

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 1248/93

RE TP

AT AUCKLAND

Before: R.P.G. Haines (Chairman)
T. Gutnick (Member, UNHCR)

Counsel for the Appellant: R J McKee

Appearing for the NZIS: No appearance

Date of Hearing: 19 September 1994

Date of Decision: 31 July 1995

DECISION

INDEX

	Page
Introduction	3
The Liberation Tigers of Tamil Eelam	3
The Appellant's Case	6
The Appellant's Evidence at the Appeal Hearing	12
The Issues	19

Assessment of the Appellant's Case	20
Exclusion: Article 1F(a)	24
Jurisdiction to Consider Exclusion	24
Crimes against Humanity	25
"Serious reasons for considering" - The Standard of Proof	32
The Mens Rea Ingredient and the Degree of Complicity	32
Reasons for the Appellant's Exclusion from the Refugee Convention	35
Conclusion	39

This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a Sri Lankan national of the Tamil race.

INTRODUCTION

The appellant arrived in New Zealand on 22 April 1993. His refugee application was submitted on 6 August 1992. The Refugee Status Section interview took place on 14 October 1992. By letter dated 9 February 1993, the appellant was advised that his application had been declined. From this decision, he has appealed.

This appeal was heard on 19 September 1994. A crucial aspect of the inquiry was the appellant's role in the Liberation Tigers of Tamil Eelam (LTTE), an organisation described by Mr McKee, in his submissions to the Refugee Status Section, as "a terrorist organisation which cares little who suffers as a result of its actions" (NZIS file p 48). At the conclusion of the hearing, Mr McKee sought and obtained leave to file written submissions on the application of the Exclusion Clause provisions of Article 1F(a) of the Refugee Convention, and in particular, the recent decision of Sivakumar v Canada (Minister of Employment and Immigration) [1994] 1FC 433 (FC:CA) which applied Article 1F(a) to an asylum seeker who had played an active role in the LTTE. The Authority directed that the submissions be filed by 3 October 1994. However, the submissions were not filed until 7 February 1995. Those written submissions have been taken into account by the Authority.

THE LIBERATION TIGERS OF TAMIL EELAM

According to the US Committee for Refugees, Sri Lanka: Island of Refugees

(1991) 8, in 1972, an eighteen year old school dropout named Velupillai Prabhakaran, along with about 30 fellow Tamil teenagers, took control of one of the many informal Tamil youth groups that had sprung up in Jaffna, renaming it the Tamil New Tigers. In 1975, Prabhakaran claimed responsibility for the assassination of a fellow Tamil, Alfred Duriappah, the pro-government mayor of Jaffna. In 1976, the Tamil New Tigers changed its name to the Liberation Tigers Tamil Eelam (LTTE). Soon afterwards, LTTE attacks on policemen and public officials, particularly Tamil “traitors” began to escalate.

The human rights abuses committed by the LTTE since its formation are well-documented. We intend to refer by way of example only to what is said of the LTTE in the documents which were in evidence before the Authority at hearing:

- (a) The assassination of opposition leaders and candidates: US Committee for Refugees, Sri Lanka: Island of Refugees (1991) 8.
- (b) The LTTE has also followed a systematic campaign to ensure its supremacy in the North East by wiping out rival militant groups: US Committee for Refugees, Sri Lanka: Island of Refugees (1991) 17. The execution of members of rival Tamil groups has been described as “systematic”: Asia Watch, Halt Repatriation of Sri Lankan Tamils (August 11, 1993) 2.
- (c) Police officers captured by the LTTE have been massacred. See US Committee for Refugees, Sri Lanka: Island of Refugees (1991) 17-18 where it is reported by way of example that on June 11, 1990, LTTE guerillas attacked seventeen police stations in the Eastern Province and captured an estimated 600 policemen. Shortly afterwards, more than 100 decomposed bodies were discovered. The fate of the

remaining policemen is not known. See further Asia Watch, Human Rights in Sri Lanka: An Update (March 12, 1991) 3.

- (d) Amnesty International has also collected numerous reports of extra-judicial executions of civilians by the LTTE. Victims include large numbers of Sinhalese and Muslim civilians, as well as Tamil people considered “traitors”. The LTTE has also been responsible for the “disappearance” of prisoners taken, including policemen and others in government service, as well as those it considers “dissident” Tamils and is reported to have tortured prisoners: US Committee for Refugees, Sri Lanka: Island of Refugees (1991) 19.

- (e) The LTTE has engaged in “ethnic cleansing” by committing atrocities against innocent Sinhalese and Muslims living in areas sought to be dominated by the LTTE. For example, in late October 1990, the LTTE issued a summary eviction notice to all Muslims living in the northern districts of Mannar, Mullaitivu, Kilinochchi, and Jaffna: leave or be killed: US Committee for Refugees, Sri Lanka: Island of Refugees (1991) 25. See further Asia Watch, Human Rights in Sri Lanka: An Update (March 12, 1991) 4.

- (f) The LTTE has also imposed severe restrictions on freedom of expression in areas under its control. Civilians in the north dare not voice criticism of the LTTE, whatever their private opinion, and such printed publications as are produced are subject to tight LTTE censorship. Those voicing views perceived to be non-supportive of the LTTE are “disappeared”: Asia Watch, Human Rights Accountability in Sri Lanka (31 May 1992) 48.

- (g) The LTTE also requires each family to provide one recruit for the LTTE. If a family refuses, they must work on an LTTE farm or pay a

very substantial sum of money: Asia Watch, Halt Repatriation of Sri Lankan Tamils (August 11, 1993) 10.

- (h) No one under 25 years of age is allowed to leave LTTE territory unless it is a medical emergency. The age limit was formerly 30. Those wishing to go to Vavuniya or Colombo must get a pass and pay a sizeable fee to the LTTE: Asia Watch, Halt Repatriation of Sri Lankan Tamils (August 11, 1993) 14.

