

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIZY & ANOR v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 264

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming political persecution in Sri Lanka – whether the applicant had also raised a claim of a fear of persecution based upon his Tamil ethnicity, which was not dealt with by the Tribunal, considered – Tribunal accepted applicant’s claim of detention and torture which was irrelevant to his political claim, but which would have been relevant to a claim based upon ethnicity – claim arising from the applicant’s material although not clearly articulated by him – jurisdictional error found.

Federal Magistrates Court Rules 2001 (Cth)

Appellant S395/2002 v Minister for Immigration (2003) 203 ALR 112
Chen v Minister for Immigration (2000) 106 FCR 157
Dranichnikov v Minister for Immigration (2003) 77 ALJR 1088
Htun v Minister for Immigration (2001) 194 ALR 244
Minister for Immigration v Sarrazola (No 2) (2001) 107 FCR 184
NABE v Minister for Immigration [2004] FCAFC 263
Paramanathan v Minister for Immigration (1998) 94 FCR 28
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte S134/2002 (2003) 195 ALR 1
SCAL v Minister for Immigration [2003] FCAFC 301
SDAQ v Minister for Immigration (2003) 199 ALR 265
SGBB v Minister for Immigration (2003) 199 ALR 364
Sellamuthu v Minister for Immigration (1999) 90 FCR 287
STYB v Minister for Immigration [2004] FCA 705
SZAIX v Minister for Immigration [2006] FCA 3
Thevar v Minister for Immigration [1999] FCA 1182
WAEE v Minister for Immigration (2004) 75 ALD 630

First Applicant: SZIZY

Second Applicant: SZIZZ

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: REFUGEE REVIEW TRIBUNAL
File Number: SYG1852 of 2006
Judgment of: Driver FM
Hearing date: 6 March 2007
Delivered at: Sydney
Delivered on: 11 May 2007

REPRESENTATION

Counsel for the Applicant: Ms B Nolan
Solicitors for the Applicant: Wright Stell Lawyers
Counsel for the Respondents: Mr J Mitchell
Solicitors for the Respondents: Blake Dawson Waldron

ORDERS

- (1) A writ of certiorari shall issue quashing the decision of the Refugee Review Tribunal signed on 29 May 2006 and handed down on 8 June 2006.
- (2) A writ of mandamus shall issue, requiring the Refugee Review Tribunal to redetermine the review application before it, according to law.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG1852 of 2006

SZIZY

First Applicant

SZIZZ

Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal (“the Tribunal”) handed down on 8 June 2006. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicants protection visas. The following background relating to the protection visa claims of the applicants and the Tribunal’s decision on them is taken from the written submissions of the applicants and the Minister.
2. The first applicant (hereafter “the applicant”) is a citizen of Sri Lanka. He left Sri Lanka on 14 March 2005 and arrived in Australia on 15 March 2005. He lodged an application for a protection (Class XA)

visa under cover of letter from his then solicitors dated 26 April 2005. That application included his wife, the second applicant, who did not make independent claims, relying instead on her membership of his family.

3. The applicant claimed to have a well-founded fear of persecution because of his perceived affiliation with the Liberation Tigers of Tamil Ealam (“LTTE”). The applicant wife relied on her membership of his family (relevant documents “RD”117).
4. In a statement attached to his application for a protection visa, the applicant claimed, in summary, the following (RD33):
 - a) He was the target of attempted murder on a few occasions.
 - b) He was followed by political opponents, and relocations to four different places did not deter them.
 - c) His aunt was killed for harbouring him and for not divulging his whereabouts.
 - d) People with whom he associated were brutally killed by his political opponents with the help of the Sri Lankan authorities.
 - e) He was searched.
 - f) He feared serious persecution and for his life.
 - g) He is a Sri Lankan Tamil.
 - h) His political career started in or about August 1983 (at 14 years of age).
 - i) In 1983, thousands of innocent Tamils were killed by Sinhalese with the help of the Sri Lankan authorities.
 - j) He joined in demonstrations against the Sri Lankan authorities and Sri Lankan Government for not protecting the innocent Tamils and also for aiding and abetting the Sinhalese.
 - k) He was charged by the police for organising and participating in demonstrations against the Sri Lankan Government.

