6FEDERAL COURT OF AUSTRALIA

Tharmalingam v Minister for Immigration & Multicultural Affairs

[1999] FCA 1180

IMMIGRATION - Protection Visa - Convention Relating to Status of Refugees 1951 - Asylum seeker recognised as refugee in France - whether owed protection obligations by Australia under the convention - whether right of re-entry to France has been lost - nature of evidence on which Refugee Review Tribunal can decide that question - whether apparent loss of right to re-enter France by effluxion of time after decision of Refugee Review Tribunal enables Court to remit matter for further consideration by Tribunal.

Migration Act 1958 ss 48B, 417, 476(4)(a)

Convention on the Status of Refugees 1951

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 applied

Minister for Immigration and Multicultural Affairs v Thiyagarajah (Supplementary Reasons for Judgment, unreported 4 March 1998) referred to

Sellamuthu v Minister for Immigration and Multicultural Affairs [1999] FCA 247 (unreported, 19 March 1999) distinguished

Reg. v Home Secretary; Ex parte Cambolat [1997] 1 WLR 1569 referred to.

YOGARAJAH THARMALINGAM v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 411 of 1999

RYAN, TAMBERLIN and MADGWICK JJ

SYDNEY

26 AUGUST 1999

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 411 OF 1999

ON APPEAL FROM A SINGLE JUDGE

OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	YOGARAJAH THARMALINGAM Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	RYAN, TAMBERLIN and MADGWICK JJ
DATE OF ORDER:	26 AUGUST 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal, such costs to be taxed in default of agreement.

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 411 OF 1999

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BETWEEN:	YOGARAJAH THARMALINGAM Appellant
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JUDGE:	RYAN, TAMBERLIN and MADGWICK JJ
DATE:	26 AUGUST 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE COURT

1 This is an appeal from an order of a single Judge of the Court dismissing an application for review of a decision by the Refugee Review Tribunal ("the Tribunal") to the effect that the appellant, Mr Tharmalingam, was not a person to whom Australia owed protection obligations under the Convention on the Status of Refugees 1951 ("the Convention"). The appellant is a Sri Lankan citizen who had fled, in 1992, to France where he lived in a large group of Sri Lankan Tamil refugees. Because of literary and other activity in which he engaged which was critical of the LTTE (a Tamil group to which his group, "EROS", was opposed), he feared that he would be subject to persecution in France, a fear which he claimed was substantiated by the alleged murder by the LTTE in Paris of his associate, Mr Sabalingam.

2 On 14 February 1996, the appellant, who had arrived in Australia on about 13 January 1996, applied to the Australian authorities for a Protection

Visa (866). That application was refused by a delegate of the Minister but, on a review by the Tribunal, that decision was set aside on 24 July 1997. The Minister then sought review by this Court of that decision and, on 6 February 1998, Whitlam J, by consent, set aside the Tribunal's decision and remitted the matter to the Tribunal. In the meantime, a Full Court of this Court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 had held that Australia did not owe protection obligations to a person who had been accorded refugee status in France and was entitled to effective protection in that country. Accordingly, when Mr Tharmalingam's application returned to the Tribunal it was seen to be appropriate to determine it by answering the following questions:

(1) whether the appellant had the right to reside in, enter and re-enter France;

(2) whether there was a risk that France would return the appellant to Sri Lanka; and

(3) whether the appellant had a well-founded fear of persecution in France.

3 The Tribunal resolved the third of those questions adversely to the appellant and there was no challenge either at first instance or on appeal to that finding. However, it was urged that it was not open to the Tribunal to find that the appellant had a right to re-enter France.

4 The objective facts before the Tribunal were not in dispute. The appellant had a *Certificat de Refugie* which expired on 15 March 1998. He also held a current *Carte de Resident* which allowed him to live and work in metropolitan France until 11 April 2004. He had travelled to Australia on a *Titre de Voyage* which expired on 9 June 1996. The evidence before the Tribunal as to the effect of a *Titre de Voyage* included a cable from the Australian Department of Foreign Affairs and Trade which contained this passage:

"Refugees who travel outside France normally travel on a Titre Voyage which shows the date on which they were given refugee status and the date by which they must re-enter France. The re-entry date can be less than the validity of the Titre de Voyage. Three years appears to be the maximum re-entry validity, for persons with substantial periods of residence in France. As previously advised France will accept back refugees within the validity of the re-entry period, but once that has expired they are unlikely to accept them back (at least from a Convention country like Australia)."

