FEDERAL COURT OF AUSTRALIA

MIGRATION - Protection visa - review of Refugee Tribunal determination that applicant not a refugee - Article 1A(2) of Convention Relating to the Status of Refugees - whether "well-founded fear" of persecution on objective facts - role of Court when considering findings on credibility.

PRACTICE AND PROCEDURE - whether error by Tribunal for failure to refer to evidence in reasons.

Migration Act 1958 (Cth): Pt 8 ss 420(2)(b), 476(1)(e)

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

Minister for Immigration and Ethnic Affairs v Wu Sha Liang (1996) 185 CLR 259 applied

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

Guo v Minister for Immigration and Multicultural Affairs (1996) 64 FCR 151 considered

Kopalapillai v Minister for Immigration and Multicultural Affairs (unreported, Merkel J, 24 December 1997) considered

Navaratne v Minister for Immigration and Multicultural Affairs (unreported, Tamberlin J, 1 August 1997) considered

Emiantor v Minister for Immigration and Multicultural Affairs (unreported, Merkel J, 3 December 1997) considered

Muralidharan v Minister for Immigration and Ethnic Affairs (1996) 136 ALR 84 applied

Sun Zhan Qui v Minister for Immigration and Multicultural Affairs (unreported, Wilcox, Burchett & North JJ, 23 December 1997) distinguished

SUJEENDRAN SIVALINGAM v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

VG 472 of 1997

GOLDBERG J

MELBOURNE

5 MARCH 1998

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 472 of 1997

BETWEEN:	SUJEENDRAN SIVALINGAM Applicant
AND:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	GOLDBERG J
DATE OF ORDER:	5 MARCH 1998
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's taxed costs of the proceeding including reserved costs.

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

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JUDGE:	GOLDBERG J
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PLACE:	MELBOURNE

REASONS FOR JUDGMENT

Introduction

The applicant has applied to the Court pursuant to Pt 8 of the *Migration Act* 1958 (Cth) ("the Act") for an order of review in respect of the decision of the Refugee Review Tribunal ("the Tribunal") on 24 July 1997 whereby the Tribunal affirmed the decision of the delegate of the Minister on 24 April 1997 that the applicant is not a refugee under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (the "Convention") and that the applicant is not entitled to a protection visa. The applicant seeks an order that the decision of the Tribunal be set aside, that the Court declare that the applicant is a person to whom Australia has protection obligations under the Convention and that the applicant is entitled to a protection visa under the Act or alternatively, an order requiring the Tribunal to reconsider the decision according to law.

The applicant was born in Sri Lanka on 19 February 1977 and arrived in Australia by air on 5 April 1997. He did not have in his possession on arrival at Melbourne airport a passport or a visa entitling him to enter Australia. He was interviewed by an immigration inspector with the assistance of a Tamil interpreter over the telephone, given an application form for a protection visa and transferred to the Immigration Detention Centre at Maidstone where he has remained.

The applicant lodged an application for a protection visa on 10 April 1997. On 24 April 1997 the delegate of the Minister decided to refuse to grant the applicant a protection visa and the applicant lodged an application for review with the Tribunal on 5 May 1997. The Tribunal conducted a hearing on 28 May 1997 and the Tribunal's decision was delivered on 24 July 1997.

Applicant's background

The applicant is a Sri Lankan national and a Tamil from the Jaffna region. He has no family members in Australia as his mother and two sisters are living in Sri Lanka and his father died in 1996. It appears that he had travelled from the north of Sri Lanka to Colombo by passenger ship, arriving in Colombo in January 1997. In his initial interview with an immigration inspector at Melbourne airport the applicant said he went to Colombo on 15 March 1997 and made arrangements to obtain a passport. The Tribunal said that it was left in serious doubt as to whether the applicant was actually located in the north of Sri Lanka until shortly prior to his departure for Australia but, for present purposes, his date of arrival in Colombo is not critical. What is more relevant is the manner in which he was able to get to, and leave, Colombo because he did not appear to have, as the Tribunal found, serious difficulty in Colombo or in leaving Colombo.