- l) Although his parents refused to send him to the Liberation Tigers of Tamil Ealam (LTTE), he helped in their propaganda work as he did not have any other alternative.
- m) From age 14-23, he was taken into custody by the army on three occasions and assaulted and ill-treated by them on all occasions.
- n) In 1991, the Sri Lankan army attacked his area and his house was destroyed by shelling.
- o) In 1993, he was admitted to the Eastern University at Vantharumullai. One day in that year when returning home from the University, there was an incident where he was detained and accused of being an LTTE member by an army officer, on the basis that 'all Tamils are LTTE supporters', who hit him severely and cut his right hand with a broken bottle. Army officers shot at the bus and he was subsequently interrogated, detained for four days and assaulted. He was released on certain conditions.
- p) In 1996 he commenced employment as a teacher in Kakkachchivaddai, a stronghold for the LTTE. From 1997 he assisted Kaushalyan and Karuna, high ranking officers in the LTTE, primarily in social, administrative and accounts work. He was pressured to join the LTTE. At public meetings he was asked to sit with Kaushalyan and Karuna to impress the public.
- q) In 2004, there was a split between Karuna, a high-ranking LTTE commander and the LTTE. Karuna subsequently left the LTTE. This led to hostilities between the LTTE and Karuna that resulted in the assassination of 12 of Karuna's supporters. Karuna sought the assistance of Sri Lankan authorities and Karuna's supporters went in search of the applicant. As a result the applicant relocated four times.
- r) The applicant was targeted by Karuna supporters who believed he was an LTTE supporter.
- s) After the Tsunami in December 2004 Karuna's supporters went to the applicant's aunt's house in search of the applicant. His aunt was later found dead.

- t) After the applicant obtained a visa for travel to Australia Karuna's supporters along with army officers in civilian dress went in search of the applicant.
 - u) He feared persecution at the hands of Karuna's supporters and Sri Lankan authorities.
5. On 12 August 2005 a delegate of the Minister refused to grant the applicants a protection visa. On 14 September 2005, the applicant applied to the Tribunal for review of the delegate's decision (RD 71-76). The applicant gave further oral evidence before the Tribunal on 21 December 2005.
6. The Tribunal's written statement of reasons (RD 71), records the applicant's claims, outlined above, and a summary of the applicant's oral evidence.
7. Under the heading "Findings and Reasons" the Tribunal made the following key findings:
- a) It did not accept the applicant's claims regarding his political profile, either real or imputed, such that he would have been or would face a real chance of being sought, for punishment which would amount to persecution under the Convention relating to Refugees 1954, as amended by the 1967 Protocol ("Convention").
 - b) The Tribunal referred to an anonymous letter received in relation to the applicant's claims (which stated that the applicant's claims were untrue and that his situation in Sri Lanka was something other than he was claiming). The Tribunal stated it had totally discounted the letter, giving it no weight.
 - c) The Tribunal found that the applicant's claims did not establish that he was a person *wanted* as a result of his previous activities (his social and administrative work for an LTTE member, his work as a teacher and the representational work he did as a teacher and educated member of the community).
 - d) The Tribunal did not accept that the applicant was compelled to work for Kaushalyan.

- e) The Tribunal did not accept that applicant was pursued at all by the Karuna group.
- f) The Tribunal did not accept that the applicant's aunt was killed because she had given refuge to the applicant, finding the applicant's story far-fetched in the light of his previous activities and associations.
- g) The Tribunal found that the applicant was not sought by the Sri Lankan army because of the close cooperation between the Sri Lankan army and the Karuna group.
- h) The Tribunal accepted the applicant's claims in relation to the 1993 bus incident: that he was held, tortured and that this led to his abandonment of his university studies. However, the Tribunal found that episode of little relevance, 13 years later, to the subsequent claim that he was a person wanted.

The judicial review application

- 8. These proceedings began with a show cause application filed on 3 July 2006. The applicant asserted actual notification of the Tribunal decision on 9 June 2006. I find that the application was filed within time. I gave directions in relation to the conduct of the matter on 27 July 2006. Those directions related to the filing of additional material. A preliminary hearing pursuant to rule 44.12 of the *Federal Magistrates Court Rules 2001* (Cth) was to have been held on 9 October 2006, however, that hearing was dispensed with and the matter proceeded to a final hearing on 6 March 2007.
- 9. The applicants now rely upon an amended application filed on 28 September 2006. The following ground of the application is relied upon:

The Tribunal failed to deal with an integer of the applicant's claim, thereby constructively failing to exercise its jurisdiction.

Particulars

The applicant claimed that he was held and tortured by the Sri Lankan army, one of whose members told him that “to him all Tamils are LTTE supporters” (RD 120).

The Tribunal accepted that the applicant had been held and tortured by the Sri Lankan army (RD 136).

The Tribunal did not reject the applicant’s claims that (RD119):

- i) from age 14-23, the applicant was taken into custody by the army on three occasions and assaulted and ill-treated by them on all occasions;*
- ii) after the 1983 riot, Tamils were taken into custody, detained indefinitely without being charged or produced before court;*
- iii) as time passed, the arbitrary arrest of Tamil boys and the atrocities of the Sri Lankan authorities increased;*
- iv) Tamils were discriminated and treated unreasonably and they were considered second-class citizens;*
- v) thousands of Tamils were mercilessly persecuted and killed by the Sri Lankan authorities; and*
- vi) in 1991, the Sri Lankan army attacked the applicant’s area and his house was destroyed by shelling.*

*The Tribunal’s positive finding, coupled with the absence of any rejection of the above claims, raises the case that the applicant may face persecution from the Sri Lankan army because he is a Tamil. The Tribunal was required to determine that case, although it may not have been clearly articulated by the applicant: see *Htun v Minister for Immigration and Multicultural Affairs (2003) 194 ALR 244 at 248 and the cases there cited.**

Although the Tribunal found that the Sri Lankan army had no interest in the applicant on grounds of real or imputed political opinion by reason of his activities (RD 135.5, 136.5), it failed to consider whether the applicant faced persecution from the Sri Lankan army because he is a Tamil.