5 The second piece of evidence before the Tribunal relevant to the appellant's re-entry to France was a memorandum from the French Deputy Consul-General dated 18 August 1998 to Mr Foster of the Tribunal which was in these terms:

"The French Authorities have just advised me that if left France for a period of time exceeding three years, no longer has the right to reside in

France, and, consequently, the renewal of travel document would not be considered a “mere formality”.

Furthermore, prolonged stay in a country where is likely to receive protection will not improve chances of returning to France.

Hoping this information will be of assistance to you.”

6 That memorandum, it is common ground, related to a person other than the appellant since, as the Tribunal explained *“the message relates to another person, the name and gender references of that person have been omitted.”*

7 Thirdly, the Tribunal had received information from the French Consulate in Sydney which was specifically related to the appellant. As summarised by the Tribunal that information was :

“So far as his position vis a vis France is concerned, the position was clarified for the Tribunal in a conversation with M. Magniadas, supervisor of the visa section at the French consulate in Sydney and an officer of the RRT on 13 August 1996, as follows:

> The applicant had violated the conditions under which he was granted protection (by not returning to France or applying for a renewal of his Titre de Voyage within the specified time). The French government would need to decide if he was still under their protection. To return to France, the applicant would have to gain permission to renew his Titre de Voyage. The possession of a valid Carte de Residence is not sufficient for him to renew his Titre de Voyage. He can apply to renew his Titre de Voyage at the French Consulate, but the matter must be referred to France for a decision and M. Magniadas thinks the process will take at least 2 months. If the renewal is granted he can return to France (as a resident since his Carte de Residence is still valid). He could then apply in France for a renewal of his Certificat de Refugie. M. Magniadas could give no opinion on the likelihood of the Titre de Voyage being renewed.

In a further conversation on 31 October 1996, the same officer advised the Tribunal:

> If the applicant made an application for refugee status in another country, then France considers that the applicant is now under the protection of that country until the application is decided. If the application is refused, then the French authorities will consider whether they will renew his Titre de Voyage, but they will not consider such a renewal while he has an unresolved claim for refugee status in Australia. As he put it, France considers that, under international law, responsibility for the applicant has transferred from France to Australia.”

8 The Tribunal relied on the memorandum from the French Deputy Consul-General, concededly related to another applicant, as supporting a finding that *"provided an application for renewal of the travel document is made within three years from the date of departure from France and there is no likelihood of the applicant receiving protection in this country, the renewal will be granted."* Mr Leeming of Counsel for the appellant contended that the memorandum of 18 August 1998 did not support a conclusion that an applicant who had been out of France for two years and nine months had a right to a renewal of his or her French travel document. It was pointed out that the memorandum had been elicited in response to enquiries made by the Tribunal about another applicant whose circumstances were unknown to the Court and may have differed significantly from those of the appellant. Those features may be conceded, but they do not detract from the impression that the memorandum was a statement of general policy to the effect that a person who had been absent from France for less than three years was entitled as of right to a renewal of his or her French travel documents, including a *Titre de Voyage*. That inference could more confidently be drawn by the Tribunal in the absence of evidence, which the appellant was not impeded from adducing, that persons in his situation had no right to renewal of their *Titres de Voyage* but were dependent on the favourable exercise by the French authorities of some administrative discretion.

9 In his reasons for judgment, the learned primary Judge indicated that he had some difficulty accepting the submission advanced on behalf of the appellant that *"a statement to the effect that a particular person will not be entitled to automatic renewal of a travel document where that person has been outside France for three years, does not mean that such a document will be automatically renewed if the period of stay is less than three years".* However, it was contended on the appeal that his Honour fell into error when he suggested that the existence of a *right* of re-entry to France was not a pre-condition of a decision by the Tribunal refusing the appellant's application. In that respect, the learned primary Judge observed:

"It is true that the material from the Consulate, whether looked at separately or collectively, does not contain in its terms a commitment to renew the travel document in the case of the applicant. However, that circumstancewas not, of itself at least, a pre-condition of the decision-making process undertaken by the Tribunal. It may be accepted that the Consulate had made it clear that renewal was not automatic in the sense that it was no "mere formality", but the relevant question before the Tribunal was a broader one.

