush aside the applicants' claims of mistreatment on the basis that this did not constitute persecution **by** the authorities.

Nor, I think, was it open to the Tribunal to reject the claim of persecution on the basis that it was merely "indiscriminate cruelty". It is possible non-Tamils held in police or army detention in Sri Lanka are also beaten and tortured. I am not aware of any evidence about this; certainly, the Tribunal made no finding about it. However, even if this is so, the only reason the two applicants for protection came to be in police or army custody was because of their ethnicity and perceived political opinion. They were detained because they were Tamils and suspected of being sympathetic to LTTE. I do not suggest it is an act of persecution, within the meaning of the Convention, for the Sri Lankan police or army to select people for questioning about the LTTE on the basis of their perceived Tamil ethnicity – after all, LTTE is a **Tamil** nationalist organisation – and to detain them for that purpose for a reasonable time. But the fact that people have been **selected** for detention **on the basis of their ethnicity or perceived political opinion** makes it important for a government to ensure there is no abuse of the power of detention. The people who are at risk of "indiscriminate cruelty" have been selected on a basis mentioned in the Convention. McHugh J made the point in *Applicant A* at 258-259:

"Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race.

However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. In cases coming within the categories of race, religion and nationality, decision-makers should ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution."

For the above reasons, it was legally incorrect for the Tribunal to reject the claims of Mr Paramananthan and Mr Sivarasa on the ground that the mistreatment they had suffered amounted to "indiscriminate cruelty" falling short of "persecution". In each case, the Tribunal should have entered upon the questions whether there was a causal connection between the cruelty the applicants had suffered and their Tamil ethnicity and/or perceived sympathy for the LTTE and, if so, whether the cruelty was something the Sri Lankan government tolerated or was unable to control. The Tribunal's failure to take this course constituted an error of law involving an incorrect application of the law to the facts as found by the Tribunal, within the meaning of s476(1)(e) of the *Migration Act.*

Orders

I am of the opinion that both matters must be remitted to the Tribunal for further consideration and redetermination. In the case of Mr Sivarasa, Burchett J has already so ordered. I agree with Merkel J that the Minister's appeal in that case should be dismissed with costs. In relation to Mr Paramananthan's appeal, again in agreement with Merkel J, I would allow the appeal, set aside the decision of Davies J and, in lieu thereof, order that the decision of the Tribunal be set aside and the application for a protection visa be further considered and redetermined by the Tribunal. The Minister should pay Mr Paramananthan's costs of the appeal and before Davies J.

I certify that this and the preceding twelve (12) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox

Associate:

Dated: 21 December 1998

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 533 of 1998
ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA	
BETWEEN:	KIRUSHANTHAN PARAMANANTHAN APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

	NG 652 OF 1998
BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS APPELLANT
AND:	VIJAYAKUMAR SIVARASA RESPONDENT
JUDGES:	WILCOX, LINDGREN, MERKEL JJ
DATE:	21 DECEMBER 1998
PLACE:	SYDNEY

REASONS FOR JUDGMENT

LINDGREN J:

I have read in draft the Reasons for Judgment of Wilcox J and of Merkel J, which make it both unnecessary for me to state any background and appropriate for me to proceed immediately to give my reasons for concurring in the orders proposed by Merkel J.

I find it sufficient to treat the relevant Convention ground as “well-founded fear of being persecuted for reasons of … membership of a particular social group…”, the

particular social group being young Tamil males from LTTE-controlled areas in the north and east of Sri Lanka.

The Tribunal accepted each refugee-claimant or gave him the benefit of the doubt in relation to his claims of arrest, detention, interrogation and mistreatment while in detention.

The following crucial passage occurs in the Tribunal's Reasons in each case:

"[While/Although] mistreatment of persons in detention in Sri Lanka has been well documented by Amnesty and others**, there is no suggestion that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males**. Rather, it appears to have been a generalised failure to adhere to basic standards of human rights. As such, the mistreatment which the applicant suffered during detention cannot be regarded as persecutory in the Convention sense. … Furthermore, the Tribunal notes the recent improvement in human rights referred to in [certain published material]."

In conclusion, the detentions could not of themselves be regarded as persecutory, but rather as the legitimate enforcement of procedures designed to combat the threat of LTTE terrorism. The mistreatment during the detentions cannot be regarded as appropriately designed to achieve a legitimate end of government policy, but neither would it be persecution in the Convention sense, but rather indiscriminate cruelty. Moreover, the evidence suggests that such abuses are no longer so widespread as before. Therefore, although the applicant may be subjected to detentions in the foreseeable future as he has been in the past, these detentions do not give rise to a well-founded fear of being persecuted by the authorities for reasons of race, imputed political opinion or any other Convention reason should he return to Sri Lanka." (emphasis supplied)

Subject to one inconsequential matter mentioned below, I think that the course of the Tribunal's reasoning in this passage is clear. It depended upon a distinction between detention for questioning and pending the completion of inquiries on the one hand, and mistreatment during detention on the other. The Tribunal regarded the former, although discriminating in its effect against young Tamil males from LTTE-controlled areas, as a permissible procedure of the Sri Lankan authorities for combating LTTE terrorism and not as persecutory conduct. Accordingly, the Tribunal eliminated detention as such from further consideration. The Tribunal properly regarded mistreatment during detention as insupportable, but this left remaining the question whether that mistreatment was for a Convention reason. The "no suggestion" statement was to the effect that there was no material suggesting that young Tamil males were singled out from other detainees for mistreatment. Accordingly, so the Tribunal reasoned, the mistreatment was properly to be regarded as "indiscriminate cruelty" to all detainees, whether Sinhalese or Tamil, within the place of

detention. The Tribunal noted "[m]oreover" that such abuses of human rights were not as widespread as they had previously been. In the result, if either of the present refugee-claimants were to return to Sri Lanka, while he might well be detained by the authorities by reason of his membership of the particular social group, young Tamil males from LTTE-controlled areas, this would not be "persecution"; and while he might, in detention, suffer an abuse of his human rights in the form of physical mistreatment (something not as likely to happen as it once was), this would not, so far as the material before the Tribunal revealed, be persecution for reason of his membership of that particular social group.

I do not understand the Tribunal to have said that as a result of the improvement in the situation regarding the abuse of human rights, there is no longer a well-founded fear that, if returned, each refugee-claimant would again be detained and, while detained, suffer an abuse of his human rights of the kind mentioned. The Tribunal's use of the expression "no longer so widespread as before" does not signify a finding that there was no longer a real chance of detention or mistreatment in detention.

The reasoning of the Tribunal gives rise to two issues: first, the particular issue whether the Tribunal was entitled to think that there was "no suggestion" in the material before it that the mistreatment itself was for a Convention reason; second, the general question whether the distinction drawn between detention and mistreatment during detention which underlay the Tribunal's approach led it into error. I will address these questions in turn.

There **was** material before the Tribunal suggesting that the refugee-claimants were physically mistreated in detention because they were young Tamil males from LTTE-controlled areas. There was material of that kind in a paper of the British Refugee Council, "*Protection denied: Sri Lankan Tamils, the Home Office and the forgotten war*" dated February 1997, which the refugee-claimants' solicitor had submitted to the Tribunal. As Wilcox J notes, that report was based on a visit to Sri Lanka in December 1996 by two senior officers. In the fifth chapter, "Life in the City", under the heading "5.5 The question of return", the report stated as follows:

"Despite the attempts by the government to promote human rights, **the culture within the Sri Lankan security forces remains suspicious of Tamils – in particular young males, although all Tamils, whether male or female, young or old, are at risk**. **That Tamils should come under suspicion because of the actions of the LTTE is understandable. What is concerning is the continued use of** detention without trial, and in contravention of the Emergency Regulations; **of torture to extract confessions**, often in a language not understood or spoken by the signatory; **and of extrajudicial executions which are linked to the security forces. While there has been a systematic reduction in human rights violations, particularly against the Sinhalese population**, **there continues to be human rights violations in Colombo, particularly against Tamils, which the government appears to be unwilling or unable to prevent. It is for this reason that Colombo should not be assumed to be safe for Sri Lankan Tamils.**" (emphasis added)

There was evidence before the Tribunal which suggested two possible motivations for the torture of young Tamil males detained by the Sri Lankan security forces: revenge for attacks carried out by the LTTE (Amnesty International, *Sri Lanka; Government's response to widespread "disappearances" in Jaffna*, November 1997, p 7; Amnesty International, *Sri Lanka; Wavering commitment to human rights*, August 1996, p 15); and suspicion that detained Tamils were members of the LTTE (British Refugee Council report, p 26; Danish Immigration Service, *Report on the fact-finding mission to Sri Lanka,* April 1997, p 52; statement of Kirushanthan Paramananthan, 10 October 1997, p 2; Application for a Protection Visa (866) submitted by Vijayakumar Sivarasa on 21 November 1997, answers to questions 39 and 40).

The statement of the Tribunal that "there is no suggestion that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males" could mean one of two things: first, that **similar treatment**is received by any persons detained by the Sri Lankan security forces; or second, that there is **similar motivation** for the mistreatment of Tamil detainees as for the mistreatment of other detainees.

If the first construction of the "no suggestion" passage is correct, the Tribunal has failed to answer the essential question before it, that is, whether the treatment which young Tamil male detainees in particular receive is motivated by a Convention reason. By failing to address this issue, the Tribunal has failed to make a finding on a material question of fact and so has not observed the procedure which s 430 (1) (c) of the Act required it to observe (cf s 476 (1) (a)). The failure to do so also suggests that the Tribunal incorrectly interpreted the applicable law (s 476 (1) (e)) in that the question before it was not whether other detainees suffer but why Tamil detainees do.