*To make a decision without having considered all the claims is to fail to complete the exercise of the jurisdiction embarked on. The claim or claims and their component integers are considerations made mandatorily relevant by the Act: see *Htun v Minister for Immigration and Multicultural Affairs (2003) 194ALR 244 at 259 and the cases there cited.**

The evidence

10. I have before me as evidence the book of relevant documents filed on 22 August 2006. I also have before me as evidence the affidavit of Oliver David Young filed on 27 February 2007, to which is annexed an Auscript transcript of the hearing conducted by the Tribunal on 21 December 2005.

Submissions

11. The applicants make the following written submissions in relation to the grounds of review advanced in the amended application:

In this application the applicant alleges that the Tribunal failed to address a clearly articulated claim and fell into jurisdictional error: Dranichnikov v Minister for Immigration (2003) 77 ALJR 1088; NABE v Minister for Immigration [2004] FCAFC 263; Htun v Minister for Immigration (2001) 194 ALR 244; NBGV v Minister for Immigration [2005] FCA 690. Put differently, the error made by the Tribunal was to re-cast the applicant's claim on a more limited basis than it was put.

The Tribunal identified the applicant's claim as being contained in the statement attached to his visa application. In this statement the applicant claimed that he was held and tortured by the Sri Lankan army, one of whose members told him that "to him all Tamils are LTTE supporters" (RD 120).

The Tribunal accepted that the applicant had been detained and tortured by the Sri Lankan army (RD 136). Further, the Tribunal did not reject the following claims:

- a) that from age 14-23, the applicant was taken into custody by the army on three occasions and assaulted and ill-treated by them on all occasions.*
- b) that after the 1983 riot, Tamils were taken into custody, detained indefinitely without being charged or produced before court;*
- c) as time passed, the arbitrary arrest of Tamil boys and the atrocities of the Sri Lankan authorities increased;*
- d) that Tamils were discriminated and treated unreasonably and they were considered second-class citizens;*

- e) *that thousands of Tamils were mercilessly persecuted and killed by the Sri Lankan authorities; and*
- f) *that in 1991, the Sri Lankan army attacked the applicant's area and his house was destroyed by shelling.*

This raises the claim that the applicant may face persecution from the Sri Lankan army because he is a Tamil. That is a Convention reason.

Although the Tribunal found that the Sri Lankan army had no interest in the applicant on grounds of real or imputed political opinion by reason of his activities (RD 135.5, 136.5), it failed to consider whether the applicant faced persecution from the Sri Lankan army because he is Tamil.

On making these findings the claim of well-founded fear of persecution for membership of an ethnic group became an "integer" of the applicant's case: Htun at 259, [42], SCAT v Minister for Immigration [2003] FCAFC 80 at [29]. A failure to deal with such an "integer" amounted to a failure of the Tribunal to complete the jurisdictional task required of it by Part 7 of the Migration Act 1958 (Cth) (Migration Act), and in particular by s 414. As a result of this initial failure there was, in addition, "... a serious absence of assessment of the imponderables about the future as a required component of the assessment as to whether there was a real as opposed to a remote chance of persecution": Htun at 259-60, [43].

The Tribunal is required to determine whether the applicant has a well founded fear of persecution for the Convention reason of ethnicity, even if this claim may not have been understood to have been clearly articulated by the applicant: Htun at 248 and Sellamuthu v Minister for Immigration [1999] 90 FCR 287 at 292, cf. Minister for Immigration v Islam [2001] FCA 1681.

The claim or claims of the applicant and their component integers are considerations made mandatorily relevant by the Act: see Htun at 259, and the cases there cited. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. By failing to deal with the question of whether the applicant had a well – founded fear of persecution for reasons of his ethnicity, the Tribunal did not consider a question which it was its duty to consider, and this amounted to a constructive failure by the Tribunal to exercise its jurisdiction: Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 577 and Sellamuthu at [21]. Or

differently put it the failure by the Tribunal to make the necessary inquiry was an error of law going to its jurisdiction because it affected the exercise of the Tribunal's power: Minister for Immigration v Yusuf (2001) 206 CLR 323.

It is on this basis that the decision of the Tribunal's is a nullity and is therefore, not a privative clause decision and is unprotected by s 474 of the Migration Act. It is on this basis that this Court is allowed to intervene to issue the prerogative relief sought by the applicant.