As has been noted, the Tribunal found that it was "in [its] view highly unlikely that France will refuse to renew the titre de voyage if Australia refuses the application for a protection visa". In my opinion, there was evidence in the form of the material from the French Consulate which made this conclusion one that was open."

10 To similar effect, his Honour doubted whether s 476(4)(a) of the *Migration Act 1958* ("the Act") had any relevant application to the present case. He continued:

"As has been said, the decision-making process to be undertaken by the Tribunal did not depend in any specific sense upon a conclusion being reached that the applicant had an automatic entitlement to a renewal of his titre de voyage. True, it is that the prospects of that renewal was a material circumstance to be taken into account, but it is not the case that the decision-maker was required by law, domestic or international, to reach the decision **only if** that particular matter, that is, the renewal of the titre de voyage, had been established. There is no explicit provision in the Act or in the Convention to that effect and, in my view, no basis, in logic or experience for making an implication to that effect."

11 Those observations were said to be inconsistent with the conclusion reached by a Full Court of this Court in *Thiyagarajah* where von Doussa J, with whom Moore and Sackville JJ agreed, concluded at 562:

"It is not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status. It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee, and has accorded that person effective protection, including a right to reside, enter and re-enter that country."

12 We accept that the approach taken by the Full Court in *Thiyagarajah* requires a finding that the applicant has a *right* to re-enter the third country before the Tribunal is relieved of the necessity to consider the merits of the application. However, it is unnecessary for us to determine whether the primary Judge in the present case misapplied that principle because the evidence constituted by the Deputy Consul-General's memorandum of 18 August 1998 clearly permitted the Tribunal to infer the existence of the requisite right. That the Tribunal drew that inference in the present case is clear from its reasons where it noted:

"The question therefore is whether there is a real chance that France will refuse the applicant the renewal of his titre de voyage in the event that he is refused a protection visa in this country. The most recent information supplied by the French Consulate indicates that provided he applies for renewal within three years from his departure from France, a period which expires on 11 January 1999, the renewal of the travel document will be granted on the basis that he still has a right of residence in France. The earlier information suggested that France would not consider the issue until the application in Australia is resolved. So far as this Tribunal is concerned, the issue has been resolved on 13 October 1998 well before the relevant period runs out."

13 It is sufficient for the finding made by the Tribunal to be open to it on the evidence and it is not to the point that the learned primary Judge or the members of this Full Court, if required to act as a tribunal of fact, might have drawn a different inference.

14 The second, although related, argument advanced on behalf of the appellant was that the Tribunal had been under a duty to make more enquiries than it did to establish whether the French authorities would grant the appellant the travel documents necessary to evidence a right of re-entry to France. However, this is not a case where the applicant has been unable, through fear, absence from his own country or other circumstances, to substantiate claims which he has made which had to be determined by the Tribunal. As to such a case, Wilcox and Madgwick JJ observed in *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247 (unreported, 19 March 1999) at para 19:

"It follows that all of the substantial claims, and information in support of them, put forward by an applicant must be considered. In the course of doing so, the RRT must also, of course, bear in mind whether it should exercise any of its impressive ancillary powers to supplement the information put before it by either the Department or the applicant. In this case, the RRT did not consider all the available information. This constitutes, in our opinion, an “error of law being an error involving an incorrect interpretation of the applicable law” within the meaning of s 476(1)(e). It could only be by virtue of an incorrect interpretation of the Act as to the RRT’s duties that the Tribunal member could have considered it unnecessary to consider the applicant’s claims, and the available information, more thoroughly than he did."

15 In the present case, there was no apparent impediment to the appellant's establishing by evidence from the French authorities or otherwise, that, had it been the fact, the appellant had, as at 13 October 1998, no right of re-entry to France. Accordingly, we are unable to impute to the Tribunal any departure from the principle which was stated in these terms by Lord Woolf MR delivering the judgment of the Court of Appeal in *Reg. v Home Secretary; Ex parte Cambolat* [1997] 1 WLR 1569 at 1579:

"It is also important to bear in mind that it is for the Secretary of State to evaluate the material. If the Secretary of State could properly come to the decision which he did on that material then this court cannot interfere. He is the person who has to form the opinion. However in order to form the opinion, it is necessary for him to take such steps as are reasonable in the circumstances to acquaint himself with the relevant facts."

