FEDERAL COURT OF AUSTRALIA

MIGRATION - appeal from decision of judge of Court exercising jurisdiction of the Court to review a decision of the Refugee Review Tribunal ("RRT") – whether procedures required by the *Migration Act* or Migration Regulations to be observed were observed by the RRT – whether the approach of the RRT to its task of assessing the credibility of the story told by the appellant involved an error of law – whether the RRT failed properly to give consideration to whether the appellant held a well-founded fear of being persecuted for reasons of imputed political opinion by reason of his age and ethnicity

Migration Act 1958 (Cth) ss 31, 36, 420, 475, 476

Migration Regulations

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379; cited

Eshetu v Minister for Immigration and Multicultural Affairs (1997) 71 FCR 300; considered

Guo v Minister for Immigration and Ethnic Affairs (1996) 64 FCR 151; cited

Kopalapillai v Minister for Immigration and Multicultural Affairs (Full Court of the Federal Court of Australia, unreported, 8 September 1998); applied

Abalos v Australian Postal Commission (1988) 171 CLR 167; cited

Devries v Australian National Railways Commission (1993) 177 CLR 472; cited

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331; cited

Attorney-General (NSW) v Quin (1990) 170 CLR 1; cited

Anisminic Ltd v Foreign Compensation Commission (1969) AC 147; cited

Craig v South Australia (1995) 184 CLR 163; cited

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

SUJEENDRAN SIVALINGAM v

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

VG 103 of 1998

MELBOURNE

O'CONNOR BRANSON& MARSHALL JJ

17 SEPTEMBER 1998

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 103 of 1998

BETWEEN:	SUJEENDRAN SIVALINGAM APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE(S):	O'CONNOR, BRANSON AND MARSHALL JJ
DATE OF ORDER:	17 september 1998
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

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

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 103 of 1998

BETWEEN:	SUJEENDRAN SIVALINGAM AppELLAnt
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE(S):	O'CONNOR, BRANSON AND MARSHALL JJ
DATE:	17 september 1998
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

INTRODUCTION

This appeal is from a decision of Justice Goldberg ("the primary judge") exercising the jurisdiction of the Federal Court to review a decision made by a member of the Refugee Review Tribunal ("RRT"). The appellant (who was an applicant before the RRT and the Court, at first instance) claims that Australia has protection obligations towards him under the Convention relating to the Status of Refugees 1951 (amended by the 1967 Protocol) (the "Refugees Convention"). The RRT was not satisfied that Australia had such obligations to the appellant. Its reasons were based largely on findings as to credit made against the applicant. The primary judge found no legal error in the RRT so doing.

In this case the appellant submits that the RRT erred in its approach to the issue of the credit of the applicant and the primary judge was wrong in declining to interfere with that decision.

This appeal was heard concurrently with the appeals in *Sutharsan Kopalapillai v The Minister for Immigration and Multicultural Affairs* (unreported, Full Federal Court, 8 September 1998) and *Thisanathan Thevanathan v The Minister for Immigration and Multicultural Affairs* in which judgment is delivered today. The same principal contentions were advanced in each of the three appeals. We have delivered separate reasons for judgment in each case. It may be noted however, that there is understandably considerable overlap between our reasons for decisions in each of the three appeals.

BACKGROUND FACTS

The appellantis a 20 year old single male from Sri Lanka. He is a Tamil from the Jaffna Peninsula.

The appellant arrived illegally in Australia on 5 April 1997 from an international flight which landed at Melbourne airport. He was interviewed at the airport by an immigration inspector with the assistance of a telephone interpreter service and was permitted to make an application for a protection visa.

The report of the immigration inspector records, amongst other things,the following:

"PAX IS SINGLE. FATHER DECEASED, MOTHER AND TWO SISTERS IN SRILANKA. PAX WAS A STUDENT ('O' LEVEL) TO 1994 AND HAD WORKED SINCE, DOING GARDENING/HORTICULTURE.

