FEDERAL COURT OF AUSTRALIA

IMMIGRATION - Refugees - Refusal of protection visa - Unsuccessful review by Refugee Review Tribunal - Whether Tribunal properly applied “real chance” test - Whether credibility findings properly made - Whether failure to take relevant consideration into account ground of review.

Migration Act 1958 ss 420(2)(b), 430(1), 476(1)(a), (3)(e)

Chan v The Minister (1989) 169 CLR 379 applied

Eshetu v The Minister (1997) 145 ALR 621 considered

Guo v The Minister (1996) 64 FCR 151 mentioned

Navaratne v The Minister (unreported, 1 August 1997, Tamberlin J) approved

Abalos v Australian Postal Commission (1990) 171 CLR 167 applied

The Minister v Guo (1997) 144 ALR 567 applied

Randhawa v The Minister (1994) 52 FCR 437 cited

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 cited

THISANATHAN THEVANATHAN v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

VG 468 OF 1997

SUNDBERG J

24 DECEMBER 1997

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG468 of 1997

BETWEEN:	thisanathan thevanathan Applicant
AND:	minister for immigration and multicultural affairs Respondent

JUDGE:	SUNDBERG J
DATE OF ORDER:	24 DECEMBER 1997
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's taxed costs of the application.

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

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JUDGE:	SUNDBERG J
DATE:	24 DECEMBER 1997
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

BACKGROUND

The applicant is an eighteen year old Tamil Hindu from the Jaffna Peninsula in the far north of Sri Lanka. He arrived in Australia illegally on 4 December 1996. He applied for a protection visa on 13 December 1996. On 1 May 1997 a delegate of the respondent refused to grant the visa. An application for review of the refusal was dismissed by the Refugee Review Tribunal on 25 July 1997. Before me is an application for review of the Tribunal's decision under Part 8 of the *Migration Act* 1958.

EVIDENCE BEFORE TRIBUNAL

The applicant's evidence was that he lived at Inuvil near Jaffna from his birth until 1995. He left school in Year 11 because of military operations on the Jaffna Peninsula. In mid-1995 he and his family went to Meesalai which he said was in "the southern area of the north Sri Lanka peninsula". They stayed at Meesalai until

September 1995 when they returned to Inuvil. They stayed there for two months before returning to Meesalai.

The applicant claimed that on 21 November 1995 he and his father were arrested by members of the Sri Lankan security forces. He said he and his father were travelling to their home at Inuvil in order to collect some jewellery they had left behind. They did not think the army was active in the area. The applicant escaped from detention and returned to Meesalai before moving to Kilinochchi, which is about twenty kilometres south of Elephant Pass which is on the Jaffna Lagoon. The applicant claimed that shortly afterwards he learned that his father had been beaten by the security forces and had died of a heart attack. He said he has two brothers and a sister in Sri Lanka who returned to Inuvil in November 1996.

The applicant claimed that from Year 10 at school he helped the Liberation Tigers of Tamil Eelam (LTTE) by attending to wounded persons, digging bunkers and delivering food. At one stage he said he was, and at another that he was not, a member of the LTTE. He said that after an uncle had told him that the army had a photograph of him and was looking for him, the uncle sent him to an agent to plan his departure from Sri Lanka. He said he went from Kilinochchi to Vavuniya through the jungle in order to by-pass check points. Vavuniya is about 100 kilometres due south of Kilinochchi. From Vavuniya he travelled by train to Colombo which is on the south-west coast. He spent a day in Colombo before returning to Vavuniya. He stayed in Vavuniya for about three weeks before returning briefly to Colombo. He said that he used his birth certificate and a temporary ID card obtained in Vanni when he travelled to Colombo. He claimed that in Colombo his agent made all the arrangements for his passport, which was issued in the applicant's own name. He said the agent paid a bribe at Colombo airport to enable him to depart for Australia.

The applicant claimed he would not be safe in Sri Lanka because he is sought by the security forces, and because violent incidents and abuse of human rights remain frequent. He said he would also be at risk of harm at the hands of Tamil groups opposed to the LTTE.

