FEDERAL COURT OF AUSTRALIA

Applicant A169 of 2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 8

Migration Act 1958 (Cth)

Plaintiff S157/2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 211 CLR 476; [2003] HCA 2 applied
Minister for Immigration & Multicultural Affairs v Respondents S152 of 2003 [2004] HCA 18; (2004) 78 ALJR 678 applied
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323 cited
Paul v Minister for Immigration & Multicultural Affairs (2001) 113 FCR 396 cited
W396/01 v Minister for Immigration & Multicultural Affairs (2002) 68 ALD 69; [2002] FCA 455 cited
Reid v Secretary of State for Scotland [1999] 2 AC 512 cited
Re Minister for Immigration & Multicultural Affairs ex Parte Applicant S20/2002 (2003) 77 ALJR 1165; [2003] HCA 30 at 1193, [167] discussed
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 considered
Bruce v Cole (1998) 45 NSWLR 163 cited
Osman v United Kingdom (1998) 29 EHRR 245 cited

APPLICANT A169 OF 2003 v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, IAN LINCOLN, MEMBER REFUGEE REVIEW TRIBUNAL AND PRINCIPAL MEMBER OF THE REFUGEE REVIEW TRIBUNAL

SAD 132 OF 2004

FINN, MARSHALL & MANSFIELD JJ
25 FEBRUARY 2005
ADELAIDE

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **SAD 132 OF 2004**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**APPLICANT A169 OF 2003** **APPELLANTS**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	IAN LINCOLN, MEMBER REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
	PRINCIPAL MEMBER OF THE REFUGEE REVIEW TRIBUNAL **THIRD RESPONDENT**

JUDGES: **FINN, MARSHALL & MANSFIELD JJ**

DATE OF ORDER: **25 FEBRUARY 2005**

WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay to the first respondent costs of this appeal.

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

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **SAD 132 OF 2004**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**APPLICANT A169 OF 2003** **APPELLANTS**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	IAN LINCOLN, MEMBER REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
	PRINCIPAL MEMBER OF THE REFUGEE REVIEW TRIBUNAL **THIRD RESPONDENT**

JUDGES:	**FINN, MARSHALL & MANSFIELD JJ**
DATE:	**25 FEBRUARY 2005**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 This is an appeal from a decision of a judge of the Court given on 27 May 2004 dismissing an application for constitutional writs in respect of a decision of the Refugee Review Tribunal (the Tribunal) made on 31 January 2003. The application was made to the High Court on 25 March 2003, and was remitted to this Court for hearing and determination by order made on 11 June 2003. To succeed on the application it was necessary for the appellant to show that the decision of the Tribunal was infected with jurisdictional error: *Plaintiff S157/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 211 CLR 476; [2003] HCA 2 (*S157/2002*).

2 The appellants are all members of the one family: husband, wife and their son and daughter. They are all nationals of Sri Lanka. They arrived in Australia on 18 December 1995. They applied for a protection visa under the *Migration Act 1958* (Cth) (the Act) on 30 June 1997. On 14 July 1997 their application for a protection visa was refused by a delegate of the respondent. On 30 April 1999 the Tribunal affirmed that decision. The appellants did not then seek any form of judicial review of the Tribunal's decision.

3 Instead, they decided to make a fresh application for a protection visa. Section 48A of the Act precluded them from so doing without the permission of the respondent under s 48B of the Act. The appellants asked the respondent to exercise the power available under s 48B to allow them to make a further application for a protection visa, and also to exercise the power available under s 417 of the Act to substitute a decision more favourable to the appellants than that of the Tribunal's decision of 30 April 1999. On 7 February 2000 the respondent informed the appellants that he declined to exercise either of those powers in their favour.