If the second construction of the "no suggestion" passage is correct, the Tribunal has based its decision on a fact that did not exist, namely, that there was "no suggestion" that the treatment suffered by Tamil detainees was motivated by a Convention reason. The evidence referred to above does indeed suggest that those in the security forces who torture persons such as the refugee-claimants do so for reason of one or more of race, membership of a particular social group or imputed political opinion. While it is a matter for the Tribunal to accept or reject that evidence, in this case either it failed to do either, or, if it did reject that evidence, it failed to state its reasons for doing so: see s 430 (1) (b), (c) and (d) of the Act.

In my view, for the above reason both matters should be remitted to the Tribunal.

I turn now to the second and more general issue mentioned above. I do not think that the two-stage approach taken by the Tribunal, at least in the way in which the Tribunal implemented it, was a permissible one. Let it be assumed that these

refugee-claimants have a well-founded fear that they would, upon return to Sri Lanka, be detained, and, during detention, be tortured, not because their tormentors wished to persecute young Tamil males from LTTE-controlled areas, but because they derived perverse pleasure from their mistreatment of detainees (whether Sinhalese or Tamil) or because they wished to extract bribes from the friends and relatives of the detainees (whether Sinhalese or Tamil). In such a case, "the authorities" **regarded as a whole**, would be engaged in persecution for a Convention reason, in my opinion.

This conclusion would flow from the fact that the initial arrest and detention would be on account of membership of a particular social group and from the hypothesised fact that the mistreatment was not the isolated and unforeseeable act of an individual member of the security forces, but was sufficiently common for it to be said that there was a well-founded fear of its occurrence. In such a case, the authorities' otherwise permissible initial act of arrest and detention for questioning and pending completion of inquiries would be coloured by the well-founded fear of the mistreatment to follow. The authorities would be committing the refugee-claimants to a detention during which there was a well-founded fear they would in fact be mistreated.

In the present cases, the refugee-claimants were arrested and detained by the authorities because of their membership of the particular social group, young Tamil males from LTTE-controlled areas. This reason makes suspect the nature and incidents of the detention for questioning and pending completion of inquiries, and makes it incumbent on the authorities to ensure that the detention, on its face non-persecutory, is not made something else by reason of the sufficiently common unauthorised acts of individual members of the security forces. The following passage from the judgment of McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258-259, is pertinent:

"Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race.

However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. In cases coming within the categories of race, religion and nationality, decision-makers should

ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution." (references omitted)

The Tribunal was bound to scrutinise the nature of the treatment in detention to which the authorities committed the refugee-claimants, and might again commit them if they were to return to Sri Lanka. It did not do so. This obligation of the Tribunal is not shown to have been discharged by its statements that according to the *Amnesty International Country Report: Sri Lanka, 1996,* there had been "recent improvement in human rights" and that abuses of human rights in detention "are no longer so widespread as before".

The Tribunal's bifurcation of the experiences of the present refugee-claimants into "detention" and "treatment in detention" led the Tribunal into committing an error of law, being either an incorrect interpretation of the Convention definition of "refugee" or an incorrect application of that definition to the facts as found by it (cf s 476 (1) (e) of the Act). Further, the Tribunal failed to set out its findings on material questions of fact, namely, the questions whether each applicant had a well-founded fear of being detained by the Sri Lankan authorities by reason of his being a young Tamil male from an LTTE-controlled area and, if so, of suffering mistreatment while in detention (cf s 430 (1) (c) of the Act).

For these further reasons, each matter should be remitted to the Tribunal.

I certify that the preceding six (6) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Lindgren.

Associate:

Dated: 21 December 1998

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY NG 652 OF 1998

ng 533 of 1998

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULATURAL AFFAIRS AppELLANT
AND:	VIJAYAKUMAR SIVARASA Respondent
AND BETWEEN:	KIRUSHANTHAN PARAMANANTHAN APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

JUDGES:	WILCOX, LINDGREN AND MERKEL jj
DATE:	21 december 1998
PLACE:	SYDNEY

REASONS FOR JUDGMENT

MERKEL J

Introduction

The Court heard two appeals on consecutive days in the above matters. The appeals concern whether two young Tamil male citizens of Sri Lanka, who came from the Jaffna peninsula in northern Sri Lanka, ("the applicants") had a well founded fear of being persecuted for reasons of race (Tamil ethnicity), political opinion (imputed support for or association with the Tamil separatist movement and, in particular, the Liberation Tigers of Tamil Eelan ("the LTTE")) or as members of a particular social group (young displaced Tamil males who had previously resided in the Jaffna peninsula).

Shortly after arrival in Australia each of the applicants lodged an application for a protection visa on the ground that he was a refugee. Each application was refused by a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister"). Applications for review of the delegates' decisions refusing the protection visas were heard and determined on different occasions before the same member of the Refugee Review Tribunal ("the RRT") upon substantially similar material. The RRT affirmed the decisions of the delegates refusing each applicant's application for a protection visa, giving a substantially similar decision in each matter.

Applications by the applicants for review of the RRT's decisions under Part 8 of the *Migration Act 1958* (Cth) ("the Act") were heard by different judges of the Court.

In the matter the subject of the first appeal, being the application by Vijayakumar Sivarasa ("Sivarasa") for a protection visa, Burchett J set aside the decision of the RRT and remitted the matter to the RRT, differently constituted, for determination according to law. The Minister appealed against the decision to a Full Court.

In the matter the subject of the second appeal, the application by Kirushanthan Paramananthan ("Paramananthan") for a protection visa, Davies J dismissed the application. Paramananthan appealed against the decision to a Full Court.

Although each appeal was heard separately, the main issues were essentially the same, relating to challenges to almost identical passages in the reasons for decision of the RRT in each case and were argued on the basis that the decisions of the respective primary judges were inconsistent and were not capable of being reconciled. Senior counsel for the Minister contended that the decision of Davies J was the correct approach to the issues raised by each appeal, whilst counsel for Sivarasa and Paramananthan contended that the correct approach was that taken by Burchett J.

In each matter the RRT accepted that the applicant for the protection visa, after fleeing Jaffna, had subsequently come to the attention of government authorities because he was a young Tamil man from Jaffna. The "attention" to which the RRT referred was random arrest and detention, during which each applicant was subjected to severe mistreatment including beatings and extortion, and only released after substantial bribes had been paid.

In Sivarasa's case the RRT accepted that, towards the end of 1994, after Sivarasa had fled from the conflict in the north he was arrested and detained in Colombo in June 1995, in February and April 1996 and in January, June and October 1997. The

RRT also accepted that on each of the occasions, apart from October 1997, Sivarasa had been severely mistreated by army and police personnel. The "mistreatment" included being chained and beaten and threats made to his life. He had also been forced, on numerous occasions, to pay bribes to obtain his release. The final occasion on which Sivarasa was arrested and detained was in October 1997, shortly before his departure from Sri Lanka. The RRT did not accept the full account of Sivarasa in relation to his detention on that occasion, however, it did accept that following a bomb explosion in the commercial district in Colombo on 14 October, Sivarasa was rounded up and held in detention for two days. Although the RRT did not accept that Sivarasa had been "severely tortured" on that occasion, it appeared to accept that after that arrest and detention Sivarasa informed his aunt, who was visiting Colombo at the time, that he was facing hardship and harassment and was unable to stay in Sri Lanka.

The context in which Sivarasa's arrests and detentions occurred was summarised by Burchett J:

"…what the evidence showed, without contradiction, was that the arrests and detentions were aimed at suppressing the rebellion of a group who were exclusively Tamil, the Liberation Tigers of Tamil Eelam, so that Tamils were targeted. While the LTTE might terrorize others, the applicant's complaint was that he was arrested and detained because he was a Tamil, and tortured in relation to allegations of his involvement in the Tamil political organization, the LTTE."

The RRT identified the respondent's claim for refugee status as follows:

"The applicant claimed that as a young Tamil from Jaffna he will be subjected to further arrest, detention and torture if he were to return to Colombo."

In Paramananthan's case the RRT accepted a similar story of random arrest, detention and severe "mistreatment" after Paramananthan and his family had fled the Jaffna peninsula in 1996. When travelling with his mother on a back road to Colombo, in an endeavour to leave the country, Paramananthan was detained in two transit camps where he was questioned, stripped of his clothes, beaten and tortured until his mother was able to obtain his release upon the payment of money. In Colombo in May 1997, Paramananthan was taken into police custody where he was again severely beaten, making it impossible for him to walk for some time; again he was released after payment of money. Although Paramananthan managed to leave Sri Lanka on 13 September 1997, due to inadequate travel documents, he was returned to Colombo airport on the following day where he was detained by the police for three to four hours and again beaten until he lost consciousness. He was released again after payment of money. A short time later, on 16 September 1997, when Paramananthan was residing in a house where a large cache of LTTE arms had been seized, he and other Tamils were arrested. He was again blindfolded, questioned and beaten. His release was arranged only after payment of money. Paramananthan then left Sri Lanka for Australia via Singapore.

The arrests and detentions experienced by Paramananthan occurred in much the same context as those experienced by Sivarasa. As was said by Davies J in Paramananthan's case:

"In a country such as Sri Lanka, where atrocities and breaches of human rights have occurred with great frequency over many years…the basic objective of the Government is not to persecute persons of the Tamil race but to defend the country against the Tamil Separatists…"

In each case the central issues for determination by the RRT were whether at the time of its decision in the matter it was satisfied that the arrests, detentions and "mistreatment" which the RRT had found had occurred amounted to persecution "for reasons of race,…membership of a particular social group or political opinion" within

the meaning of Art 1A(2) of the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention") and, if so, whether the applicants had a well-founded fear of the recurrence of those, or similar, events if returned to Sri Lanka.

The Convention 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."

The class of visa to which Sivarasa and Paramananthan claimed to be entitled is that provided for by s 36 of the *Migration Act* 1958 (Cth) ("the Act"). Section 36 is in the following terms:

"**36. (1)** There is a class of visas to be known as protection visas.