According to the applicant a family friend obtained a passport for him in his own name which accurately recorded his date of birth. The applicant had to show his ticket and his identification when boarding the ship to Colombo and after about a week in Colombo he was provided with a passport and in the company of an agent, he travelled to Australia via China and Cambodia.

The applicant's claim to have a well-founded fear of persecution if he is returned to Sri Lanka is related to what is said to be a connection or association with the Liberation Tigers of Tamil Eelam ("LTTE"). The applicant said that at Colombo airport it was alleged by the authorities that he had connections with the LTTE but that the agent with whom he was travelling paid a bribe and the applicant was able to have his passport stamped.

The matters raised by the applicant in relation to the LTTE were that his father drove a vehicle for the LTTE after 1994. When the Sri Lankan army took Jaffna in 1995 the family moved to Kaithady and the applicant said he assisted the LTTE by digging bunkers and encouraging other villagers to do the same. The applicant said his father died in November 1996 after being beaten by army personnel and in the same month he was also beaten and was obliged to wear a mask and identify members of the LTTE. The applicant told the Tribunal he was detained for ten days but does not know where he was held as he was blindfolded when being taken there. The applicant said that the authorities later inquired about him at his home when he was absent and, when prompted by the Tribunal, he said he was also detained in July 1996 following a general round-up and held for three or four days and beaten while in custody.

The applicant says he fears persecution not only from the Sri Lankan authorities but also from the LTTE. He says that Tamils are treated like slaves and that considerable suffering has continued since the army took control of the Jaffna Peninsula and that he is at particular risk of persecution because he is a young male. He considers that the LTTE might now regard him as a traitor.

Grounds of review

Four grounds of review were relied on at the hearing:

> "1. The decision involved an error of law involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision within s.476(1)(e) of the Migration Act.
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> PARTICULARS

Rather than considering whether or not the Applicant had a subjective fear that was objectively well founded (the Chan test) the decision maker sought to rely on conflicting statements made by the Applicant to determine credibility and failed to look properly or at all at the individual claims of the Applicant to see whether the claims of the Applicant satisfied the Chan test.

2. The decision maker erred in law when he concluded that it was inconceivable that the Applicant would have, as instructed by his agent, given either false evidence during the interview at the airport upon his arrival or referred to only minor problems because of his fear of being returned to his homeland. Further, the Tribunal erred in law in then concluding that there were inconsistencies between the evidence given by the Applicant at the airport and that given at the hearing and therefore the Applicant lacked credibility.

3. Procedures that were required by law to be observed in connection with the making of the decision were not observed within s.476(1)(a) of the Migration Act.

(i) In reaching his decision the decision maker failed to consider in a balanced way, the totality of the material before him and in particular material relating to whether or not the Applicant had been involved with the LTTE and might suffer adverse treatment because of such involvement.

(ii) In reaching his decision the decision maker failed to afford to substantial justice (sic) or properly look at the merits of the Applicant's case and the duty of the decision maker as cast by s.420 and s.476 of the Migration Act 1958 were not followed in that the decision maker failed to properly consider the Applicant's explanation for statements made by him to those who interviewed him at the airport on his arrival. The decision maker failed to properly consider the material but rather took into account his own unsubstantiated views as to how an Applicant for refugee status should act on arrival at the border of a country in which he sought refugee protection.

4. The decision maker erred in law in adopting a procedure whereby he accepted parts of the Applicant's claims and rejected other parts in circumstances where there was no logical or reasonable basis for doing so and there was no logical or accepted basis for the decision maker differentiating between evidence he accepted and evidence he rejected. It was inappropriate in the circumstances to accept as credible parts of the Applicant's claims on the basis such claims were inconsistent with statements made by the Applicant on his arrival at the Australian border. Such a procedure amounted to a failure to afford substantial justice or properly look at the merits of the Applicant's case and there was a failure by the decision maker to follow or apply the duty that was cast upon him by s.420 and s.476 of the Migration Act 1958."

