FEDERAL COURT OF AUSTRALIA

Perampalam v Minister for Immigration & Multicultural Affairs [1999] FCA 165

IMMIGRATION – refugee – violence to elderly Tamil woman during interrogations – whether, interrogation in itself being legitimate, the violence could be regarded as “an indiscriminate abuse of authority and an act of inhuman cruelty” not falling within the Convention – whether cruelty that was not “systematic” fell outside the Convention – whether a well founded fear could exist though actual harm suffered fell outside the Convention – whether extortion by the Tamil Tigers was not Convention-related because Tamil victims were selected for their wealth – whether Tribunal erred in law in finding that the appellant could reasonably resettle in a different part of Sri Lanka – whether the Tribunal erred in failing to make findings about particular objections to the suggested resettlement – reference to the Minister’s power under s 417.

Migration Act 1958 (Cwth) ss 417, 430, 476

Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 160 ALR 24 applied

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331; 190 CLR 225 applied

Yan Xu & Anor v Minister for Immigration and Ethnic Affairs (Olney J, unreported, 18 April 1997) distinguished

Sivarasa v Minister for Immigration and Multicultural Affairs (Burchett J, unreported, 11 June 1998) applied

Abdalla v Minister for Immigration and Multicultural Affairs (1998) 51 ALD 11 applied

Mohamed v Minister for Immigration and Multicultural Affairs (Hill J, unreported, 11 May 1998) applied

Kabail v Minister for Immigration and Multicultural Affairs (Burchett J, unreported, 3 September 1998) applied

Hamad v Minister for Immigration and Multicultural Affairs (Moore J, unreported, 4 November 1998) applied

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

Logenthiran v Minister for Immigration and Multicultural Affairs (Wilcox, Lindgren and Merkel JJ, unreported, 21 December 1998) applied

Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 distinguished

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 applied

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

Reg v Immigration Appeal Tribunal; Ex parte Jonah [1985] Imm AR 7 referred to

PERAMPALAM v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 1233 of 1998

Burchett, Lee and Moore JJ

1 March 1999

Sydney

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 1233 of 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MANGAYATKARASI PERAMPALAM Appellant

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGES:	BURCHETT, LEE AND MOORE JJ
DATE OF ORDER:	1 MARCH 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made at first instance be set aside, and in lieu thereof it be ordered that the decision of the Refugee Review Tribunal be set aside with costs, and the matter be remitted to the Tribunal, differently constituted, for determination according to law.

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	
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JUDGES:	BURCHETT, LEE AND MOORE JJ
DATE:	1 MARCH 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BURCHETT AND LEE JJ

1 This is an appeal from the dismissal of an application to review a decision of the Refugee Review Tribunal refusing a protection visa to the applicant, a Tamil widow aged 67 years, who has fled from Sri Lanka, claiming to be a refugee within the well known Convention definition. There are two matters to be noted at the outset. First, the central proposition of law on which the appellant relies was laid down by a decision of a Full Court in *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24 *after* the decisions of the Tribunal and of the judge at first instance in the present matter, so the Tribunal and his Honour did not have the benefit of that decision. Previously, the relevant decisions were conflicting. In the second place, the appellant's case must be considered in the light of the Tribunal's express acceptance "that the applicant's evidence of her experiences is credible". Not only did the Tribunal make that general finding, but it also made a number of findings on particular matters in accordance with the appellant's account of events. Indeed, in the course of the appellant's evidence, the Tribunal interrupted her when she was referring to an especially savage interrogation, of which she said "I couldn't bear it"; and assured her:

"I don't need to go into the details of what happened to you there because I accept what happened to you. I understand it is [a] very very distressing experience and

something you probably never [will] be able to forget. Now … that experience made you to decide to leave the area straight away."

Then, during submissions, the appellant's solicitor put to the Tribunal that "Mrs Perampalam has presented [as] a really credible witness", to which the Tribunal responded: "I agree."

2 The appellant arrived in Australia, with her stepmother who is aged 83, on 23 February 1997, and shortly afterwards they lodged combined applications for protection visas. They come from the village of Thambiluvil in the Amparai district of Sri Lanka's Eastern Province. The appellant's husband, who died in 1982, was a school principal and active politically in the Tamil cause, as a supporter of the Tamil United Liberation Front, not the more militant Tamil Tigers (LTTE). The family had some wealth, owning a plantation. The district in which they lived included Muslims (in the majority), Sinhalese (next in numbers) and Tamils. The whole surrounding area seems to have been, for a number of years now, a theatre of conflict involving the Tamil Tigers, the Sri Lankan army and police, the Sri Lankan Special Task Force (STF) and the Muslim Home Guard, which has been aligned with the government. Atrocities on a substantial scale have occurred, perpetrated not only by one side.