4 Despite s 48A of the Act apparently then precluding the appellants from further applying for a protection visa, on 19 April 2001 they again applied for a protection visa under the Act. On 23 April 2001, an officer of the Department of Immigration and Ethnic Affairs wrote to inform the appellants that their application was incompetent as they had previously unsuccessfully applied for a protection visa. It added:

> *'You will be notified in writing whether or not you are allowed to make a further application for a protection visa, by an Onshore Protection case manager or the Minister's Office as soon as possible.'*

On the material before the Court, the next communication was from the Department of Immigration and Multicultural Affairs dated 8 May 2001. It indicated that the fresh application for a protection visa was being processed. On 13 August 2001 a delegate of the respondent again refused to grant to the appellants a protection visa under the Act. They sought review of that decision by the Tribunal. On 31 January 2003, the Tribunal affirmed the decision of the delegate. It was that decision which was the subject of the proceedings before the Court.

5 It appears that the initial application for a protection visa made on 30 June 1997 has been treated by the respondent, and by the Tribunal, as no application at all as it did not provide information upon which the substantive issues raised by the application could be addressed,

and so did not substantially comply with the requirements of a valid application. In consequence, it appears that the respondent, and the Tribunal, have regarded s 48A of the Act as not applying to that earlier application. In those circumstances, it is appropriate to address the present appeal on the basis that the application for a protection visa made on 19 April 2001 was a competent application under the Act.

THE CLAIMS

6 The husband is the principal appellant. He is Singhalese. He is now 45 years old. He claimed to be a person to whom Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol, so as to satisfy the criterion for the grant of a protection visa specified under s 36(2) of the Act. His wife and children did not separately claim to have that status, but were part of the application as members of the family unit. We shall therefore call the husband the principal appellant.

7 The principal appellant claimed that he was owed protection obligations by Australia under the Convention because he was a 'refugee' as defined in Art 1A(2) of the Convention. His evidence to the Tribunal was generally accepted as credible. It found that he fears returning to Sri Lanka firstly because he fears he is at risk from the LTTE because of his possible knowledge of the involvement of certain persons with whom he had been friends and who were LTTE activists who apparently set fire to an oil refinery at Kollonawa in October 1995, and secondly because he fears he is at risk from the Sri Lankan authorities who may wish to investigate his previous association with those activists and his alleged involvement in assisting them with illegal imports.

8 The principal appellant is a good cricketer. Through his cricketing contacts, he became associated with the Tamil Union Cricket Club and thereby obtained his first job soon after leaving school. Some years later, through the same contacts, he was employed by a privately owned customs house Trico Maritime Pty Ltd so he could continue to further his cricketing potential. He was able to help his friends, including his cricketing associates, with customs clearances whilst working in that job.

9 In October 1995, whilst the principal appellant was overseas on a cricketing tour, the Kollonawa Oil Refinery was set on fire by members of the LTTE. On his return from overseas, an acquaintance with whom he had dealt in the course of his work told him that one

of his friends at the Tamil Union Cricket Club and another person had been arrested for that attack, and he was warned not to reveal anything about them to the authorities lest he and his family be killed. He feared for his safety as a result of that contact.

10 In November 1995 his house was searched by police, allegedly because he had helped the two persons charged with the oil refinery fire to illegally clear goods through Sri Lankan customs. The principal appellant and his family were then living with relatives. He said that his friends' imports were never checked for customs clearance, because he was so trusted by the authorities, but he never suspected that those persons were involved in illegal activities or were members of the LTTE. On 16 November 1995 the principal appellant was given, through his father, a letter requiring him to report to the police to be interviewed about his knowledge of one of the persons suspected of another oil refinery attack at Orugodanwatta in November 1995. He understood that illegal weapons had been found in the house of the suspect which had apparently been cleared for customs entry by his employer. He remained in hiding and did not respond to that requirement, and then fled Sri Lanka. The principal appellant and his family left Sri Lanka on 17 December 1995 on a valid Sri Lankan passport.

