REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

	REFUGEE APPEAL NO. 74796
	REFUGEE APPEAL NO. 74797
AT WELLINGTON	
Before:	RPG Haines QC (Chairperson)
	M Hodgen (Member)
Representing the Appellants:	J Petris
Date of Hearing:	2 & 3 December 2003; 7 & 8 March 2006
Date of Decision:	19 April 2006

DECISION

INDEX

INTRODUCTION [1]
The delay [3]

BACKGROUND [8]

THE LTTE [21]
General background [22]
Examples of LTTE attacks on the civilian population [23]
Krishnakumar Sathasivam aka "Kittu" [25]
The *MV Yahata* [28]

THE APPELLANT'S CASE [35]

CREDIBILITY DETERMINATION [49]
The statement by the oiler called Mohan [50]
Credibility assessment [58]

ROADMAP [67]

WHETHER INCLUSION BEFORE EXCLUSION [69]
Conclusion [83]

EXCLUSION - ARTICLE 1F(a) [86]
Serious reasons for considering [89]
War crimes and crimes against humanity - the definition [95]
Crimes against humanity - the elements [103]
Accomplices and parties [108]
Parties - whether a causation element [116]

FINDINGS OF FACT ON WAR CRIMES AND CRIMES AGAINST HUMANITY [121]
The LTTE and crimes against humanity [123]
Crimes against humanity - the conduct of the appellant [126]
War crimes [127]
Conclusion on the application of Article 1F(a) [128]

EXCLUSION - ARTICLE 1F(b) [130]
Non-political crime [132]
Serious [134]
No proportionality exercise [135]
Extradition, expiation and accomplices [136]

Serious non-political crime - the conduct of the appellant **[138]**
Conclusion on the application of Article 1F(b) **[142]**

ARTICLE 1A(2) - THE INCLUSION ISSUE **[143]**

INCLUSION - THE FEMALE APPELLANT **[144]**

CONCLUSION **[147]**

INTRODUCTION

[1] This is a conjoined appeal against the decision of a refugee status officer given on 27 June 2003 declining the grant of refugee status to the appellants who are both citizens of the Democratic Socialist Republic of Sri Lanka.

[2] The appellants are husband and wife. The facts on which their joint refugee claim are based relate almost exclusively to the male appellant and for convenience he will be referred to in this decision as “the appellant”. The female appellant will, unless the context otherwise requires, be referred to as “the appellant’s wife” or “the wife”.

The delay

[3] The delay in determining this appeal must be both acknowledged and explained notwithstanding that neither appellant wishes to take the point.

[4] By the conclusion of the second day of the appeal hearing (3 December 2003) it was clear from the narrative of events given by the appellant that the exclusion provisions of Article 1F(a) and (b) of the Refugee Convention had potential application. However, Article 1F was addressed neither in the decision of the refugee status officer at first instance nor in the written submissions filed prior to the appeal

hearing, nor in the opening submissions made by the solicitor for the appellant. At the conclusion of the appellant's evidence on the second day of the hearing the Authority drew his solicitor's attention to the fact that the exclusion issue would need to be addressed. Leave was granted for written submissions to be filed. By letter dated 10 December 2003 the solicitor for the appellants filed a brief submission to the effect that on the facts, no exclusion issue arose. This has subsequently been recognised as an untenable submission.

[5] Because the Authority received so little assistance from both the refugee status officer and from the solicitor for the appellant on the exclusion issue it was, of necessity, required to conduct its own researches. Regrettably, this took some time. Eventually, the product of those researches was collected and assembled into two volumes of material. To assist navigation of the extensive documentation, a seventeen page summary was also prepared. This summary was divided into five distinct sections, each addressing a particular aspect of the case.

[6] Together with a *Minute* dated 31 October 2005, the two volumes and the summary were released to the appellant for his consideration. He was initially afforded six weeks to consider the new material and to file such further evidence and submissions as he wished. The Authority intended then reconvening the hearing to explore with the appellant the new information and such further evidence as he wished to produce. The filing date of 17 December 2005 was subsequently extended at the request of the solicitor for the appellants to 15 February 2006. Further submissions and evidence for the appellants were in fact filed on 13 February 2006. The Authority has been told that each appellant has a good grasp of written English and has had full opportunity to consider the new country information.

[7] At the reconvened hearing on 7 and 8 March 2006 the Authority was able to canvass with the male appellant the new documentation at length and to traverse once

again the material aspects of his case. In the result the Authority is now in a position to determine the difficult credibility and factual issues raised by this case.

BACKGROUND

[8] At about 11.10pm on 13 January 1993 in the Bay of Bengal approximately 440 nautical miles south-east of Madras, a coastguard vessel of the Indian Navy intercepted on the high seas a cargo vessel which was drifting under "not under command" lights and not displaying its nationality flag.

[9] Repeated radio calls were initially not responded to. When the Master did eventually reply, he did not give the correct name of the vessel or the call sign and other details of the boat. When the coastguard vessel demanded boarding for verification the Master said that his boat was carrying 110 tonnes of explosives and that dire consequences would follow if an attempt at boarding was made. The suspect boat then attempted to flee, taking a zig-zag course. After a chase of approximately two and a half hours, it agreed to the demand by the coastguard vessel that it sail towards Madras.

[10] The cargo boat was the *MV Yahata* and the Chief Engineer on board at the time was the appellant.

[11] The vessel had a crew of nine, comprising, in hierarchical order:

Master	-	Jayachandra
Chief Engineer	-	The appellant
Second Officer	-	Satkumalingam
Bosun	-	Krishnamoorthy
Oiler #1	-	Subash Chandran
Oiler #2	-	Indralingam
Oiler #3	-	Mohan
Deck Boy	-	Kesavan

[12] Also on board the *Yahata* was Krishnakumar Sathasivam, a founder member of the Liberation Tigers of Tamil Eelam ("LTTE") and whose *nom de guerre* was "Kittu", together with nine other members of the LTTE.

[13] By 16 January 1993 the *Yahata* was anchored about eight nautical miles from the Madras coast. The Master had by then revealed that the *Yahata* was carrying ten AK47 rifles, one FNC rifle, one RPG, about twenty-five hand grenades and a huge quantity of oil and explosives. Indian Navy and coastguard vessels advised that they would be inspecting the vessel. The Master of the *Yahata* refused to allow this and the Indian vessels then came under RPG and small arms fire. The *Yahata* was subsequently set on fire by those on board and it eventually sank at about midnight.

[14] All nine crew members abandoned ship and were rescued by the Indian Navy. Kittu and his companions perished in the incident.

[15] Detention of the crew followed along with prosecution under the domestic law of India. In a judgment given on 29 June 1996 all accused were acquitted on all charges. From this decision the prosecution appealed to the Supreme Court of India.

[16] The appeal was successful. In a judgment given on 13 March 1997 in *State v Jayachandra* (Criminal Appeal No. 823 of 1996) the Supreme Court found that the trial judge had fallen into serious error in a number of respects. It found that:

(a) The prosecution had satisfactorily established:

> ... that the accused had used criminal force against the Indian Naval Officers while they were performing their duty and that was done with an intention to prevent or deter them from discharging their duty. They are, therefore, held

guilty of having committed the offence punishable under Section 353 IPC [Indian Penal Code] read with Section 34 IPC.[1]

[Judgment p 14]

(b) The prosecution had satisfactorily established:

... that accused had, in furtherance of their common intention, destroyed their ship. We, therefore, hold that the accused thereby have committed an offence punishable under Section 438 IPC read together with Section 34 IPC.[2]

[Judgment p 15]

[17] It is from the Supreme Court judgment that we have taken the narrative of facts set out above.

[18] The Supreme Court directed that all accused be convicted. For the offence under s 353 of the Indian Penal Code they were ordered to suffer "rigorous imprisonment"

---

[1] Sections 34 and 353 of the Indian Penal Code, 1860 provide:

34. **Acts done by several persons in furtherance of common intention -**

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

353. **Assault or criminal force to deter public servant from discharge of his duty -**

Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[2] Sections 437 and 438 of the Indian Penal Code, 1860 provide:

437. **Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden -**

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

438. **Punishment for the mischief described in Sec. 437 committed by fire or explosive substance -**

Whoever commits, attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

for a period of two years. For the offence under s 438 of the Indian Penal Code they were ordered to suffer "rigorous imprisonment" for a period of three years, the sentences to run concurrently. The acquittals secured at trial were otherwise maintained.

[19] Although the crew had by then already served their sentences they remained in custody in India under immigration legislation. Further litigation ensued. The upshot was that because the appellant was able to obtain on 1 November 2000 a Sri Lanka passport, he was released from custody and permitted to leave India on 23 August 2001 for Singapore. There he obtained a New Zealand visitor's visa on 11 September 2001 and arrived in New Zealand on 13 September 2001. His wife and two children arrived in New Zealand from Sri Lanka via Singapore on 24 December 2001 after also securing visitor visas. On the day of their arrival in New Zealand the appellant filed his refugee application. The wife's application was filed on 18 January 2002.

[20] The basis of the refugee claim is that because of his presence on the *Yahata* and his trial and conviction in India, the appellant will be at risk of being regarded by the authorities in Sri Lanka as a member or supporter of the LTTE. In addition, should he return to Sri Lanka he will come under pressure from the LTTE to join or assist them. Should he refuse, they will harm him. Should he agree, he will increase the danger of coming to harm at the hands of the Sri Lankan authorities. The wife's claim is that she will be harmed either by the authorities or by the LTTE because she is the wife of the appellant.

THE LTTE

[21] Because so much of this case requires an understanding of the LTTE, an abbreviated description of the organisation and its activities follows. We do not attempt to summarise the voluminous evidence assembled by the Authority and

disclosed to the appellants pursuant to the *Minute* of 31 October 2005. Nor do we intend providing extensive citations.

General background

[22] The following description has been taken from Samarasinghe and Samarasinghe, *Historical Dictionary of Sri Lanka*, (The Scarecrow Press, 1998) at 96-97:

> The LTTE was founded in 1976 by Velupillai Prabhakaran (q.v.). It was the successor to the Tamil New Tigers, a group that was also set up by Prabhakaran in 1974...
>
> The original backers of the LTTE were largely drawn from the *Karaiyar* caste in the Velvatiturai area of the Jaffna peninsula. However, now it has a broader social base. Since 1983 it has emerged as the most powerful of the Tamil rebel groups fighting for an independent Tamil state, (*Eelam*), in northeast Sri Lanka. It has a well-established international network of branch offices in London, Paris, and elsewhere to conduct international propaganda and to raise funds. At the beginning, the party relied heavily on bank robberies and other such blatantly illegal activities for funds. The tradition still continues with money raised through international drug trafficking, extortion from Tamils living in the territory under its control and also from those living abroad. It also receives substantial voluntary contributions from its sympathizers, especially wealthy Tamil expatriates in the West. It is also reported to have profit-making businesses such as shipping. The LTTE also received arms, equipment, and assistance with training from India before 1987. As a part of the July 1987 deal India also gave the LTTE US$2 million. In recent times taxes imposed on the residents and businesses in the territory under control has become a principal source of revenue. The LTTE fighters also continue to capture large quantities of arms, ammunition, and other equipment from Sri Lankan government forces operating in the north and east. It has its own newspaper *Eelanathan*.
>
> The LTTE demands the right of self-determination for the Tamils and its declared goal is *Eelam* (*q.v.*). However, it has hinted its willingness to settle for something less than total independence. The LTTE has used terror tactics to virtually eliminate all those who have opposed it. It decimated its rival rebel groups in internecine warfare in northeast Sri Lanka and in Tamil Nadu in India. It assassinated several of the traditional Tamil leaders, including the TULF (q.v.) chief Appapillai Amirthalingam (q.v.). It stands accused by India of assassinating the former Indian Prime Minister Rajiv Ghandhi, who made an enemy of the LTTE by failing to consult the latter in the 1987 peace accord and later backed by the Eelam People's Revolutionary Liberation Front (q.v.). The LTTE is also the principal suspect in the assassination of President Premadasa (q.v.), Ranjan Wijeratne (q.v.), Lalith Athulathmudali (q.v.), Gamini Dissanayake (q.v.), and several other senior Sinhalese political leaders. It has also conducted several terrorist attacks against Sinhalese and Muslim civilian targets to achieve "ethnic cleansing" of the northeast. It is not clear how much popular support the LTTE enjoys in the northeast.
>
> After fighting the Sri Lankan forces from the early 1980s until 1987, the LTTE fought the Indian Peacekeeping Force (q.v.) over the next three years. When the latter evacuated in

March 1990, the LTTE took over the Jaffna peninsula. It established a rudimentary administration in the area and ran it until it was ousted from Jaffna city in late 1995 by Sri Lankan forces in Operation *Riviresa*.

