

# FEDERAL COURT OF AUSTRALIA

## **Minister For Immigration & Multicultural Affairs v Shaibo [2000] FCA 600**

**IMMIGRATION** – protection visa – application for review of decision of Refugee Review Tribunal – Sri Lankan Tamil voluntarily joins police force – sent to north of country to fill void left by departing armed forces – deserts police force because of fear for his life and because appalled at torture, murder and rape committed by some members of police force – upon return to Sri Lanka, would be offered amnesty upon terms requiring him to resume service in north of country – whether fear of persecution on Convention ground made out – whether Tribunal erred in law in concluding that applicant before it (present respondent) feared persecution on Convention ground.

*Migration Act 1958 (Cth) s 476(1)(e)*

*Murillo-Nunez v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 150, cited*

*Timic v Minister for Immigration and Multicultural Affairs [1998] FCA 1750, cited*

*Mijoljevic v Minister for Immigration and Multicultural Affairs [1999] FCA 834, cited*

*Mehenni v Minister for Immigration and Multicultural Affairs (1999) 164 ALR 192, cited*

**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v MOHAMED ELIYAS CADER MEERA SHAIBO**

**N 979 OF 1999**

**LINDGREN J**

**10 MAY 2000**

**SYDNEY**

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 979 OF 1999

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AFFAIRS  
  
APPLICANT

AND: MOHAMED ELIYAS CADER MEERA SHAIBO  
  
RESPONDENT

JUDGE: LINDGREN J

DATE OF ORDER: 10 MAY 2000

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal made on 13 August 1999 in proceeding N 97/20520 be set aside and the matter to which that decision related be referred to the Refugee Review Tribunal for further consideration and decision in accordance with law.

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

IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY N 979 OF 1999

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS  
APPLICANT

AND: MOHAMED ELIYAS CADER MEERA SHAIBO  
RESPONDENT

JUDGE: LINDGREN J  
DATE: 10 MAY 2000  
PLACE: SYDNEY

**REASONS FOR JUDGMENT**

# Introduction

1 The Applicant (“the Minister”) applies under s 476(1) of the *Migration Act 1958* (Cth) (“the Act”) for review of a decision of the Refugee Review Tribunal (“RRT”) setting aside a decision of a delegate (“the Delegate”) of the Minister not to grant the respondent (“Mr Shaibo”) a protection visa.

2 Section 29 of the Act provides that subject to the Act, the Minister may grant a non-citizen permission, to be known as a visa, to do one or both of the following:

- (a) travel to and enter Australia;
- (b) remain in Australia.

Section 496 of the Act provides that the Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under the Act. It is not in dispute that the Minister delegated all relevant powers to the Delegate.

3 Section 65 of the Act provides that after considering a valid application for a visa, the Minister, if satisfied of the matters specified in the section, is to grant the visa, or, if not so satisfied, is not to grant the visa. One of the matters specified in s 65 is that the criteria for the visa specified by the Act or the regulations have been satisfied. Section 36 of the Act provides that a criterion for the grant of a protection visa is that the applicant for it is a non-citizen in Australia to whom Australia has protection obligations under the *Convention Relating to the Status of Refugees* done at Geneva on 28 July 1951 as "amended" by the *Protocol Relating to the Status of Refugees* done at New York on 31 January 1967 (compendiously, "the Convention").

4 Article 1A(2) of the Convention provides that a refugee is any person who:

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

Criteria to be satisfied by an applicant for a protection visa at the time of the decision on the application also include the criterion specified in cl 866.221 of Schedule 2 to the *Migration Regulations 1994*, which is that the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Convention.

5 The RRT's decision was a "judicially reviewable decision" (s 475(1)(b) of the Act). The Minister was entitled to apply to this Court for review of it on certain grounds (s 476) and the Court has the jurisdiction provided by Part 8 of the Act, but no other jurisdiction, with respect to it (ss 485, 486).

6 Mr Shaibo's case was that he is outside the country of his nationality, Sri Lanka, and has a well-founded fear of being persecuted for reason of one or more of race, membership of a particular social group or political opinion.