12. The Minister's written submissions are relevantly as follows:

In respect to the ground summarised in paragraph 5.1(a), the First Respondent submits that:

- a) The Applicant's claims were that he had a well-founded fear of persecution based on his perceived affiliation with LTTE, such perception being held by the Karuna and the Sri Lankan Army: CB 37; transcript at [page 9, line 9].*
- b) These claims were articulated at the hearing by the Applicant in answer to requests by the RRT member for clarification as to the basis of his fears: transcript at [page 8, line 4]; [page 8, line 40], [page 13, line 9]; [page 21, line 44]; [page 23, line 33]; [page 36, line 4].*
- c) The RRT considered all of the evidence in support of those claims and made findings in respect to those claims. Specifically, the RRT member stated (CB 128):*

The applicant[']s claims in relation to the activities of the Karuna group, the Sri Lanka Army and the LTTE are consistent with the available country information, some of which the applicant himself has provided and other information available to the Tribunal from other sources.

- d) The RRT then gave the reasons why it was not satisfied that those claims gave rise to a well-founded fear of persecution for a convention reason. Specifically the RRT member stated:*

The Tribunal's concern with the applicant's claims is not that they are inconsistent with country information rather that the applicant is not a person who is wanted as a result of his previous activities (his social and administrative work for Kaushalyan, his work as a

teacher and the representational work he did as a teacher and an educated member of the community).

...

It follows from the above discussion that the applicant is not sought by the Sri Lankan army as the applicant had argued that it was because of the close cooperation between the Sri Lanka army and the Karuna group that the army had any interest in him.

- e) *The RRT member provided the reason for decision, being that the RRT member was not satisfied that at the time of the decision he was wanted by Karuna or the Sri Lankan Army. The findings in respect to the Applicant's claims were expressed generally and not in respect to each individual incident or piece of evidence referred to by the Applicant. Such an approach does not demonstrate jurisdictional error on the part of the RRT on the basis that it failed to take into account a relevant consideration: see Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [91]; WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630 at [47]. Rather it reflects findings on questions of fact that the RRT member thought were material. Such an approach is all that is required of the RRT in respect to its reasons for decision: Yusuf at [68].*
- f) *In circumstances where the elements of the Applicant's claim have been addressed, the failure to expressly mention or grapple with part of the competing body of evidence does not mean that the RRT decision is vitiated by jurisdictional error by reason of failure to take account of a relevant consideration: Paul v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 396 at [79]; Applicant A169 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 8 at [24]; Yusuf at [68].*

In respect to the ground summarised in paragraph 5.1(b), the First Respondent submits that claims to a well-founded fear of persecution based on the Applicant's ethnicity were not squarely raised in the material before the RRT and as a result the RRT member was not obliged to consider such claims: NABE v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 263 at [58] – [65]. Specifically, the claim to a subjective fear based on the Applicant's ethnicity as a Tamil

as opposed to his perceived political opinion was not raised by the Applicant despite numerous requests by the RRT member to clarify the basis of his fears: see transcript at [195]; [220] – [245]; [335] – [370]; [555] – [565]; [595]; [925]. The RRT member was not required to make the Applicant’s case for him and was not obliged to speculate on possible claims that were not made by the Applicant when he had been given the opportunity to articulate those claims: NABE at [58]; Applicant S 395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 at [1].

13. Both parties took the opportunity also to make oral submissions through their counsel at the trial of this matter on 6 March 2007. Ms Nolan submits that, although the applicants may not have clearly articulated a claim of ethnic persecution in Sri Lanka, that claim squarely arose on the material before the Tribunal and therefore needed to be considered. The applicants rely upon *NABE v Minister for Immigration (No 2)* at [57]-[60] and [63]. Ms Nolan submits that, properly understood, the first applicant’s claim was a claim of imputed political opinion based upon ethnicity as well as upon his association with particular persons and events.
14. Mr Mitchell, for the Minister, submits that this is a case of an unarticulated claim and that the claim does not arise from the material. Mr Mitchell submits that the protection visa claims made by the applicant were discursive and represented a personal history of the applicant as well as a history of events in Sri Lanka over a considerable period. The claims required clarification which is what the presiding member sought to do at the hearing. As best as could be ascertained at that time, the applicants’ claim was that found by the presiding member in his reasons. There was no ethnic claim because the applicants’ ethnicity was coincidental rather than causal. The Minister relies upon the decision of the High Court in *Applicant A v Minister for Immigration* (1997) 190 CLR 225.
15. In reply, Ms Nolan submits that the protection visa claims made by the applicant in relation to his ethnicity, properly understood, were real claims that required consideration and not simply background. The key, in her submission, is the applicants’ claim of serious harm being

suffered by him while a passenger on a bus¹. The presiding member accepted the factual elements of this claim² but dismissed it as irrelevant to the claims of persecution as the presiding member understood them. However, in Ms Nolan's submission, the incident was highly relevant to the first applicant's claim of persecution based upon his ethnicity.

Reasoning

16. In *NABE* at [57]-[63] the Full Federal Court said:

The nature of the review function was described by Allsop J (with whom Spender J agreed) in Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244 at 259 [42]:

'The requirement to review the decision under s 414 of the Act requires the tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration ... It is to be distinguished from errant fact finding. The nature and extent of the task of the tribunal revealed by the terms of the Act... make it clear that the tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant.'

