FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZCXB v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1139

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a Protection (Class XA) visa – claim of failure by the Tribunal to fully consider persecution of the applicant – claim of failure to consider fully what harm encompasses – application allowed – matter remitted to Refugee Review Tribunal.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.91R, 91X, 424, 424A, 430, 483A

A v Minister for Immigration (1999) 53 ALD 545
Applicant S v Minister for Immigration (2004) 77 ALDR 541
Dranichnikov v Minister for Immigration (2003) 73 ALD 321
Minister for Immigration v Yusuf (2001) 206 CLR 323
Muin v Refugee Review Tribunal; *Lie v Refugee Review Tribunal* (2002) 190 ALR 601
MZWEL v Minister for Immigration [2006] FCA 442
NABE v Minister for Immigration (No 2) (2004) 144 FCR 1
Rajaratnam v Minister for Immigration [2000] FCA 1111
Re Minister for Immigration; Ex parte Miah (2001) 206 CLR 57
SAAP v Minister for Immigration [2005] HCA 24
SZBNQ v Minister for Immigration [2005] FCA 1033
SZEEU v Minister for Immigration [2006] FCAFC 2
SZEPY v Minister for Immigration [2006] FMCA 31
WAEE v Minister for Immigration (2003) 73 ALD 630

Applicant:	SZCXB
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 611 of 2004
Judgment of:	Lloyd-Jones FM
Hearing date:	24 May 2006

Delivered at: Sydney

Delivered on: 16 November 2006

REPRESENTATION

Counsel for the Applicant: Dr J Azzi

Counsel for the Respondents: Mr A McInerney

Solicitors for the Respondents: Blake Dawson Waldron

ORDERS

(1) The Refugee Review Tribunal is joined as the second respondent.

(2) The name of the first respondent be amended to read 'Minister for Immigration and Multicultural Affairs'.

(3) The application filed on 8 March 2004 for judicial review of the decision of the Refugee Review Tribunal is upheld.

(4) A writ of certiorari issue quashing the decision of the Refugee Review Tribunal made on 10 February 2004.

(5) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent.

(6) The first respondent is to pay the applicant's costs and disbursements of and incidental to the application, including any reserved costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG611 of 2004

SZCXB
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The Proceedings

1. These proceedings were commenced by an application under s.39B of the *Judiciary Act 1903* (Cth) invoking s.483A of the *Migration Act 1958* (Cth) ("the Act") filed in the Sydney Registry of the Federal Magistrates Court of Australia on 8 March 2004 for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal decision was made on 15 January 2004 and handed down on 10 February 2004, affirming a decision of the delegate of the first respondent made on 3 March 2003, refusing to grant the applicant a Protection (Class XA) visa. The applicant seeks relief in the form of constitutional writs against the decision of the Tribunal.

2. The applicant in these proceedings is not to be identified pursuant to s.91X of the Act and has been given the pseudonym "SZCXB".

3. The applicant has not sought to join the Tribunal as a party, however given that it is an exercise of the Tribunal's jurisdiction that is under review, I will make the appropriate order that the Tribunal is joined as a party: *SAAP v Minister for Immigration* [2005] HCA 24 at [43], [91], [153] and [180].

Background

4. The Tribunal decision of Jack Hoysted, reference N03/45970, contains the following background information. The applicant, who claims to be a citizen of Sri Lanka, arrived in Australia on 3 November 2001. On 3 May 2002, she lodged an application for a Protection (Class XA) visa with the Department of Immigration under the Act. On 3 March 2003, a delegate of the Minister refused to grant a protection visa and on 18 March 2003, the applicant applied to the Tribunal for review of the delegate's decision.(Court Book ("CB") 108)

5. The relevant background facts of the applicant are set out in the written submissions prepared on behalf of the applicant by Dr J Azzi and I adopt paragraphs 5 to 15 of those submissions for the purposes of this judgment:

> *5. The applicant stated that she lived in Jaffna until January 2001, at which time she left to stay with her sister in Colombo prior to her departure to Australia. Her sister has since departed Sri Lanka for Canada.*
>
> *6. The Applicant has two daughters and a son in Australia and a son in Canada and has no relatives remaining in Sri Lanka.*
>
> *7. The applicant claimed that because of her age she worried about returning to Sri Lanka alone as she has nowhere to live and no-one to look after her.*
>
> *8. The applicant claimed to fear harm from non-LTTE Tamil organisations (such as EPDP) or the Sri Lankan authorities who "may harass her and extort money from her because of her past association with the LTTE".*
>
> *9. The applicant also claims to have had a cordial relationship with the LTTE and was on some cultural committees for the LTTE in about 1985.*