(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."

Australia has protection obligations to a person who satisfies the definition of a refugee under the Convention. Section 31 of the Act authorises the making of regulations which prescribe criteria for a visa or visas of a specified class, including protection visas. Section 65 provides for the Minister to grant or refuse to grant a visa if "satisfied" that the criteria for the visa have been satisfied.

Clause 866.221 of Schedule 2 of the Migration Regulations ("cl 866.221") provides that a criteria to be satisfied by the applicant for a protection visa is that at the time of the decision on his or her application:

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

Under s 415(3) of the Act, the decision of the RRT varying a decision of the Minister (or the delegate of the Minister) is treated as a decision of the Minister.

The subjective nature of the criterion in cl 866.22l, being one of "satisfaction", is of significance when the decision made is the subject of judicial review: see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272-277. However, in the present appeals the issues raised by the applicants, if established, fall within the area of reviewable error discussed in *Wu Shan Liang*.

In each matter the RRT was satisfied that there was not any special reason, apart from each applicant being a young Tamil man from Jaffna, why he would be likely to come to the attention of the authorities. That finding (which is not challenged) and the material upon which it was based, raised a claim of feared persecution for reasons of race, political opinion and membership of a particular social group. The question the RRT was required to address, in accordance with law, was whether the fear was well-founded.

The finding excluded a case of political persecution in so far as it could be said to arise from whether "certain behaviour or actions on the part of the applicant are or have been perceived by the authorities in power as political opposition": see Professor Hathaway in the *Law of Refugee Status* 1st ed (1991) at 153 and *Guo v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 151 at 160 per Beaumont J. However, it does not follow that the applicants did not have a well-founded fear of being persecuted for an imputed political opinion arising from the fact that they were young Tamil males from the Jaffna peninsula. In *Minister for Immigration and Ethnic Affairs v Guo* (1997) 144 ALR 567 at 575 Brennan CJ,

Dawson, Toohey, Gaudron, McHugh and Gummow JJ accepted that it is sufficient if the political opinion referred to in the Convention is the perceived or imputed opinion of the claimant by the persecutor. In such circumstances, in cases concerning Tamils from the Jaffna peninsula in Sri Lanka, it does not matter that the imputed opinion is not actually held by an applicant for a protection visa; it may be sufficient if the alleged persecutors identify the applicant as a supporter of the Tamil separatist movement and mistreat him or her for that reason.

The RRTs' reasons for decision

In so far as the decision of the RRT in each case concerned the same issues the decision was in substantially the same form. In particular, the statement as to the law relating to Art 1A(2) of the Convention was identical, as was the description of political developments in Sri Lanka. I do not make that observation in a way that is intended to be critical of that approach. Obviously, to the extent that each case involved the same issues it was understandable that the passages to which I have referred would appear in an almost identical form.

However the tendency, which I have observed in a number of cases, of the RRT to state the law, albeit accurately but necessarily incompletely, in the same way in different cases can result in the RRT not focusing upon the particular aspect of the law which might be decisive of the matter before it. Such a practice, whilst understandable and convenient, can lead the RRT into error when a particular aspect of the definition calls for more detailed consideration. I will return later to this aspect of the appeals when I consider the submission that the RRT had misapplied the "real chance" test in relation to whether each of the applicants for a protection visa has a well-founded fear of persecution for a Convention reason if returned to Sri Lanka.

The critical findings of the RRT in each case were contained in three paragraphs. As the paragraphs contain minor differences it is appropriate to set them out separately. The emphasis is added. In Sivarasa's case the RRT said:

"The Tribunal accepts that the applicant came to the attention of the authorities because he was a young Tamil man from Jaffna, but notes that he was not charged on any of these occasions and that the Sri Lankan authorities have adopted these procedures to counteract the threat of LTTE terrorism. In Applicant A & Anor v MIEA and Anor, McHugh J stated at 354 that 'The enforcement of generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place an additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race.'

While I have reservations as to whether the applicant during his claimed detentions in February 1996, April 1995 (sic) and in January and June 1997 suffered mistreatment to the extent he has alleged, in the absence of contrary evidence I am prepared to give him the benefits of the doubt. **Although mistreatment of persons in detention in Sri Lanka has been well documented by Amnesty and others, there is no suggestion that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males. Rather, it appears to have been a generalised failure to adhere to basic standards of human rights.** As such, the mistreatment which the applicant suffered during detention cannot be regarded as persecutory in the Convention sense (see Applicant A per Brennan J at 334, Yan Xu & Anor v MIEA & Anor, unreported, Olney J, 18 April 1997 at 13). Furthermore, the Tribunal notes the recent improvement in human rights referred to in the Amnesty 1996 report on Sri Lanka cited above, and in its November 1997 report, Sri Lanka, Government's response to widespread disappearances in Jaffna which states, inter alia that 'Amnesty International appreciates some important steps taken by the government to restore the rule of law in Sri Lanka amid difficult circumstances. These include the ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, the establishment of the HRC (Human Rights Commission) and the commissions of enquiry into past human rights violations…'

In conclusion, the detentions could not of themselves be regarded as persecutory, but rather as the legitimate enforcement of procedures designed to combat the threat of LTTE terrorism. The mistreatment during the detentions cannot be regarded as appropriately designed to achieve a legitimate end of government policy, but neither would it be persecution in the Convention sense, but rather indiscriminate cruelty. Moreover the evidence suggests that such abuses are no longer so

widespread as before. Therefore, although the applicant may be subjected to detentions in the foreseeable future as he has been in the past, these detentions do not give rise to a well-founded fear of being persecuted by the authorities for reasons of race, imputed political opinion or any other Convention reason should he return to Sri Lanka."

In Paramananthan's case the RRT said:

"The Tribunal accepts that the applicant was targeted because he was a young Tamil man from Jaffna, but notes that he was not on any of these occasions singled out from others in the same position and that the Sri Lankan authorities have adopted these procedures to counteract the threat of LTTE terrorism. In Applicant A & Anor v MIEA and Anor, McHugh J stated at 354 that 'The enforcement of generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place an additional burdens (sic) on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race.'

While I have reservations as to whether the applicant during his various periods of detention suffered mistreatment to the extent he has alleged, in the absence of contrary evidence I am prepared to give him the benefit of the doubt. **While mistreatment of persons in detention in Sri Lanka has been well documented by Amnesty and others, there is no suggestion that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males. Rather, it appears to have been a generalised failure to adhere to basic standards of human rights.** As such, the mistreatment which the applicant suffered during detention cannot be regarded as persecutory in the Convention sense (see Applicant A per Gummow J at 334. Yan Xu & Anor v MIEA & Anor, unreported, Olney J, 18 April 1997 at 13). Furthermore, the Tribunal notes the recent improvement in human rights referred to in the Amnesty 1996 report on Sri Lanka cited above.

In conclusion, the detentions could not of themselves be regarded as persecutory, but rather as the legitimate enforcement of procedures designed to combat the threat of LTTE terrorism. The mistreatment during the detentions cannot be regraded as appropriately designed to achieve a legitimate end of government policy, but neither would it be persecution in the Convention sense, but rather indiscriminate cruelty. Moreover, the evidence suggests that such abuses are no longer so widespread as before. Therefore, although the applicant may be subjected to detentions in the foreseeable future as he has been in the past, these detentions do

not give rise to a well-founded fear of being persecuted by the authorities for reasons of race or imputed political opinion should he return to Sri Lanka."

The RRT, after discussing certain other aspects of each applicant's claims, concluded that it

"…is therefore not satisfied on the basis of the cumulative evidence that the applicant faces a real chance of persecution for a Convention reason should he return to Sri Lanka."

The Primary Judges' decisions

(i) Burchett J in Sivarasa's case

Burchett J, in a passage not challenged by senior counsel appearing for the Minister, said that Sivarasa's account of torture, involving beatings, and threats and the exaction of bribes to obtain his liberty, if accepted, would plainly have constituted persecution "if inflicted for reasons of race or political opinion".

After referring to the critical finding of the RRT (which I have set out above) his Honour said:

> "There can be no difficulty with the proposition that necessary and reasonable enforcement, by the legitimate government of a

> country, of measures to combat terrorism will not amount to persecution, even if a race, or other group within the scope of the Convention, from which the terrorists come is targeted, and even if innocent members of that group unavoidably suffer distress, temporary detention or various forms of interference with their civic rights. But at least where such a group is targeted and its members are the victims of unnecessary and disproportionate harm inflicted on them, those so victimized will properly be described as persecuted."

Burchett J questioned the validity of the RRT's distinction between the legitimacy of the action of government authorities in arresting and temporarily detaining Sivarasa for questioning and the illegitimacy of its agents' unauthorised actions in making "continu[ing]" use of "well documented" torture (or as the RRT said "mistreatment"). His Honour said that the material before the RRT raised, as a central issue, whether the applicant's treatment by the authorities was because he was a Tamil and then said of the RRT's findings:

"In the face of all this, the Tribunal's use of restricted language, and its failure to make a finding that the officers did not torture the applicant because he was a Tamil, must be seen as deliberate."

His Honour observed:

> "…there is yet a further problem with the Tribunal's attempt to quarantine the torture and extortion to which it accepted the applicant had been subjected following the racially motivated (but in themselves justified) arrests and detentions for questioning. Even if the police and security forces were generally guilty of 'indiscriminate cruelty' and 'generalised failure to adhere to basic standards of human rights', it would not follow, as a matter of logic, that the applicant's fear of such treatment for reasons of race and imputed political opinion would not be well-founded. For it to be well-founded, there need only be a real chance that he would be persecuted for reasons of his race or political opinion."