If a general summary were required, it is to be found in the Amnesty International report, Sri Lanka: Assessment of the Human Rights Situation (February 1993, AI Index: ASA 37/1/93) tendered by the appellant. It contains at pp 14-16 a damning indictment of the LTTE. Among the abuses documented by Amnesty International are the commission of numerous gross abuses of human rights, including the deliberate killings of hundreds of non-combatant Muslim and Sinhalese civilians, the arbitrary killing of civilians in bomb attacks on buses and trains, the torture and killing of prisoners, and abductions for ransom. The LTTE also executed prisoners accused of being traitors. Numerous people have been held for ransom by the LTTE as part of its fund raising effort and a former LTTE member described to Amnesty International how funds were extracted from the public by force, including by taking children prisoner for ransom from their parents. Muslims have also been held for ransom. The report records that while the LTTE announced in February 1988 that it would abide by the provisions of the Geneva Conventions and its Optional Protocols I and II, and while it continues to claim that it abides by these standards, consistent reports from the north east indicate that it fails to do so.

THE APPELLANT'S CASE

The appellant is 31 year old single man who has spent most of his life in the northern part of Sri Lanka on the Jaffna peninsula. He is the second eldest of four sons. His parents and brothers continue to live in the Jaffna area of Northern Sri Lanka.

In support of his refugee application, the appellant has submitted a detailed fifteen page statement dated 3 August 1992. We do not intend reciting the statement at length. It is sufficient for the present purpose to note the following principal features:

1. In 1980, the appellant and other school friends were at school for soccer practice. They were spoken to by members of the security forces concerning posters found at the school promoting the LTTE. When the appellant and his friends refused to answer questions about the posters, they were forced to remove them using their tongues and their mouths. The appellant and his companions were then taken to a nearby military base where they were held for two days until they were released as a result of the intervention of the school principal. During the period of custody, the appellant and his friends were beaten and denied food and water. As a result of his experience, the appellant developed an intense dislike for the Sri Lankan security forces.
2. From approximately mid-1980, the appellant became attracted to the LTTE and its ideal of creating a separate state for Tamils. He frequently attended political meetings held by the LTTE and, as a result, was elected President of the LTTE propaganda group in his class. His activities included the selling of LTTE books, stamps, calendars and organising political meetings, both at his own school and at other schools.

As a result of his extracurricular activities, the appellant failed his GCE advanced level examination in 1981 but successfully passed it in the following year. However, he was refused entry to University due to his poor marks. The appellant continued his studies at a Technical College from 1983 to 1985. During this period, he continued his LTTE activities and was a member of the student wing of the LTTE.

3. In 1985, the appellant joined the military wing of the LTTE and was trained in the use of arms, the laying of mines and in making guerilla attacks. When he completed his training in December 1985, he was made head of the training camp and as such was involved in training newly recruited members.
4. In January 1986, one of the appellant's brother was arrested by the security forces and questioned about the appellant's activities. During his interrogation, the brother was tortured and, as a result, now suffers from fits. His left arm and leg were "damaged".
5. In 1986, the appellant was appointed as area Military Commander in his home village, which was very close to the Pallali Army Base, which was surrounded and besieged by the LTTE in May 1986. In his statement, the appellant described the fighting which took place over the following twelve months, fighting in which he was actively involved and, as a result of his activities, he was promoted to 2nd Lieutenant and placed in charge of three men.
6. In 1987, because the LTTE was short of arms, the appellant was asked "by the leader" to go to India for an arms deal. His passport was obtained for him by the LTTE from the Jaffna Passport Office. At the last minute, the trip was cancelled.

7. Following the arrival of the Indian Peace Keeping Force (IPKF) and before hostilities resumed, the appellant engaged in propaganda work for the LTTE, visiting villages and meeting with student organisation representatives in order to strengthen the LTTE movement.
8. When hostilities commenced with the IPKF, the appellant was based in a LTTE camp and “was fighting from there”. He described how the fighting resulted in “the highest casualties I have ever seen”.
9. After the LTTE was forced underground by the IPKF, the appellant was assigned the task of collecting “donations”. He stated:

“We had put a tax on cigarettes and liquor and I was collecting the money and supplied it for the LTTE movement”.
10. On Friday, 5 February 1988, while returning from a nighttime visit to his parents, the appellant was caught by the IPKF in “a general roundup” of young men and taken to an army camp where he was held for ten days by the IPKF. During this period, he was beaten and asked to identify LTTE hideouts and activities. From the questions asked of the appellant, it was apparent that the IPKF soldiers did not know that the appellant was a member of the LTTE. The appellant, for his part, refused to divulge any information. As a result of the beatings received, the appellant was taken to Jaffna Hospital for treatment. The medical certificate from the Hospital records swelling of both legs, pain in the chest and a contusion on the right thigh with abrasions. While receiving treatment, the appellant managed to escape the soldiers who had accompanied him to the Hospital.
11. The appellant resumed his propaganda and tax collecting activities in

the LTTE.

12. On Thursday, 23 August 1989, the appellant was arrested once more by the IPKF while attending a political meeting and taken to an army camp. He was identified by the soldiers as an escaped prisoner and detained for approximately six months. He was released by the IPKF in February 1990 when they withdrew from Sri Lanka. During the period of the appellant's detention, he was ill-treated by various methods, including having chilli powder put in his eyes and being burnt with steam and with cigarette butts. As a result of this treatment, the appellant decided to provide the soldiers with some information about the LTTE.

A medical certificate from Jaffna Hospital dated 17 February 1990, notes that the appellant complained of pain in both eyes and there were both abrasions and contusions to his body. The appellant was also suffering from malaria and was admitted to hospital for fourteen days.

13. The appellant states that with the withdrawal of the IPKF from Sri Lanka in March 1990, the LTTE took over control of the Jaffna peninsula and "other rival [Tamil] groups such as EPRLF, TELO were chased to India".
14. Following the withdrawal of the IPKF, the appellant stated that hostilities between the LTTE and the Sri Lankan security forces resumed and the "worst war" commenced. As the appellant was not then fit for military activities, he took part in the building of bunkers, the supplying of food and arms to the LTTE, and the collecting of funds. He was also involved in the forcible conscription of children. His statement contains the following paragraph:

“I was working with 2 members. We were collecting funds and jewellery from the public. We were strict on this issue. We were ordered to collect forcibly from the public. The LTTE manpower was very weak at that time. We got orders from our leaders to conscript a child from each family. Finally the LTTE imposed laws on public sectors such as Banks, schools, universities and the LTTE ruled those bodies”.

