HIGH COURT OF AUSTRALIA

McHUGH J

RE THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS OF THE COMMONWEALTH OF AUSTRALIA & ORS RESPONDENTS

EX PARTE DURAIRAJASINGHAM PROSECUTOR

Re The Minister for Immigration and Multicultural Affairs;
Ex parte Durairajasingham
[2000] HCA 1
21 January 2000
S98/1996

ORDER

Application dismissed with costs.

Representation:

R T Beech-Jones for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second and third respondents

R W Killalea for the prosecutor (instructed by Sheila Foliaki-Singh & Associates)

CATCHWORDS

Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham

Immigration law and Administrative law – Refugee – Refugee Review Tribunal decision refusing to grant protection visa – Application in original jurisdiction of High Court for prerogative relief – Whether Tribunal failed to take into account relevant considerations and evidence – Whether Tribunal failed to consider all available inferences from evidence – Whether s 430(1) of the *Migration Act* 1958 (Cth) required the Tribunal to refer to evidence contrary to its findings – Whether a breach of s 430(1) amounts to a jurisdictional error grounding prerogative relief.

Constitutional law – Federal jurisdiction – Role of the High Court under the Constitution – Extent of High Court's jurisdiction to grant certiorari pursuant to s 75(v) of the Constitution.

Words and phrases – "well-founded fear of persecution" – "reasons for the decision".

The Constitution, s 75(v).
Migration Act 1958 (Cth), ss 415(1), 420, 430(1).
Convention relating to the Status of Refugees of 1951.

1 McHUGH J. This is an application in the original jurisdiction of the Court, made pursuant to s 75(v) of the Constitution, for prerogative relief against the Minister for Immigration and Multicultural Affairs of the Commonwealth of Australia ("the Minister") as first respondent, Roslyn Smidt sitting as the Refugee Review Tribunal ("the Tribunal") as second respondent, and Shunmugam Nganasamantham in his capacity as principal member of the Tribunal as third respondent.

2 In substance, Mr Durairajasingham, ("the prosecutor") contends that a decision of the Tribunal made on 9 April 1996 affirming that the prosecutor was not entitled to a protection visa (the "Tribunal's Decision") was a nullity. In his amended application, the prosecutor seeks orders nisi for:

(a) a writ of prohibition directed to the Minister, prohibiting him or his agents or delegates from acting upon, giving effect to, proceeding further upon, or enforcing, the Tribunal's Decision;

(b) a writ of certiorari directed to the Tribunal removing the Tribunal's Decision into this Court to be quashed;

(c) a writ of mandamus directed to the third respondent directing him to appoint a member of the Tribunal to rehear and redetermine the prosecutor's application for a protection visa according to law; and

(d) an injunction against the third respondent requiring him to appoint a member of the Tribunal other than the second respondent to rehear and redetermine the prosecutor's application for a protection visa according to law.

3 In accordance with ordinary practice, the second and third respondents took no part in the proceedings, apart from filing submitting appearances. The Minister presented the substantive arguments on the respondents' side of the record.

4 The Minister submits that neither the test for the granting of an order nisi nor the test for the granting of an order absolute has been made out. He submits that the appropriate course for me is to treat the application for an order nisi as an application for an order absolute in the first instance and to deal with the matter "on a final basis". The Minister contends that O 55 sub-rule 1(4) of the High Court Rules confers power on me to deal with the matter on a final basis. That sub-rule states:

> "The Court or Justice may, in its or his discretion, in a case in which it appears necessary for the advancement of justice, grant an order absolute in the first instance for a writ of *habeas corpus*, *certiorari*, *mandamus* or prohibition, or for the production of a person."

5 I reject the Minister's contention. In terms, the sub-rule confers power on the Court or a Justice to make an order for relief absolute in the first instance only if the prosecutor has made good his or her claim for the relief. It does not confer a power on the Court or a Justice to make an order dismissing an application for an order nisi for relief as if the application were an application for an order absolute.

6 That being so, I must first determine whether the prosecutor has made a case for the grant of the orders which he seeks. If I had concluded that he had made out a case, it would have been necessary for me to go on to consider whether I should exercise my discretion under O 55 r 1(4). However, for the reasons which follow, I am of the opinion that the prosecutor has failed to make an arguable case for the grant of an order nisi and that the application for relief should be dismissed.

The effect of the amendments to the *Migration Act* 1958 (Cth)

7 In *Abebe v The Commonwealth*[1], Gleeson CJ and I pointed out that:

> "[T]he Parliament has chosen to restrict severely the jurisdiction of the Federal Court to review the legality of decisions of the Refugee Review Tribunal. That restriction may have significant consequences for this Court because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this Court. The effect on the business of this Court is certain to be serious."

8 This case is but one of many applications for prerogative relief against the Tribunal currently pending in this Court[2]. Its procedural history vividly illustrates that the serious effect on the Court's business, which Gleeson CJ and I predicted in *Abebe*, is now being experienced. The case also demonstrates, if demonstration were necessary, that the effect of restricting the jurisdiction of the Federal Court to hear applications by persons claiming refugee status will often be to produce two hearings instead of one (a partial remitter to the Federal Court and a hearing in this Court), to lengthen the time taken to dispose of those applications and to use the time of the Federal judiciary inefficiently. A single judge of the Federal Court can, subject to appeal, dispose of a case in the Federal Court. A Justice of this Court can only dispose of an application by holding that

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1 (1999) 73 ALJR 584 at 597; 162 ALR 1 at 17.

2 Of the 102 applications for prerogative relief currently pending in this Court, 66 of them arise under the *Migration Act*. As more and more claims for refugee status are made, these numbers are bound to increase.

the applicant has not overcome the low hurdle for the grant of an order nisi. Even then his or her decision may be subject to appeal. If an order nisi is granted, the matter can only be disposed of by the Full Court of this Court unless it "appears to be one of urgency"[3].

