ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES) OR PARTICULARS IDENTIFYING X AND Y

IN THE COURT OF APPEAL OF NEW ZEALAND

CA109/2008
[2009] NZCA 488

BETWEEN	X Appellant
AND	REFUGEE STATUS APPEALS AUTHORITY First Respondent
AND	ATTORNEY-GENERAL (MINISTER OF IMMIGRATION) Second Respondent
AND	Y Third Respondent

Hearing: 6 and 7 May 2009

Court: Hammond, Arnold and Baragwanath JJ

Counsel: C S Henry for Appellant and Third Respondent
I C Carter and R A Kirkness for First and Second Respondents

Judgment: 20 October 2009 at 4 pm

JUDGMENT OF THE COURT

A The appeal with respect to X is allowed.

B The cross-appeal with respect to Y is dismissed.

C The cases of X and Y are remitted to the Refugee Status Appeals Authority, for consideration of their refugee status claims under Article 1A(2) of the 1951 Convention Relating to the Status of Refugees.

D Costs are reserved.

E This case may be cited as *Tamil X v Refugee Status Appeals Authority*.

REASONS

HAMMOND J

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Introduction

[1] We have before us an appeal by X and a cross-appeal by the Attorney-General in relation to Y from a decision of Courtney J in the High Court: HC AK CIV-2006-404-4213 17 December 2007. In her judgment, Courtney J dealt with a judicial review application brought by X and Y regarding a decision of the Refugee Status Appeals Authority (RSAA), which declined to grant both parties refugee status: *Refugee Appeal No 74796* (19 April 2006). X and Y are a married couple who are citizens of the Democratic Socialist Republic of Sri Lanka.

[2] The RSAA found that X was not a refugee because he fell within Article 1F of the 1951 Convention Relating to the Status of Refugees (the Refugee Convention). It held that there were serious reasons for considering that X was complicit in crimes against humanity committed by the Liberation Tigers of Tamil Eelam (LTTE) and had committed a serious non-political crime. The RSAA found that Y was not a refugee within the meaning of Article 1A(2) of the Refugee Convention. This was because Y had no well-founded fear of persecution if she returned to Sri Lanka.

[3] X appeals against the High Court's refusal to grant judicial review of the RSAA's decision in relation to him. The Attorney-General cross-appeals against the High Court's grant of judicial review to Y and its remittal of her case back to the RSAA for a reconsideration of her refugee status.

[4] The grounds of appeal in X's case, as set out in the Notice of Appeal, are as follows:

> 1.1 The decisions of the [RSAA] and the High Court were wrong because it is unreasonable, if applying the correct principles, to have concluded that there are serious reasons for considering that I have committed crimes against humanity and/or a serious non-political crime before coming to New Zealand.
>
> 1.2 In arriving at its decision, the [RSAA] erred by effectively placing the burden on me to show that I was not ineligible for refugee status.

> 1.3 Both the [RSAA] and the High Court adopted inferences which are unsupported by any or any sufficient evidence.

[5] X seeks an order setting aside the decision of the RSAA, and remitting to it his application for refugee status, for consideration by a differently constituted panel than that which arrived at the challenged decision.

[6] A note of caution must be intruded at this point. This appeal is against the judgment of the High Court, which was a judicial review of the RSAA decision. It is not a general, open-ended merit appeal against the determination of the RSAA. Effectively, Mr Henry maintained before us that the RSAA got it wrong, both in its legal approach and how it handled the facts, and that the High Court should have decided accordingly. Such an approach would be quite inconsistent with orthodox judicial review principles. It was only after some judicial prodding that the appeal was brought onto a proper footing.

[7] With respect to X's appeal, I propose to proceed in the following manner in this judgment. First, I will set out the general narrative. Secondly, I will indicate the course that the proceeding took in the Refugee Status Branch (RSB). Thirdly, I will outline the RSAA determination. Fourthly, I will note the basis of the complaint to the High Court, and the decision of the High Court on judicial review. Fifthly, I will deal with the appeal against the High Court determination.

[8] I will then deal separately with the cross-appeal relating to Y.

The general narrative

[9] X was born on 26 August 1956 in Velvettithurai, Sri Lanka. For most of his adult life he has worked in the shipping industry. In November 1981, X left Sri Lanka and was employed by the Petrostar Company in Saudi Arabia, and then as a third engineer with the Arabian Petroleum Supply Company. Between 1981 and 1989, he spent a total of no more than two months in Sri Lanka, spread over three visits. In June 1989, during the last of those visits, he married Y.

[10] Following the marriage, X did not return to Saudi Arabia. He spent five months at home before travelling to Singapore in November 1989 to work for the Neptune Orient Line as a fourth engineer on a container ship. X next returned to Sri Lanka to be with his wife for the birth of their first child, a daughter who was born in May 1990. Despite obtaining a licence of competence to work as a maritime engineer in 1991, X was unable to secure a job in his area of expertise for many months.

[11] Finally, in June 1992 X was contacted by an employment agent who alerted him to a chief engineer position aboard a Honduran-flagged cargo boat, the *MV Yahata*. That vessel was owned by a company based in Thailand. X joined the *Yahata* on 5 July 1992 to work as its chief engineer. He had not previously held a position with that level of seniority. His certificate was to act as a second engineer. But he was given this position aboard the *Yahata* because it was a relatively small ship compared to others on which he had previously worked. The vessel had a crew of nine, including X. For the remainder of 1992, the *Yahata* carried cargo between various ports in Thailand and Singapore.

[12] On 4 January 1993, the *Yahata* set sail from Phuket on a voyage to Sri Lanka. Cargo was loaded in packets and barrels that we now know to have been arms and explosives. During the loading, ten passengers boarded the *Yahata* in addition to the nine crew on board. One was Krishnakumar Sathasivam, a founding member of the LTTE known as "Kittu". The other passengers were LTTE cadre.

[13] X's account was that he did not know that the *Yahata* was a LTTE ship nor did he know that those on board were LTTE members or sympathisers. He claimed that he was only made aware of this when the Master of the *Yahata* brought two of the passengers to the engine room where he worked, to be shown the ropes by X. The passengers were resistant to being given orders and told X that they were from the LTTE. X was disturbed by this development. He protested to the Master, who confirmed that the *Yahata* was a LTTE ship, and then declared his wish to leave the ship before it sailed. The Master firmly told X that he could not do so prior to the ship's arrival in Sri Lanka. The ship sailed with all LTTE passengers on board.

[14] On the evening of 13 January 1993, the *Yahata* was intercepted on the high seas by a coastguard vessel of the Indian Navy. Repeated radio calls to the *Yahata* were not responded to. When the Master replied, he did not give the correct name of the vessel. After the coastguard personnel demanded to board the *Yahata* for verification, the Master said that the boat contained explosives and that dire consequences would follow if an attempt to board was made. The *Yahata* then attempted to flee. After a chase, the Master acceded to the coastguard personnel's demand that the *Yahata* sail towards Madras. Near Chennai Harbour, the *Yahata* was surrounded by at least five vessels and two helicopters of the Indian Navy. Eventually, the naval vessels opened fire on the *Yahata*, and the crew, including X, jumped into the sea to save themselves. They were rescued by Indian Navy helicopters while the *Yahata* sank, engulfed in flames. The ten LTTE passengers who had come aboard, including Kittu, perished from causes which have apparently never been specifically determined.

[15] The *Yahata* crew who had been rescued were detained and taken to Indian soil. They were charged with committing, in international waters, nine offences against the domestic law of India. After a trial in the Indian Court of Sessions, which lasted 36 days between September 1994 and June 1996, all the accused were acquitted on all charges. During this period, X and the other crew members had remained in prison.

[16] After the acquittals, the prosecution immediately appealed directly to the Supreme Court of India, under s 19(1) of the Terrorist and Disruptive Activities (Prevention) Act 1987 which specifically enabled such a course. The two charges under that Act were striking terror in a section of people (here, the Indian naval/coastguard personnel!) (s 3(1)) and conspiring or attempting to commit a terrorist act (s 3(3)).

[17] The Supreme Court of India set aside the acquittals of all nine crew members on two of the charges which had initially been laid under the Indian Penal Code 1860, and entered convictions: *State v Jayachandra* (Criminal Appeal No 823 of 1996) 13 March 1997. The charges were for assault or criminal force to deter public servants from discharge of their duty (s 353), and mischief with intent to destroy or

make unsafe a decked vessel committed by fire or explosive substances (s 438). The Supreme Court took this course after it "perused the evidence" which had been presented to the Court of Sessions. X and his co-accused were then sentenced to a three year term of "rigorous imprisonment".

[18] Notwithstanding that the crew had already served their sentences, they all remained in custody under Indian immigration legislation for being in India without valid travel documents. For reasons associated with his immigration status, X remained in custody in India until he was able to obtain a Sri Lankan passport in November 2000. He was permitted to leave India for Singapore in August 2001. He obtained a New Zealand visitor's visa in Singapore and arrived in New Zealand on 13 September 2001. Y and the couple's two children arrived in New Zealand on visitor's visas in December 2001. Shortly thereafter, X and Y applied for refugee status. Both X and Y have family in New Zealand and had made a social visit on an earlier occasion.

The Refugee Status Branch consideration

[19] Article 1A(2) of the Refugee Convention defines a refugee as a person who:

> Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...

[20] The basis of X's claim to refugee status under Article 1A(2) was that because of his presence on the *Yahata* and his trial and conviction in India, he would be at risk of being regarded by the Sri Lankan authorities as a member of or supporter of the LTTE if he returned to Sri Lanka. Further, should he return to Sri Lanka he would come under pressure from the LTTE to join or assist them. If he agreed, he would increase the danger of coming to harm at the hands of the Sri Lankan authorities. If he refused, he would risk being harmed by the LTTE. Y's claim was that she would be harmed either by the authorities or by the LTTE because she is the wife of X.

[21] After a period of investigation of over a year, the RSB declined X and Y's application for refugee status in New Zealand: Claim No 4071582 & 4094761 27 June 2003.

[22] In the course of a lengthy decision, the RSB accepted X and Y's claims as credible. Significantly, the RSB accepted as credible X's account of his employment as chief engineer on board the *Yahata*.

[23] The RSB then turned to the issue of whether X and Y had a well-founded fear of persecution. According to the RSB, X and Y feared returning to Sri Lanka for the following reasons (at 20):

> (i) [X and Y] fear the Sri Lankan authorities because they will be waiting for the return of the men associated with the *MV Yahata* incident. If they were to return to Sri Lanka, [X and Y] fear that X would be arrested, interrogated and mistreated because of his association with the *MV Yahata*; and
>
> (ii) [X and Y] fear the militant groups, Eelam People's Revolutionary Liberation Front ("EPRLF"), Eelam People's Democratic Party ("EPDP"), People's Liberation Organisation of Tamil Eelam ("PLOTE") and the Tamil Eelam Liberation Organisation ("TELO"). These militant groups may also target [X] for mistreatment because of his association with the *MV Yahata*.

[24] In relation to fear of the Sri Lankan authorities, the RSB took the view that (at 27):

> ... there is not a real chance [X] would be of interest to the Sri Lankan authorities:
>
> - [X] was cleared of any link with the LTTE and of engaging in terrorist activity by the Indian authorities;
> - He has already served his sentence in India;
> - He was able to acquire a genuine, valid Sri Lankan passport;
> - [Y] was not questioned about [X] by the Sri Lankan authorities;
> - She was able to acquire a genuine, valid Sri Lankan passport without any assistance; and
> - The Sri Lankan government is actively pursuing ceasefire talks with the LTTE, and has removed restrictions on the movement of all Sri Lankan citizens, including Tamils.

[25] In relation to fear of the LTTE, the RSB considered (at 29):

> There is no indication that either of them are of interest to the LTTE. [X] has never been approached by the LTTE, and was involved in the *MV Yahata* incident by accident. There is no evidence that his position as a crewmember onboard this vessel has solicited any interest in him by the LTTE. [Y] lived in Sri Lanka throughout [X's] ordeal, and was never approached by any LTTE members inquiring after [X].

[26] The RSB concluded that there was not a chance of X and Y being persecuted if they returned to Sri Lanka. Because their fear of being persecuted was not well-founded, X and Y were not refugees within the meaning of Article 1A(2) and refugee status was declined.

The Refugee Status Appeals Authority appeal

[27] Both X and Y appealed to the RSAA on 4 July 2003. A hearing was held on 2 and 3 December 2003. There was then a lengthy gap until two further days of hearing on 7 and 8 March 2006.

[28] The RSAA explained this delay as follows. By the end of the second day of the appeal hearing, the RSAA had, of its own motion, come to the view that the Article 1F exclusion provision had potential application in this case.

[29] Article 1F of the Refugee Convention provides:

> The provisions of the Convention *shall not apply* to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.
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> (Emphasis added.)

[30] The exclusion issue had not been raised by the RSB or in the submissions filed prior to the RSAA hearing. Leave was granted for written submissions to be filed addressing the exclusion issue. On 10 December 2003, Mr Petris, the then solicitor for X and Y, filed a brief submission to the effect that no exclusion issue arose on the facts.

[31] The RSAA described this submission as untenable (at [5]): "Because the [RSAA] received so little assistance from both the [RSB] and from the solicitor for the appellant on the exclusion issue it was, of necessity, required to conduct its own researches. Regrettably, this took some time". The product of this research, including extensive country information, was collated into two volumes of material, and was released for consideration in October 2005. Further submissions and evidence for X and Y were filed in February 2006. The hearing reconvened in March 2006.

[32] The RSAA decision released on 19 April 2006 dismissed the appeals by X and Y. X was excluded from the Refugee Convention by Article 1F(a) and (b). While she was not excluded from the Refugee Convention, Y was not a refugee within the meaning of Article 1A(2).

[33] The RSAA decision begins with a short introduction discussing the delay which had occurred. Under the heading "Background", the circumstances surrounding the extraordinary sinking of the *Yahata* are detailed. This is followed by a lengthy chronicle of the misdeeds of the LTTE in Sri Lanka, based on the research assembled by the RSAA. Extensive examples of LTTE attacks on the civilian population are given to demonstrate "a consistent and flagrant pattern of human rights abuses by the LTTE in the twelve year period 1985 to 1996": at [24]. After a contextual discussion of Kittu and the *Yahata*, the decision then sets out X's case, where X denied all knowledge that he was on a LTTE vessel before 4 January 1993: at [35]-[48].

[34] The RSAA then considered the credibility of X. It said that X's denial had to be assessed against "the totality of the evidence comprising not only his own account

but also the country information … as well as the written account given by one of the oilers on board the *Yahata*, Mohan": at [49].

[35] As early as December 2003, Mr Petris had advised the RSAA that X had been in contact with Mohan Theivasigamani, and that Mohan had been recognised as a refugee in the United Kingdom. A Home Office letter dated 12 September 2002 confirming that Mohan had been granted indefinite leave to enter the United Kingdom as a refugee was tendered as evidence.

[36] The RSAA noted that while Mohan's statement clearly raised the issue of exclusion, "neither the appellant nor the [RSAA] has been able to ascertain whether this issue received consideration prior to Mohan being recognised in the United Kingdom as a refugee": at [56]. When this Court became aware that Mohan had been recognised as a refugee in the United Kingdom, we pressed counsel for a copy of the decision. We are most grateful to Mr Carter for going to some trouble to procure the decision for us.

[37] We now know the details of Mohan's refugee status claim. The RSAA did not. On appeal, Mohan was granted refugee status in the United Kingdom: HX/22281/2001 20 December 2001. The adjudicator held:

> 10.4. Applying Paragraph 156 of the UNHCR Handbook I do not consider that the exclusion clause should apply in this particular appeal as no evidence has been adduced that the Appellant has committed a serious crime such as a capital offence. However, I consider that the degree of persecution which the Appellant fears quite severe.
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> …
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> 10.6. I consider that as the Appellant is fairly high ranking and has some notoriety he would be immediately brought to the attention of the authorities upon his return to Sri Lanka. I have no doubt in my mind that following this the Appellant would be severely ill treated and tortured.

[38] Mohan's statement which was before the RSAA included the following:

> During my last trip from Singapore which was made on vessel *Yahata* to Sri Lanka via Thailand on December 15, 1992. This vessel belonged to the LTTE and was carrying arms and explosives for the LTTE. [Kittu] joined us along with nine others, half way at Straits of Mallaca. He too was returning back to Sri Lanka.

[39] The RSAA considered that Mohan's account challenged X's account in the following ways (at [57]):

> (a) The *Yahata* was a LTTE vessel. The presence of Mohan on that vessel as an oiler was not an accident or coincidence. He was placed on the vessel by the LTTE after having proved himself as a loyal and dedicated member of that organisation. It seems surprising that the appellant was not similarly a trusted and loyal LTTE member or supporter.
>
> (b) The statement by Mohan … explicitly asserts that the vessel was carrying arms and explosives for the LTTE. If the oiler knew this information, how is it that the Chief Engineer did not?

[40] It is now necessary to set out in full the RSAA's reasons for its adverse credibility assessment in relation to X:

> [59] The central issue in the appeal is whether the appellant is telling the truth when he asserts that he had no knowledge that the *Yahata* was a LTTE ship. That is, until it was boarded by Kittu and his associates several days before the interception by the Indian Navy; that he was never asked, prior to joining the *Yahata* (or subsequently), whether he supported the LTTE; and that he had no means of acquiring knowledge (or cause for suspicion) either in relation to his dealings with the other members of the crew or in relation to the nature of the cargo carried by the *Yahata*.
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> …
>
> [61] In the following circumstances the Authority rejects the appellant's claims that his presence on the *Yahata* was innocent, without knowledge that it was a LTTE vessel and without knowledge of its cargo, particularly the explosives it was carrying at the time it was intercepted by the Indian Navy.
>
> [62] First, it defies common sense that the LTTE would hire as Chief Engineer a person in respect of whom no loyalty test had been conducted and in respect of whom no inquiry at all had been made as to his sympathies. If the appellant's denials are to be believed, it would mean that the LTTE placed in command of the engine room of a vessel in its fleet a person of unknown quantity. In this relatively small vessel carrying a total crew of only nine (four of whom worked in the engine room), only the appellant was able to diagnose and supervise the vessel's means of propulsion. As the appellant said, the vessel could set sail without a Chief Engineer but if there were mechanical problems it was highly unlikely that the unqualified oilers would be able to restore propulsion. This raises the question as to why an organisation as formidable as the LTTE would put in the hands of a wholly unknown element a vessel carrying not only a huge quantity of explosives but also the then second in command of the LTTE. The appellant told the [RSAA] that he was not the only member of the crew surprised and unhappy at the presence of Kittu and the nine other men on the *Yahata*. He said that one of the other oilers (Indralingam) and the second officer (Satkumalingam) were also most unhappy. But this only makes the appellant's story even less believable, asserting as he does that of the three officers on board, only the

Master was aware that it was an LTTE ship and that the two other officers were not. His account also requires acceptance that more humble crew members such as the oiler Mohan were carefully chosen for proved loyalty but that two of the three officers were not.

[63] Second, the appellant says that he was never aware of the nature of the cargo carried by the *Yahata* during his six months of service on the vessel. That is, with the exception of the single occasion on which the Master told him that the boxes or packages contained air-conditioners. He said that there was no connection between the deck and the engine room. While admitting to having seen parcels he claimed that he did not know what was inside them. As to the statement by Mohan that he (Mohan) knew the cargo of the vessels on which he served, the submission made on behalf of the appellant is that Mohan's knowledge of the presence of the explosives was knowledge gained ex post facto during the course of the criminal trial in India. As mentioned earlier, we do not accept that this is how the statement by Mohan reads. On the contrary, it is a detailed narrative given from first hand knowledge. In particular para 10 of the statement is explicit in describing the cargo carried by other LTTE vessels on which Mohan served as "cloths, medication and petroleum products". When in para 11 Mohan describes the *Yahata* as carrying "arms and explosives for the LTTE" the context shows that this is a narrative of what Mohan personally observed. We are of the view that it is inherently improbable that after serving six months on a small vessel the appellant was quite unable to describe the cargo during this period apart from "packages" and "petrol drums and diesel".