10. *The applicant stated that she left Sri Lanka "because many of the Tamils who helped the LTTE have disappeared and she feared that she would also disappear."*

11. *The applicant further claimed that members of the EPDP threatened to hand her over to the Sri Lankan authorities if she did not pay them money. The applicant paid the money but nevertheless "became aware that EPDP killed some LTTE supporters even after they paid."*

12. *At the time the applicant fled to Trincomalee, Tamil boys also demanded money for fear of handing her over to Sri Lankan authorities. The applicant gave them jewellery. She also paid money to move to Colombo.*

13. *The Applicant said that she could not leave Colombo immediately on being granted a visa because "she had to wait for money to be sent from her children overseas" (CB 112).*

14. *In Colombo, the applicant said that she was afraid that her involvement with the LTTE would become known and that Singhalese thugs demanded money from her. EPDP boys also demanded money from her saying they knew of her LTTE activities in Jaffna.*

15. *The applicant suggested that three-quarters of the Tamils in Sri Lanka have supported the LTTE.*

The Tribunal's Findings and Reasons

6. A convenient summary of the Tribunal's reasons are contained in the first respondent's written submissions prepared by Mr McInerney and I adopt paragraph 5 of those submissions:

> *5. The essential reasoning of the Tribunal was that:*
>
> *(a) the applicant had suffered persecution, by extortion in the past on two occasions for imputed political opinion;*
>
> *(b) the extortion she had suffered in the past was caused by anti-LTTE forces. There was no complaint made that she had been persecuted in the past by the government;*
>
> *(c) the independent country information did not indicate wide-spread harassment was occurring of Tamils who had a record of having assisted the LTTE;*

(d) it was unlikely anti-LTTE organisations would harass or harm someone like the applicant whose connections to the LTTE were as historical, or as limited, as those of the applicant.

(e) it did not accept that there is a real chance that the applicant will be persecuted by anti-LTTE organisations in the foreseeable future;

(f) the applicant had not been targeted by the government in the past;

(g) it did not accept that there was a real chance that the applicant will be persecuted by the Sri Lanka authorities in the foreseeable future (CB 140.3).

Application for Review of the Tribunal's Decision

7. On 8 March 2004, the applicant filed an application in this Court for review under s.39B of the Judiciary Act. On 6 October 2004, she filed an amended application. At the commencement of the hearing, Dr Azzi sought leave to file a further amended application. As there was no objection by the respondents, leave was granted. The further amended application contains the following grounds:

1. The Tribunal committed a jurisdictional error of law by failing to afford the Applicant procedural fairness in circumstances where the Tribunal failed to give the applicant particulars of information it considered were part of the reason for affirming the decision of the delegate in accordance with section 424A of the Migration Act 1958 (the "Act").

Particulars

a. "[I]nformation and evidence given by other applicants" (CB 139) played a part in the Tribunal's conclusion "that there is [not] a real chance that the Applicant would face harm serious enough to be considered persecution should she return to Sri Lanka" (CB 140)

b. The information and evidence in paragraph a. constituted a part of the reasons for the Tribunal's decision.

c. *It was therefore incumbent on the Tribunal to afford the applicant procedural fairness in accordance with section 424A of the Act.*

2. *The Tribunal committed a jurisdictional error of law by failing to correctly apply the test of what constitutes persecution cumulatively – that is, it misconceived how its inquiry into the reasons for extortion was to be undertaken.*

   Particulars

   a. *The Tribunal accepted that the Applicant, an elderly lady, "has real concerns about going back to Sri Lanka".*

   b. *The Tribunal further accepted that "she will have no one to look after her an no relatives to stay".*

   c. *The Tribunal further accepted that money has been extorted from t he Applicant but did not accept that such concerns would constitute persecution notwithstanding independent evidence "and evidence given by other applicants [that] small time extortion or demanding of bribes to pass through certain areas is common and practised by the various non-government as well as government bodies in Sri Lanka".*

   d. *In the preceding circumstances, the Tribunal erred by not accepting that there is a real chance that the applicant will be persecuted by the Sri Lankan authorities.*

3. *The Tribunal committed a jurisdictional error of law by failing to consider the Applicant's claim of fear of disappearance by reason of her helping the LTTE in the past and for failing to give adequate or any reasons for rejecting the particular claim in accordance with section 430 of the Migration Act.*

4. *The Tribunal committed a jurisdictional error of law by failing to consider the threat of the anti-LTTE group handing the Applicant over to the SLAF given her accepted previous relationship with the LTTE and for failing to give adequate or any reasons for not accepting that claim in accordance with section 430 of the Migration Act.*