The LTTE entered into peace talks with President Premadasa that lasted over 18 months until June 1991. Similar talks were held with President Kumaratunga in 1994-1995. On both occasions the talks were suddenly broken off by the LTTE and war resumed.

As at mid 1996, the LTTE has established itself in the jungles of Kilinochchi on the mainland. They are also moving quite freely in many parts of the eastern province. They are also continuing the random terrorist attacks in the south, mainly on Colombo.

Examples of LTTE attacks on the civilian population

[23] The human rights abuses committed by the LTTE since its formation are well documented and have been referred to by the Authority on several occasions (see relevantly *Refugee Appeal No. 1248/93 Re TP* (31 July 1995)). We intend to refer by way of example only to attacks on innocent civilians in the period 1985 to 1996. This is not to suggest that human rights abuses by the LTTE ceased in 1996. Far from it. The period selected is the most relevant as it provides the background against which the appellant's presence on the *Yahata* is to be assessed. Nor are the examples to be treated as an exhaustive catalogue of gross violations of human rights by the LTTE. On the contrary, they are, as stated **examples only** of a consistent pattern of conduct.

14 May 1985	The LTTE attacked Anuradhapura, a town sacred to Sri Lanka's Buddhist majority, killing more than 170 people and wounding more than a hundred. Witnesses said that the LTTE strafed a bus stop, a nearby market, other parts of the town and the area around Sri Naha Bodhi, the place that houses the Buddhists' sacred bo tree, which they believe is the world's oldest tree, grown from a sapling under which the Buddha is believed to have attained enlightenment: United Press International, 14 May 1985 (NEXIS).

May 1986	The LTTE killed twenty Sinhalese villagers, including children, in eastern Trincomalee. In one incident the attackers forced eleven people, among them toddlers and children, to kneel on the banks of a canal and shot them in the head, mostly at point-blank range. The previous day the LTTE had killed twelve Sinhalese, including a child in nearby villages: Victoria Graham, "Tamil terrorists kill 32 people in two days, Defence Ministry says", Associated Press, 25 May 1986 (NEXIS); Victoria Graham, "Tamils kill twenty villagers in Laska", Associated Press, 25 May 1986 (NEXIS).
17 April 1987	In a Good Friday massacre LTTE rebels ambushed three buses and two trucks carrying 200 people. The vehicles were stopped on a jungle road and the passengers separated into groups of Tamils and Sinhalese. The guerillas then opened fire on the Sinhalese passengers, killing at least 122 Sinhalese. Women and children were among the victims: Dexter Cruez, "Massacre in Sri Lanka: More than one hundred killed, scores wounded", Associated Press, April 17, 1987 (NEXIS); Iqbal Athas, Untitled, United Press International, 17 April 1987 (NEXIS). One account of the massacre states that among the dead were seventeen security force personnel, including two police inspectors and eight constables. The legs and hands of these seventeen were broken before they were shot dead: Iqbal Athas, "Tamil terrorists murder 127 in jungle ambush", The Times, 19 April 1987 (NEXIS).
21 April 1987	A massive LTTE bomb exploded in a crowded bus station during the rush hour in the heart of Colombo, causing more than one hundred deaths and several hundred casualties: Michael Hamlyn,

	"Sri Lanka's violent divisions explode in the heart in the Colombo: Over 100 die in massacre at bus station", *The Times*, 21 April 1987 (NEXIS).
26 December 1987	At least twenty-five people were killed after the LTTE shot and killed a policeman and then battled police and IPKF soldiers in a fierce gun fight at a crowded market in the eastern port city of Batticaloa: Patrick Cruez, "25 killed in battle at market", Associated Press, 27 December 1987 (NEXIS).
31 December 1987	In a New Year's Eve massacre the LTTE lined up residents in a Sinhalese village in northeastern Sri Lanka and shot and killed ten of them. Security sources stated that the attack appeared to be aimed at obstructing government plans to resettle Sinhalese villagers who had fled their homes after a string of attacks by the LTTE in September. In the central hill city of Kandy, a bomb exploded outside a hotel crowded with New Year's Eve revellers, killing three people and injuring more than 150. Three more bombs in the vicinity of the historic Dalada Maligawa temple in Kandy were defused: Iqbal Athas, "Tamil rebels kill 10 in village massacre", United Press International, 1 January 1988 (NEXIS).
2 March 1988	LTTE, disguised in army uniforms, shot and killed fifteen Sinhalese civilians who were dining in their homes: Iqbal Athas, "Army says Tamil rebels massacre villagers", United Press International, 3 March 1988 (NEXIS).
5 March 1988	A LTTE land mine exploded under a truck near the port city of Trincomalee killing at least twenty-six fishermen and farmers

who were hitchhiking a ride to Trincomalee. Nine women and two children were among the victims, most of whom were Sinhalese: Patrick Cruez, "Twenty-six killed in rebel attack", Associated Press, 5 March 1988 (NEXIS). Later in March, a time-bomb in a sack of onions exploded on a rural bus, killing ten Sinhalese farmers and wounding a further fifteen. The attack was blamed on the LTTE: Patrick Cruez, "Bombing bag of onions kills ten on bus", Associated Press, 29 March 1988 (NEXIS).

30 April 1988 — In an attack one hundred miles north of Colombo LTTE rebels strafed a bus with automatic weapons, killing six soldiers returning from leave and five civilians and wounding seven other passengers: "Tamil rebels kill eleven in Sri Lanka", United Press International, 30 April 1988 (NEXIS). A few days later near Trincomalee the LTTE detonated explosives under a bus crowded with shoppers. At least twenty-six passengers were killed and thirty injured, fifteen of them critically. Most of the victims were Sinhalese. On the previous day the LTTE had ambushed a bus in the northern Vavuniya District, killing five civilians and six Sri Lankan soldiers who were guarding the vehicle: Patrick Cruez, "Tamil rebels blow up bus, kill twenty-six", Associated Press, 1 May 1988 (NEXIS).

10 October 1988 — Seventy-five suspected LTTE assailants armed with guns and knives attacked the sleeping jungle hamlet of Makongaskada, near the town of Vavuniya. The attackers woke up residents, dragged them from their homes and shot or stabbed to death twenty-one men, twelve women and twelve children. The LTTE denied that it was responsible for the massacre: Elmo Perera, "Sri Lanka

	separatist blame rivals for massacre", United Press, 11 October 1988 (NEXIS).
24 March 1990	LTTE guerillas attacked seventeen police stations in the Eastern Province and captured six hundred policemen. At estimated 110 Sinhalese officers were lined up and shot: US Committee for Refugees, *Sri Lanka: Island of Refugees* (October 1991) 27.
11 June 1990	The LTTE launched surprise attacks against a number of police stations and military installations, and summarily executed many of the captured Sinhalese and Muslim police officers: Canadian DIRB, *Sri Lanka: Chronology of Events February 1988-August 1992* (September 1992).
13 July 1990	In a massacre attributed to the LTTE, 168 Muslims returning from Colombo to their home village in eastern Sri Lanka were reportedly abducted, robbed, hacked to death and burned in Kurukkalmadam in Batticaloa District. In another report a further 35 Muslims were waylaid and killed at Ondachchimadam on the following day. Later in that month seventeen Muslim farmers suspected of siding with government troops were abducted and fourteen of them killed by unidentified attackers accused by Muslim leaders and miliary spokesmen of being LTTE members: Asia Watch, *Human Rights in Sri Lanka - An Update* (12 March 1991) pp 4-5.
3 August 1990	Suspected LTTE members attack two mosques in the village of Kattankudi in the Batticaloa district of eastern Sri Lanka. Some 140 people worshipping in the mosques at the time were killed in the attack and 125 wounded. The bodies of eighteen Muslims

were found hacked to death in Amparai District on 5 August. The LTTE had issued a handwritten ultimatum on LTTE stationery to all Muslim villagers in the area to vacate their villages by 10 August. Another 33 Muslims were reportedly killed by LTTE members while they were harvesting paddy in Amparai District on August 6 and 51 were killed in another district on August 7. The LTTE was accused of killing hundreds of Muslim civilians in the late evening and early morning hours of August 11-12. Attackers wielding knives, guns and grenades massacred nearly 200 people in Saddam Hussein, Pooaikadu and Kalawaichanai villages near Eravur, a predominantly Muslim town in Batticaloa district. It is alleged that the LTTE stormed the village, throwing grenades into the homes of sleeping residents, dragging them out and killing them. The government count was 115 men, 27 women and 31 children killed in the attack: Asia Watch, *Human Rights in Sri Lanka - An Update* (12 March 1991) p 5.

October 1990 — The LTTE evicted approximately 60,000 Muslims living in the North. They were told to surrender their valuables and given only a few days to leave: US Committee for Refugees, *Sri Lanka: Island of Refugees* (October 1991) p 27.

22 May 1991 — The LTTE assassinated former Indian Prime Minister, Rajiv Ghandhi in southern India. A woman terrorist went up to Ghandhi during an election rally and deliberately detonated a bomb strapped to her waist. She and Ghandhi were killed along with a dozen other people: United Press International, “Alleged mastermind of Ghandhi assassination commits suicide in South India”, 20 August 1991 (EPIC/Infotrack); Jon Swain, “Sri Lankan

	police identify Ghandhi killer", Sunday Times (London), 2 June 1991 (NEXIS).
21 June 1991	The Defence Ministry operational headquarters in Colombo was bombed in a suicide attack by two men driving a van carrying 70 kg of explosives. Eleven soldiers and ten civilians were killed and over 100 wounded. The attack was attributed to the LTTE, although not claimed by it: Canadian DIRB, *Sri Lanka: Chronology of Events February 1988-August 1992* (September 1992).
27 June 1991	The LTTE was blamed for an attack on a bus travelling from Pottuvil to Colombo. Fourteen passengers were killed when the bus was fired upon after it had stopped because of landmines: Canadian DIRB, *Sri Lanka: Chronology of Events February 1988-August 1992* (September 1992).
December 1991	A conference of Muslims in Colombo called on the Government to secure the release of thirty-six Muslim businessmen allegedly kidnapped by the LTTE and held for the past year, with ransoms being demanded of up to 5 million rupees per hostage: Canadian DIRB, *Sri Lanka: Chronology of Events February 1988-August 1992* (September 1992).
January 1992	The government of India began repatriating some 30,000 Sri Lankan Tamils reportedly willing to return to Sri Lanka. LTTE clashes with government troops increased markedly around the town of Trincomalee to disrupt the arrivals: Canadian DIRB, *Sri*

Lanka: Chronology of Events February 1988-August 1992 (September 1992).

