

NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANTS AND OF THEIR CLAIM OR STATUS MUST BE MAINTAINED PURUSANT TO S 151 OF THE IMMIGRATION ACT 2009.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF APPELLANTS REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA188/2012
[2013] NZCA 74**

BETWEEN	RT, DT AND LT, A MINOR BY HIS LITIGATION GUARDIAN Appellants
AND	THE IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR Second Respondent

Hearing: 21 February 2013

Court: Stevens, French and Ronald Young JJ

Counsel: C S Henry and R Sathiyathan for Appellants
C A Griffin for Second Respondent

Judgment: 26 March 2013 at 11.30 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellants must pay the second respondent's costs for a standard appeal on a band A basis and usual disbursements.**
-

REASONS OF THE COURT

(Given by Ronald Young J)

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Introduction

[1] Mrs T, her daughter and her son, who are all Sri Lankan, left Sri Lanka on 24 August 2009 using their own passports. They travelled to South America. When they left South America they travelled on false Malaysian passports heading for Australia. On 19 September 2009 they were stopped in transit in New Zealand because the New Zealand authorities discovered the Malaysian passports were false.

[2] The family then claimed refugee status in New Zealand but the Refugee Status Branch of the Department of Labour declined their claims in February 2010. The Refugee Status Appeals Authority (RSAA) dismissed their appeal.¹

[3] Immigration New Zealand then revoked their temporary permits on 2 August 2010. But in early September 2010 Mrs T and her children appealed against the requirement to leave New Zealand. Their appeal was dismissed by the Immigration and Protection Tribunal (IPT).² The IPT dismissed their appeal.³ Mrs T and the children then filed judicial review proceedings in the High Court. On 7 March 2012 that application was refused by Ellis J.⁴ It is from that decision that Mrs T and her children now appeal.

[4] The issues to be determined on appeal are, as identified by counsel:

1. Whether the High Court erred in holding that “nothing turn[ed]” on the fact that the appellants sought judicial review of, rather than appealing against, the decision of the Immigration and Protection Tribunal (“IPT”).
2. Whether the High Court misconstrued the submissions advanced on the appellants’ behalf in that court with respect to:
 - 2.1 The adequacy of the RRA/IPT’s assessment of all the Family’s circumstances, against the criteria set out in s 47(3) of the Immigration Act 1987 (repealed);
 - 2.2 The position taken by the decision in *A, B, C (a Family of Peru) v Chief Executive of the Department of Labour* [2001] NZAR 981 in respect of the RRA’s reliance on assessments made by the RSAA.
3. Whether the High Court should have required the RRA/IPT to do its own assessment of relevant background information available to the Tribunal, including information related to risk of harm in Sri Lanka to persons of comparable social status to the family as “well off Tamils”, when that Tribunal evaluated for itself the credibility of the basis of the appellants’ fear of being kidnapped for ransom, and/or of death, in Sri Lanka.

¹ *Refugee Appeal No 76502, Refugee Appeal No 76503, Refugee Appeal No 76504* RSAA Auckland, 29 June 2010 [RSAA decision].

² The IPT replaced the Removal Review Authority as from 29 November 2010. All appeals lodged before 29 November 2009 are determined under the transitional provisions of the Immigration Act 2009.

³ *AB (Sri Lanka)* [2011] NZIPT 500137 [IPT decision].

⁴ *RT v The Immigration and Protection Tribunal* [2012] NZHC 345, [2012] NZAR 565 [High Court judgment].

4. Whether the High Court erred in identifying a “possible” or “arguable error” by the IPT in the Tribunal’s approach to and consideration of the psychological evidence of Dr McCormick and the fears of the children as to their risk of harm in Sri Lanka.
5. Whether the High Court erred in concluding that the IPT had properly considered all of the available information relevant to the appellants’ appeal, and that even if it hadn’t, the appellants should have no relief.

Background facts

[5] Mrs T, her husband and her two children (a girl born in 1991 and a boy in 1994), who are Tamils, lived in Colombo, Sri Lanka for a number of years prior to the departure of the wife and the children. Mrs T says that her husband is a successful businessman. However, in about 2009 the family became subject to threats. In May 2009 Mrs T said that her husband was kidnapped by six men and a ransom of 10 million rupees was demanded. Mrs T claimed that to pay the ransom they had to sell a new family home which was being built. Eventually the house was sold for 20 million rupees which was paid to the kidnappers and Mr T released.

[6] Mrs T and her two children claim that in August 2009, the children were on their way to a nearby temple when other men attempted to kidnap them but passersby rescued the children. The Police refused to accept a complaint about the attempted kidnapping because the T family were Tamils. Shortly afterwards Mr T received an anonymous phone call seeking a further ransom failing which either the children or Mr T and his wife would be killed.

[7] As a result Mrs T said that the family decided that she and the children should leave Sri Lanka. They arranged to leave with the assistance of an agent who also arranged their false Malaysian passports.

[8] After the Ts’ arrival in New Zealand, they claimed refugee status. Immigration New Zealand declined their refugee status claim and their appeal was dismissed. The RSAA rejected Mrs T’s narrative of the kidnap events. It did not accept that Mr T had been kidnapped, nor did it accept that an attempt had been made to kidnap the children.

[9] The RSAA considered that Mrs T's concern about her and her children being persecuted if they returned to Sri Lanka was not well founded. There was nothing in their backgrounds which meant they would be at risk if they returned to Sri Lanka.

[10] As a result of the rejection of the Ts' refugee claim, Immigration New Zealand told them that their temporary permits would be revoked from early August 2010. The family appealed to the IPT. The Ts had to bring themselves within s 47(3) of the Immigration Act 1987 in such an appeal, which provides as follows:

47 Appeal against requirement to leave New Zealand

...