3 Although the Tribunal examined evidence from earlier years, and detailed a number of events, it is sufficient, for the purpose of explaining the setting in which have arisen the questions of law that are to be decided, to pick up the story in 1990, and then to abbreviate it somewhat. In that year, a son-in-law of the appellant, Mr Thambiah, a lawyer who spoke several languages, was compelled by the LTTE to act as an interpreter on their behalf. Then, in June of the same year, at a spot only two kilometres away from where the appellant lived, about 200 police were murdered by the LTTE, and the authorities naturally took steps in response. The Muslim Home Guard informed the STF about Mr Thambiah's role, and he was interrogated many times. Eventually, he fled, and now lives with his wife in Australia. Mr Thambiah having left, the STF looked for him, taking the appellant and a son of hers into detention for interrogation, during which she was slapped. After a day, they were released, but the STF and members of the Muslim Home Guard continued to come to the house in order to question her, and she was again slapped. The Home Guards "accused the whole family of being LTTE members".

4 On other occasions, the appellant was accused by the LTTE of acting as an informant for the STF. They demanded money from her, and assaulted her. Regardless of her inability to resist the STF, the LTTE members complained that she allowed them to use her premises, and "they said that they would 'shoot me down'." Although this particular passage in a statutory declaration submitted by the appellant is not mentioned in the Tribunal's reasons, the Tribunal did not question its accuracy at the hearing, and, as has been said, it gave a clear general endorsement to the appellant's evidence.

5 The STF was informed about fifty sarongs which the appellant had been coerced by the LTTE into making for them. A detachment of the STF went to the appellant's house. The following is her written account of what happened, the account previously mentioned which the Tribunal told her, when she came to give oral evidence, need not be gone into because it was accepted. She said:

"The STF soldiers asked me whether I was involved with the LTTE by helping them stitch sarongs. The entire STF detachment was inside the house. One of them pushed me, I fell on the table and lost one of my front teeth. I was bleeding from the upper jaw. They grabbed me by the hair and kicked. I fell on the ground again. My right hip was dislocated, and I could not get up immediately. When my step-mother tried to intervene, she was dragged away by her hair. She, too, fell on the ground. One of the soldiers dragged me into a room and started speaking in Sinhala and he started tearing at my house coat and he tore the house coat (like a dressing gown with my nightie underneath) I was wearing it (it was all torn at the back) I started screaming and I fell to the ground. When I was on the ground he kicked me. The other soldiers came into the room and I was very shamed because I was exposed and was covering myself with my hands. After this I was deeply afraid – I never thought that something like this would happen to me. The STF stayed in the house for about thirty minutes, and searched all over the house, destroying all our valuables at home."

It should be added that, although the Tribunal did not question the appellant's description of how she and her stepmother were treated, and of what was done in their house, it stated the opinion that her use of the word "dislocated" with regard to her hip was not to be taken literally.

6 After this incident, the appellant and her stepmother left the area the next morning, and departed Sri Lanka for Australia on 22 February 1997.

7 It is now possible to come to the core issue in the appeal. The Tribunal stated in its reasons:

"The Tribunal accepts that on more than one occasion the applicant was slapped and pushed around by her interrogators. Such mistreatment during detention cannot be regarded as appropriately designed to achieve a legitimate end of Government policy, but neither is it persecution for a Convention reason (see Applicant A per McHugh J at 354 [this is a reference to the report of Applicant A v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331; that case is now reported in 190 CLR 225, and the page referred to corresponds to pages 257-258 of the CLR report]; Yan Xu & Anor v MIEA & Anor, unreported, Olney J April 18 1997 at 13). It was not part of a course of systematic conduct aimed at the applicant for a Convention reason, but rather an indiscriminate abuse of authority and an act of inhuman cruelty (Applicant A per Brennan CJ at 334 [this would be 190 CLR 233]; see also Yan Xu per Olney J at 13). Furthermore, the Tribunal notes the efforts by the Sri Lanka Government to counter abuses by security forces … ."

With specific reference to the serious assault which immediately preceded the appellant's and her stepmother's departure from their home, the Tribunal commented:

"The mistreatment suffered by the applicant was clearly not an appropriate measure to achieve a legitimate end of Government policy (Applicant A per McHugh J at 354). However, for the reasons given above in relation to the mistreatment she suffered during interrogation about her son the Tribunal finds that the mistreatment was not persecution under the Convention but rather an indiscriminate abuse of authority and an act of inhuman cruelty (Applicant A per Brennan CJ at 334; see also Yan Xu per Olney J at 13). The Tribunal also notes that it was not condoned by the authorities and was stopped by the attacker's colleagues: according to the applicant's evidence, her ordeal ended when she screamed and other soldiers ran into the room and saw what was happening."