HE STATED THAT HIS HOME TOWN IS PALALI AND THAT HIS FAMILY MOVED TO THE NEARBY TOWN OF ACHUVELLY IN 1991 AFTER THEIR HOUSE WAS DESTROYED DURING HOSTILITIES.

THEY CAMPED WITH OTHER FAMILIES AT A SCHOOL THERE.

HE LEFT SRILANKA BECAUSE OF PROBLEMS WITH THE ARMY AND WITH THE LTT (TAMIL TIGERS).

IN MARCH 96 THE LTT WHO SUSPECTED HIM OF SUPPORTING THE ARMY, TOOK HIM AND HELD HIM FOR THREE DAYS. THEY BEAT HIM AND BROKE HIS LEG.

IN JULY 96 THE ARMY HELD HIM FOR TWO DAYS.

THE ARMY TOOK HIM AGAIN IN OCTOBER 96 AND HELD HIM FOR ONE WEEK. AT THIS TIME HIS FATHER WENT TO PLEAD PAX' CASE AND WAS BEATEN. HIS FATHER DIED SHORTLY AFTERWARDS AS A RESULT OF THE BEATING.

ASKED WHY THE ARMY HELD PAX, HE STATED THAT HE WAS PART OF THE ROUND UP THAT OCCURS FREQUENTLY."

By an application dated 15 April 1997 the appellant made application for a protection visa. On 21 April 1997 the appellant's then solicitor provided to the respondent an unsigned statement apparently taken from the appellant on 16 April 1997 with the assistance of a Tamil interpreter. Thestatement indicates thatthe appellant's father was employed by the Liberation Tigers of Tamil Eelam ("the LTTE") as a lorry driver and was a strong sympathiser of the LTTE believing in the objectives of the LTTE namely quality and justice for the Tamil people of Sri Lanka. The statement includes the following passage:

"After the 1995 evacuation when the Sinhalese Army arrived and cleared out the Northern Peninsula of Tamil people and when the Army had gained complete control on that Peninsula we resided in Kaithady sharing residence there with Tamil community.

We had been tenants in a vegetable farm at Atchuveli but [our] main income was from the salary my father earned. My father was a driver for supplies to the Tamil Tigers until he was arrested on the 15 October, 1996, beaten, tortured and then killed on about the 20th of October, 1996. It was the Sri Lankan Army who did this as a consequence of his involvement with their opponents the LTTE."

The appellant's statement indicates that the appellantand his family returned to Atchuveli soon after the death of his father and that the appellant was later identified as a LTTE sympathiser by masked Tamil informers and arrested, beaten and detained for 10 days. The statement asserts:

"I was detained for 10 days. I was beaten with plastic tube and questioned as to scars still quite visible on my lower left ankle. I was interrogated endlessly and was nearly suffocated in petrol fumes as a means of torturing me until I confessed that my father had involved with the Tamil Tigers.

Likewise any other information I had was extracted from me and I was forced in a state of great fear to likewise inform, under protection of a mask, at a subsequent two occasions. …

After the 10 days the Army Commander had been bribed by a family friend in Intralingam who apparently paid 50,000 rupees to the corrupt Army Officer to have my release arranged. There were follow up visits and threats from the Army upon my release whilst in Kaithady and likewise I knew I was under great suspicion from the Tamil Tigers themselves."

As to the appellant'sdeparture from Sri Lanka, the statement asserts:

"I took a boat ride from KKS Port in Jaffna to Trincolami Port. From there were stayed for approximately 8 days in Columbo whilst the agent that Intralingam had contacted made the preparations. I was given a false passport and was able to flee the country, travelling to Cambodia where we stayed in the Hotel Evergreen for 16 days.

We then went to China in Guanhzhou where we stayed in the New Minster Hotel. I had left Columbo on 5 February, 1997 and departed from Guanhzhou bound for Australia on 5 April 1997. The agent had accompanied me to Cambodia and China but he did not allow me to retain the travel documents and passport papers. Rather he put in on the plane bound for Melbourne (a 12 hour flight) and took the passport materials from me once I was seated."

