Administrative
Appeals
Tribunal

DECISION AND REASONS FOR DECISION [2006] AATA 320

ADMINISTRATIVE APPEALS TRIBUNAL	**)**	
	)	**No N2005/495**
GENERAL ADMINISTRATIVE DIVISION	**)**	

Re **"SRYYY"**

Applicant

And **Minister for Immigration and Multicultural Affairs**

Respondent

DECISION

Tribunal	Professor GD Walker, Deputy President
Date	5 April 2006
Place	Sydney
Decision	The decision under review is affirmed.

.....
Professor GD Walker
Deputy President

CATCHWORDS

IMMIGRATION – REFUGEE CONVENTION – refusal of protection visa – remittal from Federal Court of Australia – Article 1F of Refugees Convention – crimes against humanity or serious non-political crimes outside Australia prior to entry – examination of the applicant's role as interrogator in the Sri Lankan army – Elements of crime against humanity of torture - Rome Statute of International Criminal Court – all elements of crime satisfied – serious reasons for considering applicant committed the crime against humanity of torture – partial defence of superior orders not relevant.

Migration Act 1958 ss 36(1), 36(2), 65, 500(1)(c)

Migration Regulations 1994

Convention Relating to the Status of Refugees 1951

United Nations Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status*

"Elements of Crimes" as adopted by the Assembly of State Parties, New York, 10 September 2002

Arquita v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 465

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

Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556

Ovcharuk v Minister for Immigration and Multicultural Affairs (1998) 88 FCR 173

Prosecutor v D. Kunarac, R. Kovac, Z. Vickovic, Appeals Chamber, 12 June 2002

Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam (2003) 214 CLR 1

Re SRYYY and Minister for Immigration and Multicultural Affairs [2003] AATA 927

SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1588

SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 220 ALR 394

SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 9

Teoh v Minister for State for Immigration and Ethnic Affairs (1995) 183 CLR 273

REASONS FOR DECISION

5 April 2006 Professor GD Walker, Deputy President

Summary

1. The applicant, SRYYY, aged 26, a citizen of Sri Lanka, applied to the Administrative Appeals Tribunal for a review of a decision of a delegate of the respondent, the then Minister for Immigration and Multicultural and Indigenous Affairs, made on 4 December 2002 to refuse the grant of a protection (Class XA) visa to the applicant on the grounds that he is not a person to whom Australia owes protection obligations under the Convention Relating to the Status of Refugees of 1951 ("the Refugees Convention").

2. On 19 September 2003, the tribunal (Deputy President Handley) affirmed the decision. On 17 March 2005 an order was made by Merkel J of the Federal Court of Australia that the decision of the tribunal of 19 September 2003 be set aside and the matter remitted back to the tribunal to be determined according to law.

3. The respondent, the Minister for Immigration and Multicultural Affairs, states that the applicant, as a member of the Sri Lankan Army, assaulted and tortured citizens associated with the Liberation Tigers of Tamil Eclon ("LLTE"). The respondent therefore refused SRYYY's protection visa on the basis that as he had committed war crimes and crimes against humanity, he was not a person to whom Australia owed protection obligations under Article 1F of the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

Issue

4. The issue for the tribunal to decide is whether the applicant is subject to the exclusionary provisions set out in Article 1F of the Refugees Convention. Relevantly, this requires the tribunal to determine whether it should be satisfied that "there are serious reasons for considering" that the applicant has committed a war crime or a crime against humanity.

The applicant and the original review

5. The applicant was born in Dudan Goda Inkaludara, Sri Lanka, on 20 December 1979 and is aged 26. He served as a soldier in the Sri Lankan Army from May 1997 until late March 2000 (T p74). Between 1997 and 1998, he was stationed at Trincomalee (T p129). He was then transferred to the Elephant Pass Army where he served until 1999 before being transferred to Jaffna. In March 2000, the applicant became ill requiring hospitalisation. At the end of March 2000, due to his slow recovery, he was given three months' leave.

6. On 20 May 2000, the applicant left Sri Lanka and went to Singapore to study (T p105). By so doing he became an army deserter. On 16 November 2000, he left Singapore and came to Australia, arriving on 17 November 2000 (T p72). He entered Australia on a visitor visa subclass 676 which permitted him to remain in Australia until 10 December 2000 (T pp72, 98).

7. On 8 December 2000, the applicant lodged an application for a protection (Class XA) visa seeking protection in Australia from having to return to Sri Lanka (T3 p70). In the relevant part of the application, the applicant stated that he had been a soldier in the Sri Lankan Army from May 1997 until March 2000. In answer to question 37 "What do you fear may happen to you if you go back to that country?" the applicant said that he feared that he would be killed (T p77).

8. On 7 May 2001, the applicant was interviewed by an officer of the then Department of Immigration and Multicultural Affairs ("DIMA") at its Sydney office (T6 p103). The transcript of the interview indicates that the applicant may have been involved in the interrogation, assault and torture of civilians, including children. On 14 May 2001, the applicant was again interviewed by the same officer of the department at its Sydney office (T7 p125). In this interview, the applicant confirmed what he said in the first interview (T p146).

9. On 1 August 2001, a departmental officer advised the applicant that she was considering refusing his application for a protection visa and inviting him to respond (T8 p155). On 21 August 2001, the applicant responded by filing a statutory

declaration dated 20 August 2001 in which he stated that he was following orders when asked to interrogate and torture or assault detainees and that he had a "moral conscientious objection" to doing so (T p164).

10. On 4 December 2001, a delegate of the respondent decided to refuse the applicant's application for a protection visa on the ground that there were serious reasons to consider the applicant has committed crimes against humanity or serious non-political crimes outside Australia prior to entry. Accordingly, the delegate found that the applicant was excluded by Article 1F of the Refugees Convention from the protection afforded by that Convention.

11. On 19 December 2002, the applicant lodged an application for a review of this decision by the tribunal (T1 p1). The matter was heard by Deputy President Handley on 20 August 2003. On 19 September 2003, the decision of the respondent was affirmed by the tribunal (in a confidential decision), on the basis that the tribunal was satisfied that the applicant was involved in acts which could be characterised as lower level torture or cruel and inhuman treatment involving the intentional infliction of both physical and mental pain and suffering. The tribunal found that "Even if the physical pain was not always severe, the mere physical threats and lower level violence could have led to more severe mental suffering, especially in the case of children" (*Re SRYYY and Minister for Immigration and Multicultural Affairs* [2003] AATA 927).

The Federal Court appeal

12. The applicant subsequently lodged an appeal in the Federal Court of Australia. On 19 December 2003, a single judge of the Federal Court, Lindgren J, found that there was no jurisdictional error in the tribunal's decision and ordered that the appeal be dismissed as incompetent: *SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1588. On 19 January 2004 the applicant filed an application for an extension of time for leave to appeal the decision of Lindgren J which, on 27 February 2004, was allowed by Hely J. On 17 March 2005, an Order was made by Justice Merkel of the Federal Court that the appeal be allowed, the orders of Lindgren J of 19 December 2003 be set aside and in lieu

thereof it be ordered that the decision of the Administrative Appeals Tribunal of 19 September 2003 be set aside and the matter remitted to the tribunal for determination according to law: *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 ALR 394.