9 The effect of restricting the jurisdiction of the Federal Court must inevitably impose on the Justices of this Court the dilemma of choosing between two unpalatable alternatives. The first alternative is to give preference to the applications of persons held in custody and claiming refugee status to the detriment of the Court's general constitutional and appellate jurisdiction. The second alternative is to continue to give preference to the constitutional and appellate jurisdiction of the Court with the result that claimants for refugee status are detained in custody for longer periods than is likely to have been the case if the Federal Court had retained all of its jurisdiction to deal with refugee cases.

10 One of the principal reasons for the setting up of the Federal Court in 1976 was the recognition that, with more and more matters arising under laws of the Parliament, this Court could not act as a federal trial court and still have adequate time for research and reflection in respect of the important matters falling within its constitutional and appellate jurisdiction.

11 With the setting up of the Federal Court, the days when Justices of this Court would sit alone to hear actions against the Commonwealth or between interstate residents or to hear cases concerning matters such as income tax, intellectual property and customs prosecutions were thought to have ended. In 1984 the Parliament again recognised the need for this Court to confine itself to constitutional and important appellate matters by amending the *Judiciary Act* 1903 (Cth) so that appeals to the Court could only be brought with the leave of the Court[4]. Earlier the Parliament had given the Court and its Justices power to remit certain matters commenced in its original jurisdiction to the State and the federal courts[5]. In 1983, the Court was empowered to remit most claims for prerogative relief for prohibition and mandamus, such as those involved in this case, to the Federal Court for determination[6]. Subsequent amendments gave the

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3 High Court Rules, O 55 r 4.

4 *Judiciary Amendment Act (No 2)* 1984 (Cth), s 3.

5 *Judiciary Act*, s 44.

6 The power arose from the conferral of jurisdiction on the Federal Court to hear claims for prerogative relief, subject to certain exceptions, by s 39B of the *Judiciary Act*, which was inserted by the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1983 (Cth). This Court already had power under s 44(1) of the

(Footnote continues on next page)

Court power, via s 44(1) of the *Judiciary Act*, to remit to the Industrial Relations Court[7], and now to the Federal Court[8], applications for prerogative relief against the Industrial Relations Commission which were becoming frequent.

12 Sir Garfield Barwick, who as Attorney-General began the process of creating the Federal Court, has said[9]:

> "My own basic objective in proposing a new federal superior court was to free the High Court of Australia, as of this time but particularly for the future, for the discharge of its fundamental duties as interpreter of the Constitution and as the national court of appeal untrammelled by some appellate and much original jurisdiction with which it need not be concerned ... [T]he jurisdiction, appellate and original, vested in the High Court partly by the Constitution itself and partly by the action of the Parliament under section 76 [of the Constitution], appears now to be too great. Its exercise requires judicial time and energy which would serve Australia better if they could be added to what is now available for the performance of the two fundamental responsibilities of the Court".

13 Given this history and the need for this Court to concentrate on constitutional and important appellate matters, I find it difficult to see the rationale for the amendments to the *Migration Act* 1958 (Cth) ("the Act") which now prevent this Court from remitting to the Federal Court *all* issues arising under that Act which fall within this Court's original jurisdiction. No other constitutional or ultimate appellate court of any nation of which I am aware is called on to perform trial work of the nature that these amendments to the Act have now forced upon the Court.

14 There is no ground whatever for thinking that the judges of the Federal Court are not capable of dealing with all issues arising under the Act which fall within this Court's jurisdiction. Although the refugee matters that cannot be remitted to the Federal Court do arise under this Court's constitutionally entrenched jurisdiction, most of them are not constitutional matters as that term is

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Judiciary Act to remit matters commenced in this Court to a court having jurisdiction to hear them.

7 *Industrial Relations Reform Act* 1993 (Cth), s 56.

8 *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), Sched 16.

9 "The Australian Judicial System: The Proposed New Federal Superior Court" (1964) 1 *Federal Law Review* 1 at 2-3 quoted in Bennett, *Keystone of the Federal Arch* (1980), at 91. See also the discussion by Bennett at 91-94.

ordinarily understood. The great majority of the matters which cannot be remitted simply involve questions of administrative law with which the Federal Court has long been familiar and in respect of which it has great experience and expertise.

15 The reforms brought about by the amendments are plainly in need of reform themselves if this Court is to have adequate time for the research and reflection necessary to fulfil its role as "the keystone of the federal arch"[10] and the ultimate appellate court of the nation. I hope that in the near future the Parliament will reconsider the jurisdictional issues involved.

Procedural history

16 The prosecutor is a Sri Lankan citizen of Tamil ethnicity. He arrived in Australia with his wife and child on 21 June 1994 and applied for a protection visa under the Act on 22 July 1994. On 3 August 1995, the prosecutor's application was refused by the Minister's delegate. The prosecutor applied to the Tribunal to review the delegate's decision. On 9 April 1996, the Tribunal found that the prosecutor was not a "refugee" within the meaning of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together, "the Convention"). Specifically, the Tribunal found that the prosecutor did not have "a well-founded fear of being persecuted" for a reason set out in the Convention definition of "refugee".

17 On 17 May 1996, the prosecutor filed an affidavit in this Court exhibiting a draft order nisi. Concurrently with the filing of that affidavit the prosecutor commenced proceedings in the Federal Court seeking review of the Tribunal's Decision pursuant to Pt 8 of the Act. At a directions hearing on 6 June 1996, a Justice of this Court ordered the prosecutor to make an election as to which of the two proceedings he wished to pursue. The prosecutor elected to withdraw his application in the Federal Court and continue the proceedings in this Court.

18 Subsequently, the parties filed a consent order in this Court, which in terms purported to remit "the applications for order nisi for the writs of mandamus directed to the first respondent and a writ of prohibition directed to the second respondent" upon certain of the grounds relied on by the prosecutor, "to the

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10 As it was described by Alfred Deakin as Attorney-General of the Commonwealth speaking on the introduction of the Judiciary Bill: House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10967. The phrase was first used by Josiah Symon in 1897 at the Adelaide Convention Debates: *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 20 April 1897 at 950.

extent to which the Federal Court has or would have jurisdiction therein pursuant to ss 475 and 476 of the Migration Act (Cth) 1958". A consent order was made in those terms on 25 November 1996. That left outstanding in this Court that part of the dispute between the parties over which the Federal Court had no jurisdiction.

