FEDERAL COURT OF AUSTRALIA

MIGRATION – Refugees – Convention definition of "refugee" – refugee-claimant's inability, or, owing to well-founded fear of persecution for a Convention reason, unwillingness to avail self of protection of country of nationality – Sri Lankan national of Tamil ethnicity granted refugee status in France and, later, French nationality – alleged persecution in France by persons associated with Liberation Tigers of Tamil Eelam ("LTTE") – claim that French authorities unable to protect – unwillingness to rely on those authorities for fear of reprisals by LTTE – meaning of expression "is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" in Convention definition – whether presumption that country of nationality offers effective protection – whether Tribunal had considered all evidence relevant to France's capacity to give effective protection in case of particular refugee-claimant.

Convention Relating to the Status of Refugees 1951, Art 1A

Re Attorney-General (Canada) and Ward; United Nations High Commissioner for Refugees (intervener) (1993) 103 DLR (4th) 1, applied

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

Australian Securities Commission v Marlborough Gold Mines Limited (1993) 177 CLR 485, referred to

Qantas Airways Limited v Cornwall (Unreported, FCA/FC, Burchett, Cooper and Finn JJ, 24 July 1998), referred to

Bank of Western Australia v Commissioner of Taxation (1994) 55 FCR 233, referred to

Ratnam v Minister for Immigration and Ethnic Affairs (1997) 47 ALD 203, considered

Minister for Immigration and Multicultural Affairs v A, B and C (Unreported, FCA/ RD Nicholson J, 9 April 1998, VG 335 of 1997), considered

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v NAGARATNAM PRATHAPAN

NG 794 of 1997

BURCHETT, WHITLAM, LINDGREN JJ

SYDNEY

12 AUGUST 1998

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 794 of 1997

on appeal from a judge of the federal court of australia

BETWEEN:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS AppELLANT
AND:	NAGARATNAM PRATHAPAN Respondent

JUDGES:	BURCHETT, WHITLAM, LINDGREN JJ
DATE OF ORDER:	12 AUGUST 1998
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made on 5 September 1997 in proceeding NG 236 of 1997 be set aside and that in lieu thereof it be ordered that

(a) the decision of the Refugee Review Tribunal given on 27 February 1997 in proceeding N96/12474 that the applicant is not a refugee and is not entitled to a protection visa and affirming a decision of a delegate of the Minister to refuse the applicant a protection visa, be affirmed; and

(b) the applicant pay the respondent's costs of the 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 794 of 1997

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Appellant
AND:	NAGARATNAM PRATHAPAN Respondent

JUDGES:	BURCHETT, WHITLAM AND LINDGREN JJ
DATE:	12 AUGUST 1998
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BURCHETT J

I have had the advantage of reading in draft the judgment of Lindgren J, with which I am in general agreement. In my opinion, there was in this case ample evidence to support the conclusion of the Refugee Review Tribunal that, in substance, the respondent was neither unable nor, owing to well-founded fear of persecution, unwilling to avail himself of the protection of France. He was unwilling, but unwillingness alone is not enough.

I certify that this page is a true copy of the Reasons for Judgment herein of the Honourable Justice Burchett

Associate:

Dated: 12 August 1998

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	ng 794 of 1997

BETWEEN:	minister for immigration and multicultural affairs Appellant
AND:	nagaratnam prathapan Respondent

JUDGES:	BURCHETT, WHITLAM & LINDGREN JJ
DATE:	12 august 1998
PLACE:	SYDNEY

REASONS FOR JUDGMENT

WHITLAM J:

I agree with the reasons and proposed orders of Lindgren J.

I certify that this page is a true copy of the Reasons for Judgment herein of the

Honourable Justice Whitlam

Associate:

Dated: 12 August 1998

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 794 of 1997

on appeal from a judge of the federal court of australia

BETWEEN:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS AppELLANT
AND:	NAGARATNAM PRATHAPAN Respondent

JUDGES:	BURCHETT, WHITLAM, LINDGREN JJ
DATE:	12 AUGUST 1998
PLACE:	SYDNEY

REASONS FOR JUDGMENT

LINDGREN J:

INTRODUCTION

The appellant ("the Minister") appeals from a decision of a Judge of the Court given on 5 September 1997 by which his Honour set aside a decision of the Refugee Review Tribunal and ordered that the matter be remitted to the Tribunal for rehearing according to law. His Honour also ordered the Minister to pay the costs of the present respondent (applicant before him) ("Mr Prathapan").