THE TRIBUNAL'S REASONS

11 The Tribunal described the principal appellant's circumstances as follows:

> *'The picture that emerges ... is that he may have unwittingly, or under pressure from his Tamil cricketing friends, connived in some breach of Sri Lankan customs law which, as it turned out, helped the LTTE in a terrorist attack. As a result he has concerns both about the outcome of any police investigation and about LTTE attempts to prevent him from revealing information about their activities to the police.'*

12 However, the Tribunal did not accept that investigation of the principal appellant by the Sri Lankan authorities exposed him to a risk of persecution. It considered such investigation would simply be a legitimate measure by the Sri Lankan authorities, under laws of general application, in combating criminal activity. It accepted that the Sri Lankan authorities might impute to the principal appellant a pro-Tamil and pro-LTTE opinion in undertaking such investigations by reason of his association with the predominantly Tamil cricket club. It said:

> *'However the Tribunal finds that this would not be a essential and significant motive for such an investigation, which would be a legitimate state measure to combat terrorism. The Tribunal considers that the applicant would have the*

> *opportunity in such an investigation to establish the true (and limited) nature of his involvement and finds that the applicant would not face any real chance of significant unfairness, discrimination or mistreatment as a part of an investigation of the 1995 event.'*

The Tribunal was not satisfied that the investigations directly concerning the principal appellant in late 1995 were due to Convention-related persecution, nor that any further similar investigation might have that flavour.

13 In reaching those views, the Tribunal had regard to the not very vigorous search for the principal appellant by the authorities in late 1995, his ability to leave Sri Lanka lawfully and openly, and independent information about Sri Lanka available to the Tribunal as to the changed political climate in Sri Lanka since about 2002, including a ceasefire agreement between the Sri Lankan authorities and the LTTE. However, it acknowledged the risk that relations between the government and the LTTE may relapse. It expressly concluded that, even in such a case, it was not satisfied that investigation of the principal appellant's involvement in possible breaches of the law in relation to terrorist acts would give rise to a real chance of persecution for a Convention reason. It further positively found that any questioning of the principal appellant by the Sri Lankan authorities, or his prosecution by the authorities, over alleged breaches of customs law or the provision of alleged assistance to terrorists, would not be for a Convention reason. It further found that the principal appellant would not suffer disproportionate or discriminatory treatment or punishment for a Convention reason, if he were found to have committed an offence.

14 The Tribunal then addressed the principal appellant's fear for the welfare of himself and his family from LTTE activists because of their concern that he might reveal information about their activities. Such conduct would be by a non-state agency. The independent information available to the Tribunal included the commitment of the LTTE to the police process. In the light of that commitment, the Tribunal did not consider that there was a real chance that the principal appellant would be sought out and persecuted by the LTTE in any event. However, it went on to acknowledge that the truce and peace process may not necessarily hold into the foreseeable future, and in the event that it did not do so that the LTTE might take some adverse action against the principal appellant and his family.

15 On the basis of independent information regarding Sri Lanka, the Tribunal considered that the principal appellant would be able to avail himself of effective state protection if he were

sought out by the LTTE activists in the way he feared. It is commented:

> *'However the Tribunal considers that, if this process breaks down and armed struggle is resumed by the LTTE, the Sri Lankan authorities are likely to increase their efforts to combat terrorism and finds that the increased vigilance of the authorities in this situation of revived hostilities would be sufficient to meet the applicant's need for protection.*
> *...*
> *In this context it is not necessary that the government can guarantee protection: see* MIMIA v Prathapan *(1998) 156 ALR 672 at 680-81: even if the Sri Lankan authorities could not prevent specific instances of actual violence, it does not follow that the nature and extent of the protection provided by the Sri Lankan authorities in response to past acts was in the past, or would be in the future, inadequate for Convention purposes.'*

THE GROUNDS OF APPEAL

16 Before the Court at first instance, the only ground of jurisdictional error asserted in respect of the Tribunal's decision was the alleged failure to take into account a relevant consideration, namely that any breakdown of the truce and peace process between the Sri Lankan authorities and the LTTE might lead to such a vigorous resumption of hostilities that the Sri Lankan authorities would be unable to protect the principal appellant and his family.