- (3) An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

[11] Before the IPT hearing, the family obtained a psychological report relating to the children from Dr G McCormick. The IPT described Dr McCormick's report, which was new evidence before the IPT, in the following terms:⁵

The son was described to Dr McCormick (presumably by his mother) as becoming increasingly withdrawn over 2010 and his academic performance had slowly deteriorated even though he was usually an able student. He had also become socially withdrawn and had not had contact with friends becoming increasingly pre-occupied with his situation and concerns about the future. The son described experiencing initial insomnia and frequent nightmares, a pervasively low and ruminative mood, increasing irritability with people, intrusive concerns about his safety and was "absolutely clear in his own mind that if he was to return to Sri Lanka he would be kidnapped, tortured and killed". He presented as "an extremely frightened child".

The son also described his attempted kidnapping "as a real and harrowing event". He experiences flashbacks to this event and occasions when he clearly feels that he is in the kidnap situation again. His baseline anxiety is high and he has an exaggerated startle response.

Dr McCormick states that the daughter also presented as a frightened and traumatised person with high levels of baseline anxiety. She described her kidnapping "in vivid terms" and she too is convinced that if she had to return

⁵ IPT decision, above n 3, at [22]–[25].

to Sri Lanka she would be kidnapped again and tortured, abused or killed. Like her brother she is a timid person and it was difficult to discuss her traumas with her, but her memories of being in the police station are extremely frightening for her. She has lost 10 kg in weight, described hair loss and slept in her mother's bed as she felt too frightened to sleep on her own. She has a nightly nightmare, awaking in a frightened, startled and sweating state and also has daily headaches.

In the opinion of Dr McCormick, both children described symptoms consistent with a diagnosis of post traumatic stress disorder and, on the basis of the clinical symptoms, a trauma did occur and their presentation was inconsistent with feigned symptoms. Returning the children to Sri Lanka will increase their psychological distress. Neither wants to abandon their homeland but each is petrified of returning there.

[12] Like the RSAA, the IPT also rejected the T family's claims of kidnapping. The IPT said that the T family was not at real risk of being harmed if they returned to Sri Lanka. The IPT, therefore, concluded there were no exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the applicants to be removed from New Zealand.⁶

The High Court decision

[13] The Judge identified what she said was the "essence" of the two grounds of review of the IPT's decision. They were that even if Mrs T's factual narrative was rejected, that did not mean that the risk of harm to the T family, if they returned to Sri Lanka, was not real and severe and relevant to the s 47(3) enquiry; and it did not mean that their subjective fears of harm were not real, acute and also relevant to the s 47(3) enquiry.

[14] The High Court rejected the appellant's claim that the IPT had simply adopted the adverse credibility findings made against Ms T by the RSAA thereby abdicating its own statutory function under s 47. Section 47(3) imposed a different test and required a different approach from refugee matters. The Judge was satisfied that while the IPT endorsed the RSAA's reasoning as to the credibility of the kidnapping claims, it did not do so uncritically.

⁶ Immigration Act 1987, s 47(3).

[15] As to the way in which the IPT dealt with Dr McCormick's evidence, the Judge said there was "an arguable error of approach" by the IPT:⁷

At the outset I record my acceptance of Ms Griffin's submission that, notwithstanding the absence of evidence to the contrary, it was open to the IPT to discount Dr McCormick's diagnosis and views. Nonetheless, the passages from the decision I have quoted above do seem to me to reveal an arguable error of approach. In particular I have concern that:

- (a) At [41] of the decision the IPT says that the children's trauma and fear identified by Dr McCormick must be "weighed against" the negative view that the Tribunal had taken of the T's credibility; and
- (b) At [43] the IPT appears to imply that "heightened subjective fears about one's personal safety" can only give rise to exceptional humanitarian circumstances where they are based on "past traumatic experiences" (which in the T's case the Tribunal did not accept existed);

[16] And further:⁸

While at [42] the IPT does appear to assess and take into account the children's present psychological condition, the statements that both precede [42] (at [41]) and follow it (at [43]) give rise to a reasonable inference that that assessment was significantly influenced by the IPT's rejection of the T's factual narrative. And the analysis in [42] (which focuses solely on the stresses associated with the Ts' upheaval, flight and uncertain present status) suggests that the IPT has failed to consider whether the children's subjective fears derive from the risks that they perceive that they, as Tamils belonging to a particular socio-economic group, face more generally.

[17] The Judge, therefore, concluded that whatever the truth was as far as the alleged kidnapping attempt was concerned, the children did have significant and genuine concerns about potential kidnapping.

[18] Thus, the Judge said:⁹

Accordingly, to the extent that [41]–[43] of the decision suggest that trauma and psychological distress can only qualify as exceptional circumstances of a humanitarian nature if they have their foundation in actual events that have been experienced by the person concerned, then I agree with Mr Henry that they are wrong. The question then becomes whether such an error should operate to vitiate the IPT's decision overall.

⁷ High Court judgment, above n 4, at [39].

⁸ At [40].

⁹ At [42].

[19] However, the Judge accepted that it would only be in a rare case where an applicant's wholly subjective fears could amount to exceptional circumstances of a humanitarian nature.

[20] The Judge acknowledged the appellants' observation that the IPT in its decision said very little about the risk of kidnapping. But that was understandable, the Judge said, because there was very little factual material placed before the IPT to consider the likelihood of kidnapping. It was, the Judge considered, the responsibility¹⁰ of the appellant to ensure that all relevant information was placed before the IPT. Thus, the Judge concluded that the IPT could not be criticised for failing to take into account information that was not before it. The Judge noted the RSAA had concluded that the chance of the appellants being kidnapped was essentially conjecture and fell below a real chance. Further, the appeal to the IPT had not been based on a challenge to this conclusion.

[21] For those reasons, therefore, the Judge said that even if she had decided that the IPT had erred by not seeking out relevant information about kidnapping or misconstruing the effect of the children's mental health, she would not have allowed the judicial review.

The RSAA and IPT decisions

[22] To understand the challenge to the IPT's decision, and the High Court judgment, it is necessary to identify what happened to the family's refugee status challenge before the IPT and what the issues of that challenge were.