16 It has been submitted in the alternative on behalf of the appellant that it is clear from the material obtained from the Deputy Consul-General that, any previously existing right of re-entry to France, has been lost upon the expiration of three years since he left France and he is now dependent on the favourable exercise of a discretion by the French authorities. As a result there is, so it was submitted, a real risk that the appellant will not be able to return to France. We entertain grave doubts whether this Court, on reviewing a decision of the Tribunal, can take account of events which have happened, or circumstances which have changed, since the Tribunal made the decision under review. However, we have been referred to the supplementary reasons for judgment of the Full Court in *Thiyagarajah* (unreported, 4 March 1998). In the joint reasons of von Doussa and Moore JJ reference was made to this

passage from the judgment of von Doussa J in the earlier judgment of the Full Court (1997) 80 FCR 543 at 569:

"There is plainly insufficient material before this Court to determine whether the respondent's travel documents can or cannot now be renewed or whether, if Australia attempted to return the respondent to France, he would now face a danger of refoulement to Sri Lanka. The latter would seem highly unlikely, since France would continue to have obligations under Article 33 of the Convention. Nonetheless, it is perhaps a possibility. Moreover, it would seem that the respondent is precluded by s 48A of theAct from taking a further application for a protection visa, unless the Minister exercises the discretionary power conferred on him under s 48B to permit such an application to be made."

17 Their Honours then observed at p 3 of the supplementary reasons:

"The submissions of the parties do not provide this Court with any new material to establish whether the respondent's travel documents have in fact expired since the decision of the RRT, and if so whether they can or cannot be renewed. Nor do the submissions provide any additional material regarding the risk that the respondent might face a danger of refoulement to Sri Lanka if Australia attempted to return him to France. This Court is in no better position now than it was when the Reasons for Judgment were delivered to form a view on these matters. It is not appropriate for this Court to instigate further investigations about these factual questions, although they remain questions that need to be explored. It is therefore necessary that the appeal to this Court be disposed of by an order framed to enable the outstanding factual questions to be considered and determined.

.....

The power of the Full Court on an appeal from a single Judge who has heard and determined an application for review under s 476 of the Migration Act 1958 (Cth) arises under s 481 of that Act, and s 28 of the Federal Court of Australia Act 1976 (Cth). The power of the Federal Court under s 481(1) includes power to make the following orders:

(a) an order affirming, quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or such earlier date as the Court specifies;

(b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit.

On appeal from a single Judge, the Full Court is empowered by s 28(1)(b) of the Federal Court of Australia Act to "give such judgment, or make such order, as, in all the circumstances, it thinks fit...". This power is expressed in wide terms, and enables the Full Court to make any order that could have been made at first instance: see Watkins Ltd v Renata (1985) 8 FCR 65 at 73-74. This Court therefore has the power to refer "the matter to which the decision relates" back to the RRT for further consideration. The matter to which the decision relates is the claim by the

respondent and his family for protection visas. Essential to the determination of that claim is the question whether the respondent and his family are non-citizens in Australia to whom Australia has protection obligations under the Refugees Convention: s 36(2) of the Migration Act. If the matter is remitted to the RRT for further consideration, of necessity the earlier decision of the RRT must be set aside so that, on further consideration, the RRT (in accordance with such directions as are contained in the order for remittal) can make a decision which gives effect to its further consideration."

18 However, Sackville J, who was the other member of the Full Court in *Thiyagarajah* disagreed with the course proposed in the supplementary reasons of the majority saying, at p 2 of his reasons:

"If the orders made by the primary Judge remain on foot, the RRT would be seized of Mr Thiyagarajah's application to review the decision of the delegate to reject his application for a Protection Visa (866). It is now established that the critical time to determine whether the person claiming refugee status has a well-founded fear of persecution if he or she is returned to the country of nationality or (as in this case) of refuge, is the time at which the decision is made: Minister for Immigration and Ethnic Affairs v Singh (1997) 142 ALR 191 (FCA/FC). As the five member Court said (at 194):

> "The fear is not a fear in the abstract, but a fear owing to which the applicant is unwilling to return, and thus it must exist at the time the question of return arises, namely at the time the decision is made whether the applicant is a refugee".

.....

But for the apparent expiry of Mr Thiyagarajah's travel documents after the RRT's decision in the present case, I think it clear that the appropriate orders (leaving aside the question of costs) would be those foreshadowed by von Doussa J, namely:

1. Appeal allowed.

2. Set aside the order of Emmett J made on 3 March 1997 and in lieu thereof order that the application for judicial review be dismissed with costs.