The appellant’s statement records that because of the actions described in the passage quoted above, the LTTE lost much public sympathy and support. In addition, a pass system was introduced which prevented anyone between the ages of ten and thirty years from leaving for the south:

“Because of this, the public gave their support and sympathy towards the LTTE but the LTTE was doing worse things, such as introduction of a pass system to leave Jaffna. The LTTE did not allow anyone who is 10-30 years of age to leave”.

15. At this stage, the appellant “got fed up to stick with the LTTE” and decided to leave both the LTTE and Sri Lanka. His father went to Colombo in January 1991 and extended the validity of the appellant’s passport. After a delay of almost twelve months, a New Zealand visa was arranged and the appellant received a message from his father to join him (the father) in Colombo.

In the meantime, the LTTE had conscripted one of the appellant’s brothers into the military, leading to an argument between the appellant and one of the LTTE leaders who refused to release the brother from military service.

16. The appellant left Jaffna on 10 March 1992 without notifying the LTTE and reached Colombo nine days later. There he stayed at the house

of a friend of his father who was a retired police officer. Through this person, a police clearance certificate was obtained and on 1 April 1992, the New Zealand Embassy in Singapore issued a student visa to the appellant. The appellant left Sri Lanka on 20 April 1992 and flew to Auckland via Kuala Lumpur and Hong Kong. He arrived in New Zealand, as mentioned, on 22 April 1992.

17. The appellant claims to be in fear of persecution at the hands of the Sri Lankan forces, Tamil groups such as the EPRLF and TELO who are allied with those forces, and also at the hands of the LTTE. He also claims that when the IPKF released him from prison, his photograph was published in the newspaper. No details as to the identity of the newspaper or its area of circulation have been given by the appellant.

At the appeal hearing, the chronology of events given by the appellant conformed very much to that which appears in his written statement. However, the content of his evidence changed in material respects, particularly with regard to his account of his activities in the LTTE. There was a conscious effort on his part at the appeal hearing to minimise his role in the LTTE. It seemed to the Authority that at some point subsequent to the submission of the written statement, the appellant became aware that a truthful account of his activities in the LTTE could well lead to his exclusion from the Refugee Convention. The account in that statement has accordingly been "revised". We accordingly turn to the appellant's evidence given on 19 September 1994.

THE APPELLANT'S EVIDENCE AT THE APPEAL HEARING

Again, no purpose would be served by relating at length the evidence given

by the appellant at a long and attenuated hearing. We intend to highlight only the following aspects of his evidence:

- (a) The appellant claimed that throughout his time in the LTTE, he was not involved in guerilla military activities. His sole focus was on propaganda and the organising of meetings. He also claimed, for the first time, that from July 1983 until his departure from Sri Lanka in early 1992, he was involved in a humanitarian organisation known as the Tamils Rehabilitation Organisation (TRO). He described this organisation as being affiliated with the LTTE and, in fact, all funds had to pass through the LTTE. His involvement had been at the suggestion of the LTTE itself. In support of this belated claim, the appellant produced in evidence an Information Bulletin (Vol 1, No 1, January 1994) published by the Tamils Rehabilitation Organisation, Walthamstow, London E17 4SA together with a certificate of incorporation for the TRO issued under the Companies Act 1985 (UK) dated 17 February 1992. The Authority also received a copy of the (undated) Articles of Association of Tamils Rehabilitation Organisation (Australia) Limited.

Asked why he had never previously mentioned his nine year involvement in the Tamils Rehabilitation Organisation, the appellant first claimed that on arrival in New Zealand, he did not know what information to volunteer and, accordingly, decided to wait until he was interviewed by the Refugee Status Section before he gave the information. When it was pointed out to the appellant that there was no mention of the organisation in the Refugee Status Section interview, he responded that that was because no one had asked him about the organisation. Asked why there was no mention of the organisation in the memorandum filed in support of the appeal on 27 July 1994, the appellant replied that even Mr McKee had not asked

him about details of his case. The Authority does not accept the appellant's protestations, particularly given that Mr McKee has acted for the appellant since the appellant's first arrival in New Zealand and appeared with him at the Refugee Status Section interview on 6 November 1992. If there was any truth to the appellant's new claim, we are sure that he would have made mention of the TRO before now.

The appellant's attention was drawn to the fact that the Information Bulletin, in providing a brief summary of the TRO's aims and history, specifically states that the TRO was formed in 1985 in South India. The appellant was asked how he could have been active in the organisation in Sri Lanka from 1983. He replied that the organisation was formed after the 1983 riots in Colombo but was not then recognised. Asked whether the Information Bulletin was wrong in claiming that the organisation was formed in South India, the appellant continued to claim that the organisation had in fact begun in Sri Lanka, but publicity was not given to this fact as it was an LTTE movement and, if people knew this, they would not feel encouraged to donate money to the TRO. He claimed that the LTTE was still involved with the TRO and that the funds of the TRO went through the LTTE. Challenged with the fact that the Information Bulletin states that the TRO was not established in the north and east of Sri Lanka until 1987, the appellant claimed that it was not **registered** until that time and, for that reason, people may not think that it was established. It was then pointed out to the appellant that the Information Bulletin states quite specifically that the TRO did not begin **operating** in Sri Lanka until 1987. If this was correct, the appellant could not claim that it had been operating in Sri Lanka up to four years earlier. The appellant insisted, nevertheless, that he was telling the truth.

- (b) The appellant also claimed that apart from receiving basic training with the LTTE, he was not involved with the military wing of the organisation. He had nothing to do with weapons and the training that he gave to other LTTE members was only in the supply of food and weapons to the frontline, not in fighting. He denied being trained in the use of arms, the laying of mines and in making guerilla attacks. Confronted with his written statement which is to the contrary, the appellant claimed that the misunderstanding was due to a translation error. The Authority did not find the appellant's response convincing.
- (c) The appellant did concede that he was appointed by the LTTE to be in charge of the appellant's village area. However, he avoided using the expression "Military Commander" which is the term employed by him in his written statement. Later, in his evidence, the appellant did admit to being Military Commander of the area in question, but qualified his answer by adding (for the first time) that there were in fact **two** Military Commanders, one "for the public" and one "for the fighters". He was Military Commander for the public. Challenged on the fact that this substantial qualification as to his role is disclosed neither in his written statement nor in the Refugee Status Section interview, the appellant once again blamed the misunderstanding on a translation error. Again, the Authority did not find the appellant's response convincing. He insisted that he was only involved in the supplying of food to the LTTE and the construction of bunkers for use by both the LTTE and the civilian population. In addition, he was also involved in propaganda work and the collection of funds. In this regard, he claimed that the civilian population were happy to part with their money voluntarily, and that he never demanded money from them and likewise no one ever refused to make a donation when requested by him.