[23] The original refugee decision was given by a Refugee Status Officer through the Department of Labour.¹¹ The officer concluded that there was no real chance of the T family being persecuted if they returned to Sri Lanka. We note that the officer rejected, as lacking credibility, the accounts of kidnapping by Mrs T and the children. Mrs T and the children appealed to the RSAA. That appeal was heard in

¹⁰ Immigration Act 1987, s 50(2)(a).

¹¹ The officer's decision focused on whether Mrs T and the children had a well founded fear of persecution if returned to Sri Lanka.

May 2010 and a decision given in June 2010. The T family (mother, son and daughter) all gave oral evidence in front of the RSAA.

[24] Mrs T told the RSAA that she began living in Colombo in 1990. Until 2009 the family were regularly stopped at checkpoints throughout the city and subject to searches of their home. The family were lawfully resident in Colombo going about their lawful business and beyond “the inconvenience inherent in the searches of the home or roadblock questioning,” they encountered no problems.¹²

[25] Mrs T described to the RSAA the difficulties relating to the alleged kidnapping of her husband on 16 May 2009, the subsequent attempt with respect to the children and the further threats.

[26] After Mrs T and the children left Sri Lanka, and were finally stopped in New Zealand, Mrs T’s husband left Sri Lanka for India but his businesses continued to be operated in Sri Lanka. He later returned to Sri Lanka where Mrs T said he was in hiding.

[27] The RSAA also received the following information from the appellants:

- (a) Letter dated 10 April 2010 from the Deputy Minister of Vocational and Technical Training in Sri Lanka confirming his knowledge of the problems faced by the family;
- (b) Statement from employee of the shop relating to the telephone conversation he had with the mother following the kidnap of the husband;
- (c) Statement from the mother’s brother-in-law confirming the kidnap of the husband and the steps he took to sell the family home to pay the ransom demand;
- (d) Copy of deed of transfer in relation to the sale and purchase of the family home [relevant to the ransom payment];
- (e) Letter from the daughter’s doctor confirming that she is suffering from stress-related headaches;
- (f) Bundle of country information relating to the situation for Tamils in Sri Lanka.

¹² RSAA decision, above n 1, at [7].

[28] The RSAA identified the principal issue as whether on the facts as found there was a real chance of the appellants being persecuted if they returned to their country. If the answer to that question was “yes” then it was required to consider whether there was a Refugee Convention reason why that was the case. To establish the relevant facts, the RSAA had to assess the credibility of the kidnap claims.

[29] The RSAA concluded that the core of the kidnapping claims by Mrs T, the son and daughter were not true. It, therefore, assessed their claims for refugee status against the factual background that Mrs T and her children were Tamils who lawfully resided in Colombo and had a family business there.

[30] The RSAA then considered the situation of Tamils generally in Sri Lanka after the end of the civil war. It considered previous decisions of the RSAA from 2009 which extensively considered the situation of Tamils in Sri Lanka. It noted that while more recently there had been some easing of the conditions in Sri Lanka “substantial humanitarian challenges remain and human rights abuses continue to occur”.

[31] On the other hand a series of international reports after 2009 showed that progress on human rights concerns in Sri Lanka was being made – particularly a report by the International Crisis Group in 2010.

[32] In addition, the United Nations High Commissioner of Refugees Country of Origin Research and Information Country Report on Sri Lanka in April 2010 noted some improvement in the human rights situation in the final months of 2009 despite previous concerns regarding emergency laws, fears of terrorism and latent anti-Tamil sentiments.

[33] Having set out the Sri Lankan background, the RSAA considered how that situation translated into risk for the appellants. In particular, it considered:¹³

what risk of detention and subsequent ill treatment do they face on arrival at the airport and post arrival in resuming their lives in Colombo.

¹³ At [77].

[34] The RSAA referred to a United Kingdom Border Agency Country of Origin Information Service Report prepared from information gathered from a visit by UK officials to Sri Lanka in 2009. The RSAA concluded that while Tamils may be more likely to be stopped on arrival at the airport in Sri Lanka and have their backgrounds checked, unless there were outstanding criminal matters or there was evidence of previous membership of a prohibited organisation, any detention at the airport would be brief. There was no reason to expect that the appellants would be likely to suffer any serious harm as a result of any airport detention. Given there was nothing to suggest that the appellants had any criminal or terrorist background, then the chance of any significant harm fell well below a real chance threshold.

[35] The RSAA also noted that, although the son did not have an identity card, this was because he was below the age at which such a card was required when he left Sri Lanka. An identity card could be obtained upon his return to Sri Lanka.

[36] As to the situation for Tamils in Colombo, the RSAA considered previous appeals where relevant evidence had been given. It considered, in particular, detentions during cordon and search operations, detention at check points, and kidnapping and abduction of Tamils in Colombo. The RSAA then applied this information to the T family situation.

[37] It said that while the appellants could be expected to be stopped at check points during cordon and search operations they had no reason to suppose that they would be detained for further questioning because there was nothing “in their backgrounds to excite any interest in them”. The RSAA said that “the chance of them being kidnapped is essentially conjecture and falls below the real chance threshold”.

[38] The RSAA concluded that while life for Tamils in Colombo had some uncertainty, there was no real chance at the present time that these appellants would be persecuted. The appeal was, therefore, dismissed.

[39] The appellants then appealed to the Removal Review Authority (now the IPT). They claimed there were exceptional circumstances of a humanitarian nature

that would make it unjust or unduly harsh for the family to be removed from New Zealand and it was not in all the circumstances contrary to the public interest to allow the applicants to remain in New Zealand.¹⁴

[40] An appeal to the IPT is dealt with on the papers in contrast with the RSAA oral hearing.

