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

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MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

VG 748 of 1997

O’CONNOR BRANSON& MARSHALL JJ

MELBOURNE

17 SEPTEMBER 1998

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 748 of 1997

BETWEEN:	THISANATHAN THEVANATHAN Applicant
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 748 of 1997

BETWEEN:	THISANATHAN THEVANATHAN Applicant
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 Sundberg ("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 Court, 8 September 1998) and *Sujeendran Sivalingam v The Minister for Immigration and Multicultural Affairs* (judgment 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 appellant is a 19 year old single male from Sri Lanka. He is a Tamil of the Hindu faith from the Jaffna Peninsula.

The appellant arrived in Australia on 4 December 1996 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 A MINOR – 17 YEARS OLD.

…

PRIOR TO HIS DEPARTURE FROM SRI LANKA HE WAS A STUDENT.

HE HAS NO FRIENDS OR RELATIVES IN AUSTRALIA, HOWEVER, A FRIEND OF HIS UNCLE LIVES IN SYDNEY – HIS NAME IS PARATHARAMAN – THEY HAVE NOT MET.

HE HAD COME TO A/A TO ESCAPE THE WAR AND HOPEFULLY CONTINUE HIS STUDY. HE WAS MEMBER OF THE LLT AND WAS TAKEN BY THE SRI LANKAN ARMY AND WAS ONLY RELEASED AFTER THE INTERVENTION OF HIS UNCLE. AFTER HIS RELEASE HE DECIDED HE MUST LEAVE THE COUNTRY.

…

PAX WAS RELUCTANT TO PROVIDE ANY DETAILED INFORMATION IN REGARDS TO HIS TRAVEL – SAYS HE LEFT SRI LANKA AND STOPPED IN ONE OR TWO PLACES BEFORE MELBOURNE. DOESN'T KNOW WHAT AIRLINES USED. DOESN'T KNOW WHAT NAME HE USED ON TICKETS. NO DETAILS PROVIDED IN REGARDS TO WHERE HE STAYED IN SINGAPORE OR IF ANYONE HELPED HIM."

In a statement lodged in support of the appellant's application for a protection visa, the appellant asserts that he lent support to the LTTE organisation ("Tamil Tigers") by cutting trenches and bunkers in the city of Jaffna, by carrying injured or wounded people following attacks of the Sri Lankan army and taking these people and caring for them in the Jaffna hospital. The statement also contains the assertion that the appellant was "used to deliver food to the Front". The statement includes the following passage:

"Although I was very closely associated I did not take part as a soldier in any of the conflict. I was the only one so involved from my family, although with the rest of the community in north Sri Lanka my family supports the objectives of the Tamil Tigers seeking independence from the oppressive national Government.

The powerful resources of the SL Army was successful in uprooting and forcing many Tamil Communities into evacuations driving them from Jaffna South to Meesalai. It became very dangerous to resist the escalating military pressures of the Army and with my family I moved into the southern area of the north SL peninsula known as the Meesalai District. We waited there for approximately one month but the military pressures continued forcing us, together with countless thousands of other evacuees, to proceed further south across the Marshes and wetlands and Lagoon area into central or north-central Sri Lanka which is a tropical rainforest area large and undeveloped. It was very difficult in that circumstance where we stayed for approximately 10 months having abandoned our property in the town Innuvil which is to the east of Jaffna. But we had no alternative the SL Army having effectively uprooted the Tamil population in the peninsula zone.

Mosquitos, dysentery, malaria, lack of food and sanitation made those months horrible for all the Tamil people driven into this forest area known as the "Banni area". At least there the Tamils were in control and we were safe from Army attacks but the other difficulties made it a very insecure existence.

Then after approximately 10 months an uncle of mine arrived from the northern peninsula area with the news that there were efforts and programs returning the

Tamils into the northern city and town areas from where they had been earlier driven out. He understood that all in our family could return save for myself. He had learnt and told us that there had been reports made of my assisting the Tamil militia and that I could be arrested or tortured or dealt with even more seriously if the Singalese Army learnt of my whereabouts. So the return of my family was only able to be organised if I did not accompany them.

This information from our uncle, a Mr Bavanathan, created a crisis in our family but he was able to make contacts with certain agents who could arrange the exit from Sri Lanka of persons who were insecure or whose safety could not be guaranteed because of the conflict between Singalese and Tamil forces. I never did learn how my involvement or support of the Tamil Tigers was reported or who advised of such activities on my part. I know that many times through torture people can be forced to disclose the names and other identity particulars of opponents of the Government. It was with much sadness that I realised that my life was at risk and that I would have to separate from my widowed mother and my two brothers and sister."