Submissions

8. In respect of the first ground, Dr Azzi submits that the Tribunal was able to reject "that there is a real chance that the applicant would face harm serious enough to be considered persecution" by partly relying on "evidence given by other applicants" that there is "small time extortion" or demand for "bribes to pass through certain areas".(CB 139.8) Dr Azzi referred the Court to *SZEEU v Minister for Immigration* [2006] FCAFC 2 ("*SZEEU*") at [227] – [228] per Allsop J:

> *227. The "similar claims information" was, in my view, information. The Tribunal had identically or substantially identically worded statements from others from the same adviser. That was knowledge communicated to the Tribunal concerning some particular fact, subject or event and was knowledge of relevant facts or circumstances communicated to, or received by, the Tribunal. Whilst it does not appear to play a central or integral role in the reasoning process displayed in the reasons, I conclude that it did play* ***a*** *part in the disbelief of the appellant, which was the or a reason for the decision of the Tribunal. It was sufficiently important or relevant for the Tribunal (perfectly fairly I might say) to tax the appellant with the subject at the hearing. The Tribunal described the evidence about that exchange at p 11 of its reasons. There may, in any given case be a relevant distinction to be drawn between using information as part of the reason and the information simply being the context or platform for questioning, the answers to which questioning the Tribunal does not believe and such answers (and not the information) being a part of the reason. Here, however, the identically worded statements were of importance to the Tribunal – hence the questioning. That they remained a relevant operative consideration in the Tribunal's consideration of the claims can be seen from the following paragraphs in the reasons at pp 12 and 17 respectively:*
>
> > *…The Tribunal was also concerned that the Applicant's original statement purporting to reflect his own personal experiences included the same details (for the most part in the same words) as the statements of other applicants with the same adviser, including the applicants in N02/41412 and N02/41414, for example in relation to having fled overseas after the 1996*

> *elections and in relation to having led a Taslima Nasreen support group.*
>
> …
>
> *It follows from the findings in this case, that the Tribunal is satisfied that the essentially common statement submitted by applicants in several cases involving the same adviser (including N02/41412 and N02/41414) untruthfully represents a number of specific things as having befallen the Applicant which are not in fact his own experiences.*

> *228. The introductory words to the last cited paragraph are not enough to dissuade me from the conclusion, based on all of the reasons read together, that the "similar claims information" was a part of the reason for affirming the decision.*

9. Justice Weinberg, who agreed with Allsop J, accepted that "the similar claims information played a part in the Tribunal's conclusion" and that the Tribunal regarded the information as "sufficiently important to warrant mention". This caused the Tribunal to err by failing to satisfy the mandatory requirements of s.424A of the Act: *SZEEU* at [164] per Weinberg J, at [216] – [217] per Allsop J; *MZWEL v Minister for Immigration* [2006] FCA 442 at [24] - [29] per Kenny J).

10. The information and evidence given by other applicants was that there was extortion but it was not sufficiently serious or grave. However, that seems to contradict the applicant's evidence of extortion of 100,000 rupees.(CB 44) Dr Azzi submits that in order for the Tribunal to conclude that this amounted to small time extortion, it had to satisfy itself, based on the capacity and wherewithal of this particular applicant, of the magnitude of the extortion.

11. Dr Azzi submits that there is nothing in the Tribunal's records to confirm that the applicant was able to meet those extortion claims with either jewellery or money. To determine whether the extortion claim met the characteristics of "small time extortion", the Tribunal relied on similar claims in other cases by other applicants. In accordance with *SZEEU*, the Tribunal had to give particulars of that information and possible findings in writing to the applicant and give her an opportunity to comment. Dr Azzi submits that both Allsop and Weinberg JJ said

that similar claim information is not excluded by s.424A(3)(a) of the Act.

12. Dr Azzi submits that the Tribunal reference to "evidence given by other applicant"(CB 139.6) was either a reference to:

a) Similar claims that form part of the reasons why the Tribunal found that instances of extortion and bribery were "small time" and therefore not sufficient to amount to persecution for a Convention reason; or

b) If not a reference to similar claims, then at least to findings that the applicant's extortion and bribery claims were "small time" by reason of evidence adduced from other applicants and therefore not sufficient to amount to serious harm.

The applicant claimed in her statutory declaration that the "EPDP (Eelam People's Democratic Party, an anti-Tamil LTTE group) harassed me and threatened me that they would hand me over to the army if I would fail to pay 100,000 Sri Lankan rupees"(CB 44.12) and that armed Tamil boys threatened to hand her over to the army if she did not pay them 50,000 rupees.(CB 44.16)

13. Dr Azzi submits that for the Tribunal to make a finding of evidence of "small time" extortion directly contradicts the applicant's evidence. This requires that the applicant be given an opportunity to comment on whether the extortion was "small time" or not. In either case, the evidence given by other applicants was sufficiently important information which formed part of the reasons for affirming the delegate's decision and which fell within the ambit of s.424A of the Act.