- (d) As to the appellant's claim not to have been involved in military activities, he was questioned about the following paragraph which appears in his written statement:

"Then we attacked the army camps. We used small arms and mortar shells. I was a fighter at [V school]. The school was occupied by the forces as a result of that attacked (sic). the forces withdrew from the school.) After this attack I was promoted to 2nd Lieutenant and had three men under my control".

The appellant claimed that the "we" referred to the LTTE generally, and not to him. The appellant's attention was drawn to the fact that the third sentence in this passage specifically uses the first person, i.e., "I was a fighter". The appellant denied being a fighter. He said that he used to take people for fighting, and therefore he was called a fighter, even though he did not engage in this activity. As will be seen, the Authority does not believe the appellant's denial.

- (e) To further challenge the appellant's attempt to distance himself from substantial involvement in the LTTE organisation and its military activities, the Authority asked the appellant why he would be asked to go to India in 1987 "for an arms deal" as claimed in his written statement. The appellant initially stated that he was asked to go because he could talk and speak very well and thereby increase the prospect of obtaining a reduction in the price of the weapons. He said that he might even persuade the suppliers to give some weapons freely. He then became uncomfortable with this claim (given his protestation never to have received weapons training), and changed his evidence, claiming that even though he knew nothing about weapons, he was selected to go to India for the arms deal as he would be able to explain to the arms dealer the "situation of the

country”. The Authority was at a loss to know how such an explanation could assist the negotiation of an arms deal and was at a further loss to know why the appellant would be selected for this task given that there are thousands of Tamil refugees in India, many of them LTTE supporters. The LTTE has also run guerilla training camps in India. There was no shortage of people who could explain the situation in Sri Lanka just as well as the appellant.

- (f) Asked about his claim in the written statement that in 1987, he was “again mobilised” as a military supporter, the appellant insisted that this meant nothing more than the supplying of food and the collecting of funds.

- (g) It was put to the appellant that the methods used by the LTTE to collect tax were violent, and that those who refused to pay were punished severely or killed. The appellant claimed, unconvincingly, that he first found out that this was so after July 1990, and he believed that such methods are in fact employed by the LTTE. He also accepts that a child or the principal bread earner would be kidnapped and the family blackmailed for money. In addition, jewellery was taken from families or threats made that a member of the family would be forcibly recruited into the LTTE unless money was paid. He said he received this information from the public. Asked why he had only received this information seven years after first starting work for the LTTE, the appellant said that prior to 1990, there were small incidents only which he was prepared to dismiss. However, after 1990, the public began to hate the LTTE. It was put to the appellant that the Authority found it difficult to understand how a person in daily contact with the public did not find about LTTE abuses until late 1990. The appellant’s response was that in his area, no abuses occurred. As will be seen, the Authority does not believe the

appellant.

In the appellant's opinion, the LTTE only turned into "a bad organisation" in 1990.

- (h) The appellant was then asked about the instructions received in mid-1990 and which are described in the following passage from his evidence:

"I was working with 2 members. We were collecting funds and jewellery from the public. We were strict on this issue. We were ordered to collect forcibly from the public. The LTTE manpower was very weak at that time. We got orders from our leaders to conscript a child from each family. Finally the LTTE imposed laws on public sectors such as Banks, schools, universities and the LTTE ruled those bodies".

The appellant claims that he did not carry out the instructions to collect funds and jewellery from the public by force, nor did he conscript children into the LTTE. In short, he disobeyed his orders. It was pointed out to the appellant that he did not leave the north of Sri Lanka until March 1992. The Authority enquired whether, in the twenty months which intervened from mid-1990 until his departure, he suffered any punishment or discipline for disobeying orders. The appellant claimed that he suffered no adverse consequences even though the LTTE knew that he was not carrying out instructions. Pressed on this point, he added that the LTTE instead used two other members to enforce the demand for money and manpower. The appellant has never previously made such a claim. The claim is, in any event, entirely at odds with the clear and specific passage from his statement quoted earlier in this paragraph.

- (i) Asked why it had taken him so long to leave the LTTE when, from mid-1990, it was apparent that the organisation had “gone bad”, the appellant stated that he had to do a lot of planning to leave and in any event thought that he could change their ways. As to the indiscriminate bombing attacks carried out by the LTTE against civilian targets and as to the massacres carried out by the LTTE against both Muslims and Sinhalese, the appellant claimed that he did not approve of or support these atrocities, but claimed that if he had defied the LTTE, he would have been killed. In any event, he had not become disillusioned with the LTTE until 1990 when the forced tax collection and conscription were introduced.
- (j) The appellant also claimed at the hearing, for the first time, that the brother who had been conscripted into the LTTE in 1991 was now being held in a LTTE detention camp. The appellant was confronted with the fact that at the Refugee Status Section interview held on 14 October 1992, the appellant had described his brother as “an ordinary member” of the LTTE. The appellant denied having said this and claimed to have told the interviewing officer that his brother had been forcibly conscripted into the LTTE. The Authority notes that there is no such suggestion in the interview report. Significantly, when the appellant was given an opportunity to comment upon and correct the interview report, nowhere in the five pages of corrections and submissions is any qualification made of the kind now advanced by the appellant. When the appellant was asked why he had not earlier claimed that his brother was in a LTTE detention camp, he claimed that, at the time of the Refugee Status Section interview, he did not know this fact. The Authority cannot help but notice, however, that nowhere in the memorandum submitted by Mr McKee to the Authority on 27 July 1994 is reference made to the brother’s detention by the LTTE. Mention is only made of the brother’s conscription.