TRIBUNAL'S REASONING

The Tribunal set out art 1A(2) of the Refugees Convention and extracts from *Chan v The Minister* (1989) 169 CLR 379 at 389, 396, 399, 429, 430 and other cases dealing with the 'real chance' test. After closely examining the applicant's evidence and statements, the Tribunal concluded that "he is not a person who can be believed on any material issue". The basis for this conclusion appears from the following passage from the Tribunal's reasons:

In relation to the applicant's claim that he was detained by members of the armed forces due to his connections with the LTTE, the Tribunal makes the following observations.

In his interview at Melbourne airport with an immigration inspector he stated that he was a member of the LTTE. He added that he was detained by members of the armed forces and released after the intervention of his uncle. He later claimed in a statement attached to his application for a protection visa that he worked for the LTTE from about 1995, digging bunkers and trenches, and carrying wounded persons to hospital. He added that somehow his involvement with the LTTE became known to the authorities. He said that the return of his family to their home area could only be guaranteed if he did not accompany them. Accordingly, an uncle made arrangements for him to cross military lines at Vavuniya by avoiding the check-point; the applicant said that [he] was not carrying proper ID. He then received his passport and departed the country by air from Colombo about two days after going to the south. He did not reiterate at that time his earlier claim that he was detained; indeed his statement at that time indicated the opposite. He referred to his mother being a widow, but gave no details of the circumstances of the death of his father.

In a subsequent interview with a Departmental officer the applicant stated that his uncle had no involvement in his release by the army. He claimed that he had told his adviser about the death of his father, despite it not being included in the statement. The applicant claimed that his father was killed after he and his father had, in November 1995, tried to return to their home. He claims that they were both taken to a camp where they were beaten. He added that he was able to escape, but his father remained in custody and the family later received news of his death.

At the hearing the applicant claimed that he and his father tried to return to their home because they remembered they had left some jewellery behind. He said that he did not know why they were arrested. When asked why he had made no timely mention of such a major claim - that he and his father were arrested, and his father died in custody - he explained, differently from his earlier explanation, that he had been too scared to mention it at first and he did not know what to say.

During the course of his application the applicant has also provided discrepant evidence concerning whether he was a member of the LTTE and whether his uncle had connection to the LTTE. He initially denied that he had met others who also entered Australia illegally before arrival, but later stated that he had done so. At the hearing he conceded that he obtained a pass to go from Vavuniya to Colombo. He also gave evidence that he had his birth certificate as ID, along with other "temporary ID".

The Tribunal finds it implausible that the applicant would, on more than one occasion, omit the central aspect of his claim for refugee status. It finds his various explanations for not having done so to be unconvincing. Apart from ignoring crucial aspects of his claim in the early stages of his application the applicant has changed several aspects of his story, including on key points, during the course of his application. His accounts contain so many discrepancies that the Tribunal concludes that he is not a person who can be believed on any material issue.

The Tribunal then considered whether the applicant had a well-founded fear of persecution for a Convention reason. It observed that the applicant conceded that he had had to show ID when travelling from the north to Colombo. He had 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 features identifying him. The Tribunal referred to a Department of Foreign Affairs and Trade (DFAT) cablegram stating that a person who wishes to travel south from the LTTE - controlled areas must obtain a pass, which will be issued only if he is not suspected of being a member of the LTTE. The Tribunal observed that the applicant was able to obtain a pass to travel to Colombo, which indicated that he was not considered a security risk or suspected of being a member of the LTTE.

The Tribunal noted that in leaving Colombo for Australia the applicant had relied on his own passport and passed through all checks. The Tribunal thought it improbable that the authorities would have permitted the applicant to leave Sri Lanka if they had had any real interest in him. Reference was made to another DFAT cablegram which indicated that there is tight security at airports in Sri Lanka. Sri Lankan passport holders are checked against the register by passport control at port of embarkation. People sought by the government are unlikely to be able to leave unless they hold forged passports of a high quality. The same cablegram indicated that passports are issued only after presentation of a birth certificate and a National Identity Card, and after checks of registers containing the names of those in whom the authorities have an interest.