Burchett J concluded:

"When the matter is looked at in this way, it seems very significant that the Tribunal's specific finding concerning the applicant's fear of persecution, so far as it is based on the tortures inflicted on him in 1995, 1996 and in January and June of 1997, is couched in quite restricted terms. After the findings I have already quoted, the Tribunal concludes:

> 'Therefore, although the applicant may be subjected to detentions in the foreseeable future as he has been in the past, these detentions do not give rise to a well-founded fear of being persecuted by the authorities for reasons of race, imputed political opinion or any other Convention reason should he return to Sri Lanka (emphasis added)'

It will be observed that this finding refers only to persecution 'by the authorities', although it is founded on a distinction, made in the earlier passages I have quoted, between the actions of the authorities and the unauthorized cruelty of individual officers. The Tribunal simply did not address the point on which it would have been extremely difficult to reject the well-founded nature of the applicant's fear. In failing to address fear founded on a real chance that officers investigating LTTE atrocities would torture him for reasons of race or imputed political opinion, and that the government would be unable or unwilling to protect him from them, as it had proved to be in the past, the Tribunal erred in law. It did not deal with the one question which most directly arose on the view of the facts that it took. Its approach involved 'an incorrect application of the law to the facts as found' within the meaning of s 476(1)(e)."

The application for review was also granted by his Honour on a procedural ground, however, senior counsel for the Minister conceded that if he fails in his submissions on the substantive ground, the procedural ground does not advance the matter further.

(ii) Davies J in Paramananthan's case

The decision of Davies J was handed down about one month before that of Burchett J. Davies J, after outlining the relevant legal principles made a number of general observations on the operation of the Convention in relation to Sri Lanka. His Honour cited cases in Australia and in the United Kingdom which had accepted that arrests and detentions in similar circumstances did not entitle the victim of that conduct to refugee status. His Honour referred to a Canadian decision, *Thirunavukkarasu v Canada (Minister for Employment and Immigration)* (1994) 109 DLR (4th) 682, which took a contrary view. Davies J said:

"Linden JA, delivering the judgment of the Federal Court of Appeal, said that the appellant, who was a male Tamil faced, according to the findings of the Refugee Panel, a serious risk of persecution in the north of Sri Lanka. Linden JA turned his attention to the question of relocation of the appellant to Colombo. The Refugee Panel had concluded that the appellant would face no more than a minimal possibility of persecution if he was relocated to Colombo. Linden JA, however, referred to the appellant's testimony that he had been subjected to arbitrary arrest and detention, as well as beatings and torture, at the hands of the Sri Lankan Government during his time in Colombo, and that these were motivated by the simple fact that he was a Tamil. Linden JA concluded that the appellant faced a serious risk of persecution in Colombo from the Sri Lankan Government on the basis of race and that the discretion of the Court should be exercised by declaring the appellant a Convention Refugee. This finding was to the contrary of the United Kingdom cases to which I have referred. I have no difficulty in accepting that the conclusion reached in Thirunavukkarasu is one to which a decision-maker could come if the decision-maker thought it proper to do so, having regard to the facts as outlined in that case and in cases such as the present."

Davies J then said:

"I have not engaged in this very long introduction with a view to saying that Tamils who flee Sri Lanka are or are not entitled to the protection of the Refugees' Convention; but rather to say that the conditions in Sri Lanka are such that conflicting decisions can be expected. It appears that the Sri Lankan Government is not

seeking to persecute Tamils but to protect the country from Tamil Separatists and Tamil terrorists. It is endeavouring to eliminate human rights abuses and has established systems to reduce their occurrences. On the other hand, if the evidence of claimants for refugee status is accepted, human rights violations, detentions, beatings, torture and death continue to occur at the hands of the Armed Forces and of the Security Forces. In a circumstance such as this, it is not for the Court to make up its own mind. This Court does not have the discretionary power which was exercised in Thirunavukkarasu. The terms 'well-founded fear', 'persecuted for reasons of' and 'race, religion, nationality and membership of a particular social group or political opinion' are all terms which require the decision-maker to come to a value judgment. In a case such as the present where one of the issues is whether the harm which the applicant suffered in Sri Lanka was motivated by a desire or intent on the part of the members of the Security Forces who were involved to harm Tamils and where excessive force and brutality seems to be committed in the objective of identifying terrorists or possible terrorists, the facts are difficult to characterise as one thing or another. In this area, one decision-maker could form one view while another decision-maker could come to another."

Davies J, after discussing the principles relevant to judicial review, indicated that in his view the Tribunal understood that the crux of the case was whether the applicant was likely to suffer persecution at the hands of the Sri Lankan forces if he returned to Sri Lanka. Davies J referred to the critical paragraphs from the RRT decision relating to so called indiscriminatory "mistreatment" and concluded:

"There was material before the Tribunal justifying this conclusion if the Tribunal chose to rely upon [that material]. For example, the report from the Danish Immigration Service said that of the 550 Tamils who had been expelled from Switzerland, only 27 had been arrested on entry or shortly afterwards at checkpoints or boarding houses and that the majority of these 27 were detained for 48 hours for identity checking and the detainee was, as a rule, released. According to the report, the Swiss Federal Refugee Office had not received information of maltreatment suffered by any of the repatriated asylum seekers. The Australian High Commission in Colombo and the Department of Foreign Affairs also rejected the view that young Tamil males in Colombo were likely to suffer persecution.

Other material before the Tribunal pointed in a different direction. The British Refugee Council reported that the laws I have mentioned and other steps taken by the Sri Lankan Government to improve human rights for all citizens of Sri Lanka had not put an end to abuses. The Council reported, inter alia:

> ‘Despite the attempts by the government to promote human rights, the culture within the Sri Lankan security forces remains suspicious of Tamils - in particular young males, although all Tamils, whether male or female, young or old, are at risk. That Tamils should come under suspicion because of the actions of the LTTE is understandable. What is concerning is the continued use of detention without trial, and in contravention of the Emergency Regulations of torture to extract confessions, often in language not understood or spoken by the signatory and of extrajudicial executions which are linked to the security forces. **While there has been a systematic reduction in human rights violations, particularly against the Sinhalese population, there continues to be human rights violations in Colombo, particularly against Tamils, which the government appears to be unwilling or unable to prevent. It is for this reason that Colombo should not be assumed to be safe for Sri Lankan Tamils.’** (emphasis added)

One can see that there was material before the Tribunal from which a conclusion could be drawn, as it was drawn by the Tribunal, that such human rights violations as occurred in Colombo, particularly against male Tamils, were not of such a nature as to constitute persecution. On the other hand, there was material before the Tribunal from which a contrary inference could have been drawn. The Tribunal was the decision-maker of fact and the Tribunal concluded in the passage I have set out above that, although mistreatment is endured by Tamils during detentions, nevertheless such mistreatment did not constitute persecution but rather indiscriminate cruelty. By the words ‘indiscriminate cruelty’, the Tribunal implied random or individualised cruelty not reflecting an intention on the part of the Armed or Security Forces or of the Government to harm or injure Tamils. I cannot draw a conclusion from the Tribunal's approach to these matters that the Tribunal erred in its interpretation of the applicable law or incorrectly applied the law to the facts as found.”

Davies J said that the RRT had reached an honest and reasonable decision by reference to broad principles which are generally accepted within the international community, was entitled to give substantial weight to views expressed by the Australian High Commission in Colombo and the Department of Foreign Affairs and Trade (which were to the effect that as at December 1996, the Sri Lankan government had taken effective steps to improve its human rights record in respect of Tamils) and said he had not identified any reviewable error in the Tribunal’s decision. Accordingly, the application was dismissed with costs.

Whilst, in general, his Honour's observations might appear to be unexceptionable, in the present cases they raise two related issues of fundamental importance. The first is whether Davies J was correct in concluding that the "real chance" test was satisfied by the RRT appearing to prefer one credible view of the situation in Sri Lanka over another credible view without taking into account whether its preferred view might be inaccurate. The second relates to the RRT's sweeping conclusion based on its preferred view, which is dispositive of the applicants' case, without explaining the findings of fact and referring to the evidence or other material relied upon as required by s 430 of the Act. As I later explain, the finding of "indiscriminate cruelty" falls into that category. The s 430 issue is not one of mere form; compliance with s 430 can reveal whether the "real chance" test has been properly applied and non compliance can disguise a flaw in the reasoning process and, therefore, a ground for judicial review: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366-367 per Deane J.

There is a further matter of some importance arising from his Honour's reference to and discussion of conflicting decisions in the United Kingdom, Canada and Australia in relation to refugee claims of young Tamil men from Jaffna. Davies J correctly pointed out that such decisions showed how difficult and borderline the decision might be in particular cases. However, his Honour also referred to "inconsistent" decisions in Australia of the RRT in relation to the claims of young Tamil men. Whilst some measure of inconsistency might be an inherent aspect of administrative decision making, it is apposite to recall the observation of Brennan J in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634 at 639 where his Honour said:

"Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice."

The proper application of the “real chance” test in the determination of refugee cases (which so fundamentally concern the rights and liberties of individuals) is a critical aspect of the performance by the executive branch of government, of Australia’s protection obligations under the Convention. In Australia, the ultimate repository of the performance of these obligations is the RRT. If “inconsistency” exists, as his Honour indicated it did, in RRT decisions in relation to essentially the same claims, then that is a matter of some concern. In particular, if the inconsistency arises from a failure to understand and apply the correct principles of law in relation to such refugee claims, it is appropriate to clarify the applicable principles.