## **Procedural background**

7 Mr Shaibo arrived in Australia on 24 July 1994. On 25 July 1997, he applied for a protection visa (visa sub-class 866). On 6 November 1997 the Delegate refused to grant him the visa. On 5 December 1997, Mr Shaibo

applied to the RRT for review of the Delegate's decision. The RRT conducted a hearing on 13 August 1999. On the same day the RRT set aside the Delegate's decision and remitted the matter to the RRT for reconsideration with a direction that Mr Shaibo was a person to whom Australia had protection obligations under the Convention. The Minister filed the application by which this proceeding was commenced on 6 September 1999.

## **The Reasons for Decision of the RRT**

8 The RRT commenced its reasons for decision by referring to the procedural background, the legislative framework and the law relating to the Convention definition of a "refugee". It then turned to consider Mr Shaibo's claims and evidence.

9 The RRT accepted that the written statement provided by Mr Shaibo, a Tamil speaking Muslim, was a true reflection of what had happened to him and of his life in Sri Lanka. It went on to reproduce his written statement. In particular, it quoted the grounds on which Mr Shaibo relied as follows:

"I seek protection from the Australian government for the following reasons.

- *As a member of a small minority group and a person whose mother tongue is Tamil I was sent to war front without being given proper training.*
- *I joined the Police Service to perform my civil duties to my country and fellow citizens. Using at war front is a breach of my beliefs.*
- *Though as a Muslim I have a political opinion against the LTTE for the inhuman treatment they had done to the Northern Muslims, I am not at war with them. As a Tamil speaking Muslim my political opinion is that the just rights of Tamil speaking minorities be given in Sri Lanka and I don't want to be involved in killing my fellow Tamil speaking citizen or be killed by them.*
- *My return to Sri Lanka may result in detention and being sent to the war front. Latest newspaper articles indicate that the Armed forces chief has issued an order to arrest deserters and them to be court martialled."*

10 Mr Shaibo was born in Kurunegala in the North Western province of Sri Lanka. During his college years he was a keen sportsman and a member of the school's cadets and was the sergeant in the platoon.

11 After President Premadasa's death Mr Shaibo applied to join the Sri Lankan police and attended the Sri Lankan Special Task Force's Training School at Katukurunda from 26 July 1993. However, the new President, Mr

DB Wijethunga, wanted to consolidate the Government's power in the east of Sri Lanka. In order to fill the void created by the absence of the armed forces elsewhere in the country, he ordered the police to move in. After three months' training, Mr Shaibo was stationed north of Vavuniya, where the Sri Lankan Government and the Liberation Tigers of Tamil Eelam ("LTTE") ran parallel administrations. On protesting that he had inadequate training for such a difficult and dangerous posting, he was told that Tamil speaking officers were needed in that area.

12 As from 1 November 1993, Mr Shaibo was transferred to Erukkalampity Police Station in Mannar District. There he had to work with former rebels opposed to the LTTE. He said it was "a matter of life and death" working with them because he could not be sure who belonged to which groups and who believed what. He claimed that one of these persons turned out to be an LTTE informer who warned him to leave the police force to save his life. In consequence, Mr Shaibo left the Police Station after having spent only nine days there. He returned to his home on 13 November 1993.

13 Afraid of being arrested for having deserted his post, he moved from his home to a friend's house in Dehiwala. With the help of an agent, he obtained an Australian visa on 15 July 1994. He arrived in Australia on 24 July 1994.

14 During his first year in Australia, his brother, a dried fish merchant, assisted the LTTE out of fear for his life rather than sympathy for the LTTE cause. In January 1996 the brother had assisted an LTTE member by providing his truck and posing as the driver's assistant. This LTTE member was a terrorist and was arrested in Colombo in March 1996. His arrest led to the arrest of the driver. After a "tip off", Mr Shaibo's brother escaped to India. Mr Shaibo went from Australia to India to meet his brother in April or May 1996. His brother told him that he could not return to Sri Lanka as the Government "would arrest him under the Prevention of Terrorism Act".

15 Because his class 435 visa was not going to be extended and there was an amnesty granted by the Army, Mr Shaibo left Australia on 8 May 1997 for Sri Lanka and remained there for six weeks, staying in Colombo and visiting his family at home. On 13 May 1997 the armed forces began a major offensive to capture the highway from Vavunia to Jaffna. There was a call for reinforcements from the police force, including deserters, to man the areas captured by the army. The police force called on Mr Shaibo to report for duty. But not wanting to go to "the war front", he returned to Australia, apparently in late June or early July 1997.