10 April 1992	A bomb exploded in a bus in Amparai, killing about twenty-five civilians and injuring many others. LTTE militants were suspected: Canadian DIRB, *Sri Lanka: Chronology of Events February 1988-August 1992* (September 1992).
29 April 1992	At least fifty-four people were killed when LTTE rebels attacked the Muslim village of Alanchipothana in Polonnaruwa District: Canadian DIRB, *Sri Lanka: Chronology of Events February 1988-August 1992* (September 1992).
2 June 1992	LTTE rebels killed more than fifteen Muslims, as well as a young Tamil who refused to leave, and wounded twenty-five others in an attack on a bus in Amparai district. Two weeks later Tamil passengers on the Batticaloa-Colombo train defied LTTE gunmen and protected the lives of one hundred Muslims on board: Canadian DIRB, *Sri Lanka: Chronology of Events February 1988-August 1992* (September 1992).
15 July 1992	LTTE militants attacked a bus at Kirankulam, near Batticaloa, killing nineteen Muslim passengers and wounding five others: Canadian DIRB, *Sri Lanka: Chronology of Events February 1988-August 1992* (September 1992).
21 July 1992	LTTE militants stopped a train bound for Colombo, separated out the Muslim passengers and killed six of them twenty-five kilometres north of Batticaloa: Canadian DIRB, *Sri Lanka:*

	Chronology of Events February 1988-August 1992 (September 1992).
1 May 1993	President Premadasa was assassinated during a May Day parade when a LTTE suicide bomber rode a bicycle into the cavalcade and exploded the bomb he was carrying: Samarasinghe & Samarasinghe, *Historical Dictionary of Sri Lanka* (The Scarecrow Press, 1998) p xxxix.
August 1994	A LTTE freighter, the *MV Swene* left the port of Nikoleyev with sixty tonnes of RDX and TNT explosive. The explosives were transported to the north-eastern Sri Lanka coast and transferred to several LTTE bases. Some of these explosives (300-400 kg) were subsequently used in the January 1996 truck bomb attack against the Central Bank building in Colombo which killed more than 100 civilians and seriously wounded 1,300 others: Samarasinghe & Samarasinghe, *Historical Dictionary of Sri Lanka* (The Scarecrow Press, 1998) p xli.
12 February 1996	A lorry loaded with 144 kgs of explosives was discovered by the police at a Buddhist temple in Kotahena: Samarasinghe & Samarasinghe, *Historical Dictionary of Sri Lanka* (The Scarecrow Press, 1998) p xli.
15 February 1996	The LTTE vessel *Horizon* containing arms was destroyed by the Sri Lankan navy 21 miles off Mullaitivu: Samarasinghe & Samarasinghe, *Historical Dictionary of Sri Lanka* (The Scarecrow Press, 1998) p xli.

12 April 1996	The LTTE made an abortive pre-dawn attack on Colombo Harbour: Samarasinghe & Samarasinghe, *Historical Dictionary of Sri Lanka* (The Scarecrow Press, 1998) p xlii.

[24] As mentioned, these incidents are but examples of a consistent and flagrant pattern of human rights abuses by the LTTE in the twelve year period 1985 to 1996. This period has been selected as it represents the period during which the appellant, up to July 1992, spent varying periods in Sri Lanka, providing him with first hand knowledge of events. It is useful at this stage to record that the agreed periods when the appellant was in Sri Lanka are as follows:

1956-1981
1986 March (10 days); November (20 days)
1989 May to December
May 1990 to July 1992

He told the Authority that while overseas he followed developments in Sri Lanka by listening to radio broadcasts and by reading newspapers. If there were major incidents, and if they were reported, he would have been aware of them. He agrees that the incidents outlined took place. If he did not specifically hear of a particular incident he accepted nonetheless that such incidents were typical of what was "happening all the time". During his time in Sri Lanka he was aware from newspaper reports and from other persons of the repetition of incidents of the kind described. This was particularly true during his periods in Colombo where life was closer to normal than in the north and east and access to news and information much easier.

Krishnakumar Sathasivam aka "Kittu"

[25] In addition to describing the human rights abuses committed against civilians by the LTTE, it is necessary to provide a brief note on "Kittu" who at the time was the second-in-command of the LTTE.

[26] According to Vivek Chaudhary, "Ruthless veteran of Tigers'fight - Sathasivam Krishnakumar", Guardian (London) 7 August 1991, (NEXIS), Krishnakumar Sathasivam was one of the founding members of the LTTE. Born on 2 January 1960 in Velvettithurai, a fishing village in the northern province of Jaffna, he joined the LTTE soon after leaving school in 1978 and took the *non de guerre* "Kittu". Velvettithurai is also the home of the leader of the LTTE, Velupillai Prabhakaran. Kittu was his chief lieutenant until he lost a leg in a 1987 grenade attack and required an artificial limb to be fitted in Britain.

[27] In 1990 Britain ordered his deportation, prompting him to seek political asylum in Switzerland. But when it appeared that his request was unlikely to be granted, he left in 1992 for an undisclosed European destination: Brahma Chellaney, "Sri Lankan rebel leader believed killed in ship blaze", United Press International, 16 January 1993 (NEXIS). In 1990 Kittu was part of a LTTE delegation which flew to Colombo for the failed peace talks with the Sri Lankan Government. Kittu is described as well known throughout Sri Lanka and in Tamil communities around the world: Vivek Chaudhary, "Ruthless veteran of Tigers'fight - Sathasivam Krishnakumar", Guardian (London) 7 August 1991, (NEXIS). The appellant acknowledged that he had heard of Kittu prior to joining the *Yahata*.

The *MV Yahata*

[28] To complete the *dramatis personae*, a brief note on the *Yahata* is necessary.

[29] Peter Chalk, in *Liberation Tigers of Tamil Eelam's (LTTE) International Organization and Operations - A Preliminary Analysis* (Canadian Security Intelligence Service, Commentary No. 77, 17 March 2000), observes that the LTTE is:

> ... widely recognized to be one of the most proficient and dangerous guerilla/terrorist groups in the world. In large part, this reputation is owed to the extremely sophisticated international network that has been built by the organisation to sustain its 26 year-long struggle against the Colombo Government for the creation of an independent state of Tamil Eelam.

[30] Professor Chalk goes on to state that LTTE external activities can be subdivided into three main areas: publicity and propaganda; fund raising; arms procurement and shipping. He states that prior to 1987, the LTTE procured most of its weaponry from Afghanistan (via the Indo-Pakistan border), directly from Indian external sources, indigenous production and munitions captured from the Sri Lankan military. However, following the signing of the Indo-Sri Lankan Peace Accord of 1987, the LTTE lost the benefit of external Indian support. As a consequence, in the mid 1980s, the LTTE started building its own maritime network with the help of a Bombay shipping magnate. At the time of writing his *Commentary* (Winter 1999) Professor Chalk stated that the fleet then numbered at least ten freighters which mostly travelled under Panamanian, Honduran or Liberian flags, tended to be crewed by Tamils originating from the Jaffna seaport of Velvettithurai and were typically owned by various front companies located in Asia. The ships frequently visited Japan, Indonesia, Singapore, South Africa, Burma, Turkey, France, Italy and Ukraine. Ninety-five percent of the time the vessels transported legitimate commercial goods such as hardwood, tea, rice paddy, cement and fertilizer. However, for the remaining five percent they played a vital role in supplying explosives, arms, ammunitions and

other war-related material to the LTTE theatre of war. Professor Chalk goes on to note that weapons from China, North Korea and Hong Kong were trafficked across the South China Sea, through the Malacca and Singapore Straits to the Bay of Bengal and then on to Sri Lanka. Arms from Cambodia, Vietnam and Burma transited through Thailand before being loaded onto vessels for the trip across the Bay of Bengal. Explosives have consistently been emphasised in the global weapons procurement efforts of the LTTE. He cites as one of the largest single consignments that which took place in August 1994 when a LTTE freighter, the *MV Swene* transported sixty tonnes of RDX and TNT explosive to the northeastern Sri Lankan coast. Protected by special Sea Tiger speedboats the explosives were off-loaded and transferred to several secret LTTE jungle bases. Some of these explosives (300-400 kg) were subsequently used in the massive January 1996 truck-bomb attack against the Central Bank building in Colombo - widely recognised as (then) one of the most devastating terrorist assaults in history.

[31] It has been claimed that by 1990 the *MV Yahata* was considered the finest vessel in the LTTE fleet: "Killing of Sea Bird not a big blow to LTTE shipping operations", Sunday Times, 18 February 1996. The vessel was registered in San-Lorenzo.

[32] Various analysts have emphasised the connection between Velvettithurai and the LTTE fleet. See for example Anthony Davis, "Tiger International - How a secret global network keeps Sri Lanka's Tamil guerilla organisation up and killing", Asia Week, 26 July 1996:

> By contrast, the Tigers' arms-procurement network has always been shrouded in secrecy. No less global in its reach than the propaganda wing, it has been painstakingly built up since 1983 and is backed by tens of millions of dollars. At its foundation is Velvettiturai, a sun-bleached fishing port on the north coast of the Jaffna peninsular, colloquially known as VVT. Birthplace of Prabhakran, it has long been the center of a web of Asia-wide LTTE commercial, maritime and smuggling contacts.

[33] Anthony Davis also notes that an important LTTE cell was established on the Andaman Coast in the Thai town of Trang before it was shifted north to a front company in Phuket. As will be seen, it was in Trang that the appellant first joined the *Yahata*.

[34] Against this extensive background it is possible to turn to the appellant's case. Our assessment of the credibility of his claims follows in a later section.

THE APPELLANT'S CASE

[35] The appellant was born on 26 August 1956 in Velvettithurai and is currently forty-nine years of age. After completing his education in Velvettithurai in 1976 he began working as a technical assistant at an enterprise in Jaffna which traded in video, audio and electrical appliances. Once in 1977 and one in 1978 he was detained for a day by the Sri Lankan army and questioned whether he knew people who were engaged in unlawful activities.

[36] In 1981 he decided that northern Sri Lanka was becoming too dangerous and that the deteriorating security situation was affecting his employment prospects. He determined to go to sea. In November 1981 he travelled to Saudi Arabia and was employed by the Petrostar Company. He worked in engine rooms, first as an oiler and later as a third assistant engineer. He was based in the Persian Gulf, travelling to Egypt, Somalia, Yemen, Bahrain and Dubai. He did not return to Sri Lanka until March 1986 when he visited his family for ten days before returning to Saudi Arabia and commencing work as a third engineer for the Arabian Petroleum Supply Co. He returned to Sri Lanka again briefly in November 1986 (20 days) for the purpose of registering his intended marriage. After returning to work with the Arabian Petroleum Supply Co he travelled to various Persian Gulf countries such as Sudan, Egypt and Yemen.

[37] The appellant next returned to Sri Lanka in May 1989 for the purpose of marrying his wife. During his six months in Sri Lanka his house was burnt down by the Indian Peacekeeping Force, forcing him and his wife to relocate to Colombo for one month before returning to Velvettithurai to stay with relatives. At the end of 1989 he obtained work as a fourth engineer on a container ship plying between Singapore, Malaysia and Indonesia.

[38] In April 1990 the appellant returned to Velvettithurai because he wanted to be with his wife for the birth of their first child, a daughter, who was born in May 1990. During this time the family were affected by the fighting between the LTTE and the Sri Lankan Army in that their home, being close to the shore in Velvettithurai, was in danger of being hit by navy shelling. The family moved away for three months to Mattuvil and later to Point Petro after Mattuvil experienced difficulties with its water supply. By June 1992 the family had to move from Point Petro also because the Sri Lankan Army had begun shelling that area. Thereafter they moved between Velvettithurai. Mattuvil and Point Petro, depending upon the circumstances prevailing in each town at the time.