The review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised by the material or evidence before it – Chen v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 157 at 180 [114] (Merkel J). There is authority for the proposition that the Tribunal is not to limit its determination to the 'case' articulated by an applicant if evidence and material which it accepts raise a case not articulated – Paramanathan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 at 63 (Merkel J); approved in Sellamuthu v Minister for Immigration and Multicultural Affairs (1999) 90 FCR 287 at 293 – 294 (Wilcox and Madgwick JJ). By way of example, if a claim of apprehended persecution is based upon membership of a particular social group the Tribunal may be required in its review function to

¹ See RD 120

² RD 136

consider a group definition open on the facts but not expressly advanced by the applicant – Minister for Immigration and Multicultural Affairs v Sarrazola (No 2) (2001) 107 FCR 184 at 196 per Merkel J, Heerey and Sundberg JJ agreeing. It has been suggested that the unarticulated claim must be raised ‘squarely’ on the material available to the Tribunal before it has a statutory duty to consider it – SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 265 at 273 [19] per Cooper J. The use of the adverb ‘squarely’ does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal.

There is some authority which might be taken to suggest that the Tribunal is never required to consider a claim not expressly raised before it. In SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 301, membership of a ‘particular social group’ was put to the Tribunal as a Convention ground for apprehended persecution. The Tribunal was held ‘not obliged to consider whether some other social group might be constructed ...’ at [19]. That decision however turned upon particular circumstances. Its correctness is not in contention here. It does not establish a general rule that the Tribunal, in undertaking a review, can disregard a claim which arises clearly from the materials before it.

In SGBB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 364 at 368 [17], Selway J referred to the observation by Kirby J in Dranichnikov, at 405, that ‘[t]he function of the Tribunal, as of the delegate, is to respond to the case that the applicant advances’. He also referred to the observation by von Doussa J in SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 548 that ‘[n]either the delegate nor the Tribunal is obliged to consider claims that have not been made’ (at [16]). Selway J however went on to observe in SGBB (at [17]):

‘But this does not mean the application is to be treated as an exercise in 19th Century pleading.’

His Honour noted that the Full Court in Dranichnikov v Minister for Immigration & Multicultural Affairs [2000] FCA 1801 at [49] had said:

‘The Tribunal must, of course, deal with the case raised by the material and evidence before it. An asylum claimant does not have to pick the correct Convention "label" to describe his or her plight, but the Tribunal can only deal with the claims actually made.’

His Honour, in our view, correctly stated the position when he said (at [18]):

‘The question, ultimately, is whether the case put by the appellant before the tribunal has sufficiently raised the relevant issue that the tribunal should have dealt with it.’

This does not mean that the Tribunal is only required to deal with claims expressly articulated by the applicant. It is not obliged to deal with claims which are not articulated and which do not clearly arise from the materials before it.

In STYB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 705, Selway J questioned whether the comments made by Merkel J in Paramanathan accurately reflected the position. He said (at [15]):

‘Whether or not those comments were correct when they were made, they may not now accurately reflect the jurisdiction of this Court. That jurisdiction is limited to the identification of jurisdictional errors. The question in this context is whether the Tribunal has made a jurisdictional error in not considering a claim that has not been made. In my view it does not make a jurisdictional error in such circumstances, providing, of course, that it correctly identifies the legal issues relevant to the claim that is made: contrast the majority and minority reasons in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112.’

We are of the view that the observations by Merkel J in Paramanathan, by the Full Courts in Sellamuthu and Sarrazola (No 2) and by Cooper J in SDAQ are consistent with the proposition that the Tribunal is not required to consider a case that is not expressly made or does not arise clearly on the materials before it. The Tribunal’s obligation is not limited to procedural fairness in responding to expressly articulated claims but, as is apparent from Dranichnikov, extends to reviewing the delegate’s decision on the basis of all the materials before it.

Whatever the scope of the Tribunal's obligations it is not required to consider criteria for an application never made. The application for protection visas by a mother and her children on the basis that they were refugees was not required to be considered as though it were an application in their capacity as the family of a man who had been granted a temporary protection visa – Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte S134/2002 (2003) 195 ALR 1 at 8-9 [31]-[32]. Gleeson CJ generalised from this, albeit in dissent, in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 at 114 [1]:

‘Proceedings before the tribunal are not adversarial; and the issues are not defined by pleadings, or any analogous process. Even so, this court has insisted that, on judicial review, a decision of the tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant’s lawyers, at some later stage in the process.’

It is plain enough, in the light of Dranichnikov, that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error. The same may be true if a claim is raised by the evidence, albeit not expressly by the applicant, and is misunderstood or misconstrued by the Tribunal. Every case must be considered according to its own circumstances. Error of fact, although amounting to misconstruction of an applicant’s claim, may be of no consequence to the outcome. It may be ‘subsumed in findings of greater generality or because there is a factual premise upon which [the] contention rests which has been rejected’ – Applicant WAEE (at 641 [47]). But as the Full Court said in WAEE (at [45]):

‘If the tribunal fails to consider a contention that the applicant fears persecution for a particular reason which, if accepted, would justify concluding that the applicant has satisfied the relevant criterion, and if that contention is

supported by probative material, the tribunal will have failed in the discharge of its duty, imposed by s 414 to conduct a review of the decision. This is a matter of substance, not a matter of the form of the tribunal's published reasons for decision.'