The second hearing

13. At the hearing of this matter on remittal, the applicant was represented by Ben Zipser, counsel, and the respondent was represented by Stephen Lloyd, counsel, instructed by the Australian Government Solicitor's office. The evidence before the tribunal comprised the documents produced pursuant to s 37 of the *Administrative Appeals Tribunal Act 1975* ("the T Documents"), including supplementary T documents (Exhibit R1), together with the evidence tendered by the parties at the remittal hearing. Oral evidence was given in person by the applicant. After the hearing the respondent submitted a folder of additional materials (Exhibit R4) relevant to element 4 of the alleged offence, the existence of "a widespread or systematic attack against any civilian population". In response, the applicant lodged some further written submissions, with supporting materials (Exhibit A3).

Applicable Legislation and Policy

14. Section 29 of the Migration Act provides, inter alia, for the general granting of visa to a non-citizen to permit to do either or both of the following:

> *(a) travel to and enter Australia; or*
> *(b) remain in Australia.*

15. Section 36(1) of the *Migration Act 1958* ("the Act") provides for a class of visas to be known as "protection visas". Section 36(2) states:

> *A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.*

16. Section 65 requires the Minister to grant a visa where satisfied that there is a valid application which meets all statutory requirements and regulatory criteria.

Schedule 2 of the Migration Regulations 1994 specifies the criteria which are to be satisfied before visas of various classes will be granted. The Applicant applied for a protection (Class XA) visa. Class XA includes two subclasses: 785 (temporary protection) and 866 (protection) which is a permanent visa. The Migration Regulations provide in Schedule 2, clause 866.221, that among the criteria to be satisfied at the time of the decision are:

> *866.221 The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention*

In clause 866.111, "Refugees Convention" is stated to mean "the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees".

17. Article 1A (2) of the Refugees Convention defines a "refugee" as a person who:

> *Owing to a 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; …*

18. However, Article 1 of the Convention also excludes certain persons from the protection obligations which State Parties agree to afford refugees. In particular, Article 1F 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.*

19. The jurisdiction of the Tribunal to review decisions under the Act is set out in s 500(1). This states, relevantly:

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

(a) …

(b) …

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33 (2);

Evidence

20. The applicant gave evidence in person with the assistance of a Sinhalese interpreter.

21. Two statements of the applicant were also filed with the tribunal, the statement of the applicant made 28 April 2003 (Exhibit A1) and tendered at the previous hearing and a further statement prepared in October 2005 (Exhibit A2). In his October 2005 statement he admitted that there were one or two occasions on which he caused a detainee's lip to break when a small amount of bleeding occurred. He also said that when he was told to threaten or assault a detainee: "Whenever I threatened a detainee, I intended to scare the detainee so that he or she would answer the question being asked. However, I did not intend to cause the detainee any mental injury or any mental suffering which continued after the interrogation".

22. The transcript of the evidence of the applicant given at the previous proceedings on 20 August 2003 (*Re "SRYYY" and Minister for Immigration and Multicultural and Indigenous Affairs* file No N2002/1971) was also taken into evidence (Exhibit R3).

23. The applicant's evidence thus comes from eight sources:

(1) The applicant's letter to the department dated 24 December 2000 (T pp101-102);

(2) The record of an interview between Kate Watson of the Department of Immigration and Multicultural Affairs (DIMA) and the applicant at Sydney on 7 May 2001 (T pp103-123);

(3) The record of an interview between Kate Watson of DIMA and the applicant at Sydney on 14 May 2001 (T pp125-154);

(4) A statutory declaration by the applicant dated 20 August 2001 (T p164);

(5) Exhibit A1, a statement signed by the applicant on 28 April 2003;

(6) Exhibit R3, the transcript of the evidence in this application before Deputy President Handley on 20 August 2003 (Exhibit R3);

(7) Exhibit A2, a statement signed by the applicant on 24 October 2005; and

(8) The applicant's oral evidence at the hearing before me on 10 March 2006.

24. Having examined all that material, I conclude that sources (1) to (6) above are accurately summarised in paragraphs 14 to 24 of Handley DP's decision in this matter dated 19 September 2003. I adopt those paragraphs as a summary of the evidence from the applicant placed before the tribunal up to that date and reproduce them (changing only the paragraph and exhibit numbers) as paragraphs 25 to 35 below.

25. The applicant provided a statement dated 28 April 2003 (Exhibit A1). He is currently living at Strathfield in Sydney. He joined the Sri Lankan Army in May 1997 as an ordinary soldier having been unsuccessful in other job applications both in the private and public sectors, principally because of his lack of English skills. He spent the first three months in a training camp. Only three months training was given to new recruits because of the shortage of soldiers. Then he was posted to Trincomalee for about a year, where he served in the security post at the entry to the camp but also in the frontline in any advances against the Liberation Tigers of Tamil

Eclon ("LTTE"). From Trincomalee, he was posted to Elephant Pass for about a year where he performed duties of a similar nature.

26. During the course of his duties, the applicant witnessed innocent civilians being killed and injured as well as fellow soldiers. He did not like witnessing such events. He asked for leave but this was refused. He requested a transfer and was posted to Jaffna where he was assigned, with four others, to duties inside the camp as part of a unit responsible for questioning suspects. Suspects were brought to the camp by the Army in order to obtain information, for example as to members of the LTTE. This questioning took place on most days, usually of two or three suspects a day. There were between 2000 and 2500 soldiers in the camp at Jaffna, most of whom were involved in patrols outside the camp. The applicant said he never asked to go on the patrols. By that time, he had a good knowledge of the war and knew that it was largely innocent civilians, his fellow citizens, who were being harmed. He did not want to see this.

27. The applicant's immediate superior was a sergeant and the officer in charge was a second lieutenant. The applicant's job was to ask questions of suspects brought to the camp. This was done in a room with one person being questioned at a time. Having obtained the person's details, if the sergeant was present, the sergeant would often ask the questions himself. The second lieutenant would also sometimes be present. If the sergeant though someone was lying or knew something, he would instruct the applicant and any fellow members of the unit involved – they usually worked in pairs – to intimidate the person. They did this by kicking or beating the person with a baton, mostly about the legs. The baton was made of wood and was about 18 inches long. When, at first, the applicant refused to do this, the sergeant ordered him to "just do it".

28. If the sergeant believed someone was telling the truth, and the person was innocent and did not know anything, the person would be taken elsewhere and probably released. If the sergeant thought the person was not telling the truth after questioning, which could last for three to five hours, the person would be taken to another part of the camp for further interrogation. The applicant said he did not know what happened at that stage although he had heard rumours of more severe action.

If the person was a member of LTTE, he would be detained and questioned repeatedly. The applicant said he suspected that such a person would be subjected to assaults and torture elsewhere in the camp.

29. The applicant said he complained to the sergeant on many occasions that he did not want to do this work and asked to be transferred. The sergeant said he could not be transferred immediately – he had to work there for some time. The applicant had to carry out the sergeant's instructions. When the applicant complained to the second lieutenant, his response was the same. The applicant was scared that if he did not comply, he might be implicated in something, faces severe punishment, or be court martialled. He believed the sergeant's orders were lawful because he was the applicant's superior. The applicant was asked why he did not leave or quit. He said they would have caught him and brought him back to serve. He is not sure whether others who deserted were punished. This was kept confidential. If they were punished severely and this was publicised, nobody would enlist in the Army. [Other evidence confirmed that deserters are rarely punished, and amnesties are periodically offered to deserters (Exhibit R4, p112).]