[39] In the middle of June 1992 the appellant was contacted by an employment agent and told than an opportunity had come up for him to work as the Chief Engineer on board a vessel owned by a company based in Thailand. He would be required to travel to Trang in Thailand where he would be met by an agent who would have the necessary documents for him to sign. The appellant was never told the name of the company but because he had experienced difficulty securing a suitable position, he accepted the offer. He felt that the priority was to secure employment in line with his experience and qualifications and he trusted the employment agent and his prospective employer.

[40] On 1 July 1992 the appellant left Sri Lanka from Colombo for Bangkok, Thailand. He then made his way to Trang where he met the agent who told him that the contract would be signed at a later date as he (the appellant) was required to board the vessel docked at Phuket as soon as possible. On 5 July 1992 the appellant boarded the *Yahata*, which he noticed was a refrigerator ship registered in Honduras. Including himself, the crew comprised nine persons, their names and details being those set out earlier at para [11].

[41] For the next six months the *Yahata* plied between different ports in South East Asia, including Trang, Canthong in Thailand, Bangkok and Singapore. Almost always the cargo was transported to and from the vessel by trawlers. The appellant never knew what the cargo was as it was invariably contained in packets or boxes. The Master did, however, on one occasion mention that items being brought aboard were air-conditioning units. Although the *Yahata* was fitted out as a refrigerated ship, at no time were the refrigerator units ever used.

[42] The appellant claims that he had little interaction with the crew. He was one of three officers on board and it was not appropriate to be familiar with the six non-officers. In addition, his area of authority was confined to the engine room where he worked with the three oilers. He knew nothing about the other crew members apart from the fact that most, if not all, came from or near Velvettithurai. Prior to joining the vessel he had met only one in casual circumstances and knew of the Master by reputation only. He said that he did not know that the vessel was a LTTE ship nor did he know (as it was never discussed) that most of those on board were LTTE members or sympathisers. He himself was never asked whether he was a LTTE member or his views on the LTTE.

[43] On 4 January 1993 the *Yahata* departed from Phuket carrying a cargo, the nature of which was entirely unknown to the appellant beyond his noticing that the items

were in packets or in barrels. On this occasion, during the loading, ten persons boarded the *Yahata* from one of the trawlers and remained on board. Later the Master brought two of the new passengers to the engine room and told the appellant that the two men would be working in the engine room and were to be taught by the appellant what to do. The two men proved resistant to being given orders, telling the appellant that they were from the LTTE and would not take orders from the appellant. The appellant went to the bridge to raise the issue with the Master. There he found the Master with four or five of the other passengers including one man who had removed his artificial leg. On raising his concerns with the Master the appellant was told by the Master that the *Yahata* was a LTTE ship. The appellant says that he told the Master that he did not wish to be on a LTTE ship and wanted to leave. The Master replied that the appellant was free to leave once the vessel reached Sri Lanka. The appellant learnt that the man with the artificial leg was Kittu and he noticed that with two exceptions (the second officer and an oiler called Indralingam), the crew were not surprised at the presence on board of the ten LTTE cadres and were talking to them happily.

[44] On the southward journey to Sri Lanka the *Yahata* stopped for a short period of approximately two hours to enable the appellant to remove and repair a unit from the engine. It was also during this time that the first and last letters of *Yahata* were painted over so that the name of the vessel appeared to be the *MV Ahat*. The appellant says that he had no knowledge of this act as he spent most of his time in the engine room.

[45] One morning he learnt from the Master that the *Yahata* had reached its destination and the engines were stopped. The vessel began drifting at about noon. That evening at about 10pm an Indian coastguard vessel came alongside and the appellant was instructed by the Master to give control of the engines to the bridge. Later he learnt that the *Yahata* had been instructed to proceed to Madras. Near Chennai harbour the

Yahata was surrounded by vessels of the Indian Navy and the *Yahata* dropped two anchors. Kittu then called the crew members together and told them that he had spoken to navy officers who had agreed to take the crew members and would repatriate them to Sri Lanka. On the appellant's account, a short time later the Indian Navy began firing on the *Yahata* and the crew jumped into the sea. The *Yahata* began burning and the crew were rescued and placed in custody. The balance of those on board were presumably killed, drowned or took their own lives.

[46] There then followed interrogation, prosecution and trial. As previously mentioned, that trial ended on 29 June 1996 with the appellant initially being acquitted on all charges. Produced in evidence was a copy of that trial decision. However, on 13 March 1997 the prosecution was successful, on appeal, in securing the conviction of the appellant on two charges by the Supreme Court of India and his sentence to a total of three years imprisonment. The judgment of that court was also produced in evidence along with a large number of associated court and judicial documents evidencing the long period of detention which followed the appellant's "release" from the sentence imposed by the Supreme Court.

[47] Without going into detail, it is sufficient to note that eventually, with the assistance of a friend, the appellant was able to obtain in Sri Lanka a genuine Sri Lankan passport issued on 1 November 2000. On 23 August 2001 the appellant left India from Chennai airport for Singapore. There he obtained a New Zealand visitor's visa, falsely stating that he had no reason to claim asylum in New Zealand as he did not have any problems in Sri Lanka. He arrived in New Zealand on 13 September 2001 and was issued with a visitor's permit valid for one month. A further permit was subsequently granted to 13 December 2001. In the meantime the appellant's wife and children left Sri Lanka for Singapore where they obtained limited purpose visas and on 24 December 2001 they arrived in New Zealand.

[48] As previously mentioned the claim by the appellant to refugee status is based on his anticipation of being harmed by the authorities in Sri Lanka by virtue of his proved involvement in the smuggling of war material into Sri Lanka for the LTTE. It is claimed that substantial publicity was given to the *Yahata* sinking and to the subsequent trial and conviction of the crew members. The appellant also points to the fact that at least one of the crew members (Mohan) has been recognised as a refugee in the United Kingdom because of his role in the incident. The claim to refugee status is also based on the assertion that the LTTE will pressure him into assisting them in the future. Should he refuse he will be harmed. Should he agree he will increase the risk of coming to harm at the hands of the Sri Lankan authorities. The wife's claim to refugee status is based on her fear of being harmed by both the Sri Lankan authorities and the LTTE.

CREDIBILITY DETERMINATION

[49] The appellant's denial of all knowledge that he was on a LTTE vessel must be assessed against the totality of the evidence comprising not only his account but also the country information summarised earlier as well as the written account given by one of the oilers on board the *Yahata*, Mohan. As this account has not yet been described, we turn to the statement by Mohan.

The statement by the oiler called Mohan

[50] When opening the case on 2 December 2003 the solicitor for the appellant advised the Authority that a significant issue, not addressed by the refugee status officer at first instance, was what had happened to the rest of the crew. He told the Authority that the appellant had been in contact with Mohan and had subsequently received a fax from him dated 26 November 2003 confirming that he (Mohan) had been recognised as a refugee in the United Kingdom. Tendered in evidence at that

time was a Home Office letter dated 12 September 2002 confirming that Mohan had been granted indefinite leave to enter the United Kingdom as a refugee. Also produced to the Authority at that time was a copy of the Convention travel document consequently issued to Mohan on 24 April 2002 under Article 28 of the Convention. It was accepted by the solicitor for the appellant that the basis of the refugee application by Mohan and the circumstances in which he was recognised as a refugee were unknown. Accordingly, at the conclusion of the hearing on 3 December 2003 the Authority pointed out that it would be greatly assisted were further information to be obtained as to the basis on which the asylum application in the United Kingdom had been made and granted. In addition, the appellant was given leave to file written submissions by 19 December 2003.

[51] On 11 December 2003 the solicitor for the appellant received from his client further faxed documentation relating to Mohan's asylum claim in the United Kingdom. On that same day he (the solicitor) forwarded the documentation to the Authority under cover of a letter dated 11 December 2003 which read:

> We enclose documentation which was received today regarding the application for Asylum in Britain by Mr Mohan Theivasigamani a member of the crew Yahata.
>
> The evidence on material issues is consistent with that of [the appellant] and Mr Theivasigamani conviction did not prevent him from being granted asylum in Britain.

[52] The documentation filed with the Authority included a typewritten document dated 25 July 2000 and described as "Statement Mohan Theivasigamani". The rest of the documents are not, in this context, directly relevant.

[53] Before we turn to the content of the statement by Mohan it is relevant to note the appellant's account relating to the receipt of the documentation. He told the Authority on 8 March 2006 that the documentation had been obtained from Mohan by a friend of the appellant's. That documentation had then been faxed to the appellant and also

separately faxed by the friend to the solicitor for the appellant. He (the solicitor) first became aware of the documentation when he arrived at work on the morning of 11 December 2003. It had then been promptly despatched to the Authority. The appellant said that at the time he received the faxed documents he was holding down two jobs and working long hours. He did not have time to read the documentation carefully and did not notice anything in the statement by Mohan to cause him concern. As it turns out there is much in the statement to cause the appellant concern. We mention these circumstances only because during the hearing the appellant said that if he had had anything to hide, he would not have tendered the Mohan statement in evidence. The short point is that the statement was tendered without the appellant giving the contents any real consideration.

[54] We do not intend to set out the statement by Mohan at length. A précis will largely be sufficient. Mohan was born in March 1967 which meant that when the *Yahata* was intercepted in January 1993 he was 26 years of age. After being detained and tortured by the Indian Peacekeeping Force he joined the LTTE at the end of July 1988. For the next two years up to 1990 he assisted LTTE fighters to cross from the Vanni jungle into Jaffna. In 1990 he was directed to work in a shell factory belonging to the LTTE and for the next two years he manufactured munitions. Towards the end of June 1992 he was ordered by the LTTE to go to Colombo where he was given travel documents and instructed to fly to Singapore. There he joined a LTTE vessel called the *Showamaru* which then made approximately four trips between Thailand and Sri Lanka ferrying clothes, medication and petroleum products.

[55] The last voyage made by Mohan was on the *Yahata* and as earlier mentioned he was on board the vessel when it was intercepted in the Bay of Bengal. In his statement he describes the vessel unambiguously as belonging to the LTTE and as carrying arms and explosives for the LTTE. The relevant paragraphs follow:

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

[56] Presumably this statement by Mohan dated 25 July 2000 was submitted in support of the refugee application to the Home Office. While it clearly raises the issue of exclusion, neither the appellant nor the Authority has been able to ascertain whether this issue received consideration prior to Mohan being recognised in the United Kingdom as a refugee.

[57] Be that as it may, the statement by Mohan challenges the appellant's account in significant respects:

(a) The *Yahata* was a LTTE vessel. The presence of Mohan on that vessel as an oiler was not an accident or coincidence. He was placed on the vessel by the

LTTE after having proved himself as a loyal and dedicated member of that organisation. It seems surprising that the appellant was not similarly a trusted and loyal LTTE member or supporter.

(b) The statement by Mohan at para 11 explicitly asserts that the vessel was carrying arms and explosives for the LTTE. If the oiler knew this information, how is it that the Chief Engineer did not?

Credibility assessment

[58] The appellant impresses as an intelligent, hardworking and conscientious individual with exceptional recall of his personal history. From the detailed account he has given the Authority is satisfied that he has worked at sea serving in engine rooms and that he has gained marine certificates for such employment. In the assessment of his evidence which follows we have made allowance for the fact that he spent some eight to nine years in prison in India in at times harsh conditions. We have also taken into account the medical certificate dated 20 November 2003. We have noted that the reference dated 9 November 2003 from a New Zealand Justice of the Peace speaks highly of him.

[59] The central issue in the appeal is whether the appellant is telling the truth when he asserts that he had no knowledge that the *Yahata* was a LTTE ship. That is, until it was boarded by Kittu and his associates several days before the interception by the Indian Navy; that he was never asked, prior to joining the *Yahata* (or subsequently), whether he supported the LTTE; and that he had no means of acquiring knowledge (or cause for suspicion) either in relation to his dealings with the other members of the crew or in relation to the nature of the cargo carried by the *Yahata*.