At the hearing before the RRT the solicitors for the appellant gave an explanation as to the circumstances in which the unsigned statement was obtained and by letter dated 5 June 1997, after the hearing, a submission was made by those solicitors in the following terms :

"We acknowledge receipt of your letter dated 3 June 1997 and thank you for the opportunity to provide further material.

…

We can confirm that due to an oversight in our own office, (perhaps arising as a result of the transfer of our Peter Wearne from our Springvale office, which was closed at about this time, to the main office in Dandenong involving quite a lot of

disruption and administrative difficulty), the original unsigned Statement by the applicant filed with Forms B and C on 17 April 1997 was not subsequently signed by him. It was not sent to him and had not been corrected by him as at the date of the RRT hearing.

In our usual procedure the signature would be obtained, after necessary corrections and amendments are effected, following the dictation of a statement based upon notes derived at the original conference held between our migration agent and the particular refugee applicant at the IDC. …

We note that the supplementary Statement of the applicant in regard to his allegations concerning his handling by the Federal Officers at their intercepting of him upon his arrival at Melbourne airport was signed by him and apparently no problems or apparent inconsistencies were raised at the RRT hearing on 28 May 1997 in respect of that part of his story.

…

We do apologise to the RRT and the presiding member in question whose function is made even more difficult taking evidence from the applicant in the context that we have described above. We consider these matters must be acknowledged and confirmed for the sake of the rights of the applicant."

In a further statement signed by the appellant on 4 June 1997, the appellant gave an account of his journey to Australia, his two arrests and the arrest and subsequent death of his father.

REASONING OF THE REFUGEE REVIEW TRIBUNAL

In its written reason for decision the RRT noted:

" …that the applicant made a number of detailed claims in his initial interview at the airport. He said at that time that he was detained for three days by the LTTE in March 1996, for two days by the arm in July 1996 and for a week in October of that year. He made no mention of his father being beaten and detained in late 1996, and dying in custody. At the hearing he claimed that he was detained for ten days by the army at an unknown location in November 1996. When discrepancies in his evidence were referred to by the Tribunal the applicant said that he was also detained by the army as part of a general round-up for three or four days in July 1996. He claimed at the hearing that he gave false evidence during his interview at the airport because he was fearful of being turned around and because that the agent who facilitated his departure from Sri Lanka instructed him to mention only minor problems upon arrival. Yet he did provide specific detail at that time, not merely of a minor nature."

The RRT concluded (on the issue of credibility):

"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 the 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 not credible."

The Tribunal went on to note the various discrepancies in the submissions made by the appellant. The Tribunal found the appellant's claim that he was detained by the LTTE on suspicion of having worked for the army was at odds with his evidence that he not only willingly assisted the LTTE to build bunkers, but encouraged others to pitch in, as well. The Tribunal seriously doubted whether the appellant was actually located in the north of Sri Lanka because at his interview with immigration inspector he stated that he went to Colombo on 15 March 1997. At the hearing he said he arrived in Colombo in January 1996; he recalled it was the month of January because it was just after the harvest festival. The Tribunal concluded that the appellant does not have a well-founded fear of persecution for a Convention reason were he to return to Sri Lanka whether he were to reside in Colombo or in the north of Sri Lanka.

The Tribunal gave consideration to whether the appellant faced persecution if required to return to Sri Lanka because he is a young Tamil male. The Tribunal noted that the appellant had been able to obtain a passport and travel to Colombo, passing stringent security checks. It was not satisfied that any activity he or his father may have undertaken in Jaffna provided him with a profile such that he would be of interest to the authorities. The Tribunal concluded that *"the applicant does not have a well-founded fear of persecution for a Convention reason."*

REASONS OF THE PRIMARY JUDGE

The primary judgeconsidered the RRT's reasoning and concluded:

"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."