In argument, counsel for the applicant amplified these grounds in the following way. He submitted that the Tribunal had an obligation to consider the evidence properly and rationally and a failure to consider the cumulative factors constituted a breach of s 420(2)(b) of the Act and therefore resulted in an error of law within s 476(1)(e) of the Act. It was said that the Tribunal was put on notice by a letter of 5 June 1997 from the applicant's solicitors that a supplementary statement of the applicant was in existence and that the Tribunal should have followed up the supplementary statement or referred to it in its reasons. Complaint was also made that the Tribunal failed to mention or refer to a number of aspects of the applicant's evidence in its reasons such as the applicant being roughly handled at the airport which had an effect on the way he told his story to the immigration officer; the fact that in the course of the hearing the interpreter informed the Tribunal on a number of occasions that he was having difficulty in interpreting the applicant's evidence; the fact that an explanation had been given by the applicant's solicitors after the hearing for the reason why the applicant's statement had been unsigned; the contents of the solicitor's letter of 5 June 1997 and the requests made in it.

It was submitted that there was nothing in the Tribunal's reasons which showed that it had taken any of these matters into account, and that the Tribunal must have ignored these matters. It was said that if the Tribunal had taken these matters into account it would have reached an opposite conclusion to the one it reached and would not have made the finding it did as to the applicant's credibility. It was also submitted that the Tribunal had, in effect misread or not correctly stated the contents of a statutory declaration made by the President of the Australian Council for Tamil Refugees and a Department of Foreign Affairs cable.

It was submitted that the findings on credibility were based on a failure to make a proper inquiry as to whether the applicant had a well-founded fear of persecution in accordance with the principles set out in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, *Minister for Immigration and Ethnic Affairs v Wu Sha Liang* (1996) 185 CLR 259 and *Minister for Immigration and Ethnic Affairs v Guo* (1997) 144 ALR 567. It was said that the required inquiry involved the Tribunal considering all the facts put before it and that discarding facts in the course of the Tribunal's investigation and reasons is a failure to observe proper procedures. Reliance was placed on the observations of Kirby J in *Wu* at 293 (point 8).

The respondent's submissions, in short, were that the case advanced by the applicant was in disregard of and contrary to the principles stated by Kirby J in *Wu* (points 1 and 5). The respondent submitted that the Tribunal was entitled to consider and determine its view of the credibility of the applicant and that the findings it had made were open to it on the evidence, there being a number of inconsistencies in the applicant's evidence.

Tribunal's reasons and findings

In order to put the grounds relied upon by the applicant in context it is necessary to identify how the Tribunal reached its decision. The Tribunal correctly identified the basis for the jurisdiction and the legislative framework within which it was operating. The Tribunal noted that the criterion for the grant of a protection visa was that Australia had protection obligations in relation to the applicant because he was a refugee in accordance with Article 1A(2) of the Convention. It then analysed a number of passages in the judgment in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (supra), correctly identified the "real chance" test and recognised that the term "well-founded fear of being persecuted" required an applicant to establish a subjective fear which fear must have a basis in reality. The Tribunal noted the observations of McHugh J in *Chan's case* in relation to the term "persecuted" and said that although the applicant's circumstances at the time of leaving his country of nationality are a logical starting point of an inquiry as to whether there exists a well-founded fear of being persecuted, the relevant date for considering whether a person is a refugee for the purposes of the legislation is the date of the Tribunal's determination of the application: *Minister for Immigration and Ethnic Affairs v Mohinder Singh* (1997) 142 ALR 191 at 196.

The Tribunal then set out the factual background to the applicant's arrival in Australia to which I have already referred and then analysed the evidence before it, particularly in relation to the manner in which the applicant travelled within and left Sri Lanka.

The Tribunal noted that the applicant needed to show identification when travelling from the north of Sri Lanka to Colombo and that he passed all security checks at the airport when leaving and had a passport in his own name which carried other identifying features. The Tribunal then noted a cablegram of 29 June 1997 from the Department of Foreign Affairs and Trade which stated that a person who had crossed over from LTTE-controlled areas had to obtain a pass to travel south which would only be granted if the authorities did not suspect a person of being a member of the LTTE. The Tribunal said that the fact that the applicant was able to obtain a pass to travel to Colombo indicated that he was not considered a security risk or suspected of being a member of the LTTE. The Tribunal thought it improbable that the authorities would permit the applicant to leave Sri Lanka, which he did by producing his own passport, if they had any real interest in him. The Tribunal then noted that the authorities had ample opportunity to take action against the applicant if they had wished to do so.