[64] Third, in addition to these factors, when the appellant was questioned about his knowledge that the vessel was part of the LTTE fleet, the overwhelming impression was of a witness who deliberately turned a blind eye to the obvious. He claimed to have kept his distance from the crew, even the three oilers who worked daily under his supervision in the engine room. He knew little more than their place of birth. He also kept his distance from the other crew and did not fraternise with them. In the result, after six months at sea with eight other persons, he claims to have known virtually nothing about his companions. When one adds:

> (a) His denial of any knowledge that the *Yahata* was a LTTE vessel; and
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> (b) His claim that at no time was he ever asked whether he supported the LTTE; and
>
> (c) His denial that he ever had cause for suspicion (until the arrival on board of Kittu)

the accumulation of factors is so overwhelmingly improbable that the [RSAA] has no hesitation in rejecting his evidence. The denials are, in our view, a device employed by the appellant to cover the fact that he was on the *Yahata* because he was a trusted member of or supporter of the LTTE and was willingly engaged in assisting the LTTE to smuggle war material including explosives into Sri Lanka for use by the LTTE. As a dedicated and conscientious individual he had acquired the skills which would allow him to competently run an engine room on a small vessel such as the *Yahata* and was now putting his skills to good use. He was aware that to maintain its cover the *Yahata* necessarily engaged in the carriage of "legitimate" cargo

> but when the need or opportunity arose, it would then smuggle war material for the LTTE. His responsibility, as the second most important officer on board, was to ensure that the means of propulsion was dependable and if there was a breakdown, that it was repaired.
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> [65] From his own personal experience and observation, having lived in Velvettithurai and other places in the north of Sri Lanka as well as Colombo, he was well aware that the LTTE was guilty of gross human rights abuses on a large and systematic scale including the killing of innocent civilians and the deliberate bombing of civilian targets. In fairness he accepted as much. But the issue is whether his presence on the *Yahata* was an innocent or knowing one. Notwithstanding his denials to the contrary, the [RSAA] is of the view that his engagement in the secretive smuggling operations of the LTTE was a fully knowing one and evidence of his dedication to the aims, objectives and methods employed by the LTTE. He knew that the items he helped smuggle into Sri Lanka would as likely be used in "conventional" warfare against the Sri Lankan Army as in perpetrating gross human rights abuses against innocent civilians.

[41] The significance of the RSAA's findings at [64]-[65] should not be underestimated. The RSAA did not merely find that there were "serious reasons for considering" that X was complicit in the LTTE's activities. Rather, the RSAA made a very strong affirmative finding that X was "fully knowing" and complicit in gross human rights abuses by helping to smuggle arms into Sri Lanka which would likely be used both in conventional warfare against the Sri Lankan Army and against innocent civilians. Those are, of course, findings of the utmost seriousness. It is difficult to think of a jurisdiction which, knowing of these findings, would accept X's presence with any degree of equanimity. The consequences of being returned to Sri Lanka may well be very serious for X, given the events which have transpired in that country.

[42] After a survey of Article 1F jurisprudence, the RSAA considered that there was "personal and knowing participation by [X] and a sharing by him of a common purpose with the LTTE in the commission of the crimes against humanity": at [126]. Thus, the RSAA concluded that X was excluded from the Refugee Convention by Article 1F(a) because there were serious reasons for considering that X had committed a crime against humanity: at [128].

[43] While it was not strictly necessary to then address Article 1F(b), the RSAA held as follows (at [142]):

> Looked at against the background of the facts and circumstances earlier outlined and the level of penalty inflicted by the Supreme Court of India, we conclude that any of these crimes is of sufficent gravity to justify the withholding from the appellant the benefits conferred by the Refugee Convention. By virtue of Article 1F(b) the provisions of the Refugee Convention cannot apply to [X].

[44] While Y was not excluded from the Refugee Convention, the RSAA considered that she had failed by a "substantial margin" to establish the well-founded fear element of the Article 1A(2) definition: at [146].

The judicial review application

[45] X and Y sought judicial review of the RSAA's decision. That application was heard in April 2007. Almost eight months then went by until the High Court delivered judgment in December 2007.

[46] Mr Henry for X asserted that the RSAA erred in law in the following respects:

(a) Failing to interpret Article 1F restrictively, so as to place the burden of proof on the Executive and accord X the benefit of the doubt when making its credibility assessment.

(b) Making an adverse credibility determination against X when there was no, or no adequate, evidence to support it.

(c) Failing to identify the specific crime against humanity that the RSAA considered there were serious reasons for thinking X was complicit in.

(d) Finding that there were serious reasons for thinking that X was complicit in a crime against humanity when there was no, or no adequate, evidence on which it could reach that conclusion.

(e) Relying on the judgment of the Supreme Court of India convicting X of offences under the Indian Penal Code 1860 to conclude that there

were serious reasons for thinking that X had been guilty of a serious non-political crime.

[47] The High Court Judge first canvassed the proper approach to an application for judicial review of this kind (at [6]):

> The Court will only intervene if the decision or the decision-making process exceeds the [RSAA's] power, is procedurally unfair, is based on a misunderstanding of the facts or discloses an error of law, if the [RSAA] has taken irrelevant matters into account, or is so unreasonable that no rational authority could have made that decision.

She cited *B v Refugee Status Appeals Authority* HC AK M1600/96 23 July 1997 with approval and concluded (at [9]):

> To succeed, X and Y must show that the [RSAA's] decisions, including its determination in relation to X's credibility, *were so unreasonable* that no RSAA, *properly conducting itself, could have made them*.
>
> (Emphasis added.)

[48] In relation to the first ground of appeal, the Judge held that it would be wrong to interpret Article 1F so as to place the burden of proof on the Executive, and accord X the benefit of the doubt. The Judge said (at [22]):

> Where there is evidence, the issue in a judicial review application can only be whether a [RSAA] conducting itself properly could reasonably have reached the conclusions it did on the evidence before it. It would, however, be wrong to view this as being determined by reference to a burden of proof.

[49] The second ground of appeal was whether the RSAA's credibility determination was open to it on the basis of the evidence. Under this head, the Judge concluded (at [54]):

> [T]he [RSAA] was not bound to give X the benefit of the doubt in considering his version of events and that there was credible information available to it in the form of published material and Mohan's statement which was inconsistent with the account X gave. There was, therefore, an adequate basis on which the [RSAA] could have concluded that X's account lacked credibility. The fact that it could have drawn different inferences from some of that material does not justify this Court interfering with its decision.

[50] On the third ground of appeal – whether the RSAA had identified the specific crime against humanity that it had serious reasons for considering X was complicit in – the Judge held (at [69]):

> … the position is clear that the [RSAA] … had to identify one of the specified crimes against humanity, but not a particular instance of that crime.

[51] On the fourth ground of appeal – whether it was open to the RSAA to find that X was complicit in a crime against humanity – the Judge held (at [86]):

> Whilst there is no evidence of X's involvement in the LTTE as a member, much less a leader in the organisation, and no evidence of direct participation by him in any previous attacks on civilians, his participation in that voyage, even if there was no other such voyage, cannot be viewed in any way other than providing active assistance to the LTTE with knowledge of the real possibility that the explosives and weapons were destined to be used against civilians. I therefore consider that it was open to the [RSAA] to find that X was complicit in the war crimes committed by the LTTE.

[52] Finally, in relation to the commission of a serious non-political crime under Article 1F(b), the Judge had this to say (at [99]):

> [The RSAA] was entitled to undertake its consideration of Article 1F(b) in the context of its earlier finding that X was a loyal supporter of the LTTE and was willingly on board the *MV Yahata* with knowledge of its cargo. In those circumstances the [RSAA] was entitled to conclude that, notwithstanding the unsatisfactory aspects of the Supreme Court's decision, it was sufficient to provide serious reasons for considering that X had committed the crimes for which he was convicted.

X's appeal

[53] X's grounds of appeal before this Court are set out at [4] above. The arguments before us were wide-ranging. They included extensive discussion of the appropriate standard of review to be employed in a case of this character, and whether review of fact-finding by an administrative tribunal is permissible on judicial review. Because Mr Henry's initial written submissions were insufficiently focused on the actual decision under appeal (that of the High Court), we found it necessary to allow further written submissions. This has regrettably delayed the delivery of this judgment.

[54] I have had the advantage of seeing in draft the judgment of Baragwanath J. He agrees with me on the grounds on which I would allow the appeal. But he has taken the view that it is also appropriate to consider some of these wider issues, and would allow the appeal on those grounds too.

[55] I think the appeal can and should be resolved on a straightforward and orthodox judicial review basis: namely, that both the RSAA and the High Court misdirected themselves in law as to the proper approach to the issue of complicity in crimes against humanity. To articulate this proposition, I need first to make some general comments about the proper approach to Article 1F, and then to address the specific issue of complicity in crimes against humanity and serious non-political crimes.

The appropriate approach to Article 1F of the Refugee Convention

The provenance of Article 1F

[56] The definition of a refugee in Article 1A(2) of the Refugee Convention is a person who owing to well-founded fear of being persecuted for a Convention reason is unable or, owing to such fear, is unwilling to avail him or herself of the protection of that country. The stipulated Convention reasons are race, religion, nationality, membership of a particular social group or political opinion. For a careful treatment of the refugee definition, see Hathaway *The Law of Refugee Status* (1991). Refugee status most usually arises in the wake of cataclysmic events such as civil or military wars or other periods of great social and economic upheaval.

[57] The aftermath of the Second World War produced just such an upheaval, as countless thousands of refugees washed about the face of Europe and elsewhere. It was in this context that the Refugee Convention was born. This Convention has since been subscribed to by more than a hundred nations. A good number of countries have also absorbed the Convention into their domestic law, either in whole or in part, as a base standard in domestic legislation upon which asylum and other related protections have been formulated. In New Zealand, refugee determinations

are governed by Part 6A of the Immigration Act 1987. Section 129D(1) provides that refugee status officers and the RSAA are to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention; the text of the Refugee Convention itself is set out in Schedule 6.

[58] From the outset, one of the concerns of the drafters was to avoid the Refugee Convention being abused. This could happen in at least two ways. First, there was the possibility of refugee status being granted to war criminals who were fleeing from the Axis powers. As the Supreme Court of New Zealand has noted in *Attorney-General v X* [2008] 2 NZLR 579 at [15]: "[i]n a Convention negotiated in the years following the Second World War, [Article 1F] was intended to ensure that war criminals could not escape extradition and prosecution by claiming refugee status". Secondly, there was the problem of divisive individuals, still torch-bearers for their various causes, who might in one way or another jeopardise the internal security of asylum countries. Why would countries sign up to an asylum convention if it meant those countries had to allow some particularly bad specimens of humanity into their body politic?

[59] Article 14(2) of the Universal Declaration of Human Rights 1948 carved out an exception to the right to seek and enjoy asylum from persecution in other countries in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. Thus, in drafting the Refugee Convention, it was necessary to safeguard the rights of countries of refuge just as much as the rights of potential refugees. Hathaway described refugee law in its embryonic form as "constitut[ing] a humanitarian exception to the protectionist norm": at 2.

[60] Just how this safeguarding was to be done is a story of some complexity, which is detailed in a number of works on international law. See generally Goodwin-Gill & McAdam *The Refugee in International Law* (3ed 2007) at 162-190. Van Krieken (ed) *Refugee Law in Context: the Exclusion Clause* (1999) has a comprehensive collection of the basic documents.

[61] The outcome of the international accord was Article 1F (at [29] above), which provided that those persons who fell within the Article were not considered to be deserving of international protection. Articles 1D and 1E excluded from the refugee definition those receiving UN protection or assistance and those who were not considered to be in need of international protection. As Robinson *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) at 67 said:

> Section F is couched in categorical language … It follows that, once a determination is made that there are sufficient reasons to consider a certain person as coming under this section, the country making the determination is barred from according him the status of a refugee.

[62] The peremptory effect of Article 1F has been noted by this Court in *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 at 297, and by the Supreme Court of New Zealand in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at [29].

[63] Sovereign prerogatives were preserved by permitting Contracting States to decide for themselves when a refugee status claim was within the scope of the Article 1F exclusion provision. In response to a proposal that exclusion be determined by the United Nations High Commissioner for Refugees (UNHCR), Mr Rochefort, a French drafter of the Refugee Convention, said (UN Doc E/AC.7/SR.166 22 August 1950 at 6):

> … in the absence of a world government and of a sovereign international court of justice, that power of discretion, which was an essential safeguard both for the real refugee and for the country of refuge, must, perforce, be left to States. The only practical solution was to trust the countries which were willing to grant hospitality.

[64] The issue of who determines refugee status was resolved by the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1979) at 189:

> It is … left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.

[65] The Contracting State must have "serious reasons for considering" that a claimant is within Article 1F. Right from the outset, it was recognised that this was a difficult standard. For instance, Mr Lequesne of the United Kingdom considered the standard to have been "too vague to justify an important decision. The choice was difficult: it was necessary either to allow governments to take an administrative decision when a judicial decision was called for, or to run the risk of including … criminals": 5 UNGAOR (334th meeting) 4 December 1950 at 390.

[66] For a quarter of a century, such doctrinal issues did not matter very much, as Article 1F was rarely invoked. That may have been because the sort of persons who could have been caught by the exclusion provision routinely "went to ground" and simply did not apply for refugee status. After all, one would not have readily advertised that one was an ex-Nazi seeking asylum. However, appalling events in various places in the latter half of the twentieth century have brought the exclusion issue into much greater prominence, with all its attendant difficulties. For an overview, see Gilbert "Current issues in the application of the exclusion clauses" in Feller, Türk & Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) at 425-478; and Hathaway & Harvey "Framing Refugee Protection in the New World Disorder" (2001) 34 Cornell Int'l LJ 257.

The practical difficulties associated with Article 1F

[67] Refugee status determination, particularly in relation to Article 1F issues, is complex yet must attract high quality decision-making.

[68] The difficulties are apparent enough: somebody like X effectively comes out of the night, against the background of extraordinary and unusual facts. Houle has said:

> The process of assessing the weight of evidence to determine refugee status is complex and difficult, mainly because of the absence of credible evidence on which to base the refugee claims. The events related by the claimant cannot be checked directly: they took place in a foreign country and often a considerable period of time before the … hearing. In most cases, the decision-maker is given an incomplete story, namely the claimant's version

> of events, and even then this is usually done through an interpreter. Therefore [decision-makers] are required to make sound decisions based on scanty, ever-changing information about the claimants' countries of origin and, more significantly, information about a culture that is alien to them. In fact, [decision-makers] are required to assess the credibility of testimony in something of a cultural vacuum. These factors often impede [decision-makers] from fully understanding the claimant's story.
>
> "Pitfalls for Administrative Tribunals in Relying on Formal Common Law Rules of Evidence" in Creyke (ed*) Tribunals in the Common Law World* (2008) 104 at 107.

[69] To like effect, see Goodwin-Gill & McAdam at 551:

> Refugee claims are not like other cases; they rarely present hard facts, let alone positive proof or corroboration. More often than not, the decision-maker must settle for inferences instead, that is, conclusions drawn from the generally inadequate material available. In the absence of hard evidence, the possibility of persecution must be inferred from the personal circumstances of the applicant, and from the general situation prevailing in the country of origin. The credibility of testimony is thus both an essential pre-condition to the drawing of inferences relating to refugee status; and a matter of inference in itself. Inference in this context does not mean the strict logical consequences of known premises, or the process of reaching results by deduction or induction from something known or assumed. Rather, it is the practical business of arriving at a conclusion which, although not logically derivable from the assumed or known, *nonetheless possesses some degree of probability relative to those premises*.
>
> (Emphasis in original.)

See also Pearson "Fact-Finding in Administrative Tribunals" in Pearson, Harlow & Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008) at 301.

[70] A recognition of these problems leads me to think that the difficulties in refugee cases, and perhaps even more so in Article 1F cases, are more forensic than doctrinal. Nevertheless, there are some doctrinal disputes about Article 1F which were much aired before us, and on which I should comment.

The doctrinal features of Article 1F

[71] A great deal of ink has been spilt on the standard which is required for exclusion of a person under the Refugee Convention. The textual standard in Article 1F is that the decision-maker must find there are "serious reasons for considering"

that the claimant falls within Article 1F(a), (b) or (c). "Serious reasons" can hardly be described as a *specific* standard. The UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses* HCR/GIP/03/05 4 September 2003 have opined that to satisfy the standard, "clear and credible evidence is required. It is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met": at [35].

[72] In perhaps the leading journal article on the subject, Bliss argues that the "threshold is not a familiar standard in most legal systems and does not in itself provide a clear and precise test": "'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses" (2000) 12 IJRL 92 at 115. Bliss goes on to suggest that the standard is less than that required for conviction for a criminal offence in a common law system, but greater than a civil balance of probabilities standard: at 115-116.

[73] Glass has rightly noted that "'on the balance of probabilities' and 'beyond reasonable doubt' reflect the particular values and interests considered to be at stake in, for example, negligence cases or criminal cases. Refugee law generates different values and interests": "Subjectivity and Refugee Fact-Finding" in McAdam (ed) *Forced Migration: Human Rights and Security* (2008) 213 at 216.

[74] The distinct values and interests generated by refugee law means that attempting to approximate the "serious reasons for considering" standard of proof to a civil or criminal standard is ill-advised. As Lord Steyn held in *R v Secretary of State for the Home Department; ex parte Adan* [2001] 1 All ER 593 at 605:

> In principle, therefore there can be only one true interpretation of [the Refugee Convention] … in practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.

[75] This quest for the "true autonomous and international meaning of the treaty" has received an imprimatur in the Article 1F context by the English Court of Appeal in *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222. In that case, Sedley LJ held (at [33]-[34]):

> It is part of [counsel's] case that the standard of proof set by Art 1F is cognate with the criminal standard, that is to say proof beyond reasonable doubt or such that the tribunal is sure of guilt. This is manifestly not right. The whole point of Art 1F is that it is dealing, at least in limbs (a) and (b), with people who in many instances might have been convicted and gaoled but have not been. If the receiving state is in a position to prosecute them, it is a necessary assumption that it will do so. Art 1F therefore deals with asylum-seekers who are suspect but still at large. At the same time it clearly sets a standard above mere suspicion. *Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says*.
>
> What it says can, however, be legitimately read in the light of the co-ordinate French text, which uses the phrase "*des raisons sérieuses de penser*". This certainly imports no additional weight into the verb "consider" in the English text.
>
> (Emphasis added.)

[76] Arden LJ's concurring speech in *Al-Sirri* dealt with the required standard in similar terms (at [77]):

> There is no doubt that the Refugee Convention imposes obligations of the highest importance on states to provide refuge to refugees, and that the exceptions from the obligation to give refuge, such as that contained in art 1F(c), must be applied only when the state justifies this course as required by art 1F(c). As to the meaning of "serious grounds", Art 33(2) of the Refugee Convention provides some guidance. Under that provision a refugee cannot claim the benefit of refoulement if "there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is …". The expression "serious reasons" is different from, and in my judgment on the natural meaning of the words requires more than "reasonable grounds", for otherwise the same phrase would have been used in art 1F(c).

[77] The view that the Refugee Convention simply means what it says has also found favour in Australia: *Arquita v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 465 at [56] (FC) and *VWYJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 1 at [25] (FC).

[78] It follows that the required approach is similar to that of s 5(1) of the Interpretation Act 1999 (NZ): the meaning of an enactment must be ascertained from its text and in the light of its purpose. In the Refugee Convention context, one has to give effect to the text bearing in mind the purpose, but with no added glosses that are not contained in the text itself. If there are to be limitations, those should have been

provided by the Refugee Convention or the Contracting State's implementing legislation.

[79] In the result, the correct standard has to be considered in the terms of the Refugee Convention itself: the decision-maker has to be satisfied that there are "serious reasons for considering" that exclusion should apply. The decision-maker does that by considering all the relevant material that is available to it. Adding glosses by analogy with civil litigation or criminal prosecution simply confuses matters.