- (k) In re-examination, when asked about his claim to have been appointed an area Military Commander and to having two people under his command, the appellant surprisingly denied having anyone under his command.

It is claimed by the appellant in the appeal memorandum that:

1. He is at risk of death at the hands of the LTTE as a “traitor” if he attempts to live in the LTTE controlled areas in the North of Sri Lanka.
2. He is at risk of at least arbitrary arrest and detention if he attempts to live in the government controlled areas in the south.

On this basis, it is claimed that the appellant has a well-founded fear of persecution for a Convention reason.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is 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; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.”

In the context of this case, the four principal issues are:

1. Is the appellant genuinely in fear?

2. Is it a fear of persecution?
3. Is that fear well-founded?
4. Is the persecution he fears persecution for a Convention reason?

In this regard we refer to our decision in Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB (11 July 1991).

In the same decision this Authority held that in relation to issue (3) the proper test is whether there is a real chance of persecution.

ASSESSMENT OF THE APPELLANT'S CASE

As indicated in the narrative of the appellant's case, the Authority does not find the appellant a credible witness. Our conclusion is that the written statement submitted with the refugee application contains an accurate account of the facts and of his activities in the LTTE. At some time subsequent to the submission of that statement, the appellant learned that on the evidence given by him in his statement, there was a very real possibility of his being excluded from the Refugee Convention under the terms of Article 1F. In the result, he has attempted to resile from significant parts of his written statement and to play down to a very substantial degree his involvement in the LTTE. Having seen and heard the appellant, we do not accept that there have been translation errors or that the appellant has been misunderstood. Rather, the appellant has made a belated (and unconvincing) attempt to portray himself as a kind hearted and benevolent LTTE cadre. His attempts foundered badly on his claim to have been actively involved in the Tamils Rehabilitation Organisation over a period of

years when the organisation simply did not exist. It also led to him making the progressively absurd claims that he was Military Commander of an area in civilian matters only, inventing for the purpose a Military Commander for military purposes and then ultimately arriving at the position where he claimed that he in fact had no one under his command.

In short, we do not accept the account given by the appellant at the appeal hearing. We prefer instead to accept the facts set out in his original written statement dated 3 August 1992.

On the facts contained in that statement, we address first the appellant's fear of persecution at the hands of the Sri Lankan security forces. In this regard, the only occasion on which the appellant was detained by Sri Lankan security forces was in 1980. The two subsequent periods of detention were by the IPKF who, as mentioned, left Sri Lanka in March 1990. Since the appellant's release by the IPKF at that time, there have been no reports of enquiries being made for the appellant by the Sri Lankan security forces. The last time such enquiry was made was in December 1985 when the appellant's brother was arrested. The appellant's claim that the IPKF published his name and photograph in an unidentified newspaper does not significantly add to the appellant's case as there is no basis on which the Authority can safely infer that this information is held by the Sri Lankan security forces. It is a bare possibility only. It is significant that the appellant's father was able to renew his (the appellant's) passport in February 1991 without apparent difficulty. Given the long struggle between the LTTE and the Sri Lankan security forces, we do not accept that the passport would have been extended had the Sri Lankan authorities an interest in the appellant. Furthermore, the appellant, on his own admission, was able to obtain a police clearance certificate. He does claim that it was arranged through a friend of his father and it would appear that a small bribe was paid. Again, we do not accept that a known LTTE cadre could obtain a

certificate so easily if there was any real interest on the part of the Sri Lankan authorities. On top of this, the appellant was able to pass safely through the international airport at Colombo upon his departure. In these circumstances, there is no more than a bare possibility of the appellant being apprehended by the security forces. This falls well short of the real chance threshold required by the Refugee Convention. This limb of the appellant's case is no more than speculative.

We turn now to the fear of persecution at the hands of the LTTE. On the facts that we have accepted, we find that the appellant for a period of nine to ten years was a loyal, active and dedicated member of the LTTE. During this period, he rose to a position of some influence and control. As a result of his sudden desertion from his post, we are prepared to accept that he will be punished by the LTTE with a degree of severity that is properly stigmatised as persecution. We do not accept that relocation in Colombo is a realistic alternative as the LTTE have been active there notwithstanding tight security. Several political and military leaders have been assassinated in the city over the past four years, including the Minister of State for Defence Ranjan Wijeratne, the Navy Commander Vice-Admiral Clancy Fernando and President Ranasinghe Premadasa, who was assassinated on 1 May 1993. Police attributed all these assassinations, as well as that of opposition leader, Lalith Athulathmudali on 23 April 1993, to the LTTE: Amnesty International Sri Lanka: Balancing Human Rights & Security: Abuse of Arrest & Detention Powers in Colombo (February 1994, AI Index: ASA 37/10/94) 4.

In these circumstances, we find that there is a real chance of persecution were the appellant to return to Sri Lanka. The remaining Inclusion Clause issue for consideration is whether that persecution will be for one of the five Convention reasons. In this regard, it is important to remember that the examination of the circumstances must be approached from the perspective

of the agent of persecution, since that is the perspective that is determinative in inciting the persecution: Refugee Appeal No. 461/92 Re ABA (1 March 1994) 20-22; Refugee Appeal No. 702/92 Re GS (5 August 1994) 12; Canada (Attorney General) v Ward [1993] 2 SCR 689, 746-747 (Can:SC). Put another way, in terms of Article 1A(2), the issue is whether the persecution feared by the appellant at the hands of the LTTE is persecution **for reason of** his political opinion (actual or imputed). In this regard, the evidence goes no further than establishing that deserters from the LTTE are severely punished. There is no evidence to suggest that deserters such as the appellant are imputed with a political opinion. The LTTE, on the evidence before the Authority, punishes desertion in order to enforce discipline within its ranks. Nor is there anything on the evidence to suggest that in his dealings with the LTTE, the appellant gave cause for the LTTE to impute to him a political opinion. In this respect, the two reasons given by him for leaving the LTTE were as follows:

- (a) He “got fed up to stick with LTTE”.
- (b) Following the conscription of his brother into the LTTE, the appellant had an argument with one of the leaders who refused to release the appellant’s brother. The appellant’s statement continues:

“Thereafter I didn’t want to stay with LTTE”.

