



IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION]

Case No. 10 of 2016

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN
1500234, brought pursuant to s43 of
the *Refugees Convention Act 1972*

BETWEEN

QLN 110

Appellant

AND

THE REPUBLIC

Respondent

Before: Crulci J

Appellant: T. Baw

Respondent: G. Bennett

Date of Hearing: 29 September 2016

Date of Judgment: 21 July 2017

CATCHWORDS

APPEAL - Refugees – Refugee Status Review Tribunal – Error of law – Inconsistencies – Credibility Findings – Failure to consider Country Information – Appeal DISMISSED

JUDGMENT

1. This matter is before the Court pursuant to section 43 of the *Refugee Convention Act* 2012 ("the Act") which provides:

43 Jurisdiction of the Supreme Court

(1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.

(2) The parties to the appeal are the Appellant and the Republic.

...

2. The determinations open to this Court are defined in section 44 of the Act:

44 Decision by Supreme Court on appeal

(1) In deciding an appeal, the Supreme Court may make either of the following orders:

- (a) an order affirming the decision of the Tribunal;
- (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Court notes that the original Notice of Appeal was filed outside the time provided by s 34(4) of the Act, and an order was made on or about 11 May 2016, extending the time under s 43(5).
4. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 8 April 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 9 October 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention¹ relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complementary protection under the Act.

BACKGROUND

5. The Appellant is a 25 year-old male from Sanganai City in the Jaffna district in North Sri Lanka. He is a Tamil and Hindu. His parents, older brother, and younger sister, remain in Sri Lanka. He completed 11 years of schooling in 2008, and was employed at his father's business as a driver and administrator from 2008 to 2013.
6. The Appellant claims a fear of persecution if returned to Sri Lanka arising from an incident that occurred in January 2013, as a result of which the

¹ 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention".

Appellant claims to have been imputed with the political opinion as a supporter of the Liberation Tigers of Tamil Elam ("LTTE"), and the subsequent harm suffered by the Appellant. He also claims a fear of being harmed on the basis of being a Tamil from North Sri Lanka, and of being a member of the particular social group of failed asylum seekers.

7. In May 2013, the Appellant left Sri Lanka for India illegally by boat. In June 2014, he left for Australia by boat. He was transferred from Australia to Nauru in August 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination ("RSD") interview on 6 December 2014. The Secretary summarised the claims presented by the Appellant at the interview as follows:

- *He was born in Pandatharippu, Jaffna and is of Tamil ethnicity.*
- *The Applicant lived in Pandatharippu, Jaffna until he left Sri Lanka on 20 May 2013.*
- *The Applicant fled Sri Lanka as he feared for his safety as he believed he would be imputed as a supporter of the Liberation Tigers of Tamil Elam (LTTE) due to his presence when fireworks were thrown at a Sri Lankan Army (SLA) camp.*
- *In January 2013, the Applicant claims that he was driving a truck past a SLA camp and some people on bikes threw firecrackers at the entrance to the camp. Whilst the people on the bikes fled the scene, the Applicant, in his slow moving truck was still out the front of the camp when the SLA officers came to investigate.*
- *The SLA officers detained the Applicant and over the course of the next two hours the Applicant was beaten. The Applicant told the SLA officers that he did not know who threw the fireworks.*
- *The Applicant was eventually released on the condition he agreed to report to the camp each Monday. The beating resulted in the Applicant being covered in bruises all over his body.*
- *In February 2013, the Applicant was unwell such that he was unable to report to the SLA camp.*
- *That night the SLA came to the Applicant's home and took him to the SLA camp where he was detained and tortured for a few hours.*
- *The Applicant was told that in the future he would need to report to the Sunagan camp.*
- *When the Applicant reported to the Sunagan camp SLA officers would tie his hands and beat him with guns and sticks.*
- *The Applicant was threatened that he would be sent to the 4th floor in Colombo for further interrogation.²*

9. The Secretary accepted that the Appellant was a Tamil from North Sri Lanka, and had no involvement with the LTTE, or in any other political party or criminal activity.³

² Book of Documents ("BD") 80-81.

³ BD 82.