[60] The evidence leaves the Authority in no doubt at all that the *Yahata* was part of the LTTE fleet and was used to smuggle war material including arms, ammunition and explosives into northern Sri Lanka for use by the LTTE. This much is clear from the country information and the judgment of the Supreme Court of India to which reference has been made. On the particular voyage the Master has been recorded as telling the Indian authorities that the *Yahata* was then carrying 110 tonnes of explosives (Judgment p 2). There is no evidence to support the assertion later made by the LTTE itself that at the time the *Yahata* was intercepted, Kittu was on a peace mission: Brahma Chellaney, "Sri Lankan rebel leader believed killed in ship blaze", United Press International, 16 January 1993 (NEXIS). On the contrary, the Authority has received a written statement by one of the oilers on board the *Yahata* at the time asserting that the cargo was indeed as the Master claimed. It has been submitted that Mohan was simply re-stating that which he learned after the event during the course of the trial in India. We do not accept this submission because that is not what Mohan says in his statement and because that is not how the statement reads. Contextually, Mohan asserts that he was a long term member of the LTTE and he knew the cargo carried by the various vessels on which he served.

[61] In the following circumstances the Authority rejects the appellant's claims that his presence on the *Yahata* was innocent, without knowledge that it was a LTTE vessel and without knowledge of its cargo, particularly the explosives it was carrying at the time it was intercepted by the Indian Navy.

[62] First, it defies common sense that the LTTE would hire as Chief Engineer a person in respect of whom no loyalty test had been conducted and in respect of whom no inquiry at all had been made as to his sympathies. If the appellant's denials are to be believed, it would mean that the LTTE placed in command of the engine room of a vessel in its fleet a person of unknown quantity. In this relatively small vessel carrying a total crew of only nine (four of whom worked in the engine room), only the appellant

was able to diagnose and supervise the vessel's means of propulsion. As the appellant said, the vessel could set sail without a Chief Engineer but if there were mechanical problems it was highly unlikely that the unqualified oilers would be able to restore propulsion. This raises the question as to why an organisation as formidable as the LTTE would put in the hands of a wholly unknown element a vessel carrying not only a huge quantity of explosives but also the then second in command of the LTTE. The appellant told the Authority that he was not the only member of the crew surprised and unhappy at the presence of Kittu and the nine other men on the *Yahata*. He said that one of the other oilers (Indralingam) and the second officer (Satkumalingam) were also most unhappy. But this only makes the appellant's story even less believable, asserting as he does that of the three officers on board, only the Master was aware that it was an LTTE ship and that the two other officers were not. His account also requires acceptance that more humble crew members such as the oiler Mohan were carefully chosen for proved loyalty but that two of the three officers were not.

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

LTTE" the context shows that this is a narrative of what Mohan personally observed. We are of the view that it is inherently improbable that after serving six months on a small vessel the appellant was quite unable to describe the cargo during this period apart from "packages" and "petrol drums and diesel".

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

(a) His denial of any knowledge that the *Yahata* was a LTTE vessel; and

(b) His claim that at no time was he ever asked whether he supported the LTTE; and

(c) His denial that he ever had cause for suspicion (until the arrival on board of Kittu)

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

now putting his skills to good use. He was aware that to maintain its cover the *Yahata* necessarily engaged in the carriage of "legitimate" cargo but when the need or opportunity arose, it would then smuggle war material for the LTTE. His responsibility, as the second most important officer on board, was to ensure that the means of propulsion was dependable and if there was a breakdown, that it was repaired.

[65] From his own personal experience and observation, having lived in Velvettithurai and other places in the north of Sri Lanka as well as Colombo, he was well aware that the LTTE was guilty of gross human rights abuses on a large and systematic scale including the killing of innocent civilians and the deliberate bombing of civilian targets. In fairness he accepted as much. But the issue is whether his presence on the *Yahata* was an innocent or knowing one. Notwithstanding his denials to the contrary, the Authority is of the view that his engagement in the secretive smuggling operations of the LTTE was a fully knowing one and evidence of his dedication to the aims, objectives and methods employed by the LTTE. He knew that the items he helped smuggle into Sri Lanka would as likely be used in "conventional" warfare against the Sri Lankan Army as in perpetrating gross human rights abuses against innocent civilians.

[66] Against these general findings we turn to the issues raised by this appeal. Where necessary we will make more specific and detailed findings of fact based on the general conclusions we have just particularised.

ROADMAP

[67] In carrying out its functions under Part 6A of the Immigration Act 1987 the Authority is required to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention. See s 129D. This means that the

Authority is required to determine, where appropriate, not only whether a claimant satisfies the inclusion requirements of Article 1A(2) but also whether the claimant should be excluded from the protection of the Convention because of the application of any of Articles 1D, 1E and 1F of the Convention. See further ss 129F(1), 129L(1)(c) and (f) read together with ss 129O(2) and 129R of the Act. Because the inclusion and exclusion provisions are all part of the single definition of the term "refugee" in Article 1 of the Convention, there is a question as to whether, either as a matter of law, or as a matter of practice, the inclusion issues must be addressed before the decision-maker addresses exclusion.

[68] It will be seen that the Authority proposes addressing the exclusion issues first. Whether this is possible as a matter of law is examined under the next heading.

WHETHER INCLUSION BEFORE EXCLUSION

[69] It must be remembered that the Inclusion, Cessation and Exclusion provisions of Article 1A(2), 1C, 1D, 1E and 1F are all part of a single definition of who is a refugee. There are both positive and negative components to the definition. The Convention prescribes not only who is but also who is not a refugee. Article 1A(2) commences:

> **A.** For the purposes of the present Convention, the term "refugee" **shall apply** to any person who:
>
> (1) ...
>
> (2) 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....
> [emphasis added]

[70] Article 1F, on the other hand, commences:

> **F.** 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.
>
> [emphasis added]

[71] The mandatory terms of Article 1F appear with equal clarity in the equally authentic French text of the Convention:

> **F.** Les dispositions de cette Convention **ne seront pas applicables aux personnes** dont on aura des raisons sérieuses de penser:
>
> (a) ...
>
> (b) ...
>
> (c)
>
> [emphasis added]

[72] As pointed out by James C Hathaway and Colin J Harvey in "Framing Refugee Protection in the New World Disorder" 34 Cornell Int'l L. J. 257 (2001) at 263, the general impetus for Article 1F was a determination to give legal force to Article 14(2) of the Universal Declaration of Human Rights, 1948 which provides that the right to asylum may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. Article 14 provides:

Article 14

> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[73] As Hathaway and Harvey observe at *op cit* 263, the fundamental conviction that certain persons are beyond the pale, that is simply not deserving of international protection, led the drafters to craft Article 1F as a mandatory mechanism of exclusion. Although a government may invoke its sovereignty to admit a person described in Article 1F to its territory, it is absolutely barred from granting Convention refugee status to that person. They conclude at *op cit* 264:

> Because no asylum seeker described in Article 1(F) can qualify for Convention refugee status, state parties to the Refugee Convention are under no duty to consider the merits of a protection claim made by such a person. Although it may sometimes be more convenient to consider an Article 1(F) exclusion in the course of an asylum hearing, at least where the facts that justify peremptory exclusion are intertwined with those relating to refugee status, there is no legal impediment to addressing Article 1(F) concerns as a preliminary matter.

[74] The opinion of Guy Goodwin-Gill in *The Refugee in International Law* (2nd ed 1996) at 97 is to the same effect:

> Being integral to the refugee definition, if the exclusion applies, the claimant cannot be a Convention refugee, whatever the other merits of his or her claim.

[75] That Article 1F excludes "persons" rather than "refugees" from the benefits of the Convention underlines the point that the question of a well-founded fear of being persecuted (Article 1A(2)) is irrelevant and need not be examined where the circumstances prescribed in Article 1F are present.

[76] The peremptory exclusion mandated by Article 1F has long been recognised in the jurisprudence of the Canadian federal courts which, singular in common law

jurisdictions (and possibly also in civil law jurisdictions), have acquired unrivalled experience in the application of Article 1F. In *Canada (Minister of Employment and Immigration) v Mehmet* [1992] 2 FC 598 (FC:CA) both the majority (Marceau and Décary JJ.A) at 606 and 608 and the minority (Desjardins JA) at 615 were in agreement that Article 1F is completely external to the characteristics of a refugee. In *Moreno v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 (FC:CA) the Court at 326 left open the question whether, as a matter of law, it is possible to determine exclusion prior to addressing the inclusion clause. That issue was, however, directly addressed in *Gonzalez v Canada (Minister of Employment and Immigration)* [1994] 3 FC 646, 657; (1994) 115 DLR (4th) 403, 411; (1994) 24 Imm LR (2d) 229, 238 (FC:CA). In this case the Federal Court of Appeal held that there is no obligation to deal with inclusion if the decision-maker concludes that the claimant is excluded by reason of the commission of crimes against humanity because, if the person is excluded from the definition as a result of the commission of such crimes, then by necessary implication the claimant cannot be found to be a Convention refugee. Hence there is no need to consider whether such a person would be included in the definition.

> The exclusion of Article 1F(a) is, by statute, integral to the definition. Whatever merit there might otherwise be to the claim, if the exclusion applies, the claimant simply cannot be a Convention refugee.

The Court noted, however, that, from a practical point of view, it would be preferable for the decision-maker to deal with inclusion, so that, if the reviewing court determined that he or she was in error with respect to the findings on exclusion, the Court could then review the conclusions concerning inclusion.

[77] For more recent application in Canada of the principle that if exclusion applies, a claimant simply cannot be a Convention refugee see *Alemu v Canada (Minister of Citizenship & Immigration)* (2004) 38 Imm LR (3d) 250, 265 (FC:TD), *Xie v Canada (Minister of Citizenship and Immigration)* [2005] 1 FC 304; (2004) 37 Imm LR (3d)

163 (FC:CA) at [38] and *Sing v Canada (Minister of Citizenship and Immigration)* [2005] FCA 125 (FC:CA) at [70].

[78] The position in Australia is the same. See *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533; 186 ALR 393 at [5], [31], [61] and [85] to [87] (HCA) (Gleeson CJ; Gaudron, McHugh & Kirby JJ). So too in the United Kingdom. See *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115; [2003] INLR 133 at [64] to [91] (IAT) and *KK (Article 1F(c)) Turkey; KK v Secretary of State for the Home Department* [2005] INLR 124 at [47] (IAT).

[79] The mandatory and peremptory exclusion demanded by Article 1F is underlined by the absence of a balancing or proportionality exercise. The decision-maker does not weigh the gravity of the crime or act against the gravity of the possible persecution: *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, 297-300 (CA) where the relevant Canadian, English and Australian case law is collected and discussed. The decision in *S v Refugee Status Appeals Authority* has subsequently been approved by the Supreme Court of New Zealand in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at [29]-[42]. For recent Canadian authority to the same effect reference may be made to *Xie v Canada (Minister of Citizenship and Immigration)* [2005] 1 FC 304; (2004) 37 Imm LR (3d) 163 (FC:CA) at [39]. In addition to these judicial decisions there is the cogent analysis by James C Hathaway and Colin J Harvey in "Framing Refugee Protection in the New World Disorder" 34 Cornell Int'l L.J. 257 (2001) at 294-296.