On these bare facts, there is no evidence on which the Authority could justify a finding that the appellant’s act of desertion will be perceived by the LTTE in political terms, leading to the persecution of the appellant for his actual or imputed political opinion rather than for his act of desertion. In these circumstances, the facts are closer to INS v Elias-Zacarias 112 S.Ct. 812, 815-816 (1992) than to Canada (Attorney General) v Ward [1993] 2 SCR 689, 749.

As a consequence of this finding, the appellant's claim to refugee status on the basis of his fear of persecution at the hands of the LTTE must fail for the simple reason that there is no Convention reason to the feared persecution.

In any event, even if we are wrong in holding that the Inclusion Clause provisions of Article 1A(2) are not fulfilled either in relation to the appellant's fear of persecution at the hands of the Sri Lankan security forces or at the hands of the LTTE, it is our alternative finding that the appellant is nevertheless excluded from the protection of the Refugee Convention by virtue of the fact that in terms of Article 1F(a), there are serious reasons for considering that he has committed crimes against humanity.

EXCLUSION: ARTICLE 1F(a)

Article 1F of the Refugee Convention provides:

“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.”

Jurisdiction to Consider Exclusion

Under the Authority's Terms of Reference which came into force on 30 August 1993, we are required to determine not only whether a refugee claimant is a refugee within the meaning of Article 1A(2) of the Refugee Convention, but also to determine whether a person who meets the definition of a refugee in Article 1A(2) should nevertheless be excluded from the protection of the Convention pursuant to Article 1F. See Part II para 5(1)(b) of the Terms of Reference:

“ To make a determination on appeal from decisions of the Refugee Status Section as to whether a person who meets the definition of a refugee in Article 1A(2) of the Convention should nevertheless be excluded from the protection of the Convention, pursuant to Article 1D, 1E or 1F of the Convention”.

Crimes against Humanity

According to Atle Grahl-Madsen, The Status of Refugees in International Law Vol 1 (1966) 272 Article 1F(a) developed from the reference to Article 6 of the London Charter of the International Military Tribunal in para 7(d) of the UNHCR Statute. The Charter of the International Military Tribunal, annexed to the London Agreement, 8 August 1945, is to be found in M Cherif Bassiouni, Crimes Against Humanity in International Law (1992) 582. Article 6 provides:

“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, organizers, 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.”

For the purposes of this decision, there is no need to delimit with any greater particularity what is meant by the reference to “international instruments” in Article 1F(a) other than to note the relevance of Common

Article 3 of the Geneva Conventions of 1949¹ (Common Article 3) and the second additional Protocol of 1977² (“Protocol II”) to the 1949 Geneva Conventions³.

Before the adoption of Protocol II, Common Article 3 of the 1949 Geneva Conventions was the only legal regime governing non-international armed conflicts: Claude Pilloud, *et. al.*, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987) 14, 44. Common Article 3 remains the most firmly established source of international law on internal war: Edward K Kwakwa, The International Law of Armed Conflict: Personal and Material Fields of Application (1992) 22; Heather A Wilson, International Law and the Use of Force by National Liberation Movements (1988) 43-52.

Common Article 3 as it appears in the Geneva Convention Relative to the Protection of Civil Persons in Time of War of August 12, 1949 is in the following terms:

“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 and those placed *hors de combat* by sickness, wounds, detention, or any other cause,

¹ For the text of the Conventions, see the Geneva Conventions Act 1958 and, in particular, the First, Second, Third and Fourth Schedules. The Geneva Conventions were considered by this Authority in Refugee Appeal No. 47/92 Re PS (5 August 1992) 9.

² See the Geneva Conventions Act 1958 and, in particular, the Fifth and Sixth Schedules added by the Geneva Conventions Amendment Act 1987.

³ See further Hathaway, The Law of Refugee Status (1991) 217.

shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. 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;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted Court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

Although it is generally accepted that the scope of Common Article 3 is broader than that of Protocol II, Protocol II was introduced to remedy perceived inadequacies of Common Article 3. Whether it has achieved this end is debatable: Kwakwa *op cit* 22; Wilson *op cit* 162. Protocol II develops and supplements Common Article 3. Its scope of application extends to all armed conflicts which are not covered by Article 1 of Protocol I, and which

take place in the territory of a state between its armed forces and dissident but organised armed groups in sufficient control of a part of the state's territory, such as to enable the group to carry out "sustained and concerted military operations and to implement [Protocol II]": Kwakwa *op cit* 22. These conditions precedent are satisfied on the facts and significantly, as already mentioned, 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 (February 1993, AI Index: ASA 37/1/93, 14).

It is unnecessary to set out the Protocol at length. However, the following Articles are of relevance to the facts of the present case⁴:

"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;

⁴ A commentary on the Articles is to be found in Claude Pilloud, *et. al.*, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987).

- (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.
- 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.”

“ARTICLE 17--PROHIBITION OF FORCED MOVEMENT OF CIVILIANS

- 1. The displacement of the civilian population shall not be

ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”

For the purpose of defining crimes against humanity in the context of the present case, we intend relying on Article 6 of the London Charter of the International Military Tribunal, Common Article 3 and Protocol II, noting that there is considerable overlap between their various terms. We also intend taking into account the following two factors:

- (a) It is commonly accepted as part of the definition of crimes against humanity in the international sphere that crimes against humanity must generally be committed in a widespread, systematic fashion: Sivakumar v Canada (Minister of Employment and Immigration) [1994] 1 FC 433, 442-443 (FC:CA).
- (b) Another historic requirement of a crime against humanity has been that it be committed against a country’s own nationals: Sivakumar v Canada (Minister of Employment and Immigration) [1994] 1 FC 443 (FC:CA). While the Canadian Federal Court of Appeal has expressed doubt about the continuing advisability of this requirement in the light of the changing conditions of international conflict, it is an issue which does not require resolution on the facts of the present case.

For the avoidance of doubt, we intend following Sivakumar v Canada (Minister of Employment and Immigration) [1994] 1 FC 433, 444 (FC:CA) in holding that individuals with no connection to the state can commit crimes against humanity and are not immune from the reach of international criminal law. On the contrary, they are now governed by it. In fairness to

the appellant, he did not claim immunity from the application of Article 1F(a) on the basis that neither he nor the LTTE were legally capable of committing crimes against humanity.