The last observation must be restricted to the tearing off of the appellant's clothing, since the other violence offered was not confined to the one attacker, and the destruction of her valuables continued for another half an hour. In fact there is no evidence at all, in the account of which the Tribunal said it required no further details because it accepted it, that the other soldiers did not condone what was done, certainly as regards a number of acts of violence towards two ladies, one in her late sixties and the other over eighty, in which the appellant lost a tooth. The Tribunal does not in its reasons comment on the appellant's physique, but a social worker whose report is in evidence describes her as "an elderly and frail woman", and the transcript reveals that during the hearing her obvious disabilities, and the pain they were causing, were observed and accepted.

8 The Tribunal's attitude to the way the appellant was treated during interrogation is laid bare most clearly in its final statement of its view on the central issue, towards the end of its reasons:

"In sum, the Tribunal finds that … the detention and sporadic interrogations she underwent constituted a normal and legitimate security procedure in a climate of civil war and terrorism and in the light of her and her son-in-law's sometime work for the LTTE; the kind of assault she suffered just before coming to Australia is not condoned by the State and cannot be considered persecution for that reason … ."

9 The problem which must now be faced is whether it is possible to reconcile with the decision of the Full Court in *Paramananthan* the way the Tribunal disposed of the basic question of the appellant's claim to have a "well founded fear of being persecuted for reasons of race … membership of a particular social group or political opinion". In *Paramananthan*, Wilcox J said (at 34; all emphases original):

"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 [the] 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."

When this passage is applied to the circumstances of the present case, allowance must be made for the fact that the appellant is not a young Tamil male, but an elderly Tamil woman. However, it is impossible to doubt that her ethnicity was relevant to her perceived support of the LTTE, and in any case, the Convention definition does not require that a refugee's fear of persecution be for reasons *both* of race *and* of political opinion; either is sufficient. It follows that the reasoning of Wilcox J can be applied simply on the basis that she was interrogated because of her perceived political opinion, and then suffered the "indiscriminate abuse of authority and an act of inhuman cruelty" which the Tribunal found her to have suffered. Wilcox J made this quite explicit, towards the end of the passage which has been quoted, when he said "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".

10 Lindgren J, who saw the nexus with the Convention as being membership of a social group constituted by young Tamil males from LTTE-controlled areas, that apart, took a similar view. He said (at 38):

"[T]he 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."

11 Merkel J (with whose reasons Wilcox J expressed general agreement) made it clear (at 56) that the Tribunal "is required to determine the substantive issues *raised by the material and evidence before it".* (The emphasis is original.) That is to say, the Tribunal is not entitled to reduce its duty of determination of the merits to a mere consideration of the way in which an applicant (possibly misguidedly) seeks to argue a case on the basis of the evidence. Merkel J went on to refer (at 61) to the Tribunal's "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'." After some further remarks, his Honour continued:

"I would add that I am in agreement with Burchett J [in Sivarasa v Minister for Immigration and Multicultural Affairs, unreported, 11 June 1998] 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'." (The emphasis is original.)

The distinction thus rejected in *Sivarasa,* and by the Full Court in *Paramananthan* (the judgments in which also deal with the appeal from the decision at first instance in *Sivarasa*), is the very distinction which the Tribunal in the present case drew as the foundation of its reasoning and in specific terms in its own summary of that reasoning. It follows that the Tribunal erred in law.

12 Twice in the core statement of its reasoning which has been quoted above, the Tribunal referred to particular passages in the judgments of Brennan CJ and McHugh J in *Applicant A* and to a passage in the judgment of Olney J in *Yan Xu*. It is not possible to identify the point of the reference to the passage in *Yan Xu*, which has nothing to do with either of the propositions in relation to which it is cited. Perhaps the intention was to refer to Olney J's acceptance of the view that refugee status could be denied to a person who "could not be differentially affected" by the acts alleged to constitute persecution, a view which is stated in *Yan Xu* at 16. This topic is dealt with much more fully in the judgment of McHugh J in *Applicant A* at CLR 257-258; ALR 354 and by Brennan CJ in the same case at 233; 334. Neither of these passages is at all in conflict with the statements made in the Full Court in *Paramananthan* to which reference has been made. McHugh J referred (at 258; 354) to the legitimacy of measures affecting a particular race in circumstances of civil war, but he immediately added (at 259; 355) that such cases require close scrutiny. This, of course, is because in times of conflict, the line between justified severity and excess is all too readily crossed.