The Tribunal concluded from this material that the authorities had had ample opportunity to take action against the applicant had they wished to do so.

The Tribunal referred to another body of material concerning the situation in the Jaffna Peninsula. The LTTE had run a virtual state within a state since 1990. But towards the end of that year the army had pushed them out of their stronghold, Jaffna City, and out of cities to the east, Chavakachcheri and Kilali. As at mid-1996 many of the refugees displaced by the earlier fighting had returned to areas under government control. Jaffna City was assuming a state of normality. The LTTE had lost its administrative and logistical base in Jaffna. Its capacity to reorganize, launch financial drives and carry out continued terrorist attacks was therefore questionable. A report dated 24 June 1997 confirmed that many people had moved back to the north since the government asserted its control in Jaffna. Another DFAT cablegram observed that there had been no reports of difficulties peculiar to asylum seekers. Yet another noted that those who had left the country legally, and had not engaged in terrorist activities abroad, had no need to fear the authorities on return.

The Tribunal noted that notwithstanding reports of an improvement in human rights since the election of the Peoples' Alliance government, there continue to be reports of some random arrests, frequent mistreatment of detainees and of other more serious breaches of human rights. While some young Tamil males with real

connections to the LTTE may be at risk of persecution, the Tribunal was not satisfied that the applicant was at risk of such harm.

The Tribunal found that the applicant's fear of adverse attention from the authorities for having dug bunkers, attended wounded people, and delivered food for the LTTE was groundless.

The Tribunal noted again that the applicant had been able to obtain a passport, had travelled to Colombo, and had passed stringent security checks. It was not satisfied that any activity he or his father may have undertaken in the north provided him with a profile that would make him of interest to the authorities.

The Tribunal observed that it had considered a body of material submitted by the applicant which referred to continuing human rights abuse and other problems in Sri Lanka. But it concluded that there was nothing in that material to indicate that a person with the applicant's profile would face a real chance of persecution for a Convention reason.

GROUNDS OF REVIEW

(a) Failure to act according to substantial justice and merits of case

It was submitted that a failure to comply with the requirement in s 420(2)(b) to act according to substantial justice and the merits of the case is a failure to observe procedures required by the Act to be observed in connection with the making of a decision for the purposes of s 476(1)(a). I will assume that that is so. Cf *Eshetu v The Minister* (1997) 145 ALR 621. The failure to comply with s 420(2)(b) was said to lie in the Tribunal's assessment of the applicant's credibility. According to the applicant's counsel the Tribunal did not adopt a proper approach to the assessment. Before dealing with this question, I should mention a preliminary submission made by the applicant's counsel. It was that the Tribunal's starting point in its assessment of the applicant's credibility, namely that he claimed he had been detained by the armed forces because of his connection with the LTTE, was false. It was said that the applicant had never asserted that connection. I do not agree. In his initial interview with the immigration inspector at Melbourne Airport, the applicant said "he was a member of the LTTE and was taken by the Sri Lanka Army". The natural reading of that is that he was taken by the army because he was a member of the LTTE. If that were not the reason for his arrest, there would have been no occasion to mention his membership. In his later statement accompanying his application for a protection visa the applicant said he had been a supporter, though not an enrolled soldier, of the LTTE, and that he could not return from the "Banni area" because reports had been made that he had assisted the LTTE and that he could be arrested if the army heard of his whereabouts. The Tribunal was entitled to

conclude that the applicant claimed that he had been arrested because of his association with the LTTE.

Reliance was placed by the applicant's counsel on a passage in Hathaway, *Law of Refugee Status* at 84-85:

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 sworn testimony of the applicant is to be accepted as true.

Reference was also made to *Guo v The Minister* (1996) 64 FCR 151 at 194 where Foster J observed that self-contradictory statements, though of obvious importance, do not necessarily require a conclusion that a witness is being untruthful in those aspects of his evidence, or that that whole of his evidence should for that reason be rejected. There might be a hard core of acceptable evidence despite exaggeration or fabrication of parts of the testimony.