His Honour considered that by making findings on the appellant's credibility the RRT did not ignore or mis-applythe test in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

CONTENTIONS ON APPEAL

The contentions of the appellant amounted to two propositions. First it was argued that the primary judge erred in concluding that the RRT did not make an error of law in adopting the approach which it did to the assessment of the credibility of the applicant. This aspect of the appellant's case on appeal was outlined in the following paragraphs of the appellant's written submissions:

> "18. The proper construction and application of the refugee criteria in the Act involves both substantive and procedural considerations The test must be properly understood, and must be administered and applied properly. These two aspects cannot be strictly separated.
>
> 19. The main contentions of the appellant in the present case is that the RRT erred in its approach to the issue of the applicant's credibility. The case raises, in the context of the obligations and mechanisms described above, a question of principle as to the proper approach to be adopted in relation to this issue.
>
> …
>
> 21. The law recognises … that special circumstances apply in certain cases in which issues of credibility arise. … It has frequently been stated in academic learning that refugee cases involve such special considerations. … The appellant submits that the RRT in the instant case … has not taken sufficient account of these considerations and has thereby adopted an improper approach to the fulfilment of its function and role under the Act and Regulations and Australia's obligations under the Refugees Convention.
>
> 22. A decision maker who adopts an incorrect approach to the issue of credibility will have failed to ask the right question or misunderstood his or her proper function when administering the Refugees Convention and thereby will have erred in law, failed properly to exercise their jurisdiction and misconstrued and misapplied the Convention … .
>
> …
>
> 27. The task of deciding whether particular claims are credible must never be allowed to become a substitute for the true test in the Refugees

> Convention. The approach of the RRT in the instant … case is to treat 'credibility' as a test in, and of, itself. This approval fundamentally distorts the function of the RRT under the Act". (citations omitted)

Second, the appellant argued that the primary judge erred in upholding the finding of the RRT that the appellant does not have a well-founded fear of being persecuted by reason of imputed political opinion arising from his being a young Tamil male in Sri Lanka.

STATUTORY BACKGROUND

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

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

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

Australia has protection obligations to the applicant under the Refugees Convention if he is a person who:

"… owing to a 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". (Art 1A(2) of the Refugees Convention)

Section 31 of the Act authorises the making of regulations which prescribe criteria for a visa or visas of a specified class, including protection visas. Clause 866.221 of Schedule 2 of the Migration Regulations ("clause 866.221") provides that a criteria to be satisfied by the applicant for a protection visa is that at the time of the decision on his or her application:

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

The decision of the RRT is a decision reviewable by the Federal Court (s 475 of the Act). Section 476 of the Act prescribes the grounds upon which an application for review may be brought in the Federal Court. It is in the following terms:

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

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

(b) that the person who purported to make the decision did not have jurisdiction to make the decision;

(c) that the decision was not authorised by this Act or the regulations;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(e) that the decision involved an error of law, being an error involving an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

(f) that the decision was induced or affected by fraud or by actual bias;

(g) that there was no evidence or other material to justify the making of the decision.

(2) The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

(3) The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:

(a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and

(b) an exercise of a personal discretionary power at the direction or behest of another person; and

(c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

(d) taking an irrelevant consideration into account in the exercise of a power; or

(e) failing to take a relevant consideration into account in the exercise of a power

(f) an exercise of discretionary power in bad faith; or

(g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).

(4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

CREDIBILITY ISSUES

Section 476(1)(a)

Section 476(1)(a) of the Act is concerned with procedures required by the Act or the Regulations to be observed. The majority of the Full Federal Court in *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300 took the view that s 420 of the Act describes procedures with which the Refugee Review Tribunal is required by the Act to comply (per Davies J at p 203; per Burchett J at p 317). Although the High Court has granted special leave to the respondent to appeal the decision in *Eshetu's* case to the High Court, we consider that it is appropriate for us to follow the decision. No application was made for the hearing of this appeal to be adjourned pending a decision of the High Court in *Eshetu's* case.