13 *Paramananthan* shows that the attempt to quarantine "indiscriminate abuse of authority and … inhuman cruelty" occurring during interrogation from the whole activity of interrogation of Tamils and persons suspected of supporting the LTTE, of which the impugned conduct forms part, involves legal error. But there is also legal error in the Tribunal's formulation of what it takes to be necessary to establish persecution – "a course of systematic conduct aimed at the applicant for a Convention reason". In some contexts, that might be sufficient, precision not being required; here, however, the Tribunal's statement is intended to be exact, so as to exclude the mistreatment of the appellant as outside the Convention. The discussion of the nature of persecution by McHugh J in *Applicant A* at 258; 354 makes it clear that the ordinary case of persecution involves actions "directed at members of a race … or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed". It is not necessary, or even usual, on his Honour's view, that the conduct be aimed individually at an applicant, although this may be the case. Nor, of course, is it correct to draw a contrast between "systematic" and "indiscriminate" conduct with a view to denying the relevance to the Convention of any conduct, however racially motivated (or otherwise related to the Convention), which can be characterised as not "systematic". The true position in this regard was stated by the Full Court in *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11 at 20; see also *Mohamed v Minister for Immigration and Multicultural Affairs*

(unreported, Hill J, 11 May 1998); *Kabail v Minister for Immigration and Multicultural Affairs* (unreported, Burchett J, 3 September 1998); *Hamad v Minister for Immigration and Multicultural Affairs* (unreported, Moore J, 4 November 1998).

14 The Tribunal drew attention to the proximity of the electricity transformer to the appellant's home as a factor in her interrogation and in the concern of the authorities. But it is plain that her complaints, which were accepted by the Tribunal, were not confined to attacks on her related to the transformer. And a minute examination of the precise circumstances of each actual form of persecution suffered by her really misses the point. The question is, in the light of the broad information made available to the Tribunal and of the treatment she has sustained, does she have a well founded fear of persecution on a Convention basis? Cf. *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572-573. A member of a victimised group (whether identified by race, political opinion or otherwise within the Convention) could have such a fear, though he or she had been able in the past to escape harm entirely. In the present case, the general information about the treatment of Tamils in the Eastern Province, combined with the accepted evidence that the age and sex of the appellant and her stepmother had proved little protection to them, called for consideration of the question whether fears for the future of a kind relevant to the Convention were well founded. As Hill J said in *Mohamed* (at 13):

"There need not be any particular act in fact perpetrated against the individual."

This aspect of the matter was not considered by the Tribunal, and it should have been. In *Logenthiran v Minister for Immigration and Multicultural Affairs* (unreported, Wilcox, Lindgren and Merkel JJ, 21 December 1998), such an error was held sufficient to vitiate a decision.

15 A separate issue in the Tribunal related to the question of extortion. The appellant gave evidence of extortionate demands made upon her by the LTTE, enforced by violence and threats of violence, from which the government was plainly unable to protect her. As to this, the Tribunal found:

"While there is no doubt that the LTTE approaches Tamil[s] for funding, its primary reason for selecting individuals as prime targets for extortion is because of their perceived wealth … ."

The appellant was seen as affluent. Although the Tribunal expressly accepted that "the LTTE has frequently attempted to extort money from the applicant", and that, given its "current strength in the Eastern Province … there is a real chance based on past occurrences that the LTTE would make similar demands on the applicant were she to return to her home and estates in Thambiluvil", it did not regard activity of this kind as "persecution for a Convention reason".

16 The Tribunal cited *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565, where Burchett J said (at 569), in a judgment with which O'Loughlin and R D Nicholson JJ agreed:

"Plainly, extortionists are not implementing a policy; they are simply extracting money from a suitable victim. Their forays are disinterestedly individual."

But this was in the context (as appears from the same judgment at 567) of an express finding by the Tribunal that "the applicant has not satisfied me that the extortion was anything other than a criminal act, or that he was targeted for any reason other than he was known to have money". Here, the Tribunal's finding is the opposite: it says "there is no doubt that the LTTE approaches Tamil[s] for funding". The additional fact that the particular Tamils approached are chosen "because of their perceived wealth" is no more legally relevant than the fact (in *Paramananthan*) that the security forces targeted, among Tamils, young males from Jaffna who might be thought more likely to be guerillas. Extortion directed at those members of a particular race from whom something might be extorted cannot be excluded from the concept of persecution within the Convention, and *Ram* does not suggest it can. On the evidence, it was plainly open to the Tribunal to conclude that the fanatical combatants in the LTTE saw it as the obligation of every Tamil to make sacrifices, willingly or by coercion, for Tamil Eelam. No doubt, it was for this reason the finding was made "that the LTTE approaches Tamil[s] for funding". A motivation of this kind is sufficient for the purposes of the Convention. The words "persecuted for reasons of" look to the motives and attitudes of the persecutors (see *Ram* at 569), and if the LTTE practices extortion, with violence and threats of violence, against Tamils, the government being unable to provide protection, because the LTTE holds that Tamils must be coerced into supporting it, the terms of the Convention are satisfied.