Mr Prathapan, his wife and son had applied to the Tribunal for review of decisions of a delegate of the Minister on 10 October 1996 refusing them protection visas. The Tribunal had concluded that Mr Prathapan was not a refugee within the meaning of the term "refugee" set out in Article 1A of the 1951 *Convention Relating to the Status of Refugees* as amended by the 1967 *Protocol Relating to the Status of Refugees* (together, "the Convention"). The result was that he did not satisfy the criterion for the grant of a protection visa that he be a person to whom Australia had protection obligations under the Convention, and, therefore, that none of the three applicants before the Tribunal were entitled to protection visas.

THE TRIBUNAL'S REASONS FOR DECISION

In its Reasons for Decision, the Tribunal noted under the heading "THE EVIDENCE AND CLAIMS" the following "Background".

Mr Prathapan was born in Jaffna in Sri Lanka on 8 September 1959, his wife was born at Madurai in Tamil Nadu State in India on 8 October 1966, and their son was born in Australia on 28 February 1995. Mr Prathapan lived in Sri Lanka until 1983. In December of that year he went to France. He was granted refugee status in France. He acquired French nationality on 24 December 1992. Mr Prathapan married in India on 5 April 1993 and, after visiting his brother in Colombo for a few days, returned to France with his bride. They lived in France until December 1994 when they travelled to Australia on visitors' visas that had been issued to them by the Australian Embassy in Paris on 7 September 1994. Mr Prathapan came to Australia on a French passport, and Mrs Prathapan came here on an Indian passport. They arrived in Australia on 22 December 1994 and have remained here since.

Under the heading "Summary of claims", the Tribunal noted that Mr Prathapan had experienced problems with the Liberation Tigers of Tamil Eelam ("LTTE") in Jaffna in the early 1980s. In about February 1983, he moved to Colombo, where, as a young Tamil male, he had some problems with the Sri Lankan authorities. It was these problems in his homeland that led him to go to France in 1983.

In 1984, Mr Prathapan's brother also went to France after experiencing problems in Sri Lanka with both the LTTE and the Sri Lankan Armed Forces. In 1990, the brother was threatened by the LTTE in France on suspicion that he had been working with another Tamil independence organisation against the LTTE. This organisation was the Eelam People's Revolutionary Liberation Front ("EPRLF"). In about 1991, Mr Prathapan began to receive telephone calls in France asking about his brother. The brother came to Australia in 1992. He was granted refugee status here on 21 January 1994 on the basis that he faced a real chance of persecution in Sri Lanka.

In late 1992, Mr Prathapan's apartment was robbed by people whom the concierge of the building described as "Indian looking people". Before the Tribunal, Mr Prathapan acknowledged that the state of his apartment when he first saw it after this incident was consistent with his having been the victim of a burglary rather than of a politically motivated crime. In 1993, after Mr Prathapan returned to France from India with his bride, the telephone calls resumed. He said that in those calls he was accused of giving information to the EPRLF during his visit to India.

In late 1993 or early 1994, Mr Prathapan was asked to make musical recordings for the LTTE (Mr Prathapan is a musician). He refused. About a month later he received a "threatening" telephone call from someone he thought was representing the LTTE. He said that the caller accused him of failing to raise money for the LTTE, but made no mention of his refusal to make the recordings specifically. He also said that his refusal in this respect was never mentioned on any other occasion when he was threatened by the LTTE.

On 5 June 1994, Mr Prathapan had performed in a concert which was arranged by the Old Boys' Association in France of a Sri Lankan college. He said that he understands that the proceeds of the concert were remitted to one of the Tamil independence groups in Sri Lanka for rehabilitation work among the Tamils. He testified that he did not know which group might have received the money. After the concert, he again received telephone threats from an individual he thought represented the LTTE. This man accused him of helping rival groups and his brother, who, the man said, must have been in India with another Tamil group and not in Australia at all.