19 Owing to an apparent oversight, there was a discrepancy between the relief sought in the application for orders nisi and the terms of the consent order. The application sought prohibition directed to the first respondent, certiorari directed to the second respondent and mandamus directed to the third respondent. The consent order purported to remit applications for an order of mandamus directed to the first respondent and an order of prohibition directed to the second respondent. That being so, I think the better view is that the remittal to the Federal Court was a nullity. The proceedings which were purportedly remitted to the Federal Court had never been commenced in this Court. An essential requirement of the successful invocation of this Court's jurisdiction under s 75(v) of the Constitution is that the relief sought is one of the remedies set out in that section. Moreover, the Court's constitutional jurisdiction to grant a particular s 75(v) remedy is not invoked unless the originating process, by its terms, seeks that remedy. As this Court's jurisdiction had never been invoked with respect to mandamus directed to the first respondent or prohibition directed to the second respondent, there were no proceedings of that nature pending in this Court which could be remitted to the Federal Court.

20 On 11 November 1997, Davies J dismissed that part of the proceedings purportedly remitted to the Federal Court. On 13 July 1998, the Full Court of the Federal Court dismissed an application by the prosecutor for leave to appeal from the decision of Davies J.

21 When the matter was relisted in this Court, I brought the discrepancy between the terms of the application for relief under s 75(v) and the terms of the consent order to the attention of the parties. I indicated to them that it might be necessary to rehear in this Court those matters that had already been litigated in the Federal Court. However, when the matter later came on for hearing in this Court, counsel for the prosecutor sensibly abandoned reliance on the grounds which were the subject of the remittal to Davies J, no doubt on the basis that, even if Davies J had no jurisdiction to deal with them, his Honour's reasoning showed they could not succeed in this Court.

The prosecutor's case before the Tribunal

22 The prosecutor claimed and the Tribunal accepted that he:

(a) had attended college in Jaffna in the early 1970's and had become well-known through playing cricket and being elected president of the College Union;

(b) had been involved in activities protesting against the Sri Lankan government's policies towards Tamils in the early 1970's;

(c) had been involved, for a period in the 1970's, with the Tamil United Liberation Front (TULF), a party which was formed in 1976 to unite all Tamil parties and fight the government to liberate Tamils;

(d) had belonged to a Tamil party known as PLOTE for about six months in 1983, which he believed was a non-violent organisation;

(e) had friends in the Liberation Tigers of Tamil Eagles ("LTTE"), another Tamil party, who had tried to force the prosecutor to join LTTE and go to India for military training and that, as a result of this pressure, he had paid an agent to arrange for him to go to Germany;

(f) had left Sri Lanka in 1983 and had been granted temporary residence in Germany; and

(g) had returned to Sri Lanka from Germany on 14 October 1993 in order to be married and had been married on 18 October 1993.

23 These matters formed the background to the prosecutor's claim that he had a well-founded fear of persecution for a Convention reason. In substance, the prosecutor claimed that he feared persecution by reason of the political opinions held by or imputed to him and by reason of his race. The two specific matters which were the focus of the inquiry in the Tribunal as to whether the prosecutor had a present well-founded fear of being persecuted were the prosecutor's claims that:

1. while in Sri Lanka in late 1993, he had been approached by members of PLOTE and asked to return to his home town of Jaffna and act as a spy for PLOTE; and that

2. he would be at risk from the authorities in Sri Lanka, if he returned, because of his ethnicity as a Tamil.

24 In relation to matter 1, the prosecutor gave evidence that two weeks after his wedding on 18 October 1993, he was approached at a market by a young man who recognised him because of his fame as a cricketer in Jaffna when he was at college in the early 1970's. The man asked the prosecutor if his brother was a lecturer at Jaffna University and the prosecutor had agreed that he was. The prosecutor also claimed that, shortly after the meeting at the market, the same man came to his house and took him to meet two other men. One of these men was an old friend from PLOTE named Manikathasan. They took the prosecutor to a hotel where a police escort took them to a room. Manikathasan told the prosecutor that some of their mutual friends had been killed by LTTE and that

Manikathasan and others were now working to destroy LTTE by supporting the government. According to the prosecutor, Manikathasan said that he was aware that the prosecutor's brother, who was a lecturer at Jaffna University, was an active member of LTTE and that one of the prosecutor's friends held a senior position in the LTTE broadcasting service. Manikathasan then allegedly asked the prosecutor to go to Jaffna to spy for PLOTE. The prosecutor told those seeking to recruit him as a spy that he had recently married and that he did not want to undertake the task, but Manikathasan continued to insist that he should go. The prosecutor claims that he discussed this incident with his wife, that they decided they should go to Germany and that he had left for Germany on 10 November 1993.

25 The prosecutor's wife claimed that, about two months after he left for Germany, the young man whom the prosecutor had met in the market threatened to kidnap her daughter. The prosecutor said that he became increasingly concerned for the safety of his wife's daughter (his step-daughter), but had been unable to obtain a visa for his wife and step-daughter to join him in Germany. Accordingly, he returned to Sri Lanka on 28 April 1994 and arranged visas for him and his family to visit his sister in Australia. He arrived on 21 June 1994 and while in this country made an application for a protection visa.