[80] Even more ink has been spilt on the so-called "burden of proof", although that terminology is inapt in this subject area: *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 at [31] (CA).

[81] One view, consistent with traditional common law principles and the UNHCR *Guidelines*, is that it is entirely reasonable, given the character of Article 1F, to expect the decision-maker to presume that the claimant is innocent. It is said there is enough of a linkage between exclusion and the criminal process that claimants should be given the benefit of the doubt before a decision-maker finds that there are "serious reasons for considering" that they fall within Article 1F.

[82] The point of view adopted by the High Court Judge in this case is that the person seeking refugee status is responsible for ensuring that all information and evidence that he or she wishes to have considered is provided to the RSAA: see s 129P(1) of the Immigration Act. This view was affirmed by this Court in *Jiao* at [31]. While the RSAA may make further enquiries if it sees fit, it is not obliged to do so but can decide the refugee claimant's application on the evidence before it: s 129P(2). There is no burden on a refugee claimant to prove that Article 1F does not apply.

Complicity in crimes against humanity (Article 1F(a))

Introduction

[83] The central issue on this appeal is whether the High Court was wrong to conclude that it was open to the RSAA on the evidence before it to find that X was complicit in crimes against humanity.

[84] To invoke Article 1F, there must be "serious reasons for considering" that a claimant has (a) committed a crime against peace, a war crime, or a crime against humanity; (b) a serious non-political crime; or (c) is guilty of acts contrary to the purposes and principles of the United Nations.

[85] The parties do not dispute that the LTTE has been involved in the perpetration of crimes against humanity and war crimes, as defined in the requisite international instruments, on a wide scale.

[86] An issue of critical importance in this particular case is whether there were "serious reasons for considering" that X was a member of the LTTE and involved in the commission of crimes against humanity. The RSAA observed that X's liability, if any, would depend upon being an accomplice or party because there was "no evidence" that the appellant personally committed a war crime or crime against humanity: at [107].

[87] The burden of Baragwanath J's judgment is devoted to a consideration of whether the act of shipping explosives and ammunition on the *Yahata* could constitute a crime against humanity. His approach is predicated on the view that carriage by LTTE vessels of arms and munitions may not be treated as *per se* unlawful when the broader civil war context is appreciated.

[88] I prefer to resolve the appeal on a more orthodox judicial review basis: that the RSAA and the High Court misdirected themselves in law as to the proper approach to complicity in crimes against humanity under Article 1F(a). I deal with this issue under the following heads: the approach in the RSAA and High Court; the

correct legal test for complicity; and whether the "serious reasons for considering" threshold was met in this case.

The approach in the RSAA and High Court

[89] The RSAA's definitional approach to crimes against humanity was based on the Supreme Court of Canada's four-part test in *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100 at [119]. First, a proscribed act must be carried out. Secondly, the act must occur as part of a widespread or systematic attack. Thirdly, the attack must be directed against a civilian population. Fourthly, the person committing the proscribed act must know of the attack and know or take the risk that his or her act will comprise part of that attack. The RSAA expanded on the fourth point, of critical relevance to X, with reference to a series of decisions of the Federal Court of Canada including *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 and *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306.

[90] The RSAA then turned to whether the evidence established that there were serious reasons for considering that X had committed a crime against humanity as an accomplice or party. It concluded (at [126]):

> The real issue is whether the final element of a crime against humanity has been established, namely that the appellant was a party to those acts and in particular that there was personal and knowing participation by the appellant and a sharing by him of a common purpose with the LTTE in the commission of the crimes against humanity. In this regard we are of the clear view that the answer must be in the affirmative. By the time he joined the *Yahata* in July 1992 he was thirty-six years of age. He was a mature, intelligent, hardworking and conscientious individual whose very qualities made him an exceptional choice to be the Chief Engineer on a significant LTTE asset, the *Yahata*. With his marine qualifications acquired legitimately while working for other shipping companies, he could be relied upon to keep the *Yahata* going. Born and raised in Velvettithurai and having spent most of his life living in northern Sri Lanka (apart from during the periods when he was at sea), he was well aware from his own witnessing of events, from the scale of the violence and from the historical and political environment in which the LTTE emerged, that the LTTE was guilty of gross human rights abuses on a large and systematic scale, including the killing of innocent civilians and the deliberate bombing of civilian targets. He was also aware of the ethnic cleansing operations carried out by the LTTE. He voluntarily and in full knowledge joined the *Yahata*. His engagement on the secretive smuggling operations of the LTTE was, as we have earlier found, a

> fully knowing one and evidence of his dedication to the aims, objectives and methods employed by the LTTE. He knew that the items he helped smuggle into Sri Lanka would as likely be used in "conventional" warfare against the Sri Lankan forces as in perpetrating gross human rights abuses against innocent civilians. Knowing all this he willingly joined the *Yahata* intending to assist the LTTE in the prosecution of the war through the methods which the LTTE had chosen, namely conventional warfare, the terrorising of the civilian population of Sri Lanka and the "cleansing" of the north and east of Muslims, Sinhalese and Tamils who did not support the LTTE. The smuggling of arms and explosives into Sri Lanka was vital for each and every of these aims.

[91] After surveying the Canadian jurisprudence before the RSAA (at [75]-[80]), Courtney J formulated her test for complicity in the following way (at [81]):

> … it is clear that a person will be complicit in a crime against humanity if he or she participates, assists or contributes to the furtherance of a systematic and widespread attack against civilians knowing that his or her acts will comprise part of it or takes the risk that it will do so. There need not be a specific event identified that is linked to the accomplice's own acts.

[92] Courtney J placed considerable emphasis on the basis on which she could review the factual findings of the RSAA, rather than scrutinising whether the correct legal test for complicity was applied. In terms of whether it was open to the RSAA to find that X was complicit in a crime against humanity, Courtney J noted (at [86]):

> Whilst there is *no evidence* of X's involvement in the LTTE as a member, much less a leader in the organisation, and *no evidence* of direct participation by him in any previous attacks on civilians, his participation in that voyage, even if there was no other such voyage, cannot be viewed in any way other than providing active assistance to the LTTE with knowledge of the real possibility that the explosives and weapons were destined to be used against civilians.
>
> (Emphasis added.)

The correct legal test for complicity

[93] I am presently concerned with whether Courtney J's approach to complicity erred in law.

[94] For many years, there has been some debate about whether mere membership of an organisation is sufficient to give rise to complicity. There is such a thing as "innocent" association: somebody may, in a formal or less formal sense, belong to an

organisation but not go beyond a passive role. The difficulty in a practical sense is how to determine when there is a sufficient degree of complicity. The closer somebody is to being a leader rather than a "rank and file" member, the more likely an inference can fairly be drawn that the person knew and shared the organisation's aims and purposes in committing the relevant crime. For a review of the relevant principles, see *Valère v Minister of Citizenship and Immigration* [2005] FC 524 at [21]-[24] (FC).

[95] The test for complicity has recently been helpfully clarified by the English Court of Appeal in two recent cases concerning Article 1F and LTTE personnel: *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292 and *R (on the application of JS (Sri Lanka)) v Secretary of State for the Home Department* [2009] 3 All ER 588.

[96] The appellant in *KJ (Sri Lanka)* had been a LTTE member, albeit one who had not been involved with terrorist activities or attacks on civilians. The Asylum and Immigration Tribunal excluded him from refugee status on the basis that he was an active member of an organisation that carried out acts contrary to the purpose and principles of the United Nations within the meaning of Article 1F(c).

[97] On appeal, Stanley Burnton LJ noted that "mere membership of an organisation that, *among other activities*, commits [proscribed Article 1F] acts does not suffice to bring the exclusion into play": at [35]. The Judge did not characterise the LTTE as an organisation that promotes its objects only by acts of terrorism; rather, "it pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka": at [38]. In relation to organisations such as the LTTE, the operation of the exclusion provisions is less clear cut (at [38]):

> A person may join such an organisation, because he agrees with its political objectives, and be willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations.

[98] In allowing the appeal on the Article 1F(c) issue, Stanley Burnton LJ noted that the "facts found by the Tribunal showed no more than that he had participated in military actions against the government, and did not constitute the requisite serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations": at [40]. Thus, *KJ (Sri Lanka)* supports the proposition that in cases where an organisation engages in a conventional military struggle among other activities, a searching examination of individuated guilt is required.

[99] *JS (Sri Lanka)* concerned JS, a Tamil citizen of Sri Lanka who had claimed asylum in the United Kingdom. The Secretary of State had found that JS had been a highly-trusted member in the intelligence wing of the LTTE and had been complicit in its crimes under Article 1F(a).

[100] On appeal, JS argued that the LTTE is not an organisation solely or mainly devoted to the commission of terrorist acts; instead, it is a political organisation which has been openly engaged in armed combat against government forces. A further ground of appeal was that the Secretary of State had made a general reference to acts committed by the LTTE and had inferred from the claimant's position in the LTTE that he bore criminal responsibility for them.

[101] In allowing JS's appeal, Toulson LJ considered that the starting point for a decision-maker addressing the question whether there are serious reasons for considering that an asylum seeker has committed an international crime, so as to fall within article 1F(a), is the Rome Statute of the International Criminal Court: at [115]. The decision-maker had to identify the type of crime (Articles 7 and 8), and then determine whether there were serious reasons for considering that the applicant was guilty of such a crime. Where criminal responsibility as a commander is not alleged, the decision-maker would have to consider the provisions of Articles 25 and 30 dealing with individual criminal responsibility and the required mental element. Article 25(3)(d) is directed at joint criminal enterprise liability:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

…

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime.

[102] Toulson LJ endorsed the principles of joint criminal enterprise liability identified by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Tadić* Case IT-94-1 15 July 1999 (at [104]):

> According to that jurisprudence, in order for there to be joint enterprise liability, there first has to be a common design which amounts to or involves the commission of a crime provided for in the statute. The actus reus requirement for criminal liability is that the defendant must have participated in the furtherance of the joint criminal purpose in a way that made a significant contribution to the crime's commission. And that participation must have been with the intention of furthering the perpetration of one of the crimes provided for in the statute.

[103] In disapproving of the guidance on the exclusion provisions given by the Immigration Appeal Tribunal in *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115, Toulson LJ held that it was clear that mere membership of an organisation committed to the use of violence to achieve its political goals was not enough to make a person guilty of a crime against humanity. He agreed with Stanley Burnton LJ in *KJ (Sri Lanka)* that joining such an organisation may not involve conspiring to commit criminal acts or in practice doing anything that contributes significantly to the commission of criminal acts.

[104] While it was the purpose of some members of the LTTE to commit international crimes in pursuit of political ends, the Secretary of State had wrongly presumed that JS, as a member of the LTTE, was guilty of personal participation in those crimes: at [123]. Rather, the Secretary of State should have considered whether there was evidence affording serious reason for considering that JS was party to that design, that he had participated in a way that made a significant

contribution to the commission of the crimes, and that he had done so with the intention of furthering the perpetration of them. Although JS's position in the LTTE showed that he was trusted to perform his role, neither a significant contribution nor an intention to further the purpose of those members of the LTTE was shown.

[105] The approach to joint criminal enterprise liability in *Tadić,* as endorsed in *JS (Sri Lanka),* is a distinctly more restrictive approach to complicity in the Article 1F context than that applied by Courtney J in the High Court. The learned Judge and the RSAA before her relied on Canadian jurisprudence that, in fairness to them, has been overtaken by the emerging English jurisprudence canvassed above.

[106] I respectfully adopt the approach to complicity endorsed by Toulson LJ in *JS (Sri Lanka).* Given that New Zealand is a state party to the Rome Statute of the International Criminal Court, New Zealand refugee decision-makers should focus on that international instrument when tasked with discovering "the true autonomous and international meaning" of the Refugee Convention: *ex parte Adan* at 605. Because Article 1F(a) refers specifically to the definition of crimes against humanity in the international instruments, *JS (Sri Lanka)* was correct to view those instruments, including the Rome Statute, as the principal source of reference for domestic courts: at [95]. The characterisation of joint criminal enterprise liability, derived from the ICTY in *Tadić*, has been supported by Professor May in *Crimes Against Humanity: A Normative Account* (2005) at 124-128. Professor Cassese has described the approach to joint criminal enterprise in *Tadić* as a "fully fledged legal construct of modes of criminal liability" in international criminal law: *International Criminal Law* (2ed 2008) at 191.

[107] It follows that X's appeal against the Article 1F(a) finding must be allowed because the High Court and RSAA misdirected themselves in law as to the proper approach to complicity. Appellate intervention is justified in this instance on a similar basis to that adopted by Kirby J in *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 at [134]:

> … Allowing fully for the elusiveness of an all-encompassing definition of what amounts to a question of law, there could be no doubt that a demonstrated error in an approach by a decision-maker to the meaning and operation of a critical statutory phrase would be an error of law. It will often

> be difficult to discern error of law in a finding of primary facts. However, where the decision-maker has given reasons that indicate that the finding was arrived at by a misunderstanding of the applicable legal test, or where the finding resulted from a failure to apply correctly the language of that phrase to the facts as found, a court reviewing for error of law is entitled to intervene. It does so not to impose on the decision-maker any view that the court may have of the facts, but to ensure that the correct legal criteria are applied when the administrative decision-maker reaches the conclusion on the facts.

Was the "serious reasons for considering" threshold met in this case?

[108] In this case, the High Court Judge found that there was no evidence of X's involvement in the LTTE as a member, much less a leader, and no evidence of participation in previous attacks: at [86]. I pressed counsel during the course of the hearing as to whether there was evidence to the effect that X had been involved in LTTE activities prior to taking up employment on the *Yahata*. No evidence was presented. Thus, as he walked down the Thai wharf to join the *Yahata* in July 1992, X was "clean".

[109] The Judge ascribed significance to X's "participation in that voyage" *in itself* as evidencing "active assistance to the LTTE with knowledge of the real possibility that the explosives and weapons were destined to be used against civilians": at [86]. But this finding contravenes the RSAA's earlier finding that the cargo would "as likely be used in "conventional" warfare against the Sri Lankan forces as in perpetrating gross human rights abuses against innocent civilians": at [126].

[110] The Attorney-General's argument on appeal is that the combination of risk that the cargo would be used unlawfully and X's presence, by which he is taken to have accepted such risk, establishes serious reasons for considering that he thereby committed a crime against humanity. In other words, it is suggested that X's participation in the *Yahata's* last voyage, coupled with a credibility determination adverse to his account, gives rise to *per se* liability for the commission of crimes against humanity.

[111] The third element of the correct test for complicity in *JS (Sri Lanka)* assumes prominence here: that participation must have been with the intention of furthering

the perpetration of a crime against humanity. The requisite intention cannot be forensically inferred from physical presence on a boat and an adverse credibility determination based on the apparent implausibility of X's account. The RSAA's finding that X joined the *Yahata* in "full knowledge" (at [126]) is unmoored from the correct legal test.

[112] On the correct approach to complicity outlined above, there could not be "serious reasons for considering" that X was complicit in crimes against humanity under Article 1F(a) of the Refugee Convention.

Commission of a serious non-political crime (Article 1F(b))

Introduction

[113] Article 1F(b) of the Refugee Convention provides that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he or she has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

[114] The Supreme Court of India entered convictions against X on the following two charges under the Indian Penal Code 1860:

> 353. **Assault or criminal force to deter public servant from discharge of his duty –**
> Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
>
> 438. **Punishment for the mischief described in Sec. 437 committed by fire or explosive substance –**
> Whoever commits, attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For the sake of completeness, s 437 provides:

> 437. **Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden –**
> Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The approach in the RSAA and High Court

[115] In concluding that Article 1F(b) applied to X, the RSAA characterised the s 438 conviction as follows (at [141]):

> Our assessment of the facts is that [the destruction of the *Yahata*] was not committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy. Rather, the act was committed to destroy the vessel and its cargo and to thereby prevent their seizure. This is a serious non-political crime.

[116] Courtney J had concerns about the RSAA's reliance on the Supreme Court of India's conviction (at [98]):

> There was no attempt at all to consider the position of any individual accused. If there was evidence, one might have expected some reference to it, given the careful consideration given to other aspects of the evidence. If there was no evidence one might reasonably expect some reference to that fact and an explanation as to why the accused were all to be nevertheless regarded as equally culpable. Secondly, whilst judges can be expected to apply the criminal standard without necessarily re-stating it, it is of concern that the Court's conclusion was expressed in terms contrary to the criminal standard.

[117] These concerns did not detract Courtney J from holding that the RSAA was "entitled to conclude that, notwithstanding the unsatisfactory aspects of the Supreme Court's decision, it was sufficient to provide serious reasons for considering that X had committed the crimes for which he was convicted": at [99].

[118] Significantly, the Judge held that the RSAA was entitled to undertake its consideration of Article 1F(b) in the context of its earlier finding that X was a loyal supporter of the LTTE and was willingly on board the *Yahata* with knowledge of its cargo: at [99].

Discussion

[119] The Article 1F(b) point can be disposed of shortly. I have placed emphasis (at [108] above) on Courtney J's finding that there was no evidence of X's involvement in the LTTE as a member prior to taking up employment on the *Yahata*. I have also concluded that the RSAA failed to apply the correct legal test for complicity in concluding that X joined the *Yahata* in "full knowledge".

[120] Thus, Courtney J considered Article 1F(b) in the context of findings that I have determined are based on an evidential lacuna and a misapplication of the correct legal test for complicity.

[121] The suggestion that X's loyal support of the LTTE and his full knowledge of the *Yahata's* cargo gave rise to a "non-political crime" in the sinking of the *Yahata* bifurcates political and non-political activities in a quite artificial manner. The RSAA was seeking to have it both ways by:

(a) Arguing that X is excludable under Article 1F(a) because he was knowingly on the *Yahata* which was transporting explosives for the LTTE, whose known purpose is to achieve a separate Tamil state.

(b) Arguing that X is excludable under Article 1F(b) because the destruction of the *Yahata* to prevent seizure of the cargo was not done for a political purpose.

[122] Mr Carter conceded that the *Yahata's* operation may be said to pursue the goal of overthrowing or subverting or changing the Sri Lankan government, in accordance with the definition of "political crime" proffered by Lord Lloyd in *T v Secretary of State for the Home Department* [1996] AC 742 at 787 (HL).

[123] The second element of the "political crime" definition in *T* is that there is a sufficiently close and direct link between the crime and the alleged political purpose: at 787. Mr Carter's argument that the destruction of the *Yahata* would fail this limb is to suggest that the political became non-political at the time of destruction. This is

an arbitrary distinction and one that fails to appreciate the rationale for destruction which was, as the Supreme Court of India suggested, to "avoid detection of the true state of affairs": at 15.

[124] I am satisfied that there could not be "serious reasons for considering" that the destruction of the *Yahata* was a serious non-political crime under Article 1F(b) of the Refugee Convention.

Conclusion

[125] I would allow X's appeal. In my view, when the proper approach to complicity is appreciated, this particular case fell well below the mark for an adverse Article 1F determination. Normally, the case would be remitted to the RSAA to enable it to be reconsidered on the Article 1F issue, against the principles I have noted. But here there is a High Court finding of "no evidence" of the requisite kind. So we can safely conclude that issue now.

[126] It is however necessary to remit the case to the RSAA for consideration of the Article 1A(2) issue, which was never determined by the RSAA because of its pre-emption by the Article 1F point. I see no reason to remit the proceeding to a differently constituted panel of the RSAA. That is a matter for the RSAA, which will doubtless pay due regard to the UK determination with respect to Mohan (see [37] above). See *Minister of Immigration v Al-Hosan* [2009] NZAR 259 at [75] (CA): "unless there is a particular reason for the matter to be considered by [Deportation Review Tribunal] members other than those involved in the initial decision, the allocation of the membership of the DRT to any matter before it should be made by the DRT itself". In *Al-Hosan*, as in this case in relation to the RSAA, there had been no pleaded allegation or submission to suggest bias or predetermination on the part of the DRT which made the initial decision.