Mr Prathapan claimed he was accosted outside the Madeleine Metro Station in Paris on 20 July 1994 by four young Tamils. He said he recognised them as LTTE when they spoke to him. They accused him of supporting the EPRLF and demanded money for the LTTE. They sprayed some type of chemical in his face which caused his eyes to water and burnt his skin. He said he needed to take one week's sick leave but did not need to see a doctor. He said that he went to the local police station after the incident; that the police asked him if he knew who had attacked him and whether there were any witnesses; that he did not know the identity of his attackers; and that he did not tell the police that he thought he had been attacked by persons associated with the LTTE because he feared the LTTE might do him and his

family serious harm in revenge. He said that he might have lodged a formal complaint with the police if he had been a single man but that his wife was pregnant at the time and that he feared the consequences if the LTTE responded to his complaint with reprisal action.

The Tribunal noted independent evidence about the availability of protection in France taken from the United States Department of State's *"Country Report on Human Rights Practices for 1996* (Bureau of Democracy, Human Rights and Labour, 30 January, 1997). The parts of this Report noted by the Tribunal included the following:

"France is a constitutional democracy with a directly elected President and National Assembly and an independent judiciary.

The law enforcement and internal security apparatus consists of a Gendarmerie, national police, and municipal police forces in major cities, all of which are under effective civilian control.

The Government fully respected the human rights of its citizens, and the law and judiciary provide effective means of dealing with individual instances of abuse."

"The law provides for an independent judiciary, and the Government respects this provision in practice.

The judiciary provides citizens with a fair and efficient judicial process…"

France provides first asylum and provided it to approximately 17,200 persons in 1996. The Government cooperates with the United Nations High Commissioner for Refugees and other humanitarian organizations in assisting refugees. There were no reports of forced return of persons to a country where they feared persecution."

"Statutes ban discrimination based on race, religion, sex, ethnic background, or political opinion, and the Government effectively enforces them."

The Tribunal satisfied itself that the applicants before it had made valid applications for review of the delegate's decisions and then noted that according to Article 1A of the Refugees Convention, the term "refugee" applies to 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 Tribunal said that the definition established four requirements applicable to Mr Prathapan's claim to be a refugee: first, that he be outside each of his countries of nationality; second, that he have a well-founded fear of being persecuted in each of those countries; third, that the fear be of persecution for one or more of the Convention reasons; and fourth, that he be unable, or unwilling because of his fear, to avail himself of the protection of each of his countries. The Tribunal saw the case as raising the following three issues;

(A) Whether Mr Prathapan was a national of France;

(B) If so, whether there was a real chance that he would be so seriously harmed in France by the LTTE that the Tribunal could find he faced a chance of persecution by them; and

(C) If there was a real chance that he would be persecuted in France by the LTTE, whether there was a real chance the responsible French authorities would not protect him from persecution for a Convention reason or could not protect him from such persecution by the LTTE.

In relation to (A), the Tribunal found that Mr Prathapan was a national of France and that there was a possibility that he was also still a national of Sri Lanka. If he was a national of both countries, the definition of "refugee" required that he have a well-founded fear of persecution for a Convention reason in both. Since the Tribunal member was satisfied that he did not have a well-founded fear of persecution in France, the member did not need to consider whether he might have such a fear in respect of Sri Lanka also.

In relation to (B), the Tribunal was not satisfied that there was a real chance that Mr Prathapan would be so seriously harmed in France by the LTTE that it could find he faced a real chance of "persecution" there.

In relation to (C), the Tribunal was not satisfied that there was a real chance the responsible French authorities would not or could not protect Mr Prathapan from persecution in France by the LTTE.

THE REASONS FOR DECISION OF THE JUDGE AT FIRST INSTANCE

His Honour saw the application as giving rise to two "matters of substance argued which [were] capable of giving rise to judicial intervention": **persecution** and **protection**.