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

"Finally, once the arrangements were made Mr Bavanathan who is my mother's stepbrother, confirmed that I should leave. When I crossed further south across a military boundary line at Vavuniya, avoiding the military checkpoint at that town, passing into the southern area, I did not have a proper identification document. I was later provided with a passport by the agents who were arranging my exit. It took one day by train from Vavuniya to Colombo and about 2 days later I flew out of that city leaving Sri Lanka.

We stayed about one week in Singapore. I was with 3 others at the time. I am not sure of the arrangements but understand my passport is valid. We were not able to move around much but one week later the agents caring for my passage took me to an airport and said that I would be flying to Australia. I know nothing about the price or the other money arrangements necessary for my travels. I had not met my 3 Tamil companions fleeing the country like myself until we arrived in Singapore."

REASONING OF THE REFUGEE REVIEW TRIBUNAL

In its written reason for decision the RRT observed:

"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.

…

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 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."

The RRT concluded (on the issue of credibility):

"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 went on to note other adverse evidentiary material on which it based its decision, in particular that the appellant was able to obtain a pass to travel to Colombo and on leaving Colombo produced his own passport, at least, as ID and passed through all checks. The Tribunal found that, notwithstanding the existence of widespread corruption in Sri Lanka, it is improbable that the authorities would permit the appellant to leave Sri Lanka if they had any real interest in him. The Tribunal also found that the appellant's expressed fear of experiencing adverse attention from the authorities for having dug bunkers was groundless, such activity having been common-place in Jaffna. In view of the appellant's lack of even basic knowledge about first-aid, the Tribunal was not satisfied that he engaged in working with wounded people. While accepting that he may have delivered food for use by LTTE members from time to time, the Tribunal found that any fear of persecution for that reason is groundless.

The Tribunal was not satisfied that any activity the appellantor his father may have undertaken in the north provides him with a profile such that he would be of interest to authorities. The Tribunal was also not satisfied that the appellant risked serious harm by reason that he was a young Tamil male. The Tribunal considered other material submitted by the applicant but found that nothing in any of that material indicated that a person with the profile of this appellant would face a real chance of

persecution for a Convention reason. 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 judge rejected a preliminary submission made by the appellant's counsel that the RRT had wrongly concluded that the appellant had claimed that he had been detained by the armed forces because of his connections with the LTTE. We agree with his Honour that the RRT was entitled to find, as it did, that when the appellant told the immigration inspector at Melbourne airport that he "was a member of the LTTE and was taken by the Sri Lankan Army" he was asserting that he was taken by the army because he was a member of the LTTE.

His Honourconsidered the RRT's findings as to the appellant's credibilityand concluded:

"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 fathers' 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 conclusions 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."

The primary judge declined to receive in evidence a transcript of the hearing before the RRT. He did so on the basis that the informal transcript on which the appellant wished to place reliance had not been provided to the solicitor for the respondent in sufficient time for the solicitor to check its accuracy. The appellant did not have the financial means to obtain the Auscript transcript of the hearing. Before this Court counsel for the respondent advised that the respondent had now ordered from

Auscript the transcript of the hearing before the RRT. By consent that transcript is now before this Court.

The primary judge gave consideration to the appellant's submission that the RRT failed properly to direct itselfconcerning a "well-founded fear of persecution" as interpreted by *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and later cases. His Honour concluded that the RRTdid not incorrectly interpret the law**.** He was also satisfiedthat it did notincorrectly apply the law to the facts.

CONTENTIONS ON APPEAL

The principalcontentions 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.

The appellant also argued that the primary judge erred in refusing to allow the appellant to rely on the transcript of the hearing before the RRT. It is convenient to deal with this issue immediately. In our view, his Honour has not been shown to have erred in refusing, in the circumstances which prevailed before him, to receive in evidence the informal transcript of the hearing before the RRT. However, we reiterate our concern that the respondent did not earlier take the step that he has now taken, of himself ordering the Auscript transcript of the hearing. It is appropriate for us to add that we have ourselves considered the transcript of the hearing before the RRT. In particular we have considered the explanation offered to the RRT by the solicitor for the appellant as to the manner in which he conducted the interview with the appellant which resulted in the preparation of the appellant's statement lodged in support of his application for a protection visa. Having considered the transcript of the hearing before the RRT, we are satisfied that, had it been received by the primary judge, it could not have caused his Honour to reach a decision different from that which he did reach.