[41] As to the information provided by the appellants to the IPT, the decision noted:¹⁵

The appeal was supported by the following information:

- (a) Sworn declarations from the mother and two children in which they describe their arrival in this country and the preparation of their refugee claims, affirm that the incident of the attempted kidnapping of the children did take place and describe their fears of returning to Sri Lanka and the negative impact of these fears on their wellbeing.
- (b) Psychological report (9 September 2010) prepared by specialist psychiatrist, Greig McCormick, the details of which will be discussed below [obtained after the RSAA hearing].
- (c) Two media reports concerning the torture and detention of young Tamil men deported to Sri Lanka from Australia and the United Kingdom.
- (d) Marriage and birth certificates.

[42] The appellants' case before the IPT was that the RSAA had wrongly rejected the children's claims that an attempt had been made to kidnap them. The appellants did not attempt to directly challenge the RSAA's conclusion regarding the claim the father had been kidnapped although Mrs T did not resile from that claim. The appellants stressed that Dr McCormick's report supported the children's version of events in Sri Lanka.

[43] There were further specific grounds of appeal relating to a broader fear of kidnapping by the children, and the fact that the daughter was suffering post traumatic stress disorder (from Dr McCormick's report) from anxiety and fears that she would be tortured or killed if she returned home was emphasised. Thus, it was

¹⁴ Immigration Act 1987, s 47(3).

¹⁵ IPT decision, above n 3, at [16].

said the children's "subjective fears of being persecuted would make their lives impossible if they returned to Sri Lanka".¹⁶ Finally, it was claimed the son was particularly vulnerable to detention on return to Sri Lanka because he did not have a Sri Lankan identity card.

[44] The IPT rejected the proposition that Dr McCormick's evidence could be used to undermine the RSAA's conclusion that the descriptions of the attempted kidnapping were untrue.

[45] The IPT undertook an assessment of the evidence relating to the alleged kidnapping. They referred to the RSAA's analysis and said that they agreed with the finding that the claim of the kidnapping of the husband and attempted kidnapping of the children were untrue.

[46] However, the IPT accepted that the children were experiencing stress and anxiety and that the symptoms described with respect to the daughter as to hair loss and persistent headaches, did exist. The IPT acknowledged that the family's situation was hardly ideal. It accepted that heightened subjective fears about personal safety based on past traumatic experiences could give rise to exceptional humanitarian circumstances. It said:¹⁷

However, where, as in the present case, the claimed source of the children's subjective fears, namely the past targeting of the family by kidnappers, is not credible, the Tribunal can give little weight to them.

[47] The IPT then went on to consider the conditions in Sri Lanka particularly those for Tamils. It took into account the extensive analysis of this situation by the RSAA including vulnerability to kidnapping and any other risk of harm. They concluded that the children were not at real risk of being harmed or kidnapped and that there were no exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellants to be removed from New Zealand.

¹⁶ At [15].

¹⁷ At [43].

[48] We now turn to the appeal grounds which we have in part reordered from those listed above at [4].

Appeal grounds

Did the Judge proceed as if the proceedings were an appeal rather than a judicial review?

[49] At para [21] of her judgment, the Judge said:

The Ts chose not to exercise their right of appeal against the IPT's decision, but instead filed the present proceedings. Nothing turns on that choice.

[50] The appellants submitted that this indicated that the Judge undertook her analysis as if she was faced with an appeal rather than a judicial review. We reject that claim.

[51] The above observation is neutral. It accurately records the position that nothing turns on the decision of the appellant to seek judicial review of the IPT's decision rather than appeal it. The approach of the Judge to the application for judicial review amply demonstrates that she appreciated it was not an appeal.

[52] Beginning at para [30] of her judgment the Judge identifies the appellants' grounds of review. They are, in summary:

- (a) failures to take into account relevant factors (the risk of harm to the children if they return to Sri Lanka and that their subjective fears of harm were real, acute and relevant);
- (b) failure of the IPT to consider the relevant evidence of the particular risks faced by wealthy Tamil business people in Colombo;
- (c) failure of the IPT to take into account and understand the medical evidence relating to the children; and
- (d) failure of the IPT to properly apply the test in s 47.

[53] There can be no doubt, therefore, that the Judge was alive to the fact that this was a judicial review. She identified the review questions posed by the appellants (essentially failure to take into account relevant considerations and error of law). In her judgment she answered these questions. We, therefore, reject this ground of appeal.

Dr McCormick's report and the children's medical condition

[54] The second respondent gave notice that it proposed to support the High Court decision by raising two particular grounds as follows:

- (a) whether the IPT erred in its approach to and consideration of the psychological evidence of Dr McCormick and the subjective fears of the children as to their risk of harm or kidnapping in Sri Lanka; and
- (b) whether the IPT was required to expressly consider the alleged risk of harm/kidnapping to the family arising from their social status as "well off Tamils" when that issue (or relevant information to support the alleged risk) was not directly put before the IPT by the appellants.

[55] Ground (a) is effectively the same as appeal issue (4).

[56] First, we deal with Dr McCormick's evidence and the subjective fears of the children. We consider Dr McCormick's report and then the Judge's approach to it.

[57] Dr McCormick's report was obtained after the RSAA's decision and before the IPT considered the s 47(3) application. The report was completed in September 2010. Dr McCormick said he had been asked to review the position of the children from a clinical perspective "in order to ascertain whether or not there were any psychological or psychiatric factors operating which are germane to the current situation". Dr McCormick was aware that the children wished to appeal the proposal to remove them from New Zealand and that evidence was required by the T family to establish that there were exceptional circumstances of a humanitarian nature.

[58] Dr McCormick's report details the background claims of the family relating to the kidnapping of the husband, the attempted kidnapping of the children and the further attempt to extort money from them.

[59] Dr McCormick describes the son's mood and his fears. He also details the position of the daughter whom he describes as presenting as "a frightened and traumatised person with high levels of baseline anxiety".¹⁸ He notes her concerns about her kidnapping and her claim that she had lost ten kilograms in weight, had significant hair loss and often had nightmares, awakening in a frightened startled state.