26 The Tribunal made the following findings in relation to the prosecutor's claim on matter 1 above[11]:

> "I do not believe that members of PLOTE tried to recruit him to go to Jaffna and obtain information on the LTTE for them. In the first place, I find the claim that he was recognised in the market by a young man who had not seen him for some 25 years, then asked by an organisation which he had only belonged to for six months ten years earlier to go to Jaffna, where he had not lived for ten years, to spy on the LTTE because his brother was a member, to be utterly implausible, particularly as his brother was only in Jaffna occasionally during the period in question. Second and more importantly, I do not accept that his brother was a member of or an adviser to the LTTE. As the information set out below indicates, LTTE members were detained whenever and wherever they were found by the Sri Lankan security forces for most of the period during which Mr Durairajasingham's brother was studying in Kandy. If he had been a member or important associate of the LTTE during that period and his membership had been known to PLOTE, which as Mr Durairajasingham himself pointed out, was working with the government to crush the LTTE, he would, I am sure, have been detained by the security forces.

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11 Unreported, Refugee Review Tribunal, N95/08732, 9 April 1996 ("Tribunal's Reasons"), at 10-11.

> As I do not accept that Mr Durairajasingham was approached by PLOTE and asked to spy for them in Jaffna, it follows that I do not accept that his wife and step-daughter were threatened by members of PLOTE seeking him after he left Sri Lanka."

27 In relation to matter 2, the Tribunal said that "while I believe it is unlikely that Mr Durairajasingham would face persecution within the reasonably foreseeable future as a result of his ethnicity if he returned to the Jaffna region, I do not find the possibility so unlikely as to be remote"[12]. Having made that finding, the Tribunal then considered whether it would be unreasonable to expect the applicant to live in another part of the country. In doing so, the Tribunal applied the principle in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[13] which the Tribunal expressed as follows[14]:

> "Applicants who would be safe from persecution if they stayed away from [their home] area will not be eligible for a protection visa, unless it is unreasonable to expect them to try and live in another part of the country."

28 In relation to whether it was reasonable to expect the prosecutor to relocate from Jaffna to Colombo, the Tribunal said, inter alia[15]:

> "From the evidence cited above it is clear that most Tamils in Colombo will be required to identify themselves and, if not long term residents in the city, explain their presence. Those who are unable to identify themselves or cause suspicion for some other reason may be detained for a brief period and some of those detained are held for little or no reason other than the fact that they are Tamils; those most likely to be found in this latter group are young men from Jaffna. However, even during the 1993 crackdown and the security tightening following the bombing of Colombo, the evidence does not suggest that Tamils in Colombo faced more than a remote chance of serious harm amounting to persecution unless they were seriously suspected of involvement in the LTTE. Mr Durairajasingham has never been involved with the LTTE nor is there any suggestion that he was suspected of involvement with them in the past. He had no problems with

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12 Tribunal's Reasons at 12.

13 Unreported, Federal Court of Australia, Davies J, 8 December 1993. That decision was upheld by the Full Court of the Federal Court in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437.

14 Tribunal's Reasons at 3.

15 Tribunal's Reasons at 17-18.

> the authorities on his last two visits to Colombo, one of which occurred in the latter half of 1993 when there were particularly intense security activities in the capital and I do not consider he faces a real chance of being detained for a prolonged period or ill-treated by members of the security forces in Colombo."

Availability of prerogative relief

29 The particular relief sought against the Tribunal is certiorari. Section 75(v) of the Constitution does not in terms confer jurisdiction on this Court to issue writs of certiorari. The Court has not yet decided whether it has jurisdiction to grant certiorari other than as an aid to the exercise of a jurisdiction expressly conferred upon it or in the course of exercising its "accrued" jurisdiction to deal with the entire "matter" before it[16]. However, in my opinion, it is clear that the Court has no jurisdiction to grant certiorari in a s 75(v) matter otherwise than as an incident of its accrued or expressly conferred jurisdiction[17]. The Constitution confers no express power to grant certiorari. As Brennan CJ has pointed out, because the power to grant certiorari is merely ancillary to the jurisdiction conferred by s 75(v) of the Constitution, it does "not expand the occasions when a writ of mandamus or prohibition would issue"[18] under that paragraph of the Constitution. The ancillary nature of the power to grant certiorari means that the power can be exercised only when it is necessary to effectuate the grant of some other aspect of the Court's jurisdiction conferred by or pursuant to ss 75 and 76 of the Constitution. Accordingly, unless the prosecutor can demonstrate that he is entitled to obtain an injunction, mandamus or prohibition against the respondents or one or more of them, the Court has no power to grant certiorari quashing the decision of the Tribunal.

30 Each of the prosecutor's claims for mandamus and prohibition is based upon the contention that the Tribunal's Decision was void ab initio. That being so, in order to succeed in his claims for mandamus and prohibition, the prosecutor must demonstrate that, in reaching its decision, the Tribunal made a jurisdictional error[19]. A non-jurisdictional error would not ground prerogative relief. At common law certiorari lies for non-jurisdictional errors apparent on the

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16 *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 348.

17 *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 604; *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25-26, 32-33.

18 *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 604.

19 *Craig v South Australia* (1995) 184 CLR 163.

face of the record[20], but because the power of this Court to issue certiorari is ancillary to the jurisdiction to issue mandamus or prohibition, to obtain an order of certiorari the prosecutor must demonstrate that the Tribunal has made a jurisdictional error.

31 In addition to the claim for prerogative relief, the prosecutor also seeks an injunction against the third respondent. No doubt the power to grant injunctions under s 75(v) is not confined to jurisdictional error, and, if an injunction was appropriate, in some situations certiorari would also lie to quash a decision or order so as to effectuate the grant of an injunction. But there is nothing in this case which would warrant the grant of an injunction against the third respondent unless the decision of the Tribunal was void. Indeed, no order could be made against that respondent unless relief was obtained against the first and second respondents. Nor is there anything in the case which would justify an injunction against the first and second respondents if mandamus or prohibition is not available. There is nothing to suggest that, even if the first and second respondents have acted within their jurisdiction, they have acted or are threatening to act unlawfully in some way that infringes or threatens to infringe the legal rights of the prosecutor to stay in this country.

The grounds upon which the relief is sought

32 The grounds upon which the prosecutor seeks prerogative relief in this Court are set out below. It is convenient to retain the original numbering of the grounds, even though the withdrawal of some grounds has the effect that the numbering is no longer sequential.