The grounds of appeal

In substance, senior counsel for the Minister contended that Burchett J had committed the very error against which Davies J cautioned; he had intruded upon the fact finding exercise committed to the RRT. Counsel for Paramananthan contended that Davies J had erred in failing to recognise that the RRT had not addressed the central issue of whether, if he is returned to Sri Lanka, Paramananthan faced a “real chance” of arrest, detention and further mistreatment (including torture) because he was a young Tamil male from Jaffna. In particular, it was contended that the RRT’s distinction between arrest and detention by the authorities and “mistreatment” by police and army personnel demonstrated a failure to understand and apply the “real chance” test and, accordingly, Burchett J had correctly concluded that the RRT had not applied “the law to the facts as found” within the meaning of s 476(1)(e) of the Act. It was said that the threat of persecution need not be the product of any policy or law of the Sri Lankan government. It was enough that “the government has failed or is unable to protect the person in question from persecution”: see *Chan Yee Kin v*

Minister of Immigration and Ethnic Affairs (1989) 169 CLR 379 at 430 per McHugh J (with whom Mason CJ expressed his agreement).

The appeals raise difficult and important questions in relation to the application of the Convention to citizens fleeing a country such as Sri Lanka which has been torn by war and terrorism resulting from a separatist movement based exclusively on race. In such circumstances, as the material before the RRT in the present cases demonstrates, the line between legitimate government counter terrorist activity (which is inevitably focused on those of Tamil ethnicity) and racial and political persecution of Tamils will not be an easy one to draw.

The Law

The material before the RRT raised the issue of whether Sivarasa and Paramananthan had a well-founded fear of persecution if returned to Sri Lanka by reason of each being a young Tamil male from the Jaffna peninsula. These attributes, which had led to their severe "mistreatment" in the past, raised the question of whether they had a "well-founded" fear of persecution for reasons of race (Tamil ethnicity), political opinion (imputed support for or association with the Tamil separatist movement and, in particular, the LTTE) and membership of a social group (young displaced Tamil males who had previously resided in the Jaffna peninsula) if they returned to Sri Lanka. The major issue arising in each appeal was whether the RRT had addressed these issues in accordance with law.

The applicable legal principles can now be taken to be well established by the decisions of the High Court in *Chan Yee Kin v Minister for Immigration and Ethnic*

Affairs, *Minister for Immigration, and Ethnic Affairs v Wu Shan Liang*, *Minister for Immigration and Ethnic Affairs v Guo* and *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

(i) Persecution for a Convention reason

The RRT did not regard summary arrest, detention, torture and extortion of the applicants as persecution in the sense used in the Convention. In Paramananthan, Davies J helpfully summarised the authorities in relation to persecution for a Convention reason. The authorities establish a number of propositions.

1. Harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm: see *Chan Yee Kin* at 388 per Mason CJ and at 430 per McHugh J;

2. The harm or threat of harm need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution: *Chan Yee Kin* at 430 per McHugh J.

3. Although persecution involves the infliction of harm, it implies something more; an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution: *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568 per Burchett J.

4. In the context of a country torn by war or terrorism, random acts of violence which occur during civil war and acts done pursuant to laws for the protection of the community in the course of the identification or punishment of criminals or terrorists would not ordinarily be seen as persecution of the individuals affected even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. However, law or its enforcement must be appropriately adapted to achieve some legitimate end of

government policy. A law or its purported enforcement will be persecutory if its real object is not the protection of the public but the oppression of the members of a race, religion, nationality or particular social group or the holders of particular political opinions: see *Chan Yee Kin* at 354 per McHugh J.

5. If measures constituting serious violations of human rights are directed, for example, to members of a particular race, that circumstance may be thought to constitute persecution for the purposes of the Convention. As Davies J said in Paramananthan that is because an inference can be drawn from the excess of the measures taken, the inappropriate violence or detriment in what is done, that the measures involve an intent to inflict harm or penalty for reasons of race, political opinion etc.

6. The central thread running through the above authorities, as Davies J correctly emphasised, is that persecution for the purposes of the Convention involves something more than a person showing they are at risk on their return; a "discriminatory" or "differential" impact is required; the victim must be able to show fear of persecution for reasons which are over and above "the ordinary risks" incurred by other citizens in the country whether ravaged by civil war, terrorism or otherwise: see *Adan v The Secretary of State for the Home Department* [1998] 2 WLR 702 at 713 per Lord Lloyd and *Hussein v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Lindgren J, 3 November 1998) at 16-19. Accordingly, indiscriminate persecution which is the product either of inhuman cruelty or of unreasoned antipathy by the persecutor towards the victim or victims of persecution would not constitute persecution for a Convention reason: see *Chan Yee Kin* at 388 per Mason J. In *Applicant A* McHugh J (at 258), after observing the "infinite variety of forms persecution may take", said:

"Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however, the applicant may be the only person who is subjected to discriminatory conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee."

Discriminatory conduct ordinarily establishes a causal nexus between the harm said to be inflicted and the reason for its infliction.

7. Whether conduct satisfies the discriminatory criterion is a question of fact which involves evaluation of matters of fact and degree. The evaluation may require consideration of whether the alleged persecutory conduct is in pursuit of a

legitimate national objective but, ordinarily, only for determining whether the discriminatory criterion for establishing persecution for a Convention reason has been satisfied: see *Applicant A* at 258-259 per McHugh J.

The present appeals afford a good example of the difficulties that can arise in relation to the discriminatory criterion. It is true that, in order to protect the public, a number of laws have been enacted by the Government of Sri Lanka which permit the summary arrest and detention of individuals suspected of engaging in terrorist activities. Arrest and detention of individuals, who happen to be of a particular race, *in accordance* with such laws, is unlikely to be discriminatory and therefore persecutory as the persons are not targeted as persons of that race, rather, they are targeted as persons suspected of terrorism. However, the summary round up, arrest, detention, torture and extortion of young Tamil males from the Jaffna peninsula who are in Colombo or other government controlled areas, is not conducted *in accordance* with or authorised by such laws. Any mantle of legitimacy is lost in respect of such conduct which is plainly discriminatory and, as was pointed out by Burchett J in Savarasa, will constitute persecution. When the material before the RRT raises such a case, as it clearly did in each of the present matters, the conduct in question will, as was stated by McHugh J in *Applicant A* (at 259) become "inherently suspect and requires close scrutiny" in order to ascertain if it was engaged in for a Convention reason. As Davies J observed, the excess of the "measures" taken can properly found an inference of an intent to inflict harm for a Convention reason.

(ii) A "well-founded" fear of persecution

The definition of a refugee requires that the applicant for refugee status has a genuine fear of being persecuted for a Convention reason if returned to his or her country of nationality (the subjective element) and that that subjective fear is "well-founded" (the objective element). An important issue in each appeal is whether the

RRT understood and correctly applied the “real chance” test in determining that the fear of persecution held by the applicants was not “well-founded”.

Chan Yee Kin is authority for the proposition that an applicant for refugee status would satisfy the definition if he or she showed a genuine fear founded on a “real chance” of persecution for a Convention reason if returned to the country of his or her nationality. However in *Guo* (at 576-577) the majority judgment of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, whilst acknowledging that the “real chance” test is helpful in understanding the statutory requirement that the fear be “well-founded”, emphasised that the “real chance” test is epexegetic of, and not a replacement or substitute for, the Convention term “well-founded fear of being persecuted…”. In these reasons I refer to the “real chance test” in the sense that test has been explained in *Guo*. In that context the majority judgment in *Guo* (at 577) is authority for the propositions that:

- a fear is well-founded where there is a “real substantial basis for it” - a substantial basis may be far less than a fifty per cent chance that the object of the fear will eventuate;

- no fear can be well-founded for the purpose of the Convention unless the evidence or material indicates a real ground for believing that the applicant for refugee status is at risk of persecution - such a risk can exist even though the evidence does not show that persecution is more likely than not to eventuate.

In determining whether there is a “real chance” of persecution consideration will generally have to be given to the past events relied upon by the applicant as giving rise to the fear of persecution and the probability of the recurrence of those, or similar, events. The importance of the decisions in *Wu Shan Liang* and *Guo*, is that they explain the evaluative process by which the RRT is to make its findings as to past events in order to enable it to determine the likelihood of persecution for a

Convention reason if the applicant for refugee status is returned to his or her country of nationality.

In *Wu Shan Liang*, Brennan CJ, Toohey, McHugh and Gummow JJ (at 281) said:

"…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."

Kirby J (at 294) said:

"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 the assessment of the 'real chances' affecting the treatment of the applicant if he or she were to be returned to China." (footnotes omitted)

In *Guo* (at 578-579), after stating that whilst the course of the future was not predictable and the degree of probability that an event would occur was usually assessable, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ continued:

"The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, 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. In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an 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. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future.

Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. 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 *Guo* (at 587) Kirby J said:

"Because the future can never be told with certainty, particularly perhaps in the variable and sometimes unpredictable matter of persecution, this court endorsed a test which both permits and requires rational speculation and denies the necessity of the proof of affirmative certainty."

When conflicting material relating to some past event is before the tribunal, a finding that one version of events is more probable than another on the balance of probabilities is not inconsistent with the correct application of the "real chance" test. However, the correct application of that test may in some, but not other, circumstances make it appropriate for the tribunal to consider the possibility that any of its findings as to past events were inaccurate. In *Guo* (at 579-580) Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ explained that situation as follows:

"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 whether 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." (Emphasis added)

It can be seen from the foregoing that consideration of whether a certain finding of fact was or might be wrong:

- is mandatory in respect of facts found on the basis that they are "slightly more probable than not" if the facts are those relied upon for concluding that an applicant has not been punished or harmed for a Convention reason;
- is unnecessary when the RRT has no real doubt that its findings in that regard are correct;
- has a varying applicability in cases lying between the two situations stipulated above.

See also *Emiantor v Minister for Immigration and Multicultural Affairs* (1997) 48 ALD 635 at 650 per Merkel J and *Demir v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Ryan J, 19 October 1998) at 18-22 and 24.