[127] We were advised that X is legally aided. I would therefore reserve costs. If any application for costs is to be made on X's behalf, that application should be made within 14 days of the date of delivery of this judgment. The first and second

respondents are to have 14 days to reply. This Court would then determine costs on the papers.

Y's cross-appeal

Introduction

[128] Y is X's spouse of two decades. The parties were married in June 1989 and their first child was born in May 1990.

[129] In late 1992, after X had left Sri Lanka to join the *Yahata*, Y moved to Colombo from the LTTE-controlled areas in the north of Sri Lanka where she had previously been living. Y gave birth to her second child in Colombo in January 1993, and remained there until she heard of the *Yahata's* demise. She then moved back almost immediately to a northern LTTE-controlled area. In November 2001 she was able to obtain a Sri Lankan passport. She did not disclose any details about her relationship to X to the issuing authorities.

[130] After securing visitor visas, Y arrived with her two children in New Zealand on Christmas Eve 2001. She applied for refugee status on 18 January 2002.

Y is declined refugee status

[131] The RSB declined Y's application for refugee status in New Zealand. The RSB decision rested on a finding that there was not a real chance that Y would face persecution for a Convention reason if she returned to Sri Lanka. Because her fear of persecution was not well-founded, Y was not considered to be a refugee within the meaning of Article 1A(2).

The RSAA appeal

[132] Y then appealed to the RSAA. The RSAA dismissed Y's Article 1A(2) inclusion claim in two paragraphs:

> [145] From the time her husband left Sri Lanka in July 1992 to join the *Yahata* until her own departure from Sri Lanka in December 2001 she had no difficulties with government officials or with the LTTE. She was able to leave Colombo in February 1993 (that is, after the *Yahata* incident and the detention of her husband in India) and to return to the LTTE-controlled northern areas. She was also able to leave the LTTE-controlled area and to return to Colombo with her children to commence her journey to New Zealand. In preparation for this trip she was issued with a Sri Lankan passport on 26 November 2001. In these circumstances we can see no basis whatever for her assertion that she faces a real risk of being persecuted in Sri Lanka either by the Sri Lankan authorities or by the LTTE.
>
> [146] It was suggested that perhaps the incident-free period from January 1993 to December 2001 was due to the fact that the authorities in Sri Lanka had not made the connection between her and her husband. This is pure speculation and cannot establish a refugee claim. In any event, even were the [RSAA] to assume in favour of the female appellant (and against the facts) that the connection between her and her husband had not been made in earlier years, the assumed fact is counterbalanced by the fact that a cease fire had been in effect since February 2002 and the government ban on the LTTE was lifted in the same year. There is no evidence that even were the true circumstances to be made known to the Sri Lankan authorities, the female appellant would thereby be at risk of being persecuted for a Convention reason. As the [RSAA] has emphasised repeatedly, conjecture or surmise has no part to play in determining whether an anticipated risk of harm is well-founded. Such anticipation is "well-founded" when there is a real substantial basis for it. A substantial basis may exist even though there is far less than a fifty percent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Refugee Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of being persecuted. A fear of being persecuted is not well-founded if it is merely assumed or if it is mere speculation: *Refugee Appeal No 72668/01* [2002] NZAR 649 at [154]. The appellant's wife has failed by a substantial margin to establish the "well-founded" element of the refugee definition. There is therefore no call for the [RSAA] to examine any of the other inclusion issues.

The High Court determination

[133] Y applied for judicial review of the RSAA's decision at the same time as X. She claimed that the RSAA had erred in:

(a) Relying on the fact that Y had not suffered persecution at the hands of the Sri Lankan security forces prior to leaving Sri Lanka in concluding that there was no real risk to her of future persecution; and

(b) Failing to consider whether the families of known LTTE members or sympathisers were at risk of persecution by the Sri Lankan authorities, notwithstanding the current cease fire.

[134] On the first ground of appeal, Courtney J noted that past persecution or lack thereof is not determinative of prospective risk: "what has happened in the past will be an unreliable indicator if there has been change in circumstances over time": at [106]. However, the facts that Y pointed to were "not so much speculation as circumstances consistent with her claim that her relationship with X had not come to the attention of the authorities": at [106].

[135] As to the second ground, Mr Henry had pointed to recent country information which indicated that the cease fire had not been complied with. For Courtney J, "[i]f a group of which Y is a member faces persecution notwithstanding the cease fire, the mere fact of the cease fire cannot, in itself, justify the conclusion that Y does not face a real risk of persecution": at [109]. The Judge considered that if the country information indicated that there was danger to families of LTTE supporters, Y's position needed to be considered against those facts.

[136] The Judge remitted Y's case back to the RSAA for reconsideration of her refugee status, with the benefit of the new country information. The Crown cross-appeals this decision.

This appeal

[137] The essence of Mr Carter's submissions is that the Judge erred in suggesting that the RSAA had used Y's past experience to determine the risk posed to her in the future, because the RSAA had applied the standard forward-looking assessment of risk. He submits that the RSAA did not assume that the absence of persecution in the past necessarily meant there would be no risk of persecution in the future. Rather, it was open to the RSAA to conclude that there was no evidence of a change in circumstances that might give rise to a real risk of persecution in the future in relation to Y's particular circumstances. Mr Carter asserts that the Judge confused taking into account relevant considerations (whether Y had a well-founded fear of

being persecuted if she returned to Sri Lanka) with taking into account particular pieces of evidence (the recent country information provided by Mr Henry).

Discussion

[138] Both the RSAA and High Court judgments are notable for their cursory analysis of Y's position, taking two and ten paragraphs respectively to reach their conclusions with respect to Y's Article 1A(2) claim.

[139] There is some force in Mr Carter's argument that Courtney J essentially substituted her own view on the facts for those of the RSAA, presumably propelled by an understandable measure of sympathy for Y.

[140] In relation to the materiality of the cease fire to the holding that Y was not at risk of being persecuted if she returned to Sri Lanka, we are entitled to take judicial notice of the extensively publicised fact that the dreadful conflict between the Sri Lankan authorities and the LTTE has now come to an end. The terrible loss of life of both LTTE operatives and civilians in the north of Sri Lanka must indicate that the cease fire was not ultimately effective.

[141] Mr Carter rightly conceded that s 129J(1) of the Immigration Act would permit a subsequent claim for refugee status where circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. While it would be quite inappropriate for us to speculate on what the prospects now are for persons who are perceived to be LTTE supporters, it is clear that the circumstances in Sri Lanka have markedly changed.

[142] I would dismiss the cross-appeal. I would remit Y's case to the RSAA for reconsideration of Y's Article 1A(2) claim in light of the current circumstances. Because of the regrettable delays in finalising the refugee status of Y, I would urge distinct expedition on this reconsideration.

[143] Given that Y is legally aided, I would reserve costs in the same terms as those in relation to X (see [127] above).

Result

[144] Although separate reasons have been delivered, the panel is unanimous:

a) That X's appeal should be allowed and the cross-appeal with respect to Y should be dismissed.

b) That the cases of X and Y should be remitted to the RSAA, for consideration of their refugee status claims under Article 1A(2) of the Refugee Convention.

(c) That costs should be reserved, on the terms set out in [127] above.

ARNOLD J

[145] I have had the benefit of reading the judgments of both Hammond and Baragwanath JJ in draft. I agree with them that X's appeal must be allowed:

(a) In relation to the finding of the Refugee Status Appeal Authority (RSAA) that there were serious reasons for considering that X had committed international crimes (ie, crimes against peace or humanity or war crimes) in terms of Article 1F(a) of the Convention Relating to the Status of Refugees 1951 (as modified by the 1967 Protocol) (the Refugee Convention), I would allow the appeal essentially for the reasons given by Hammond J.

(b) In relation to the RSAA's finding that there were serious reasons for considering that X had committed a serious non-political crime in terms of Article 1F(b), I would allow the appeal because I consider that the guilty verdicts relied upon are unsafe.

My purpose in writing this brief separate judgment is to comment further on the authorities in relation to the "association" ground, which is relevant to the RSAA's Article 1F(a) finding, and to explain my reasoning in relation to the RSAA's finding in respect of Article 1F(b).

[146] In relation to the cross-appeal in respect of Y, I agree with Hammond and Baragwanath JJ that it should be dismissed.

Article 1F(a)

[147] As Courtney J noted at [86], there was no direct evidence that X was a member of the Liberation Tigers of Tamil Eelam (LTTE) or that he had personally committed acts constituting crimes against humanity. Accordingly, if he was excluded from refugee status by Article 1F(a), it had to be on the basis that he was (at least) involved with the LTTE and deliberately assisted their illicit activities through his participation in the transportation of weapons and explosives aboard the vessel *Yahata*.

[148] The RSAA did not believe X when he denied that he was a member of the LTTE or that he had any knowledge of the activities that the *Yahata* was engaged upon when intercepted by vessels of the Indian Navy. Hammond J has set out the essential passages from the RSAA's decision: see [40] above. Of particular importance is what the RSAA said at [65] of it decision:

> … But the issue is whether [X's] presence on the *Yahata* was an innocent or a knowing one. Notwithstanding his denials to the contrary, the [RSAA] is of the view that his engagement in the secretive smuggling operations of the LTTE was a fully knowing one and evidence of his dedication to the aims, objectives and methods employed by the LTTE. He knew that the items he helped smuggle into Sri Lanka would as likely be used in "conventional" warfare against the Sri Lankan Army as in perpetrating gross human rights abuses against innocent civilians.

[149] The RSAA returned to this later in its decision: at [126]. The key elements of its decision on this point seem to be that:

(a) X was a member of the LTTE.

(b) He knew that the LTTE pursued its objectives both through legitimate warfare and through actions constituting international crimes.

(c) With that knowledge he joined the *Yahata*, which he knew was a LTTE vessel, and was prepared to assist the LTTE in whatever method it chose, legitimate or illegitimate, to further its aims.

(d) He knew that the *Yahata* was engaged in illicit smuggling operations, and that the explosives and other items on board the vessel might be used in either conventional warfare or international crimes.

[150] I agree that in light of the evidence before it, the RSAA adopted the wrong approach on this aspect of the case, for reasons which I can shortly explain.

[151] The answer to the question whether a person qualifies as a refugee or is subject to the exception in Article 1F of the Refugee Convention should not vary depending upon the jurisdiction in which the person makes his or her claim to refugee status. As an international treaty dealing with the rights of displaced peoples, the Refugee Convention should receive a uniform interpretation across jurisdictions which are party to it. Lord Steyn made this point in *R v Secretary for State for the Home Department; ex parte Adan* [2001] 2 AC 477. When addressing a divergence of state practice concerning the interpretation of Article 1A(2) of the Refugee Convention, Lord Steyn said at 516 – 517:

> It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.

[152] As a consequence, it is necessary to ascertain the approach taken by other jurisdictions when considering the "association" issue. Decisions from Canada and the United Kingdom are of particular assistance on this point.

[153] The Court of Appeal of the Federal Court of Canada has developed the relevant principles over a number of decisions, principally *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306, *Moreno v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 and *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433.

[154] In relation to association, the principles emerging from these cases are as follows:

(a) The key test is whether there are serious grounds for considering that there was "personal and knowing participation" in a proscribed crime by the person seeking refugee status: *Ramirez* at 179 – 180.

(b) Simply being a member of an organisation which from time to time commits international offences is not normally sufficient for exclusion from refugee status: *Ramirez* at 180; *Moreno* at 440.

(c) But equally membership of an organisation is not a prerequisite to a finding of complicity in proscribed conduct carried out by, or in the name of, the organisation: *Bazargan v Canada (Minister of Employment and Immigration)* (1996) 205 NR 282 at [10] – [11] (FC). Rather, it is one factor that, depending upon the circumstances, may or may not lead to a finding of personal and knowing participation: *Savundaranayaga v Canada (Minister of Citizenship & Immigration)* (2009) 77 Imm LR (3d) 247 at [34] and [37] (FC).

(d) Presence at the scene of a prescribed crime is not enough by itself to qualify as personal and knowing participation, although presence coupled with other facts may well indicate involvement. So, in addition to presence, membership of the group involved may,

depending on the circumstances, be sufficient. The ultimate question in this type of case concerns "the existence of a shared common purpose and the knowledge that all of the parties in question may have of it": *Ramirez* at 180; *Moreno* at 441 – 444.

(e) The closer a person is involved in the decision-making process and the less he or she does to thwart the commission of the proscribed conduct, the more likely it is that he or she will be held to have been complicit in the conduct: *Moreno* at 443; *Sivakumar* at 440.

(f) Where an organisation is principally directed to a "limited, brutal purpose", simply being a member of it may, by necessity, involve personal and knowing participation in persecutorial acts: *Ramirez* at 180. (Another formulation is being a member of an organisation "whose very existence is premised on achieving political or social ends by any means deemed necessary": *Moreno* at 440 – 441.) This was described in *Savundaranayaga* at [32] as a "rebuttable presumption". The key consideration is still whether there was "a personal and knowing participation and a sharing of a common purpose": *Savundaranayaga* at [41].

[155] The principles set out in the Federal Court of Appeal decisions referred to above have been discussed and applied in a number of subsequent Canadian decisions: see, for example, *Penate v Canada (Minister of Employment and Immigration)* [1994] 2 FC 79 at 84 – 86 (FC); *Cardenas v Canada (Minister of Employment and Immigration)* (1994) 23 Imm L R (2d) 244 at [9] – [13] (FC); *Cabrera v Canada (Minister of Citizenship and Immigration)* (1998) 158 FTR 202 at [5] – [6] (FC).

[156] The principles have also been adopted and applied in the United Kingdom, most significantly by the Immigration Appeal Tribunal in *Gurung v Secretary for State for the Home Department* [2003] Imm AR 115. The approach in *Gurung* was largely adopted in a recent decision of the Court of Appeal, but was then criticised and amended somewhat by a subsequent decision of that Court.

[157] In *Gurung* the Immigration Appeal Tribunal said:

(a) Mere membership of an organisation which has committed proscribed crimes will not bring a person within the Article 1F exclusions: at [104].

(b) Where the organisation is one "whose aims, methods and activities are predominantly terrorist in character" very little more than membership of the organisation will be necessary to establish complicity in proscribed crimes which it commits. In such a case "voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question": at [105].

(c) Although complicity may arise indirectly, it must be established that the person was a voluntary member of the organisation who fully understands its aims, methods and activities, including any plans it had to carry out proscribed crimes: at [108]. The Tribunal went on to make an observation of particular relevance to the present case:

> Thus for example it would be wrong to regard the mere fact that an appellant has provided a safe house for LTTE combatants as sufficient evidence that he has committed an excludable offence. If, however, he has transported explosives for LTTE combatants in circumstances where he must have known what they were to be used for, there may well be a serious article 1F issue.

[158] The United Kingdom Court of Appeal accepted the propositions from *Gurung* set out in [157](a) – (c) above in *MH (Syria) v Secretary of State for the Home Department* [2009] 3 All ER 564 at [7] – [11] and [28]. (The Court did, however, note that legislative guidance had subsequently been given in relation to Article 1F(c): at [13] – [15] and [29]). In *MH (Syria)*, the Court heard two appeals raising Article 1F issues. Only the first is presently relevant. It concerned a Kurdish woman who fled the Middle East and sought asylum in the United Kingdom. She had joined the Kurdistan Workers Party (PKK) as a 13 year old. After several years she was trained as a first aid worker, becoming an assistant nurse, and worked in that

capacity at various camps in Iraq, losing a leg when she stepped on a land mine. While her principal work seems to have been with refugees, she did treat injured PKK combatants, although she was not a combatant herself. She then became a Kurdish language teacher for primary school children. Ultimately she became disillusioned with the PKK and fled to England. She was denied refugee status under Article 1F and challenged that decision. The Court of Appeal concluded that the evidence "could not reasonably be said to disclose serious reasons for considering that MH had been guilty of acts contrary to the purposes and principles of the United Nations [Article 1F(c)]": at [36]. Her involvement in the proscribed activities of the PKK was too peripheral to render her complicit in them.

[159] The Court of Appeal also made some relevant observations in *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292. A question arose as to whether the appellant, a LTTE member, was excluded from refugee status on the ground that there were serious reasons for considering that he had been guilty of acts "contrary to the purposes and principles of the United Nations": Article 1F(c). In the course of delivering a judgment with which his colleagues agreed, Stanley Burnton LJ said that each of Article 1F(a), (b) and (c) requires the personal guilt of the person in question. It followed that "mere membership of an organisation that, *among other activities*, commits such acts does not suffice to bring the exclusion into play": at [35] (emphasis in original). The Judge then said:

> On the other hand, in my judgment a person who knowingly participates in the planning or financing of a specified crime or act or is otherwise a party to it, as a conspirator or aider or abettor, is as much guilty of that crime or act as the person who carries out the final deed.

[160] Stanley Burnton LJ went on to note that the application of Article 1F would be straightforward in the case of an active member of an organisation which promoted its objects only by acts of terrorism: at [37]. However, he said that the LTTE was not such an organisation while KJ was a member. Rather, it pursued its political ends both by military action directed at the Sri Lankan Government forces and by acts of terrorism, that is, by legitimate and illegitimate means. The Judge said at [38]:

> A person may join such an organisation, because he agrees with its political objectives, and be willing to participate in its military actions, but may not

> agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in an organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations.

[161] KJ's appeal was allowed. Stanley Burnton LJ accepted that he must have known of the LTTE's terrorist activities and that he had participated in military actions against the Government, but held that there was insufficient material to constitute serious grounds for considering that he had been guilty of acts giving rise to exclusion under Article 1F(c): at [39] – [40].

[162] The Court of Appeal considered the *Gurung* analysis again in *JS (Sri Lanka) v Secretary of State for the Home Department* [2009] 3 All ER 588. The appellant, JS, was a Tamil and a Sri Lankan citizen. He had been a member of the LTTE since the age of ten. He received military training, including training in the use of small arms. He participated in various military operations against the Sri Lankan army, including commanding a platoon of 45 fighters. At age 18 he suffered injuries, from which he took six months to recover. There was then a ceasefire between the Sri Lankan Government and the LTTE. The appellant was assigned to be one of the chief security guards to the leader of the LTTE's Intelligence Division and later became second in command of that Division's combat unit, a position which he held for four years. After that he fled to the United Kingdom, where he was denied refugee status on the basis that he was excluded under Article 1F because he had been complicit in war crimes and crimes against humanity. He challenged that decision.

[163] Toulson LJ delivered a judgment with which the other members of the Court agreed. He discussed the three Canadian decisions identified at [153] above, before discussing *Gurung*, *KJ (Sri Lanka)* and other English decisions, several of which involved LTTE members.

[164] Toulson LJ set out the submissions advanced by counsel for the Secretary for State as follows:

[26] [Counsel] advanced three main submissions:

1. There was evidence in the material before the court that during the period that the claimant was an adult member of the LTTE, the LTTE was responsible for widespread acts amounting to war crimes or crimes against humanity, despite the fact that a ceasefire was supposedly in place for most of that time. The Intelligence Division was an elite, feared and highly secretive branch of the organisation, believed to be involved (among other things) in political assassinations and the use of torture to extract information. There was also material to suggest that its activities included guiding suicide bombers to their targets and forming hit squads to target civilians.

2. There is a significant difference between the [Secretary] having serious reasons for considering that a person has committed a war crime or a crime against humanity and an international criminal tribunal having sufficient evidence to prosecute that person. A person may fall within the exclusion provided by article 1F(a) although further investigations and evidence gathering may be needed before that person could be charged with a particular offence.

3. The information given by the claimant himself about his involvement in the LTTE was sufficient to provide serious reasons for considering that he had committed war crimes or crimes against humanity, applying the complicity doctrine as it has been developed as a matter of international criminal law and international humanitarian law.

He said that he accepted the first two submissions, leaving the third as the critical point.