14. Mr McInerney, appearing for the respondents, submits in his written submissions that the applicant's claims were premised on the fact that she had been subject to extortion in the past because of the perception that she was a supporter of the LTTE.(CB 139.6-9) The country information indicated that extortion was a tactic employed by the government, the LTTE and anti-LTTE forces against political opponents and that the amounts extorted could be up to 1,000,000 rupees (AUD10, 415).(CB 125.5)

15. Mr McInerney submits that the Tribunal accepted that the applicant had had money and jewellery extorted from her in the past.(CB 139.6) It also accepted that in effect the applicant's claim of past incidents of extortion by anti-LTTE forces were for an imputed political opinion. In doing so, the Tribunal had regard to country information and evidence from other applicants which supported the applicant's claim that small time extortion or demanding of bribes was common and practised by the government, LTTE and anti-LTTE forces.(CB 139.7) The applicant's claim is based on two incidents of extortion. The first was for 50,000 rupees and the second for 100,000 rupees – both at the low end of the range recorded in the independent country information. It follows that the independent country information and evidence from other applicants corroborated the applicant's claims of past persecution for a Convention reason (ie. imputed political opinion as a person previously linked to the LTTE).

16. Mr McInerney submits that the reference to "evidence of other applicants" was "information" within the meaning of s.424A(1) of the Act. This was, however, no different to what was within the independent country information.(CB 139.6) The information contained in "evidence given by other applicants" was not information in respect of which the Tribunal had a duty to produce particulars in writing to the applicant under s.424A(1) of the Act for two reasons:

    a) It provided corroborative support for the Tribunal accepting that the applicant had suffered persecution in the past for imputed political opinion. It was not, therefore, a part of the reason for affirming the delegate's decision.

    b) It was not information specific to the applicant but was information about a class of persons of which the applicant was a member. It follows that s.424A(3) of the Act exempted the Tribunal from providing particulars in writing to the applicant about such information. There was no jurisdictional error in the Tribunal failing to do something it was not required to do.

17. Mr McInerney directed the Court's attention to a reference in *SZEEU* at [16] per Moore J to the characteristics of similar claims information:

> *The second piece of "information" identified by counsel for the appellant, was that the Tribunal had received essentially the same claims in the same words by several other applicants with the same migration agent ("the similar claims information"). The Tribunal noted this fact in its reasons and also that it had raised this matter with the appellant at the hearing. Later in its reasons, in the section headed "Findings and Reasons", the Tribunal said that it was concerned that the appellant's original statement included the same details as provided in the statements of other applicants with the same adviser. Ultimately, at the end of the "Findings and Reasons" section, the Tribunal said that it was satisfied that the essentially common statements submitted by applicants in several cases involving the same adviser untruthfully represented a number of specific incidents as being the appellant's experiences when in fact they were not. No particulars were provided to the appellant under s 424A.*

18. Mr McInerney submits that the Court in that case was concerned that the Tribunal had facts before it from other cases represented by the same migration agent as the applicant, with identically worded statements. Those statements which the Tribunal knew about (but the applicant did not) caused the Tribunal to doubt the truthfulness of the applicant's claim. Similar observations were made in *SZEEU* by Allsop J (reproduced at [8] above) and Weinberg J (reproduced at [9] above). Mr McInerney submits that it is clear from a reading of the above paragraphs that the similar claims information was information of an entirely different character from the evidence given by other applicants, to which the Tribunal in this case referred.

19. I believe that the distinction made between the circumstances as described in *SZEEU* by Allsop and Weinberg JJ and the present case is valid. Information relating to "small time" extortion or bribes, practised by the Government, the LTTE and anti-LTTE forces, was given both by the independent country information and other visa applicants. It did not consist of identical or substantially identical statements from others prepared by the same migration adviser, as was the case in *SZBMI v Minister for Immigration* (which was joined in *SZEEU*). I am satisfied that the information referred to in this matter was not specifically about the applicant and was just about a class of persons, however that class is defined. By virtue of s.424A(3), the Tribunal was not obliged to give particulars to the applicant of such information and no breach of s.424A of the Act arises. The Tribunal

decision as a whole does not suggest a breach of procedural fairness given its reliance on this background information. The Tribunal gained knowledge of general country information through absorption and experience from its work in other matters touching on the same area: *A v Minister for Immigration* (1999) 53 ALD 545 at 555; *Re Minister for Immigration; Ex parte Miah* (2001) 206 CLR 57 at [32]; *Muin v Refugee Review Tribunal*; *Lie v Refugee Review Tribunal* (2002) 190 ALR 601 at [263].