Ground 3

33 Ground 3 alleges that the Tribunal failed to take into account the following relevant considerations in deciding that the prosecutor faced no more than a remote chance of persecution for a Convention reason in Colombo:

(a) The evidence of the increased risk of persecution of the prosecutor by reason of the fact that if he returned to Colombo he would be likely to be detained for a longer than usual period as a returning Tamil who did not have an identity card and that he would be questioned as to the reasons for his presence in Colombo and as to his previous political activities.

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20 *Craig v South Australia* (1995) 184 CLR 163; *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338.

(b) The fact that, if detained for a longer than usual period, the prosecutor faced an increased risk of ill-treatment amounting to persecution while in detention.

(c) The increased risk of persecution of the prosecutor in Colombo by reason of his background as a Tamil from Jaffna which was a terrorist stronghold.

(d) The increased risk to the prosecutor by reason of the fact that the authorities may become aware of his previous anti-government political activities in Jaffna, particularly by reason of his earlier arrest and detention as a result of those activities.

(e) The deteriorating security situation in Colombo since the bombing in January 1996 including independent evidence of subsequent large scale and repeated arrests and detentions of Tamils in Colombo.

(f) The information from Amnesty International contained in a letter to the prosecutor's solicitor dated 4 March 1996 which formed part of the evidence before the Tribunal.

(g) The prosecutor's claim that he fears persecution by LTTE, a terrorist organisation in Sri Lanka.

(h) The increased risk to the prosecutor by reason of the possibility that the authorities in Colombo will suspect that his brother is a member of, or associated with, LTTE.

(i) The oral evidence given by the prosecutor that during his last two visits to Colombo he had his German travel documents as evidence of his identity, and he would not now have those documents.

(j) The prosecutor's claim that PLOTE tried to recruit him, in Colombo, to spy on LTTE.

(k) The prosecutor's wife's claim that members of PLOTE came to her home looking for the prosecutor "about three times in the two months or so after he [the prosecutor] left for Germany" and that a "young man … came to her home shortly after he [the prosecutor] left for Germany and that about two months later came again and threatened to kidnap her daughter"[21].

34 Ground 3 must be taken to allege that, by reason of the Tribunal's failure to take various matters into account, its decision was beyond its jurisdiction.

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21 Tribunal's Reasons at 7.

35 In *Craig v South Australia*[22], this Court said:

> "If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

36 Clearly, the failure to take into account relevant considerations can constitute a jurisdictional error. But in my opinion there was no failure to take relevant considerations into account in relation to the matters mentioned in Ground 3. Each of the "considerations" set out at Grounds 3(b), (c), (d), (e) and (h) are assertions of fact. It is manifestly clear from the Tribunal's reasons that it considered that the "facts" asserted in Grounds 3(b), (c), (d), (e) and (h) were incorrect, or at all events were not a fully accurate representation of the situation. Furthermore, it was open to the Tribunal to take that view of the statements and contentions of the prosecutor and his wife. As Gummow and Hayne JJ said of a similar argument in *Abebe v The Commonwealth*[23], Grounds 3(b), (c), (d), (e) and (h) were each "self-evidently a contention that depends upon the Court reviewing the merits of the Tribunal's decision rather than the process by which it arrived at its conclusion. Such a contention could not be advanced as a ground for the grant of prerogative relief[24]".

37 The remaining matters in Ground 3, namely, those in pars 3(a), (f), (g), (i), (j) and (k), are couched in terms of "claims" and "evidence" rather than as assertions of fact. However, it cannot be said that the Tribunal failed to take them into account.

38 The Tribunal examined the evidence referred to in paragraph 3(a) but concluded that the vast majority of people detained were released within a short period (generally 48 hours) and that the prosecutor had not experienced any such problems when he visited Sri Lanka in 1993 and 1994[25].

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22 (1995) 184 CLR 163 at 179.

23 (1999) 73 ALJR 584 at 623; 162 ALR 1 at 53.

24 See, eg, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, per Brennan CJ, Toohey, McHugh and Gummow JJ.

25 Tribunal's Reasons at 10.

39 The Tribunal expressly referred to the letter referred to in par 3(f)[26]. It is clear that, by reason of other evidence referred to by the Tribunal[27] and its statement that "the evidence does not suggest that Tamils in Colombo faced more than a remote chance of serious harm"[28], the Tribunal was of the view that on balance the contents of that letter did not accurately describe the situation in Colombo. But there is nothing to suggest that it did not take the letter into account.

40 The Tribunal expressly referred to the claim referred to in par 3(g)[29]. The Tribunal clearly rejected the claim, when it said:[30] "[a]fter considering Mr Durairajasingham['s] claims in their entirety, I conclude that he faces no more than a remote chance of persecution for a Convention reason in Colombo in the reasonably foreseeable future."

41 The Tribunal did not expressly refer to the evidence referred to in par 3(i) but it is clear that the Tribunal directed its mind to the evidence because it noted that, even if a Tamil person has difficulty producing identification documents, the vast majority of Tamils are released within 48 hours[31].

42 The Tribunal expressly rejected[32] the prosecutor's claim referred to in par 3(j) and his wife's claim as set out in par 3(k).

43 Accordingly, the prosecutor has not shown that the Tribunal failed to take into account any of the considerations set out in Ground 3. It is unnecessary therefore to determine whether the failure to take any of these matters into account would have constituted jurisdictional error.

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26 Tribunal's Reasons at 10.

27 Tribunal's Reasons at 13-17.

28 Tribunal's Reasons at 17.

29 Tribunal's Reasons at 9.

30 Tribunal's Reasons at 18.

31 Tribunal's Reasons at 9 and at 11-12.

32 Tribunal's Reasons at 11.

Ground 4

44 Ground 4 alleges that the Tribunal failed to take into account, in considering whether it was reasonable to expect the prosecutor to return to Colombo, the following relevant considerations:

(a) The considerations in grounds 3(a) to (k).