[165] Toulson LJ agreed with the judgment in *Gurung* that reference had to be made to international instruments and international jurisprudence when applying Article 1F(a) in order to give meaning to the terms "war crimes" and "crimes against humanity", but that he disagreed with it in other respects: at [95] – [96]. In particular, he said the Appeal Tribunal's approach in *Gurung* to liability for international crimes in the context of an organisation which uses criminal methods on a regular but not exclusive basis was "less structured, less clear and (as a result) potentially wider" than the relevant international instruments and jurisprudence allowed: at [97]. (The international instruments to which he referred were the Rome Statute of the International Criminal Court (ICC statute) and the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY statute).)

[166] Toulson LJ went on to note that there was general agreement that mere membership of an organisation committed to the use of violence as a means to achieve its political goals was not enough to make a person guilty of an international crime: at [98]. He referred to the statement in *Gurung* that where the organisation is one whose aims, methods and activities are predominantly terrorist in nature, very little more is necessary and approved the explanation given in *Sivanantharajan v Secretary of State for the Home Department* UKAIT AA/01049/2008 4 December 2008 as to what was necessary in those circumstances. Toulson LJ said that participation in activities that did not involve or promote the commission of international crimes was not enough. Accordingly, in *Sivanantharajan* the appellant's participation in attacks on Sri Lankan army camps had to be excluded from consideration, as did his involvement in the identification and arrest of people suspected of spying for the Sri Lankan Government in Tamil controlled areas: at [100]. He noted that similar decisions were reached in two other cases involving LTTE members: *Pushparajah v Secretary of State for the Home Department* UKAIT AA/000124/2007 18 January 2008 and *Arokiyanathan v Secretary of State for the Home Department* UKAIT AA/09777/2006 24 June 2008 at [101].

[167] Toulson LJ said that the principles adopted in the ICTY statute in relation to joint enterprise liability should be adopted: at [104]. He then said:

> [107] A person who becomes an active member of an organisation devoted exclusively to the perpetration of criminal acts may be regarded as a person who has conspired with others to commit such acts and will be criminally responsible for any acts performed in pursuance of the conspiracy. I use the words "active member" deliberately. As with any other conspiracy case, there may be questions about the scope of the conspiracy entered into by the person concerned and whether there was the requisite proximity between what he agreed and the crime or crimes in question. But the Secretary of State in considering an application for asylum and the effect of article 1F is concerned only with whether there are serious reasons for considering that the applicant has committed an international crime, and in the case of an active member of an organisation dedicated entirely to terrorist activities that is unlikely to present any problem. However, as Stanley Burnton LJ said [in *KJ (Sri Lanka)*], it is another matter if an organisation pursues its political ends in part by acts of terrorism and in part by other means. Joining such an organisation may not involve conspiring to commit criminal acts or in practice doing anything that contributes significantly to the commission of criminal acts.

[168] In relation to the case before him, Toulson LJ concluded:

> [123] Applying those principles to the present case, I conclude that the Secretary of State failed to address the critical questions. Given that it was the design of some members of the LTTE to carry out international crimes in pursuit of the organisation's political ends, she acted on a wrongful presumption … that the claimant, as a member of the LTTE, was therefore guilty of personal and knowing participation in such crimes, instead of considering whether there was evidence affording serious reason for considering that he was party to that design, that he had participated in a way that made a significant contribution to the commission of such crimes and that he had done so with the intention of furthering the perpetration of such crimes. The fact that he was a bodyguard of the head of the intelligence wing (referred to … as providing the evidence of how highly trusted he was within the LTTE) shows that he was trusted to perform that role, but not that he made a significant contribution to the commission of international crimes or that he acted as that person's bodyguard with the intention of furthering the perpetration of international crimes. Reference was made by the Secretary of State and by Blair J to his command responsibilities in a combat unit, but there was no evidence of international crimes committed by the men under his command for which he might incur liability under article 28 [of the ICC statute]. His own engagement in non-criminal military activity was not of itself a reason for suspecting him of being guilty of international crimes.

[169] On the approach articulated in these cases, the decision of the RSAA in the present case cannot be upheld given the evidence before it. Like Toulson LJ in *JS (Sri Lanka)* I am concerned that the RSAA's approach was "less structured, less clear and (as a result) potentially wider" than is permissible. (In fairness to the RSAA, I should point out that this and the other decisions of the Court of Appeal discussed above post-date its decision, and indeed the decision of Courtney J.)

[170] I reach this view for three reasons:

(a) The authorities indicate that the LTTE is not an organisation "devoted exclusively to the commission of criminal acts". Rather, it is an organisation that pursues its objectives by both legitimate and illegitimate means. Accordingly, it was necessary to show that X was party to the LTTE's illegitimate designs, that he contributed significantly to the LTTE's international criminal actions and did so with the intention of furthering them.

(b) Even accepting the RSAA's factual finding that X was a LTTE member, there was no evidence that he was a high-ranking member

with any significant power. If anything, he was in the foot-soldier category, or perhaps slightly above that.

(c) Again, accepting the RSAA's factual finding that X knew of the cargo that the *Yahata* carried, there was no evidence before the RSAA either as to its intended use or that X knew of any intended use. The best that can be said is that X knew that the weapons were as likely to be used for attacks on civilians as for attacks against the Sri Lankan army: see the RSAA decision at [65] and [126]. But given what is said at (a) above, this is not sufficient to meet the requirements of Article 1F(a).

[171] In my view, given the non-specific nature of the evidence against X, the RSAA applied what amounts to a "guilt by association" approach in its assessment. Accordingly, I agree that the RSAA made an error of law in relation to this aspect of the case.

Article 1F(b)

[172] At trial in India, X was acquitted of all charges against him in relation to the *Yahata*. On the Crown's appeal to the Supreme Court of India, he was convicted on two of the charges, namely using criminal force to deter a public servant from performing his duty and intentionally destroying the *Yahata*: see [114] above for the relevant provisions of the Indian Penal Code 1860. The RSAA concluded that these convictions gave serious grounds for considering that X had committed a serious non-political crime in terms of Article 1F(b).

[173] The House of Lords considered Article 1F(b) in *T v Secretary of State for the Home Department* [1996] AC 742. Lord Lloyd of Berwick gave the leading speech, with which Lord Keith of Kinkel and Lord Browne-Wilkinson agreed. Having considered both extradition and refugee cases, including cases from other jurisdictions such Canada and the United States, and various other international sources, Lord Lloyd concluded as follows at 786 - 787:

> A crime is a political crime for the purposes of article 1F(b) of the [Refugee Convention] if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.

[174] Lord Lloyd had earlier in his speech given examples of situations falling on either side of the line – an accused who killed a dictator in the hope of changing the government (political) against an accused who robbed a bank to obtain funds to support a political party (non-political): at 781.

[175] The passage from Lord Lloyd's speech just quoted was discussed in *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533, where the majority adopted a similar approach: see especially [15] – [22] per Gleeson CJ and [41] – [47] per Gaudron J.

[176] I doubt that the relationship between the crimes for which X was convicted and any political purpose was sufficiently close to move them out of the category of non-political crimes, and accordingly agree with the RSAA in that respect: see [141] of the RSAA's determination. The fact that the crimes occurred in a broadly political context is not sufficient of itself. The close and direct link required by the second element of Lord Lloyd's test is, in my view, absent. Accordingly I do not agree with Hammond J's analysis at [121] - [123] or Baragwanath J's analysis at [310]. Rather, what concerns me is the basis on which the convictions were entered against X.

[177] The trial Judge had acquitted X and the other accused because he did not accept the evidence of the Indian naval officers that they had fired only warning shots at the *Yahata* and that those on board had then fired on the navy vessels. The Supreme Court held that the trial Judge was not entitled to reject the naval officers' evidence in this respect.

[178] X and his fellow accused had denied that they had fired on the Indian Navy vessels. But even if it is accepted that someone on the *Yahata* did return fire, there does not seem to have been any substantial evidence that X was one of those involved. In this context it must be remembered that in addition to the nine accused crew members, there were ten LTTE personnel on board the vessel travelling as passengers, including Kittu, a LTTE leader. The latter group died when the vessel went down. The trial Judge had rejected the allegation that there was a conspiracy between the nine accused to commit any offence as far as the Indian Navy vessels were concerned. The evidence of the Indian Navy officers treated the accused and the others on board the *Yahata* as a group, without discrimination. The Indian Supreme Court accepted that view without analysis or comment. I am not satisfied that there was a proper basis for that approach. It may be that there was return fire from the *Yahata*, but the evidence does not implicate X, except in the most general and, in my view, unsatisfactory way.

[179] I consider that Courtney J accurately stated the difficulty with the Supreme Court's decision at [98]:

> I agree that there was reason for concern in relation to this judgment. There was no attempt at all to consider the position of any individual accused. If there was evidence, one might have expected some reference to it, given the careful consideration given to other aspects of the evidence. If there was no evidence one might reasonably expect some reference to that fact and an explanation as to why the accused were all to be nevertheless regarded as equally culpable. Secondly, whilst judges can be expected to apply the criminal standard without necessarily re-stating it, it is of concern that the Court's conclusion was expressed in terms contrary to the criminal standard.

[180] Despite her evident reservations about the safety of X's convictions, Courtney J concluded that they were sufficient to provide serious reasons for considering that X had committed the offences of which he was convicted, particularly because the RSAA had earlier found that X was a loyal member of the LTTE and was willingly aboard the *Yahata* with knowledge of its cargo: at [99]. I do not agree that those elements are sufficient and accordingly consider that the RSAA's decision in relation to Article 1F(b) is unsustainable. Without some evidence that X was involved in the firing on the naval vessels or in the sinking of the *Yahata*, either as a principal or a party, I do not see how it can properly be said that there were serious grounds to consider that he was guilty of a serious non-

political crime. A conclusion that there were such grounds would be based simply on his presence onboard the *Yahata*, albeit if the RSAA's conclusions are accepted as a LTTE member and with knowledge of what it was carrying. These factors alone do not indicate complicity in the particular crimes of which he was convicted. Accordingly, the "serious grounds" test was not met.

[181] As a consequence, I consider that X's appeal should be allowed.

BARAGWANATH J

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The appeals and their results

[182] These appeals concern the refugee status of X and his wife, Y, each of whom is Tamil and a citizen of Sri Lanka.

[183] On 16 January 1993 the 130 tonne vessel *MV Yahata*, owned by the Liberation Tigers of Tamil Eelam (LTTE), was sunk off the coast of Madras following gunfire from Indian navy ships. X, who was the ship's chief engineer, jumped overboard with other crew members. Also on board were LTTE personnel, including the LTTE second in command, Krishna Kittu, who with others had recently joined the vessel and went down with it. The vessel had been carrying arms and explosives for the LTTE, which was until very recently engaged in hostilities with the government of Sri Lanka and had been responsible for crimes against humanity and war crimes on a large scale. X was rescued by the Indian navy. With the captain and others he was charged with various offences and, after acquittal at first instance, was convicted by the Supreme Court of India of using criminal force against the Indian naval officers with intent to prevent them from discharging their duty and of being party to a common intention to destroy the vessel. All were sentenced to three years rigorous imprisonment.

[184] X and Y later came to New Zealand and claimed refugee status.

[185] The Refugee Status Appeal Authority (RSAA) held that X is not entitled to refugee status under Article 1F of the Convention Relating to the Status of Refugees (1951) 189 UNTS 150, as modified by the 1967 protocol (the Refugee Convention), because there are serious reasons for considering that he has committed a war crime or a crime against humanity. It also held that Y does not fulfil the condition of Article 1A(2) that she have well-founded fear of persecution for Refugee Convention reasons that would entitle her to recognition as a refugee. X appeals against the High Court's refusal to grant judicial review of the RSAA's decision. The Crown cross-appeals against the High Court's grant of judicial review to Y and its reference of her case back to the RSAA for rehearing.

[186] The main point on X's appeal is whether one commits a relevant crime simply by affording assistance to an organisation some of whose other members commit such crimes but which also engages in civil war by conventional means. Because I am satisfied that the answer is no, his appeal should be allowed. There being no substantial reason to disagree with the High Court's decision in relation to Y, the cross-appeal should fail.

Legal context

[187] To be or not to be a refugee is a question of the person's legal status. The United Nations High Commissioner for Refugees has said:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria… Recognition of his refugee status does not … make him a refugee, but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.
>
> Hathaway *The Rights of Refugees under International Law* (2005) at 11.

[188] Commonly refugee cases raise what may be called an inclusion question: whether a refugee status claimant (shorthand for a claimant for recognition of such status) can meet the definition of refugee in Article 1A of the Refugee Convention, that:

> …owing to well-founded fear of being persecuted for [certain stipulated] reasons he is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ... .

The initial hearing before the Refugee Status Branch of the New Zealand Immigration Service was limited to Article 1A. It held that neither X nor Y has established refugee status in terms of Article 1A. At the *de novo* hearing on appeal the RSAA rejected Y's claim under Article 1A. But on judicial review of its decision Courtney J in the High Court set aside that decision and directed a rehearing. The Attorney-General's cross-appeal is against that decision.

[189] On X's appeal the RSAA found it unnecessary to consider the inclusion question under Article 1A. It raised and determined against him the logically prior exclusion question under Article 1F, which has no application to Y. Even if X could satisfy the Article 1A inclusion test, a question which does not arise for

consideration on this appeal, a person who falls within Article 1F of the Refugee Convention lacks refugee status. It states:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[190] The appeal to this Court by X is against Courtney J's decision declining judicial review of a determination of the RSAA that there are serious reasons for considering that he has committed a war crime, a crime against humanity and a serious non-political crime. It is convenient first to consider the appeal by X and then the cross-appeal concerning Y.

Factual context of claim by X

[191] X claims that there are no grounds on which it could properly be found that there are serious reasons for considering he has committed a war crime, or a crime against humanity.

[192] It is no role of this Court to assess the rights and wrongs of the parties to the hostilities in Sri Lanka, the origin of which some trace to 101BC when a Sinhalese king, Duttugemunu, defeated the Tamil king, Elara, to unite the whole island. Others point to the effects of colonialism which ended in 1948 when Ceylon gained independence from Britain. Others again refer to anti-Tamil riots of 1956, 1977 and 1983. The last was triggered by an LTTE ambush and killing of 13 Sri Lankan soldiers, and was followed by a constitutional amendment prohibiting separatism and the expulsion of 14 Tamil Members of Parliament. But, for the reasons that follow, it is essential in order to determine the appeal to assess a point first raised by this

Court: whether the conflict is to be classified as a civil war, in which, within certain defined limits, international law permits the use of violence.

[193] In accordance with its admirable practice the RSAA had collated and, prior to its second oral hearing, provided to X and Y substantial files setting out the history of the hostilities in Sri Lanka as well as the relevant jurisprudence. We invited Crown counsel to advise us whether New Zealand holds a position as to their status.

[194] Crown counsel responded the next morning that the events with which this case is concerned occurred during a civil war in Sri Lanka between the LTTE and the Government of that state. New Zealand's position on the LTTE is that it is a militant, separatist group that has committed acts of terrorism in Sri Lanka, India and elsewhere and has no democratic mandate to represent the Tamil people. Mr Carter also supplied us with a 2005 news report from the United Nations High Commission for Refugees website recording that the LTTE began fighting in 1983 for a separate homeland for minority Tamils, who are mainly Hindus and account for about 3.2 million of Sri Lanka's 19 million people, claiming discrimination by the largely Buddhist Sinhalese, who number about 14 million people and dominate the military and police. The LTTE waged a bloody campaign for nearly two decades. They were among the first modern groups to use suicide bombings, killing numerous officials, including the late Indian Prime Minister Rajiv Ghandi in 1991 and the Sri Lankan President, Ranasinghe Premadasa, two years later. On the government side, human rights groups repeatedly accused the police and military of torturing suspected LTTE rebels during the war in which nearly 65,000 people were killed before a ceasefire in 2002, which later broke down. Since the hearing in this Court, the war has reached its end after the Sri Lankan army overwhelmed the LTTE, who had made a final stand in a confined area in the northeast of Sri Lanka.

[195] The events in Sri Lanka and the conduct of the LTTE have previously been considered both by the RSAA and by courts in other jurisdictions. In *Re TP* Refugee Appeal 1248/93 31 July 1995 the RSAA was chaired by Rodger Haines QC, who also chaired it in the present case. The RSAA's decisions to which he is party have been repeatedly adopted by final courts in other jurisdictions. *Re TP* concerned a leader of the LTTE who was held to fall within the exclusion provisions of

Article 1F(a). En route to its conclusion the RSAA marshalled considerable evidence of atrocities committed by the LTTE, to which it held TP was party. That information was also used as the factual basis for its decision in this case.

[196] Mr Henry provided us with a helpful chart which analysed the episodes on which the RSAA relied against a line showing where X was at the time plus a code recording X's response to the RSAA's careful questioning of him about each event. It began with X starting work in January 1981 on Petrostar Company Ltd ships based in Saudi Arabia, which continued for five years until 19 March 1986. Two and a half years into that period there occurred the killing by the LTTE of 13 Sri Lankan soldiers which ignited the civil war. Many Tamils were killed and it was in general a terrible time for Tamil people. Questioned by the RSAA, X accepted that it was the major event in recent Tamil history; without it, he said, Tamil boys would not have joined the LTTE. Asked about bombs in Colombo in 1984, in an aircraft at the Katunayake International Airport in 1985, and again in Colombo on 9 November 1987, when 31 people were killed and 106 injured, he said he used to listen to radio news reports but could not now give details. He agreed that the LTTE was a very violent organisation and said he was frightened of them.

[197] Asked about an attack on a sacred Buddhist shrine at Anuradhapura in May 1985, he agreed that such a major event would have been on the news and he would have heard of it. He described an attack in May 1986 by the LTTE on a hamlet south of Trincomalee, which killed twenty villagers, including children, and another on 17 April the following year near Kitulottuwa, when 128 civilians were taken out of vehicles and shot, as the kind of things that happened all the time and which he would have discussed with others. He said he sympathised with the civilians. He gave similar responses to questions about other attacks such as one on 21 April 1987 at a crowded bus station in Colombo causing more than a hundred deaths and another on 9 November 1987 in Colombo killing 31 and injuring 106.

[198] It is unnecessary to recount other episodes as to which X was questioned and others again to which the RSAA referred in its decision. There was overwhelming evidence to support its conclusion that the LTTE committed war crimes and crimes against humanity regularly and on a large scale. Some, Mr Henry submitted, were

killings of soldiers and police in the course of a civil war. He instanced a suicide bombing attack on Defence Ministry operational headquarters in Colombo which killed eleven soldiers as well as ten civilians. But the summary execution of many captured officers fell well outside any arguable justification. So too did the atrocities committed against civilians, including women and children.

[199] While the conduct of its opponents can afford no justification for such abuses, it may be noted as a matter of context that in *SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 220 ALR 394 at [96] (FCA) the Administrative Appeals Tribunal was satisfied that, as unhappily tends to happen in civil war, there were reciprocal crimes against humanity by the Sri Lankan authorities against members of the Tamil community:

> [63] … the Tribunal is satisfied that the Sri Lankan Army was involved in systematic persecution of a civilian group, namely the Tamil population. The Tribunal therefore finds that there are serious reasons for considering that the [appellant] was involved in committing war crimes namely of torture or inhuman treatment against Tamil civilians.

[200] Throughout the period until 4 January 1993, when X left Phuket on board the *Yahata* on its final voyage, X was serving on ships, with some exceptions when he was ashore in Sri Lanka. He took off a fortnight in March 1986, 20 days in November 1986, six months in 1989, and from May 1990, when his daughter was born, to June 1992 during which period he was living with his wife and daughter in Velvettiturai, the port town of Jalna in the north of Sri Lanka, or in a village nearby.

[201] Velvettiturai is the birthplace of the LTTE founder and leader, Vellupillai Prabhakaran, killed in the final stage of the hostilities this year, and of other leaders, and was the early centre of the LTTE activities, including the operation of several vessels. Some 95 per cent of its activity was legitimate commerce. The balance entailed carriage of armaments and explosives. The LTTE also established a cell on the Andaman Coast in the Thai town of Trang.

The RSAA decision

[202] The RSAA rejected X's account that it was not until after the vessel had embarked on its final voyage that he learned it was owned by the LTTE and was carrying arms, so he was unwillingly prevented from leaving it. It held that he was in consequence party to crimes against humanity and war crimes by the LTTE.