It was on the basis of this evidence that the Tribunal was not satisfied that any activity the applicant or his father might have undertaken in Jaffna provided him with a profile "such that he would have been of interest to the authorities". The Tribunal noted a report (in the form of a statutory declaration) of the Australian Council of Tamil Refugees which referred to continuing human rights abuses and other problems in Sri Lanka but the Tribunal said that the report did not indicate that a

person with the profile of the applicant would face a real chance of persecution for a Convention reason.

As well as analysing the evidence in relation to the extent to which the Sri Lankan authorities would have an interest in the applicant, the Tribunal also analysed the evidence he had given in relation to his treatment in Sri Lanka. The Tribunal noted a number of inconsistencies and discrepancies in his evidence, in particular the fact that he raised incidents of detention and beatings at the Tribunal hearing to which he did not refer in his initial interview at the airport. The Tribunal then made the following critical finding:

"The applicant has furnished evidence that is inconsistent on both minor and major detail. In the view of the Tribunal it is inconceivable, in the circumstances of this case, that the applicant would not have outlined all key claims in a timely manner if they were true. In light of inconsistencies in his evidence and delays in making crucial claims, the Tribunal finds that the applicant's evidence concerning detention and mistreatment of himself or his father is not credible".

The Tribunal also referred to the applicant's claim that he had been detained by the LTTE on suspicion of having worked for the Sri Lankan army.

The Tribunal then noted the discrepancy in relation to the date the applicant said he arrived in Colombo. In the airport interview the applicant said he went to Colombo on 15 March 1997 and at the hearing before the Tribunal he said he arrived in Colombo in January 1997, recalling that it was January as it was just after the harvest festival. The Tribunal noted that the two dates were "discrepant by two months" and then said:

"The Tribunal is left in serious doubt as to whether the applicant was actually located in the north of Sri Lanka until shortly prior to his departure for Australia. He has not, however, claimed any serious difficulty in Colombo and, in assessing the material before it the Tribunal finds that he does not have a well-founded fear of persecution for a Convention reason either in relation to Colombo or the north."

The Tribunal also said:

"While noting that some young Tamil males with real connections to the LTTE may be differentially at risk of persecution, the Tribunal is not satisfied that the present applicant is at risk of such harm".

Specifically the Tribunal found that:

"The applicant's expressed fear of experiencing adverse attention from the authorities for having dug bunkers is groundless."

Consideration of Tribunal's reasons

The Tribunal's finding was that the applicant "does not have a well founded fear of persecution for a Convention reason ...". Although the Tribunal did not expressly state that it found that the applicant had a fear of persecution, determined subjectively, which was not well-founded by reference to objective considerations, I consider that on a fair reading of the Tribunal's decision that is the basis for its conclusion that the applicant did not have a well-founded fear of persecution for a Convention reason. It is true that the Tribunal did not make a specific finding as to whether the applicant had a subjective fear. However earlier in its reasons it had correctly directed itself as to the law relating to a "well-founded fear of persecution" referring to *Chan* and, in particular, it set out the proposition in *Chan* that the applicant must have a subjective fear and that the fear must have a basis in reality. The Tribunal's findings on the applicant's credibility were such as to entitle the Tribunal to reach the conclusion that the applicant's fear of persecution was not well-founded. The Tribunal was in effect assuming that the applicant had a fear of persecution or at least accepting for the purpose of the argument that the applicant had such fear. If this had not been the position there would have been no point in the Tribunal considering, and ruling on, the evidence as to whether there was a well-founded basis for such a fear. Absent such a fear there was no further inquiry to be made.

As was pointed out by the majority of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Sha Liang* (supra) at 272:

"... the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned by the way in which the reasons are expressed. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons for the decision-maker upon proper principles into a reconsideration of the merits of the decision."