30. The applicant said most of the beating he was involved in took place on the legs to avoid serious wounds to other parts of the body. He did not intend to cause pain, wounds or bleeding or make the person cry. The objective was to intimidate a person in order to get a reply to questions. The applicant acknowledged that he had also slapped a person on the face on about four occasions although he cannot recall when. He cannot recall ever causing a person any permanent injury or to bleed.

31. The applicant said children were sometimes brought in with their families. If children between the age of 11 and 14 were questioned, the objective was to scare them so they would provide information. The sergeant ordered him to intimidate the children by threatening them verbally, for example that they would be killed if they did not tell the truth. The applicant said he only questioned children under 16 during the first two days he was at the camp. He only slapped a child of such an age once. The sergeant forced him to do this. The younger children urinated on the floor in fright. After two days, he protested against questioning younger children and, thereafter, was only ever involved in questioning the older children. It was

sometimes necessary to threaten or hit them. Young people of that age were sometimes keen members of the LTTE.

32. The applicant said that in early March 2000, he became ill and was admitted to the military hospital at the camp. When after five or six days he was still not well, he was given permission to go home on leave for three months to recuperate. His parents suggested that he undertake further education and they arranged for him to study at Tease Polytechnic in Singapore. The applicant went to Colombo to obtain a passport and then made the necessary travel arrangements, flying from Sri Lanka to Singapore on 20 May 2000. In October 2000, he went to the Australian Embassy in Singapore and obtained a visitor visa for entry to Australia. He left Singapore on 16 November 2000, arriving in Australia on 17 November 2000. On 8 December 2000, he lodged an application for a protection visa.

33. The applicant said when he was first interviewed for recruitment into the Army, he thought he would be assigned to the sports section and posted to Colombo. He was a good cricket player and the Army assigned good cricketers to Colombo where they would play cricket in addition to their other duties as soldiers. He was aware the Army were fighting the LTTE and that he might be posted to a place where would be required to fight against the LTTE, but he never wanted to see people dying in a war zone. He later realised his decision to join the Army was wrong. He never wanted to see someone injured.

34. In cross-examination, the applicant denied that he had ever been personally involved in beating a suspect which had resulted in the breaking or dislocation of bones (T p145). However, others might have done that. He said there was only one occasion when his slapping a person had led to the person's lips breaking and there being a little blood. He only would slap a person in the face if he was ordered to do so. He said a statutory declaration made by him on 20 August 2001 (T p164) was exaggerated – it was prepared by someone who wanted to help him.

35. The applicant acknowledged that he had assaulted suspects when no superior officer was present but only having been ordered to do so by the sergeant who then went elsewhere in the camp but with the intention of returning. They would

not hit every person questioned – only if they thought the person had information in which case hitting became part of the questioning procedure.

36. That completes the summary of sources (1) to (6). Sources (7) and (8) therefore remain. In Exhibit A2, the statement dated 24 October 2005, the applicant referred to the record of interview dated 14 May 2001 and stated that to the best of his recollection, during the period in which he interrogated detainees at Jaffna between about August 1999 and March 2000, there were only one or two occasions on which he caused a detainee's lips to break, such that bleeding ensued. He did not intend to cause broken skin and the bleeding was minimal.

37. He then referred to the somewhat obscure passage in the transcript (T p145) in which he said "Sometimes when a baton is used to beat, or kick by boots some parts of the body get numbed ... If the attack or assault was so serious that particular place of the body, I mean powerless, something like numb ... it's something like it slipped from the grip". Kate Watson then asked, "[S]o it becomes detached, the bone becomes detached?" He replied, "Yes, not severely but in a little manner, little slippery, some sort of slippery".

38. In Exhibit A2 he said that he did not understand the answers he gave in that passage and no longer recalled what he meant to communicate by those answers.

39. He then referred to his statement dated 28 April 2003 (Exhibit A1) in which he stated that he was often directed by his sergeant or another superior officer to threaten or assault a detainee. He explained that whenever he threatened a detainee, he intended to scare the detainee so that he or she would answer the question being asked. He did not, however, intend to cause the detainee any mental injury or mental suffering that continued after interrogation.

40. The statement went on to say that when he joined the Sri Lankan army in 1997, he knew there was a civil war between the Sri Lankan government and the LTTE, and that the army, on behalf of the government, was fighting the LTTE. At the time he was serving at Jaffna, he understood that the army was fighting LTTE members who fought against the government but that the army was not fighting the

Tamils generally, or sympathisers or supporters of the LTTE, or LTTE members who did not fight against the government.

41. His understanding was that the army sought to harm or neutralise only LTTE members who fought against the government. He understood that the army was not seeking to harm or neutralise the Tamils generally, or LTTE sympathisers or supporters, or members who were not fighting the government. At the same time, he understood that during the fighting, civilians were sometimes killed, but the army did not intend to kill the civilians. Those deaths were accidental.

42. At the hearing on 10 March 2006 (source (8) in the above list), the applicant was cross-examined about Exhibit A2. He was most evasive, offering two or three unresponsive answers to almost every material question. Eventually, however, his assent was obtained to the propositions that he had beaten and threatened to beat or otherwise harm detainees in order to induce them to answer, that he threatened to kill children, some of whom were very frightened by the process, that he interrogated persons who were perceived to be supporters of the LTTE and that the conflict in which the government and the LTTE were engaged amounted to a race war. After interrogation the detainees were either released or sent on for further interrogation. In either event he never saw them again and did not know whether they suffered any lasting harm as a result of their treatment.

43. He was then asked about an exchange at the 2003 hearing between Ms Dale Watson, representing the Minister, and himself:

> *MS WATSON:* *If you didn't like what you were doing, why didn't you ask to go with the other soldiers in the camp and do the normal soldiering duties?*
>
> *THE INTERPRETER:* *The main reason is that by that time I had gained a very good knowledge as to what the law* [scil "war"] *was. It was actually something woven by politicians. It was not the real war – a conventional war as such. Only innocent civilians were being harmed. I disliked going out and I didn't want to see innocent civilians getting involved. They were after all citizens of my country and I was signed in the sports section – sports division so I expected to go to Colombo and get involved in the cricket team* (Transcript p20, Exhibit R3).

44. He replied that he did not ask to be sent to fight because the war was not real. When it was pointed out to him that his statement that “Only innocent civilians were being harmed” conflicted with his recent statement, he replied that the army wanted to destroy the LTTE cadres and that the civilians who suffered might have been LTTE sympathisers. If he saw innocents being killed it was just as a result of an exchange of fire between the two sides.

45. He affirmed his reply recorded on page 15 of the transcript (Exhibit R3) stating that the interrogations could continue for up to three to five hours.

46. In relation to a passage in the record of interview dated 7 May 2001 (T p110), he said that the interrogations would take place in a room where he and two or three other soldiers were present with the sergeant. The sergeant would ask questions while he was in the room and if no acceptable answers were forthcoming he would threaten to order the soldiers to harm the detainee, saying “I’ll hand you over to them”. He would tell them to assault and threaten to kill them.

47. The applicant said he told the sergeant he did like doing it but did it nevertheless. The interrogations were not continuous, as the sergeant would leave the room periodically to report to his superior and then return. Following the sergeant’s orders, the applicant would slap, kick, threaten and beat the handcuffed detainees, and “others would take over if I was tired”. Detainees who were strongly suspected of being LTTE cadres were treated “firmly”.