10. The Secretary did not accept that the Appellant was detained and tortured because of his presence when the fireworks were thrown at the SLA camp, or that he had reporting obligations imposed that led to him being tortured multiple times in 2013. The Secretary also did not consider the Appellant to have been of adverse interest to the SLA or any other person or party at the time of his departure from Sri Lanka.
11. The Secretary did not accept these claims because of findings made as to the credibility of the Appellant. It was found that the Appellant's claims with respect to the firecracker incident, his detention and torture after the incident, the reporting obligations imposed, and living arrangements after January 2013 were inconsistent, vague and not detailed.⁴
12. The Secretary also found the Appellant's fear of persecution due to his Tamil ethnicity and status as a failed asylum seeker not to be well-founded.⁵ For the same reasons that the Secretary rejected the Appellant's application for refugee status, the Secretary found that Nauru did not owe the Appellant complementary protection.⁶

REFUGEE STATUS REVIEW TRIBUNAL

13. Before the Tribunal the Appellant maintained that he would be persecuted if returned to Sri Lanka on the basis of his imputed political opinion as a supporter of the LTTE, being a Tamil from North Sri Lanka, and his status as a failed asylum seeker.⁷
14. The Appellant also maintained his claims with respect to the firecracker incident and the reporting obligations imposed. The Tribunal noted that the Appellant "described in detail the events that occurred after the crackers went off". The Appellant said that soldiers thought the camp was being attacked and ran out and surrounded the Appellant's vehicle, being the only vehicle at the scene. The soldiers, some of whom were armed, told the Appellant to get down and inspected the vehicle. The soldiers took him inside the camp and questioned him about who had thrown the firecrackers and slapped and beat him.
15. The Appellant said he reported to the camp on 5 successive Mondays and was not mistreated on these occasions. The Appellant also said he was not mistreated on the day he was ill and failed to attend the camp to sign the register. He said he might have been confused or under stress when he said in his RSD interview that he had been tortured.⁸ However, he maintained that, subsequently, he was required to report to the Chunnakkan camp.⁹

⁴ BD 81.

⁵ BD 87.

⁶ BD 88.

⁷ BD 252.

⁸ BD 257.

⁹ BD 256 [69].

16. On the two or three occasions he reported to the Chunnakkan camp his hands were tied behind his back and he was beaten and slapped. The soldiers told him that if he didn't say anything he would be sent to the "Colombo fourth floor" where Sri Lanka's Criminal Investigation Division notoriously uses torture for interrogations.¹⁰

Tribunal's Decision

17. The Tribunal accepted that the Appellant was a Tamil from North Sri Lanka and the Appellant's account of the firecracker incident. The Tribunal said:

*"As to whether the incident involving the firecrackers occurred under the circumstances he described, that he was assaulted at Pandarharripu army camp that night and that he was required to register at the camp on 5 occasions, his evidence on these matters, which has been detailed and cogent, has been consistently given over time. His evidence is also broadly consistent with evidence from various sources such as the International Crisis Group that in this period the Sri Lankan Army's presence was widespread and visible in the Northern Province."*¹¹

18. However, the Tribunal said that it was apparent from the Appellant's evidence that the soldiers, after realising the camp was not under attack, were satisfied that the Appellant did not throw the firecrackers and was not involved with the LTTE. If the soldiers suspected otherwise, they would have treated the Appellant far more harshly.¹²
19. The Tribunal also did not accept the Appellant's account of later events as credible, i.e., that he had failed to report to the camp on one occasion and was, as a result, required to report at the Chunnakkan camp where he was treated more brutally. The Tribunal said that it did not accept the account of these events for the following reasons:

"Firstly, on the Monday when he claims he was ill and decided not to report his and his parents' failure to consider contacting the camp that day and explaining his absence is highly implausible. No one from the family rang or visited the camp to explain his failure to appear in order to pre-empt any problems. This sanguine attitude is particularly implausible given the SLA's reputation among Tamils.

Secondly, his evidence significantly changed regarding how he was treated when taken to the camp on the night he failed to report. In both his RDS statement and his written statement to the Tribunal he referred to being tortured and mistreated, yet said at the Tribunal hearing that he was not mistreated at all on that occasion. This change in his account casts serious doubt on his claim that he failed to report and was picked up at his home and taken to the army camp.

¹⁰ BD 257.

¹¹ BD 259 [92].

¹² BD 259 [96].

Thirdly, given the SLA's very limited attention to him after realising he did not throw the firecrackers and was not involved with the LTTE, it seems incongruous that they decided he must report at a different "main" SLA camp in future.

Fourthly, and more significantly in terms of overall credibility, his evidence has been internally inconsistent with regard to the period in which he was reporting at the second camp, casting doubt on whether this happened at all.

He told the Tribunal that he reported on three consecutive weeks at Chunnakkan camp which would make the most recent occasion around mid-March, yet agrees that he said at the Transfer Interview that he reported many times, until two days before he left Sri Lanka for India in May. This is a further significant change in his account. The Tribunal is not persuaded by his explanation for the change in that account (that on reflection he realised the earlier time was wrong) and infers that he was not reporting at all at a second camp.