I also note that Kirby J set out a number of principles which he said should guide courts in supervising decisions of the type under consideration. He said at 291:

> "1. The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of a decision-maker with a fine appellate tooth comb, against the prospect that a verbal slip will be found warranting the inference of an error of law.
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> ...
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> 3. Specifically, the reviewing judge must be careful to avoid turning an examination of the reasons of the decision-maker to a reconsideration of the merits of a decision where a judge is

limited to the usual grounds of judicial review, including for error of law.

..."

I have approached the Tribunal's reasons with these principles in mind and am satisfied that the Tribunal adopted the approach that it either found or assumed that the applicant had a fear of persecution and then determined whether that fear was well-founded by reference to objective considerations, that is it had a basis in reality.

It was submitted for the applicant that the Tribunal had fallen into an error of law as it had not considered whether the applicant had a subjective fear that was well-founded but rather, relied on its view of the applicant's credibility. The Tribunal analysed the evidence to determine whether there was a basis in reality, that is a well-founded basis for such a fear if it existed and found, in my view, that such a well-founded basis did not exist. Such a finding was open to the Tribunal having regard to the following findings which were open on the evidence:

- That the applicant was able to obtain a pass to travel to Colombo, indicating that he was not considered a security risk or suspected of being a member of the LTTE.

- In leaving Colombo the applicant produced his own passport, at least, as identification, and passed through all checks.

- Notwithstanding the existence of widespread corruption in Sri Lanka it is improbable that the authorities would permit the applicant to leave Sri Lanka if they had any real interest in him.

- It is apparent that the authorities had ample opportunity to take action against the applicant if they had wished to do so.

- It is inconceivable, in the circumstances of this case, that the applicant would not have outlined all key claims in a timely manner if they were true.

- That the applicant's actions in digging bunkers was unlikely to attract adverse attention from the authorities.

On the findings made by the Tribunal, which it was entitled to make on the evidence before it, it was open to the Tribunal to find that the applicant's fear was not based on objective facts indicating a basis in substance for it.

The circumstances surrounding the applicant's journey from north of Sri Lanka to Colombo and his departure from Colombo were also factors which the Tribunal was entitled to take into account in determining whether the Sri Lankan authorities would

have an interest in the applicant. As the majority of the High Court pointed out in *Minister for Immigration and Ethnic Affairs v Guo* (supra) at 577:

"Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is 'well-founded' when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50% chance that the object of the fear will eventuate ..."

The majority then said at 577:

"In this and other cases, the tribunal and the Federal Court have used the term 'real chance' not as epexegetic of 'well-founded', but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in the future the apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show the persecution is more likely than not to eventuate."

Whether or not a fear is well-founded depends upon the factual basis for it. The Tribunal found that the factual basis asserted by the applicant was such that it was not satisfied that the applicant was at risk of harm or persecution because of what was said to be a connection to the LTTE. In my view it was open to the Tribunal on the facts before it so to find.

The thrust of the applicant's submissions was that the Tribunal's decision was predicated primarily upon its view of the applicant's credibility and that it did not address a number of issues which were brought to its attention, nor did it properly address the proper test for a well-founded fear of persecution. It was said that the Tribunal did not address matters raised in a letter from the applicant's solicitors of 5 June 1997 nor matters raised in a supplementary statement referred to in that letter. It was also submitted that the Tribunal in making its adverse finding of credibility ignored what was said to be the overall consistency of the applicant's evidence on the critical claims advanced by him. The Tribunal's approach to other aspects of the evidence was also criticised.

In my view, and in the light of the observations I have already made, these submissions are another way of saying that the Tribunal should not have made the findings of fact it did on the evidence before it. Putting the matter another way, the applicant is seeking a merits review which it is no part of the task of this Court to undertake: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356 per Mason CJ; *Wu* at 291 per Kirby J. The Tribunal is not bound to accept uncritically the evidence of the applicant but is entitled to form a view on his credibility. In my opinion the Tribunal's findings on credit were open to it on the evidence.