17 As the learned judge at first instance pointed out, the Tribunal did have regard to that possibility. It addressed the right questions and did not fall into jurisdictional error in doing so. It accepted that the principal appellant had a fear of mistreatment by LTTE activists, especially if the truce and peace process were to break down. Consequently, it was necessary for the Tribunal to determine whether it was satisfied that the principal appellant would be unable or unwilling to avail himself of the protection of the Sri Lankan authorities. See *Minister for Immigration & Multicultural Affairs v Respondents S152 of 2003* [2004] HCA 18; (2004) 78 ALJR 678 at [19], 682 (*S152/2003*) per Gleeson CJ, Hayne and Heydon JJ. The absence of any evidence that the effectiveness of state protection in Sri Lanka fell below that required by international standards meant that the principal appellant did not demonstrate error on the part of the Tribunal.

18 On this appeal, the appellants sought to raise a fresh ground of appeal as well as to argue again that which had been argued at first instance. The fresh ground of appeal concerned the Tribunal's determination rejecting that the principal appellant had a well-founded fear of persecution from the Sri Lankan authorities. It was contended that the Tribunal had

committed jurisdictional error by failing:

> *' ... to properly consider whether the appellant would be subjected to Convention/related persecution if the ceasefire negotiations at the time between the Sri Lankan authorities and the LTTE broke down.'*

It was acknowledged that this matter had not been raised before the learned judge at first instance.

19 The argument was that, as the Tribunal accepted that in the reasonably foreseeable future there was a risk of eruption of LTTE violence if the peace process broke down, it was obliged to consider evidence that in that event there would be an increase in incidents of mistreatment and an increase in human rights violations by the Sri Lankan authorities against Tamils and those imputed with a pro-Tamil and pro-LTTE opinion, and that the Tribunal had failed to consider that evidence. The ignoring of that material is then argued to constitute jurisdictional error, based upon the observations of McHugh, Gummow and Hayne JJ in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 (*Yusuf*).

20 The second ground of appeal related to the principal appellant's fears of harm from the LTTE if he were to return to Sri Lanka. It was contended that the Tribunal fell into jurisdictional error in finding that, if the peace process breaks down and the LTTE increases its violent activities:

> *' ... the increased vigilance of the authorities in this situation of revived hostilities would be sufficient to meet the applicant's need for protection reflecting the Tribunal's conclusion at [18] above.'*

It was argued that the passage quoted, reflecting the Tribunal's conclusion at [15] above 'is against the weight of the evidence' so that the Tribunal must have ignored that evidence and that there was insufficient evidence to support the finding referred to. It was further argued that, in either of those events, jurisdictional error on the part of the Tribunal was made out.

CONSIDERATION

21 The first ground of appeal is predicated upon the proposition that the Tribunal did fail to consider the information referred to in two reports of the Department of Foreign Affairs and Trade (DFAT) of 4 April 2002 and 16 May 2002 concerning the mistreatment of Tamil's by the Sri Lankan authorities prior to the truce and the peace talks.

22 In fact, the Tribunal has expressly referred to each of those reports in its reasons for decision. Each of the reports is structured as a series of answers to specific questions, focusing upon the changed circumstances in Sri Lanka following the ceasefire and the LTTE participation in the peace plan. Each of the reports included information about the state of affairs in Sri Lanka prior to the ceasefire, as that information set the scene from which the state of affairs in Sri Lanka subsequent to the ceasefire was discussed.

23 In our view, it has not been shown that (as asserted) the Tribunal failed to have regard to the way in which the Sri Lankan authorities treated Tamils prior to the ceasefire, or that it failed to have regard to the particular information on the topic contained in the two DFAT reports. Indeed, having regard to the terms of those reports, and to the Tribunal's reasons, we are satisfied that the Tribunal did have regard to that information in reaching its decision.