In cases such as the present, where claim for refugee status is based on being a member of a racial group specifically targeted by the authorities for conduct capable of constituting persecution for a Convention reason, the past events that could be expected to be logically probative of whether there is a real chance of the persecution eventuating, fall into at least two main and possibly over lapping categories. The first category relates to the past events which have given rise to the subjective element of the fear of the applicant. Those events relate mainly to the applicant's experiences and the reason he or she fears their recurrence. The second

category relates to past events relevant to determining the likelihood of the recurrence of the events feared by the applicant if returned to his or her country of nationality, that is, the objective element. That element will include the role of government authorities and officials in respect of the events complained of, and similar events experienced by others in a like situation to that of the applicant, and whether the government authorities or officials had failed or were unable to protect the applicant and others from their recurrence.

Whether, and if so, the extent to which the RRT evaluated these matters in accordance with the passages to which I have referred in *Wu Shan Liang* and *Guo* is important to the outcome of the appeals.

(iii) Membership of a particular social group

In the present case determining whether there is a real chance of persecution for reasons of *race* or *political opinion* might involve difficult questions of fact but those issues do not give rise to any particular conceptual difficulty. However, whether there was persecution of the applicants as members of a particular social group does give rise to some difficulty in that regard.

In Ram v Minister for Immigration and Ethnic Affairs (at 569) Burchett J, with whom O'Loughlin and R D Nicholson JJ agreed, said:

"A crowd is not a social group…certainly not one of a kind that is properly described as having a membership. There must be a common unifying element binding the members together before there is a social group of that kind. When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his

being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is 'for reason of' his membership of that group."

In Applicant A Dawson J (at 241) said:

"The adjoining of 'social' to 'group' suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society."

McHugh J (at 264) said:

"Only in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group."

Brennan CJ (at 234) said:

"There is nothing in the term 'a particular social group' which limits the criteria for selecting such a group nor anything in the travaux preparatoires which suggests that any limitation was intended. There is no reason to treat 'a particular social group' as necessarily exhibiting an inherent characteristic such as an ethnic or national identity or an ideological characteristic such as adherence to a particular religion or the holding of a particular political opinion. By the ordinary meaning of the words used, a 'particular group' is a group identifiable by any characteristic common to the members of the group and a 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large. The characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguish the members of the group from society at large. The persons possessing any such characteristic form a particular social group."

Although there was a difference between the majority and the minority in *Applicant A* as to whether a social group can be defined by reference to the fact that that group was persecuted, that issue does not arise in the present case.

In *Minister for Immigration and Multicultural Affairs v Zamora* (Federal Court of Australia, Black CJ, Branson and Finkelstein JJ, 5 August 1998) the Court said (at 8):

"In our view Applicant A's case is authority for the following propositions. To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community."

The RRT, in the present cases, did not appear to address the question of whether young displaced Tamil males from the Jaffna peninsula, residing in Colombo or other government controlled areas, constituted a particular social group for the purposes of the Convention and, if so, whether the applicants were persecuted for reasons of membership of that group.

This issue, and other aspects of the appeals, raise questions concerning the function and duties of the RRT in relation to an application for the review of a decision refusing a protection visa.

The function of the RRT

Although the evaluation of the facts determinative of a claim for refugee status is a matter committed to the RRT, its conclusion as to whether the conduct in question constituted persecution when it occurred and, importantly, whether there is a "real chance" of that conduct recurring must, for present purposes be determined not only in accordance with law (s 476(1)(e)) but also in accordance with the procedures required by the Act to be observed (s 476(1)(a)). The RRT's primary function is to review RRT-reviewable decisions. Section 414(1) of the Act relevantly provides:

> *"…if a valid application is made under section 412 for review of an RRT-reviewable decision, the Tribunal must review the decision."*

"RRT-reviewable decisions" are defined in s 411 as including a decision that a person is not a refugee as defined and a decision to refuse to grant a protection visa.

Unless the Tribunal is prepared, on the papers before it, to make the decision or recommendation that is most favourable to the applicant (s 424), the Tribunal

> *"must give the applicant an opportunity to appear before it to give evidence…"* (s 425(1))

The Act provides that the RRT is to conduct its proceedings in a manner which incorporates elements of an inquisitorial proceeding, principally the ability to obtain "such…evidence as it considers necessary": see s 425(1). Save for the applicant, the Tribunal has a discretion as to who it will hear and in relation to what matters: see ss 426, 427(3). As the Act does not provide for there to be any respondent to proceedings before the RRT, the applicant is the only party to the application. The

Act also excludes certain characteristic features of the adversarial system, such as an enforceable right of a party to call witnesses (ss 425(2), 426) and the right to be represented, or to cross-examine witnesses (s 427(6)). These inquisitorial powers of the RRT are reinforced by powers to have investigative procedures conducted on its behalf: see ss 427(1)(d) and 428.

The Act's guidelines in respect of the exercise by the RRT of its review powers, link the inquisitorial nature of the procedure with the manner in which merits review is to be conducted. Section 420(2), which sets out the guidelines, provides:

"The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

The provisions to which I have referred provide for the RRT to operate in an inquisitorial, non-adversarial manner. Concepts such as onus of proof and burden of proof have no role to play before the RRT: see *Immigration and Refugee Law in Australia*, Mary Crock (1998) at 138 and 262 and the authorities there cited. As stated in *Pepaj v The Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Merkel J, 25 November 1998) at 7 the RRT must:

"…determine whether it is "satisfied" that the applicant for a protection visa is a refugee in accordance with the definition of a refugee as set out in the Convention : see ss36 and 65 of the Act and at 866.22 of the Migration Regulations. Thus the question is not one of onus but one of satisfaction"

In *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-425 Brennan J said of the inquisitorial procedures of the Administrative Appeals Tribunal:

> *"Proceedings before the A.A.T. may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the Board and the A.A.T. is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it…The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings."*

Although the Act authorises the provision to the RRT of "written arguments relating to the issues arising in relation to the decision under review" (s 423(1)(b)), there is nothing in the Act to indicate that the RRT's review is circumscribed by the scope of the arguments presented. In general, an administrative tribunal is entitled to be guided by the issues that the parties choose to put before it for its consideration (see: *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342, *Repatriation Commission v Hughes* (1991) 23 ALD 270 at 274 and *Tuite v Administrative Appeals Tribunal* (1993) 40 FCR 483 at 487-489) and is entitled to have regard to the case put (*Noble v Repatriation Commission* Federal Court of Australia, Beaumont, Branson and Merkel JJ, 3 November 1997) at 16. However, ultimately the RRT is under a duty to fulfil its statutory obligation to "review the decision" before it and to do so according to s 420(2), which requires it to act according to the "merits of the case". Unlike an adversarial proceeding, parties do not appear and put a case, as such, to the RRT. As stated above, the RRT is required to determine whether it is "satisfied" that the applicant is a person to whom Australia has protection obligations under the Convention.

Material and evidence, as well as arguments, may be presented to the RRT but its inquisitorial procedures or enquiries are not limited to or by the materials, evidence, or arguments presented to it. In an appropriate case the RRT may undertake its own enquiries and, in some instances, may be obliged to do so: see *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 170 per Wilcox J, *Luu v Renevier* (1989) 91 ALR 39 at 49-50 per Davies, Wilcox and Pincus JJ and *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 151 ALR 505 at 547-548 per

Wilcox J. Similarly, the RRT is not to limit its determination to the "case" articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant. That obligation arises by reason of the nature of the inquisitorial process and is not dependent upon whether the applicant is or is not represented: cf *Bouianov v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Branson J, 26 October 1998) at 2 and *Saliba v Minister for Immigration and Ethnic Affairs* (Federal Court of Australia, Sackville J, 5 November 1998) at 16-17. Representation can be relevant to the content of a duty to act according to "substantial justice" or fairly in a particularly case, but cannot affect the fundamental duty of the RRT, acting inquisitorially, to review the decision before it according to the "merits of the case".

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

I would arrive at the same conclusion based on s 420, the nature, scope and requirements of which have been the subject of much judicial attention in the Court. Some of the various views can be seen in *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300 and the authorities referred to therein. See also the authorities discussed in *Immigration and Refugee Law in Australia*, Mary Crock, (1998) at 284-288. Much of the attention has focused on the content of the meaning of "substantial justice" and its relationship with the common law rules of natural justice which are excluded as a ground of review under s 476. In *Emiantor v Minister for Immigration and Multicultural Affairs* (1997) 48 ALD 635 (at 653) I observed that "the precise content of the duty imposed by s 420 may not be clear". Although that issue is before the High Court, in my view, at the least, s 420 imposes a duty to determine the "merits of the case" and in doing so make finding on the questions central to that determination: see *Calado v Minister for Immigration and*

Multicultural Affairs (Federal Court of Australia, Moore, Mansfield and Emmett JJ, 2 December 1998) at 21-22 and *Franjo Buljeta v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Katz J, 4 December 1998) at 13-14 and the authorities there referred to.

It is interesting to note that in the Explanatory Memorandum to the *Migration Reform Act 1992* (Cth) which introduced s 420 (then numbered s 166C) "substantial justice" in the section was described as having been "used to emphasise that it is the issues raised by the case, rather than the process of deciding it, which should guide the RRT in making its decisions". As Foster J observed in *Li v Minister for Immigration and Multicultural Affairs* (1997) 144 ALR 179 (at 198) s 420:

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

Closely related to that duty arising under s 420 is the duty of a decision maker or tribunal to give the questions before it for its determination "proper, genuine and realistic consideration upon the merits": see *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292 per Gummow J; *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 at 12-15 per Sheppard J; *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 at 482-483 per Gummow J; *Surinakova v Minister for Immigration* (1991) 33 FCR 87 at 96 per Hill J; *Mocan v Refugee Review Tribunal* (1996) 42 ALD 241 at 245 per Merkel J.