The decision of the High Court

[203] The High Court, applying the familiar *Wednesbury* test of reviewability (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 at 229-230 (CA)) held that such a finding was open to the RSAA.

Discussion

[204] I consider the appeal under three heads:

(a) Was the conduct of shipping explosives and ammunition on the *Yahata* a crime against humanity and a war crime?

(b) What are the legal tests for application of Article 1F?

(c) What was X's role?

(a) Was the conduct of shipping explosives and ammunition on the* Yahata *a crime against humanity and a war crime?

[205] X's argument before the Refugee Status Branch, the RSAA, the High Court, and initially in this Court focused upon his own conduct and his denial that he chose to serve on the LTTE vessel knowing it was carrying arms and munitions. But when the point was raised by this Court Mr Henry added the submission, briefly touched on in submissions to the RSAA, that the conduct of shipping explosives and ammunition on the *Yahata* for a party engaged in civil war was neither a crime against humanity nor a war crime.

[206] So the first issue must be whether that is so.

[207] The RSAA found that on its final voyage *Yahata*, owned and operated by the LTTE, was carrying a very large quantity of explosives and weapons for use by the LTTE against others. We return to X's challenge to that finding but proceed for the present on the footing that it was correct.

[208] An understanding of "crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes", requires reference to the relevant instruments. They include (emphasis added):

> **The London Charter**
>
> *Article 6*
>
> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) CRIMES AGAINST PEACE: namely, planning preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) *WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment* or deportation to slave labor or *for any other purpose of civilian population* of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) *CRIMES AGAINST HUMANITY: namely, murder*, extermination, enslavement, deportation, *and other inhumane acts committed against any civilian population*, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949)

…

Article 3 [known as "Common Article 3"]

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. *Persons taking no active part in the hostilities*, including members of armed forces who have laid down their arms…, *shall in all circumstances be treated humanely….*

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

…

Protocol II to the Geneva Conventions (1977)

ARTICLE 4: FUNDAMENTAL GUARANTEES

1. *All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person*, honour and convictions and religious practices. *They shall in all circumstances be treated humanely, without any adverse distinction.* It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, *the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:*

> (a) *violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment* such as torture, mutilation or any form of corporal punishment;
>
> (b) collective punishments;
>
> (c) taking of hostages;
>
> (d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

ARTICLE 13. PROTECTION OF THE CIVILIAN POPULATION

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

[209] Mr Henry raised a threshold argument that, as at the time of the *Yahata's* last voyage in 1993, conduct in the course of an internal armed conflict could not constitute either a crime against humanity or a war crime. His argument receives support from international experts. In *SRYYY v MIMA* the Full Court stated:

> [49] Perhaps the most significant change in terms of scope and content of individual criminal responsibility since the Second World War has been the recent acceptance that war crimes for which an individual may be criminally responsible may be committed in situations of internal armed conflict. As recently as 1994, the Commission of Experts established pursuant to Security Council Resolution 780 to report on questions relating to breaches of humanitarian law in the former Yugoslavia concluded that "there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes" and, consequently, "the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal are offences when committed in international, but not in internal armed conflicts" (Annexure to the Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 at [52] and [54]). The situation under customary law was also reflected in the international instruments which dealt with war crimes up to and including the Statute of the ICTY.

[210] The Full Court judgment continued (at [49]:

> That changed in 1994 with the Statute of the ICTR and in 1995 with the ICTY's decision in *Tadić* [Case IT-94-1 15 July 1999]. In *Tadić* the ICTY held at [94] that customary international law did contain an offence of war crimes committed during internal armed conflict, and imported such an offence into Art 3 of the ICTY Statute. However, war crimes are defined so as to include conduct occurring in an internal armed conflict under the Statutes of the ICTY and the ICTR, the Draft Code of Crimes and the Rome Statute, but were not so defined in the earlier instruments.

[211] Mr Henry cited Shabas *An Introduction to the International Criminal Court* (3ed 2007) at 115:

> …in its first major judgment, the Appeals chamber of the International Criminal Tribunal for the former Yugoslavia stunned international lawyers by issuing a broad and innovative reading of the two categories of war crimes in the Statute of the Tribunal, affirming that international criminal responsibility included acts committed during internal armed conflict. In *Tadić*, the judges in effect read this in as a component of the rather archaic term 'laws or customs of war'. These developments were on the ground that this was dictated by the evolution of customary law. Their judicial interpretation was open to criticism as a form of retroactive legislation. The debate about whether to include war crimes in non-international armed conflict continued throughout the drafting of the Statute. Eventually, doubts about the broadening of the scope of war crimes were laid to rest at the Rome Conference in 1998, when States confirmed that they were prepared to recognise responsibility for war crimes in non-international armed conflict. The dichotomy is not entirely resolved, however, because not all war crimes punishable in international armed conflict are also punishable in non-international armed conflict.

[212] But as the RSAA observed at [101]:

> These requirements do not present a difficulty in the present case for, as noted in *Refugee Appeal No. 1248/93 Re TP* (31 July 1995) at 6 and 28, the LTTE announced in February 1988 that it would abide by the provisions of the Geneva Conventions and Protocols I and II: Amnesty International, Sri Lanka: an Assessment of the Human Rights Situation (AI Index: ASA 37/1/93, 14 February 1993).

[213] In their final reply submissions of 12 October 2009, Crown counsel accepted that at the time of the Nuremberg Tokyo trials in 1945 war crimes could be committed only in international armed conflict. But they pointed to the Rome Statute of the International Criminal Court as demonstrating that by 1998 the definition of war crimes had evolved to the point where by Article 8(2)(e)(i) "war crimes" included conduct occurring "in armed conflicts not of an international character". They cited as well as *Tadić* the decision of the Canadian Federal Court of Appeal in *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 holding that crimes committed during the civil war in El Salvador were either war crimes or crimes committed against humanity. They further cited Article 22 of the International Law Commission's 1991 *Final Draft Code of Crimes Against the Peace and Security of Mankind (Part II)* (Document A/46/10) at 105 which did not distinguish between international and non-international armed conflicts.

[214] The LTTE's acceptance of the Geneva Conventions makes it unnecessary for this Court to discuss the threshold argument. That is not, however, to suggest that the argument, effectively that *Tadić* was wrong, should be regarded as having arguable merit. The need, recognised since 1945, for evolution of international criminal law has seen:

> … heavy reliance by the newly created *international* courts upon customary rules or unwritten general principles.
>
> Cassese *International Criminal Law* (2ed 2008) at 5.

It is now established that such norms bind rebels engaged in armed conflict if they violate the laws of war. There must follow from such obligation the reciprocal right of a rebel to be treated as a lawful belligerent so long as the laws of war are complied with.

[215] The strength of the argument – that those principles require courts seized of such problems to fill the gap identified by the 1994 Commission of Experts – is obvious. The need for principled evolution of international law to which President Cassese alludes has the same *raison d'être* as that law itself: the need to avoid injustice. The history of international law is not of stasis but of properly controlled development.

[216] The recognition of rules for the conduct of war is seen as early as Deuteronomy 20:19 and, albeit in barbaric form, at 21:10-14. Islamic legal treatises on international law from the ninth century onwards covered the application of Islamic military jurisprudence to international law. The evolution of the modern international law of war received impetus from Grotius whose *De Jure Belli et Pacis (On the Law of War and Peace)* was published in 1625 (an English translation by Campbell was republished by Batoche Books (Kitchener Ontario) in 2001). In chapter three it distinguished between public war, carried on by the person holding the sovereign power, and private war, carried on by private persons without authority from the state. Subsequent writings of jurists, international treaties and state practices evolved into the modern law of war between states, under which there is in certain circumstances recognition of the legality of armed conflict.

[217] International law did not originally apply to civil war the recognition of legality of armed conflict accorded to war between states. La Haye's *War Crimes in Internal Armed Conflicts* (2008) contains a useful account of how such recognition emerged. The work records (at 6) that during the eighteenth and nineteenth centuries it gradually became acceptable to apply the rules of war to certain large-scale civil wars in instances where the rebels' side was recognised as being belligerents by the legitimate government or a third party. Four conditions had to be satisfied before a state of belligerency could be recognised:

> (a) an armed conflict within the state concerned, of a general, as opposed to a local, character;
>
> (b) the insurgents must occupy and administer a substantial part of the state territory;

(c) they must conduct their hostilities in accordance with the laws of war, through organised armed forces under a responsible command;

(d) circumstances exist that make it necessary for third states to make clear their attitude to those circumstances by recognition of belligerency.

[218] Subsequently Common Article 3 of the 1949 Geneva Conventions and the 1977 Protocol II ([208] above) regulated the conduct of hostilities in internal armed conflicts. La Haye concludes at 8:

> … it is reasonable to believe that an armed conflict, as defined in Common Article 3, presupposes the existence of armed hostilities in the territory of one of the high contracting parties [to the Geneva Conventions], between the regular military forces and some organised armed groups…; moreover these hostilities need to be regarded as being sufficiently serious and prolonged.

[219] Protocol II did not modify the conditions under which Common Article 3 is applicable. It defines internal armed conflict as a conflict which:

> ... takes place in the territory of a high contracted party (HCP) between its armed forces and dissident armed forces or other organised armed groups, which under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol.

[220] In *Tadić* the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) defined the existence of an armed conflict:

> Whenever there is resort to armed force between states or protracted armed violence within governmental authorities and organised armed groups or between such groups within a state.

[221] In the *Limiaj* case (*Prosecutor v Limaj* IT-03-66-T, trial judgment 30 November 2005) the Trial Chamber of the ICTY considered that:

> ... some degree of organisation by the parties will suffice to establish the existence of an armed conflict.

[222] La Haye concludes that the level of organisation of armed groups, as well as the intensity of armed hostilities, seem to be the commonly accepted criteria of current international law which differentiate armed conflict from internal disturbances: at 13. I have no doubt that the civil war in Sri Lanka fell within the former class.

[223] La Haye cites President Cassese's opinion that Common Article 3 confers rights and obligations on both sides: "*La guerre civile et le droit international*" (1986) 19 RGDIP 553 at 567. The relevant norms are both customary and treaty based.

[224] These themes were not advanced before the RSAA or the High Court.

[225] The RSAA directed itself according to a statement by the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100 at [119] that:

> … a criminal act rises to the level of a crime against humanity when four elements are made out:
>
> (1) an enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
>
> (2) the act was committed as part of a widespread or systematic attack;
>
> (3) the act was directed against any civilian population or any identifiable group of persons; and
>
> (4) the person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of the attack.

[226] There can be no doubt that there had been widespread or systematic attacks by the LTTE against civilians as required by (1), (2) and (3) and relevant knowledge (4) on the part of those who committed the proscribed conduct. There is no reason to believe that there would not be further similar conduct by some persons associated with the LTTE in which the cargo on board the *Yahata* might be used. But the present question concerns more specifically the cargo of that ship, the intention of the LTTE in relation to that and, vitally, X's conduct and knowledge. None of these matters were explored below.

[227] The Crown's position, that the LTTE was engaged in civil war with the government of Sri Lanka, means that this case falls outside the "purely terrorist" category: that of belonging to a group whose essential object is the commission of proscribed acts rather than conventional war. The Crown advances that argument to meet X's contention that a participant in a civil war is not subject to the law of war

and may be open to charges of war crime or crime against humanity. But the Crown must accept the rind with the fruit. Inherent in the Crown's position is acceptance that those who do take part in civil war must not only comply with, but also receive the protection accorded to combatants by, international criminal law. In particular, they may lawfully be party to the carriage for legitimate military purposes of arms and explosives.

[228] The evidence in this case established that, deplorable though certain of the LTTE's conduct was, notably its crimes against civilians and captives, its war against the government was conducted on a much wider scale than that. Indeed it engaged in the manufacture of munitions which were used in conventional warfare against the Sri Lankan military. Such conduct did not of itself entail any crime against humanity. On the contrary, international law recognises the lawfulness of warfare conducted in accordance with the UN Charter (1945) 1 UNTS XVI and the Geneva Conventions. Some perspective is provided by the fact that for the purposes of Article 1F(b) unless a crime, even murder, is non-political, the offender is not rendered ineligible for refugee status: the Article 1F(b) exclusion is "he has committed a serious *non-political* crime outside the country of refuge prior to his admission to that country as refugee". The topic was discussed by the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533.

[229] There was no evidence suggesting that in transporting arms from Singapore to Sri Lanka the LTTE was not exercising the right of self-defence recognised both by Article 51 of the UN Charter and as an inherent right under customary international law: *Nicaragua v United States of America* [1986] ICJ Rep 14.

[230] It follows that the carriage by the LTTE vessels of arms and munitions may not be treated as *per se* unlawful. In the absence of evidence that those on board the *Yahata* were to be used for unlawful purposes, the issue is whether such carriage plus an unquantified possibility of unlawful use can amount to a substantive crime against humanity or a war crime to which X could be party.

[231] I have noted that the present point was not clearly taken before the RSAA, with its burdensome dual task of investigator and judge without the assistance of Crown counsel. Nor did the High Court receive the assistance of counsel upon it. But I am satisfied that it is unanswerable.

[232] In making its credibility finding against X the RSAA stated (and later repeated at [126]):

> [65] …the issue is whether his presence on the *Yahata* was an innocent or knowing one. Notwithstanding his denials to the contrary, the Authority is of the view that his engagement in the secretive smuggling operations of the LTTE was a fully knowing one and [there was] evidence of his dedication to the aims, objectives and methods employed by the LTTE. He knew that the items he helped smuggle into Sri Lanka would as likely be used in "conventional" warfare against the Sri Lankan Army as in perpetrating gross human rights abuses against innocent civilians.

I read the RSAA's last sentence as meaning that the items would be as likely to be used in committing crimes against humanity as in conventional warfare.

[233] Since there was, unsurprisingly, no evidence as to the ratio of unlawful to lawful uses by the LTTE of their weapons and explosives, the RSAA could not have been attempting an assessment of that kind. Its reasoning must be that one simply could have no idea to which purpose they would ultimately be put. But that means the Crown cannot establish either that this cargo was in fact going to be put to an unlawful purpose rather than used for conventional warfare or that there was a substantial risk of such prospect.

[234] The Crown's argument is that the combination of risk that the cargo would be used unlawfully and X's presence, by which he is to be taken to have accepted such risk, establishes serious reasons for believing that he thereby committed a crime against humanity and a war crime.

[235] But no authority was cited to support the argument that to carry weapons which someone else may or may not misuse makes one guilty of a crime against humanity because the recipient has done so in the past and may do so again. Such conclusion could be reached only if either the LTTE's conduct could be condemned as wholly unlawful, a conclusion inconsistent with the fact that it was a party to a

civil war (which is *ex hypothesi* lawful); or the risk was so high as to warrant concluding that, then and there, there existed serious reasons for believing that X thereby committed a crime against humanity and a war crime.

[236] English authority points the other way. In *MH (Syria) v Secretary for State for the Home Department* [2009] 3 All ER 564 (CA), a 29 year old Syrian Kurdish woman was declined asylum under Article 1F(c) on the grounds that she had joined a guerrilla group, the PKK (Kurdistan Workers Group), even though she was not engaged in combatant activities but as a nurse. The Court of Appeal held that the evidence could not reasonably be said to disclose serious reasons for considering that she had been guilty of the act contrary to the purpose of principles of the United Nations as required by 1F(c). The reasons included the fact that, although the PKK had been proscribed in 2000 and had been involved in illegal military operations and acts of terrorism, there was no suggestion that it fell at the extreme end of the continuum when mere membership may be sufficient to establish complicity in conduct infringing Article 1F.

[237] A conjoint appeal related to an Afghan who had been refused refugee status under Article 1F(a) on the grounds that he had worked for the Afghan Intelligence service (KhAD), which committed human rights violations on a large scale, and there were therefore serious reasons for considering that he had committed a crime against peace, a war crime, or a crime against humanity. Richards LJ held (at [70]):

> The general matters referred to [by Crown counsel] are insufficient to establish a case of personal participation, and he did not point to any specific evidence of personal participation that could undermine the immigration Judge's finding (in favour of the respondent) or require more elaborate reasoning in support of it. The immigration Judge's rejection of the [respondent's] assertion that he was ignorant of the abuses does not touch on the question whether he personally committed such abuses.

[238] In *R (on the application of JS (Sri Lanka)) v Secretary for State for the Home Department* [2009] 3 All ER 588 (CA) Toulson LJ delivered the judgment of the Court of Appeal allowing an appeal against the rejection of an application for judicial review by a Tamil citizen of Sri Lanka. His claim for asylum was based on his fear that if returned he would face mistreatment because of his race and membership of the LTTE, which he joined at the age of 10. He was trained in the

use of small weapons and attended classes on the history of the LTTE. He was sent to a military school in Jaffna. He later joined the intelligence division of the LTTE and took part in various military operations against the Sri Lankan army, serving as the second in command of the intelligence divisions combat unit.

[239] The original decision against his refugee status application recorded that the LTTE had over an extended period, including four years while JS was an adult and an active member of the LTTE, been responsible for a wide range of war crimes and crimes against humanity. It concluded that there were serious reasons for considering that he was aware of and fully understood the methods employed by the LTTE, and was therefore complicit in war crimes and crimes against humanity and ineligible for protection under the Refugee Convention. In the High Court it had been submitted for JS that it was not enough to say that he was a member of the LTTE, it had to be shown in what way he had supposedly committed a crime against peace or a crime against humanity. Secondly, for present purposes, the LTTE could properly be regarded as a political rather than a terrorist organisation. The Judge rejected both arguments.

[240] On appeal, the Crown made clear that it did not allege that JS had personally participated in any war crime or crime against humanity. It submitted that:

(a) There was evidence that during the period while JS was a member of the LTTE it was responsible for widespread acts amounting to war crimes or crimes against humanity. The Court of Appeal accepted that submission.

(b) There is a significant difference between the Home Secretary's having serious reasons for considering that a person has committed a war crime and an international criminal tribunal having sufficient evidence to prosecute that person. That submission was also accepted.

[241] The critical issue was the third, the Crown submitting that the information given by the appellant about his involvement in the LTTE was sufficient to provide serious reasons for considering that he committed war crimes or crimes against

humanity. The Court of Appeal rejected that submission. It cited the decision of the ICTY in *Prosecutor v Krajisnik* Case IT-00-39-A 17 March 2009, where the Appeals Chamber of the ICTY rejected the argument that the concept of joint criminal enterprise had no textual basis in the statutes and had been created and developed by the ICTY's Judges as an improper expansion of criminal liability. The Appeals Chamber held that participation in a joint criminal enterprise is a form of "commission" in breach of the ICTY Statute, but that, to commit a crime by participation in a joint criminal enterprise, the accused must have contributed to the common purpose in a way that contributed significantly to the commission of a crime. There had to be proof that the participants, including the accused, had a common state of mind that the relevant crimes forming part of the objective should be carried out. The Appeals Chamber said:

> The "bridge" … between the KCE's objective and Krajisnik's criminal liability, as far as mens rea is concerned, is consistent with a shared intent that the crimes involved in the common objective be carried out.

[242] The Court of Appeal cited *Pushparaja v Secretary of State for the Home Department* AA/000124/2007 18 January 2008 (UKAIT) which stated:

> Although in our view not falling too far short, we find that the principal or dominant purpose of the LTTE has not come to be one of the commission of an act contrary to Art 1F. On the basis of our findings, the appellant occupied within the LTTE an intermediate position of leadership and authority, with a responsibility for battlefield command and surveillance but not for atrocities or human rights abuses. In light of these conclusions … we conclude that Art 1F … do(es) not serve to exclude him from refugee… protection.

[243] The Court of Appeal further cited *KJ (Sri Lanka) v The Secretary for State for the Home Department* [2009] EWCA Civ 292 where, referring to the LTTE, Stanley Burnton LJ stated at [35]:

> … mere membership of an organisation that *among other activities* commits [acts falling within art 1F] does not suffice to bring the exclusion into place.
>
> (Emphasis in original.)