[80] The non-binding UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (HCR/GIP/03/05, 4 September 2003); 15 IJRL 492 (2003) at [24] assert a proportionality test. But the *Guidelines* do not address the textual and contextual impediments to such test and are unpersuasive. Furthermore the *Guidelines*

are not supported by the Conclusions reached by the Expert Roundtables convened by the UNHCR in 2001 to examine the topics of exclusion and non-refoulement. See Feller, Türk & Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, 2003) at 178-179; 481. These Roundtable discussions, or more particularly the Conclusions reached by them, preceded all six of the current UNHCR Guidelines. This is the point made in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at [30], [31] and [33] & [34] (NZSC). The UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* which was published as part of the *Guidelines* on Article 1F and reproduced at 15 IJRL 502 (2003) does little to advance the argument and singularly fails to mention, let alone address the Hathaway and Harvey article.

[81] While UNHCR *Guidelines* serve a limited purpose and may on occasion be of assistance, their provenance is problematical and their terms at times open to trenchant criticism. See for example two of the papers delivered at the 5th World Conference of the International Association of Refugee Law Judges held at Wellington, New Zealand in October 2002: Hugo Storey, "'From Nowhere to Somewhere': An Evaluation of the UNHCR 2nd Track Global Consultations on International Protection: San Remo 8-10 September 2001 Experts' Roundtable on the IPA/IRA/IFA Alternative", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (October 2002) 359, 365-369 & 389-390; Sharon Pickering, "Gender Persecution: A Response to the UNHCR Guidelines", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (October 2002) 347, 349-350. For specific criticism of UNHCR *Guidelines* in the exclusion context reference may be made to the two relatively recent decisions of the Immigration Appeal Tribunal (UK) in *KK (Article 1F(c)) Turkey; KK v Secretary of State for the Home Department* [2005] INLR 124 at [68] to [70] (IAT) and *AA (Exclusion Clause) Palestine* [2005] Imm AR 593 at [64] to [67] (IAT). In the

latter case, the following commentary on the UNHCR *Handbook* is to be found at [67]. It is a commentary which applies with equal force to UNHCR *Guidelines*:

> [67] The UNHCR Handbook is a source of guidance as to the law and is not a source of legal obligation. It is not necessarily a guide to state practice, because it may not relate to state practice in any particular paragraph but more to UNHCR's exhortations. Its exhortations may also reflect the humanitarian perspective, wider than the Refugee Convention, which UNHCR sometimes adopts. Interpretation or guidance from UNHCR is entitled to great respect but it may also be inaccurate or tendentious.

[82] In our view it is always best to work from the text of the Refugee Convention and the general rule of treaty interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, 1969, most recently discussed by the Authority in *Refugee Appeal No. 74665/03* (7 July 2004); [2005] INLR 68 at [43] to [49]. Compare *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) at [111] (McGrath J) and [271] (Glazebrook J). The UNHCR should not be recognised as the final arbiter on questions of the interpretation of the Refugee Convention: Rt Hon Lord Justice Dyson, "The Interpretation of the Refugee Convention: Idiosyncrasy v Uniformity", Keynote address given at the IARLJ World Conference, Stockholm, 21 April 2005 at p 10. See also Professor James C Hathaway, "Who Should Watch Over Refugee Law?", IARLJ, *Stemming the Tide or Keeping the Balance - The Role of the Judiciary* (2002) 393, 395-398.

Conclusion

[83] As a matter of law, exclusion under Article 1F of the Refugee Convention is peremptory in the sense that it is both mandatory and devoid of any balancing or proportionality exercise. The operation of Article 1F is in no way dependent on a prior finding that the refugee claimant has satisfied the inclusion requirements of Article 1A(2). As the Canadian Federal Court of Appeal in *Gonzalez* has held, whatever merit there might otherwise be to the refugee claim, if the exclusion terms apply, the claimant simply cannot be a Convention refugee.

[84] That having been said, however, the experience of the Authority has shown that in practice inclusion and exclusion issues are often inextricably connected. In these circumstances separate hearings on inclusion and exclusion can be impracticable, artificial and potentially unfair. It is most often the case that it is both fair and convenient that both issues be addressed at the same hearing. This facilitates a single investigation and, in the decision-making stage, a single credibility finding and a single finding of facts. This does not mean that all cases must be determined in this way. See for example *Refugee Appeal No. 70405/97* (29 May 1997). Everything depends on the circumstances of the case and the particular demands those circumstances make on the duty of fairness. But a distinction must be made between the **hearing** and the **decision**. While in the ordinary course it is best for inclusion and exclusion to be addressed at the same hearing, it does not follow that the **decision** itself must address both issues. If the claimant is excluded by (say) Article 1F, there is no legal obligation on the decision-maker to address inclusion.

[85] Here, because the inclusion and exclusion issues are closely connected, the hearing conducted by the Authority canvassed both inclusion and exclusion. In the unusual circumstances of this case which turn so much on the *Yahata* issue, we propose addressing in this decision the exclusion provisions first. Whether inclusion ultimately falls for consideration will depend on our finding in relation to exclusion. If the appellant is excluded from the Refugee Convention it may not be necessary to address inclusion.

EXCLUSION - ARTICLE 1F(a)

[86] The purpose and effect of Article 1F of the Refugee Convention is to exclude from the refugee protection regime those who are undeserving of protection. In loose terms Article 1F addresses those who themselves have abused the human rights of

others and, consistently with Article 14 of the Universal Declaration of Human Rights, 1948, those who have committed a serious non-political crime outside the country of refuge and those who are guilty of acts contrary to the purposes and principles of the United Nations.

[87] Exclusion is not premised on the individual being charged or convicted of the relevant crime: *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 (FC:CA) at 311; *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 158 ALR 289 (FC:FC) at 294 and *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 ALR 394 (FC:FC) at [79]. Rather, exclusion occurs where there are serious reasons for considering that the relevant crime or act has been committed:

> **F.** 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.

[88] The phrase "serious reasons for considering" has been judicially considered in New Zealand and overseas.

Serious reasons for considering

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

Canada (Minister of Employment and Immigration) [1992] 2 FC 306 (FC:CA) at 311 MacGuigan JA (with whom Stone & Linden JJA agreed) stated:

> The words "serious reasons for considering" also, I believe, must be taken, as was contended by the respondent, to establish a lower standard of proof than the balance of probabilities.

[90] This holding has been applied in the Federal Court of Canada in an unbroken line of authority culminating in *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] SCC 40; (2005) 254 DLR (4th) 200 (SC:Can) at [114]:

> The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion but less than the standard applicable in civil matters of proof on the balance of probabilities....

[91] It has also been established in Canada that the "serious reasons for considering" standard of proof applies only to questions of fact. Thus, while it is a question of fact whether the individual 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 v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 (FC:CA) at 313; *Mugesera* at [116].

[92] The same interpretation of "serious reasons for considering" has been adopted in Australia in *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 ALR 394 (FC:FC) at [79] and in the United Kingdom decisions of *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115; [2003] INLR 133 at [95] (IAT) and *AA (Exclusion Clause) Palestine* [2005] Imm AR 593 at [48] (IAT).

[93] In New Zealand, this Authority in *Refugee Appeal No. 1248/93 Re TP* (31 July 1995) at 32 followed and applied the holding in *Ramerez* that the words "serious

reasons for considering" must be taken to establish a lower standard of proof than the balance of probabilities. That lower standard of proof was accepted as correct in *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301, 306 (Smellie J) (reversed on other grounds in *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 (CA)). In *Garate v Refugee Status Appeals Authority* [1998] NZAR 241 Williams J at 248 cited with approval the holding of this Authority in *Refugee Appeal No. 1248/93 Re TP* as to the lower standard of proof.

[94] We turn now to war crimes and crimes against humanity.

War crimes and crimes against humanity - the definition

[95] While Article 1F(a) excludes any person in relation to whom there are serious reasons for considering that he or she 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, we intend to consider exclusion primarily in relation to crimes against humanity as it is this category which has clearest application to the facts of the present case. After identifying the legal ingredients of a crime against humanity we will turn to accomplices and complicity.

[96] It is true, as pointed out in *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 ALR 394 (FC:FC) at [46] that there is a substantial overlap in the various definitions of a war crime and crime against humanity and that disparities may in some cases have a determinative impact on the outcome of a particular case. However, the present case is not in this category, particularly given that, on the findings we have made, there are no issues of duress or superior orders. Contrast the facts in *SRYYY*. We intend to rely on the definitions of war crime and crime against humanity which were well established in international law as at 1993 (cf

Harb c Canada (Ministre de la Citoyenneté & de l'Immigration) (2003) 27 Imm LR (3d) 1 (FC:CA) at [8] to [10]).

[97] According to Atle Grahl-Madsen, *The Status of Refugees in International Law* Vol 1 (1966) 272, Article 1F(a) developed from the reference in para 7(d) of the UNHCR Statute to Article 6 of the London Charter of the International Military Tribunal. But since then the relevant international law has evolved substantially. A short summary is helpfully provided in *SRYYY*. It is sufficient to note that definitions of crimes against humanity are now to be found in various international instruments, principal of which are listed below. We have included some instruments relating to war crimes as they are also useful in the present context:

(a) The *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, 8 August 1945 ("the London Charter").

(b) Article 3 common to the First, Second, Third and Fourth Geneva Conventions, 1949 ("Common Article 3").

(c) The Second Protocol Additional to the Geneva Conventions, 1977 ("Protocol II").

(d) The Statute of 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 ("the ICTY").

(e) The Statute of the International Tribunal for Rwanda, 1994 ("the ICTR").

(f) The Rome Statute of the International Criminal Court, 1998.

[98] Article 6 of the London Charter stipulated:

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.

[99] Next relevantly in time are the provisions of Common Article 3 of the Geneva Conventions. It has been said that this Article remains the most firmly established source of international law on internal or non-international law: 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; Steven R Ratner & Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 2nd ed (2001) 95-97. Until 1977, Common Article 3 of the Geneva Conventions of 1949 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 provides:

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, 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.

[100] By the 1960s, states seemed willing to consider a more comprehensive set of protections than those in Common Article 3: Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed, 97. Efforts culminated in Protocol II which provides for the protection of victims of non-international conflicts. However, not all non-international conflicts are governed by Protocol II. It does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. Instead Article 1(1) imposes the requirements of (a) two sets of armed forces, (b) responsible command, and (c) sufficient control over territory to carry out sustained operations, none of which is necessarily required for the application of Common Article 3:

> **ARTICLE 1**
>
> (1) This Protocol ... shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

[101] These requirements do not present a difficulty in the present case for, as noted in *Refugee Appeal No. 1248/93 Re TP* (31 July 1995) at 6 and 28, the LTTE announced in February 1988 that it would abide by the provisions of the Geneva Conventions and Protocols I and II: Amnesty International, *Sri Lanka: An Assessment of the Human Rights Situation*, (AI Index: ASA 37/1/93, 14, February 1993). It is also plain from the facts that at the relevant time there were two sets of armed forces (the LTTE and the Sri Lankan armed forces), responsible command (on both sides) and each side

undoubtedly had sufficient control over territory to carry out sustained operations. Article 4 of Protocol II provides:

ARTICLE 4. FUNDAMENTAL GUARANTEES

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

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

   (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

   (b) collective punishments;

   (c) taking of hostages;

   (d) acts of terrorism;

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

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

   (g) pillage;

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

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

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

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

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

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

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

ARTICLE 13. PROTECTION OF THE CIVILIAN POPULATION

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

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

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.