Finally, he claimed to have been hiding for approximately two months before travelling to India, but again his evidence on this issue has drifted. At the RSD interview he said he visited his parents' home during daylight hours, but to the Tribunal he said that he did not do this, and instead that he had not gone out at all and his parents had visited him."¹³

20. The Tribunal therefore found that the SLA only mistreated the Appellant on one occasion, being the night of the firecracker incident. It said that the Appellant would not be regarded as a LTTE supporter as a result of the incident, given that he had never had links with the LTTE, was not suspected of supporting the LTTE when he left Sri Lanka, and had done nothing since to suggest that he was a supporter.
21. The Tribunal accepted that Tamils faced considerable harassment, discrimination and, in some cases, persecution during the civil war.¹⁴ However, it noted country information that harassment and discrimination had eased since the war, and found that there was no reasonable possibility of the Appellant being subject to harm on the basis of race if returned to Sri Lanka. Therefore, it said that the Appellant's fear of persecution on this basis was not well-founded.¹⁵
22. The Tribunal also accepted that the Appellant would be subject to scrutiny if returned to Sri Lanka. However, the Tribunal noted country information that suggested the risk of torture to "great majority of returnees" is low, including to those suspected to have left Sri Lanka illegally. The Tribunal further noted country information from the Australian Department of Foreign Affairs and Trade ("DFAT") on the treatment of returning asylum seekers and said that:

"DFAT has recently confirmed allegations of torture and mistreatment by some returning asylum seekers, but has been unable to verify them. It

¹³ BD 260-261 [99]-[105].

¹⁴ BD 261 [112].

¹⁵ BD 265 [133].

assesses that the risk of such treatment for the majority of returnees (including those who left illegally) is “low”. The Tribunal is satisfied that that is the case.

There is evidence that a small number of Tamils who have voluntarily re-entered Sri Lanka since the election have been detained. While this may have occurred, it is unclear why these people were singled out and without more information the Tribunal does not consider it has any adverse implications for the applicant.”¹⁶

23. The Tribunal therefore did not accept that the Appellant would suffer harm upon return to Sri Lanka due to his status as a returned asylum seeker, and found that this fear was also not well-founded.¹⁷ For the same reasons, the Tribunal concurred with the Secretary that the Appellant was not owed complementary protection.¹⁸

THIS APPEAL

24. The Appellant filed a Notice of Appeal on 22 July 2016 and an Amended Notice of Appeal on 17 August 2016. That Notice reads as follows:

1. *The Tribunal erred on a point of law by disposing of the Appellant’s claims that (a) he had been detained and tortured by the Sri Lankan army officers on a number of occasions when he was asked to report to a second army camp; and (b) that he was in hiding before he left Sri Lanka, unsupported by any proper basis and rather made by bare assertions lacking any sufficient logical grounds and upon alleged inconsistencies concerning peripheral details.*

Particulars

- a. *At D[100], the Tribunal questioned the Appellant’s credibility based on their view that an apparent “sanguine attitude” of the Appellant made it “highly implausible” that he was ill and could not report to the authorities, notwithstanding the Appellant’s contrary evidence.*
- b. *At D[101], the Tribunal stated that the Appellant changed his account at the Tribunal hearing, however, the transcript of the hearing when read as a whole indicates the Tribunal’s finding is erroneous, the Appellant gave consistent evidence of his detention and torture.*
- c. *At D[102], the Tribunal misunderstood the evidence, and in thereby was internally inconsistent in its finding as to the reason the Appellant had to report to a second army camp.*
- d. *At D[103]-[104], the Tribunal failed to consider the Appellant’s explanation for the difference in the times he said had to report to the army camp (sic).*
- e. *At D[105], the Tribunal failed to consider the Appellant’s explanation for an alleged different (which the Appellant denies) in whether he went into hiding before departing Sri Lanka.*

¹⁶ BD 267 [146]-[147].

¹⁷ BD 268 [150].

¹⁸ BD 269 [156].

2. The Tribunal conceded at D[146] & [147] that certain country information stated that there has been some allegation of returned Tamils to Sri Lanka being tortured and mistreated, but did not consider it had any adverse implications for the Appellant. However, it failed to consider the other and more recent country information that was provided in the Appellant's written submissions that indicated that Tamils, especially those with alleged links or perceived supporters of the LTTE, continue to suffer arbitrary detention, torture and violence.
25. The Appellant took the Court to various authorities to support the proposition that the Court should be careful in making a credibility finding on the basis of "so-called inconsistency" in the evidence of asylum seekers, given language and translation difficulties, mistrust of persons in positions of authority, and the traumatic nature of the events upon which the claim for asylum is based. The Appellant took the Court to the following passage of *Thevendram v Minister for Immigration and Multicultural Affairs* ("*Thevendram*") (per Lee J, Merkel and Carr JJ agreeing):¹⁹