(b) The evidence given by the prosecutor at the hearing held by the second respondent on 21 March 1996 to the effect that his parents no longer live in Colombo and that they are presently homeless, their whereabouts being unknown to him.

(c) The increased difficulties faced by recently arrived Tamils in Colombo in finding employment and accommodation.

(d) The fact that the prosecutor does not speak Sinhalese.

(e) The evidence of the previous difficulties faced by the prosecutor in attempting to relocate to Colombo.

(f) The unpredictability of the political and security situation in Sri Lanka, and particularly in Colombo.

(g) The quality of any internal protection available to the prosecutor in Colombo.

(h) The prosecutor's claim that PLOTE tried to recruit him, in Colombo, to spy on LTTE.

(i) The prosecutor's wife's claim that members of PLOTE came to her home looking for the prosecutor "about three times in the two months or so after he [the prosecutor] left for Germany" and that a "young man … came to her home shortly after he [the prosecutor] left for Germany and that about two months later came again and threatened to kidnap her daughter."

45 Ground 4 must also be taken to allege jurisdictional error in failing to take into account various matters. It is based in part on the same grounds as are set out in Grounds 3(a) - (k). In so far as Ground 4 relies on those grounds, they must be rejected for the reasons given in respect of Ground 3. Of the additional matters raised in Ground 4, Grounds 4(b), (c), (d) and (e) were not addressed in those exact terms by the Tribunal. However, those grounds are all directed to attacking the Tribunal's implicit factual conclusion that the prosecutor was a man who could be expected to survive and manage alone, if necessary, in Colombo where the language and culture differs from his own. In my opinion, it is clear

that the Tribunal directed its mind to the matters set out in Grounds 4(b), (c), (d) and (e), having regard to the Tribunal's statement that[33]:

> "There is a large Tamil population in Colombo. Mr Durairajasingham has previously lived and worked in Colombo. Members of Mr Durairajasingham's family have lived in Colombo and other parts of Sri Lanka at different times over a period of many years and his sister is a long term resident of the city. Mr Durairajasingham has not lived in Jaffna for many years and his ability to live and work in Germany for some ten years demonstrates his ability to adapt to life in places where the language and culture differ from his own. Perhaps most importantly of all, his wife has lived in Colombo for most of her life and members of her extended family still live there. In these circumstances, I do not believe it would be unreasonable to expect Mr Durairajasingham to relocate to Colombo to avoid the possibility of persecution or the violence associated with the war in the north."

46 In relation to the remaining matters in Ground 4, ie pars (f) and (g), the Tribunal examined in great detail the security situation in Colombo[34], the examination occupying some six pages of its reasons. It cannot be said that the Tribunal failed to take these matters into account.

47 In any event, none of the matters with which I have specifically dealt with under Ground 4 suggest jurisdictional error.

Ground 5

48 Ground 5 alleges that the Tribunal acted beyond jurisdiction in that it erred in law in considering whether the prosecutor had a well-founded fear of persecution and whether it was reasonable for him to relocate to Colombo by failing to consider the cumulative effect of his claims and the evidence in support of them.

49 Ground 5 therefore expressly alleges jurisdictional error. While the ground is cast in the language of the failure to consider a relevant consideration, (ie "the cumulative effect of the prosecutor's claims and the evidence in support of them"), it is in substance a quarrel with the overall finding of fact made by the Tribunal – that the prosecutor did not have a well-founded fear of persecution for a Convention reason. The language of "cumulative effect" adds nothing. The absence of a substantive complaint of an error of law in this ground (as opposed

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33 Tribunal's Reasons at 18.

34 Tribunal's Reasons at 13-18.

to a quarrel with a factual finding dressed up as an error of law), combined with the failure to make out Grounds 3 and 4 compel the conclusion that Ground 5 is not made out.

Ground 14

50 Ground 14 alleges that the Tribunal erred in law by failing to identify inferences which could have been drawn from the material facts and which might have been relevant to the application of the "real chance" test to the prosecutor's claim of persecution. On its face, Ground 14 seems to allege an error within jurisdiction rather than jurisdictional error. But in any event the prosecutor has failed to establish the ground.

51 The first aspect of Ground 14 is in substance a complaint about the following passage from the reasons of the Tribunal[35]:

> "In the first place, I find the claim that he was recognised in the market by a young man who had not seen him for some 25 years, then asked by an organisation which he had only belonged to for six months ten years earlier to go to Jaffna, where he had not lived for ten years, to spy on the LTTE because his brother was a member, to be utterly implausible, particularly as his brother was only in Jaffna occasionally during the period in question. Second and more importantly, I do not accept that his brother was a member of or an adviser to the LTTE."

52 The complaint is that, by finding that the material facts asserted by the prosecutor were "utterly implausible", the Tribunal formed the view that no other inference could reasonably be drawn on the facts as found. The prosecutor submits that other inferences were reasonably open and ought to have been considered. One was the inference that the prosecutor's brother could have been valuable as a source of information even if he was only in Jaffna occasionally. Another was the inference that the members of PLOTE thought the prosecutor's brother was a member of LTTE, even if in fact he was not.

53 The prosecutor relies on the following passage from the judgment of Kirby J in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[36] in which his Honour describes the process of determining whether a fear is well-founded:

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35 Tribunal's Reasons at 11.

36 (1996) 185 CLR 259 at 294.

> "[it] involves the delegate's making findings as to primary facts, identifying the inferences which may properly be drawn from the primary facts, as so found, and then applying those facts and inferences to an assessment of the 'real chances' affecting the treatment of the applicant if he or she were to be returned".