I accept the proposition that at an initial interview at an airport in a strange country an applicant may not be as articulate and as forthcoming as he or she might be in a more relaxed and less threatening atmosphere. In this respect I am mindful of the cautions stated by Professor Hathaway in *The Law of Refugee Status* (1991, Butterworths) at 84 - 86 in relation to the evidence of claimants for refugee status. However, as Merkel J said in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (unreported, 24 December 1997) at 8, these cautions, although offering sound and sensible advice to decision-makers "are not of themselves rules or principles of law". The Tribunal was entitled to take into account any inconsistencies between the applicant's statement at the initial interview at the airport and his later evidence (either documentary or oral) in the hearing before the Tribunal. The Tribunal is entitled to take into account any inconsistencies in evidence given in statements made by the applicant at any of these points of time and it is for the Tribunal to form its judgment on any such inconsistency.

The issue of the credibility of an applicant in a refugee case is similar to that issue in proceedings before an administrative tribunal or court of law which has to form a judgment on the truthfulness of an applicant or plaintiff's story. The Tribunal is not bound to accept uncritically and at face value a version of events given by an applicant. And a reviewing court in a refugee case is in no different position to that of an appellate court in considering appeals on issues of findings on credibility issue. I adopt with respect the following observations of Tamberlin J in *Navaratne v Minister for Immigration and Multicultural Affairs* (unreported, 1 August 1997):

"The credibility of an applicant is largely a matter of impression. There is no reason, in principle, why the observations of the High Court in Abalos v Australian Postal Commission (1990) 171 CLR 167 at 179, as to the disadvantage of an appellate body in considering credibility findings should not apply in respect of review applications to this Court under s 476 of the Act. The oft-cited remarks of the Court as to the 'subtle influence of demeanour' are especially important in migration cases where many of an applicant's assertions must be accepted at face value in the absence of any evidence to the contrary. Inevitably, a great deal must depend on the demeanour as well as the consistency of the evidence of an applicant in testifying as to specific critical facts that are incapable of being independently verified. For these reasons it will often be difficult to persuade this Court on a review application to set aside findings by an administrative decision-maker on credibility questions."

I have carefully read the Tribunal's findings on credit and in my opinion, its findings were open to it on the evidence. It does not appear that the Tribunal made an arbitrary assessment of the applicant's credibility but rather approached the matter in what was, in my view, a rational manner, taking into account matters relevant to the issue of credibility. The proper approach of the Court when confronted with the criticism of a Tribunal's findings on the issue of an applicant's credibility has been considered recently in a number of unreported decisions in this Court: *Eric Emiantor v Minister for Immigration and Multicultural Affairs* (unreported, Merkel J, 3 December 1997); *Thangarajah Thillainadarajah v Minister for Immigration and Multicultural Affairs* (unreported, Heerey J, 3 December 1997); *Thisanathan Thevanathin v*

Minister for Immigration and Multicultural Affairs (unreported, Sundberg J, 24 December 1997); *Kopalapillai v Minister for Immigration and Multicultural Affairs* (supra).

I am conscious of the following observations of Foster J in *Guo v Minister for Immigration and Multicultural Affairs* (1996) 64 FCR 151 at 191 on the issue of credibility of an applicant in an application for refugee status before the Refugee Review Tribunal:

"Serious concerns about the creditworthiness of an applicant's testimony can, of course, be fatal to a favourable finding on the balance of probabilities. However, a finding that he or she has failed to establish fact A on the balance of probabilities because, in all the circumstances, including matters of demeanour, the decision-maker is not prepared to accept the applicant as a credible witness does not, as a matter of logic, necessarily mean that the possibility of the applicant's correctly asserting the existence of fact A has been entirely excluded. Mere doubts or concerns as to the applicant's credibility would not be sufficient to exclude the possibility. For this result, a positive state of disbelief would be required on the part of the decision-maker."