Section 420 of the Act provides as follows:

"**420. (1)** The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal in reviewing a decision:

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

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

Davies J observed in *Eshetu*'s case at p 204 that one of the elements of acting *"according to substantial justice and the merits of the case"* is -

"the provision of procedures which are fair and just and are directed to ensuring that the application can be decided according to its substantial justice and merits".

When asked to identify the matter of procedure concerning which the appellant made complaint under s 420 of the Act, Mr Bell QC, senior counsel for appellant responded:

"The matter of procedure was the manner in which the tribunal approached its task of assessing … credibility …"

Counsel for the appellant submitted that the primary judge failed to adopt a proper approach with respect to the amount of deference he said should be paid to a finding on credit made by the RRT. Counsel drew attention to the purpose intended to be served by the Refugees Convention, namely the positive purpose of ensuring that those persons who fall within the terms of the convention can obtain refuge. Counsel submitted that it was important that a decision maker adopt a positive stance towards the Refugees Convention and towards the fulfilment of Australia's obligations thereunder, and avoid any assumption that applicants for protection visas are untruthful.

If the RRT had reached its decision in this case by adopting a procedure which placed on the applicant an onus of establishing that he was truthful, or even a procedure based on the assumption that the purpose of the hearing before it was to discover whether the applicant was a truthful person, we would consider such procedures as contravening s 420 of the Act. As Foster J observed in *Guo v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 151 at 194:

"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."

However, for the reasons given below, we agree with the approach taken by the primary judge to the criticisms made by the appellant of the RRT's approach to issues of credibility.

As we said in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (Full

Court of the Federal Court of Australia, unreported, 8 September 1998):

"The role of the RRT was to determine whether, on the totality of the evidence and other material available to it, it was satisfied that the appellant is a person to whom Australia has protection obligations under the Refugees Convention (s 415 of the Act and clause 866.221). It may be that the submissions of the appellant amount to a contention that the criterion for a protection visa prescribed by clause 866.221 should be understood, not as a criterion requiring satisfaction in the decision maker that the applicant is a person to whom Australia has protection obligations under the Refugees Convention, but rather, as a criterion designed to eliminate from consideration for the grant of a protection visa a person whom the RRT is satisfied on the evidence and other material before it is not a person to whom Australia has protection obligations. To the extent that the appellant did advance such a contention, it must be rejected as being contrary to the plain meaning of s 31 of the Act and clause 866.221: the criterion prescribed by clause 866.221 is a positive and not a negative criterion." (at 12)

Section 476(1)(e)

The appellant submitted that the approach of the RRT to its task of assessing the credibility of the story told by the appellant also involved an error of law within the meaning of s 476(1)(e) of the Act. In *Eshetu*'s case at pp 304-305, Davies J expressed the view, which we consider it appropriate to follow, that the *"applicable law"* for the purposes of s 476(1)(e) -

"will include not only criteria specified in the Act and Migration Regulations but also the substantive elements of the s 420(2)(b) requirement that the Refugee Review Tribunal act in accordance with the substantial justice and merits of the case."

(See also Burchett J at p 317)

The appellant accepted that the determination of the credibility of a witness in legal or administrative proceedings may be an important part of the role of the trier of fact in any given case. However, he contended that decisions of the High Court such as *Abalos v Australian Postal Commission* (1988) 171 CLR 167 and *Devries v Australian National Railways Commission* (1993) 177 CLR 472 are distinguishable in

the context of judicial review of decisions of administrative bodies such as the RRT. Such authorities, it was argued, are to be applied only where a decision on credit has been made: -

(a) by a court constituted by judges with years of legal training and security of tenure;

(b) where pleadings have identified the issues for decision so that witnesses are on notice of the relevant issues;

(c) in a context in which legal representation is the norm so that the impartiality of the judge is not infringed by his or her involvement in the process of obtaining evidence from a witness;

(d) in a context in which careful attention is paid to the formal qualifications of any interpreter, and to the quality of the interpreting service provided by him or her; and

(e) following a hearing open to public scrutiny.