54 In the same case, his Honour said, in a passage which is also relied on by the prosecutor[37]:

> "the decision-maker must not, by a process of factual findings on particular elements of the material which is provided, foreclose reasonable speculation upon the chances of persecution emerging from a consideration of the whole of the material. Evaluation of chance, as required by *Chan*[38] cannot be reduced to scientific precision. That is why it is necessary, notwithstanding particular findings, for the decision-maker in the end to return to the question: 'What if I am wrong'[39]? Otherwise, by eliminating facts on the way to the final conclusion, based upon what seems 'likely' or 'entitled to greater weight', the decision-maker may be left with nothing upon which to conduct the speculation necessary to the evaluation of the facts taken as a whole, in so far as they are said to give rise to a 'real chance' of persecution."

55 However, in this case, the Tribunal took a definite view that the prosecutor's story about his brother being a member of LTTE was not to be believed. That conclusion of the Tribunal is not expressed to be attended with doubt. Indeed, quite the opposite is evident from the use of the language "utterly implausible".

56 In *Minister for Immigration and Ethnic Affairs v Guo*[40], Brennan CJ, Dawson, Toohey, Gaudron, Gummow JJ and I said:

> "In the present case, however, the Tribunal appears to have had no real doubt that its findings both as to the past and the future were correct. That is, the Tribunal appears to have taken the view that the probability of error in its findings was insignificant. Once the Tribunal reached that conclusion, a finding that nevertheless Mr Guo had a well-founded fear of persecution for a

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37 (1996) 185 CLR 259 at 293.

38 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

39 *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 421 at 441 per Einfeld J.

40 (1997) 191 CLR 559 at 576.

> Convention reason would have been irrational. Given its apparent confidence in its conclusions, the Tribunal was not then bound to consider whether its findings might be wrong."

57 Accordingly, in the present case there was no reason for the Tribunal to consider the inferences to be drawn if it was wrong in rejecting the claim that the prosecutor's brother was a member of LTTE or that it was wrong in stating that he was only in Jaffna occasionally. In addition, the "inference" that, although the prosecutor's brother was not a member of LTTE, members of PLOTE thought him to be a member of LTTE, was not an inference that the Tribunal could draw from the evidence. At best this "inference" was no more than conjecture or surmise. However, "[c]onjecture or surmise has no part to play in determining whether a fear is well-founded."[41]

58 The prosecutor makes a further complaint in support of Ground 14: the Tribunal made no finding on the facts or inferences to be drawn from the statements by the prosecutor's wife in relation to being threatened while the prosecutor was in Germany. However, the Tribunal said[42]:

> "As I do not accept that Mr Durairajasingham was approached by PLOTE and asked to spy for them in Jaffna, it follows that I do not accept that his wife and step-daughter were threatened by members of PLOTE seeking him after he left Sri Lanka."

59 This is a clear rejection of the evidence of the prosecutor's wife, a rejection that was almost inevitable once the prosecutor's account of recruitment was rejected. The evidence given by her could not conceivably be believed in light of the rejection of the prosecutor's evidence. The version of events given by the prosecutor and his wife was that the threats were made as a consequence of the prosecutor's refusal to join PLOTE as a spy. As the evidence of the prosecutor and his wife was rejected, there was no need for the Tribunal to identify the facts and inferences which might have been drawn from it had it been believed.

Ground 15

60 Ground 15 alleges that the Tribunal erred in law in failing, contrary to s 430(1)(c) of the Act, to set out findings on material questions of fact. On its face, Ground 15 is also a complaint of an error within jurisdiction. But the oral submissions of the prosecutor made it clear that Ground 15 is a claim of jurisdictional error.

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41 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572.

42 Tribunal's Reasons at 11.

61 Ground 15 is in substance a complaint that the Tribunal's reasons for decision do not satisfy the requirements of s 430(1)(c) of the Act. Section 430(1) provides:

> "Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:
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> (a) sets out the decision of the Tribunal on the review; and
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> (b) sets out the reasons for the decision; and
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> (c) sets out the findings on any material questions of fact; and
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> (d) refers to the evidence or any other material on which the findings of fact were based."

62 The specific defects which are alleged are that the Tribunal failed to set out findings of fact on the claims made by the prosecutor's wife, that:

- "the young man who had approached them at the market had been in his late twenties or early thirties"[43];
- members of PLOTE came to her home looking for the prosecutor "about three times in the two months or so after he [the prosecutor] left for Germany"[44]; and
- "the young man he had first met in the market came to her home shortly after he [the prosecutor] left for Germany and that about two months later came again and threatened to kidnap her daughter"[45].

63 It is true that the Tribunal did not expressly make findings on the details of the prosecutor's wife's evidence. However as I have already indicated, the Tribunal rejected the factual claim by the prosecutor that PLOTE attempted to recruit him. The Tribunal expressly said that "it follows that I do not accept that his wife and step-daughter were threatened by members of PLOTE seeking him after he left Sri Lanka."[46]

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43 Tribunal's Reasons at 7.

44 Tribunal's Reasons at 9.

45 Tribunal's Reasons at 7.

46 Tribunal's Reasons at 11.

64 There is some authority in the Full Court of the Federal Court for the proposition that s 430(1) requires the reasons of the Tribunal to refer to evidence contrary to findings of the Tribunal[47]. However the contrary view was taken by differently constituted Full Courts in *Ahmed v Minister for Immigration and Multicultural Affairs*[48], *Addo v Minister for Immigration and Multicultural Affairs*[49] and *Sivaram v Minister for Immigration and Multicultural Affairs*[50]. In *Addo*, the Court said[51]:

> "Section 430(1) does not impose an obligation to do anything more than to refer to the evidence on which the findings of fact are based. Section 430 does not require a decision-maker to give reasons for rejecting evidence inconsistent with the findings made. Accordingly, there was no failure to comply with s 430(1) of the Act.
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> …
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> It is not necessary, in order to comply with s 430(1), for the Tribunal to give reasons for rejecting, or attaching no weight to, evidence or other material which would tend to undermine any finding which it made."