We do not intend making this already lengthy decision any longer by an extensive examination of the application of Article 1F(a) as we believe that the facts of the appellant's case are reasonably clear. It is necessary, however, to explain our understanding of the standard of proof, the mens rea ingredient and the degree of complicity required before it can be said that an individual has committed a crime against humanity. In this regard, we have been much assisted by three recent decisions of the Canadian Federal Court of Appeal, namely, Ramirez v Canada (Minister of Employment and Immigration) [1992] 2 FC 306 (FC:CA); Moreno v Canada (Minister of Employment and Immigration) [1994] 1 FC 298 (FC:CA) and Sivakumar v Canada (Minister of Employment and Immigration) [1994] 1 FC 433 (FC:CA). We have also been assisted by the discussion of these cases in the following articles: Joseph Rikhof, "War Crimes, Crimes Against Humanity and Immigration Law" (1993) 19 Imm LR (2d) 18; Joseph Rikhof, "The Treatment of the Exclusion Clauses in Canadian Refugee Law" (1994) 24 Imm LR (2d) 31; Joseph Rikhof, "Exclusion Update: Three Years of Federal Court Decisions" (1995) 27 Imm LR (2d) 29.

The following points are made in the three Canadian Federal Court of Appeal decisions:

"Serious reasons for considering" - The Standard of Proof

Article 1F(a) requires that there be "serious reasons for considering" that the individual has committed a crime against humanity. In the aftermath of Second World War atrocities, the

signatory states to the Refugee Convention intended to preserve for themselves a wide power of exclusion from refugee status where perpetrators of international crimes are concerned: Ramirez 313. The words “serious reasons for considering” must be taken to establish a lower standard of proof than the balance of probabilities: Ramirez 311; Moreno 309; Sivakumar 445. However, the requisite standard of proof comes into legal play only when the Tribunal is called on to make determinations which can be classified as questions of fact. The “less-than-civil-law” standard is irrelevant when the issue being addressed is essentially a question of law. Thus, while it is a question of fact whether the refugee claimant killed civilians, it is a question of law whether the act of killing civilians can be classified as a crime against humanity. This issue must be decided in accordance with legal principles rather than by reference to a standard of proof: Moreno 313.

The Mens Rea Ingredient and the Degree of Complicity

There must be personal and knowing participation in the commission of the crime: Ramirez 316-317, 318:

“At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and a knowledge that all of the parties in question may have of it”.

And at 320 the court observed:

“In my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts”.

See further Moreno 323.

It is clear that if someone personally commits physical acts that amount to a crime against humanity, that person is responsible: Sivakumar 437. However, it is also possible to be liable for such crimes - to “commit” them - as an accomplice, even though one has not personally done the acts amounting to the crime: Ramirez 315; Sivakumar 438. Mere bystanders or onlookers with no intrinsic connection with the persecuting group are not accomplices: Ramirez 317; Moreno 321-322; Sivakumar 438. However, a person who aids in or encourages the commission of a crime, or a person who willingly stands guard while it is being committed, is usually responsible. This will depend on the facts of each case: Sivakumar 438.

Those involved in planning or conspiring to commit a crime against humanity, even though not personally present at the scene, might also be accomplices, depending on the facts of the case. In addition, a commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them:

Sivakumar 439. It must be remembered, however, that in defining who is considered an accomplice under Article 1F(a), it would be unwise to rely exclusively on domestic criminal law concepts of aiding and abetting, since international instruments are not to be interpreted according to the legal system of any one country: Ramirez 315; Sivakumar 438.

Membership in an organisation which from time to time commits crimes against humanity is not normally sufficient for exclusion from refugee status. However, where an organisation is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may, by necessity, involve personal and knowing participation in persecutorial acts: Ramirez 317. This point was expanded upon in Sivakumar at 439-440:

“Another type of complicity, particularly relevant to this case, is complicity through association. In other words, individuals may be rendered responsible for the acts of others because of their close association with the principal actors. This is not a case merely of being ‘known by the company one keeps’. Nor is it a case of mere membership in an organisation making one responsible for all the international crimes that organisation commits (see *Ramirez*, at page 317). Neither of these by themselves is normally enough, unless the particular goal of the organisation is the commission of international crimes. It should be noted, however, as MacGuigan J.A. observed: ‘someone who is an associate of the principal offenders can never, in my view, be said to be a mere onlooker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts’ (*Ramirez*, *supra*, at page 317).

In my view, the case for an individual’s complicity in international crimes committed by his or her organisation is stronger if the individual member in question holds a position of importance within the organisation. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the

organisation's purpose in committing that crime. Thus, remaining in an organisation in a leadership position with knowledge that the organisation was responsible for crimes against humanity may constitute complicity. In *Crimes Against Humanity in International Criminal Law* (1992), M Cherif Bassiouni states, at p 345:

'Thus, the closer the person is involved in the decision-making process and the less he does to oppose or prevent the decision, or fails to dissociate himself from it, the more likely that the person's criminal responsibility will be at stake'.

In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organisation. Mr Justice Robertson noted this point in *Moreno, supra*, when he stated [at p 324]:

'[T]he closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach'.

Or course, as Mr Justice MacGuigan has written, 'law does not function at the level of heroism' (*Ramirez, supra*, at p 320). Thus, people cannot be required, in order to avoid a charge of complicity by reason of association with the principal actors, to encounter grave risk to life or personal security in order to extricate themselves from a situation or organisation. But neither can they act as amoral robots."

Applying the above reasoning, we must determine whether the appellant's conduct satisfies the criterion of "personal and knowing participation" in crimes against humanity. If liability is to rest on complicity, we remind ourselves that complicity rests on the existence of a shared common purpose as between "principal" and "accomplice".

Above all, however, it must be remembered that it is not our function to

make a finding that the appellant **has in fact** committed a crime against humanity. Article 1F(a) requires only that there be serious reasons for considering that he has done so. If such reasons exist, exclusion from the Refugee Convention follows.