24 It is not therefore necessary to consider whether, if the Tribunal had failed to have regard to that particular material, but had addressed the possible consequences to the principal appellant of the ceasefire breaking down (as it did), such a failure might constitute jurisdictional error on its part. We are not to be taken to have accepted the proposition that the failure to refer to that particular material might have constituted jurisdictional error. There is a clear distinction between the Tribunal taking into account relevant considerations, and the Tribunal taking into account particular pieces of evidence. A relevant consideration is one which the Tribunal is obliged to take into account properly to address each of the integers of a particular claim for a protection visa. See e.g. the discussion in the joint judgment of McHugh, Gummow and Hayne JJ in *Yusuf* at 347-348 [73]-[74]. The Tribunal did address the relevant consideration, namely whether the principal appellant's fear of the Sri Lankan authorities if he were to return to Sri Lanka involved a fear of persecution on his part and if so whether it was well-founded having regard to past history. It has therefore addressed the relevant considerations by addressing each of the elements or integers of the claim put forward by the principal appellant: cf per Allsop J in *Paul v Minister for Immigration & Multicultural Affairs* (2001) 113 FCR 396 at [79].

25 In *W396/01 v Minister for Immigration & Multicultural Affairs* (2002) 68 ALD 69; [2002] FCA 455 the Full Court (Black CJ, Wilcox and Moore JJ) held that the Tribunal had failed to appreciate, and therefore to address, an element of the principal appellant's claim. Here the Tribunal did address the elements of the appellant's claim and in addition (as we have found)

had regard to the information, which the appellants contend it had overlooked.

26 As to the second ground of appeal, the appellants have referred to several pieces of information extracted from the country information about Sri Lanka which the Tribunal had available to it. That information concerns particular attacks by the LTTE upon individuals or communities: two separate political assassinations in 1997; the attack upon a police station killing police and home guards; 11 attacks on Colombo between June 1995 and June 1996 killing some 200 civilians and wounding thousands; and the destruction of three transformers in Trincomalee in June 1997.

27 We do not accept that, because the Tribunal has not specifically mentioned that information in its reasons for decision, it has not had regard to it. Indeed, the Tribunal's reasons show that it was well aware generally of the serious and violent behaviour of the LTTE in the period up to about 2000. It was that awareness which caused the Tribunal to seek information about, and to address the significant changes in, Sri Lanka since the ceasefire, and in the course of the hearing to secure the comments of the principal appellant upon that information. It acknowledged, as the appellants' advisor submitted in a written submission subsequent to that hearing, that there had been failures of previous peace negotiations or ceasefires in 1987, 1989 and 1994. It referred to, and accepted, the principal appellant's evidence as to certain past conduct of the LTTE. It is not necessary for the Tribunal to refer to each individual piece of evidence before it to demonstrate that it has taken into account the fact or facts to which that evidence refers.

28 Counsel for the appellants invited the Court to infer from the Tribunal's reasons that it had failed to consider materials that were before the Tribunal when it considered the appellants' first application for protection visas in 1999. Counsel for the appellants contended that, because the Tribunal did not expressly refer in its reasons for decision to the file of the Tribunal relating to the appellants' first application for review, this Court ought to conclude that the decision of the Tribunal under consideration failed to have regard to, or failed to consider, the documents put before the Tribunal at the time of the first protection visa application.

29 In fact, there is express indication by the Tribunal that it *did* refer to the material before the Tribunal on the first application for a protection visa. It noted that, although the appellants

had promised to provide a further statement in support of that application within 28 days, 'there is no such statement on the file'. The Tribunal's reasons also indicate that it permitted the appellants to make further written submissions after the conclusion of the hearing, and its reasons record that 'the Tribunal asked whether the applicant believed there was any new material that would be brought forward, *noting that the information on which the applicant's case was based dated from 1995* and had already been considered a number of times' (emphasis added).

30 Accordingly, we are not satisfied that the Tribunal was ignorant of, or did not have regard to, the material put as to the risk which the LTTE might expose the principal appellant and others to in similar circumstances if the present ceasefire and peace process collapsed.