At 194 his Honour said:

"I would also make the observation that even the most experienced decision-maker can encounter considerable difficulty in assessing the credibility of a witness, especially where that witness is disadvantaged by problems of language and lack of familiarity with the situation in which he or she is placed. It is well to remember that self-contradictory statements and apparent evasiveness, although of obvious importance, do not necessarily require a conclusion that the witness is being untruthful in those aspects of his or her evidence or, more significantly, that the whole of his or her evidence should be rejected. Exaggeration or even fabrication of parts of a witness's testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony. Where proof beyond reasonable doubt is required, self-contradiction, inconsistency and evasiveness may, of course, give rise to sufficient doubt to warrant the rejection of evidence. However, in cases where only a real possibility need be shown, care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence were a portion of it could reasonably have been accepted."

In *Emiantor* (supra) Merkel J regarded these observations as significant because it was apparent that the findings made by the Tribunal in that case disclosed that it had reached a positive state of disbelief in respect of key aspects of the applicants' claim. Merkel J noted that the findings were based on the Tribunal's opportunity to see, hear and question the applicants, and he noted that the findings and the bases for them were carefully explained by the Tribunal in its reasons for decision. Merkel J concluded at 22:

"The approach of the RRT to the credibility issues was open to it on the material, was based on rational grounds and was arrived at after consideration of matters that were logically probative of the issue of credibility. In these circumstances I do not accept the contentions of the applicants that the RRT erred in law in relation to these findings or that the findings were open to challenge on any other reviewable ground. That conclusion is important to the outcome of the review as it must follow that the findings of the RRT as to the past events relied upon to support the claims for refugee status must be accepted as the starting point for the application of the 'real chance' test."

In my opinion the same observations can be made as to the Tribunal's approach to the issue of credibility in this case. By making findings on the applicant's credibility the Tribunal did not ignore or mis-apply the "real chance" or *Chan* test. It properly directed itself as to the proper test to apply and then addressed the evidence for the purpose of making findings before reaching its final conclusion based on the proper test to be applied.

The bulk of the applicant's complaints about the manner in which the Tribunal approached the evidence before it were said to constitute a failure by the Tribunal to act according to the substantial justice and merits of the case thereby resulting in a failure to observe proper procedures as required by s 420(2)(b) and s 476(1)(a) of the Act. The applicant relied on the judgments of Davies and Burchett JJ in *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 145 ALR 621 to establish a reviewable ground under these sections. The respondent submitted that *Eshetu v Minister for Immigration and Multicultural Affairs* (supra) was wrongly decided but it is not for me to determine that submission as I am bound by that decision. For present purposes I assume that the applicant's proposition of law is correct. Nevertheless on a proper analysis of what was before the Tribunal and the manner in which it went about its task, I do not consider that the Tribunal is shown to have erred in its approach to the evidence nor do I consider that it failed to act according to substantial justice and the merits of the case.

I should deal briefly with a number of the particular aspects of the evidence raised by the applicant and in particular the criticism that the Tribunal did not refer to particular aspects of the evidence in its reasons. In my view this criticism is misconceived. The solicitor's letter of 5 June 1997 did not make any particular request of the Tribunal to make any particular inquiry. Rather it brought certain matters to the attention of the Tribunal, such as the fact that the applicant's original statement was unsigned. However during the hearing the applicant told the Tribunal that the statement had been read to him and that apart from one omission which he identified he could not recall any other error or omission in the statement. Although the solicitor's letter referred to a supplementary statement there was no evidence that such a statement was in fact delivered to the Tribunal and the applicant's counsel was unable to say whether it had in fact been delivered to the Tribunal. In any event I consider that the Tribunal considered the substantial issues and matters before it in its reasons. In this respect I would adopt the observations of Sackville J (with whom

Davies and Beazley JJ agreed) in *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 136 ALR 84 at 95:

"As Wilcox J observed in Our Town v ABT (at 16 FCR 481), it is not necessary that the reasons deal with all matters raised in the proceedings; it is enough that the findings and reasons deal with the substantial issues on which the case turns.

The standard required is not one of perfection and regard must be had to the composition of the Tribunal, which does not necessarily include trained lawyers ..."

There is no substance in the criticism that the Tribunal failed to refer to the difficulties the interpreter encountered during the hearing. The transcript of the hearing was before me and on each occasion that the interpreter voiced difficulties the Tribunal gave the applicant the opportunity to tell his story and clarify the matters about which the interpreter had concern.