17 At the end of its reasons, in three brief paragraphs, the Tribunal refers to "the option of relocation". It says a reasonable option for the appellant would be to relocate "to Thambiluvil … as [she] has a daughter and a son-in-law there with amiable personal relations with the STF who she could lean on [sic]." It goes on to refer to her "network of contacts" and "close friends" in that area. The Tribunal adds:

"It is also reasonable for the applicant to resettle in Kiriulla with her son."

18 Before making these sparse findings, the Tribunal does not engage in anything like an examination of the evidence to determine whether it would be reasonable to assume the LTTE's extortion demands would cease if the appellant moved a mere quarter of a mile away from her own home to her daughter's home in Thambiluvil, or if she attempted to resettle among strangers at Kiriulla where she has a son, but no other family or friends to provide protection in a country racked by civil war. Nor does the Tribunal

consider the question whether a woman suspected by the STF of collusion with the LTTE when terrorists strike in the vicinity of Thambiluvil might not continue to be similarly suspected (and interrogated with consequences of the kind she has previously experienced) upon similar events occurring in the vicinity of her residence, wherever it may be in Sri Lanka. The most obvious reason for the Tribunal's singular silence about these questions is that its consideration of the issue of relocation is tainted by the same errors of law which affected its consideration of the principal question. It does not regard extortion by the LTTE, or violence during interrogation by the STF, as amounting to persecution within the Convention. Indeed, the Tribunal concludes its almost cursory discussion of relocation by noting the suggestion "that Sri Lanka has been a country where great violence and terror has occurred and that many people fear going or returning there." It comments:

"The Tribunal accepts that terrorist activity has taken place in major Sri Lankan cities, most recently the LTTE bombing of the Temple of the Tooth in Kandy, and that returning to the Batticaloa area of Sri Lanka might place the applicant at risk of harm given the recent increase in LTTE activity in the East. [This is the area where the Tribunal suggested the applicant should relocate, in Thambiluvil.] However, the fear of being involved in communal violence or of war does not of itself make the applicant a refugee …. ."

19 This last proposition shines a clear light on the way the Tribunal considered the matter. It did not ask whether the appellant, having shown a well founded fear of persecution, could nevertheless be reasonably expected to avail herself of an internal refuge within Sri Lanka, but rather, accepting that any such refuge might prove illusory because of terrorist activity, the Tribunal treated that fact as irrelevant because it thought the appellant's danger would lie outside the protection of the Convention. But if the appellant has a well founded fear of persecution for a Convention reason, the question is whether it is "not reasonable in the circumstances to expect [her] to relocate to another part of the country of nationality": *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 443, per Black CJ; 451, 452-453, per Beaumont J. It cannot be reasonable to expect a refugee to avoid persecution by moving into an area of grave danger, whether that danger arises from a natural disaster (for example, a volcanic eruption), a civil war or some other cause. A well founded fear of persecution for a Convention reason having been shown, a refugee does not also have to show a Convention reason behind every difficulty or danger which makes some suggestion of relocation unreasonable. In *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 431, McHugh J referred with approval to the decision of Nolan J (as Lord Nolan then was) in *Reg. v Immigration Appeal Tribunal; Ex parte Jonah* [1985] Imm AR 7, where a refugee was not required to accept internal refuge by going to a remote and primitive part of his country, which was Ghana. Having regard to these principles, it was plainly incumbent on the Tribunal in the present case to ask itself seriously whether the circumstances could really sustain the proposition that a genuine internal refuge could be found by the appellant by moving a quarter of a mile in the village of Thambiluvil, or going to stay with a son in a distant part of the country. It could not avoid that question by ignoring all

difficulties and dangers that did not in themselves constitute persecution within the Convention.

20 Finally, on this issue of relocation, the Tribunal simply did not examine at all various aspects of the evidence indicating that the appellant could not find safety in the way it proposed. Early in its reasons, the Tribunal, which, it will be remembered, accepted the appellant as "a really credible witness", had recorded:

"The applicant fears returning to Sri Lanka as if she were to do so the LTTE would extort money from her if she lived in her village, Thambiluvil, or even in Colombo as the LTTE operates there too. [Kiriulla is near Colombo, and there was no finding, and no basis for a finding, that the LTTE could not and did not operate there as well.] In Colombo, anti-LTTE groups would identify her as being an LTTE supporter, and in Thambiluvil the STF and the Muslim Home Guards would kill her for the same reason."

The Tribunal also referred, in that early portion of its reasons, to the appellant's claim that her political profile with the authorities would prevent her finding safety in Colombo or Kiriulla. The Tribunal summarised this section of her evidence as follows:

"The Deputy Defence Minister of Sri Lanka had remarked that half the Tamils in Colombo were LTTE spies, which indicated how Tamils were treated by the authorities in Colombo. Her son-in-law in Thambiluvil could not be relied upon to protect her at all times as his hospital job might necessitate him working different shifts. The applicant said she could not stay with her son in Kiriulla or her daughter in Thambiluvil because both were trying to go abroad and, anyway, she did not want to be a burden to them. Also, Thambiluvil was close to where the STF officer who assaulted her was, and she feared encountering him and his fellows again."