65 In my opinion, this passage correctly sets out the effect of s 430(1)(c) and (d). However, the obligation to set out "the reasons for the decision" (s 430(1)(b)) will often require the Tribunal to state whether it has rejected or failed to accept evidence going to a material issue in the proceedings. Whenever rejection of evidence is one of the reasons for the decision, the Tribunal must set that out as one of its reasons. But that said, it is not necessary for the Tribunal to give a line-by-line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the Tribunal. Indeed, to do so would be contrary to the direction in s 420 of the Act that:

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47 *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24 at 31; *Logenthiran v Minister for Immigration and Multicultural Affairs* [1998] 1691 FCA; *Thevendram v Minister for Immigration and Multicultural Affairs* [1999] FCA 182.

48 [1999] FCA 811.

49 [1999] FCA 940.

50 [1999] FCA 1740.

51 [1999] FCA 940 at [24] and [31].

"(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

66 In this case, the Tribunal made an express finding that it did not accept the prosecutor's wife's evidence. That was sufficient to comply with the requirements of s 430(1).

67 In addition, the prosecutor alleges that the Tribunal breached s 430(1) by failing to set out reasons for its finding that the prosecutor's claim that members of PLOTE tried to recruit him were "utterly implausible". However, this was essentially a finding as to whether the prosecutor should be believed in his claim – a finding on credibility which is the function of the primary decision maker *par excellence*. If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence. In any event, the reason for the disbelief is apparent in this case from the use of the word "implausible". The disbelief arose from the Tribunal's view that it was inherently unlikely that the events had occurred as alleged.

68 But there is a more fundamental reason why the argument based on s 430 fails to support a claim for prerogative relief. Even if, contrary to my view, there was a breach of s 430(1) by the Tribunal, it would not amount to a jurisdictional error. In *Minister for Immigration and Ethnic Affairs v Eshetu*[52], Gummow J referred to the requirement that, before granting a protection visa, the Minister and, on review, the Tribunal be "satisfied" that the prosecutor was a refugee. That requirement arose from ss 36 and 65 of the Act. His Honour said:

> "A determination that the decision-maker is not 'satisfied' that an applicant answers a statutory criterion which must be met before the decision-maker is empowered or obliged to confer a statutory privilege or immunity goes to the jurisdiction of the decision-maker and is reviewable under s 75(v) of the Constitution."

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52 (1999) 73 ALJR 746 at 768; 162 ALR 577 at 607.

The prosecutor argued at the hearing[53] that s 430(1)(c) "feeds into the ascertainment of the Minister's satisfaction" and that it is "an integral part of ascertaining the jurisdictional fact".

69 In *Public Service Association (SA) v Federated Clerks' Union*[54], Deane J said:

> "'jurisdiction' is not used in the wide and almost meaningless sense to which Lord Reid disapprovingly referred in *Anisminic Ltd v Foreign Compensation Commission*[55]. It is used in its ordinary sense to refer to the authority of a tribunal to entertain the proceedings, to determine the issues involved in them and to make orders disposing of them."

70 The language of s 430(1) indicates that the requirement that the Tribunal give reasons for its decision is not a requirement which goes to jurisdiction. The opening words of s 430(1) presuppose that the Tribunal has made a decision: "[w]here the Tribunal makes its decision", and the sub-section then goes on to impose requirements to be fulfilled subsequent to that decision being made. This construction of s 430(1) was favoured in the recent decision of the Full Court of the Federal Court in *Xu v Minister for Immigration and Multicultural Affairs*[56]. The requirements of s 430(1) cannot be said to be "some fact or event a condition upon which the existence of which the jurisdiction of a tribunal ... shall depend."[57] The requirements in s 430(1) do not go to the Tribunal's authority to "determine the issues"[58]. Section 430(1) presupposes that the determination has already been made. It requires the Tribunal to give a written, but not a lengthy, explanation of the decision already made. The ultimate issue which the Tribunal has determined is whether *it* (as opposed to the Minister)[59] has been "satisfied"

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53 Transcript of proceedings, at p 50 lines 666-669.

54 (1991) 173 CLR 132 at 149.

55 [1969] 2 AC 147 at 171.

56 [1999] FCA 1741 at [17].

57 *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125 per Mason J.

58 *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 149.

59 The Tribunal re-exercises the discretion originally exercised by the Minister (or his delegate). Section 415(1) of the Act provides that "[t]he Tribunal may, for the

(Footnote continues on next page)

that the prosecutor was a refugee. Section 430 gives the Tribunal no authority to decide the issue of satisfaction. It assumes that the authority has been exercised and that a decision concerning the issue of satisfaction has already been reached. That being so, the prosecutor's argument that s 430(1) is an "integral part", or "feeds into" the ascertainment of the Minister's satisfaction such that it is a jurisdictional fact must be rejected.

Ground 13

71 Ground 13 alleges that in the circumstances set out in Grounds 3, 4, 5, 14 and 15 and by reason of the Tribunal having failed to give adequate weight to the prosecutor's claims and the independent evidence in support of them, the Tribunal acted beyond jurisdiction. This is because the prosecutor contends that the decision was so unreasonable that no reasonable Tribunal acting according to law could have come to such a decision.

72 In so far as this ground relies on Grounds 3, 4, 5, 14 and 15 it must be rejected for the reasons given in dealing with those grounds. In so far as Ground 13 contends that the Tribunal acted unreasonably in not giving weight to the prosecutor's claims or the evidence in support of them, it is enough to say that the Tribunal was entitled to reject the claims of the prosecutor and his wife and was not acting unreasonably by refusing to act on evidence such as a letter from Amnesty International dated 4 March 1996. Because Ground 13 must be rejected, there is no need to examine whether "*Wednesbury*[60] unreasonableness" is a ground for the issue of writs of mandamus or prohibition or the grant of injunctive relief under s 75(v) of the Constitution[61].

Order

73 In my opinion, there are no arguable grounds upon which this Court could give the prosecutor the relief which he claims. The application for orders nisi must be dismissed with costs.

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purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision."

60 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

61 See the discussion by Gummow J in *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 73 ALJR 746 at 766-767; 162 ALR 577 at 605-606, particularly at par 126.