31 A further aspect of the contentions should be observed about this issue. It was argued that it would amount to jurisdictional error if the Tribunal made a wrong finding of fact, namely that the 'increased vigilance of the authorities [in the case of] revived hostilities would be sufficient to meet the appellant's need for protection'. The argument ran that there was insufficient evidence to support that finding. The contention was based upon the observations of Lord Clyde in *Reid v Secretary of State for Scotland* [1999] 2 AC 512 at 541 in which his Lordship indicated that jurisdictional error may be demonstrated through a legal deficiency including the absence of evidence or the insufficiency of evidence to support the decision. Kirby J in *Re Minister for Immigration & Multicultural Affairs ex Parte Applicant S20/2002* (2003) 77 ALJR 1165; [2003] HCA 30 at 1193, [167] (*Applicant S20/2002*) suggested that the availability of constitutional writs in Australia should adapt to afford protection as comprehensive as that now regarded as available in England. We do not think the judgments of the other judges in *Applicant S20/2002* support that proposition. There may appear circumstances in which a decision of an administrative decision-maker appears so unreasonable that no reasonable decision-maker could have come to it. In that circumstance, jurisdictional error may be established if such a conclusion is reached, because it is then inferred from the nature of the decision that the administrative decision-maker applied the wrong legal test in making the decision or was not, in reality, satisfied in respect of the correct legal test in making the decision: see e.g. *Applicant S20/2002* per Gleeson CJ at 1168, [9], and per McHugh and Gummow JJ at 1171-1172, [35]-[36]. Indeed, it is plainly established by the High Court that there is no jurisdictional error simply in making a wrong finding of fact: see e.g. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. See

also per Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163 at 187.

32 In any event we are far from persuaded that the Tribunal made a wrong finding of fact. The Tribunal did not fail to understand or appreciate the risk that, in the period prior to the current ceasefire or peace talks, the LTTE might have presented a significant risk to a person suspected by the LTTE of providing significant information to the Sri Lankan authorities adverse to the LTTE personnel and interests. It acknowledged and proceeded on that basis. It then accepted that there is a risk in the foreseeable future that such activities might be resumed. It made a further finding about the preparedness of the Sri Lankan authorities in those circumstances to endeavour to protect the potential informant, and about the quality of that protection. It had material available to it upon which it could reach those findings. Counsel for the appellants has not demonstrated that its findings were baseless, or could not reasonably have been made. One does not infer from the fact that some persons, even persons of particular susceptibility, are vulnerable targets of non-state violence that the state does not have a reasonably effective and impartial peace force and justice system. As was recognised in *S152/2003* at 684, [26] per Gleeson CJ, Hayne and Heydon JJ:

> *'No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australian courts deal with criminal cases involving violent attack on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the Tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.'*

33 In this matter there was no evidence identified by counsel for the appellants that there was any failure of state protection on the part of the Sri Lankan authorities in the sense of a failure to meet the standards of protection required by international standards. The High Court in *S152/2003* did not discuss at length the nature that such evidence might constitute, or the nature of those standards, other than to refer to the standards referred to by the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245.

34 If the submission was that it should be inferred from the nature of the decision that the

Tribunal applied the wrong test or was not, in reality, satisfied in respect of the correct test because the Tribunal could not rationally have reached the finding of fact which it did, for the same reasons, in our judgment the foundation of the proposition has not been made out.

CONCLUSION

35 Accordingly, we consider that the appeal should be dismissed. The appellants should pay to the first respondent costs of the appeal.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Finn, Marshall & Mansfield.

Associate:

Dated: 23 February 2005

Counsel for the Appellants:	B Zipser
Solicitor for the Appellants:	Harpers Solicitors
Counsel for the First Respondent:	M Roder
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second & Third Respondents:	The Second & Third Respondents did not appear
Date of Hearing:	1 November 2004
Date of Judgment:	25 February 2005