[60] Dr McCormick then said he considered that each of the children described symptoms consistent with a diagnosis of PTSD. He was satisfied that "on the basis of the clinical symptoms presented to me, a trauma did occur – [DT's and LT's] presentation to me is inconsistent with feigned symptoms".

[61] The IPT said in relation to this evidence:¹⁹

Against Dr McCormick's descriptions of the children being frightened and traumatised and "convinced" they will be killed in Sri Lanka, the Tribunal must weigh the coincidence of the mother and the daughter both omitting such a significant incident over the course of several interviews two weeks apart, the nature of the details freely disclosed and the contrived, implausible explanations offered to account for the omission. The children were also prepared to give untruthful evidence relating to their father's alleged kidnapping. The RSAA had the opportunity to interview the children and determined that the family's core narrative was not credible. This Tribunal is not prepared to reach a different conclusion from that of the RSAA which was based on an objective assessment of the family's claims, in favour of the children's subsequent self-reported fears and symptoms of anxiety and stress.

This is not to say that the children are not experiencing stress and anxiety and the symptoms described in respect of the daughter, weight and hair loss and persistent headaches, suggest that she may have some mental health issues. The family's situation is hardly ideal. A large sum of money was paid to agents to get them to Australia, where the plan was that they would be joined by the husband. The family has been separated for a lengthy period, their attempts to stay in this country unsuccessful and the children, when seen by Dr McCormick, were unable to attend school and their lives

¹⁸ Refer above at [4].

¹⁹ IPT decision, above n 3, at [41]–[43].

were in limbo. In these circumstances, confronting having to return to Sri Lanka will be stressful for the family.

Heightened subjective fears about one's personal safety based on past traumatic experiences may well give rise to exceptional humanitarian circumstances. However, where, as in the present case, the claimed source of the children's subjective fears, namely the past targeting of the family by kidnapers, is not credible, the Tribunal can give little weight to them.

[62] That analysis was the subject of criticism by the appellants in the High Court. The Judge said:²⁰

At the outset I record my acceptance of Ms Griffin's submission that, notwithstanding the absence of evidence to the contrary, it was open to the IPT to discount Dr McCormick's diagnosis and views. Nonetheless, the passages from the decision I have quoted above do seem to me to reveal an arguable error of approach. In particular I have concern that:

- (a) At [41] of the decision the IPT says that the children's trauma and fear identified by Dr McCormick must be "weighed against" the negative view that the Tribunal had taken of the T's credibility; and
- (b) At [43] the IPT appears to imply that "heightened subjective fears about one's personal safety" can only give rise to exceptional humanitarian circumstances where they are based on "past traumatic experiences" (which in the T's case the Tribunal did not accept existed);

While at [42] the IPT does not appear to assess and take into account the children's present psychological condition, the statements that both precede [42] (at [41]) and follow it (at [43]) give rise to a reasonable inference that that assessment was significantly influenced by the IPT's rejection of the T's factual narrative. And the analysis in [42] (which focuses solely on the stresses associated with the T's upheaval, flight and uncertain present status) suggests that the IPT has failed to consider whether the children's subjective fears derive from the risks that they perceive that they, as Tamils belonging to a particular socio-economic group, face more generally.

[63] And further:²¹

Accordingly, to the extent that [41]–[43] of the decision suggest that trauma and psychological distress can only qualify as exceptional circumstances of a humanitarian nature if they have their foundation in actual events that have been experienced by the person concerned, then I agree with Mr Henry that they are wrong. The question then becomes whether such an error should operate to vitiate the IPT's decision overall.

²⁰ High Court judgment, above n 4, at [39]–[40].

²¹ At [42]–[43].

Relevant to that question is Ms Griffin's submission that it will be a rare case in which a person's wholly subjective fears amount to exceptional circumstances of a humanitarian nature. That is a proposition with which I respectfully agree. And as Gendall J noted in that case if the IPT found that such a fear was not well founded as a matter of objective fact, it would be open to the Authority to conclude that s 47(3) has not been satisfied.

[64] The Judge accepted that although the IPT did go on to discuss at some length the general risks faced by Tamils including kidnapping, it did not specifically do so in relation to "well off" Tamils being held for ransom. The Judge concluded, however, that there was very little evidence to support this proposition from the appellants and the IPT and RSAA had concluded that the chance of the family being kidnapped fell below the real chance threshold. And so while the children may have themselves feared kidnapping, the chance in fact of them being kidnapped, was low. In those circumstances the Judge concluded that even if the IPT erred in its approach to the children's psychological state, it did not affect the outcome.

[65] The second respondent's point is that the Judge was wrong to be critical of the approach the IPT took to the psychological evidence, although as the second respondent pointed out, the Judge did not positively find an error of law. She only referred to an arguable error of approach or possible error of approach.²²

[66] We are satisfied that in fact the IPT did not err in its approach in considering the evidence of Dr McCormick, the subjective fears of the children and the proper approach to this evidence nor its relevance to the s 47(3) test.

[67] Before the IPT the appellants used Dr McCormick's report as evidence on which the IPT could reject the RSAA's conclusion and accept the children's version of the attempted kidnapping. This approach was rejected by the IPT. The IPT was entitled to do so. Dr McCormick could not know whether the events described by the children were true or not. The children simply repeated to him what they had previously told the RSAA. The IPT was entitled to, and did conduct, its own analysis of whether or not the children's description of the attempted kidnapping was truthful. It rejected that evidence. And so the IPT was faced with Dr McCormick's diagnosis which was essentially based on the subjective fears of the children.

²² At [39].

[68] As the High Court noted, the IPT was entitled to discount both Dr McCormick's view as to whether the children were the subject of an attempted kidnap and his diagnosis. The IPT did not simply dismiss Dr McCormick's report. It acknowledged²³ that the children were experiencing stress and anxiety. It accepted that the daughter may have some mental health issues and that the family situation was hardly ideal. It accepted that the circumstances confronting the family were stressful. They had been separated from their family in Sri Lanka for several years. They did not wish to return to Sri Lanka but there was a clear prospect that they would have to do so. The IPT acknowledged that subjective fears for personal safety can give rise to exceptional humanitarian circumstances.