16 At the hearing before the RRT, Mr Shaibo said that the police had killed LTTE members and supporters, although his testimony was based on stories he had heard from other police and he had not witnessed such events, having been in the area for only nine days. He named two senior police officers serving at the Erukkalampity Police Station in November 1993 who had boasted of having raped Tamil women, particularly younger Tamil women. He said that the police also tortured members of the LTTE. Mr

Shaibo claimed that senior police and army officers in Colombo must have known about these activities in the north, and, in particular, must have known that army and police officers were raping Tamil women.

17 He was questioned about his ability to desert his police posting and responded that discipline was sufficiently lax to permit him to leave. He claimed that he decided to desert because he had intended to serve people in the north, not to kill them. He claimed that he had joined the police force because he enjoyed sport and wanted to serve his country, not knowing about the activities of the police in picking up and torturing Tamils.

18 Mr Shaibo's movements through the airport were handled by an agent. The first time Mr Shaibo left Sri Lanka he had to pay \$14,000, and on the second occasion \$4,000, in order to leave. He was aware that he risked being apprehended for being a police deserter but told the RRT that many people deserted from the police and the army. He said that there was an amnesty in force for deserters but that he did not wish to take advantage of this because its terms required that he return to the north and resume active duty against Tamils there.

19 The RRT found Mr Shaibo to be credible although it noted that it had initially had reservations about his written submissions and, in particular, about his claim that he was able to travel back to Sri Lanka twice and for lengthy periods while a police deserter. But the RRT said that "under a prolonged period of questioning and somewhat intense scrutiny", Mr Shaibo had impressed the RRT with "his willingness to answer questions openly and honestly and his attention to detail".

20 The critical passages in the RRT's Reasons for Decision are brief. The RRT noted that Mr Shaibo's father was a person of some means and said that this fact had materially assisted Mr Shaibo in his movements into and out of Sri Lanka and in his decision to attempt to remain in Sri Lanka. The RRT mentioned these matters and the "close family ties" that existed between Mr Shaibo and his parents and brother to explain why the presiding Member's initial scepticism had been put to rest.

21 The focus of the Minister's principal attack was the following two paragraphs of the RRT's Reasons for Decision:

"The applicant applied for refugee status after returning from Sri Lanka the second time when it became apparent to him that it would be impossible for him to remain in Sri Lanka. He realised that if he accepted the amnesty offered to deserting police officers he would at the very least be forced to serve again in the north of the country and there was a strong chance that he would be persecuted on a continuing basis perhaps to the point where he would forfeit his life for having deserted his comrades.

The Tribunal believed that the applicant was appalled at the prospect of being involved in processes leading to the torture and murder of Tamil separatists and also of the activities of senior police officers in raping Tamil women and trading with Tamil [sic]."

**Grounds of the present application for an order of review**

22 The grounds of the application filed on 6 September 1999 are as follows:

“.....

2. The decision involved an error of law being an error involving an incorrect interpretation of the applicable law and/or an incorrect application of the law to the facts found by the person who made the decision.

PARTICULARS

- (1) The Tribunal misapplied the law in relation to the need for the Respondent to have a well-founded fear of ‘persecution’.
- (2) The Tribunal misapplied the law in relation to the need for any persecution faced by the Respondent to be for a Convention reason. No Convention reason was identified by the Tribunal or is apparent on the facts found.
- 3. There was no evidence or other material to justify the decision.

PARTICULARS

The Tribunal was required by law to reach that decision only if a particular matter was established, namely that the Respondent faced persecution for one of the Convention reasons, and there was no evidence or other material from which the Tribunal could reasonably be satisfied that the matter was established. In particular, there was no evidence that the Respondent if returned to Sri Lanka and forced to serve in the north ‘would be persecuted on a continuing basis perhaps to the point where he would forfeit his life for having deserted his comrades’”.