There is also no substance in the criticism made of the Tribunal's reference to the statutory declaration from the President of the Australian Council for Tamil Refugees. It is true that the declaration said that "young Tamils such as the applicant are subjected to untold mistreatments ...". However the Tribunal was entitled to consider all the evidence which bore on the applicant's particular situation and the statutory declaration was one part of that evidence. The statutory declaration referred to young Tamils generally but it was open to the Tribunal to find that although the applicant was a young Tamil his particular profile would not arouse interest or attention. For me to interfere with the Tribunal's finding on this issue would be to engage in an unjustified merits review.

The Department of Foreign Affairs and Trade cable 29 June 1997 should be considered in the same light. The Tribunal quoted that part of the cable which stated:

"An individual who has crossed over from the LTTE-controlled areas must obtain a pass to travel south. A pass will only be granted to a person the authorities do not suspect of being a member of the LTTE. The pass will be accepted by the security forces in Colombo subject, presumably, to suspicion arising after the pass has been issued ..."

and then said:

"That the applicant was able to obtain a pass to travel to Colombo indicates that he was considered a security risk or suspected of being a member of the LTTE."

But immediately after the passage the Tribunal quoted from the cable, the cable continued:

"We do not know whether the security forces in Colombo would check whether someone had been cleared by the security forces in Vavuniya".

It was submitted by the applicant that the Tribunal had therefore misread the cable or misapplied its substance. However I consider that this submission does not recognise what the cable was saying. The cable was not saying that the Department did not know whether a person was cleared by the security forces in Vavuniya before obtaining a pass to travel south. Rather the Department was saying that it did not know whether the security forces in Colombo would accept a pass in Colombo without first checking whether there had been a security clearance in Vavuniya. The Tribunal only used the cable in relation to its finding that the applicant was able to obtain the pass. On that point the cable did state that "a pass will only be granted to a person the authorities do not suspect of being a member of the LTTE". I consider the criticism of the Tribunal's use of the cable to be misconceived. In any event there was other evidence before the Tribunal in relation to the applicant's travel from the north to Colombo which involved him having to pass through security checks. Indeed this evidence included inconsistent evidence as to how the applicant reached Colombo; at the hearing he said he travelled direct to Colombo by ship whereas in his further statement of 3 June 1997 he said he travelled by boat from Jaffna to Trincomalee and from there to Colombo by train.

Overall there were a number of inconsistencies in the applicant's evidence which the Tribunal was entitled to take into account. In my view it does not follow, as submitted by the applicant, that if the Tribunal had taken into account the matters identified by the applicant as not referred to in the Tribunal's reasons, it would have reached on opposite conclusion on the credibility of the applicant. In any event for me to reach that conclusion would, again, require me to engage in a merits review which is not part of my role on this application for review.

It therefore follows that the Tribunal has not failed to act according to the substantial justice and merits of the case contrary to the provisions of s 420(2)(b) and s 476(1)(a) of the Act as explained by Davies and Burchett JJ in *Eshetu v Minister for Immigration and Multicultural Affairs* (supra).

The applicant also relied upon the decision of the Full Court (Wilcox, Burchett and North JJ) in *Sun Zhan Qui v Minister for Immigration and Multicultural Affairs* (unreported, 23 December 1997) but that decision involved a quite different fact situation. In this case it cannot be said that the Tribunal's treatment of the issues were so unreasonable that the decision could not have been made by a reasonable person. Further, I do not accept that the Tribunal failed to consider rationally the evidence contrary to the obligation identified by Finkelstein J in *Epeabaka v Minister for Immigration and Multicultural Affairs* (unreported, 10 December 1997).

The Tribunal was entitled to form a view on the credibility of the applicant and then apply the *Chan* test which, in my opinion, it did correctly.

The application will be dismissed with costs.

I certify that this and the preceding sixteen (16) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Goldberg

Associate:

Dated: 5 March 1998

Counsel for the Applicant:	R Appadurai
Solicitor for the Applicant:	Wisewoulds
Counsel for the Respondent:	W Mosley
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	19 February 1998
Date of Judgment:	5 March 1998