"If a Tribunal finds that an event or circumstance did not occur as represented in oral or documentary material before the Tribunal, and finds further that the falsity of the representation was known to the applicant at the time the applicant sought to rely upon it, such findings of fact may lead the Tribunal to determine that it is not satisfied that the applicant has a well-founded fear of persecution. But if the Tribunal does no more than assert that some part of an applicant's account of past events is "not credible", or is "implausible", and relies upon that assertion not to make findings of fact on material issues in the applicant's case, the decision-making process engaged in by the Tribunal may require analysis. (See: Minister for Immigration and Multicultural Affairs v Rajamanikkam [2000] FCA 1023 per Kiefel, North and Mansfield JJ at [21]-[23].) If general statements to the effect that claims of an applicant are "not credible", or are "implausible", are regarded as "credibility" findings not dependent on findings of fact, and that any decision based thereon is beyond the scope of judicial review, there is a real risk that reasons for decision will be constructed accordingly."

26. The Appellant further submits that the credibility findings made at [99] (set out at [18] above) are flawed for the following reasons:
- a. The Tribunal pointed to no cogent or coherent basis upon which it determined that the Appellant had a "sanguine attitude" to his one failure to report, which it said was "highly implausible". As the Australian Full Federal Court has said, such general statements are not dependent on findings of fact on material issues in the applicant's case, and they are beyond the scope of the judicial review. This is especially so when the Tribunal failed to consider the Appellant's evidence at the Tribunal hearing that he had intended to go to the camp the next day with a medical certificate stating that he was sick (T28L27-T29L43).
 - b. The Tribunal made a finding that the Appellant had "changed his account" on being tortured and mistreated when he had to report at the second

¹⁹ *Thevendram v Minister for Immigration and Multicultural Affairs* [2000] FCAFC 1910.

camp. However this fails to consider his explanation at the Tribunal hearing that he may have been referring to his reporting at the first camp and may have been mistaken (T32L41-43, T34L, T38L36). It is very clear that the overwhelming part of the Appellant's evidence at the Tribunal hearing is consistent with his previous evidence that he was detained and tortured at the second camp and he gave detailed evidence of the type of brutality he suffered and the consequential injuries he sustained (T34-T38).

- c. The Tribunal misunderstood the evidence when it found at [102] "it seems incongruous" that the Appellant was made to report to a second "main" camp after concluding that he was not of limited interest to authorities because he did not throw the firecrackers and was not involved in the LTTE. However it ignored the Appellant's evidence that he was made to report to a second camp because he failed to report on one occasion to the first camp due to being sick. The inference was that the military imposed a harsher requirement for reporting on the Appellant due to that one failure in reporting.*
 - d. The Tribunal focused on a peripheral detail about the Appellant's reporting times in the second camp. He is alleged to have said he reported "[l]ots of times" in his transfer interview but he later said he went "three times". That was used to undermine the Appellant's credibility, but as the authorities have said real caution is appropriate before any adverse inference regarding credibility is drawn on that basis. Here, the Appellant also said at his transfer interview that he went to the second camp "3 times" which is in fact consistent with his subsequent evidence.*
 - e. Lastly, the Tribunal's focus at D[104] that he changed his account from his transfer interview on whether he went into hiding before departing Sri Lanka failed to consider again that: the Appellant consistently said in his RSD interview and again at the Tribunal hearing that he was mistaken; that his submissions states that he in fact instructed his legal representatives that he did not recall stating he reported two days prior to departing and that it was incorrect; he had given detailed evidence of the circumstances of his hiding; and that he had some problems with memory loss. Again, this supposed inconsistency does not undermine his testimony about the central claims of detention and torture. Also, as the cases state, caution is required when forming a judgment on credibility as numerous factors might make it difficult for a claimant to articulate his or her circumstances with the degree of consistency one might expect from someone who is neither burdened with the language difficulties nor haunted by traumatic memories that might instil distrust in authorities.*
27. As to Ground 2, the Appellant submits that, if the Tribunal had considered the country information in his written submissions, it would have been apparent to the Tribunal that some Tamils were "singled out", and detained upon re-entry to Sri Lanka, because of perceived involvement with the LTTE. As the information would have answered the question left by the DFAT report (set out at [22] above), if the Tribunal had considered the information, it would have referred to it in its reasons. The failure to deal with all the country information means the Tribunal failed to perform its statutory task.