There was actually no evidence that the appellant had ever been to Kiriulla; certainly, she said she had never visited her son there. Her evidence was that, for him, it was only a staging post on his way "to try and go abroad".

21 If the appellant were to seek refuge in either of the places suggested by the Tribunal, and were to find herself threatened by guerilla or army activities in that area, her age and disabilities, and the burden of caring for her octogenarian stepmother would make further internal flight difficult. The Tribunal accepted her disabilities, commenting that her "pain and discomfort [were] visible".

22 In the circumstances, the Tribunal's failure to examine the question whether there was any real assurance that the appellant's son would remain in Kiriulla, its failure to consider the other matters to which reference has been made, and especially its failure to examine the *prima facie* reasonableness of the appellant's reluctance to live in Thambiluvil close to the STF officer who assaulted her so severely, must lead to the conclusion that it erred in law in relation to the issue of internal refuge. It was not open to the Tribunal to reach

the conclusion it expressed without making any findings about the various matters that have been identified: see *Logenthiran* at 13, where such a failure was held by the Full Court to constitute a breach of s 430 of the *Migration Act 1958*, so as to activate s 476(1)(a) as a ground of review.

23 The appeal must accordingly be allowed with costs; the decision of the Refugee Review Tribunal must be set aside; and the matter must be remitted to the Tribunal, differently constituted, for determination according to law.

24 Whether it will be necessary for a second hearing to take place, or whether the power under s 417 of the Act should be exercised in this case, will be a question for the Minister, having regard to all relevant matters including the age and health of the appellant and the acceptance of the appellant by the Tribunal when it said:

"I accept what you say about having been kicked several times by the members of the … of the armed forces … and the other distressing experiences you have suffered. I have no problems with anything you, with anything you've told me. I have to decide however whether that makes you a refugee. So I have no problems with what you said. I accept it and I believe you."

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Burchett and Lee.

Associate:

Dated: 1 March 1999

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY NG 1233 OF 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: MANGAYATKARASI PERAMPALAM

	Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	BURCHETT, LEE AND MOORE JJ
DATE:	1 MARCH 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

MOORE J

1 I have had the benefit of reading the reasons of Burchett and Lee JJ in a draft form. I agree with their Honours that the appeal should be allowed though on a slightly narrower footing. I do not repeat much of what their Honours have said about the circumstances of the appellant and their consideration by the Tribunal. In my opinion the approach of the Tribunal discloses two errors of the type to which s 476 of the *Migration Act 1958* is directed. One is evident in its consideration of the interrogation of the appellant and the other in its consideration of whether the appellant might find internal refuge in Sri Lanka. I will briefly explain my reasons for this conclusion.

2 The interrogation of the appellant in probably December 1996 by members of the Special Task Force ("STF") was dealt with by the Tribunal in the following passage:

The Tribunal accepts that the applicant had been very roughly treated on this occasion and that one soldier had dragged her into a room and stripped off some of her clothes before being restrained by his colleagues. The Tribunal accepts that any such assault to a person of the applicant's years and cultural background would have been shocking and frightening.

The mistreatment suffered by the applicant was clearly not an appropriate measure to achieve a legitimate end of Government policy (Applicant A per McHugh J at 354). However, for the reasons given above for the mistreatment she suffered during

interrogation about her son (scil. – son-in-law) the Tribunal finds that the mistreatment was not persecution under the Convention but rather an indiscriminate abuse of authority and an act of inhuman cruelty (Applicant A per Brennan CJ at 334, see also Yan Xu per Olney J at 13). The Tribunal also notes that it was not condoned by the authorities and was stopped by the attacker's colleagues: according to the applicant's evidence her ordeal ended when she screamed and other soldiers ran into the room and saw what was happening.

3 The appellant's direct and more detailed account of this incident is set out in the reasons for judgment of Burchett and Lee JJ.