20. Mr McInerney referred to *SZBNQ v Minister for Immigration* [2005] FCA 1033 at [14] per Hely J that the "similar claims information" in this matter is more accurately described as country information and falls within the exception in s.424A(3)(a):

> *Section 424A(1) of the Migration Act does not apply to the country information in question as it falls within the exception provided in s 424A(3)(a): see* Minister for Immigration & Multicultural & Indigenous Affairs v NAMW *[2004] FCAFC 264 (*'NAMW*'). The more recent decision of the High Court of Australia in* SAAP v Minister for Immigration & Multicultural & Indigenous Affairs *[2005] HCA 24 (*'SAAP*') does not affect the conclusion reached by the Full Court in* NAMW *that the obligation in s 424A(1) does not extend to information that is not about the appellant personally and is, at best, about a class of persons which includes the appellant.* SAAP *does establish that a breach of s 424A (if it occurs) cannot be cured merely by putting to the person in the position of the appellant at the hearing before the RRT the substance of the adverse information, but in this case, no breach of s 424A(1) has been shown.*

21. I accept the argument presented by Mr McInerney in respect of the characterisation of the "similar claims information". The demands of small-time extortion and bribes are widely practiced by many including the LTTE, anti-LTTE and the government, and are not unique to the applicant. I am satisfied that this ground cannot be sustained.

22. In respect to the second ground, Dr Azzi submits that by approaching its task on a singular claim-by-claim basis, the Tribunal failed to appreciate that extortion may have (and in the context of an insurgency struggle is likely to have) characteristics of individual targeting motivated by Convention reasons. As the Full Federal Court said in

Rajaratnam v Minister for Immigration [2000] FCA 1111 ("*Rajaratnam*") at [46] and [48] per Finn and Dowsett JJ:

> *46. As this Court has indicated on several occasions, care needs to be taken when considering whether extortion has been practised upon a person for a Convention reason: see eg Minister for Immigration and Multicultural Affairs v Sarrazola (1999) 166 ALR 641 at 645-646. The need for this is apparent enough. In the usual case of extortion the extorting party will be acting for a self-interested reason (ie to gain an advantage for himself or herself, or for another). In this sense, his or her interest in the person extorted can always be said to be personal. What needs to be recognised, though, is that the reason why the extorting party has that interest may or may not have foundation in a Convention reason. The extorted party may have been chosen specifically as the target of extortion for a Convention reason, or may have become the subject of extortion because of the known susceptibility of a vulnerable social group to which he or she belongs, that social group being identified by a Convention criterion. Or, conversely, the person may have been selected simply because of his or her perceived personal capacity to provide the particular advantage sought and for no other reason or purpose.*
>
> *47. …*
>
> *48. In a particular setting, then, extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of Convention-related persecutory conduct. For this reason the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrator's interest in the extorted personal or was it Convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be Convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.*

Similarly in that decision, Moore J (in dissent at [10]) recognised that the "personal attributes of the victim" (viz., wealth and the appearance of wealth) does not "remove from consideration the possibility that the race or ethnicity of a victim is also a factor, and perhaps a critical

factor, influencing the conduct of or motivating those engaging in the extortion and, perhaps, that there is no effective protection offered to people of that race or ethnicity."

23. Dr Azzi submits the Tribunal accepted evidence of widespread extortion and found, specifically, that the applicant "has had money and jewellery extorted from her in the past".(CB 139.8) However, the presiding member's dismissal of all Convention reasons for the extortion failed to deal with the applicant's claim of being targeted as a vulnerable Tamil who had a "cordial relationship" with the LTTE and who had two close relatives as area leaders for the LTTE. Concomitantly, the Tribunal failed to appreciate that the applicant's characteristics could have formed a particular social group – a Tamil widow (CB 44) with historical connection to the LTTE and relatives who were area leaders of the LTTE – which may have been the reason for her being the victim of extortion.

24. Dr Azzi submits that the Tribunal constructively failed to exercise its jurisdiction because it did not properly appreciate the "duality" of the applicant's extortion claim. Its finding about extortion excluded a Convention reason but it did not discuss the implications of its findings nor the reasons for the applicant's extortion. Thus, the Tribunal failed to address the critical of potential for a particular social group to be persecuted by reason of extortive behaviour of various government and non-government groups. Dr Azzi relied on *SZEPY v Minister for Immigration* [2006] FMCA 31 at [20] per Smith FM:

> …*the Tribunal at least fell into a* Rajaratnam *error by making a too simplistic analysis of the claim before it, and failing to consider the underlying reasons for the applicant being selected for the LTTE extortion demand.*

Dr Azzi also referred to *Applicant S v Minister for Immigration* (2004) 77 ALDR 541 ("*Applicant S*") at [77].

