

It would be strange if, circumstances having changed, the tribunal would be required to conduct a review where at the time an application was made to it, the interest the person had at the time the decision was made and first challenged had disappeared. The more logical construction of s 27 of the AAT Act is that the question of standing would have to be tested at the time the application is made to the tribunal, so that if there is a change of circumstances there is no accrued right which requires the tribunal to disregard that change of circumstances.

The Full Court held that, in any event, the changed circumstances deprived Allan of standing.

The appeal was allowed.

**Paramanathan v Minister for Immigration and Multicultural Affairs  
Minister for Immigration and Multicultural Affairs v Sivarasa  
Federal Court of Australia, Full Court, 21 December 1998  
(1999) 160 ALR 24**

***Migration—substantial identical passage in Refugee Review Tribunal’s Reasons for Decision in both cases—arrest, detention and interrogation of Tamils from particular areas in Sri Lanka—subsequent torture in detention—Tribunal’s approach of distinguishing between detention of such persons and what happened to them in detention—error of law arising from approach taken—failure to address claims made in a recent report supplied to Tribunal***

This case involved two appeals to the full Federal Court, one by Mr Paramanathan and one by the Minister for Immigration and Multicultural Affairs. The two cases were very similar. In each case, the applicant for refugee status had claimed that on a number of occasions he was apprehended by the security forces, detained, beaten, tortured and interrogated. In each case, the RRT accepted his claims. In each case, the member (the same in each case) said she had reservations about whether the applicant suffered mistreatment to the extent alleged (she did not say why) but “in the absence of contrary evidence”, she was “prepared to give him the benefit of the doubt”. However, in each case the RRT determined that there was no real chance of persecution if the applicant was returned to Sri Lanka. The two stated reasons were:

- “there is no suggestion that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males”; and
- the recent improvement in human rights referred to in the Amnesty 1996 report on Sri Lanka.

All three judges in this case considered that both cases should be remitted to the RRT for redetermination because the RRT had erred in determining that the fear of the applicant was not “well founded”.

All three judges referred to the statement that “there was no suggestion that such mistreatment was directed in a discriminatory way towards any particular group such as young Tamil males” and pointed out that there was an abundance of material suggesting precisely that. The Court noted that while it was for the RRT to accept or reject that evidence, in this case it made no findings whatsoever in relation to the large body of credible material pointing in favour of a “well-founded” fear on the part of the applicants.

For example, in Mr Paramanathan’s case the RRT had before it a British Council report, which was more critical of the situation than the Amnesty report. Apart from acknowledging its receipt, the RRT made no reference to the report anywhere in its reasons. The Court noted that the RRT was not bound to accept the information in this report, but it was a recent and comprehensive analysis of the position of Tamils. The RRT member gave no inkling as to her reaction to this report, even though s430 of the Act obliged her to set out her findings and to refer to the evidence on which they were based.

The Court noted the way in which the RRT had tried to distinguish between detention for questioning and pending the completion of inquiries on the one hand, and mistreatment during detention on the other. The RRT had considered that the former, although discriminatory in its effect against young Tamil males from certain areas, was a permissible anti-terrorist procedure. The RRT then addressed the question whether mistreatment while in detention was for a Convention reason. The RRT said there was no material suggesting that young Tamil males were singled out from other detainees for mistreatment. Accordingly, the mistreatment was “indiscriminate cruelty”.

The Court stated that the RRT’s bifurcation of the experiences of the claimants into “detention” and “treatment in detention” led them into committing an error of law, being either an incorrect interpretation of the Convention definition of “refugee” or an incorrect application of it to the facts as found by it. It also failed to set out its findings on material questions of fact, namely, the question whether each applicant had a well-founded fear of being detained by the Sri Lankan authorities by reason of being a young Tamil male from a certain area and if so of suffering mistreatment while in detention.

The RRT had also tried to distinguish between persecution as an act of government policy and unauthorised persecution by government functionaries (police and army). The Court pointed out that the Refugee Convention does not stipulate who the persecutor must be. It is enough that the government of the relevant country is unable or unwilling to prevent acts of persecution.