REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 71462/99

AT AUCKLAND

Before:	R P G Haines QC (Chairperson) P Millar (Member)
Counsel for the Appellant:	Margaret Robins
Appearing for the NZIS:	Neville Menezes
Date of Hearing:	10 & 11 June 1999
Date of Decision:	27 September 1999

DECISION

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INTRODUCTION

[1] This is an appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a Tamil and a citizen of the Democratic Socialist Republic of Sri Lanka.

[2] He arrived in New Zealand on 28 March 1998 and sought refugee status at the airport. The Refugee Status Branch interview was on 5 November 1998 but the decline decision was not issued until 23 April 1999.

THETHE APPELLANT'S CASE

[3] Both the appellant's mother and father are deceased. They are survived by four sons and one daughter. The eldest son has lived in Germany since 1986 where he apparently has refugee status. The second and third eldest sons have not been heard of since they last left Sri Lanka in October 1996 for India. The fourth eldest child is the appellant who is currently 23 years of age and single. The youngest sibling is the appellant's sister. She is currently in the Czech Republic where she has sought refugee status. Although born in Vavuniya, the appellant has lived most of his life in Jaffna or in its surrounding districts.

[4] Due to their Tamil ethnicity, various members of the appellant's family have suffered over the years. His grandfather lost property during the 1956 anti-Tamil riots and, along with one of the appellant's uncles, was killed during the 1983 anti-Tamil riots. In 1984, following an attack by the Liberation Tigers of Tamil Eelam (LTTE) on Sri Lankan Army forces, the appellant's eldest brother was arrested by the army and jailed for two years. Upon his release he went to Germany where, as mentioned, he now lives.

[5] Over the next 10 years, as the civil war in the north and east of Sri Lanka ebbed and flowed, the family moved at least seven times to escape the fighting, which included the bombing and shelling by the Sri Lankan army and navy of Tamil civilian areas. In July 1987 the second and third eldest brothers were arrested by the army and detained for two months. During this period they were tortured. At about this time the Indian Peace Keeping Force (IPKF) became responsible for security in the north and east under the terms of the Indo-Sri Lanka accord. The IPKF too suspected young Tamil males of being members of the LTTE with the result that the two brothers were frequently detained and questioned. The second eldest brother was eventually sent by the appellant's father to Colombo for safety but three days after his arrival in Colombo was denounced as an LTTE supporter by a pro-Government Tamil group, PLOTE. After travelling to Colombo the appellant's father was able to secure the release of the son who was sent to India in December 1988 for safety. However, while the father was in Colombo, the third eldest son was arrested and detained by the IPKF. Upon the father's return to the north, he and the appellant went to the IPKF army camp to secure the release of the third son. At the camp both the appellant and his father were beaten up by another pro-Government Tamil group, the ENDLF. The third eldest son was not released until January 1989. On his release, he too was sent to India for his safety.

[6] In November 1989 the appellant's mother died from a heart attack. Early medical assistance could not be accessed due to an IPKF-imposed curfew.

[7] By late 1991 the appellant and his family were living at the appellant's maternal grandmother's house in Point Pedro. The two brothers who had been sent to India returned in May 1994. As the family were living in an LTTE controlled area, the appellant and his brothers came under increasing pressure from the LTTE to join them and from time to time the brothers would be taken by the LTTE to do work for them.

[8] In May 1995 the appellant's father died from jaundice. Due to the years of

protracted fighting, he was unable to access medicines or medical facilities and the LTTE refused to issue passes to allow the second and third eldest sons to escort their father south to obtain medical help.

[9] After the death of his father, the appellant went into business with a cousin brother who had found a way of smuggling food and grocery items into LTTE-controlled areas from government-controlled Vavuniya. The appellant, in turn, sold these items on a commission basis. It was a profitable venture carrying with it the advantage that the appellant was largely left alone by the LTTE, provided he paid taxes to them. His brothers were not, however, that fortunate. In September 1996 they were taken by the LTTE to dig bunkers. After one of the brothers was injured by shrapnel during shelling by the Sri Lankan army, both brothers fled to India by boat. Since that time neither the appellant nor any other member of the family has heard from them.