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 303; 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 to his assessment of findings made by the RRT. Counsel emphasised 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 and submitted that it was therefore important that a decision maker adopt a positive stance towards the Refugees Convention and towards the fulfilment of Australia's obligations thereunder, particularly avoiding 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 adopted a procedure based on any assumption that the purpose of the oral hearing 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, the primary judge considered that the RRT's approach to this issue was satisfactory and we agree with him. 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 this 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. Counsel 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 the conclusions of these articles 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 the Hathaway article [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) we reiterate the view expressed by the primary judge, Merkel J in that case that the cautions of Professor Hathaway were sound and sensible advice to and guidelines for decision makers – in this context, decision makers at 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)

The primary judge concluded that the RRT had correctly applied the test from *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 in determining whether the appellant had a well-founded fear of being persecuted for a Convention reason. We agree with his Honour, and we further agree thatin so doing the RRT

made no error of law in its approach to the task of assessing the credibility of the applicant's story.

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

The reliance placed, by the appellant on these grounds of review of review is based upon his submission that the RRT lacks jurisdiction to reach a decision otherwise than in accordance with the law (*Anisminic Ltd v Foreign Compensation Commission* (1969) AC 147 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 argued 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. Counsel made reference to the fact that the conclusion on the issue in this case is brief and, to an extent, generalised.

The RRT considered the appellant's claim on this ground as follows:

"The question still remains as to whether or not the Applicant faces persecution because he is a Tamil. It is submitted that he is particularly at risk because he is a young Tamil male, has no connections in Colombo and cannot speak Sinhala. The Tribunal doubts that he has no connections in Colombo. His father is a successful trader and his uncle is a senior government official who was able to accompany the Applicant to Colombo and put him in contact with an agent. Previously, his brother had a bus company that operated between Jaffna and Colombo. In any event, the Applicant was able to travel from the Jaffna peninsula to Colombo previously without being persecuted for any Convention reason. He used his own identity card and, apart from a delay caused by usual security checking in Vavuniya, he did not encounter any problems. He has lived in Jaffna all of his life without being persecuted and the only time he has encountered difficulty with security forces was in 1996 when the SLSF took over an area previously controlled by the LTTE. However, the Applicant was questioned and released unharmed after three days. He has a family that still lives in Jaffna and the information available to the Tribunal indicates that the situation in Jaffna has resumed some normalcy, despite the deprivations that attend the ongoing battle between the LTTE and the SLSF.

…

There is evidence that there are still some round ups of young men occurring in Jaffna, and some disappearances flowing from those operations, while there is a much more intense battle continuing to the east, in Trincomalee and Batticaloa, where the LTTE has greater numbers since it fled Jaffna. The Applicant has been detained and released previously in a situation where the SLSF was specifically seeking LTTE activists. He has negotiated security procedures in Vavuniya, at the passport office and at the airport, where the authorities also actively seek to identify LTTE activists. He has his well-known father and his influential and connected uncle to assist him in Jaffna if necessary. His past history of encountering security checks leads to the conclusion that there is no more than a remote chance such checks will result in serious harm. While there continue to be shortages of medicine and some food supplies and there are regular curfews in Jaffna, those deprivations are the consequence of a situation that pertains to the general population, regardless of the reasons in the Convention and, while the Tribunal is sympathetic to the Applicant's desire not to return to such a situation, it does not alter the conclusion that his fears of persecution for a Convention reason are not well-founded. There is not a real chance that he faces serious harm because of an association with the LTTE or for any other real or imputed political opinion. Nor is there a real chance he faces persecution on account of his race or for any other Convention reason."

In our view these passages do show that the RRT gave consideration to the question of whether the appellant had a well-founded fear of being persecuted because he was a young Tamil male (imputed political opinion). We consider, on balance, that the finding made on this issue were open to it on the evidence and other material before it. We were mindful, as we presume was the primary judge, of the High

Court's exhortation in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 not to approach the task of reviewing reasons for decision with a "fine tooth comb". Adopting this approach, these findings are not, we consider open to challenge on any of the grounds prescribed by s 476 of the Act.

The appeal is 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