48. Children were slapped and threatened with death. He agreed that, given that large numbers of Tamils in Jaffna were known to have disappeared without a trace, those threats would be frightening. Some of the detainees were taken away, but he was not aware of whether other forms of torture would be applied to them in other locations.

49. That statement, it was put to him, conflicted with his reply at the 14 May 2001 interview in which he said in response to a question about other forms of treatment of detainees by other interrogators that “I cannot speak about that because I do not know about that but I think there’ll be further places or different places to do, to

torture in a serial manner" (T p146). (In light of the context, I am inclined to think that "serial" should have read "serious".) He replied that he did not know anything about that.

50. He conceded that there were differences between the accounts he gave to DIMA in 2001, to the tribunal in 2003 and to the tribunal now, but denied that his recollection would have been clearest in 2001. He said he was nervous when he first came to Australia and knew nothing about the procedures for a protection visa. He did not know the relevance of what he had to say or the consequences it might have for his protection visa application. He denied, however, that now that he was aware of the implications of his accounts, that he had changed or watered down his evidence. He claimed that he had been consistent and was telling the simple truth.

51. I do not accept that. At the hearing before me his clumsy and repeated attempts to avoid giving straight answers to the questions put to him in cross-examination made it obvious that he was attempting to remodel his evidence and retract the admissions he had made in the initial stages about his own conduct and his knowledge and understanding of the enterprise in which he was taking part, however reluctantly. Nor do I accept his claims to have forgotten material events that he previously described, for example his assertion that he no longer recalls what he meant by his description of an instance or instances in which beatings caused dislocation of a detainee's bones or detachment of the muscle from the bone.

The law relating to crimes against humanity and war crimes

52. As was stated above, the issue for the tribunal to decide is whether the applicant is subject to the exclusionary provisions set out in Article 1F of the Refugees Convention. Relevantly, this requires the tribunal to determine whether it should be satisfied that "there are serious reasons for considering" that the Applicant has committed a war crime, or a crime against humanity. In *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 at 563, French J said:

> *… "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.*

53. It is not enough that an applicant for refugee status has been a willing collaborator with a régime that has committed war crimes or crimes against humanity. The present position contrasts with that which prevailed in the years following World War II, when a wide range of activities in support of the Third Reich sufficed to exclude a person who wished to migrate to Australia. The list covered anyone who had served with the enemy combatant forces, collaborators, quislings, traitors, informers, accessories or anyone who voluntarily assisted the enemy forces. Until about 1955, membership of the National Socialist (Nazi) Party was in itself sufficient ground for rejection, even in the absence of evidence of any other activity. The rejection rate of Australian selection officers was thought to be higher than that of selection teams from other resettling countries, and Australians had the reputation of being "tough" (Andrew Menzies, *Review of Material Relating to the Entry of Suspected War Criminals into Australia*, Canberra, 28 November 1986, pp 34-86 ("the "Menzies Report")).

54. The Report of the Royal Commission on Australia's Security and Intelligence Agencies recommended the introduction of legislation incorporating a more general statement of the kind of people whom it is desired to keep out of Australia. The Menzies Report in 1986 made a similar recommendation (id., pp 59-60, 62). Those recommendations do not appear to have resulted in the adoption of any general criteria for excluding persons actively and willingly associated with régimes that commit war crimes or crimes against humanity. It is therefore necessary for the tribunal to be satisfied that there is sufficient evidence of the applicant's personal involvement in specific instances of disentitling conduct.

55. The tribunal need not find that the applicant has committed one of the crimes referred to in Article 1F(a), (b) or (c) before Article 1F will operate. The text of Article 1F makes it clear that the article applies if there are "serious reasons for considering that" one or more of the three paragraphs applies to the applicant's case: *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 at 179.

56. The United Nations High Commission on Refugees (UNHCR) has published a document titled "The Exclusion Clauses: Guidelines on their application". It points out:

> *In order to satisfy the standard of proof under Article 1F, 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. Confessions and testimony of witnesses, for example may suffice if they are reliable* [paragraph 35].

Professor Guy Goodwin-Gill in "The Refugee in International Law'", states at page 97:

> *Excluded are those 'with respect to whom there are serious reasons for considering' that they have committed a crime against peace, a war crime, or a crime against humanity, which has been interpreted to require a lower standard of proof on matters of fact than the balance of probabilities.*

The Australian case law adopts those propositions. For example, in *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 at 563, French J said:

> *Article 1F excludes from the application or Convention persons with respect to whom there are serious reasons for considering that they have committed a class 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 either the relevant crimes or acts.*

In *Ovcharuk v Minister for Immigration and Multicultural Affairs* Branson J said at [186]:

> *Whether there are serious reasons for so considering will depend upon the whole of the evidence and other material before the decision maker.*

57. In *Arquita v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 465 at 478, Weinberg J said that there must be strong evidence before the decision-maker upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. The evidence need not, however, be of such

weight as would be required to persuade the decision-maker on the balance of probabilities or beyond reasonable doubt. At 478, Weinberg J said:

> *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.*

58. A higher standard has now been prescribed by the UNHCR in its *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, Geneva 2003. That standard has now superseded the one applied in those cases.

59. The Background Note states that although exclusion does not require a determination of guilt in the criminal justice sense,

> *Nevertheless, in order to ensure that Article 1F is applied in a manner consistent with the overall humanitarian objective of the 1951 Convention,* ***the standard of proof should be high enough to ensure that*** **bona fide** ***refugees are not excluded erroneously. Hence, the "balance of probabilities" is too low a threshold.*** [emphasis added] (paragraph 107, page 38-39).

60. The European Council of Refugees and Exiles ("ECRE") document titled "Position on Exclusion from Refugee Status" dated March 2004 accords with the UNHCR Background Note in that it provides:

> *Clearly though, because of the severe consequences of a decision to exclude, the exceptional nature of exclusion and the general protection purpose of the 1951 Convention,* ***the threshold of proof applied should be high****. [emphasis added] (paragraph 33 p17); and*

> *Since the exclusion clauses deal with the commission of crimes, it seems reasonable to search for existing standards of proof in the area of criminal law, ideally international criminal law In this respect, reference can be made to the standard of proof required for criminal indictment. (paragraph 34 p17).*

61. A prominent academic commentator in the area, professor of law at the University of Essex, Geoffrey Gilbert, in "Current Issues in the Application of the Exclusion Clauses" (2001), commissioned by the UNHCR as a background paper for an expert roundtable discussion on exclusion, argues that:

> *Article 1F as a whole demands individual determination on a case by case basis … By analogy with Article 33.2 which merely requires reasonable grounds for regarding the refugee as a danger to the security of the country of refuge, where that is based on a particularly serious crime having been committed by the refugee in that country, there must be a conviction by a final judgment, that is the refugee must have been found guilty in a criminal trial –* ***'serious reasons for considering' that the applicant has committed a crime or is guilty of an act within Article 1F must therefore at least approach the level of proof necessary for a criminal conviction of the individual.*** [emphasis added] (p32)

While materials such as the Background Note may be considered by a court or tribunal interpreting an international treaty, they can have no binding force in domestic law (*Teoh v Minister for State for Immigration and Ethnic Affairs* (1995) 183 CLR 273; *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1).

62. The High Court has not found similar UNHCR publications especially useful (*Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392, 405). When there is clear Federal Court authority on a point, I do not think it appropriate or prudent for me to decide that it has been superseded unless that conclusion is obvious and inescapable, which in this case, for the reasons given, it is not. The present standard should be applied until the courts adopt a different one.