25. Dr Azzi submits that similar to the facts in *SZEPY v Minister for Immigration*, the facts in the present case presented the "potential for" a Convention related reason for the extortion where, *inter alia*:

a) The applicant's adviser presented country information indicating that "many thousands of Tamils like the applicant have already been killed or have disappeared"(CB 38.4);

b) The applicant claimed that "because of my connection with the LTTE (contributing money) and other contributions, I always feared that if the authorities were to ever find out that I was involved that they would torture and kill me"(CB 45);

c) The Tribunal's acceptance of the applicant being the subject of extortion as corroborated by evidence of widespread extortion by the LTTE and government and government aligned forces, and

d) The proceedings should have caused the Tribunal to "ask whether the applicant's characteristics were shared with other victims of extortion, and whether it was a characteristic of a particular social group of vulnerable people in the area of Sri Lanka where the applicant lived" (*SZEPY v Minister for Immigration* at [22]) in circumstances where the Tribunal noted that "most of the Tamils of [the applicant's] age in Jaffna supported or assisted the LTTE".(CB 139.9)

26. In respect of the third ground, Dr Azzi submits that country information relied upon by the Tribunal confirmed that "the LTTE reportedly committed several unlawful killings, and was responsible for disappearances, torture, arbitrary arrest, detentions and extortion" (CB 114.9) and that "between 1995 and December 2001, several hundred persons were killed or disappeared after being taken into security force custody".(CB 115.4) The applicant's claim clearly was that "she left because many of the Tamils who helped the LTTE have disappeared and she feared that she would also disappear".(CB 111.3)

27. Dr Azzi submits that by simply not accepting that there was a real chance the applicant would be persecuted by anti-LTTE Tamil organisations in light of the applicant's further claim that "members of the Eelam People's Democratic Party ("EPDP"), an anti-Tamil LTTE group, threatened to hand over to the Sri Lankan Air Force ("SLAF"), the Tribunal did not answer the applicant's claimed fear of disappearance.(CB 111.5) This was because of the lack of "evidence of widespread harassment or mistreatment of Tamils who have a record

of having assisted the LTTE".(CB 140.2) Elsewhere, there is country information confirming that "Tamil militias aligned with the former PA government also were responsible for disappearances in the past years."(CB 120.2)

28. Dr Azzi submits that the facts in the present case presented the Tribunal with sufficient evidence to require it to consider whether the applicant was a member of a particular social group and that by reason of her involvement with the LTTE she had a well-founded fear of disappearing: *Dranichnikov v Minister for Immigration* (2003) 73 ALD 321 at [26] per Gummow and Callinan JJ. By not performing its review function in accordance with *Dranichnikov v Minister for Immigration*, the Tribunal made a jurisdictional error of the kind discussed in *NABE v Minister for Immigration (No 2)* (2004) 144 FCR 1 at [50] – [60].

29. Alternatively, Dr Azzi submits that the Tribunal erred in law by not making its decision in accordance with s.430 of the Act. However no particulars or submissions were made in this respect.

30. Dr Azzi submits that the fourth ground is similar to the third ground in that the country information available to the Tribunal amply demonstrates that the LTTE and their supporters were of adverse interest to the army with "several hundred persons being killed or disappeared after being taken into security force custody".(CB 115.5) Also that "Tamil militias aligned with the former PA government also were responsible for disappearances in past years".(CB 120.2) Other country information stated that "in Thampalakamam, near Trincomalee, in 1998, police and home guards allegedly killed eight Tamil civilians, possibly in reprisal for the LTTE bombing of the Temple of the Tooth a week earlier".(CB 116.9) While in February 2000, "a fisherman seen arrested by naval personnel near Trincomalee disappeared…Those who disappeared in 2001 and previous years usually are presumed dead."(CB 119.4) While this does not directly address the applicant's claim of harassment by anti-LTTE groups, it does at least corroborate a genuine fear of being taken into custody.

31. Dr Azzi submits that again the Tribunal failed to address the critical issue – the potential for a member of a particular social group (to which the applicant belongs) to be persecuted for Convention related reasons

by being handed over to security forces by anti-LTTE groups: *SZEPY v Minister for Immigration.*

32. Dr Azzi submits that it was not open to the Tribunal to find that anti-LTTE Tamil groups lacked the wherewithal or inclination to "harass or harm someone whose connections to the LTTE are historical or as limited as those of the applicant"(CB 140.2) without sufficient evidence about the mind set of anti-LTTE Tamil groups when targeting civilians such as the applicant.