4 The Tribunal's consideration of the earlier interrogation, which it referred to when addressing the December 1996 incident, is found in the following passage:

The Tribunal accepts that the applicant had been detained for one to two days, along with her son, and interrogated afterwards on numerous occasions by the army and Muslim Home Guards over the whereabouts of her son-in-law, Mr Thambiah, who had done work for the LTTE. It finds, however, that the army's attempts to extract information on her son-in-law's whereabouts were not persecutory but were, rather, a legitimate security measure in the context of a civil war in which, according to the applicant's evidence, Mr Thambiah had been known among Tamils and Muslims in the area to have worked for the LTTE. That he had been coerced by the LTTE into being an interpreter would not have altered the fact in the authorities' minds that he did work for a guerilla group. He had disappeared from Thambiluvil at a time when the guerillas had sharply increased their campaign of violence against the authorities, as shown by the applicant's evidence on the LTTE's murders in 1990 of 200 policemen. The son-in-law had, moreover, served on the Citizens' Committee for the area and for this reason also it is natural that the authorities would treat his disappearance as a matter of concern. The Tribunal accepts that on more than one occasion the applicant was slapped and pushed around by her interrogators. Such mistreatment during detention cannot be regarded as appropriately designed to achieve a legitimate end of Government policy, but neither is it persecution for a Convention reason (see Applicant A per McHugh J at 354; Yan Xu & Anor v MIEA & Anor, unreported, Olney J, April 18 1977 at 13). It was not part of a course of systematic conduct aimed at the applicant for a Convention reason, but rather an indiscriminate abuse of authority and an act of inhuman cruelty (Applicant A per Brennan CJ at 334; see also Yan Xu per Olney J at 13). Furthermore, the Tribunal notes the efforts by the Sri Lanka Government to counter abuses by security forces (see Country Information s 7, p 17).

5 The Tribunal accepted, in relation to both the earlier interrogation and the December 1996 incident, that while the interrogation of the appellant was a legitimate security measure the appellant was mistreated. The Tribunal characterized the mistreatment as an indiscriminate abuse of authority and an act of inhuman cruelty. I do not repeat the analysis of *Paramananthan v Minister for Immigration and Multicultural Affairs* [1998] FCA 1693 undertaken by Burchett and Lee JJ which I gratefully adopt. What the Tribunal failed to do was pose for itself a question of the type identified by Wilcox J in *Paramananthan.* That is, it did not ask whether there was a causal connection

between the cruelty the applicant had suffered and her Tamil ethnicity (that is, her race) and/or her perceived sympathy for the Liberation Tigers of Tamil Eelam ("LTTE") (that is, her imputed political opinion) and, if so, whether the cruelty was something the Sri Lankan government tolerated or was unable to control.

6 The Tribunal simply did not address the relationship, if any, between the treatment meted out to the applicant and her race and imputed political opinion. As to the role of the state, it may be accepted that in relation to the earlier interrogation the Tribunal appears to have found that the Sri Lankan government was making efforts to counter abuses by security forces and, in relation to the December 1996 incident, the conduct was said not to be condoned by the authorities and was stopped by the attacker's colleagues. However this last matter is plainly a reference only to that aspect of the mistreatment of the appellant which involved her being dragged into a room by one of the soldiers who commenced to remove her clothes. That conclusion says nothing about the treatment of the appellant during the December 1996 incident in its entirety and whether the state was unable to control conduct of that type. The Tribunal failed, in substance, to address the question of whether the Sri Lankan government was able to control the conduct manifest in the earlier interrogation and the December 1996 incident. The effect of this failure and the failure to consider the causal connection discussed at the beginning of this paragraph involves an incorrect application of the law to the facts as found because the Tribunal substantially failed to address the relevant questions in assessing whether the appellant had a well founded fear of persecution for a Convention reason.

7 In my opinion the consideration by the Tribunal of the attempts by the LTTE to extort money from the appellant is not attended by reviewable error. The appellant had given evidence that she was seen as a source of money because she had quite a lot of land and children abroad. She also gave evidence that there were many other people to whom the LTTE came, including affluent people. The finding made by the Tribunal was that while the LTTE approach Tamils for funding its primary reason for selecting individuals as prime targets for extortion was because of their perceived wealth. This observation was made shortly before it noted that the appellant had said the LTTE approached many others. It was open to the Tribunal, in my opinion, to make the finding it did which appears to be a finding that the LTTE approached not only Tamils but others and did so because of their perceived wealth. Those factual findings founded the Tribunal's findings that those extorting money were "simply extracting money from a suitable victim" which involved an adoption of the language in *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 per Burchett J at 569. The Tribunal concluded that that did not involve persecution in the relevant sense and referred to an earlier part of its reasons where it had summarized the authorities dealing with what constitutes persecution under the Convention. This was an approach the Tribunal was entitled to adopt.

8 When considering the question of relocation the decision maker should address whether it is reasonable for the applicant to relocate: see

Randhawa v Minister for Immigration Local Government and Ethnic Affairs (1995) 52 FCR 437. This involves consideration of whether the applicant might, elsewhere in the country of nationality, be exposed to risks of the type that give rise to a well founded fear of persecution. However it also involves consideration of the practical difficulties an applicant may face in relocating and obtaining internal refuge. As Black CJ said in *Randhawa* at 442:

… the delegate correctly went on to ask not merely whether the appellant could relocate to another area of (the country of nationality) but whether he could reasonably be expected to do so.