[102] We turn finally to the Statute of the ICTY and its definition of crimes against humanity set out in Article 5:

ARTICLE 5. CRIMES AGAINST HUMANITY

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c)

enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

Crimes against humanity - the elements

[103] As recently stated by the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] SCC 40; (2005) 254 DLR (4th) 200 at [119], [128], [170] and [171] a crime against humanity is made up of four essential elements:

(1) A proscribed act is carried out;

(2) The act occurs as part of a widespread or systematic attack;

(3) The attack is directed against any civilian population; and

(4) The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

[104] The Supreme Court decision makes it clear that in addition to the mental ingredient (mens rea) required by the fourth element, a mental element is also required for the underlying act itself. See the explanation given at para [130]:

> Establishing an enumerated act involves showing that both the physical element and the mental element of the underlying act have been made out. For instance, where the accused is charged with murder as a crime against humanity, the accused must (1) have caused the death of another person, and (2) have intended to cause the person's death or to inflict grievous bodily harm that he or she knew was likely to result in death. Once this has been established, the court will go on to consider whether the murder was committed in the context of a widespread or systematic attack directed against a civilian population or an identifiable group; this requirement is discussed more fully below.

[105] The judgment of the Supreme Court of Canada examines in some detail the second and third elements which impose the requirement of a widespread or systematic attack and for the attack to be directed against any civilian population "as part of" a widespread or systematic attack. We do not intend to address here the relevant passages as the facts in the present case, in this respect, present no real difficulty.

[106] We turn now to the fourth and final of the essential elements for a crime against humanity. The individual in question must have a guilty mind. That is, in addition to the mental element required for the underlying act, the individual must have the requisite *mens rea*. This mental element was defined in *Mugesera* at [173] to [176] in the following terms:

> [173] ... It is now well settled that in addition to the *mens rea* for the underlying act, the accused must have knowledge of the attack and must know that his or her acts comprise part of it **or** take the risk that his or her acts will comprise part of it: see, e.g., *Tadic*, Appeals Chamber, at para. 248; *Ruggiu*, at para. 20; *Kunarac*, Trial Chamber, at para. 434; *Blaskic*, at para. 251.
>
> [174] It is important to stress that the person committing the act need only be cognizant of the link between his or her act and the attack. The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard: *Kunarac*, Appeals Chamber, at para. 103. Even if the person's motive is purely personal, the act may be a crime against humanity if the relevant knowledge is made out.
>
> [175] Knowledge may be factually implied from the circumstances: *Tadic*, Trial Chamber, at para. 657. In assessing whether an accused possessed the requisite knowledge, the court may consider the accused's position in a military or other government hierarchy, public knowledge about the existence of the attack, the scale of the violence and the general historical and political environment in which the acts occurred: see, e.g., *Blaskic*, at para. 259. The accused need not know the details of the attack: *Kunarac*, Appeals Chambers, at para. 102.
>
> [176] In *Finta*, the majority of this Court found that subjective knowledge on the part of the accused of the circumstances rendering his or her actions a crime against humanity was required (p. 819). This remains true in the sense that the accused must have knowledge of the attack and must know that his or her acts are part of the attack, or at least take the risk that they are part of the attack.

[107] Before we turn to apply these principles to the facts of the present case, we need to address also the liability of accomplices and parties. This is because there is no evidence that the appellant personally committed a war crime or crime against humanity. His liability, if any, will depend upon being an accomplice or party.

Accomplices and parties

[108] Unsurprisingly, the London Charter makes explicit provision for the liability of accomplices:

> 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.

[109] The issue of complicity has also been addressed in several decisions of the Federal Court of Canada. The seminal decision in *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 (FC:CA) deserves particular examination. Mr Sivakumar, a Tamil from Sri Lanka, had been found at tribunal level to have a well-founded fear of being persecuted at the hands of the Sri Lankan Government but had been excluded under Article 1F(a). Although it was not established that he had personally committed crimes against humanity, it was said that he was responsible for crimes against humanity committed by the LTTE because of his leadership position within that organisation and his continuing participation in it. These particular facts explain why the judgment of the Federal Court of Appeal places emphasis on inferences which can be drawn from a person's leadership position within an organisation. Those observations have no application to the facts of the present appellant's case, but the decision of the Federal Court of Appeal (delivered by Linden JA) is nevertheless illuminating in its affirmation that it is possible for a person to commit a war crime or a crime against humanity as an accomplice, even though the individual has not personally done the acts amounting to the crime. The starting point

for complicity is "personal and knowing participation" and a shared common purpose: *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 (FC:CA) at 318. This is essentially a factual question that can be answered only on a case-by-case basis. Mere bystanders or on-lookers are not accomplices as there is no personal involvement. The following passage has been taken from *Sivakumar* at p 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. Again, this will depend on the facts in each case. For example, in *Ramirez, supra*, the claimant had enlisted in the army voluntarily and had witnessed the torture and killing of many prisoners. Due to the circumstances of the claimant's participation in the military, the court found that he shared the military's purpose in committing these acts and that therefore he was an accomplice rather than an on-looker. A similar conclusion was reached in *Naredo, supra*, in which the applicants acted as guards during the torturing of prisoners. Muldoon J.'s reasoning in *Naredo, supra*, is questionable in the light of subsequent jurisprudence since he found that watching torture was as culpable as committing torture. However, his conclusion that the claimants were accomplices was probably correct on the facts given that the claimants were willing members of the intelligence service of the Chilean police who were part of a team responsible for the interrogation and torture of prisoners. By way of comparison, in *Moreno, supra*, the claimant had been conscripted into the Salvadoran army at the age of 16. He was ordered to stand guard outside a cell in which a prisoner was interrogated and brutally tortured. However, the facts disclosed that the claimant was really a by-stander who had no power to intervene in the interrogation, did not share the military's purpose in perpetrating the torture, and deserted from the army as soon as possible. Thus the claimant was found not to have been an accomplice in this act of torture ...
>
> In *Ramirez, supra*, MacGuigan J.A. explained the test for complicity in cases of secondary parties, at page 318:
>
> > At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all the parties in question may have of it.
>
> Moreover, those involved in planning or conspiring to commit a crime, even though not personally present at the scene, might also be accomplices, depending on the facts of the case....

[110] In *Bazargan v Canada (Minister of Citizenship and Immigration)* (1996) 205 NR 282 (FC:CA) at [11] to [12] (and subsequently affirmed in *Murillo v Canada (Minister of Citizenship and Immigration)* [2003] 3 FC 287 (FC:CA) at [34]; *Harb c Canada (Ministre de la Citoyenneté & de l'Immigration)* (2003) 27 Imm LR (3d) 1 (FC:CA) at [17] to

[19] and *Zrig v Canada (Minister of Citizenship and Immigration)* [2003] 3 FC 761 (FC:CA) at [56]) the principles were stated in the following terms:

> [11] In our view, it goes without saying that 'personal and knowing participation' can be direct or indirect and does not require formal membership in the organization that is ultimately engaged in the condemned activities. It is not working within an organization that makes someone an accomplice to the organisation's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organisation. At p 318, MacGuigan J.A., said that "[a]t bottom, complicity rests ... on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.

[111] Complicity was further explained in *Harb c Canada (Ministre de la Citoyenneté & de l'Immigration)* (2003) 27 Imm LR (3d) 1 (FC:CA) at [11]:

> ... It is not the nature of the crimes with which the appellant was charged that led to his exclusion, but that of the crimes alleged against the organizations with which he was supposed to be associated. Once those organizations have committed crimes against humanity and the appellant meets the requirements for membership in the group, knowledge, participation or complicity imposed by precedent ... the exclusion applies even if the specific acts committed by the appellant himself are not crimes against humanity as such. In short, if the organisation persecutes the civilian population the fact that the appellant himself persecuted only the military population does not mean that he will escape the exclusion, if he is an accomplice by association as well. [References omitted].

[112] An earlier statement of these principles is to be found in *Penate v Canada (Minister of Employment and Immigration)* [1994] 2 FC 79 (FC:TD) at 84 (cited more recently in *Zazai v Canada (Minister of Citizenship & Immigration)* (2004) 41 Imm LR (3d) 60 (FC:TD) at [28]:

> As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents of international offences have

occurred but where the commission of such offences is a continuous and regular part of the operation.

[113] Article 25 of the Rome Statute fairly reflects the principles to be derived from the case law:

ARTICLE 25

INDIVIDUAL CRIMINAL RESPONSIBILITY

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

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

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

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

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

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

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

> 4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

[114] In *Prosecutor v Blaskic* (Appeals Chamber, Case No. IT-95-14-A (29 July 2004)) (ICTY) Blaskic had submitted that liability for aiding and abetting requires, at a minimum, actual knowledge and that not only must the aider and abetter know that his acts provide support to another person's offence, but he must also know the specifics of that offence. Furthermore, he submitted that the *actus reus* of aiding and abetting includes a causation requirement. We will return to the causation argument shortly. At [45] to [50] the Appeals Chamber of the ICTY addressed the aiding and abetting issues in the following terms:

> [45] In *Vasiljevic*, the Appeals Chamber set out the *actus reus* and *mens rea* of aiding and abetting. It stated:
>
> > (i) The aider and abetter carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.) and this support has a substantial effect upon the perpetration of the crime. [...]
> >
> > (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abetter assist [in] the commission of the specific crime of the principal. [...]
>
> The Appeals Chamber considers that there are no reasons to depart from this definition.
>
> [46] In this case the Trial Chamber, following the standards set out in *Furundzija*, held that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime". It further stated that the *mens rea* required is "the knowledge that these acts assist the commission of the offense". The Appeals Chamber considers that the Trial Chamber was correct in so holding.
>
> [47] The Trial Chamber further stated that the *actus reus* of aiding and abetting may be perpetrated through an omission, "provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*". It considered:
>
> > In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.
>
> The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting.
> [48] The Trial Chamber in this case went on to state:

> Proof that the conduct of the aider and abetter had a causal effect on the act of the principal perpetrator is not required. Furthermore, participation may occur before, during or after the act is committed and be geographically separated therefrom.

The Appeals Chamber reiterates that one of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abetter has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause - effect relationship between the conduct of the aider and abetter and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. It further agrees that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the *actus reus* takes place may be removed from the location of the principal crime.

[49] In relation to the *mens rea* of an aider and abetter, the Trial Chamber held that "in addition to knowledge that his acts assist the commission of the crime, the aider and abetter needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct". However, as previously stated in the *Vasiljevic* Appeal Judgment, knowledge on the part of the aider and abetter that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation. In this respect, the Trial Chamber erred.

[50] The Trial Chamber agreed with the statement in the *Furundzija* Trial Judgment that "it is not necessary that the aider and abetter ... know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter." The Appeals Chamber concurs with this conclusion.

[115] We address the application of these legal principles to the facts in a later section of this decision.

Parties - whether a causation element

[116] It was submitted for the appellant that it had to be shown that he was aware that the explosives and weapons carried on board the *Yahata* on this particular voyage would have been used to commit a war crime or a crime against humanity. It was said that such evidence was necessary because the weapons and explosives in question were capable of dual use. They could be used in pursuing 'legitimate' war against the Sri Lankan forces or in committing war crimes or crimes against humanity.

[117] In *Sumaida v Canada (Minister of Citizenship & Immigration)* (2000) 3 Imm LR (3d) 169 (FC:CA) the applicant was a citizen of Iraq who, while a student in England, joined the al Da'wa Party, members of which were severely persecuted by the Saddam Hussein regime. Soon after joining the party the applicant became disillusioned and voluntarily reported the names of the members of the group to the Iraqi secret police. There was no direct evidence that anyone so informed upon had been killed but the Immigration and Refugee Board was of the view that the circumstantial evidence made this probable. Sumaida was accordingly excluded under the crimes against humanity limb of Article 1F(a). In the Federal Court of Appeal the submission made was that there was no evidence of complicity in a crime against humanity in view of the absence of evidence that any harm had befallen the alleged victims or that any crime had been committed against them. At best, the evidence on these issues amounted to nothing more than speculation. In rejecting this submission the Court acknowledged that while it is necessary for the decision-maker to make findings of fact as to what the alleged crimes against humanity are, it is not required that a refugee claimant be linked to specific crimes as the actual perpetrator or that the crimes against humanity committed by an organisation be necessarily and directly attributable to specific acts or omissions of a claimant.