In relation to "persecution" his Honour thought that the Tribunal had stated the test at too high a level. The Tribunal's Reasons for Decision had included the following passage;

"Persecution involves '…harassment, harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from [those responsible]." (Gladys Maribel Hernandez, Canadian Immigration Appeal Board Decision M81-1212, 6 January 1983, cited in The Law of Refugee Status, James C Hathaway, Butterworths, Canada, 1991 (Hathaway) 102). As Hathaway added, "The equation of persecution with harassment highlights the need to show a sustained or systematic risk, rather than just an isolated incident of harm"(at 102).

I cannot find in the evidence of a number of telephone calls and one incident of assault in a period of more than four years anything which suggests that the harassment the applicant suffered at the hands of the LTTE was so constant and unrelenting as to deprive him of all hope of recourse other than flight from France to Australia."

His Honour thought that the passages from the Canadian case and from the learned author's book referred to in this passage did not reflect the test of persecution laid down by the High Court of Australia in *Chan* v *Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 (Mason CJ), 429-430 (McHugh J).

His Honour next observed that the Tribunal's error in relation to the persecution issue alone did not necessarily signify that its decision could not stand, since it had also concluded that there was no real chance that the protection of France was unavailable to Mr Prathapan. Accordingly, Mr Prathapan would need to show "an independent legal error in the Tribunal's consideration of the matter of protection". His Honour thought that such an independent legal error also infected the Tribunal's reasoning.

On the protection issue, his Honour noted that the Tribunal member had said that, if there was a real chance Mr Prathapan would be persecuted in France by the LTTE, he needed to consider:

"whether there is a real chance the responsible French authority would not protect him from persecution for a Convention reason or could not protect him from such persecution by the LTTE."

But the learned Trial Judge thought this an incorrect re-statement of the relevant "requirement" of the Convention. His Honour said:

"The Convention fastens upon the inability or unwillingness **of the applicant for refugee status** to avail himself or herself of the protection of his or her country (or,

as here, countries) of nationality. The Convention does not take as its criterion the inability or unwillingness of **the applicant's country of nationality** to protect him or her." (emphasis in original)

His Honour concluded on the "protection" issue as follows:

"…, it cannot be said that the Tribunal did not err in its interpretation of the applicable law on the 'protection' issue as well as on the 'persecution' issue. Nor can one say the Tribunal **must** have come to the same conclusion had it not so erred. Therefore, one cannot say, as the Minister submitted, that the Tribunal would necessarily have come to the same conclusion, free of operative and reviewable legal error, even if it had not erred as to 'persecution'." (emphasis in original)

NOTICE OF APPEAL AND NOTICE O F CONTENTION

By his notice of appeal, the Minister relies on grounds touching both the "persecution" and "protection" issues. For reasons that will appear, I need refer only to that part relating to the issue of "protection". In that respect, the grounds propounded are that his Honour erred in holding that the Tribunal had incorrectly interpreted the applicable law on "state protection", and in "failing to conclude that the applicant, as a refugee recognised by France for whom adequate protection exists, is not a person to whom Australia owes protection obligations".

Mr Prathapan filed a lengthy notice of contention. Again, I need set out only the part relating to the issue of protection:

> "1. His Honour erred in holding that a reasonable level of police efficiency, judicial and allied services and functions, together with an appropriate respect on the part of those administering the relevant state organs for civil law and order, and human rights, in a modern and affluent democracy, would ordinarily amount to effective and "available" protection in the context of the Convention definition of a refugee.
>
> 2. His Honour erred in holding that a person claiming refugee status is not ordinarily entitled to rely on the supposed inadequacy of reasonable State protection available to him or her if it is not inferior to that available to a fellow citizen at risk of serious, criminal harm for non-Convention reasons."

REASONING ON THE APPEAL

With respect, it seems to me that the learned trial Judge fell into error on “the protection issue”. I need not decide whether he also did so on “the persecution issue”.