He concluded that evidence going no further than to show participation in LTTE military action did not constitute serious reasons for considering that the case fell within Article 1F.

[244] Toulson LJ in *JS* concluded that in order for there to be joint enterprise liability (at [42]):

> (a) There has to have been a common design which amounted to or involved commission of a crime provided for in the statutes;
>
> (b) The defendant must have participated in the furtherance of a joint criminal enterprise in a way that made a significant contribution to the crime's commission; and
>
> (c) That the participation must have been with the intention of furthering the perpetration of one of the crimes provided for in the statute.

[245] So the English cases are squarely in favour of X. For reasons that follow I respectfully consider that the English line of authority approaches Article 1F correctly.

[246] The law's standards are considered in the next part.

(b) The legal tests for application of Article 1F

Article 1F

[247] The article ought in principle to receive a uniform construction from the courts of each state which is party to the Refugee Convention: see *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477 at 516 – 517 (HL) per Lord Steyn. So in considering the requirement that there be "serious reasons for considering that [a refugee status claimant] has committed… a war crime, or a crime against humanity" it is appropriate to examine how courts of other jurisdictions have formulated the test.

Canada

[248] The RSAA stated:

> [89] In Canada it has long been established that the "serious reasons for considering" standard is one well below that required either under the criminal law (beyond reasonable doubt) or the civil law (on a balance of possibilities).

Section 19(1)(f) of the Immigration Act 1985 (Can), however, employs different language from that of the Convention:

> No person shall be granted admission who is a member of any of the following classes:
>
> …
>
> (f) persons who there are *reasonable grounds to believe* have committed … a war crime or a crime against humanity… .

It was that test, importing a reasonableness requirement, of which the Supreme Court of Canada said in *Mugesera v Canada* at [114]:

> … the "reasonable grounds to believe" standard requires something more than mere suspicion but less than the standard applicable in civil matters of proof on the balance of probabilities … .

[249] The RSAA cited the formulation of MacGuigan J in *Ramirez v Canada* (at 311):

> The words "serious reasons for considering"… must be taken… to establish a lower standard of proof than the balance of probabilities.

The Federal Court was considering the Refugee Convention. But at 312, in construing the Convention, MacGuigan J drew on s 19(1)(f):

> While I see no great difference between the phrases "serious reasons for considering" and "reasonable grounds to believe" I find no necessity exactly to equate one with the other, although I believe both require less than the balance of probabilities. "Serious reasons for considering" is the Convention phrase and is intelligible on its own. Nevertheless, the comparison with paragraph 19(1)(f) shows that Parliament was prepared to contemplate a standard lower than the usual civil standard in this kind of case.

He went on to reason:

> [I]t would… appear that, in the aftermath of Second World War atrocities, the signatory states to this 1951 Convention intended to preserve for themselves a wide power of exclusion from refugee status where perpetrators of international crimes were concerned.

[250] But while there had been debate on that topic, the report of the working group which recommended the phrasing now found in Article 1F was adopted by twenty votes to one with two abstentions: Goodwin-Gill & McAdam *The Refugee in International Law* (3ed 2007) at 164 – 165. As Professor Hathaway states in a passage cited by MacGuigan J:

> The compromise which emerged consisted of *the mandatory exclusion of an undefined category of persons who had committed "a crime against peace…"*
>
> *The Law of Refugee Status* (1991) at 215-216 (italics and underlining added).

[251] But it does not follow that because:

(a) the authors of the report provided for mandatory exclusion of persons who *had* committed a crime against peace;

(b) the Canadian statute contemplated a standard lower than the usual civil standard;

therefore Article 1F is to be construed as importing such a standard.

Australia

[252] The Australian cases do not speak with one voice. In *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 (FC), French J (now Chief Justice of Australia) stated at 563:

> Article 1F excludes from the application of the Convention persons with respect to whom there are serious reasons for considering that they have committed the classes of crime or been guilty of the classes of act there specified. The use of the words "serious reasons for considering that" suggests that it is unnecessary for the receiving State to make a positive or concluded finding about the commission of a crime or act of the class referred to. *It appears to be sufficient that there be strong evidence of the commission of one or other of the relevant crimes or acts.* The precise construction of that phrase does not fall for consideration in the present case as it is not in dispute that the crime relied upon by the Tribunal to ground the rejection of the claim for refugee status was committed.
>
> (Emphasis added.)

[253] In *W97/164 v Minister for Immigration and Multicultural Affairs* [1998] AATA 618 Mathews J, sitting as President of the Administrative Appeals Tribunal, reviewed the authorities governing the meaning to be ascribed to the expression "serious reasons for considering" in Article 1F(b). Her Honour said:

> ... I do not agree with the standard which was set in *Ramirez*. I find it difficult to accept that the requirement that there be "serious reasons for considering" that a crime against humanity has been committed should be pitched so low as to fall, in all cases, beneath the civil standard of proof. *The seriousness of the allegation itself and the extreme consequences which can flow from an affirmative finding upon it would, in my view, require a decision-maker to give substantial content to the requirement that there be "**serious** reasons for considering" (emphasis added) that such a crime has been committed.* The process whereby the seriousness of the allegation influences the level of proof required to substantiate it is well known to Australian courts (*Briginshaw v Briginshaw* (1938) 60 CLR 336, *Helton v Allen* (1940) 63 CLR 691).
>
> (Emphasis added.)

[254] *In Arquita v Minister for Immigration & Multicultural Affairs* (2000) 106 FCR 465 (FCA) Weinberg J stated:

> [54] It is sufficient, in my view, if the material before the decision-maker demonstrates that there is evidence available upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. To meet that requirement the evidence must be capable of being regarded as "strong". It need not, however, be of such weight as to persuade the decision-maker beyond reasonable doubt of the guilt of the applicant. Nor need it be of such weight as to do so on the balance of probabilities. Evidence may properly be characterised as "strong" without meeting either of these requirements.
>
> [55] To the extent that the reasons of Mathews J in *W97/164 v Minister for Immigration and Multicultural Affairs* … suggest to the contrary, I respectfully disagree.
>
> [56] The expression "serious reasons for considering" means precisely what it says. There must be reason, or reasons, to believe that the applicant has committed an offence of the type specified. That reason or those reasons must be "serious".
>
> [57] It is dangerous to reason by analogy in this area. The meaning to be attributed to the word "serious" will depend upon the context in which that word is used. It would be wrong, for example, to equate the test under Art 1F(b) with what would arguably be a lesser standard required for the grant of an interlocutory injunction….
>
> [58] In determining the meaning to be ascribed to the word "serious" in the context of Art 1F(b) it is necessary to bear in mind the fact that the Article

operates to deprive a claimant for refugee status of the opportunity to have his or her claim considered on its merits. An unduly wide interpretation of the word "serious" in this context would affect the rights of the individual in a most profound way. One would expect, therefore, that the material in support of a belief that a person has committed an offence of the type specified would have significantly greater probative value than the material required to support an interlocutory injunction…

[59] Perhaps a more pertinent analogy may legitimately be drawn with the test that must be satisfied before a person may be committed to stand trial for an indictable offence…

[60] It is clear that a magistrate would not, under any formulation of the committal test which applies in this country, commit a person to stand trial for an indictable offence unless there were at least "serious reasons for considering" that he had committed that offence. That does not mean that the evidence must persuade the magistrate beyond reasonable doubt, or even on the balance of probabilities, of that fact. It is interesting to note that the phrase "strong evidence" which French J adopted in *Dhayakpa* in explaining the expression "serious reasons for considering" in Art 1F(b), is not dissimilar to the statutory formulation which was used, historically, in relation to committal proceedings before the test was modernised, namely, that there be a "strong and probable presumption of guilt".

(Emphasis added.)

England

[255] In *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, a case concerning Article 1F(c), Sedley LJ stated:

[2] When the Convention was drawn up in Geneva in 1951, one of the concerns of the state parties was that use might be made of it by individuals guilty of the kinds of conduct against which the Convention was designed to afford protection.

…

[27] ... Until the Home Secretary has produced evidence capable of amounting to serious reason for considering that an individual comes within one of the Art 1F categories, there can be no foundation for denying him such protection as the Convention would otherwise afford. In this simple sense, which was the sense adopted by common consent before the IAT in *KK (Turkey)* [2004] UKIAT 00101, there will be a presumption of innocence in Art 1F proceedings. The critical questions are, first, what standard of proof is required to displace it, and second what evidence can lawfully contribute to such proof.

…

[33] It is part of [counsel's] case that the standard of proof set by Art 1F is cognate with the criminal standard, that is to say proof beyond reasonable doubt or such that the tribunal is sure of guilt. This is manifestly not right.

> *The whole point of art 1F is that it is dealing, at least in limbs (a) and (b), with people who in many instances might have been convicted and gaoled but have not been. If the receiving state is in a position to prosecute them, it is a necessary assumption that it will do so. Art 1F therefore deals with asylum seekers who are suspect but still at large. At the same time it clearly sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.*
>
> [34] *What it says can, however, be legitimately read in the light of the co-ordinate French text, which uses the phrase "des raisons sérieuses de penser". This certainly imports no additional weight into the verb "consider" in the English text.*
>
> ...
>
> [39] ... Once again, the need is to give effect to the words on the page, bearing in mind the scope and purpose of the provision but without fixed or prior limitations other than those contained in the text itself.

[256] Arden LJ's concurring speech also dealt with the standard of proof issue (at [77]):

> There is no doubt that the Refugee Convention imposes obligations of the highest importance on states to provide refuge to refugees, and that the exceptions from the obligation to give refuge, such as that contained in art 1F(c), must be applied only when the state justifies this course as required by art 1F(c). *As to the meaning of "serious grounds", art 33(2) of the Refugee Convention provides some guidance. Under that provision a refugee cannot claim the benefit of refoulement if "there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is…". The expression "serious reasons" is different from, and in my judgment on the natural meaning of the words requires more than, "reasonable grounds", for otherwise the same phrase would* have been used in art 1F(c).
>
> (Emphasis added.)

Discussion

[257] The issue is not of criminality – whether X committed an offence. It is of status in terms of the Refugee Convention: is he to be classed as a man of whom there are serious reasons for considering that he has committed a war crime, or a crime against humanity, and who is thus ineligible to be a refugee? If so, he is in an emphatic sense an outlaw: expelled from access to courts internationally even to present a claim that he needs but cannot avail himself of the protection of his own country.

[258] The requirement that there *are*, not may be, *serious* rather than speculative reasons for considering that the applicant has committed a war crime or a crime against humanity establishes a condition precedent to the Article 1F bar: unless such reasons exist it may not be applied.

[259] Where legislation establishes a condition precedent to a result that gravely affects a person's most basic human rights, a court of review does not apply the *Wednesbury* standard employed by the Judge in this case. It will itself determine whether the decision of the primary decision-maker was justified. In doing so it will recognise the advantages enjoyed of having seen and heard the witnesses and of special expertise, such as that of the RSAA. But on such issues it will not defer to the primary decision-maker as it will in *Wednesbury* cases where the issue is not, as here, the factual determination of status.

[260] The distinction was explained by Lord Atkin in *Eleko v Government of Nigeria* [1931] AC 662 (PC). The Governor of Nigeria had authority to make a deportation order in respect of native chiefs. He purported to make such an order against the appellant who denied he had the status of chief. Lord Atkin stated at 670:

> Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty … of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive. The analogy of the powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in question, if the Home Secretary deported a British subject in the belief that he was an alien, the subject would have the right to question the validity of any detention under such order by proceedings in habeas corpus, and that it would be the duty of the Courts to investigate the issue of alien or not.

[261] In *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74 (HL) the issue was whether the appellants were subjected to orders for detention and pending removal made by immigration officer on the grounds that they were illegal immigrants. Lord Fraser at 97 made the following analysis, to which paragraphing has been added:

> [1] The second general issue relates to the function of the courts and of this House in its judicial capacity when dealing with applications for judicial review in cases of this sort:
>
> > (a) is their function limited to deciding whether there was evidence on which the immigration officer or other appropriate official in the Home Office could reasonably come to his decision (provided he acted fairly and not in breach of the rules of natural justice), or
> >
> > (b) does it extend to deciding whether the decision was justified and in accordance with the evidence?
>
> [2] On this question I agree with my noble and learned friends, Lord Bridge and Lord Scarman, that an immigration officer is only entitled to order the detention and removal of a person who has entered the country by virtue of an ex facie valid permission if the person is an illegal entrant. That is a "precedent fact" which has to be established.
>
> [3] It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief.
>
> [4] Accordingly, the duty of the court must go beyond inquiring only whether he had reasonable grounds for his belief.
>
> [5] In both the present cases the immigration officers stated, in what appears to be a standard formula, that there were "reasonable grounds to conclude" etc. That formula indicates, in my opinion, that they applied the wrong test.

Other speeches were to similar effect. So a removal order could be made only if the person held the status of illegal entrant, a question which the courts must themselves determine at first instance and on appeal. Lord Scarman added that the principle applies to all persons within the jurisdiction (at 111):

> There is a suggestion that because an alien is liable to expulsion under the royal prerogative and a non-patrial has no right of abode, it is less difficult to infer a Parliamentary intention to deprive them of effective judicial review of a decision to infringe their liberty. And, secondly, the problem of proof.
>
> Habeas corpus protection is often expressed as limited to "British subjects". Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic "no" to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed "the black" in *Sommersett's Case* (1772) 20 St.Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed.

[262] The latest example of the distinction is *Secretary of State for the Home Department v Nasseri* [2009] 3 All ER 774 (HL) decided on 8 May 2009. At [12] Lord Hoffmann stated:

> It is understandable that a judge hearing an application for review should think that he is undertaking a review of the Secretary of State's decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. In such a case the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct approach when the challenge is based upon an alleged infringement of a Convention right.

He cited to like effect *R(SB) v Governors of Denbigh High School* [2007] 1 AC 100 (HL) on the question whether a school's decision to require pupils to wear a uniform infringed their right to manifest their religious beliefs; the issue was not whether the decision-making process was defective but whether the applicant's Convention rights had been violated.

[263] The Convention at issue in those cases was the European Convention on Human Rights. But the principle is the same with the Refugee Convention. The judgment of this Court in *Butler v Attorney-General* [1999] NZAR 205 led to the addition to the Immigration Act 1987 of Part 6A. That gave specific effect in domestic law to New Zealand's obligations at international law as a signatory to the Refugee Convention and its Protocol. Section 129D requires the RSAA in carrying out its functions to act in a manner that is consistent with New Zealand's obligations under the Convention.

[264] That fact has not always been recognised. In *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514 the House of Lords considered the Refugee Convention for the first time. It was called upon to construe s 4(1) of the Immigration Act 1971 (UK) which gave power to immigration officers to grant or withhold leave to enter the United Kingdom. Giving the leading speech Lord Bridge rejected a submission that *Khawaja* applied to an asylum application. At 522 he stated that the decision to grant or withhold leave was discretionary and a refugee determination, although important, was no more than an exercise of that discretion. So it was challengeable only according to *Wednesbury* principles.

[265] But the error of applying English domestic principles rather than those of the Refugee Convention was detected by Lord Steyn in *Adan* at 515 – 516:

> … the inquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law. Thus the European Court of Justice has explained how concepts in the Brussels Convention must be given an autonomous or independent meaning in accordance with the objectives and system of the convention… Closer to the context of the Refugee Convention are human rights conventions where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions.

[266] Lord Bridge had overlooked the fundamental point that under the Refugee Convention a claim to be a refugee concerns *existing status at international law*, not a matter on which a domestic decision-maker has a discretionary power comparable to the State's authority to grant or withhold rights of residence. It is strongly to be presumed that domestic law will conform with the State's international obligations.

[267] In "Proportionality, Deference, *Wednesbury*" [2008] NZ L Rev 423 Professor Taggart stated at 434 that:

> … recognition of the need to intensify review when fundamental human rights are threatened is of a piece with the "principle of legality". In *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 para 18 Laws LJ spoke of this as a "settled principle of the common law, one which is entirely independent of [the United Kingdom's] incorporation of the [European] Convention by the Human Rights Act 1998… the intensity of review in a public law case will depend on the subject-matter in hand; and so any interference by the action of a public body with a fundamental right will require a substantial objective justification… .
>
> In *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL) para 26 Lord Steyn disagreed with the Master of the Rolls in *Mahmood* – saying Lord Phillips MR's formulation was "couched in language reminiscent of the traditional *Wednesbury* ground of review" – and that was obviously not a good thing. In contrast, Lord Steyn expressly approved of Laws LJ's formulation…

At 465 Professor Taggart proposed merging rights in domestic human rights instruments and fundamental common law rights under the term "proportionality", considered in *Mihos v Attorney-General* [2008] NZAR 177 (HC) (see [272] below).

While the opinion of Taggart, as New Zealand's leading academic authority in this field, is of particular importance (and refers to potential differences between New Zealand and English law), it may be noted that a similar theme appears in Poole "The Reformation of English Judicial Review" (2009) Cambridge Law Journal 142.

[268] Our task is to construe and apply the Refugee Convention in exercise of what is in truth an international function. If X's status under the Convention is that of a man of whom there are serious reasons for considering that he has committed a war crime, or a crime against humanity and thus is ineligible to be a refugee, it is the task of the RSAA and the courts to declare accordingly. The reverse is also the case. Either decision is one of grave significance. The determination of X's status depends whether or not he has a double right:

(a) to continue to pursue his claim under Article 1A;

(b) of scarcely less importance, to be free of the outlaw status.

[269] The claim to non-outlaw status does not receive express reference in the New Zealand Bill of Rights Act 1990. But its character is of the same fundamental type which courts in other jurisdictions place at the intensive end of Professor Taggart's spectrum of judicial review.

[270] The assessment of that status is initially the role of the Refugee Status Branch and, on appeal, the RSAA. The Act contains no provision for further appeal against the determination of the RSAA. But Parliament is well aware of the constitutional role of the courts of general jurisdiction – the High Court and the appellate courts – to consider applications to review decisions under the Immigration Act; s 146A fixes a three month time limit for their commencement which in special circumstances the High Court may extend. How that power is exercised is a matter for the common law as supplemented by the Judicature Amendment Acts.

[271] In *Dunsmuir v New Brunswick* [2008] 1 SCR 190 the Supreme Court of Canada divided approaches to judicial review into two classes of test: one correctness and the other reasonableness. As was pointed out by Binnie J in that case the latter classification is imprecise because there remains the need to determine

just what test of reasonableness is required in a particular context. In *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 at [377]-[378] this Court referred to the difficulties of the new Canadian approach. But on any approach the international status of a person – whether or not he is one against whom there are serious reasons for considering that he has committed a war crime, or a crime against humanity – is of fundamental importance. Since classification of the status requires the same result from the courts of every state, that requires a uniform test. Because of its importance, that can only be of correctness. Certainly, as was recognised by Sedley LJ in *Karanakaran v Home Secretary* [2000] 3 All ER 449 at 477 – 480 (CA) the task of the decision-maker is evaluative. The specialist experience of the RSAA in assessing conditions in troubled states, with which the courts of general jurisdiction lack familiarity, will be a major factor which they will take carefully into account in performing their function. But in a passage endorsed by Lord Steyn in *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840 at 848 (HL) Sedley LJ goes on to state (at 477):

> What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the Convention issues.

If that final passage signifies that the test of review is other than one of correctness, it is inconsistent not only with that of *Adan* but with the *Eleko/Khawaja/Daly/Nasseri* standard, which rejects *Wednesbury* in favour of a correctness test. I would, with great respect, venture to add the further proviso:

> provided further that the Court will not content itself with the "most anxious scrutiny" test but appraise whether, giving full credit to the specialist competence of the RSAA, its decision is correct.