33. Dr Azzi submits that the Tribunal made a jurisdictional error by not performing its review task in accordance with *Applicant S,* not providing adequate written statements of its reasons for rejecting the applicant's claim in accordance with s.430 of the Act and by not considering an integer of the applicant's claim: *NABE v Minister for Immigration (No 2).*

34. In respect of the remaining grounds, Mr McInerney submits that the nature of the extortion in *Rajaratnam* was personal. Mr McInerney referred the Court to *Rajaratnam* at [46] as relied upon by Dr Azzi and submits that there is no indication in the present case that the nature of the extortion was perpetrated for reasons personal to the applicant, such as her financial capacity. The only evidence before the Tribunal was that there was extortion for her imputed political opinion.

35. *Rajaratnam* at [46] states:

> *…The need for this is apparent enough. In the usual case of extortion the extorting party will be acting for a self-interested reason (ie to gain an advantage for himself or herself, or for another)…*

Mr McInerney contends that Their Honours in that paragraph were describing the usual scenario. However, this case was unusual because the information was that the extortion was used for political purposes, not just by one political group but by all of them.

36. *Rajaratnam* at [46] continued:

> *In this sense, his or her interest in the person extorted can always be said to be personal. What needs to be recognised, though, is that the reason why the extorting party has that interest may or*

> *may not have foundation in a Convention reason. The extorted party may have been chosen specifically as the target of extortion for a Convention reason…or may have become the subject of extortion because of the known susceptibility of a vulnerable social group to which he or she belongs, that social group being identified by a Convention criterion…*

Mr McInerney contends that the Tribunal in this case went on to deal with that possibility by the finding it made. *Rajaratnam* continued:

> *… Or, conversely, the person may have been selected simply because of his or her perceived personal capacity to provide the particular advantage sought and for no other reason or purpose.*

Mr McInerney submits that there is no suggestion of that situation in this matter.

37. Mr McInerney argues that the Tribunal accepted that the applicant had money and jewellery extorted from her in the past. The people who extorted the money and jewellery did so because of the applicant's imputed political opinion; the Tribunal did deal with and accepted that she has been persecuted in the past. Mr McInerney contends that the Tribunal then considered a real chance test of the future. The Tribunal stated in its "Findings and Reasons" at CB 140.2:

> *I refer to country information. I could not find any evidence of wide-spread harassment or mistreatment of Tamils who have a record of having assisted the LTTE by anti-LTTE Tamil groups. It seems unlikely that they would have the resources or the inclination to harass or harm someone who connections to the LTTE are as historical or as limited as those of the Applicant. I do not accept that there is a real chance that the Applicant will be persecuted by the anti-LTTE Tamil organisations.*
>
> *Nor do I see that the Applicant is a risk of persecution at the hands of the government. She has not been a target of government action in the past. While I accept that the adviser's submission that the peace process is fragile I do not accept that there is a real chance, in the foreseeable future, that the Applicant will be persecuted by the Sri Lankan authorities.*

Mr McInerney contends that the Tribunal's findings dealt with the claims made by the applicant however characterised. Mr McInerney

suggests that Dr Azzi was attempting to re-characterise the applicant's claim to try to bring it within the law as stated in *Applicant S.*

38. Mr McInerney submits that the Tribunal accepted that the past incidents of extortion were for the applicant's imputed political opinion. The Tribunal applied the law in the correct manner with respect to extortion, as identified in *Rajaratnam* at [46] and [48]. The Tribunal recognised that the government, the LTTE an anti-LTTE forces employed extortion as a tactic for political purposes. In accepting that she had suffered extortion in the past for the reasons she described, the Tribunal appreciated that the extortion about which the applicant made her claim was politically motivated.

39. Mr McInerney submits that the Tribunal did address whether the applicant was a member of a social group of vulnerable people in the area of Sri Lanka where she lived. It did so by:

    a) its finding that it could find no evidence of widespread harassment or mistreatment of Tamils who had a record of having assisted the LTTE by anti-LTTE groups; and

    b) its finding that it was unlikely that the anti-LTTE groups would have the resources or inclination to harass or harm someone whose connections to the LTTE were as historical or as limited as the applicant's.

    The findings of fact made by the Tribunal were findings made at a higher level of generality than the precise issue which the applicant complains. They are a complete answer to the applicant's contention that the Tribunal failed to consider her claim that she was a member of a particular social group: *Minister for Immigration v Yusuf* (2001) 206 CLR 323; *WAEE v Minister for Immigration* (2003) 73 ALD 630 at [45] - [47].