In my view, contrary to that of his Honour, it **can** be said “that the Tribunal did not err in its interpretation of the applicable law on the ‘protection’ issue”. Moreover, while it is true, as his Honour observed, that the Convention definition fastens upon the inability or unwillingness of the applicant for refugee status to take advantage of the protection of the country of nationality and not the inability or unwillingness of the applicant’s country of nationality to protect him or her, (a) the Tribunal did not err in this respect, and (b) as his Honour recognised, with respect correctly, an unwillingness or inability to protect on the part of the country of nationality is relevant to the operation of the Convention definition.

According to the terms of the definition, the person’s well-founded fear of persecution for a Convention reason has two roles to play: it must be the cause of the person’s being outside his or her country of nationality and it must be the cause of any unwillingness on the part of that person to resort to that country’s protection. If protection is available from the country of nationality, fear of persecution is not well-founded. In those circumstances, the person would be unwilling to take advantage of the protection of the country of nationality “owing to” some cause other than a well-founded fear of persecution. It will be necessary, however, in due course, to consider the meaning of “protection” in the present context. Unlike “unwillingness”, “inability” to resort to the protection of the country of nationality is not, by the terms of the definition, required to arise from a well-founded fear of persecution.

Clearly, as a matter of language, unwillingness denotes choice, and inability, an absence of choice. But the practical effect of the distinction is less clear. This is so

because the unwillingness to which the definition refers must be due to a well-founded fear of persecution. Both the “unable” and “unwilling” limbs of the definition have objective elements which, on the facts of particular cases, will often be found to coincide.

Consider three situations: (1) the authorities of the country of nationality have the capacity to protect but will not do so because they are the persecutors; (2) the authorities of the country of nationality have the capacity to protect but acquiesce (or worse) in persecution by others; (3) the authorities of the country of nationality would protect if they could, but lack the capacity to do so. On a liberal understanding of the word “unable” as encompassing circumstances in which reliance on the country of nationality would be of no practical utility, in all three situations the person is unable to resort to state protection. On a more strict view, however, in all three there is present an element of choice, and therefore of unwillingness, albeit owing to a well-founded fear. The distinction in language may suggest that the latter view is correct: at least it is clear that the person’s being “unable” to avail himself or herself of the protection of the country of nationality does not have to arise from a well-founded fear of persecution. But in effect the two categories (“unable” and “unwilling owing to a well-founded fear of persecution”) are directed to broadly similar sets of circumstances. They are situations in which the person cannot be blamed for not following the course, ordinarily to be expected, of relying on the country of nationality for protection. A case of the country of nationality’s incapacity to protect can, in my view, properly be regarded as falling within either the “unable” or “unwilling” limb without any difference in result.

In the preceding paragraphs I have expressed my own views, but the issues in question have in fact been discussed at some length by the Supreme Court of Canada in *Re Attorney-General (Canada) and Ward; United Nations High Commissioner for Refugees (intervener)* (1993) 103 DLR (4th) 1 (*“Ward”*). That Court rejected the view that state complicity is a necessary element in a refugee claimant’s unwillingness to avail himself or herself of the protection of his or her country of

nationality, owing to a well-founded fear of persecution. It also rejected the view that such a claimant can be considered "unable" to do so only where he or she is physically unable to seek out that protection, as where he or she is "stateless". With respect, I would agree in rejecting those views.

A situation in which the authorities of the country of nationality are the persecutors is, perhaps, the clearest case in which a person's unwillingness to resort to that country for protection can be said to be due to a well-founded fear of persecution. That is not this case.

Another clear case is that in which there is a well-founded fear that the authorities of the country of nationality are complicit in, covertly support, or acquiesce in, the persecution in question. Again, that is not this case. Indeed, Mr Prathapan's case is that he did not inform the French police of his suspicion that his assailants were associated with the LTTE for the very reason that he believed that such a course would prompt police action which might give rise to reprisals by the LTTE.

Mr Prathapan's factual case is one of incapacity to protect. The Tribunal did not choose between the "unable" and "unwilling" categories, but went straight to the question whether there was "a real chance the responsible French authorities would not protect Mr Prathapan from persecution for a Convention reason or could not protect him from such persecution by the LTTE". The trial Judge saw "the real question in this case" as that raised by the second limb, but said:

"No doubt the willingness and ability of the authorities of the country of nationality to protect an applicant will usually be highly relevant to the first question, but that question was not the main issue here."