28. The Respondent submits that the Appellant's claims do not raise a point of law and must fail. The decision of Lee, Merkel and Carr JJ in *Thevendram*, according to the Respondent, is, at most, authority for the principle that where a decision-maker "does no more than assert that some part of an applicant's account of past events is "not credible", or is "implausible", and relies upon that assertion to make findings of fact on material issues, that may raise a question as to whether the Tribunal properly performed its task. In any event, the Tribunal did not rely solely on credibility to make findings of fact, but considered the evidence before it, and gave reasons for accepting some parts and rejecting others.
29. The Respondent submits that the Appellant's criticisms at [13] of his submissions invite the Court to reassess the credibility of the Appellant's evidence, which is the role of the Secretary, and, upon review, the Tribunal. The Respondent responds at [28] of its submissions as follows:
- a. *As to the finding at DR [100], there was nothing illogical about finding it surprising (or 'implausible') that a person who had been ordered to report to an army camp on a certain day would let that day pass without making some attempt to explain his or her non-attendance. The appellant was asked about this at T 28-30 (BD 208-210) but did not give any real explanation of his thinking on the day.*
 - b. *As to DR [101], there was undoubtedly a change in the appellant's account between his written statements (BD 37, 176) and his oral evidence (BD 212-213, 218). Whether this was significant was a matter for the Tribunal. The appellant's only 'explanation' was that he might have made a mistake – which begs the question why the sequence of events was not clear in his mind.*
 - c. *As to DR [102], the Tribunal clearly understood that (on his account) the trigger for the appellant being directed to report to a different camp was his failure to report. The Tribunal was entitled to think it 'incongruous' that the SLA would respond in that way, given that (as it had found) the appellant was not seriously suspected of any LTTE involvement.*
 - d. *As to DR [103]-[104], the inconsistency in the appellant's accounts was at least potentially significant. Initially he said that he had kept reporting until just before leaving Sri Lanka (BD 10). Later he said that he had reported three times and then gone into hiding for two months (BD 176 [16], 214, 219, 221-222). He was unable to reconcile these differences, except by suggesting that he might have been mistaken (BD 221).*
30. As to Ground 2, the Respondent submits that this reflects a disagreement with the Tribunals preference of some country information over other country information. The Tribunal was not obliged to refer to all the information in its reasons, as, under s 34(4) of the Act, the Tribunal is only required to refer to material on which findings of fact were based, and not material on which findings of fact were not based.
31. The Respondent further submits that there is no basis to infer the Tribunal did not refer to the country information, and it referred at several points to the existence of a body of country information beyond that which it expressly relied upon (DR [140], [145], [147], [148]).

32. Finally, in relation to the country information said by the Appellant to explain why some Tamils were “singled out”, and detained upon re-entry to Sri Lanka, the Respondent says that it is unlikely that this information would have been relevant to the Appellant, given the Appellant was found by the Tribunal to have no involvement with the LTTE. In any event, it is not clear whether this information was before the Tribunal.

CONSIDERATIONS

Ground 1

33. The Appellant, in his written and oral submissions took the Court to *Thevendram* referred to at [25] above. In *W168/00A v Minister for Immigration and Multicultural Affairs*,²⁰ the Federal Court approved the comments in *Thevendram*. Lee J said (at [11]-[12]):

“In the Law of Refugee Status 1991 (pp 84-86) Professor Hathaway has explained why great caution is necessary before any claim to refugee status is determined on the credibility of the claimant:...

Having regard to the foregoing, it may be said that adverse decisions on credibility by the Tribunal should be restricted to the most obvious cases if the risk of injustice to applicants is to be avoided. In addition, as noted in Thevendram v Minister for Immigration and Multicultural Affairs [2000] FCA 1910 at par 26, there is the further risk that decision-makers may be tempted to seek to insulate their decisions from judicial review by disposing of all issues by adverse findings on credibility.”

34. In *SAAK v Minister for Immigration and Multicultural Affairs*,²¹ the Appellant was a citizen of Iran who applied for refugee status on the basis of a fear of persecution due to his involvement with the Mojahedin. The Appellant’s primary claim of security forces searching for him after he was found with tapes and pamphlets of the Mojahedin was not made at the initial interview, and the Tribunal used this failure to make adverse findings as to whether the Appellant was involved with the Mojahedin. North, Goldberg and Hely JJ said (at [25]-[29]):

“In W168/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 538, the Full Court dealt with an appeal involving a decision of the Refugee Review Tribunal which found that the Sri Lankan appellant could not be believed because of inconsistencies in the accounts given by him to the delegate and to the Refugee Review Tribunal. Lee J said at [10]:

“An application for a protection visa is not determined by a judicial proceeding in which all relevant evidence is collected, presented and tested by parties to the proceedings. Determination of an application for a protection visa is an administrative function on limited material and limited inquiry, and the process does not provide a foundation on which a finding on credibility may

²⁰ *W168/00A v Minister for Immigration and Multicultural Affairs* [2000] FCA 1910.

²¹ *SAAK v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 86.

be made with assurance. (See: S Kneebone, The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role(1998) 5 A J Admin L 78.)"

His Honour then referred to the passage from Professor Hathaway's work referred to earlier in these reasons and said at [12]:

"adverse decisions on credibility by the Tribunal should be restricted to the most obvious cases if the risk of injustice to applicants is to be avoided."