This further question is an important one because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.

Moreover, the range of the realities that may need to be considered on the issue of the reasonableness of relocation extends beyond physical or financial barriers preventing an applicant for refugee status from reaching safety within the country of nationality and easily extends to circumstances such as those present in R v Immigration Appeal Tribunal; Ex parte Jonah [1985] Imm AR 7. Professor Hathaway, op cit at p 134, expresses the position thus:

> "The logic of the internal protection principle must, however, be recognised to flow from the absence of a need for asylum abroad. It should be restricted in its application for persons who can genuinely access domestic protection, and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized." [Original emphasis.]

9 It is convenient to set out the reasons of the Tribunal dealing with this question in their entirety:

The Tribunal has also considered the option of relocation. The Tribunal accepts that the applicant has a subjective fear of returning to Colombo. However, it is satisfied that relocation to Thambiluvil is a reasonable option as the applicant has a daughter and a son-in-law there with amicable personal relations with the STF who she could lean on. She has income from her estates there and a lifelong network of contacts. There are close friends within a bus-rise with whom she could stay for periods if she wished, as she did for one and a half months before leaving for Colombo. The applicant, according to her evidence, has been able to leave Thambiluvil whenever she wished, for medical treatment or to obtain documents in

Colombo, which indicates that she enjoyed freedom of movement. Although the LTTE is currently taking advantage of the army's preoccupation with the north to make inroads into territory in the Eastern Province, the Government has not slackened its intentions to push through its devolution plan to give Tamils more autonomy in their respective areas of population density in the East (see Relevant Country Information s. 6 p. 16), with support from other communities (Ibid, s. 4, pp. 15-16), which the applicant may make use of.

It is also reasonable for the applicant to resettle in Kiriulla with her son. There is no account of LTTE terrorist activity in the material available to the Tribunal in Kiriulla: it is a stable area and her son has a stable government job there. The Tribunal accepts that she does not wish to be a burden on her children, but this does not provide a Convention reason for extending protection obligations to her in Australia.

The Tribunal notes the judgment of Davies J in Durairajasingham v MIEA, unreported, 11 November 1997, in which it was suggested that Sri Lanka has been a country where great violence and terror has occurred and that many people fear going or returning there (at 17). The Tribunal accepts that terrorist activity has taken place in major Sri Lankan cities, most recently the LTTE bombing of the Temple of the Tooth in Kandy, and that returning to the Batticaloa area of Sri Lanka might place the applicant at risk of harm given the recent increase in LTTE activity in the East. However, the fear of being involved in communal violence or of war does not of itself make the applicant a refugee (Periannan Murugasu v MIEA, 1987 per Wilcox J at 13; Applicant A per Gummow J at 61).

10 The Tribunal had earlier recounted that the younger son of the appellant had settled in Kiriulla which is in an area south of Colombo and one of her daughters was married to a pharmacist who worked at the Thirukkovil hospital complex which is contiguous to the STF camp in that town. The Tribunal had also recounted that the applicant had said the son-in-law had good relations with the STF and had no problems with them. Thambiluvil was where the appellant had lived and where she had been exposed to gross mistreatment at the hands of both the LTTE and STF. What is not referred to in the above passage is that the applicant had said that her younger son in Kiriulla and her daughter in Thambiluvil were both trying to go abroad. That is, they were planning to leave Sri Lanka if they could.

11 Were the daughter and her husband to leave any protective effect of living with them arising from the relationship between the husband and the STF, would dissipate. If the son and daughter were to leave Sri Lanka that would plainly have an impact on the personal circumstances of the appellant if she relocated to live with her daughter elsewhere in Thambiluvil or to move to Kiriulla to be with her son. In my opinion any consideration of the reasonableness of relocation would, in the circumstances, require consideration of the prospects of either the son or the daughter or both no longer living in Sri Lanka. While the Tribunal might view that matter as being of insufficient moment to warrant a conclusion that relocation was not reasonable, equally it might form the contrary view because it considered the prospects of the son and daughter leaving Sri Lanka were high. In my opinion

the Tribunal did not deal with an essential aspect of the appellant's case as it did not appreciate the need to consider all relevant aspects of the personal circumstances of the applicant in assessing whether relocation was reasonable. This involves an incorrect application of the law to facts as found: see s 476(1)(e). It could also be characterized, as it has been by Burchett and Lee JJ, as a contravention of s 430 enlivening s 476(1)(a).

12 The appeal should be allowed with costs.

I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 1 March 1999

Counsel for the Appellant:	Elizabeth Wilkins
Solicitor for the Appellant:	McDonnells
Counsel for the Respondent:	Tim Reilly
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	8 February 1999
Date of Judgment:	1 March 1999