[69] But in this case the IPT considered that the children's subjective fears of kidnapping were insufficient to establish exceptional circumstances. In assessing their subjective fears, the IPT properly and appropriately took into account the fact that objectively those fears were very unlikely to be realised. So while the children may be fearful, there was no significant evidence which objectively justified their fears. As the IPT's decision illustrates, it did not require actual traumatic experiences as a base for subjective fear before it could be taken into account. The IPT was entitled to conclude that, given the children had been untruthful about their kidnapping attempt, as well as their father's, and given the evidence before the RSAA established that there was no real chance of them being kidnapped, their subjective fears were entitled to "little weight".²⁴

[70] There was no error in this approach. We, therefore, agree with the second respondent that the identification by the High Court of the IPT's approach to the psychological evidence as a possible error was not correct. The IPT approached this evidence appropriately and fairly and in our view no valid criticism can be made of it.

²³ IPT decision, above n 3, at [42].

²⁴ At [43].

Risk of harm of kidnapping

[71] The second ground raised by the second respondent was whether the IPT was required to expressly consider the alleged risk of harm of kidnapping to the children arising from the fact that they were “well off” Tamils and whether any failure to do so gave rise to a reviewable error. This is essentially appeal ground (3) together with the appellants’ claim that the IPT should have undertaken its own assessment of risk rather than rely upon the conclusions of the RSAA.

[72] The Judge said:²⁵

Less straightforward are the grounds for review that relate to the IPT’s treatment of the evidence of Dr McCormick and, more generally, the issue about the children’s subjective fear of kidnapping and the risks they might face in that regard.

[73] In considering the IPT’s decision, the Judge said it “suggests that the IPT has failed to consider whether the children’s subjective fears derive from the risks that they perceive that they, as Tamils belonging to a particular social-economic group, face more generally”. The Judge added:²⁶

So, regardless of whether the T’s have first-hand experience of matters of being kidnapped, it is possible that they have significant and genuine concerns about potential kidnapping based on information that (at the time they left Sri Lanka) kidnappers were indeed targeting members of wealthy Tamil families. It is, for example, not difficult to imagine that the T’s have been swept up in the “atmosphere of fear and panic” that it appears was rife amongst the Tamil and Muslim business communities in Colombo in 2009. It may not be coincidental that the reports of the existence of such an atmosphere are contemporaneous with the T’s departure from Sri Lanka. The statements made by them to immigration officials at the airport on their arrival in New Zealand are also consistent with such analysis.

[74] And further, the Judge said:²⁷

In the present case, the IPT did go on to discuss separately and at some length the evidence about the general risks faced by the Ts if they were returned to Colombo. In that context, the Tribunal refers in passing to the risk of kidnapping. But material specifically relating to the risk of “well-off”

²⁵ High Court judgment, at [38].

²⁶ At [41].

²⁷ At [44] and [46].

Tamils being held for ransom (ie material of the kind that was annexed to DT's affidavit in these proceedings) was not expressly considered.

...

Ultimately, however, it does not matter why the Ts did not place more evidence before the IPT about the objective risks of kidnapping that may be faced by middle class Tamils in Colombo. The question is rather whether, in combination with the possible error of approach I have already identified, its absence means that the application for review should be granted.

[75] The Judge acknowledged that the omission by the IPT was likely caused by the lack of material before the IPT about the kidnapping risk to such groups.

[76] The second respondent says the appellants did not raise this issue before the IPT and, therefore, the Judge's criticism of the IPT was misplaced.

[77] We agree with the second respondent that an analysis of the applicants' case before the IPT illustrates that the appellants did not directly raise with the IPT the claim that they, as well off Tamils, were especially vulnerable to kidnapping, ransom demands and harm.

[78] In the appellants' submissions to the IPT, counsel acknowledged that Mrs T had no new information which would persuade the IPT that her account of the kidnapping of her husband and the attempt with respect to the children given to the RSAA was truthful and "has agreed to abide by the Authority's (RSAA) credibility finding in respect of her case".

[79] However, with respect to the children, the appellants submitted that the IPT should not follow the credibility findings of the RSAA. The appellants' case was that if the IPT was persuaded of the truth of the children's account, then exceptional circumstances of a humanitarian nature would exist with respect to the children.

[80] Under the heading "Exceptional circumstances of a humanitarian nature" counsel's submissions focused on Dr McCormick's report and how that supported the credibility of the children's account of the alleged kidnapping attempt.

[81] The submissions then turned to the heading “Country conditions in Sri Lanka”. These submissions focused on: the vulnerability of Tamils who had failed to gain refugee status and had been returned to Sri Lanka; the fact that the son did not have an identity card and his vulnerability to detention at the airport; and the fact that the family might expect to be stopped at checkpoints during cordon and search operations.

[82] The appellants stressed in their submissions that while these incidents may not be of sufficient severity to amount to persecution in terms of the Refugee Convention, given their fear of persecution, it would make the appellants’ lives impossible if they were returned to Sri Lanka.

[83] To support these submissions, the appellants provided two media articles, one from Amnesty International Australia and the other from Tamil Net (apparently a news service run by Tamils about Tamil circumstances) to the IPT. Neither involved kidnapping. One related to the treatment of a Tamil man upon his return to Sri Lanka after an unsuccessful claim for refugee status.

[84] There are two brief mentions about kidnapping Tamils in the affidavit evidence filed by the appellants before the IPT. Near the end of her affidavit (filed in support of the appeal), Mrs T mentioned that her husband was in hiding in Sri Lanka “because well-to-do families are at risk of being kidnapped”.

[85] Further, the daughter said:

Families in Sri Lanka who are relatively wealthy like ourselves and who have families abroad, are often targeted by criminals in Sri Lanka.