**Reasoning on the present application for an order of review**

23 The RRT’s decision that it was satisfied that Mr Shaibo was a person to whom Australia had protection obligations under the Convention turns on the findings and conclusions expressed in the two short paragraphs set out above. Those two paragraphs are confusingly expressed but I think their meaning can be ascertained.

24 The two paragraphs must be read against the background of the central claim made by Mr Shaibo, which was consistent throughout:



- in accordance with a long held ambition, he joined the Sri Lankan police force, a career which he perceived to be consistent with his interest in sport and with his desire to serve his country;
- contrary to his expectations, he was used by the Government in an area in the north of the country characterised by violent conflict between the Sri Lankan army and the LTTE, in circumstances in which the police were used to fill a void left by the army when it moved to a different area of operations;
- he feared for his own life there;
- he also objected to being associated with certain criminal activity engaged in by certain police officers and directed against the local Tamils.

25 Against this background, I turn to consider the “error of law” ground relied on by the Minister.

26 Mr Shaibo might return to Sri Lanka with or without accepting the proffered amnesty. If he did not accept it, no doubt the laws providing for the punishment of deserting police officers would be invoked against him. The RRT does not refer to this possibility. I will say no more of it because, in the absence of special circumstances (the existence of which was not considered by the RRT), the ordinary non-discriminatory enforcement of such laws would not constitute persecution: see the cases referred to below.

27 The RRT did address the possibility that Mr Shaibo might accept the amnesty offered to deserting police officers. If he did so, he would be forced to resume the service that he had abandoned, that is, “to serve again in the north of the country”. But Mr Shaibo finds this unacceptable for the two reasons already mentioned: it would expose him to the risk of being killed; and he would be part of a police force which was involved in the torture and murder of Tamil separatists and in raping Tamil women, although it is not suggested that he would be compelled to engage in any of those practices himself.

28 It is established that a well founded fear of conscription into armed forces, even if resisted on grounds of conscience, is not, at least ordinarily, a well-founded fear of persecution for the purposes of the Convention: see, for example, *Murillo-Nunez v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 150; *Timic v Minister for Immigration and Multicultural Affairs* [1998] FCA 1750; *Mijoljevic v Minister for Immigration and Multicultural Affairs* [1999] FCA 834; *Mehenni v Minister for Immigration and Multicultural Affairs* (1999) 164 ALR 192; and see Hathaway, *The Law of Refugee Status* at para 5.6.2. In my view, this line of authority is not distinguishable from the present case on any of the following grounds:

- that a police force rather than the armed forces is involved;

- that Mr Shaibo voluntarily joined the police force and subsequently became a deserter;
- that Mr Shaibo would be compelled to resume the service to which he objected as a condition of accepting an amnesty in respect of his desertion;
- that some members of the police force engage in the violent criminal conduct mentioned.

29 The RRT did not refer to the question whether Mr Shaibo had a well-founded fear of persecution on a Convention ground in so far as, as a police officer, he would be involved in activities which gave rise to the rape, torture and murder of members of his own ethnic group. The RRT appears to have found simply that Mr Shaibo was “appalled at the prospect of being involved” in the processes of rape, torture and murder generally. It is not clear that the violent criminal conduct in question is itself persecutory conduct by those who engage in it. Mr Shaibo did not submit, either to the RRT or to this Court (and the RRT did not find), that his feelings of outrage were due to his sharing the ethnicity of the victims. Rather, it seems to have found that he was appalled at the violent criminal conduct in question, regardless of the ethnicity of its victims.

30 If Mr Shaibo had been conscripted into the Sri Lankan Army for a first time, the line of authority to which I referred above would have been directly applicable. A deserter to whom similar conditions are offered as the terms of an amnesty can scarcely be better placed than the new conscript.

31 This brings me to the words:

“And there was a strong chance that he would be persecuted on a continuing basis perhaps to the point where he would forfeit his life for having deserted his comrades.”

32 These words refer to the possibility of Mr Shaibo’s being killed in the armed conflict in the north of the country. The presiding Member was elaborating on the fact that Mr Shaibo would be obliged, as a condition of accepting the amnesty, to return to serve “on a continuing basis” and might even “forfeit his life” in that region. The presiding Member’s reference to this matter was consistent with the stance that Mr Shaibo had taken in his statement that accompanied his original application for a visa and in his oral evidence before the RRT: he was willing to resume service in the police force but not at “the war front” or in “the war zone”.