Counsel for the appellant observed that the RRT is different from a court of law in each of the above regards. Moreover, the appellant submitted that refugee cases involve special considerations so far as credibility is concerned. In support of this submission he referred us to a number of academic articles discussing this issue (eg. Professor Hathaway, *The Law of Refugee Status"* (1991, Butterworths) at pp 84-86; Taylor, *"Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions"* (1994) 13 University of Tasmania Law Review 43 and Kneebone, *"The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?"* (1998) 5 Australian Journal of Administrative Law 78).

We accept that refugee cases may involve special considerations arising out of problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia. Ordinarily, the knowledge and experience of members of the RRT may be expected to assure that they are sensitive to those special considerations. The specialist nature of the experience of members of the RRT was recognised by Kirby J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 at 394.

This passage from Hathaway [cited above] summarises the discussion:

"First, the decision-maker must be sensitive to the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority. They may thus be less than forthright in their dealings with immigration and other officials, particularly soon after their arrival in an asylum state. The past practice of the [Immigration Appeal] Board of assessing credibility on the basis of the timeliness of the claim to refugee status, compliance with immigration laws, or the consistency of statements made on arrival with the testimony given at the hearing is thus highly suspect, and should be constrained in the contextually sensitive manner discussed previously in Chapter 2.

Second, it is critical that a reasonable margin of appreciation be applied to any perceived flaws in the claimant's testimony. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution. Because an understandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment, only significant concerns about the plausibility of allegations of direct relevance to the claim should be considered sufficient to counter the presumption that the sworn testimony of the applicant is to be accepted as true. As stated in Francisco Edulfo Valverde Cerna [Immigration Appeal Board Decision, 7 March 1988]:

> The Board does not expect an applicant for Convention refugee status to have a photographic memory for details of events and dates that happened a long time ago, but it is reasonable to expect that important events that happened as a consequence of other events should be found to have taken place in some consistent and logical order.

Ultimately, however, even clear evidence of a lack of candour does not necessarily negate a claimant's need for protection:

> Even where the statement is material, and is not believed, a person nay, nonetheless, be a refugee. 'Lies do not prove the converse.' Where a claimant is lying, and the lie is material to his case, the [determination authority] must, nonetheless, look at all of the evidence and arrive at a conclusion on the entire case. Indeed, an earlier lie which is openly admitted may, in some circumstances, be a factor to consider in support of credibility." (footnotes omitted)

As we said in *Kopalapillai v Minister for Immigration and Multicultural Affairs*) Full Court of the Federal Court of Australia, unreported, 8 September 1998), Professor Hathaway's cautions amount to sound and sensible advice to, and guidelines for, decision makers, - in this case the RRT.

Did the RRT in the present case fail to comply with the substantive elements of the requirement s 420(2)(b) that it act in accordance with the substantial justice and merits of the case by failing, as the appellant contended, to take sufficient account of the special considerations affecting refugee cases so far as assessments of credibility are concerned? In answering this question it is important for us to bear in mind that it is not open to the appellant to seek a review of the merits of the decision of the RRT. Parliament has determined that ordinarily the RRT is to be the final arbiter on the merits for applications for protection visas. As Brennan J said in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 – 36:

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

As we said in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (Full Court of the Federal Court of Australia, unreported, 8 September 1998),

"the crucial criterion for the grant to the appellant of a protection visa was that the Minister, or on review the RRT, is "satisfied" that the appellant is a person to whom Australia has protection obligations under the Refugee Convention. A decision as to "satisfaction" is not immune from review (Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259). However, it is not to be overlooked that the criterion reflects a decision to make the satisfaction of an administrative decision maker, and not the satisfaction of a judge or a court, the determinant of eligibility for the grant of a protection visa. That is, it is part of the test of eligibility that such satisfaction be entertained by a decision maker who may not be legally trained, does not enjoy security of tenure, will not ordinarily conduct a public hearing and may involve himself or herself in the process of obtaining and elucidating evidence. Incidentally, we wish to make it plain that we do not consider that any, or all, of the above features is or are inimical to fair and just factual determinations. A number of highly regarded fact finding bodies and tribunals in this country share some or all of the above features.