Before us, both parties agreed that his Honour erred in formulating "the first question" as being whether Mr Prathapan had been "unable to avail himself of the protection of the country or countries of nationality **owing to a well-founded fear of persecution for Convention reasons**" (emphasis supplied). While this formulation does not conform to the definition (because the "unable" limb is not limited in the manner indicated), on the facts of this case, viewed as a first limb case, Mr Prathapan's inability had to be shown to be due to the ineffectuality of the French authorities as protectors of him against persecution.

After his Honour delivered judgment on 5 September 1997, a Full Court of this Court, on 19 December 1997, delivered judgment in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 151 ALR 685 ("*Thiyagarajah*"), a case which, I think, contrary to a submission made on behalf of Mr Prathapan, is relevant to the "protection" issue raised by the present appeal. Von Doussa J, with whom Moore and Sackville JJ agreed, dealt with a notice of contention by Mr Thiyagarajah who, like Mr Prathapan, was a Sri Lankan national of Tamil ethnicity, had been granted refugee status in France (unlike Mr Prathapan, he had not been recognised as a French national), and had succeeded at first instance before Emmett J in challenging an adverse decision of the Tribunal that he was not a refugee.

Factually, the case had other broad similarities with the present one. Mr Thiyagarajah alleged that he had been the object of threats and an attempted stabbing at a railway station in Paris because of what the LTTE perceived to be an association which he had with the EPRLF. He gave evidence that a prominent LTTE activist whom he had occasionally visited had been murdered. He said that he did not go to the police about the attempt to stab him because Paris was an LTTE stronghold and the LTTE could easily identify, locate and eliminate a person anywhere in France, if its members suspected that the person belonged to an opposing group. He said that if he had informed the police, he would have been vulnerable and the police would have been unable to protect him.

On the present issue, the Minister's delegate concluded that Mr Thiyagarajah would be accorded protection by the French authorities on his return. The Tribunal concluded that in view of "the human rights record of France, its political structures and mature judicial system", Mr Thiyagarajah had recourse to protection from persecution upon return to France; that, if sought, "the degree of protection normally expected of a government would have been forthcoming"; and that there was "no real chance that the French authorities [were] unable or unwilling to provide such protection".

The reasoning of Emmett J, as well as that of the Full Court upon appeal from him, appears in the following passage from the reasons for judgment of von Doussa J:

"The remaining issue concerns the respondent's notice of contention. Emmett J found that there was no error of law involved in the RRT's finding that there was no real chance that the French authorities are unable or unwilling to provide the degree of protection normally expected of a government. The notice of contention argues that his Honour erred in failing to find that in the circumstances of the case the respondent's failure to seek the protection of the French authorities for fear of retaliation by the LTTE should not disentitle him from protection according to the Refugees Convention. On the respondent's behalf it was submitted that "protection" in the relevant sense must be taken to mean the prevention of harm. A meaning based on the general nature of a State's law enforcement and judicial systems, which the respondent submits the RRT adopted, does not, so it is argued, address the question as to whether a well-founded fear of persecution exists for a particular individual. The respondent's complaint is, in essence, that even if he had sought protection from the French authorities, they could not have "guaranteed" his safety. It was submitted that the RRT failed to consider whether there was a real chance that such protection as the authorities could provide might not prevent harm to the respondent and his family and this failure resulted in a mis-application of the test whether there was a well-founded fear of persecution based on a real chance of failure of State protection.

The submissions raised on the notice of contention in substance seek to re-agitate questions of fact. The RRT dealt with the evidence before it which the respondent argued should lead to a finding that there was a real chance that the authorities in France would not extend to the respondent the degree of protection which would be extended to French nationals and would not provide a level of protection sufficient to remove a real chance of persecution in France by the LTTE. Even accepting that the respondent held a genuine fear in that respect, the fear had to be a well-founded one. It was clearly open to the RRT to find, as it did, that there was no real chance, as a matter of objective fact, upon which the respondent's genuine belief could be "well-founded".