[118] This decision has been cited with approval in *Murillo v Canada (Minister of Citizenship and Immigration)* [2003] 3 FC 287 (FC:CA) at [40].

[119] To similar effect see the passages from *Blaskic* cited earlier. The Appeals Chamber of the ICTY has specifically held that proof of a cause - effect relationship between the conduct of the aider and abetter and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. Indeed it is not necessary that the aider and abetter know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact

committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abetter.

[120] In *Mugesera* at [174] to [176] the Supreme Court of Canada made the following points:

(a) The person committing the act need only be cognizant of the link between his or her act and the attack. The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard.

(b) Knowledge may be factually implied from the circumstances. The decision-maker may consider not only the person's position in a military or other government hierarchy, but also public knowledge about the existence of the attack, the scale of the violence and the general historical and political environment in which the acts occurred. The individual need not know the details of the attack.

(c) The person must have knowledge of the attack and must know that his or her acts are part of the attack, or at least take the risk that they are part of the attack.

FINDINGS OF FACT ON WAR CRIMES AND CRIMES AGAINST HUMANITY

[121] It is now necessary to determine whether the evidence establishes that the LTTE has committed war crimes and crimes against humanity and whether there are serious reasons for considering that the appellant has committed a war crime or a crime against humanity as an accomplice or party.

[122] We intend to address the issue of crimes against humanity first.

The LTTE and crimes against humanity

[123] There can be no doubt on the voluminous evidence before the Authority and summarised earlier in this decision, that from at least May 1985 the LTTE has:

(a) Systematically eliminated all those who have opposed it, including rival rebel groups, traditional Tamil leaders, senior Sinhalese political leaders and Rajiv Ghandhi himself.

(b) Systematically and in a widespread fashion murdered Sinhalese and Muslim civilians.

(c) Engaged in the forcible "ethnic cleansing" of both Muslims and Sinhalese from the north and east of Sri Lanka.

(d) Consistently and systematically attacked the civilian population of Sri Lanka by carrying out devastating bomb attacks, particularly in Colombo.

[124] We are satisfied on this evidence that crimes against humanity as defined in Article 6 of the London Charter and Article 5 of the Statute of the ICTY have been committed by the LTTE in furtherance of its aim of exercising complete control over the northern and eastern parts of Sri Lanka and to thereby establish an independent Tamil state (*Eelam*). It was a necessary component of this aim that:

(a) Crimes against humanity be committed deliberately and with full knowledge of their atrocious nature;

(b) The acts were committed as part of a widespread or systematic attack;

(c) The attacks were directed against the civilian population in general and against identifiable groups, being Tamils opposed to the LTTE, Muslims generally and Sinhalese generally.

[125] In these circumstances the first three elements of a crime against humanity as identified by the Supreme Court of Canada in *Mugesera* had been made out. In fairness to the appellant he did not seriously challenge this aspect of the case.

Crimes against humanity - the conduct of the appellant

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

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

War crimes

[127] In the circumstances, it is not necessary to address the issue of war crimes at length. As indicated the LTTE has committed systematic breaches of Common Article 3 to the Geneva Conventions and Article 4 of Protocol II by, at the very least, murdering police officers and members of the armed forces in their custody and by murdering large numbers of the civilian population. For the reasons given under the previous heading, the appellant was a knowing and willing accomplice or party to the commission of these war crimes.

Conclusion on the application of Article 1F(a)

[128] In the circumstances, we conclude that there are serious reasons for considering that the appellant has committed a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes. He is accordingly excluded from the Refugee Convention by Article 1F(a).

[129] In the circumstances it is strictly not necessary for us to address Article 1F(b). However, in the interests of completeness we will address that issue next, albeit in more abbreviated terms.

EXCLUSION - ARTICLE 1F(b)

[130] More than one subparagraph of Article 1F may apply to the acts of an individual.

[131] The category of persons excluded from the Refugee Convention by Article 1F(b) are described in the following terms:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) ...
>
> (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) ....

Non-political crime

[132] In *T v Secretary of State for the Home Department* [1996] AC 742 (HL) Lord Lloyd (with whom Lords Keith and Browne-Wilkinson agreed) at 786-787 offered the following definition of "non-political crime":

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

[133] Lord Slynn at 776 was of the view that "serious non-political crime" includes acts of violence which are intended or likely to create a state of terror in the minds of persons, whether particular persons or the general public and which cause, or are likely to cause, injury to persons who have no connection with the government of the state.

Serious

[134] The gravity of the particular offending is relevant to whether or not it is to be classed as a serious crime: *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 (CA) at 298. Account must be taken of the nature and details of the particular offending and the likely penal consequences. At 296 the Court of Appeal accepted that the exclusion in Article 1F(b) "is directed to offending in the upper end of the scale, which is likely to attract a severe penalty, at least in the nature of imprisonment for an appreciable period of years".

No proportionality exercise

[135] The gravity of the crime is not weighed against the gravity of the possible persecution: *S v Refugee Status Appeals Authority* at 297 and 300:

> To classify any crime as serious requires an evaluation not only of the elements which form the crime, but also of its facts and circumstances, as well as the circumstances of the offender which are relevant for the purposes of the criminal law. The level of penalty inflicted or likely to be inflicted in those circumstances by the contracting state and probably, as Smellie J took into account in the present case, by the state in which the crime was committed, are relevant factors. The contracting state then has the right to exclude from its convention obligations persons who would otherwise qualify for refugee status. The inquiry therefore must be whether the crime is of sufficient gravity to justify withholding the benefits conferred by the convention. ... The seriousness of a crime bears no relationship to and is not governed by matters extraneous to the offending. There is nothing in art 1F to justify reading into its provisions restrictive or qualifying words such as those which would be necessary to require a balancing exercise of the kind suggested.

Extradition, expiation and accomplices

[136] It is not necessary for an extradition request to have been made in relation to the individual or that he or she has been accused or convicted of a particular crime: *Zrig v Canada (Minister of Citizenship and Immigration)* [2003] 3 FC 761 (FC:CA) at [78] (Nadon JA with Létourneau JA concurring); *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 158 ALR 289 (FC:FC) at 294, 300, 302-304. Nor is a person shielded from Article 1F(b) by virtue of the fact that he or she has served a sentence for the relevant crime. The notion that expiation, that is, punishment, pardon or amnesty neutralises Article 1F(b) has been expressly rejected: *KK (Article 1F(c)) Turkey; KK v Secretary of State for the Home Department* [2005] INLR 124 (IAT) at [91]. In addition, remorse or change of heart has similarly been rejected as a basis for not applying the exclusion clause: *AA (Exclusion Clause) Palestine* [2005] Imm AR 593 (IAT) at [59] and *Liu v Canada (Minister of Citizenship and Immigration)* (1996) 124 FTR 74 applied in *Refugee Appeal No. 72635/01* [2003] INLR 629 (RSAA) at [207].

[137] There is no basis for making any distinction between Article 1F(a) and Article 1F(b) so far as the responsibility of accomplices and aiders and abetters is concerned: *Zrig v Canada (Minister of Citizenship and Immigration)* [2003] 3 FC 761 (FC:CA) (per Nadon JA with Létourneau JA concurring) at para [92].

Serious non-political crime - the conduct of the appellant

[138] As previously mentioned, in a judgment given by the Supreme Court of India on 13 March 1997, the appellant was convicted of an offence under s 438 of the Indian Penal Code, 1860. The text of that provision has already been given at footnote 2, but for ease of reference it is set out again:

437. Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden -

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

438. Punishment for the mischief described in Sec. 437 committed by fire or explosive substance -

Whoever commits, attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[139] The nearest analogues under New Zealand domestic law are:

(a) Arson: Crimes Act 1961, s 267.

(b) Intentional damage: Crimes Act 1961, s 269.

(c) Endangering transport: Crimes Act 1961, s 270.

[140] The appellant has been found a party to the intentional destruction by fire of a vessel carrying explosives. On any view, danger to life was likely to ensue to those on board the *Yahata* as well as to:

(a) the officers and crew of the nearby navy and coastguard vessels; and

(b) members of the navy boarding party.

[141] Our assessment of the facts is that this act of destruction was not committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy. Rather, the act

was committed to destroy the vessel and its cargo and to thereby prevent their seizure. This is a serious non-political crime. In all the circumstances (including the appellant's conviction under s 438 of the Indian Penal Code) we are of the view that there are serious reasons for considering that the appellant has committed a serious non-political crime which in New Zealand would fall under the following provisions of the Crimes Act 1961:

(a) s 267(1)(a) and (b), (2)(a) and (3).

(b) s 269(1), (2)(a) and (3).

(c) s 270(1)(a) and (b).

Conclusion on the application of Article 1F(b)

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

ARTICLE 1A(2) - THE INCLUSION ISSUE

[143] Because we have held that the provisions of Article 1F(a) and 1F(b) stipulate that the provisions of the Refugee Convention cannot apply to the appellant, we see no point in addressing the hypothetical question whether the appellant would otherwise have satisfied the inclusion provisions of the Convention as set out in Article 1A(2).

INCLUSION - THE FEMALE APPELLANT

[144] The claim to refugee status by the appellant's wife can be addressed very shortly.

[145] From the time her husband left Sri Lanka in July 1992 to join the *Yahata* until her own departure from Sri Lanka in December 2001 she had no difficulties with government officials or with the LTTE. She was able to leave Colombo in February 1993 (that is, after the *Yahata* incident and the detention of her husband in India) and to return to the LTTE-controlled northern areas. She was also able to leave the LTTE-controlled area and to return to Colombo with her children to commence her journey to New Zealand. In preparation for this trip she was issued with a Sri Lankan passport on 26 November 2001. In these circumstances we can see no basis whatever for her assertion that she faces a real risk of being persecuted in Sri Lanka either by the Sri Lankan authorities or by the LTTE.

[146] It was suggested that perhaps the incident-free period from January 1993 to December 2001 was due to the fact that the authorities in Sri Lanka had not made the connection between her and her husband. This is pure speculation and cannot establish a refugee claim. In any event, even were the Authority to assume in favour of the female appellant (and against the facts) that the connection between her and her husband had not been made in earlier years, the assumed fact is counterbalanced by the fact that a cease fire has been in effect since February 2002 and the government ban on the LTTE was lifted in that same year. There is no evidence that even were the true circumstances to be made known to the Sri Lankan authorities, the female appellant would thereby be at risk of being persecuted for a Convention reason. As the Authority has emphasised repeatedly, conjecture or surmise has no part to play in determining whether an anticipated risk of harm is well-founded. Such anticipation is "well-founded" when there is a real substantial basis for it. A substantial basis may exist even though there is far less than a fifty percent chance that the object of the fear

will eventuate. But no fear can be well-founded for the purpose of the Refugee Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of being persecuted. A fear of being persecuted is not well-founded if it is merely assumed or if it is mere speculation: *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [154]. The appellant's wife has failed by a substantial margin to establish the "well-founded" element of the refugee definition. There is therefore no call for the Authority to examine any of the other inclusion issues.

CONCLUSION

[147] For the reasons given the Authority finds that the male appellant (Appeal 74796) is excluded from the provisions of the Refugee Convention by reason of the application of Article 1F(a) and Article 1F(b). His appeal is dismissed.

[148] His wife (Appeal 74797), while not herself excluded from the Refugee Convention, has failed by a substantial margin to satisfy the inclusion provisions. The Authority finds that she is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. It follows that her application for refugee status is declined and her appeal is dismissed.

	....
	[Rodger Haines QC]
	Chairperson