In recent times research has shown that some of the traditional methods used by courts to determine creditworthiness are unreliable. For instance, it is recognised that the confident liar is no longer necessarily to be preferred over the reticent teller of truth. The demeanour of a witness has assumed less importance in the assessment of credibility.

In relation to asylum determinations, it has been accepted that the special circumstances of such applications will often render the usual techniques of credibility evaluation inadequate... In particular, there are some factors which may result in the asylum seeker failing to disclose an important part of a claim at an early stage."

35. The Court in SAAK noted that the Tribunal sought further information about the claims made at the first interview and had taken a cautious approach to the assessment of the Appellant's involvement with the Mojahedin. The appeal was therefore dismissed.
36. In *Kopalapillai v Minister for Immigration* ("Kopalapillai"), the Appellant was a Sri Lankan Tamil whose application for refugee status was rejected by the delegate and the Tribunal. The decision of the Tribunal was based principally on findings as to the credibility of the Appellant. At an initial interview, the Appellant claimed to have been beaten by the Sri Lankan army on two occasions. In a statement attached to his visa application, the Appellant said he worked as a photographer at events of the Liberation Tigers of Tamil Elam ("LTTE") and was "sympathetic to LTTE". The Tribunal considered the following in assessing the credibility of the Appellant's claims that he was involved with the LTTE:
 - a. *The Appellant initially stated he had no affiliation with the LTTE, but at the hearing said that he was an "avid and known" supporter of the LTTE;*
 - b. *One reason given for not mentioning his involvement earlier was he believed he would be returned to Sri Lanka as a terrorist. Another reason was that he made the claims his agent told him to make;*
 - c. *The Appellant said he only used an agent as he feared that an application for a passport would lead to him being detected. It seemed unlikely that he would then follow that person's advice about what to say on arrival in Australia;*
 - d. *The Tribunal perceived the Appellant as an educated and sophisticated person. When approached at the airport, he immediately said he was a Sri Lankan seeking refugee status. The Tribunal did not accept he would then fail to "divulge the core reasons for his detentions and flight";*

- e. *The claim about his involvement with the LTTE was made after the Appellant discovered his initial claims may not have been sufficient to lead to recognition as a refugee.*²²
37. The primary judge, Merkel J, considered that *“the approach of the RRT to the credibility issues was open to it on the material, was based on rational grounds and was arrived at after consideration of matters that were logically probative of the issue of credibility”*.²³
38. The Full Court of O’Connor, Branson and Marshall JJ affirmed the decision of Merkel J. Their Honours accepted that *“refugee cases may involve special considerations arising out of problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia”*,²⁴ however found that the Tribunal made no error of law in reaching its conclusion on the credibility of the Applicant.
39. *Kopalapillai* was approved in *SZITU v Minister for Immigration and Citizenship*.²⁵ As a result of the oral evidence given by the Appellant at the Tribunal hearing, there were a number of “inconsistencies” between the Appellant’s written statement and oral evidence. The Tribunal sent the Appellant a letter under s 424A of the *Migration Act 1958* (Cth) raising concerns arising from the inconsistencies. In its reasons, the Tribunal looked at each of the matters of concern in the letter and stepped through each concern, the oral evidence and the written response. Greenwood J said:
- “The Tribunal comprehensively examined the material put to it, and against the totality of the evidence came to a clear conclusion that the evidence of the appellant was a fabrication. That conclusion was open on the evidence and rationally based on an assessment of a number of inconsistencies some of which I have mentioned and the implausible nature of the claims. One thing is perfectly clear and that is that those matters referred to the Tribunal were logically probative of the issue of credibility. The assessment of the inconsistencies as a logically probative foundation for the determination of the issue of credibility is made plain by *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547, and particularly at p 552...”*²⁶
40. The Appellant also made reference to *The Law of Refugee Status* by Professor Hathaway in his written and oral submissions. In a version of the work from 1991, Hathaway explained that:

“A claimant’s credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution. Because an understandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment, only significant concerns about the plausibility of allegations of direct relevance to

²² *Kopalapillai v Minister for Immigration* (1998) 86 FCR 547 at 551A-E.

²³ *Kopalapillai v Minister for Immigration* (1998) 86 FCR 547 at 552C.

²⁴ *Kopalapillai v Minister for Immigration* (1998) 86 FCR 547 at 557B-C.

²⁵ *SZITU v Minister for Immigration and Citizenship* [2008] FCA 758.