Mr Thiyagarajah submits that these orders should be varied so as to reopen the matter before the RRT, thereby allowing it to take account of developments after its decision, in particular the expiry of his travel documents. In considering this submission it must be remembered that there is no basis in the Migration Act (or under any other legislation or under the common law) for setting aside the RRT's decision. In my view, whatever the

scope of s 481 of the Migration Act, it is not an appropriate exercise of the Court's powers under that section to set aside a decision of the RRT, otherwise unchallengeable, **solely for the purpose of allowing the RRT to take into account developments that have occurred since the date of the RRT's decision.** The powers conferred by s 481 arise on "an application for review of a judicially-reviewable decision". In exercising those discretionary powers, the Court must take account of the outcome of the very application which enlivens the discretion in the first place. I do not think that, in exercising the powers conferred by s 481(1), the Court is entitled to take account of circumstances quite extraneous to the application for review. Nor do I think that s 28(1)(b) of the Federal Court of Australia Act 1976 (Cth) changes the position.

If there is any potential injustice in this case (a question on which there is insufficient information to make any judgment), it arises from s 48A of the Migration Act, which prevents Mr Thiyagarajah from making a further application for a protection visa, unless the Minister thinks it is in the public interest to exercise the power conferred by s 48B. I do not think it appropriate to attempt to ameliorate possible injustice flowing from s 48A by remitting a matter to the RRT under s 481(1) for reasons unconnected with the grounds of the application to review the RRT's decision." (original emphasis)

19 We have been told that the Minister has obtained special leave to appeal to the High Court from the orders made in consequence of the supplementary reasons of the majority in *Thiyagarajah*. That appeal has been listed for hearing on 29 September 1999.

20 Unlike the evidence before the Full Court in *Thiyagarajah,* the material in the present case does indicate that the appellant now faces a risk of *refoulement* to Sri Lanka because he can apparently no longer return to France as of right. His re-entry to France depends, the evidence suggests, on a favourable view being taken by the French authorities once they have been apprised that he has exhausted all avenues by which he might obtain a protection visa as a refugee in Australia. However, the right of re-entry to France which the Tribunal imputed to the appellant has been lost in large measure as a result of his own election. He could have applied to renew his *Titre de Voyage* after the decision of the Tribunal on 13 October 1998 and before the expiration of three years from his departure from France which occurred on about 13 January 1999. He could also have sought an expedited hearing and determination of his application to this Court for a review of the Tribunal's decision. That course would probably have enabled him at least to have made application to the French authorities for renewal of his *Titre de Voyage* before that, as it appears, ceased to be available as of right.

21 It is true that the appellant originally succeeded before the Tribunal on 24 July 1997 but was denied the fruits of that success by the intervening decision of the Full Court in *Thiyagarajah* on 19 December 1997, an event which was outside his control. Had the state of the law revealed by the Full Court in *Thiyagarajah* been appreciated by the Tribunal when it originally

entertained the appellant's application, he would have had about eighteen months, less any time consumed in reviewing the Tribunal's decision, in which to apply to the French authorities before his absence from France exceeded three years. These are all matters which should, we consider, weigh in the appellant's favour with the French officials charged with considering whether he should now be permitted to re-enter France when those officials come to exercise the discretion which we have presumed to be reposed in them in the events which have happened. They are also matters which, if the French decision is adverse to the appellant, should tend to a sympathetic response by the Australian Minister to a request for a determination under s 48B of the Act or to an application that the Minister, pursuant to s 417, substitute for the decision of the Tribunal now under review his own decision to grant the appellant a protection visa. Counsel for the Minister on the hearing of the appeal understandably could give no indication of how the Minister might act in the hypothetical circumstances which we have postulated in this part of these reasons. However, the existence of these residual avenues for relief available to the appellant has influenced us against exercising our discretion to remit the present matter to the Tribunal, assuming contrary to the reservations expressed above, that we have power to do so. It should not be assumed that the discretions reposed in the Minister, which have a "safety net" aspect, will not be exercised in an appropriate case.

22 For these reasons the appeal will be dismissed with costs.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Full Court.

Associate:

Dated: 26th August 1999.

Counsel for the Appellant:	Mr M J Leeming
Solicitor for the Appellant:	McDonells

Counsel for the Respondent:	Ms A F Backman
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	23 August 1999
Date of Judgment:	26 August 1999