63. In the applicant's case, the exclusionary provision relied on by the respondent is Article 1F(a), that there are strong reasons for considering that the applicant has committed a war crime or a crime against humanity. I note that the United Nations Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, January 1988) states:

> *148. At the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of the States that war criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order.*

> *149. The competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his refugee status. For these clauses to apply, it is sufficient to establish that there are "serious reasons for considering" that one of the acts described has been committed. Formal proof of previous penal prosecution is not required. Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.*

64. The Handbook provides, at paragraph 150, that the definition of "crimes against peace, war crimes and crimes against humanity" comes from international instruments, the most comprehensive being found in the 1945 London Agreement and Charter of the International Military Tribunal. That definition, as contained in Annex V of the Handbook provides:

> ***Annex V***
>
> ***EXCERPT FROM THE CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL 31***
>
> ***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 organisations, 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 labour or for any other purpose, of civilian populations 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."*

The definition of war crimes and crimes against humanity has been broadened somewhat by the Rome Statute of 1998. Article 7 of the statute relevantly provides as follows:

Article 7
Crimes against Humanity

1. For the purposes of this Statute, crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

…

(f) Torture;

…

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. …

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

…

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;"

Article 8 of the Rome Statute relevantly defines war crimes as follows:

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health; …

Article 8
War Crimes

2 …

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949,

> *namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:*
>
> *(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
>
> *(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; …"*

65. Article 33 of the Rome Statute also provides:

> *Article 33*
>
> *Superior orders and prescription of law*
>
> *1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:*
>
> *(a) The person was under a legal obligation to obey orders of the Government or the superior in question;*
>
> *(b) The person did not know that the order was unlawful; and*
>
> *(c) The order was not manifestly unlawful.*
>
> *2. For the purposes of this Article, orders to commit genocide or crimes against humanity are manifestly unlawful.*

66. In the appeal from the 2003 decision in this case, the Full Court of the Federal Court held that the Articles 7 and 8 definitions of the Rome Statute were appropriate definitions for the AAT to apply: *SRYYY* at [76]. Both counsel at the tribunal hearing also submitted that the tribunal should take into account that Article 9 of the Rome Statute provides for the adoption of a document titled "Elements of Crimes". An "Elements of Crimes" ("EoC") document was adopted by the Assembly of State Parties in New York on 10 September 2002. Article 9 of the Rome Statute has also been incorporated into domestic law (section 3 of the *International Criminal Court Act 2002*). Article 9 (Schedule 1 to the ICC Act) provides:

> *Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-third majority of the members of the Assembly of States Parties.*

The tribunal notes that Wilcox J had regard to that document when identifying the elements of crimes under the Rome Statute in *SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 9.

67. The elements of crime for Article 7(1)(f) are defined in the EoC as follows:

Article 7(1)(f) Crime against humanity of torture

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. Such person or persons were in the custody or under the control of the perpetrator.

3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

68. The introductory note to Article 7 of the EoC states:

Introduction

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to

commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population.

69. Article 8(2)(c)(i) relates to the committing of war crimes. The elements of that crime are defined by the EoC as follows:

Article 8 (2)(c)(i)- 4 War crime of torture

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

3. Such person or persons were either hors de combat, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

4. The perpetrator was aware of the factual circumstances that established this status.

5. The conduct took place in the context of and was associated with an armed conflict not of an international character.

6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

70. The introduction to Article 8 in the EoC states:

Introduction

The elements for war crimes under article 8, paragraph 2 (c) and (e), are subject to the limitations addressed in article 8, paragraph 2 (d) and (f), which are not elements of crimes.

The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.

With respect to the last two elements listed for each crime:

• There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

• In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;

• There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".

71. I now proceed to examine the elements of Article 7(1)(f) of the Rome Statute in light of the evidence.

Application of the law on crime against humanity and findings of fact

Elements

72. ***Element 1***: ***The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons***.

73. It was not disputed that the applicant served as a private soldier in the Sri Lankan army between May 1997 and March 2000. For the last six months he was stationed at the Jaffna army base, where he was part of a group of five soldiers in a unit responsible for interrogating detainees who had been brought to the camp. The detainees would be questioned about such matters as the membership, support networks and activities of the LTTE.

74. As part of the interrogation process, the applicant would seek to elicit information by intimidating detainees and using force and threats against them (T p144).

75. This evidence showed that this intimidation and violence included the following acts:

- The appellant was ordered, or "permitted" or "authorised" to slap and kick suspects and, more often, beat their legs with a wooden baton of between 18 inches and two feet in length (T pp108, 109, 112, 118 and Exhibit R3 p12). He would also beat them with his fists on their arms and legs (Exhibit A1 para 17).

- As his involvement was in what he termed the earlier phases of the interrogation process, he was not permitted to inflict serious harm. "I had no power to cut or make injuries to a person" (T p144). But some subjects were injured, sometimes seriously (T pp112, 144-146).

- Sometimes the lips of suspects were broken and bled, and sometimes the beating of the legs with a baton caused either dislocation of bones or detachment of the muscle from the bone (T p145). There was no medical evidence that would enable the tribunal to form a clearer view of the precise nature of the injuries likely to have been inflicted, but plainly they must have been of a type that would have been accompanied by severe pain.

- The applicant was involved in interrogating up to 15 detainees a day. The interrogation or assaults could last for an hour, or up to three to six hours each. There would usually be two or three other members of the interrogation group in the room where the applicant was involved in the questioning process, and when the applicant or another member became tired, another would take over (Exhibit R3 pp14-15; Exhibit A1, hearing March 2006).

- The hands of the detainee were handcuffed or tied, or the detainee was tied to a wall (T pp113, 147; hearing March 2006).

- A suspect who was not “co-operating” might be assaulted continuously for a longer period (T pp113, 147; hearing March 2006).

- The applicant was assigned to torture children (T p101) as young as 11 years of age (Exhibit R3 pp40-41). He pushed and shoved them, pulled their ears and slapped them (T p117, Exhibit R3 pp28-29). He would threaten to kill them (T p117, Exhibit R3 pp28-29). The younger children sometimes urinated in fear (T p117). He later said that he had protested to his superior about being required to assault children and that after the first two days of his activities at Jaffna he was involved only in assaulting older adolescents aged 16 to 19, some of whom were keen LTTE supporters (Exhibit R3 pp31, 41).

76. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of

the Former Yugoslavia since 1991 noted in a 2002 decision that “Existing case-law has not determined the absolute degree of pain required for an act to amount to torture” (*Prosecutor v D. Kunarac, R. Kovac, Z. Vickovic*, Appeals Chamber, 12 June 2002, para 149 (part of Exhibit A3)). Some acts, however, are considered *per se* to meet the requisite threshold of suffering. They include beating. Permanent injury is not required (*id*., para 150; M. Bergsmo, S. Lamb, Y. Takashiba, “Crimes against humanity”, in M. Bergsmo ed., *On International Crimes*, Martinus Nijhoff, forthcoming, pp5-6 (part of Exhibit A3)). The factors to be considered in assessing the gravity of the harm inflicted include “the premeditation and institutionalization of the ill-treatment” (*id*., pp4-5), a feature obviously present in this case.