In that case the appellant, who was an Iranian citizen, put to the Tribunal that the marriage of his son to a Muslim woman in Iran had ramifications for him and his family. The Tribunal made no express reference in its discussion and findings to the claimed fears of persecution which arose out of the marriage by the appellant's son to a Muslim woman although it made reference to the claim in its overview of the appellant's case. The Court held that the Tribunal had failed to consider an issue going directly to the question whether the criterion under s 36 of the Act was satisfied. The Court held that the Tribunal had therefore failed to discharge its duty of review and had made a jurisdictional error.

Generalised claims on the ground of ethnicity

17. The issue here concerns a generalised claim based on ethnicity. A generalised claim on the grounds of ethnicity can be made by an applicant, although it appears that its success is dependent on the facts of the particular claim and how an applicant's ethnicity, in the particular applicant's circumstances, would amount to the applicant having a well-founded fear of persecution. Therefore, if such a claim "clearly arises' on the material before a decision-maker" (see *SZAIK v Minister for Immigration* [2006] FCA 3, *NABE v Minister for Immigration*) then the Tribunal has a duty to consider it.
18. This issue was considered in *Sellamuthu v Minister for Immigration* [1999] FCA 247, where the applicant claimed that the RRT had failed to consider whether he had a well-founded fear of persecution on the ground of his Tamil ethnicity (he had also articulated a claim of imputed political opinion which the RRT examined). In that case, the RRT had dismissed the application on the basis that (as outlined by Wilcox and Madgwick JJ at [15]):
 - (i) *the real case of the appellant, as orally presented by his solicitor, was that there was 'a real chance that the appellant would be detained and tortured if he returned to Sri Lanka on the basis that the appellant had been detained and tortured by the Army in the past' (emphasis added);*

- (ii) *it did not accept past mistreatment of the appellant because of his unreliability; and*
- (iii) *it did not accept ‘that all Tamils in Sri Lanka have a well-founded fear of being persecuted merely by reason of their race’ [emphasis added].*

19. Wilcox and Madgwick JJ determined that the RRT had failed to consider “what nevertheless would be [the applicant’s] future on account of his race and/or the possible imputation to him of a political opinion supporting the LTTE” (at [14]). They said at [19]:

It follows that all of the substantial claims, and information in support of them, put forward by an applicant must be considered. In the course of doing so, the RRT must also, of course, bear in mind whether it should exercise any of its impressive ancillary powers to supplement the information put before it by either the Department or the applicant. In this case, the RRT did not consider all the available information. This constitutes, in our opinion, an ‘error of law being an error involving an incorrect interpretation of the applicable law’ . . .

20. Similarly, Hill J observed at [49]:

*The Appellant’s solicitor rejected before us the suggestion that he had abandoned the submission that the Appellant had a well-founded fear of persecution based on ethnicity as a Tamil. Accepting that this was the case it clearly follows that the Tribunal has simply not addressed itself to the issue which was posed to it. It is no answer to this proposition to say that the Tribunal did not accept the evidence of the appellant so far as that evidence related to events which the Appellant deposed had taken place in Sri Lanka and which involved him and his family. The Tribunal accepted expressly that the appellant was a Tamil male. **But, it made no finding of the existence or lack of subjective fear of persecution by reason of his ethnicity. Nor did it make any finding by reference to background materials before it, or to other materials to which the appellant’s submissions referred, which were presumably available to it, as to whether such a fear would be well-founded.** [emphasis added]*

21. Notably, a generalized claim on the basis of ethnicity is to be determined on the facts of each case. Wilcox and Madgwick JJ observed at [16]:

there were particular things about this Tamil in Sri Lanka that might mark him out as being more exposed to a real chance of persecution than some others. Such persecution might be by reason of an imputed political opinion, as well as, or instead of, his race.

22. And further at [24]:

We should emphasise that our conclusions depend on the circumstances of this case. In many other cases the sole substantial basis for judging whether a person falls within the Convention criteria for a 'refugee' will be the information as to his/her supposed history and background furnished by an applicant. Upon legally proper rejection of the credibility of an applicant in such a case, there will be no basis for requiring that the RRT do more than forthwith reject the claim for refugee status.