Independently of s 420, the RRT must apply itself to the question which the law prescribes. If the RRT misconceives its duty or fails to address the correct legal question committed to it by not applying itself to all the issues it is required to consider in determining the matter before it, there will have been a purported, but not real, exercise of its functions and jurisdiction. In such circumstances there will have been a constructive failure by the RRT to exercise its jurisdiction: see *Ex parte*

Hebburn Ltd; Re Kearsley Shire Council (1947) 47 SR (NSW) 416 at 420 per Jordan CJ, *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 480 per Barwick CJ and at 483 per Gibbs J; *Guo v Minister for Immigration and Ethnic Affairs* at 165-166 per Beaumont J and *Guo* (on appeal in High Court) at 581 and *Calado* at 21-22.

The Federal Court's power on review

The decision of the RRT was a judicially-reviewable decision pursuant to s 475 of the Act. Section 476 of the Act describes the grounds upon which an application for review may be brought in the Federal Court. The section relevantly provides:

"**476. (1)** Subject to subsection (2) application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or regulations to be observed in connection with the making of the decision were not observed;

…

(e) that the decision involved an error of law, being an error involving 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;"

The main questions arising on the appeals are whether the RRT:

- acted in accordance with the procedures required by the Act to be observed in connection with the making of its decision in each matter; and
- correctly applied the law relating to whether the applicants had a well-founded fear of persecution for a Convention reason.

Central to the answers to these questions is the RRT's failure to directly and clearly raise with the applicants the most substantive issue upon which their application depended, namely whether the two letters were fabricated and contrived by them to help their case.

Did the RRT correctly apply the "real chance" test?

The approach of the RRT in each matter was identical. Applying the caution expressed in *Wu Shan Liang* (at 272) against construing the reasons of an administrative decision maker unfairly, minutely and finely with an eye keenly attuned to the perception of error, the critical steps in the reasoning of the RRT may be summarised as follows:

1. Paramananthan and Sivarasa feared that, because they were young Tamil men from the Jaffna peninsula, if they returned to Sri Lanka they would be subjected to arbitrary detention, arrest, torture and extortion by members of the Sri Lankan police and military forces as had occurred on a number of occasions prior to their departures from Sri Lanka.

2. Paramananthan and Sivarasa had been targeted because they were young Tamil men from Jaffna.

3. The targeting of young Tamil men from Jaffna for arrest and detention formed part of the procedures adopted by the Sri Lankan authorities to counteract and combat the threat of LTTE terrorism.

4. While mistreatment of persons in detention in Sri Lanka has been well documented by Amnesty and others, there is "no suggestion" that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males. Rather, it appears to have been a generalised failure

to adhere to basic standards of human rights. As such, the mistreatment which Paramananthan and Sivarasa suffered during detention cannot be regarded as persecutory in the Convention sense.

5. The detentions could not of themselves be regarded as persecutory, but rather as a legitimate enforcement of procedures designed to combat the threat of LTTE terrorism. The mistreatment during the detentions cannot be regarded as appropriately designed to achieve a legitimate end of Government policy, but neither would it be persecution in the Convention sense, but rather "indiscriminate cruelty".

6. There have been reports of recent improvements in human rights in Sri Lanka and abuses of persons in detention are no longer so widespread as before.

7. Although Paramananthan and Sivarasa may be subjected to detentions in the foreseeable future on their return (as they had been in the past) the detentions do not give rise to a well-founded fear of being persecuted by the authorities for reasons of race or imputed political opinion.

8. Accordingly, the RRT was not satisfied on the basis of cumulative evidence that Paramananthan and Sivarasa faced a real chance of persecution for Convention reasons should they return to Sri Lanka. Consequently, after having "considered the evidence as a whole", the RRT was not satisfied that either person is a person to whom Australia has protection obligations under the Convention.

The "findings" in paragraph 4, which are the foundation for the RRT's conclusions of non-discriminatory treatment, are particularly troubling. The statement by the RRT that "there is no suggestion" that the mistreatment feared by Paramananthan and Sivarasa was not "directed in a discriminatory way towards any particular group such as young Tamil males" is simply wrong. As was observed by both Davies J and Burchett J, there was an abundance of credible material before the RRT to the effect that the mistreatment which the applicants feared had been directed to persons of Tamil ethnicity and, in particular, to young Tamil males from the Jaffna peninsula. A

mistaken finding of fact material to the decision can constitute a ground of review: see *Curragh Queensland Mining Limited v Daniel* (1992) 34 FCR 212 and *Abdalla v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Burchett, Tamberlin and Emmett JJ, 20 August 1998) at 9-12. See also *Inderjit Singh v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Weinberg J, 29 October 1998) at 24-27 and *Calado* at 17-19.

Davies J, in Paramananthan's case, referred to material that may have justified a conclusion that mistreatment was not directed to a particular group such as young Tamil males and upheld the decision of the RRT essentially on the ground that there was material before it which justified that conclusion if the Tribunal chose to rely upon that material. His Honour then concluded that, although other material before the RRT pointed in a different direction, as the RRT was a decision maker of fact it was open to it to arrive at the conclusion that it did on the material. In upholding the approach of the RRT, his Honour viewed the RRT as having found that the random or individualised cruelty was "indiscriminate cruelty" not reflecting an intention to inflict cruelty for a Convention reason.

The difficulty with Davies J's interpretation of the RRTs' reasons is that his Honour gives the reasons a more beneficial construction than the words can reasonably bear. The failure of the RRT's reasons to set out the critical findings and the evidence upon which they are based, is not to be remedied by the Court endeavouring to fill in the gaps by giving them a beneficial construction which is not warranted. Further, there is no presumption that the decision making process was carried out without error where the reasons do not provide logical foundation for the decision: see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 690 per Deane J.

The words used were that there is “no suggestion” of discriminatory mistreatment. However, as any fair reading of the material before the RRT makes quite clear, there was an abundance of material before the RRT, including the evidence of the applicants which it accepted, that “suggested” that the mistreatment was directed in a discriminatory way towards Tamils and, in particular, young Tamil males from Jaffna. Indeed, very little of the material “suggested” mistreatment on any wider scale against persons other than Tamils. Whilst there is a “suggestion” in part of the material before the RRT of mistreatment of criminals and some persons of Sinhalese ethnicity, that mistreatment seemed to have been unrelated to the round up, detention, arrest and subsequent mistreatment (including extortion) of Tamils as part of the Sri Lankan authorities’ purported “measures” to counteract and combat the threat of LTTE terrorism.

Burchett J, in Sivarasa’s case, was troubled by the approach of the RRT for the same reason. His Honour made selections from the voluminous material before the RRT to indicate his difficulty in understanding what the RRT meant. In substance, that material was replete with suggestions of mistreatment being directed in a discriminatory way towards young Tamil males from the north of Sri Lanka. Putting to one side the possibility that the RRT did not say what it meant to say, the only other rational explanation for the “no suggestion” observation of the RRT is that it did not take into account the experiences, which it had accepted had been suffered by the applicants in each case because they were young Tamil men from Jaffna, and the credible body of evidence referred to by Davies J and Burchett J, which it had not rejected, that corroborated the experience and fears of the applicants.

Whilst it was open to the RRT, as the fact finding tribunal, to reject or give little weight to the applicant’s evidence, it did not do so. Further, whilst it was also open to the RRT to reject or give little weight to the reports corroborating that evidence, it did not state it was doing so or otherwise appear to do so. In those circumstances, it seems to me that the RRT (contrary to what it stated in what appears to be a standard form at the conclusion of its reasons) could not have arrived at its decision based, as it

was, on the “no suggestion” observation after considering all of the material before it which was logically probative of the matters to be determined by it. As explained above, a failure to make findings as to credible material tending to establish that the applicants’ fear was “well-founded” necessarily disables the RRT from applying the “real chance” test in accordance with law to the facts. The failure is particularly serious as the material strongly suggests a “real substantial basis” for the applicants fear (see *Guo* at 577).

The succeeding “finding” in paragraph 4 that the mistreatment of the applicants was “a generalised failure to adhere to basic standards of human rights” is of equal concern. The critical matter left unanswered by that “finding”, as was noted by Burchett J, was whether that generalised failure was for a Convention reason. The evidence of the applicants and the material upon which they relied pointed strongly to that conclusion. Yet, save for the “no suggestion” observation, no other “finding” was made in that regard notwithstanding that it was the critical issue for decision. In those circumstances, I am inclined to agree with the conclusion of Burchett J that the RRTs’ use of restricted language, and its failure to make a finding as to whether the mistreatment suffered by the applicants (and others in a like position) was because they were Tamil persons, was deliberate.

The RRT left unanswered the crucial question, against whom was mistreatment directed and for what reason? The RRT accepted that the applicants had been targeted as young Tamil males from Jaffna. A literal reading of the “no suggestion” statement that mistreatment was not directed at “young Tamil males” may be partially correct as some of the material “suggested” that Tamils who were permanent or long term residents of Colombo were ordinarily able to secure their release on establishing that fact. Whilst that group may not have been mistreated as such, it was not the group to which the applicants claimed to belong and which gave rise to their fear of persecution. The case of persecution raised by the material and evidence before the RRT, related to young male Tamils from Jaffna. That was the group to which the applicants claimed to belong and which was clearly most at risk of the mistreatment

feared by them. Thus, even on a most beneficial reading, the “no suggestion” statement fails to address the case raised by the material and the evidence.

The concerns I have with the approach of the RRT are exacerbated by its purported distinction between arrest and detention as a legitimate counter terrorist activity and mistreatment which it said cannot be accepted as a legitimate counter terrorist activity but rather, “indiscriminate cruelty” and “a generalised failure to adhere to basic standards of human rights”.