77. As Mr Zipser pointed out, the applicant in Exhibit A1 maintained that he did not wish to injure detainees and only wanted to perform the minimum assault necessary for him to be seen to be carrying out his duties (paras 17, 18). In that statement he also denied ever causing a detainee to bleed or otherwise be seriously injured, which was hard to reconcile with his earlier statements. He admitted that he “sometimes caused pain to detainees” (para 20). Mr Zipser submitted that as the applicant had no desire to inflict severe pain, even though that might have been a consequence of his acts, he did not intend to inflict severe pain. He thus lacked the necessary mental element of intent required by Article 30 of the Rome Statute (see A Cassese, P Gaeta, J Jones eds, *The Rome Statute of the International Criminal Court: A Commentary,* Oxford University Press, 2002, p389).

78. The crime against humanity of torture does not, however, require a specific purpose (EoC, 119, n14). It is therefore covered by the general definition of intent in Article 30(2), which states that a person has intent where, in relation to conduct, that person means to engage in the conduct. In relation to a consequence, a person has intent where that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

79. In this case there is no doubt that the applicant intended to commit the acts of violence and intimidation described, although reluctantly, and possibly to the minimum extent necessary for him to be seen to be carrying out his duties. That involved him in inflicting physical pain on substantial numbers of people. That pain

must often have been severe. Even when it was not, the threats and violence must have led in some cases to severe mental suffering, especially in children and adolescents.

80. The crime of torture can also be committed by aiding, abetting or otherwise assisting in the commission or attempted commission of the crime by persons with a common purpose: *SZCWP* (supra) at paras 82-83. While the applicant in his more recent evidence has sought to diminish the seriousness of his own attacks, he has accepted that his comrades did seriously injure detainees while he was present as a member of the interrogation team (transcript 20 August 2003, p24).

81. I therefore find that the first element has been proved.

82. ***Element 2: Such person or persons were in the custody or under the control of the perpetrator***.

83. Sometimes the applicant would assault a detainee when there was no-one else in the room (transcript 20 August 2003, pp35-36), but it was more usual for other members of the interrogation team, including the sergeant or occasionally the lieutenant, to be present also. It was the applicant's responsibility to tie or handcuff the detainee or tie him or her to the wall (T pp147-148).

84. Mr Zipser submitted that the requirement of custody or control was purposely added by the Statute's drafters as a limit on the breadth of the offence. The applicant did not have custody or control of the detainees, because there was usually a superior NCO or officer in the room or nearby, and they were the ones who had custody of the prisoners. The fact that the applicant was present in the room was not sufficient, even though there were occasions on which he was alone with the detainee.

85. There is little authority or scholarly writing to provide guidance on what is meant by custody or control in this context. Possibilities include the applicant, the team of which he was a member, the sergeant, the lieutenant, the camp commandant or perhaps the Sri Lankan army. There is no self-evident legal limit on

how far up the chain of command one should go to identify the official having custody or control. Prisoners serving lawful sentences have sometimes been described as being in the custody of the Queen.

86. Bergsmo et al. outline the route whereby the custody and control element came to be included in the EoC and see its purpose as being to establish "some link of power or control between the perpetrator and the victim" (*supra*, at p12).

87. Another commentator writes that:

> *The term "custody" would include any form of detention or imprisonment, including arrest by security forces, other restrictions on liberty such as those in crowd control by security forces or enforced disappearances. The term "under the control of the accused" is broader and would include any form of restraint by another, including enslavement …"* (Wilhelm Schabas, *An Introduction to the International Criminal Court*, 2nd edn., p163).

That passage has little to say about who is the person who is taken to have custody, but in a footnote the author quotes a passage stating that "[T]he victims must be understood to be persons who are deprived of their liberty or who are at least under the factual power or control of the person inflicting the pain or suffering" (J.H. Burger, H. Danelius, *Commentary on the Statute of the International Criminal Court*, Otto Triffterer ed., p120). The emphasis on factual control rather than legal power accords with the statute's overall intention and orientation.

88. Construing the Article in context and in light of its purpose, therefore, it seems to me that the treaty language is referring to a situation in which the victim is for practical purposes at the perpetrator's mercy. It contemplates a person who is in some way physically restricted, confined or otherwise unable to move, take cover, escape or defend himself or herself. The provision seems intended to draw a contrast with a situation in which pain or injury is inflicted in the course of a street affray, a firefight or a running battle in the forest.

89. The detainees interrogated by the applicant were for practical purposes at the applicant's mercy, and indeed he was the one who bound them in such a way as to make them helpless. The requirement of custody or control is thus satisfied.

90. ***Element 3***: ***Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions***.

91. This element is in the nature of an exception or qualification to the principal definition. The applicant did not claim that he was exculpated by this provision, and uncontested evidence shows that it does not apply.

92. The persons interrogated by the applicant and the team of which he was a member were often family members of suspected LTTE members. There is no suggestion that they were being tortured as part of any lawful sanction for acts they had committed.

93. The applicant revealed that "I was assigned to go and arrest any person, any … suspected to be LTTE or their children, then I to arrest them and then bring them and to question them" (T p108). He knew he was assaulting innocent people (T p140). In Exhibit A1 he wrote that:

> *…*
>
> *From time to time other soldiers brought civilian detainees into the camp for interrogation. They were brought in for interrogation because it was believed they had information about the LTTE which would assist the army. Sometimes it was believed that the detainee's son or daughter was a member of the LTTE. Other times it was believed that the detainee was assisting the LTTE. Other times it was believed that the detainee had other information about the LTTE. The detainees would be questioned about these matters* (Exhibit A1 para 12).
>
> …

94. The only reasonable conclusion is that element 3 is satisfied.

95. ***Element 4***: ***The conduct was committed as part of a widespread or systematic attack directed against any civilian population***.

96. The introductory words of Article 7 of the Rome Statute make it clear that torture constitutes a crime against humanity only when it is committed as part of "a widespread or systematic attack directed against any civilian population".

97. On behalf of the respondent Mr Lloyd submitted that the applicant had admitted in his original letter in support of his protection visa application (T p101) that

his activities in the army were part of a general attack on the Tamil population of northern and eastern Sri Lanka and had claimed that he had considered whether he would “rebel” against the government because of it but had decided not to. He also acknowledged that pursuant to his own participation in that attack he was “assigned to torture children arrested on suspicion that [they] have links with L.T.T.E” (T p101).

98. His understanding was that government ministers generally did not intervene in these matters, but “the defence ministry and the defence sections are aware that this is the procedure adopted by the army” (T p149). His own conduct, on his own evidence, was largely directed toward Tamil civilians and non-combatants. It does plainly form part of the widespread or systematic attack on that population.

99. The widespread or systematic nature of the abuse of Tamil civilians, including children, was also shown by the applicant’s evidence that there was an established procedure he was instructed to follow whereby detainees were first questioned, then slapped in the face, then kicked and beaten with a baton (Exhibit R3 pp27-28). The procedure defined several successive stages of interrogation, and his responsibilities were in the first two of those (T p147). Interrogation took place at any army camp and had to be done with the consent of the camp’s highest authorities (T p119).

100. The respondent also relied on certain third party reports, including a report of the Special Rapporteur to the Commission on Human Rights dated 12 March 1998. That report considered the serious problem of extrajudicial and arbitrary executions in Sri Lanka. It indicated that the perpetrators included the armed forces and the police, who killed suspected insurgents and civilians (almost all Tamil) perceived as supporting them (T p201). It observed that the violations had been so numerous, frequent and serious over the years that they could not be treated as merely isolated or individual cases of misconduct by middle and lower-rank officers, without attaching any responsibility to the civilian and military hierarchy (T p202). Massacres by the security forces (defined as comprising the police, the army, navy and air force – T p287) of civilians, including women and children, had become ubiquitous and the law allowed impunity to persist among perpetrators (T p202). There were numerous other reports that the security forces had targeted Tamil civilians (T pp210, 227, 232, 244 (especially in Jaffna), 253, 267, 268, 269, 323).