33 Mr Shaibo’s fear of being exposed to the risk of being killed on police service is not a fear of persecution, let alone persecution on a Convention ground. He submits that he fears persecution on the ground of his membership of a particular social group, namely “deserters from the Sri Lankan police force”. I do not accept the submission. Mr Shaibo had been sent to the war zone to serve before he deserted. His case is, in substance, that he joined the police force to be a policeman not a soldier, and that the

exigencies of the civil war in Sri Lanka have led the Government to use the police force to control dangerously unstable areas captured by the army. There was no evidence that police deserters were singled out from the police force in general to be used by the Government in this way. Clearly, it was Government policy that if a deserter wished to accept the amnesty, he would have to accept all the terms of it and would not be able to dictate those on which he would be prepared to resume service. In particular, a deserter would have to accept that he would be liable again to serve at the war front.

34 For the above reasons, I do not think that the RRT meant to say, contrary to the evidence, that returning deserters were singled out to serve in the north or elsewhere in a war zone, and so to be exposed to the risks of the conflict there, including the risk of death.

35 But if I am wrong in this respect, in my view “deserters” are not a “particular social group” any more than those who contravene any other law are thereby made such a group for the purposes of the Convention.

36 Finally, even if, contrary to my view, deserters are singled out from the general body of police officers to be sent to the war zone and constitute a particular social group for the purposes of the Convention, I do not think the Government’s conduct constitutes persecution of them on the ground of their membership of that group. Rather, it is a condition of the amnesty offered to them that they accept this particular supposed penalty. They need not accept the proffered amnesty at all, in which case the alternative of non-discriminatory, ordinary punishment for desertion remains available. Being already liable to suffer that punishment, they cannot complain that the alternative of the amnesty itself contains a punitive element.

37 For the above reasons, I think that the RRT’s decision involved an error of law being an error involving an incorrect interpretation of the definition of “refugee” in the Convention, or, more directly and specifically, an incorrect application of the definition to the facts found by the RRT; cf s 476(1)(e) of the Act.

38 It is not necessary for me to address the other ground on which the Minister relies, that is, that there was no evidence or other material to justify the decision; cf s 476(1)(g) of the Act.

39 It is common ground that if I should reach the conclusion that I have reached, the RRT’s decision should be set aside and the matter to which the decision related should be referred to the RRT to be considered and determined in accordance with law.

40 The Minister seeks an order for costs. Mr Shaibo’s solicitor submits that his client should not be ordered to pay the Minister’s costs. He submits that:

- Mr Shaibo was not responsible for any error of law made by the RRT and could not be expected to consent to an order setting aside its decision in his favour;
- the matter involved complex issues of law which the Minister advanced (the debate before me involved issues of law beyond that on which I have decided in favour of the Minister above); and
- a costs order against his client could result in a situation in which, despite being eventually found to be a refugee (if he should be successful on remitter), Mr Shaibo would owe costs to the Minister for defending an earlier decision to the same effect.

41 The Minister's application for review of the RRT's decision was generated by the sparse and unclear language of the two paragraphs in the RRT's Reasons for Decision set out earlier. These called for close scrutiny by the Court and I was assisted by the submissions of the legal representatives of both parties as to their true meaning. I accept Mr Shaibo's solicitor's submission that it was not unreasonable for Mr Shaibo to attempt to support the RRT's decision in his favour and to advance a construction of the passages which supported that decision. In the unusual circumstances of the case, I think that a departure from the usual order, that the successful party has its costs, is called for. I will make no order as to costs.

## Conclusion

42 The Court orders that the decision of the RRT made on 13 August 1999 in proceeding N 97/20520 be set aside and that the matter to which that decision related be referred to the RRT for further consideration and decision in accordance with law.

I certify that the preceding forty two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lindgren.

Associate:

Dated: 10 May 2000

Counsel for the Applicant: Mr Stephen Lloyd

Solicitor for the Applicant: The Australian Government Solicitor

Solicitor for the Respondent:	Mr Ron Kessels
Date of Hearing:	1 May 2000
Date Last Submission Received:	4 May 2000
Date of Judgment:	10 May 2000