In *Navaratne v The* Minister (unreported, 1 August 1997) Tamberlin J said:

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 agree with his Honour's observations. The applicant's counsel submitted that the Tribunal's finding on credibility was not based on the applicant's demeanour, but upon the discrepancies between the various accounts he put forward at different stages. It is true that the Tribunal did not speak of the applicant's "demeanour". But in *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179 McHugh J, with whom the other justices agreed, observed that the fact that a trial judge makes

no express reference to the demeanour of a witness does not mean that demeanour played no part in the judge's findings. It is clear from its reasons that the Tribunal was influenced in reaching its conclusion on credit by the oral evidence given by the applicant in the Tribunal's presence. Thus it said that it found unconvincing his various explanations for having omitted crucial aspects of his claim in the early stages of his application. This finding clearly relates to the applicant's believability when proffering explanations for inconsistencies between his various statements when pressed about them in the course of his oral evidence.

The Tribunal did not come to its conclusion about the applicant's credibility on the basis of inconsistencies in recounting "peripheral details" (Hathaway). It did have "significant concerns about the plausibility of allegations of direct relevance to the claim" (Hathaway). The Tribunal carefully assembled the various claims and statements made by the applicant. Far from the inconsistencies being of peripheral details, they were central to his claim for refugee status: his arrest and his father's death in custody.

In my view the Tribunal was entitled to conclude that the applicant could not be believed on any material issues. It had the advantage of hearing and seeing the applicant attempt to explain inconsistencies in his evidence when they were pointed out to him. It would be quite wrong in the present case to say that the Tribunal simply compared various written statements and based its conclusion on minor discrepancies between them. The discrepancies went to the central issue in the case. The Tribunal heard the applicant's oral evidence, and was not impressed by his attempts in that evidence to explain away the inconsistencies on those central points.

This ground of review must be dismissed. It was also submitted that the failure to act according to substantial justice and the merits of the case amounted to an incorrect interpretation of the applicable law within s 476(1)(e). See *Eshetu* at 625. This ground fails for the same reasons that the claim under s 476(1)(a) read with s 420(2)(b) has failed.

(b) Incorrect interpretation of "well-founded fear" test

It was submitted that the Tribunal had incorrectly interpreted the "well-founded" fear test, had not engaged in the requisite speculation, had not made a finding as to the applicant's subjective fear, and had failed to consider the "internal flight" principle "with respect to the applicant's ability to genuinely access meaningful domestic protection in Colombo". These were said to be errors of law for the purposes of s 476(1)(e).

The Tribunal directed itself properly as to the law concerning a "well-founded fear of persecution" as interpreted in *Chan* and later cases. It did not incorrectly interpret the

law. Nor in my view did it incorrectly apply to the law to the facts. The Tribunal made a number of findings which included these:

- the applicant could not be believed on any material issue

- the applicant's ability 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 applicant 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

- it was improbable that the authorities would permit the applicant to leave Sri Lanka if they had any real interest in him

- the authorities had ample opportunity to take action against the applicant had they wished to do so

- the applicant did not fit the profile of a young Tamil male with a real connection with the LTTE who may be differentially at risk of persecution

- the applicant's expressed fear of experiencing adverse attention from the authorities for having dug bunkers and delivered food for the LTTE was groundless

- it was not satisfied that the applicant had worked with wounded people

- it was not satisfied that any activity he or his father may have undertaken in the north provided him with a profile that would be of interest to the authorities

- there was nothing in the body of material submitted by the applicant to indicate that a person with his profile would face a real chance of persecution.

On the basis of those findings the Tribunal could not have been satisfied that there was a real chance of persecution so as to find that the applicant's fear of persecution was well-founded. Accordingly the Tribunal did not incorrectly apply the law to the facts, since the facts it found do not support the applicant's contention.

The Tribunal quoted a passage from Dawson J's judgment in *Chan* at 396 to the effect that the phrase "well-founded fear of persecution" contains a subjective and an objective requirement. There must be a state of mind - fear of being persecuted - and a sufficient foundation for it. The Tribunal did not make an express finding as to the applicant's subjective fear. However, despite the fact that it did not believe him "on any material issue", it proceeded on the basis that he did in fact fear persecution, and concluded that it was not a well-founded fear. Had the Tribunal been of the view that the applicant had not established a subjective fear, it would not have written the last four pages of its decision.