101. A DFAT Country Information Report published in February 2000 noted that the incidence of torture in police stations and places of permanent detention had apparently decreased significantly in recent years (military camps were not mentioned). It cautioned, though, that some human rights groups make a distinction between torture and ill-treatment. The latter could range from relatively minor assaults such as slapping and shoving to torture. An estimated 40 to 49.4 percent of detainees were ill-treated in 1999-2000, the percentage being somewhat lower in Colombo (Exhibit R4, pp80-82).

102. A UN Working Group on Enforced or Involuntary Disappearances report published in March 2000 included tables and graphs setting out statistics on Sri Lankan civilians "affected" (ie, killed, disabled, injured, disappeared, arrested, tortured or mentally affected) from 1977 to 2004. Of the 60,517 civilians affected, 47,741 were victims of the Sri Lankan military. Of the total, 3,505 civilians were tortured, 2,346 of them by the Sri Lankan military (Exhibit R4, p93). Of the total of 60,517 civilians affected, 21,385 were in the Jaffna district. In January 2005, attacks by the military on civilians in the northeast had again begun to increase to alarming levels (*id*., p94).

103. Relying on Professor Cassese's commentary, Mr Zipser submitted, correctly in my view, that the requirement an "attack directed against any civilian population" narrows the scope of the notion of widespread or systematic practice required as a context of a specific offence if it is to amount to a crime against humanity. Article 7(2)(a) stipulates that the attack must involve "the multiple commission of acts against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such an attack".

104. The statute thus requires that the general practice be the policy of a State or an organisation and that the offender, in committing a crime against humanity, pursues or promotes such practice. A practice simply tolerated or condoned by a State or an organisation would not suffice (Cassese pp375-376). Further, the EoC stipulates that Article 7 must be strictly construed, given that crimes against humanity as defined in the Article are among the most serious crimes of concern to the international community (EoC p116).

105. Mr Zipser then referred to a number of passages in the official reports describing attempts by the Sri Lankan government to prevent and punish human rights abuses by the security forces. Most of those passages, however, also contain references to human rights abuses that point to the conclusion that the multiple acts of torture and other crimes committed against Tamil civilians were carried out pursuant to a policy or widespread practice actively pursued by the security forces, though not necessarily with the approval of the Sri Lankan government as a whole.

106. Thus, the Special Rapporteur noted that the government had taken action to investigate several incidents of human rights violations and had established a human rights commission and three other commissions for that purpose (T pp188, 190, 192), but also noted that security forces members committing fundamental human rights violations such as killings, torture or/and acts of disappearances are rarely punished and that little progress had been made (T p194). The violations had been so numerous, frequent and serious over the years that, although there might not have been a planned policy of systematic violation of human rights, the government and the military high command were still responsible for the acts and omissions of their subordinates (T p202).

107. Department of Foreign Affairs and Trade, Country Information Report number 179/98 dated 22 April 1998 reported that criminal proceedings against security forces personnel for torture, rape and murder were continuing, but only at a slow pace and a perception of impunity had developed (T p213). While progress had been made in Colombo, “The situation in the east and the north is more bleak, and there are concerns about the mistreatment of detainees on the Jaffna peninsula. While the rate of arrests in Jaffna is fairly low and military intelligence is reliable, it is estimated that almost all detainees are seriously mistreated or tortured while in military camps” (T p212).

108. Mr Zipser also referred to a Country Information Service report dated 11 December 1998 reporting that a Sri Lankan minister had issued guidelines to security forces on search operations, arrest and detention. The guidelines said that arrests should be made only if evidence is available against the arrested person, who must be informed of the reasons for the arrest. But the same report noted that

“a culture of impunity has developed, with perpetrators of grave violations of human rights being convicted of minor offences or, in most cases, not at all … Arbitrary round-ups of Tamils in many parts of Sri Lanka continue” (T p225).

109. Another Country Information Service release reported that the president had appointed a high-level committee in mid-July 1998 to probe harassment of Tamils during security round-ups and detention, but added that orders requiring humane treatment of Tamil detainees were being flouted by some police officers (T p227).

110. A US Department of State Country Report stated that the government generally respected the human rights of citizens in areas not affected by the insurgency and had taken steps to control abuses. Government security forces continued to take effective measures to limit civilian casualties during military operations (T pp259-260). At the same time, however, it noted that the on-going war with the LTTE continued to be accompanied by serious human rights abuses by the security forces. They had committed at least 33 extrajudicial killings during the period in question and also killed prisoners captured in battle. Disappearances were still common and torture remained a serious problem (*ibid*).

111. The same report referred to measures by the security forces to reduce civilian casualties (T p271), but “Despite legal prohibitions, the security forces continue to torture and to mistreat persons … Most torture victims were Tamils suspected of being LTT insurgents or collaborators” (T p267). Torture and abuse by the security forces remained widespread, though its use had diminished, especially on the Jaffna peninsula (*ibid*).

112. A US State Department report dated February 23, 2000, outlined the activities of the National Human Rights Commission and other governmental steps to control abuses, but repeated that the war continued to be accompanied by serious human rights abuses by the security forces, including disappearances and torture. In most cases there was no investigation or prosecution at all, given the appearance of impunity for those responsible (T p288). The report again noted that the security forces continue to torture and mistreat persons in custody, including children (T p296).

113. In relation to Exhibit R4, the applicant's counsel pointed out that several of the documents referred to events occurring before or after the period from August 1999 to March 2000 when the applicant was based at Jaffna. While that is true, it is also the case that some of the data relate squarely to that period (Exhibit R4, pp75-76, 91) while some cover a longer span that includes it (Exhibit R4, p89-95). In any event, when one is considering a conflict that started circa 1976 (Exhibit R4, p98) and has still not fully concluded, the presumption of continuance operates. It would take clear evidence to lead a trier of fact to conclude that between August 1999 and March 2000 the army's goals and methods were materially different from those it had at other times of active hostilities. There is no such evidence here. It is notable also that the applicant's defence itself relies on events occurring outside that period, as will be seen below.

114. Mr Zipser also objected that some of the documents in Exhibit R4 were written in a subjective and opinionated style, such as the magazine article reproduced on pages 23 to 29. That is a fair criticism. While emotive writing is not necessarily untrue, I do not give weight to uncorroborated material of that nature.

115. The applicant observed, moreover, that the documents make it clear that the LTTE itself committed numerous and gross abuses of human rights. That is correct, and some of the other documentary evidence is to the same effect. But even if one assumes that the LTTE was proportionally at least as guilty of torture as the army, that would not affect the question of whether element 4 is satisfied in this case. In a criminal trial if might be material on the question of penalty, but it would not be relevant to the perpetrator's guilt or innocence of the crime of torture.