40. Referring to the third and fourth grounds, Mr McInerney submits that the claim is that the applicant had a fear of disappearance by reason of her helping the LTTE in the past. More particularly, the fourth ground claims that there was a threat of an anti-LTTE group handing the applicant over to the SLAF given her accepted previous relationship with the LTTE. Mr McInerney contends that these grounds are

complaints directed to fear of harm from anti-LTTE forces. He says that these issues were dealt with by the Tribunal:

> *I refer to the country information. I could not find any evidence of wide-spread harassment or mistreatment of Tamils who have a record of having assisted the LTTE by anti-LTTE Tamil groups. It seems unlikely that they would have the resources or the inclination to harass or harm someone whose connections to the LTTE are as historical or as limited as those of the Applicant. I do not accept that there is a real chance that the Applicant will be persecuted by the anti-LTTE Tamil organisations*.(CB 140.1)

The Tribunal did not confine itself to extortion. It discussed harassment or harm including fear of disappearance or being handed over to opposition forces. In the same finding, the Tribunal referred to the independent country information and said that it could not find evidence of widespread harassment or mistreatment of Tamils by anti-LTTE Tamil groups with a record of assisting the LTTE. He submits that the Tribunal did not confine itself to extortion alone, but is considering much broader aspects of harassment or mistreatment. The language the Tribunal deployed encompassed a much broader concept which would clearly encapsulate a fear of disappearance and of being handed over to an opposition group.

41. Mr McInerney directed the Court to the Tribunal decision under the heading "Evidence" and in particular, the 2002 United States Department Country Reports on Human Rights Practices in relation to Sri Lanka:

> *Unlike in previous years, there were no credible reports of disappearances at the hands of the security forces.*(CB 119.1)

The Tribunal recorded and accepted that the peace process in Sri Lanka was fragile but that there had been a change in position. Mr McInerney submits that this was a finding of fact based on logical and probative grounds.

42. I do not believe that in relation to the second ground as suggested by Mr McInerney, the test of persecution was not properly applied. To apply the test of persecution properly, one must do so in a real, objective, logical and probative way. There was no probative reason to suggest, as the Tribunal did, that "I do not see how the anti-LTTE

forces could possibly have an interest in the applicant because, firstly, they do not have the inclination; and secondly, they do not have the resources". This approach did not address the issue that the applicant would not be kidnapped or harmed. Harm can be a threat to one's life, encompassing economic harm and a denial of access to property or possessions. Dr Azzi submits that the Tribunal did not address the applicant's fear of kidnapping at the hands of the anti-LTTE forces. The Tribunal finding was that anti-LTTE forces had no interest in the applicant. However, independent information did show that the government, Army and police collaborate with former government members suspected of being involved in extra-judicial killings, torture and extortion. I do not believe that this particular claim was addressed by the Tribunal member simply saying, "I do not see how they can harm you."

43. I believe that the Tribunal must initially identify the particular social group that the applicant belongs to: *Applicant S*. I am not satisfied that there was any finding to this effect in its decision. The identification of the particular social group as someone who "helped the LTTE in the past"(CB 112) was insufficient as she had close relatives which were also LTTE leaders. The second ground pleaded by Dr Azzi indicates that the Tribunal did not consider whether the extortion was for a Convention related reason. Convention related reasons are not restricted to just political aspects, but can also include religion and ethnicity. The applicant's claim was that she was a Tamil who was happy to support the LTTE and because of that support feared being extorted by the EDPD. The EPDP was closely aligned with the government of Sri Lanka and seen as the prominent anti-LTTE force. There is evidence that the EPDP had extorted money from her in the past and there is country information to show that the LTTE was involved in extorting money from the Tamil population. This aspect has not been addressed by the Tribunal. The Tribunal member made the statement that he was satisfied that neither the government nor the LTTE forces would persecute the applicant, while the aspect of members of the LTTE extorting money was not addressed. The Tribunal made reference to the LTTE extorting money from Muslim businessmen, yet this applicant is neither a Muslim nor a businesswoman. This appears to be the extent of the consideration

made by the Tribunal of the extortion issue. It did not address the question of extortion as specific to the applicant.

Conclusion

44. I acknowledge the detailed submissions made by representatives on both sides. Although it was suggested that the nature of the extortion in this case was personal to the applicant, I do not accept that proposition. The Tribunal decision does not address whether the applicant's fear of disappearance at the hands of the anti-LTTE group aligned with the government was well-founded; this finding does not appear to be based on probative material. The test of persecution was not addressed by the Tribunal in an objective, logical and probative way. The aspects of kidnap, economic harm and denial of access to her property have not been addressed. There was no specific finding in respect of the applicant's fear of kidnap at the hands of the anti-LTTE forces, although the independent country information demonstrates that the government, army and police have been implicated. The applicant is entitled to the relief sought.

45. I am satisfied that an order for costs should be made in this matter. I order that the first respondent pay the applicant's costs and disbursements of and incidental to this application.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM.

Associate:

Date: 15 November 2006