The RRT’s main findings as to the past events which were to form the foundation for its determination as to whether there was a real chance of their recurrence in the event of Sivarasa and Paramananthan’s return to Sri Lanka included:

- Paramananthan and Sivarasa were detained, arrested and mistreated because they were young Tamil men from Jaffna;

- the mistreatment and abuses suffered by Paramananthan and Sivarasa were not authorised but were nevertheless at the hands of the police and security forces as part of a course of conduct said by the RRT to constitute “cruelty” and “a generalised failure to adhere to basic standards of human rights”;

- such abuses are no longer “as widespread” as before.

The last finding is significant as, as Burchett J observed, that statement of the matter “acknowledges that they are in some sense widespread. Only the degree has seen some improvement.”. Further, the material that was relied upon by the RRT in finding that the abuses were not as widespread as before, was material to which Burchett J and Davies J referred, which indicated that far from being indiscriminate, the mistreatment was particularly targeted at young Tamil males from Jaffna. All of that evidence was evaluated, as Davies J pointed out, with other evidence that pointed

towards a significant improvement in the human rights record of the Sri Lankan authorities and indicated a lesser chance of the likelihood of mistreatment of the kind feared by Paramananthan and Sivarasa. I am not satisfied however, that such an evaluation was made. The RRT made no findings in respect of the large body of credible material pointing in favour of a "well-founded" fear on the part of the applicants. I would add that I am in agreement with Burchett J that the distinction drawn between the legitimate conduct of the "authorities" and the illegitimate conduct of individual police or army personnel failed to address *the* issue for determination being the "fear founded on a real chance that officers investigating LTTE atrocities would torture [the applicant] for reasons of race or imputed political opinion, and that the government would be unable or unwilling to protect him from them, as it had proved to be in the past".

Further, the findings of the RRT were such that the situation before it clearly fell between the two extremes of certainty of recurrence of mistreatment and such a low likelihood of recurrence that it can be safely disregarded. As was said by the majority in *Guo* (at 579):

"In between these extremes, there are varying degrees of probabilities as to whether an event will or will not occur."

In the present case, to apply the "real chance" test as enunciated in *Chan Yee Kin* and explained in *Guo*, the RRT was required to consider whether the "findings", upon which it relied to conclude that the applicants' fear of future persecution was not well-founded, might be inaccurate: see *Guo* at 579-580 per Brennan CJ, Dawson, Toohey, McGaudron, Gummow JJ.

The present is not a case like *Guo* where it was concluded that the RRT had taken the view that the probability of error in its findings was insignificant. As explained above, the RRT did not explicitly or implicitly state it had an absence of doubt in relation to the conflicting reports as to whether mistreatment was directed against young male Tamils from the North or otherwise. Indeed on the material before it any such finding would have been perverse. I say that not as an endeavour to enter

upon the merits, but rather to explain why I would not infer such a finding unless it was made in reasonably clear terms.

In these circumstances, absent the confidence in the conclusions expressed by the RRT in *Guo*, I am satisfied that what was required by the Tribunal, as a matter of law, was an assessment of the past events the subject of its findings, including whether its view of them may have been inaccurate, in order to form a view as to whether there was a real chance of their recurrence. I am not satisfied that the Tribunal has carried out that task. It does not appear to have conducted any balancing exercise of the kind required by the findings it made. Further, the failure to make explicit findings as to matters which are critical to a proper application of the term "well-founded fear of persecution" indicates that the RRT did not understand the correct meaning of the term. Accordingly, the RRT has failed to apply the law to the facts which constitutes an error of law under s 476(1)(e) of the Act.

More generally, analysing the reasons of the RRT as set out above, leads me to conclude that the RRT has failed to understand and address the central questions required by law to be addressed by it. As pointed out earlier, the material and evidence before the RRT raised a case which required determination of whether the mistreatment experienced by the applicants in the past constituted persecution for a Convention reason and, if so, whether there was a real chance of that persecution occurring again upon the return of Sivarasa and Paramananthan to Sri Lanka. The RRT's failure to understand and properly apply the real chance test resulted in it failing to address, as it was required to do, the issue of persecution on grounds of race, imputed political opinion and membership of a particular social group. The RRT found that the applicants were targeted for arrest, detention and mistreatment as young displaced Tamil males from Jaffna. There was an abundance of material before the RRT that it was from that group that persons were targeted for arrest, detention and mistreatment on the basis that they were not able to establish long term residence in or association with Colombo or any other relevant government controlled area outside of the Jaffna peninsula. That group might be capable of constituting a particular social group for the purposes of the Convention, yet no consideration was given to that issue. Similarly, although the RRT concluded that Sivarasa and Paramananthan had no special political profile as far as the authorities were concerned, as explained earlier, that conclusion did not have the consequence that the authorities had not imputed a political opinion to young Tamil males from the Jaffna region by reason of a perceived support for, or an association with, the Tamil separatist movement. Further, the one element that is central to all of the allegations of detention, arrest and mistreatment was the ethnicity of the persons involved as Tamils. That directly raised a case of racial persecution. Once the "no suggestion" statement is not accepted as a "finding" negativing a real chance of persecution for reasons of race, that issue was required to be, but was not, addressed.

Sivarasa and Paramananthan were represented at the hearing before the RRT. However, as pointed out earlier in these reasons for decision, that does not absolve the RRT, acting inquisitorially, from the duty to properly, genuinely and

realistically consider the merits of the claim for refugee status on the basis of the material and evidence before it. It did not do so in the present case.

The failures to which I have referred, amount to a constructive failure on the part of the RRT to exercise jurisdiction, a failure to apply the law to the facts and a failure to act in accordance with the procedures required by law with the consequence that each decision is reviewable under s 476(1)(a) and (e).

It was contended on behalf of the Minister that the Tribunal had correctly stated the law in its earlier summary of the law. It is true that the RRT indicated that it accepted that a person can have a well-founded view of persecution even though the possibility of the persecution occurring is well below 50%. It indicated that "a real chance is one that is not remote or insubstantial or a far fetched possibility". The Minister contended that in forming the view that there was not a real chance of persecution the RRT had acted according to its own, legally correct, definition of a well-founded fear of persecution.

The Minister's submission pinpoints the danger of merely stating the law, albeit accurately, in general terms without regard being had to the varying circumstances in which particular aspects of the law might have to be applied in the case before the RRT. The present case is a good example. It does not follow from a recognition that a "real chance" of persecution can be far less than 50% as a matter of law, that there is an understanding of the process to be followed in determining whether there is a "real chance" of persecution. The correct process as outlined in *Wu Shan Liang* and *Guo* requires an assessment of the likelihood of future events based, inter alia, upon the weight given to findings the RRT makes concerning past events. The RRT's decision might be explicable on the basis that the findings as to the past *and* the future are to be made by reference to some standard of satisfaction or proof, such as a balance of probabilities that enabled the RRT to disregard the material that pointed against its conclusions without rejecting that material or determining that little or no weight was to be given to it. Such an approach would clearly constitute error of law on the part of the RRT.

Further, for the reasons already explained, some of the difficulties in the present appeals have arisen from the failure of the RRT to comply with s 430 in respect of its reasons for decision and "findings" in relation to indiscriminate conduct and the material on which those "findings" were made: see s 430(c) and (d). That failure gives rise to review under s 476(1)(a): see *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402 at 414-415, *Hughes v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Lee J, 17 September 1998) at 8-9 and *Mashallah Kermanioun v Comcare* (Federal Court of Australia, Finn J, 20 November 1998) at 2-3.

Conclusion

For the above reasons, although slightly different to those expressed by Burchett J, I am satisfied that his Honour arrived at the correct conclusion in Savarasa's case. Accordingly, the appeal against his Honour's decision is to be dismissed with costs. For the same reasons, I am of the view that the appeal by Paramananthan against the decision of Davies J is to be allowed and that the matter be remitted to the RRT, differently constituted, to be determined in accordance with law.

Some doubt, was raised by the decision in *Kathiresan v The Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Gray J, 4 March 1998) at 13-14 and 19, as to whether the Court has jurisdiction under s 481(1)(b) of the Act to make an order referring the matter to which the decision relates to the tribunal which made the decision rather than to the individual who made the decision. In particular, Gray J considered that the only "person" to whom the Court could refer the matter was

"the person who constituted the Tribunal which made the decision concerned."

In *Minh Quang Nguyen v The Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Merkel J, 16 October 1998) at 12-15 I explained why it was my view that, when the context, scope and purpose of s 481(1) of the Act is considered, it is apparent that the "person" to whom the matter may be remitted is a reference to the Immigration Review Tribunal, the RRT or any other person who has made a decision under the Act or regulations relating to visas. In my view, the order made by Burchett J and the one which I propose be made in respect to the appeal by Davies J remitting the matters to the RRT, differently constituted, is an order authorised by s 481(1) of the Act and is appropriate in cases such as the present. Accordingly, for the above reasons in my view the orders that are appropriate are:

1. In Sivarasa's case – the appeal be dismissed with costs;

2. In Paramananthan's case – the appeal be allowed, the order of Davies J made 15 May 1998 be set aside and in lieu thereof it be ordered that the decision of the RRT be set aside and the matter be remitted to the RRT, differently constituted, for determination accordingly to law. The Minister is to pay Paramananthan's costs of the application before Davies J and of the appeal.

I certify that this and the preceding thirty-eight (38) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel

Associate:

Dated: 21 December 1998

NG 652 of 1998

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Solicitor for the Applicant:	Australian Government Solicitor
Solicitor for the Respondent:	Mr M W Gerkens of M W Gerkens & Associates
Date of Hearing:	12 November 1998
Date of Judgment:	21 December 1998

NG 533 of 1998

Counsel for the Applicant:	Mr N J Williams with Ms S McNaughton
Solicitor for the Applicant:	McDonnells
Counsel for the Respondent:	Mr R Tracey QC with

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Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	13 November 1998
Date of Judgment:	21 December 1998