The complaint that the Tribunal made an error of law, in that it failed to speculate, has no substance. In *Guo v The Minister* (1996) 64 FCR 151 at 179 one member of a Full Court of this Court had been critical of the Tribunal for making findings before it evaluated whether there was a real chance of persecution for a Convention reason. The Tribunal had also, it was said, failed to consider the possibility that any of its findings were inaccurate. When the matter reached the High Court (*The Minister v Guo* (1997) 144 ALR 567) Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said at 579:

this criticism of the tribunal's reasons is wrong. For the reasons that we have given, the tribunal was entitled to weigh the material before it and make findings before it engaged "in any consideration of whether or not Mr Guo's fear of persecution on a Convention ground was well-founded". Moreover, given the strength of some of the tribunal's findings ... the tribunal was not bound to consider the possibility that its findings were inaccurate or that the punishment was Convention-based.

...

In the present case ... the tribunal appears to have had no real doubt that its findings both as to the past and the future were correct. That is, the tribunal appears to have taken the view that the probability of error in its findings was insignificant. Once the tribunal reached that conclusion, a finding that nevertheless Mr Guo had a well-founded fear of persecution for a Convention reason would have been irrational. Given its apparent confidence in its conclusions, the tribunal was not then bound to consider whether its findings might be wrong.

I have listed the findings the Tribunal made in the present case. They were firm, confident findings. The Tribunal had no doubt about them. Their strength was due in part to the fact that, having seen and heard the applicant, the Tribunal concluded that he could not be believed on any material issue. In those circumstances it would have been irrational for the Tribunal to have assumed that its findings might be wrong.

I am not sure that I understand the complaint that the Tribunal failed to address the 'internal flight' principle "with respect to the applicant's ability to genuinely access meaningful domestic protection in Colombo". Reliance was placed on the oft cited passage from the judgment of Black CJ in *Randhawa v The Minister* (1994) 52 FCR

437 at 443 to the effect that if it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he has fled to relocate to another part of the country, his fear of persecution in relation to that country as a whole is well-founded. But that assumes a finding that the person in question has a well-founded fear of persecution in relation to part of a country. There is no such finding in the present case. The Tribunal did not find that the applicant could safely return to Colombo though he could not safely return to the Jaffna Peninsula.

(c) Failure to take a relevant consideration into account

It was contended for the applicant that while s 476(3)(d) excludes failing to take a relevant consideration into account from the ambit of improper exercise of power in sub-s (1)(d), that ground of review remains available under the other paragraphs of sub-s (1) - in the present case pars (a) and (e). Support for that submission is provided by the observation of Burchett J in *Eshetu* at 635, that the grounds referred to in pars (d) to (g) of sub-s (3) are not excluded from any of the grounds in sub-s (1) other than par (d). I am not at all sure that ordinary principles of construction would have led me to that conclusion, but for the purposes of dealing with the present submission I will assume that his Honour's view is correct. It was submitted that the relevant consideration that had not been taken into account was that the applicant had not obtained his passport in person (ie by attending at the passport office); his agent had obtained it for him. This was said to bear on the Tribunal's finding that the authorities had ample opportunity to prevent the applicant from leaving Sri Lanka if they had had any interest in him. But the "consideration" relied on is plainly not one the Tribunal was bound to take into account. Cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39. At best it might be a piece of evidence. But it is not even that. The passage in the delegate's decision recording the circumstances under which the applicant obtained his passport, upon which his counsel relied for the present submission, recorded that the applicant obtained his passport "through an agent, *after he went to the immigration office with the agent*". The relevant consideration said to have been ignored is not established as a fact. This ground of review lacks merit on several counts.

CONCLUSION

The application must be dismissed.

I certify that this and the preceding eight (8) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Sundberg

Associate:

Dated: 24 December 1997

Counsel for the Applicant:	R Appudurai
Solicitors for the Applicant:	Wisewoulds
Counsel for the Respondent:	W Mosley
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	10 December 1997