[86] Neither the appellants’ submissions, nor the evidence they supplied to support their case, claimed that the T family as “well off” Tamils would be vulnerable to kidnapping and that this vulnerability was relevant to the s 47(3) test.

[87] We are satisfied, having reviewed the submissions of the appellants and the evidence presented to the IPT that the appellants did not frame their application under s 47(3) as based on the danger to them as well off Tamils of being kidnapped and subject to ransom demands.

[88] The references which we have detailed are essentially comments in passing. They are not at the heart of the submissions. An example serves to illustrate our conclusion. The appellants claimed before us that their submissions before the IPT illustrate their appeal point. They said at [39] of their submissions:²⁸

It is submitted that country reports show that kidnappings of this nature do occur in Sri Lanka and that the children would be at risk if returned. Indeed, it is submitted that the RSAA accepts that country conditions in Sri Lanka are still extremely dangerous for certain individuals.

[89] This submission by the appellants was made in the context of trying to convince the IPT that it should accept the claim of the children that an attempt at kidnapping them had been made. The point being made by counsel in that submission, was that kidnappings do occur in Sri Lanka and so the children's claim of an attempted kidnapping should not be simply dismissed as improbable. The submission is not a claim that, apart from the alleged kidnapping of the father and attempted kidnapping of the children, the family were and will be vulnerable to kidnapping because they are wealthy Tamils. Nor is any of the affidavit evidence referred to of assistance. While it is true that perhaps two or three sentences amongst many paragraphs of submissions and evidence mention that well-to-do Tamil families are vulnerable to kidnapping, this claim has never been the focus of, or central to, submissions before the IPT by the appellants.

[90] Further, as the High Court pointed out there is simply no evidence beyond the assertions of the appellant and her children that wealthy Tamils are especially vulnerable to kidnapping. The international reports about Sri Lanka record that from time to time there have been kidnappings. The RSAA analysed this evidence. It concluded that Mrs T and her family were no more vulnerable than any other Tamil family in Colombo to ransom or kidnapping. It can be seen, therefore, that the IPT did take into account the risk of harm in Sri Lanka to persons from families who are well off Tamils. It was entitled to adopt the extensive analysis undertaken by the RSAA.

²⁸ IPT decision, at [39].

[91] The RSAA and the IPT are specialist appellate tribunals dealing constantly with immigration matters. The RSAA obtained extensive material about the situation for Tamils in Sri Lanka and particularly Colombo. The appellants have provided little, if any, evidence which contradicts the RSAA's evidence and analysis. The IPT was, therefore, entitled to rely upon this material when undertaking the assessment required of it pursuant to s 47(3).

[92] We reject the appellants' claim that the IPT breached its obligation to enquire further into the situation in Sri Lanka and their claim that the High Court failed to recognise this inadequacy. Whilst the IPT process can be seen as inquisitorial the IPT already had extensive information about Sri Lanka and no obligation, in the absence of any identified need, to itself make further enquiries.

[93] We are satisfied the Judge's criticism of the IPT decision on this point was not justified. We, therefore, reject this ground of appeal.

Misconstruction of submissions

Family's circumstances

[94] The appellants claim that the High Court misconstrued their submission (and as a result failed to consider) whether the IPT had adequately assessed the whole of the T family's circumstances against the criteria set out in s 47(3) of the Act. In particular, the appellants say that once the IPT rejected the claims of kidnapping, it failed to take into account other circumstances which might have established exceptional circumstances. This was a failure the High Court did not address in its judgment.

[95] The appellants say these circumstances were:

- (a) there was no evidence to suggest that there was any family dysfunction when Mrs T and the children left Sri Lanka. Therefore, there must have been a serious situation in Sri Lanka to drive Mrs T and her family from their home country;

- (b) as well off Tamils the family was especially vulnerable to being targeted for kidnapping and ransom payments;
- (c) Mrs T and her family were not in New Zealand of their own will. They were stopped here on their way to Australia. If they had been allowed to travel on to Australia then they may have been able to successfully obtain residence in Australia;
- (d) the full circumstances under which Mrs T and her family fled Sri Lanka;
- (e) the children's medical condition, even if the alleged attempted kidnapping is discounted;
- (f) the country conditions set out in [51]–[56] of the submissions made to the RSAA;
- (g) the submissions made by counsel for the family to the Refugee Status Branch, in particular relating to the abuse of human rights in relation to Tamils in Sri Lanka including businessmen targeted for abduction as well as human rights violations when entering Sri Lanka.

[96] Some of the information now identified by the appellants as relevant was not taken into account either by the IPT or the High Court. Primarily this was because the appellants did not identify the information as relevant before the IPT. Understandably, therefore, the High Court did not consider it. However, we consider each of the factors identified by the appellants relating to their circumstances.

[97] The information which the appellants claim was not taken into account broadly divides itself into information about the family's personal circumstances and information regarding the country situation in Sri Lanka.

Situation in Sri Lanka

[98] As to the situation more generally in Sri Lanka, we are satisfied that before the RSAA and the IPT, full information as to the situation in Sri Lanka as far as Tamils are concerned was properly before both decision makers and there was no failure to take into account relevant information by the IPT. This information was properly taken into account by the IPT and the High Court was correct in concluding the IPT made no reviewable error in this aspect.

[99] The IPT had before it the RSAA's decision which extensively examined the situation in Sri Lanka in 2009 when the appellants left and more recently. It concluded that this family had no particular vulnerability either to kidnapping or to human rights violations from the Sri Lankan authorities. No valid complaint can be made about consideration of country material.

[100] Factors raised by the appellants at (b), (d)–(e), (f) and (g) have already been dealt with in this judgment.²⁹ All were considered by the RSAA and the IPT and no error was made by the IPT or the High Court in failing to consider any of these factors identified by the appellant.