23. *Sellamuthu* has been cited in refugee claims on the basis of general ethnicity. In *Thevar v Minister for Immigration* [1999] FCA 1182, one of the grounds upon which the applicant sought review was that the Tribunal failed to consider the applicant's claim that he had a well-founded fear of being persecuted on the basis of his race. The Tribunal in this case had referred to extensive material relating to the treatment of Tamils in Sri Lanka. Cooper J at [29] referred to *Sellamuthu* and concluded that the Tribunal had addressed the claim of generalized ethnicity in the following way:

In my opinion the RRT fully explored all relevant material as it applied to the applicant across a range of circumstances operating in Sri Lanka generally and Colombo and the north and east of the country in particular. Further, the RRT considered the position of the applicant in terms of the special circumstances he claimed, the circumstances of particular sectors of the Tamil community in Sri Lanka, and the circumstances of that community in general. In each circumstance the RRT asked the correct question as to whether in the circumstances under consideration there was evidence to support on the part of the applicant a well-founded fear of persecution for a convention reason. In so doing, it posed for itself and answered the correct question which arose under s36(2) of the Act.

24. In the present matter the applicant's initial written claims appear on pages 118 to 120 of the court book. Relevantly, the applicant claimed:

In July 1983, during the communal riot, thousands of innocent Tamils were killed by Sinhalese with the help of the Sri Lankan authorities. Many of my relatives and a few of my friends were victims of the above riot. Subsequent to the above riot, Tamils all around Sri Lanka except those lived in Colombo and in Sinhalese areas, launched many demonstrations against the Sri Lankan [sic] authorities and the Sri Lankan government for not protecting the innocent Tamils and also for aiding and abetting the Sinhalese who committed the brutal killings and other illegal activities. On many occasions, I joined my friends, school mates and the community organizations in and around my village in such demonstrations. In the above demonstrations, on the instructions of the Sri Lankan Government, the police and the armed forces unreasonably assaulted a number of participants and also many including me were charged by the police for organizing and participating in demonstrations against the Sri Lankan government.

25. The applicant claimed that an important incident occurred in January 1993 after he was admitted to the Eastern University at Vantharumullai. The applicant claimed:

One day when I was returning home from university, the bus I travelled was signalled to stop by the army. As the bus driver did not notice the above signal and continued to drive, the army officers opened fire [sic] at the above bus. Due to this shooting, many passengers in the bus were injured and two were killed. Soon after the bus was stopped, the army officers dragged the bus driver out from the bus and he was assaulted and kicked severely by many army officers. His explanation that he did not notice their signal to stop and his apology for not stopping were not accepted by the army officer and many of them continued to kick him. Thereafter, all passengers in the bus were asked to get down from the bus and body searched. Following the body search, all of us were taken to Kommathurai army camp. Kommathurai army camp is situated a few kilometres from the Eastern University.

At the above army camp, all of us were interrogated separately. The officer interrogated me saw my National Identity card and after noticing my family name as ..., asked me as to whether ..., the leader of LTTE is my relative. I told him that I am not related to him. Then the army officer told me that we never tell them the truth but they will find out the truth by giving us the proper treatment. Then he asked me about the LTTE activities in my area and what were my involvements with LTTE. I told him that I

do not have anything to do with LTTE. Soon after I told the above, he pushed the table, got up and slapped me and held my collar and told me not to tell that to him, as all Tamils are LTTE supporters. I was shocked and scared to be in that camp, especially in front of that officer.

26. The applicant in explaining his claims to the Tribunal emphasised that he was not a member of the LTTE³. He maintained his protection visa claims before the Tribunal. The Tribunal accepted that the applicant is a person of Tamil ethnicity⁴. The Tribunal accepted that the claimed incident in 1993 detailed above happened but found that there was no Convention nexus. The Tribunal said:

The Tribunal accepts the applicant's claims in relation to the 1993 bus incident: that he was held, tortured and that this lead [sic] to his abandonment of his university studies. The Tribunal finds this episode of little relevance, 13 years later, to the subsequent claims by the applicant as at the time he was an unfortunate victim of someone else's suspicions and circumstances. The applicant was not held or the bus stopped because of the applicant's own actions or suspicions about the applicant. Nor does the Tribunal find that the fact that a portion of his name is the same as that of the LTTE leader ... of any relevance.

27. The question is whether the Tribunal needed to consider the Convention nexus of the applicant's Tamil ethnicity. The Minister contends that there was no such need because the applicant had not articulated a claim based upon his ethnicity and no such claim squarely arose from the material. While conceding that the applicant's claims included statements about ethnic conflict in Sri Lanka and the difficulties faced by the Tamil population, the Minister contends that this was presented essentially as historical background. The applicant contends that, properly understood, his claims included a claim of a fear of harm at the hands of the Sri Lankan armed forces by reason of his Tamil ethnicity.
28. At the hearing, the applicant was asked on several occasions to detail his claims. Much of the discussion between the applicant and the presiding member centred upon his claim of a fear of harm at the hands

³ court book, page 126

⁴ court book, page 128

of the Karuna Group. Part of the problem here is that it was the presiding member's choice to characterise the applicant's claims in that constrained way. Page 8 of the transcript records the presiding member as saying:

Okay. Now, as I said before I've read everything that you've given me and the information that I have read as well from other sources indicates a number things [sic]. It indicates that the LTTE had a problem in early 2004 with Karuna and there was a split as a group and Mr Sacchi knows that we talked about in another case whether this Karuna Group is still going now in December 2005 but in any case reading your submissions it seems to me that this is what you're fearing. You're fearing reprisals from the Karuna Group, is that correct or have I got it wrong?