The reason is that the passage echoes *Bugdaycay* and while both require close review, said in *Bugdaycay* at 531 to be necessary when "[t]he most fundamental of all human rights… the individual's right to life [is] under challenge", each connotes no more than a careful example of the deferential *Wednesbury* approach. To reject *Wednesbury* in favour of a correctness test is not to usurp the function of the expert inquisitorial RSAA, let alone retry a case in which this Court has not heard and seen the witnesses. It is to perform the function of a court of general jurisdiction, after

giving full weight to the RSAA's conclusions, to assess for itself whether the status determination accords with its own appraisal. I add that the present case may be contrasted with *Minister of Citizenship and Immigration v Khosa* (2009) 304 DLR (4th) 1 (SCC), which concerned the exercise of a humanitarian discretion under Canadian domestic law, rather than international status.

[272] Mr Carter invited consideration of the criteria to be taken into account in determining the intensity of review suggested in *Mihos v Attorney-General* at [107]:

(a) the scheme of the Act;

(b) the subject-matter;

(c) the implications of the decision;

(d) the capacity of the Court compared with that of the decision-maker;

(e) the context of the decision.

These support the need for correctness review in the present class of case.

[273] As to (a), the scheme of the Act, s 129D states:

> **129D Refugee Convention to apply**
>
> (1) In carrying out their functions under this Part, refugee status officers and the Refugee Status Appeals Authority are to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention.
>
> (2) The text of the Refugee Convention is set out in Schedule 6.

By appending the Refugee Convention and requiring that the RSAA comply with it Parliament has made clear that failure to do so is unlawful. That does not confer any discretion and points to judicial intervention in the event of non-compliance.

[274] As to (b), the subject-matter, and (c), the implications of the decision, the case engages a question of fundamental human rights at international law, breach of which would be of the utmost gravity. While ss 8 and 9 of the New Zealand Bill of Rights Act 1990 would prevent executive removal which would expose X to loss of life, torture, or cruel, degrading, or disproportionately severe treatment, a

determination that X lacks the right to seek recognition as a refugee is a form of outlawry.

[275] As to (d), the capacity of the Court compared with that of the decision-maker, the position is like that of any court of general jurisdiction required to review the judgment of an expert tribunal. The RSAA's experience and undoubted competence will receive the same kind of consideration as its advantage of having seen and heard the witnesses. Where such considerations are relevant they will receive due weight. But they afford no excuse to the reviewing court to wash its hands of the case or defer to the decision-maker below, as courts of general jurisdiction will defer to rating decisions by local authorities and commercial decision-making under statutory authority. The protection of fundamental human rights is the core business of the courts of general jurisdiction. Such rights will receive priority attention and intensive consideration on review.

[276] Finally as to (e), the context of the decision, the relevant considerations have been discussed. Taken together, the factors all point to the need for review of an intensity which can be achieved only by application of the correctness standard.

[277] That standard requires proof not that X has actually committed a war crime or a crime against humanity but of the existence of "serious reasons for considering" he has done so. As Arden LJ observed in *Al-Sirri*, "serious reasons" is different from, and requires more than, "reasonable grounds". The approach of the English Court of Appeal which uses the words of Article 1F, rather than offering comparisons with the standards of civil and criminal cases, neither of which employs the 1F formula, captures the point.

The standard of risk to employ

[278] No doubt the carriage of armaments which the carrier knows are to be used to commit a war crime or crime against humanity itself constitutes such crimes. If the LTTE used its armaments only to commit such crimes, participation in such carriage by a chief engineer with such knowledge would make him party to the crime.

[279] But that is not this case. Here there was at most an unquantified possibility that the armaments might be used for such purpose. So the initial question is: what quantum of risk of use of the cargo for a war crime or crime against humanity, rather than for conventional military purposes, must be established for the carriage itself to constitute such a crime?

[280] In civil law the House of Lords has only recently moved to accept that, by proving that the defenders had materially increased the risk of injury, the pursuer had proved that they had materially contributed to his injury: *R v McGhee* [1973] 3 All ER 1008 (HL). Lord Rodger in *Barker v Corus UK Ltd* [2006] 2 AC 572 at [77] (HL) described that step as "radical".

[281] "Materially increased the risk" of relevant crime must be the lowest possible standard for the Crown to meet in this case. Although the 110 tonnes of explosives said to be carried by the *Yahata* is large by any standard, no attempt was made in evidence to establish the incidence of the LTTE's legitimate use of matériel in combat against its use for war crimes and crimes against humanity. We cannot now embark upon speculation as to that.

[282] But it is in any event unlikely that such a low level test could be regarded as appropriate to measure serious reasons for considering commission of a crime against humanity or war crime. Pitched so low, it might have caught members of the mercantile marine who during the Second World War manned vessels carrying explosives which the crew knew might be used in retaliatory raids on cities rather than against military targets. While at the time of the Battle of the Atlantic international criminal law tended to focus on states rather than actors (Cassese at 5), the point illustrates the need for balance and, indeed, proportionality in one of the senses of that controversial term.

[283] The opinion of the leading writer on international criminal law is against such a low level test. Cassese (at 10) recognises that, like most national legal systems, international rules criminalise conduct creating an unacceptable risk of harm. Where there are conflicting interpretations of a rule the construction in favour of the accused (*dubio pro reo*) may be preferred (50-51); although that must be reconciled

with the evolution of the law. Recklessness (*dolus eventualis*), where a person foresees that his conduct is likely to produce prohibited conduct and yet willingly takes the risk of so acting, is a recognised basis for liability under some international rules (66-67). And (at 226):

> Although there is no consistent case law on this matter, it would seem that the gravity of international crimes (or at least the most serious of them) may warrant the conclusion that planning the commission of one or more of such crimes is punishable per se even if the crime is not actually perpetrated… .
>
> It would follow that planning an international crime is also punishable per se as a distinct form of criminal liability, subject to a set of conditions that can be derived from the general system of [international criminal law]:
>
> > 1. Only the planning of serious or large-scale international crimes constitutes a discrete offence… for international crimes of lesser gravity… those rules must be construed in such a way as to favour the accused (*favor rei*). Consequently, the mere planning of those crimes of lesser gravity may be held not to constitute a crime per se…
> >
> > 3. As for the requisite mens rea, it is necessary for the author to intend that the crime be committed, or else he must be aware of the risk that the planned crime would be perpetrated by him or by someone else (recklessness or *dolus eventualis*)
> >
> > …
> >
> > … in international law no customary rule has evolved on conspiracy on account of lack of support from civil law countries for this category of crime. (In civil law systems, entering into agreement to commit a crime is not punishable per se, unless it leads to the perpetration of the crime; only exceptionally, and for such categories of serious offences as undermining state security or at setting up associations or organisations systematically bent on criminal conduct in various areas, is conspiracy as such prohibited). In 2006 in *Hamdan* the US Supreme Court, per Justice Stevens, rightly rule out that conspiracy is criminalised as a war crime in international law.

[284] President Cassese's approach and the English decisions, most recently *JS*, are to similar effect. To be disqualified under Article 1F there must be serious reasons for considering that the individual was personally party to a prescribed crime.

[285] Section 66 of the New Zealand Crimes Act 1961 captures the various concepts which other systems of law employ to meet that test. A person is guilty of the crime if he or she:

(a) commits it;

(b) does or omits an act for the purpose of aiding another to commit it;

(c) abets any person in the commission of the act;

(d) incites, counsels or procures another to commit the offence or is party to a common intention to carry out an unlawful purpose and assist one another therein and in the course of that conduct there is committed by one of the participants an offence whose commission was known to be a probable consequence of the prosecution of the common purpose.

[286] Certainly, the evidence of "serious reasons" is not confined to material satisfying conventional rules of evidence: *Karanakaran* at 477. But the evidence in this case does not provide serious reasons for considering that X's conduct meets any of those tests.

[287] It follows that X's appeal must be allowed on the ground that even on the basis accepted by the RSAA there is no sufficient evidence to establish that his conduct meets the requirements of Article 1F.

(c) What was X's role?

[288] It is therefore strictly unnecessary to review in detail the challenges to the evidence against X. But because there are problems with some of the strong factual findings it is desirable to offer some comment upon them.

The quantity of explosives

[289] The first point concerns the quantity of explosives carried on the *Yahata* which, while equipped as a reefer, was not used for carrying frozen goods. It is common ground that there is no evidence implicating either the vessel or X in LTTE activity prior to the final voyage from Singapore en route to Sri Lanka. X was questioned about the fact of the LTTE's ownership of the vessel and LTTE

involvement of other crew members. They included an oiler, Mohan, who said that after being detained and tortured by the Indian peacekeeping force he had joined the LTTE in 1988.

[290] For two years Mohan worked in a LTTE shell factory manufacturing munitions. He served on other LTTE vessels which ferried clothes, medication and petroleum products between Thailand and Sri Lanka. His last voyage was on the *Yahata.* The RSAA correctly records that "[i]n his statement he describes the vessel unambiguously as carrying arms and explosives for the LTTE". The unedited statement reads:

> 11. During my last trip from Singapore which was made on vessel YAHATA to Sri Lanka via Thailand on December 15, 1992. This vessel belonged to the LTTE and was carrying arms and explosive for the LTTE. Mr Krishna Kumar @?? Kittu (Second in command after Mr Villaupllai Prabakaran) jointed us along with 9 others, half way at Straits of Mallaca. He too was returning back to Sri Lanka.
>
> 12. When we reached about 440 nautical miles southeast of Madras on the 13 January 1993 the Indian Coast Guard spotted our ship and suspected the vessel as belonging to the LTTE. The coast guard requested the Master of the vessel to allow for boarding for verification, however the Master of the vessel refused this. He further told the Coast guard that the vessel was carrying 110 tonnes of explosives and thereafter we tried to flee away from the Coast Guard Ship.
>
> 13. We were however followed by the coast guard for about 2½ hours and 2 warning shots were fired and we finally agreed to sail accompanied by the coast guard towards Madras port.
>
> 14. On the 14 January 1993, the Indian Naval ship also jointed the coast guard and escorted our ship to Madras. Upon arriving at the Madras port. We together with Mr Kittu were ordered to be surrendered to the Indian authorities. We refused, and requested to be represented by one of the Advocates Mr Chandrasekaran in India. The Indian authorities than requested us to assemble on the navigation side of the vessel without arms for which we refused and were standing with our arms. During the course of these the Indian Navy open fire and one of our crewmembers were killed and one injured. During these shootout I was inside the ship having my breakfast. I heard the shooting and went out to see what was happening.
>
> 15. I notice that one of the crewmembers were shot death and one injured and the middle of the deck got fire. Then rest of us jumped into the sea. The others and I were rescued and arrested by the coast guard. We were then transferred from Madras to Visakhapatnam Central Prison, Andrapradesh, India on the 18 January 1993.

[291] The statement supports the finding that the vessel was carrying explosives. Its account that the quantity was 110 tonnes is dependent on what Mohan said he heard the captain say when responding to the interception by the Indian navy with the passage of the vessel through international waters but without displaying a national flag. The prosecution contention that the vessel was actually carrying such quantity of explosives was later rejected by the Indian court which tried X and others, on the basis that a vessel of 130 tonnes could simply not accommodate 110 tonnes of explosives. That conclusion was not challenged in the subsequent judgment of the Indian Supreme Court.

[292] The captain's statement may have been an exaggeration aimed at dissuading the naval vessel from approaching. But it cannot be taken literally. Without it there is no evidence of what quantity of explosives was on board.

Involvement with the LTTE

[293] The RSAA conducted two substantial oral hearings at each of which X was closely questioned by the members. It described X as intelligent, hardworking and conscientious with exceptional recall of his personal history. When it was put to X (at 1624-1628), "We know … that the vessel was carrying arms and explosives" for the LTTE, he responded (at 1625), "No I didn't know that". The RSAA inferred from the whole of the evidence that he was lying.

[294] It found that:

> [65] …[X's] engagement in the secretive smuggling operations of the LTTE was a fully knowing one and evidence of his dedication to the aims, objective and methods employed by the LTTE. He knew that the items he helped smuggle into Sri Lanka would as likely be used in conventional warfare against the Sri Lankan Army as in perpetrating gross human rights abuses against innocent citizens.

[295] En route to that conclusion it reasoned that the LTTE would never have engaged a chief engineer who was not trustworthy. His subordinate Mohan was a LTTE member, as were others on board. The RSAA found it inconceivable that during his six months on the vessel he did not discern that it was LTTE owned and used as a munitions carrier. But in the absence of evidence that munitions were

carried on previous voyages, since 95 per cent of the activity of LTTE vessels was legitimate commerce, there is no particular reason to dispute X's account that he was unaware of arms or munitions being carried on such voyages.

[296] Nor is there more than suspicion that X knew before that voyage that the vessel was owned by the LTTE.

[297] Approaching Singapore, from where it made its final trip, the vessel was permitted to drift for 10 days; X was challenged as to reason and responded that they were ahead of schedule. Such delay, while suspicious, is consistent with a desire to avoid wharf charges by arriving prematurely and does not of itself go beyond suspicion to proof.

[298] After leaving Singapore the vessel was approached by another, from which ten armed men including Mr Kittu boarded the *Yahata*. There was no opportunity for X to withdraw from the vessel after that stage. Mr Kittu was in command when the vessel was intercepted by the Indian navy and forced to approach the Indian coast. It is notable that following the navy gunfire it was the crew who were rescued from the sea and the LTTE new arrivals who went down with the ship.

[299] X was examined to the effect that he came from an area where the LTTE was based; that he joined the vessel from Trang where the LTTE has a cell; that he must have had conversations with LTTE crew members; and that if he was not a member the LTTE would never have appointed him to a vessel intended to perform the ultimate trip from Singapore with Mr Kittu and the other nine LTTE new arrivals on board. Against that, two of the new arrivals were posted to the engine room. No explanation was given for that course, which is consistent with Mr Kittu's belief that X required supervision.

[300] It is unnecessary to delve further into the present point. The experience and high reputation of the RSAA is to be added to the normal advantage of a tribunal which has seen and heard the witnesses. I would nevertheless observe that, while there were obvious grounds for suspicion, the evidence supporting the RSAA's

conclusion is less convincing than it considered. There is also need to take account of the Indian proceedings in which detailed oral evidence was called.

The Indian proceedings

[301] The record before the RSAA included the judgments at first instance and of the Supreme Court of India in the criminal proceedings against X and others. The trial Judge rejected the prosecution evidence that the vessel, of 130 tonnes, was carrying 110 tonnes of explosives as well as petro-chemicals, which was an assertion alleged to have been made by the captain to a naval officer. He found that there were on board 10 AK 47 rifles, one FNC rifle, 25 to 30 hand grenades, one RPG launcher and 500-2000 rounds of ammunition. He further found that the Indian navy had no right to interfere with the free passage of the vessel sailing in international waters between Singapore and Sri Lanka. He acquitted X and his co-accused of all charges. The Supreme Court did not interfere with the factual findings save to hold that they had used criminal force against the Indian naval officers with intent to prevent them from discharging their duty and had been party to a common intention to destroy the vessel.

[302] The RSAA treated the decision of the Supreme Court of India as definitive and was accordingly critical of the first instance judgment. But, with respect to that great court, with its unparalleled responsibilities and achievements, we share the concerns about that decision which were expressed by Courtney J.

The High Court decision

[303] Mr Henry submitted in the High Court that there was no evidence that X had used force against the naval officers or participated in destroying the vessel. Nor did the Supreme Court of India give specific attention to his individual position. Moreover the notes of evidence of the trial were unavailable to the RSAA. Crown counsel submitted that these considerations did not make the Supreme Court's decision unreliable; it may be inferred that it argued that the Supreme Court would have had those materials and relied on them.

[304] Courtney J accepted that there was reason for concern about the Supreme Court judgment; that given the careful consideration of other aspects of the evidence some reference to evidence against X might have been expected if such evidence existed. But she held that, coupled with the RSAA's finding on other evidence that X was a loyal supporter of the LTTE and willingly on board the *Yahata* with knowledge of its cargo, it was sufficient to provide serious reasons for considering that X had committed the crimes of which he was convicted. In doing so she directed herself that the RSAA was not required to be satisfied to the civil standard of proof.

[305] Several points arise. First, while the captain was reported to have *told* the Indian authorities that there were 110 tonnes of explosives on board the vessel, an account supported by an acknowledged LTTE supporter Mohan whose statement was before the RSAA, we have noted that the court of first instance rejected the prosecution contention that there were *in fact* such explosives on the 130 tonne vessel. The Supreme Court did not reverse that decision.

[306] Secondly, the Supreme Court's conclusion that the crew including X sank the *MV Yahata* is without reasons or, it seems, evidence.

[307] Thirdly, it does not at all follow that, even if the Supreme Court was right to convict X of using criminal force against the Indian naval officers with intent to prevent them from discharging their duty and of being party to a common intention to destroy the vessel, the RSAA was therefore justified in bringing him within Article 1F. The High Court did not engage with that issue.

Article 1F(b): non-political crime

[308] The RSAA found and the High Court agreed that X was party to the offences of which the Supreme Court found him guilty and that there were therefore serious reasons for considering that he had committed a non-political crime. But, as the High Court of Australia demonstrated in *Minister for Immigration and Cultural Affairs v Singh*, such determination requires care.

[309] I disagree with the conclusion below on two grounds. The first is that there was no basis for the charges. There is nothing in either the judgment at first instance or the reasons on appeal to suggest that the vessel was sunk by persons on board rather than by gunfire from the naval vessel. Nor is there any suggestion that X or, for that matter, the others who survived participated in any such conduct even if it was performed by Mr Kittu and the LTTE personnel who went down with the ship.

[310] The second is that the entire prosecution case was that the *Yahata* and its crew were engaged in highly political activity. To assert that at the last moment, between the gunfire and the sinking, that activity became non-political is unreal.

Decision on X's appeal

[311] Coupled with their adoption of a less exacting test than the law requires which necessitates that the appeal be allowed, the RSAA and the High Court did not focus on the significance of the LTTE's status as a combatant in a civil war. Had they done so X's application for review would have had to succeed. While I am concerned about aspects of the other factual findings I do not rest this judgment upon that topic.

[312] I would allow the appeal and decline to direct a rehearing of the Article 1F issue on which it is not reasonably open to the RSAA to find against X. There must be a further hearing before the RSAA of the Article 1A issue in respect of X.

[313] Nothing in this judgment should be read as detracting from the high respect in which the RSAA as constituted in this case is held. But appearance of predisposition must be avoided and the RSAA should be reconstituted for the next hearing.

The cross-appeal against Y

[314] The RSAA found that there was no significant risk to Y if she were to return to Sri Lanka. It emphasised the absence of difficulties experienced by her with government officials or the LTTE from the time her husband left Sri Lanka in

July 1992 to join the *Yahata* until her own departure from Sri Lanka in December 2001. She had been issued with a Sri Lankan passport on 26 November 2001. She was able to leave Colombo after the *Yahata* episode and return to the LTTE-controlled area of the north and from there to leave for New Zealand.

[315] It rejected her submission that the authorities had made no connection between her and her husband and added that there had been a cease-fire in effect since February 2002 when a government ban on the LTTE was lifted. It therefore dismissed her application under Article 1A on the ground that she had failed to established the "well founded fear of being persecuted" element.

[316] Courtney J was satisfied that the RSAA had erred in using past experience to assess risk without considering whether there had been a change of circumstances, and in failing to consider whether, despite the cease-fire, persons in Y's position as family of persons found to be LTTE supporters are suffering persecution. She remitted the matter to the RSAA for reconsideration.

[317] Mr Carter submitted that the evidence before the RSAA was relevant to future as well as past conditions and it should be credited with having considered the effect of the change in circumstances.

[318] This Court comes to consider its decision with the benefit of hindsight. The recent tragic events in Sri Lanka make plain that the expectation of the RSAA that the cease-fire would continue was optimistic. While the present judgment raises questions about the RSAA's findings that X was a leading member of the LTTE it has not proposed setting those findings aside. Nor are those opposed to the LTTE likely to view his position in any refined way. Much has happened in Sri Lanka even since argument in this appeal. There is obvious need for reconsideration by the RSAA of whether in today's conditions Y satisfies the requirements of Article 1A.

Decision on cross-appeal

[319] I would dismiss the cross-appeal.

Costs

[320] We were told that X and Y are legally aided. I would therefore reserve costs.

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