Whilst a decision maker concerned to evaluate the credibility of the testimony of a person who claims to be a refugee in Australia will need to consider, and in many cases consider sympathetically, possible explanations for any delay in the making of claims, and for any evidentiary inconsistencies, there is not rule that a decision maker may not reject an applicant's testimony on credibility grounds unless there are no

possible explanations for the delay or inconsistency (S Taylor (1994) 13 UTLR 43). Nor is there a rule that a decision maker must hold a "positive state of disbelief" before making an adverse credibility assessment in a refugee case. The reference by Foster J, sitting as a member of the Full Federal Court in Guo's case at p 191, to a requirement for a "positive state of disbelief" was not directed to this issue of the determination of credibility, but rather to the question of when an adverse credibility finding will logically found a positive finding that a particular fact asserted by the witness does not exist." (at 16)

Applying these principles to the present case we agree with his Honour's conclusions in that the RRT made no error of law in reaching its conclusion on the credibility of the applicant. We also agree with the primary judge that the RRT made no error of law in the use which it made of those conclusions. We reject the submission that the approach of the RRT to the task of assessing the credibility of the story told by the appellant involved an error of law within the meaning of s 476(1)(e) of the Act.

Sections 476(1)(b) and (c)

The reliance placed by the appellant on these grounds of review was based on his submission that the RRT lacks jurisdiction to reach a decision otherwise than in accordance with law (*Anisminic Ltd v Foreign Compensation Commission* (1969) AC 147 per Lord Reid at p 171; considered in *Craig v South Australia* (1995) 184 CLR 163 at 178-179).

As we said in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (Full Court of the Federal Court of Australia, unreported, 8 September 1998)

"The error of law on which relevance was placed was … the allegedly erroneous approach of the RRT to its task of assessing the credibility of the appellant. As we are not satisfied that the RRT acted in this regard otherwise than in accordance with the law, it is not necessary for us to consider further these grounds of review." (at 17-18)

IMPUTED POLITICAL OPINION

The appellant contended that the RRT failed properly to give consideration to whether the appellant held a well-founded fear of being persecuted for reasons of imputed political opinion by reason of his age and ethnicity.

The RRT gave consideration to the appellant's claim in this regard in the following passages form its reasons for decision:

"The applicant conceded that he needed to show ID when travelling from the north to Colombo. He also passed all security checks at the airport when he left Sri Lanka on a passport issued in his own name and which carried other identifying features.

…

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

The applicant was provided with a passport. In leaving Colombo he produced his own passport, at least, as ID, 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.

…

Notwithstanding reports of an improvement in the human rights situation since the election of the People's Alliance government, there continue to be reports of some random arrests, of frequent mistreatment of detainees and of other more serious breaches of human rights. 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.

It is apparent that anyone who lived on the Jaffna Peninsula during the period of de facto government by the LTTE would, out of necessity at least, have had informal, and probably "official" dealings with the LTTE." [RRT Decision pp 7-11]

In our view the above passages while brief and, to an extent, generalised, disclose that the RRT did give proper consideration to the question of whether the appellant

had a well-founded fear of being persecuted for reasons of imputed political opinion. We agree with the primary judge that the findings which it made were open to it on the evidence and other material before it and are not open to challenge on any of the grounds prescribed by s 476 of the Act.

The appeal must be dismissed with costs.

I certify that this and the preceding seventeen (17) pages are a true copy of the Reasons for Judgment herein of the Honourable Justices O'Connor, Branson and Marshall

Associate:

Dated: 17 September 1998

Counsel for the Applicant:	Mr K H Bell QC with Mr R Appudurai
Solicitor for the Applicant:	Wisewoulds, Solicitors
Counsel for the Respondent:	Mr W Mosley
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	20 – 21 July 1998
Date of Judgment:	17 September 1998