116. Finally, Mr Zipser pointed out that like the reports reproduced in the T documents and referred to above, the reports in Exhibit R4 showed that while there were human rights abuses in 1999-2000, the Sri Lankan authorities were taking steps to prosecute perpetrators of past human rights abuses and prevent future abuses. He listed nine instances in the various documents (although four instances were after the applicant left Jaffna and one related to Colombo, not the north or northeast). There is no reason to doubt those parts of the reports, but the fact that the government, or parts of it, was attempting to prevent human rights abuses and

limit civilian casualties is not inconsistent with the army's simultaneous and well-documented prosecution of a widespread or systematic attack on the Tamil population.

117. The picture that emerges from this material is one of an on-going civil war against a particular population, namely Sri Lanka's Tamil minority, which is primarily directed against the LTTE as the combatant arm of that minority but which regularly involves the torture and murder of numbers of that population, including children. The Sri Lankan government as such may not have had a policy of attacking the Tamil population other than the LTTE members, and particular sections of the government have taken active steps to prevent or punish human rights abuses against civilians. At the same time, the Sri Lankan security forces, including the army, during the relevant period committed acts of torture against Tamil civilians of such number and routine frequency as to constitute a widespread or systematic attack against the Tamil population, even if there was no formally stated army or defence ministry policy promulgated in that connection. As Article 7(1) stipulates that the attack must be "widespread or systematic", it is clear that if it is widespread it need not also be systematic.

118. The widespread or systematic attack depicted in the evidence may not have been perpetrated by the Sri Lankan state as such, but it was committed by an organisation as required by Article 7(2)(c), in this case the Sri Lankan army.

119. The applicant's own conduct at the Jaffna army base was engaged in as part of that attack. He was a member of a five-man unit within the base responsible for the interrogation, including the torture, of detainees under the supervision of an NCO and an officer. The acts continued over a sustained period and the applicant was told that it was his duty to continue committing them. A standardised step-by-step procedure for interrogation and torture had been laid down that the applicant was instructed to follow. His role was in the initial phases of the interrogation and torture process and consequently his authority to inflict injury was limited, the implication being that higher limits were in force in other locations in relation to some detainees. The applicant was performing a role laid down for him as part of the army's attack on the Tamil minority.

120. The fourth element is thus satisfied.

121. ***Element 5: The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.***

122. There is no evidence to show that the applicant intended the conduct to be part of a widespread or systematic attack against a civilian population, but a considerable amount to show that he knew it was.

123. The applicant knew that the conflict in which he was involved was a conflict between two communities of different races in Sri Lanka that had been going on for 18 years (T pp136, 164; hearing 10 March 2006). He witnessed "other soldiers just shooting the innocent public and going forward … I was able to see a lot of people that is very old people, children and people of all ages had died and their bodies were fallen" (T p130). At the hearing in 2003 he went so far as to say that "Only innocent civilians were being harmed. I disliked going out and I didn't want to see innocent civilians getting involved" (Exhibit R3 p20). In his letter in support of his application for a protection visa he wrote that he had watched helplessly as innocent people were killed in the course of a raid and added that "This is just to create fear and terror in the Tamil race" (T p101). Because he witnessed innocent civilians being injured, he requested leave and a transfer away from the combat zone (Exhibit R3 p9).

124. The applicant explained that suspects were brought into the army camp and that the "questioning" of those suspects was "an ongoing setup in any camp" (T p119). Duties involving the assaulting of prisoners could only be done with the consent of the highest authorities in that particular army camp (T p119). The interrogation duties that he had to perform at Jaffna camp offended his religious beliefs because he had to assault innocent people just like his parents or his brothers or sisters (T p140). He said that he protested almost every day to his superiors about the work he was performing and asked to be transferred, but was told that the acts he was performing were part of his duties as a member of the army

and that he could not expect a transfer until he had served in that role for some time (Exhibit R3 p17).

125. The applicant understood that there were several stages laid down in the established procedure for interrogation and that his duties involved the first two steps. He knew that if detainees did not give the information they were believed to have, they would be sent to other places where there would be "torture in a serial manner", but the actual details of what was done at those steps was kept secret (T pp146-147; Exhibit R3 p32). He saw the interrogation process as a system of which his actions were just a part (T p147).

126. Mr Zipser submitted that the applicant's understanding of his role was best explained in his statement dated 24 October 2005 (Exhibit A2) in which he declared that he knew there was a civil war between the Sri Lankan government and the LTTE, and that the army, on behalf of the government was fighting the LTTE. It was his understanding that the army was not fighting the Tamils generally, or sympathisers or supporters of the LTTE, or LTTE members who were not actually fighting the government. He thought the army sought only to harm or neutralise active LTTE combatants and that it was not seeking to harm or neutralise the Tamils generally or passive LTTE members or mere sympathisers. Civilians were sometimes killed in the fighting, but the army did not intend to kill them and their deaths were accidental. At the hearing in March 2006 he had said that the army intended only to destroy LTTE cadres and that if innocent people were killed it was only because they were caught in an exchange of fire. But when it was pointed out to him that his evidence conflicted with his earlier statements, he conceded that LTTE sympathisers might have been harmed also.

127. Mr Zipser also submitted that the applicant had denied in cross-examination at the March 2006 hearing that he had any knowledge of any further torture that might be administered to detainees after he had examined them. That is not entirely accurate. He admitted knowing that they might be sent away for further interrogation, but did not admit knowing what was likely to happen to them at those other locations.

128. The applicant's understanding of his role as described in Exhibit A2 and at the later hearing differed materially from the accounts he had given to the department in 2001. When those discrepancies were pointed out to him in cross-examination, he answered that he had been nervous at the time when he first came to Australia and did not know anything about the procedures that he was undergoing. He did not know the relevance or possible consequences of his statements for his protection visa application, but maintained that he had been consistent and given the simple truth throughout. But the differences between his earlier and later statements are undeniable and point to the conclusion that he has sought to alter his evidence so as to mislead the tribunal.

129. Mr Zipser asked the tribunal to find that the applicant was not cognizant of the link between his conduct and the widespread attack on the Tamil civilian population, in the sense described by Professor Cassese (Cassese pp362-363, 373). On the basis of the evidence, however, including the points mentioned above, I am satisfied that the applicant was aware that his acts in relation to detainees taking place in the broader context of a widespread attack against the Tamil civilian population.

130. Element 5 is thus also satisfied.

Conclusion on crimes against humanity

131. For the reasons given I find that the applicant's conduct brings him within Article 1F of the Refugees Convention in that there are serious reasons for considering that he has committed a crime against humanity, namely the crime against humanity of torture as defined in Article 7(1)(f) of the Rome Statute.

132. The partial defence of superior orders created by Article 33 of the Rome Statute does not apply in the case of orders to commit crimes against humanity and is thus not relevant to this conclusion. The applicant did not seek to bring himself within the duress defence in Article 31(l)(d).

133. At the hearing it was not disputed that if the tribunal finds against the applicant under Article 7 of the Rome Statute it is not necessary to make a finding in relation to war crimes under Article 8 as well. Accordingly, I do not do so.

134. The applicant is thus not a person to whom the Commonwealth owes protection obligations under Article 1A(2) of the Refugees Convention. The decision under review is affirmed.

I certify that the 134 preceding paragraphs are a true copy of the reasons for the decision herein of Professor GD Walker, Deputy President

Signed:

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Associate

Date/s of Hearing	10 March 2006
Date of Decision	5 April 2006
Counsel for the Applicant	Mr B Zipser
Counsel for the Respondent	Mr S Lloyd
Solicitor for the Respondent	Ms D Watson, Australian Government Solicitor's office