In Re Attorney-General (Canada) and Ward, La Forest J, delivering judgment in the Supreme Court, said at 23:

> "The issue that arises, then, is how, in a practical sense, a claimant makes proof of a State's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the State authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a State's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the State protection arrangement or the claimant's testimony of past personal incidents in which State protection did not materialise. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of State apparatus, such as that recognised in Lebanon in Zalzali [Zalzaliv

> Canada (Minister of Employment andImmigration) [1991] 3 FC 605], it should be assumed that the State is capable of protecting a claimant."

Counsel for the respondent contended that the information placed before the RRT relating to certain incidents that had occurred in France, and the murder of several Tamils in Paris and Switzerland was sufficient to rebut any presumption that the French authorities were capable of protecting the respondent and his family. That raises a factual issue which was agitated before the RRT, and rejected by it. It was clearly open to the RRT to take the view which it did. The ground raised in the notice of contention is not established." (at 706-707)

The Full Court did not in terms categorise the case as belonging to the "unable" or "unwilling" category, although the references to "real chance" and "well-founded" may suggest that their Honours regarded the case as belonging to the latter class. Counsel for Mr Prathapan, in her helpful submissions, treats the present case as belonging to that class. As I have attempted to make clear, in my opinion the case can be appropriately treated as falling under either limb.

We should follow the Full Court in *Thiyagarajah* for what it decided on the present issue, unless we thought it plainly wrong: cf *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *Qantas Airways Limited v Cornwall* (unreported, FCA/FC, Burchett, Cooper and Finn JJ, 24 July 1998) at 8-9; and other authorities referred to in *Bank of Western Australia v Commissioner of Taxation* (1994) 55 FCR 233 at 255. First, the Full Court implicitly decided that the test under the Convention definition was not whether there was a well-founded fear that the country of nationality was unable to "guarantee" protection against persecution. Second, it also held that the Tribunal had been entitled to make the factual finding that a fear by Mr Thiyagarajah that there was a real chance that the French authorities would not extend to him "the degree of protection which would be extended to French nationals and would not provide a level of protection sufficient to remove a real chance of persecution in France by the LTTE" was not well-founded. Third, it referred, with apparent approval, to the passage from *Ward* set out in the passage from the judgment of von Doussa J appearing above.

For my part, far from being of the opinion that the Full Court was plainly wrong in the first of these respects, with respect I think that it correctly stated the law. Moreover, in the second and third respects, what was said is persuasive as to the general approach this Court should take in the present case. Contrary to the submission of counsel for Mr Prathapan, I do not think the approach of the Full Court in *Thivagarajah* irrelevant, on the basis that, unlike Mr Prathapan, Mr Thivagarajah had not been granted French nationality. The reasoning of von Doussa J does not depend in any way on the distinction and his Honour's reasoning applies to Mr Prathapan as a French national *a fortiori.*

Like the Full Court in *Thiyagarajah*, I see the present appeal as an attempt "to re-agitate questions of fact". I have referred earlier to the Tribunal's account of the evidence of the protection available to Mr Prathapan in France. In my view, the following conclusion of the Tribunal reveals no error of law.

"…, in the absence of any evidence to show that the responsible French authorities would not or could not discharge the duty to protect [Mr Prathapan] from persecution by the LTTE, I am satisfied that there is no real chance he faces a risk of persecution in France."

The Tribunal reached this factual conclusion on the evidence before it of the protection generally provided by the French authorities to French nationals, of whom Mr Prathapan is one. Mr Prathapan refers to his own "evidence" before the Tribunal that political assassinations took place in Paris "with impunity"; that in France in 1994 the LTTE assassinated a Mr Sabarlingam who was a writer opposed to the LTTE; that the LTTE prosecuted its aims ruthlessly at home and abroad, demanding complete loyalty and tolerating no dissent; and that the LTTE's headquarters are shared between London and Paris.