*Not dysfunctional family*³⁰

[101] As to the family's personal circumstances, we agree there was no information before any of the decision makers in this case that this family was or was not dysfunctional before Mrs T and the children left Sri Lanka. It may be that Mrs T and her family did leave Sri Lanka because of their concern about the circumstances in that country believing they would be better off in Australia.

[102] The IPT and the RSAA were well aware that Mrs T and her family had left Sri Lanka and wanted to live in Australia and that they did so probably because of their concern about what was happening in Sri Lanka. But none of that advances the

²⁹ Refer above at [68]–[69] and [71]–[93].

³⁰ Refer above at [95](a).

appellants' case. This issue does not give rise to any factor relevant to considering the statutory criteria under s 47(3).

*Travel to Australia*³¹

[103] The family was not in New Zealand of their own volition. They wanted to travel on to Australia. However, we cannot see how this can assist the appellants. The appellants chose to travel on false passports. They were stopped in New Zealand and were not allowed to go to their ultimate destination because of these false passports. In any event, they sought refugee status in New Zealand. This cannot be a factor relevant to the exceptional circumstances in s 47(3).

Reliance on A, B, C (a family from Peru) v Chief Executive Department of Labour³²

[104] The appellants placed significant reliance upon the decision of Durie J in *A, B, C* to maintain that the IPT should not have relied upon the assessments made by the RSAA as to the situation in Sri Lanka and that the IPT should have made its own assessment and reached its own conclusion as to the situation in Sri Lanka.

[105] The IPT considered and accepted as correct a significant portion of the factual material provided to the RSAA with respect to the situation in Sri Lanka, in particular, the position of Tamils in Sri Lanka and their vulnerability to kidnapping. The appellants submit it was wrong of the IPT to rely upon the RSAA evidence and conclusions. In doing so the appellants rely upon the authority of *A, B, C*.

[106] We do not see that Durie J's conclusions in *A, B, C* assist the appellants. This Court has made it clear that while the RSAA's conclusions are in no way binding on the Tribunal considering a s 47(3) appeal (now the IPT), the IPT is entitled to have regard to the comments and findings of the RSAA on substantially similar evidence.³³

³¹ Refer above at [95](c).

³² *A, B, C (a family from Peru) v Chief Executive Department of Labour* [2001] NZAR 981 (HC).

³³ *Talukder v Removal Review Authority* [2000] NZAR 194 (CA).

[107] Here, as we have previously observed,³⁴ the IPT endorsed the RSAA's conclusions with respect to the credibility of the T family's kidnapping claims but it also carried out its own analysis. The Judge in the High Court said:³⁵

I have no hesitation in concluding that the submission recorded in the preceding paragraph cannot be sustained. In my view, a straightforward reading of the IPT's decision makes it clear that, while they endorse the RSAA's reasoning, they did not do so uncritically. Moreover, I accept Ms Griffin's submission that the decision in *A, B, C* was an exceptional case and that no other decision of the Authority has been impugned for undue reliance on credibility findings made by the RSAA. Rather, there are a considerable number of cases in which reliance on factual findings made in the RSAA by the RRA/IPT has been expressly endorsed: see for example *Talukder v The Removal Review Authority*, *MR v Refugee Status Appeal Authority* and *Xiao Yun Qiu v Removal Review Authority*.

[108] As to the position more generally in Sri Lanka, there was significant international material before the RSAA and the IPT. The appellants did not challenge the accuracy of this information. Understandably and appropriately the IPT took this country information into account in its s 47(3) assessment, in particular it made an assessment of what conditions would be like in Sri Lanka for the T family if returned home.

[109] In *A, B, C* the applicant for refugee status had established a well founded fear of persecution. However, the applicant's claim for refugee status was refused because he had himself committed a crime against humanity.

[110] After removal orders were served on the applicant, an appeal was filed with the Removal Review Authority (RRA) based on the then equivalent of s 47(3).³⁶ The RRA adopted the findings of the RSAA and dismissed the appeal. An appeal followed to the High Court. Durie J found that the test the RRA had to apply was much broader than that for refugee status. This wider test had to be applied to the established facts. While the crime against humanity meant refugee status could not be granted, the RRA needed to examine the facts of the crime against humanity as part of its overall assessment of whether the appellant had met the s 63B test.

³⁴ Refer above at [45]–[47].

³⁵ High Court judgment, above n 4, at [37].

³⁶ Immigration Act 1987, s 63B(2).

[111] In this case the IPT undertook its own evaluation of the facts against the s 47(3) criteria. While it accepted the RSAA's analysis of the kidnapping evidence, it did so only after its own evaluation. There is nothing to suggest in the IPT's decision that it was somehow improperly influenced by the RSAA's decision in reaching a conclusion as to whether the s 47(3) criteria were met. As the Crown submitted, once the claims of kidnapping were rejected as untrue it was very difficult to see how the appellants could bring themselves within s 47(3).

[112] We are satisfied the IPT reached its own conclusion about the relevant facts, that it was entitled to rely upon the RSAA's extensive evidence as to the situation in Sri Lanka and that the IPT applied the known facts to the s 47(3) criteria. The judicial review decision recognised the IPT's approach. No error has been shown in this approach nor any inconsistency with the High Court decision in *A, B, C* given the different facts.

Discretion as to remedy

[113] Although not identified in the appellants' list of issues in their appeal grounds, the appellants submitted that once the Judge in the High Court found the IPT had erred (in its treatment of the psychological evidence relating to the children) then the proper course was to remit the case to the IPT to reconsider the appeal. The appellants say it was wrong of the Judge to refuse to return the case to the IPT for reconsideration after the Judge had found the IPT had erred. Guidance should have been provided by the High Court as to how the IPT should approach this evidence.

[114] We have concluded that, contrary to the High Court's decision (which was that the IPT may have erred), the IPT did not err and so the question of remedy does not arise.

Conclusion and costs

[115] For the reasons given, we are satisfied the High Court was correct to reject the appellants' application for review.

[116] The appellants must pay the second respondent's costs for a standard appeal on a band A basis and usual disbursements.

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