²⁶ *SZIU v Minister for Immigration and Citizenship* [2008] FCA 758 at [34].

the claim should be considered sufficient to counter the presumption that the sworn testimony of the applicant is to be accepted as true.”²⁷

41. In the passage cited by the Appellant, which has been accepted in number of authorities,²⁸ Hathaway explained that:

“A claimant’s credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution. Because an understandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment, only significant concerns about the plausibility of allegations of direct relevance to the claim should be considered sufficient to counter the presumption that the sworn testimony of the applicant is to be accepted as true.”²⁹

42. The relevance of inconsistency on “peripheral details” was considered in the Australian Federal Magistrates Court decision of *SZIRS v Minister for Immigration*.³⁰ In that case, the Applicant claimed that he was an active leader of the Shiv Sena in India, which supported the Bharatiya Janata Party (the former ruling party), and was threatened by the government. The Tribunal found the Applicant’s evidence to be “highly vague” and did not accept that the Applicant had been involved with the Shiv Sena. The Applicant contended that the Tribunal’s approach was “totally contrary to the quote in Professor Hathaway’s text, *The Law of Refugee Status*, that it should not take an overly stringent approach to questions of credibility. An applicant should not be impugned simply because of vagueness or inconsistency in recounting peripheral details...”.
43. Orchiston FM found that the Tribunal’s findings were open to it, and related to “the fundamental tenet of the applicant’s claim that he was a leader of Shiv Sena, was targeted, threatened and attacked by Congress supporters... these matters cannot be construed as peripheral details but rather central to his claim”.³¹
44. Upon Appeal to the Federal Court of Australia, Jessup J affirmed the decision of the primary judge, noting that the decision record of the Tribunal indicated the Appellant understood the questions posed, and reflected the vague nature of his responses.³²
45. This Court has carefully considered the information given by the Appellant at the transfer interview, in the statement accompanying his RSD application, to the Secretary, and to the Tribunal on the following topics: the night of the firecracker incident; his reporting obligations to the first

²⁷ Professor Hathaway, *The Law of Refugee Status*, 1991, pp 84-86.

²⁸ *W168/00A* at [11]; *Thevendram* at [43]; *SAAG v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 547 at [29]; *Saleh v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 248 at [19]; *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2000] FCA 1023.

²⁹ Professor Hathaway, *The Law of Refugee Status*, 2014, p 147.

³⁰ *SZIRS v Minister for Immigration* [2008] FMCA 258.

³¹ *SZIRS v Minister for Immigration* [2008] FMCA 258 at [42].

³² *SZIRS v Minister for Immigration and Citizenship* [2008] FCA 798.

camp; his failure to report to the first camp; the number of times he reported to the second camp; his treatment at the second camp; his living arrangements before departing for India. The Court notes that it did not have available to it a transcript of the RSD interview.

46. The following table reflects, in summary, the information given by the Appellant at each stage with respect to the above topics:

	Transfer Interview	Statement with RSD application	Secretary's Decision	Tribunal Hearing
Night of the firecracker incident	After being taken into the camp, the Appellant said the soldiers "slapped me twice, I started to cry" and was released "with a condition of signing every Monday morning" (BD 10).	The Appellant was detained for 2 hours and beaten. He said "My whole body was bruised and I still have the marks all over my body" (BD 37 [13]). The officers threatened to kill him if he did not report to the camp each Monday (BD 37 [12]).	The Appellant was detained at the camp and beaten (BD 80). He was "slapped twice on his ear and pushed in his stomach by the SLA officer's boot" (BD 81).	The Appellant said "They slapped me on my cheek, and then they pointed the gun at my chest and said, 'We will shoot you'. Then I started crying" (BD 220 line 31-33). The Appellant was at the camp for around 2 hours (BD 221 line 13).
Reporting obligations to the first camp	The Appellant signed in every Monday. He said "if I am one minute late, they kick me" (BD 10).			The Appellant reported at the first camp every Monday before he fell ill, which was 5 times (BD 221-222).
Failure to report	<p>The Appellant did not report one Monday because he was sick and "because of fear" and they came to search for the Appellant.</p> <p>They took the Appellant to the camp until midnight. "They beat me and asked me to tell who has thrown fireworks and they said they would kill me if I don't say the name" (BD 10).</p>	One day, the Appellant was too sick to report. The army raided his house and he was detained. He was taken to the camp and tortured for a few hours (BD 37 [14]).	In February 2013, the Appellant was unwell and unable to report to the camp. The army came to his house and detained him. He was taken to the camp and tortured for a few hours (BD 80).	<p>The Appellant could not report one day because of his "body condition". The Appellant said that he would take the slip from the medication to show them the next day (BD 224). He did not think there would be a problem if he showed the slip (BD 225 line 39-40).</p> <p>The soldiers turned up to his house that night and took him to the camp. He was not mistreated (BD 228 line 35).</p> <p>The Appellant said he might have said he was tortured because was referring to the first night (BD 228 line 41-42), or was confused or under stress (BD 229 line 24-25). He also has memory problems (BD 234 line 39-40).</p>
Reporting obligations to the second camp	The Appellant was told to go and report at the other camp in Chunnakam and he went there three times. The last time he went there was two days before departing Bangladesh on 20 May 2013. Later in the interview, the	One of the officers said he would need to go to another camp to report (BD 37 [14]).		<p>The soldiers told him he had to sign at Chunnakam instead (BD 226). The Appellant went to the second camp on three Mondays (BD 230 line 23; BD 235 line 14-15; BD 237 line 11; BD 239 line 23).</p> <p>The Appellant said he may have stated in the transfer interview he last reported</p>