29. The applicant replied:

Yes, for sure there will some reprisals and they will for sure kill me. They will shoot me. Even now they are being assassinating people.

30. I do not understand the applicant, by that statement, to be limiting his claims to a fear of harm at the hands of the Karuna Group. Later, on the same page of the transcript the presiding member sought to exclude the possibility that the Karuna Group was targeting ordinary Tamils. He said:

Yes, but what I'm trying to clarify with you is this, what you're saying about the Karuna Group targeting ordinary Tamils does not seem to be reflected in the information that's available.

31. The applicant replied:

As far as I understand, as far as I am concerned I am scared of LTTE and scared of Karuna Group and the attitude of the people, common people I am unable to explain.

32. There was a further discussion recorded on page 13 of the transcript:

MR GENTILE: That's okay, that's fine but you need to understand that I have to look at independent information, as close to independent as I can. It would be clear to me that your family would naturally write to you not to go back. You know. And I'm also aware of the problems of what is written in the newspapers

and I'm not taking that as the absolute proof. That's why I have to look at a number of sources. I hope you appreciate that because I don't want to demean what you're saying but you need to understand that I need to look in broad terms about what is going on.

THE INTERPRETER: The reason that I am really fearful, the reason why I'm reacting this way is that because of my previous experience with the army and I have been injured, harmed by this, this particular injury which was caused by a broken bottle and they tried to kill me by doing this.

MR GENTILE: Yes, I understand. It is not – I'm not calling into question anything you're saying. All I'm saying to you is that you need to appreciate that I have to get as much as possible independent information in order to assess your claims and on this particular issue about the involvement of the army or the government or some parts of the army to help the Karuna factions, there is not an agreement, there is no agreement about that. There's a lot of contrary opinions.

THE INTERPRETER: It is true, this is true and I can take off on anything to tell you that it is true and I have seen in my own eyes what happened and this is the truth that I can prove.

MR GENTILE: Okay, so just to recap, perhaps you can tell me what is it you fear if you return to Sri Lanka?

THE INTERPRETER: Firstly the Karuna Group and the army thinks that I am a member of LTTE. So there is problems for Karuna Group and the army from people like that. They think that LTTE is threatening itself in those areas because of the people like me so if we eliminate these people the LTTE will become weak. The army as well as Karuna Group working everywhere in the country targeting the LTTE supporters. They will come to the place where I am staying and they will kill me or even they will – as soon as I reach the airport they will catch me.

33. At page 24 of the transcript the applicant's migration adviser adumbrated the applicant's claim as a claim of imputed political opinion with possibly some link to his ethnicity. On page 29 of the transcript the applicant referred generally to harm faced by the Tamil population when he said:

There are a lot of people are being dying and I do not know why they are dying and through my telephone contacts I came to know.

Karuna Group and army operate together and it is they are assassinating a lot of people.

34. The transcript establishes that no claim based upon ethnicity was clearly articulated by the applicant at the Tribunal hearing. The discussion between the applicant and the presiding member, if anything, masked rather than drew out any ethnically based claim. That is probably because the presiding member saw the central issue as being the activities of the Karuna Group and explored that issue in detail with the applicant. However, the claims as explained by the applicant at the Tribunal hearing did not detract from his earlier written claims. Central to the applicant's claims was a claim that he feared harm because of a political opinion imputed to him by the Karuna Group and by the Sri Lankan authorities but, underlying that, was a more generalised fear of harm as a member of the Tamil community. The following issues squarely arose from the applicant's written claims:

- a) he was a Sri Lankan of Tamil ethnicity;
- b) ethnic Tamils had suffered grievously in the past at the hands of the Sri Lankan armed forces;
- c) he had personally suffered in the 1993 bus incident when he was detained and tortured;
- d) one of the Sri Lankan army personnel who was responsible for harming him said to him that "all Tamils are LTTE supporters"; and
- e) he was afraid to return to Sri Lanka.

35. Although the claim was generalised and tended to be masked by the obvious claim of imputed political opinion, there was, in my view, sufficient arising from the material to call for an inquiry by the Tribunal whether the applicant had a well-founded fear of harm as an ethnic Tamil in Sri Lanka, independently of his claims of a fear of harm by reason of imputed political opinion. It is, of course, notorious that there has been a civil war in Sri Lanka for decades between the LTTE and the Sri Lankan government which, at a base level, is an ethnic conflict between the Sinhalese majority and the Tamil minority. The

applicant's claims of the harm suffered by the Tamil community extended beyond a simple claim of harm to those who are politically active or believed to be so. It extended to a generalised fear of harm as a member of the minority group in an ethnic civil war. That aspect of the claim should have been considered. It was not considered and the applicant should receive relief in the form of the constitutional writs of mandamus and certiorari so that consideration of the issues by the Tribunal can be completed according to law.

36. I will hear the parties as to costs.

I certify that the preceding thirty-six (36) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 11 May 2007