In the course of the Tribunal hearing, the Tribunal member invited Mr Prathapan to comment on the adequacy of the police protection available to him in France. In response, he said;

"…it is common knowledge that groups of Algerians, Moroccans and even Israelis who have political connections have been assassinated with impunity in Paris and no action whatsoever has been taken to protect these groups."

and added;

"There was this notorious person Sabalingam murdered by the LTTE. I'm not sure, but I think he sought the protection of the French police, but he was murdered in cold blood in front of [two] children of his…"

Mr Prathapan's solicitor had made written submissions to the Tribunal putting before it the other material to which I have referred concerning LTTE activity in France.

Mr Prathapan submits that the Tribunal's failure to refer to these various matters shows that it did not consider, as it was required to do, the question whether there was a real chance **in his particular case** that the protection of the French authorities would be unavailing.

In its Reasons for Decision, the Tribunal referred to "some deficiencies in the enforcement of the law in France" and recorded that the independent evidence showed that "the law and judiciary provide effective means for dealing with abuse". I am not persuaded that the Tribunal's failure to refer to the evidence identified by counsel for Mr Prathapan indicates that the Tribunal member did not take it into account.

There was reference in submissions to the question whether there is a "presumption" that a country of nationality can provide to its nationals effective protection against persecution. The existence of such a presumption has the support of the Supreme Court of Canada in *Ward*. That Court said that "clear and convincing confirmation of a state's inability to protect must be provided", and added:

"Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus…, it should be assumed that the state is capable of protecting a claimant." (both at 23)

Ward was an unusual case in that it was conceded that the Government of the country of nationality (the Government of Ireland), could not protect Mr Ward, whose application was for recognition as a refugee in Canada. In *Ratnam v Minister for Immigration and Ethnic Affairs* (1997) 47 ALD 203 at 209, Emmett J accepted the existence of the presumption and said that the applicant bore the "not necessarily heavy" onus of demonstrating that there is a real chance that the country of nationality will not look after its nationals and that the applicant will be persecuted. Recently, in *Minister for Immigration and Multicultural Affairs v A, B and C* (unreported, FCA, 9 April 1998, VG 335 of 1997), RD Nicholson J concluded, after considering the Australian authorities, that none of them required him to hold that the presumption existed. He thought, however, that where no evidence was led that the country of nationality would not look after its nationals, even in the absence of the presumption, the applicant would still fail to discharge the onus of making out his or her case, and that there was "no self-evident policy reason to construct a presumption in those circumstances" (at 14).

It is not necessary for the resolution of the present appeal to decide whether there is a "presumption" of the kind described. The Tribunal did have before it evidence which it was entitled to accept and did accept as to the protection available to Mr Prathapan in France. I referred to some of that evidence earlier. It included evidence that in France "[t]he law enforcement and internal security apparatus … are under effective civilian control", that the French Government "fully respected the human rights of its citizens, and the law and the judiciary provide effective means of dealing with individual instances of abuse", and that "[French] [s]tatutes ban discrimination based on race, religion, sex, ethnic background, or political opinion, and the Government effectively enforces them".

It is not countervailing evidence to show that the authorities cannot guarantee immunity from persecution and reprisals. The material on which Mr Prathapan relied did not even begin to suggest that level of ineffectuality of state protection that would allow or give rise to a real chance that he would be persecuted by the LTTE regardless of his resorting to the French authorities.

Accordingly, the Tribunal was entitled to reach the conclusion which it did reach on this issue.

CONCLUSION ON THE APPEAL

The appeal should be allowed. The orders made by the trial Judge should be set aside and in lieu thereof it should be ordered that the application be dismissed, the decision of the Tribunal be affirmed, and Mr Prathapan, as the applicant for review, pay the Minister's costs of that proceeding. As respondent to the appeal, he should also pay the Minister's costs of the appeal.

I certify that this and the preceding fifteen (15) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Lindgren

Associate:

Dated: 12 August 1998

Counsel for the Applicant:	Mr J Basten QC with Mr NJ Williams
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	Ms EA Wilkins

Solicitor for the Respondent:	McDonells Solicitors
Date of Hearing:	2 July 1998
Date of Judgment:	12 August 1998