	Appellant indicated he reported at the second camp "many times" (BD 10).			two days before departing Bangladesh because he couldn't remember things properly and might have "said it wrongly" (BD 237 line 30-31).
Treatment in the second camp		"When I was going to the camp to report that I was still in area, the army officers would tie my hands and beat me with gun and sticks" (BD 37 [15]). The officers threatened to send him to the 4 th floor in Colombo (BD 38 [16]).	When he reported to the second camp officers would tie his hands and beat him with guns and sticks (BD 81). He was threatened that he could be sent to Colombo fourth floor for further interrogation (BD 81).	The soldiers tied his hands and tortured him more each time he reported (BD 230 line 18-24). The Appellant describes his injuries at BD 232 - 234. They included injury to his toes, burning from stomach, and blood passing with stools. The Appellant said the soldiers told him "We are going to send you to Colombo fourth floor and you know what will happen to you there (BD 235 line 45-BD 236 line 1).
Living arrangements before going to India			The Secretary said the Appellant claimed to continue to work at the mill but also claimed to have never stayed at home following January 2013 (BD 82).	In the 2 months departing the Appellant said "I was in my relative's place and I don't come out" (BD 238 line 1). His parents came to see him but he did not go to his parent's house (BD 238 line 31-32).

47. The Court is mindful of the need to exercise caution when making credibility findings on an asylum seeker's evidence based on vagueness or inconsistencies, particularly where the inconsistencies relate to "peripheral details". However, as provided by *Kopalapillai*, credibility findings may be made by the Tribunal based on vagueness or inconsistencies if the finding was "*open to it on the material, was based on rational grounds and was arrived at after consideration of matters that were logically probative of the issue of credibility*".³³
48. The Tribunal's reasons for finding that the Appellant's account (of events following his failure to sign the register at the first camp) lack credibility are set out at [19] above. The above table indicates that, while, apart from the transfer interview, the Appellant consistently maintained that he only reported to the second camp on three consecutive Mondays, there are inconsistencies in the Appellant's evidence with respect to the other matters.
49. The Tribunal's reasons indicate that it considered this evidence with care before arriving at the finding. During the hearing the Tribunal also questioned the Appellant on the inconsistent information and gave him an

³³ *Kopalapillai v Minister for Immigration* (1998) 86 FCR 547 at 552C.

opportunity to explain the inconsistencies (SAAK at [38]).³⁴ The matters identified in the above table are also logically probative of the Appellant's credibility, being central to the Appellant's claimed fear of persecution if returned to Bangladesh.

50. The Court finds that in addition to considering the credibility of the Appellant, the Tribunal also considered the evidence before it, and gave reasons for accepting some parts and rejecting others. The Tribunal was entitled to make the credibility findings that it made, and the Court accepts the Respondent's submissions that the claims made in Ground One of the appeal do not raise a point of law, and this ground fails.

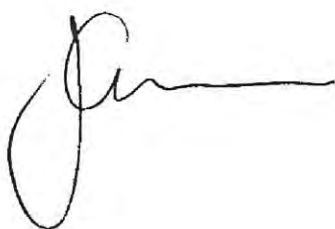
Ground 2

51. In relation to Ground 2, the Court notes that it is the role of the Secretary, and, on review, the Tribunal, to make findings as to the relevance of the country information before it. The submission that the Tribunal ought to have preferred some country information over other country information does not give rise to an appealable point of law.³⁵ In any event, the country information identified by the Appellant is not relevant to the Appellant, given that the Appellant was found by the Tribunal to not have been involved with the LTTE. This ground is not made out and is dismissed.

ORDER

52. (1) The Appeal is dismissed.

(2) The decision of the Tribunal TFN 1500234 dated 8 April 2016 is affirmed.



Judge Jane E Crulci

³⁴ Tribunal Transcript BD 228 In 37 – 43; Tribunal transcript BD 229 In 13 – 25; Tribunal transcript BD 234 In 27 – 40; Tribunal transcript BD 239 In 13 – 23.

³⁵ *ROD124 v The Republic of Nauru* [2017] NRSC 8.