REASONS FOR THE APPELLANT'S EXCLUSION **FROM THE REFUGEE CONVENTION**

As mentioned earlier, the LTTE was formed in 1972: US Committee for Refugees, Sri Lanka: Island of Refugees (1991) 8. Its assassination of policemen, public officers and Tamil "traitors" escalated from that time: *op cit* 8. In June 1981, shortly before elections were to be held for the Jaffna District DDC, the LTTE assassinated a leading UNP candidate. Two weeks later, two policemen were killed at a rally and, in retaliation, off-duty policemen and Sinhalese soldiers went on a rampage, looting, killing and setting fire to the Jaffna Public Library with its 95,000 volumes of rare books of historical and cultural significance to the Tamils. Indian Tamils suffered heavily at the hands of roaming mobs of hoodlums who destroyed property and killed innocent victims. By August, the violence had spread to the east and south: *op cit* 8. It is also widely accepted that the anti-Tamil riots in 1983 (the worst in Sri Lanka's history) were triggered when the LTTE ambushed and killed thirteen Sri Lankan soldiers at Tinneveli, then mutilated their bodies. Hundreds, if not thousands, of Tamils died in the ensuing rioting and nearly 100,000 were displaced: *op cit* 8. From at least that time, there has been a state of civil war in Sri Lanka, waged principally between the LTTE and the Sri Lankan security forces.

It is against this background that the appellant claims that from mid-1980, he has been a willing and active member of the LTTE. He cannot be ignorant of the origins, aims and activities of the organisation. His

involvement spans a period of some nine to ten years. Over that period of time, he has been variously engaged in propaganda activities, the recruiting of members and, on the facts that we have found, actively involved in the military wing and at one time responsible for the military training of LTTE recruits. He was also appointed an area Military Commander and in that capacity has seen active service in the conflict with the Sri Lankan security forces. He was promoted to 2nd Lieutenant and was sufficiently highly regarded by the LTTE that he was selected to go to India in order to negotiate an arms deal. He has also admitted to a long involvement in the “collection of donations” and the forcible conscription of children. Against the background of these facts, our finding is:

- (a) There are serious reasons for considering that the appellant has personally committed physical acts that amount to a crime against humanity, namely the forcible collection of funds and jewellery from the public and the forcible conscription of children. We rely on the following passage in his written statement of 3 August 1992:

“I was working with 2 members. We were collecting funds and jewellery from the public. We were strict on this issue. We were ordered to collect forcibly from the public. The LTTE manpower was very weak at that time. We got orders from our leaders to conscript a child from each family. Finally the LTTE imposed laws on public sectors such as Banks, schools, universities and the LTTE ruled those bodies”.

We are of the opinion that in terms of Article 6 of the London Charter of the International Military Tribunal, these acts amount to “inhuman acts” committed against the civilian population. It is also a breach of Common Article 3 which imposes an obligation to treat “humanely” persons taking no active part in the hostilities. In terms of Protocol II, these activities infringe Article 4 not only by reason of the inhumane

treatment of civilians, but also by reason of the appellant's actions amounting to violence to the life, health and physical or mental well being of the civilians, and pillage. There has also been a breach of Article 4(3) which specifically states that 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.

- (b) In the alternative, it cannot be said that the appellant was a mere member of the LTTE. Given the nature of his important role within the LTTE, there are serious reasons for considering that he knew that the LTTE committed crimes against humanity and shared the organisation's purpose in committing those crimes. That is, his leadership role within the LTTE has left him open to a charge of complicity in crimes against humanity alleged to have been committed by the LTTE. Notwithstanding his protestations to the contrary (which we do not believe), it can be inferred from his long involvement and from the position he held, that he tolerated the killings of Tamil rivals, innocent civilians (including Sinhalese and Muslims) as a necessary, though perhaps unpleasant, aspect of reaching the LTTE's goal of Tamil liberation. Likewise, the wanton and unprovoked killing of police officers and others captured by the LTTE was a fact of equal notoriety, as was the ethnic cleansing systematically pursued by the LTTE. These actions are in breach of not only Article 6 of the London Charter and Common Article 3, but also of Articles 13 and 17 of Protocol II. We have no hesitation in concluding that the LTTE has committed and continues to commit crimes against humanity, and that the killings are part of a systematic attack on both Tamils unsympathetic to the LTTE and the Sinhalese and Muslim population. The appellant did not leave the LTTE even though he had the opportunity to do so and was in possession of a passport. Even after he "got fed up to stick with LTTE" at the end of

1990, the appellant did not leave the LTTE and the north until March 1992. This inordinate delay was due solely to the fact that arrangements were being made for him to come to New Zealand. It does not explain why the appellant did not pursue other available alternatives, such as moving to Colombo to stay with the retired police officer who arranged his (the appellant's) police clearance certificate. As pointed out in Sivakumar at 441, while people cannot be required, in order to avoid a charge of complicity by reason of association with the principal actors, to encounter grave risk to life or personal security in order to extricate themselves from a situation or organisation, neither can they act as amoral robots. The appellant did have realistic alternatives available to him, but failed to avail himself of them.

By way of conclusion, then, we find that there are serious reasons for considering that the appellant has personally committed physical acts that amount to crimes against humanity. Secondly, it is our further finding, on the facts, that there are serious reasons for considering that he knew that crimes against humanity were committed by the LTTE and that he shared the organisation's purpose in committing those crimes. Complicity in those crimes is established by his long membership in the LTTE and his leadership role within that organisation.

CONCLUSION

In summary, our conclusions are as follows:

1. The appellant holds a bona fide subjective fear of returning to Sri Lanka.
2. The harm feared by him at the hands of the Sri Lankan security forces

and the LTTE is of sufficient gravity to constitute persecution.

3. There is no real chance of persecution at the hands of the Sri Lankan security forces.

There is, however, a real chance of persecution at the hands of the LTTE.

4. The harm feared by the appellant at the hands of the LTTE is not connected with or related to one of the five Convention reasons.
5. As there are serious reasons for considering that the appellant has committed crimes against humanity, the Exclusion Clause provisions of Article 1F(a) have the result that the Refugee Convention does not apply to the appellant.

For these reasons, we find both that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention and also that, in any event, he is a person excluded from the Refugee Convention by virtue of Article 1F(a). The appeal is dismissed.