[10] On 5 September 1997 the appellant's cousin brother was arrested by the LTTE on suspicion that he was acting as an informant for the Sri Lankan army. The reasoning was that the cousin would only be able to bring in goods from the army controlled area if he was an informant. Five days later the appellant himself was arrested by the LTTE. For the first 10 days he was tortured by being beaten for extended periods. The LTTE wanted information about his cousin. After the first 10 days the appellant was taken to a LTTE camp where he was detained for the next five months. There he was forced to work for the LTTE washing clothes, cleaning quarters, cooking food and digging bunkers. During this period the appellant came under fire from the Sri Lankan army and persons working with him were killed. Due to the poor conditions, the appellant contracted dengue fever and became so weak that he was eventually released by the LTTE in early February 1998. He was told, however, not to go anywhere. With the assistance of his sister he was able to obtain medicine from the Red Cross and ultimately recovered.

[11] Fearing further arrest by the LTTE, the appellant decided to go to Colombo to

live with an uncle. He did not, however, have any identity papers due to the dislocation of the administration in the north caused by the civil war. When the appellant reached Vavuniya he was detained by the security forces. For the first two days he was questioned about his identity and the purpose of his journey. While being questioned he was beaten on his hands and legs with a stick or baton. Later he was taken to a nearby transit camp and instructed to report to the Vavuniya police station twice a day. While in the transit camp he, along with three or four other young male Tamils, was taken to a PLOTE camp for several hours where, once again, he was questioned and beaten for some 10 to 15 minutes. Thereafter he was returned to the transit camp but two of the other Tamil males were not. Eventually, by paying money to PLOTE he was able to obtain a pass allowing him to travel south to Colombo. After seven days at Vavuniya, the appellant left for Colombo on 15 March 1998.

[12] Upon the appellant's arrival in Colombo by train he was arrested at the station by police after failing to produce an identity card during a routine check. The arresting officers told him that as he had no identity papers, they suspected that he was a member of the LTTE.

[13] The appellant was held at the Pettah police station for three days. On the first day he was questioned about his identity, how he had obtained a pass to travel to Colombo and the purpose of his trip to Colombo. The police made it clear that they suspected him of being a member of the LTTE and beat him on each of the two to three times that they questioned him that day. They also burnt him with cigarettes and a cigarette lighter. In this regard the medical evidence tendered at the appeal hearing establishes that the appellant has an elliptical scar on the left forearm and several small scars over the chest and abdomen which, in the opinion of the medical practitioner, could have been caused by burns inflicted by cigarettes and a cigarette lighter. The appellant says that the police officers also crushed his toes by stamping on them while he was barefoot.

[14] On the second day of detention the appellant's uncle came to the police station to

secure his (the appellant's) release but in this he was unsuccessful. That day the appellant was questioned some four or five times and on each occasion subjected to painful beatings. On the third day the uncle returned, bringing his employer. After paying a substantial bribe, they secured the appellant's release that day, 18 March 1998, but not before he had been beaten that day one more time.

[15] The appellant was advised by his uncle and his uncle's employer (also a Tamil) that he (the appellant) would have to leave Sri Lanka as it was not possible for him to live in Colombo with any safety. All the young Tamil men the employer had taken on at his business had been arrested. The uncle spoke to an agent who was able to arrange a passport for the appellant and his passage to New Zealand. On 23 March 1998 the appellant left Colombo for Singapore. He did not have any difficulty leaving Colombo as he was escorted through the airport procedures by the agent. On the instructions of the agent, the passport was destroyed by the appellant on the flight to New Zealand.

[16] Shortly before the appeal hearing the appellant established telephone contact with his sister in the Czech Republic. From her he has learnt that following his (the appellant's) departure for Colombo, his sister was questioned by the LTTE who wanted to know the appellant's whereabouts and why he had left the north without their permission. She was held for two months, beaten and made to cook for the LTTE. Following her release she had left Sri Lanka.

THETHE DECISION TO DECLINE AT FIRST INSTANCE

[17] The refugee status officer who interviewed the appellant found him to be a credible witness and his account was accepted in its entirety. The decision then addressed separately his fear of persecution at the hands of the LTTE and at the hands of the security forces.

[18] As to the LTTE, the officer concluded that there was nothing to suggest that the LTTE viewed the appellant with suspicion on account of his cousin brother, that there was less than a real chance that the LTTE was aware that he had left their area without their approval and therefore there was less than a real chance that they would kill him. It should be observed that if the appellant's evidence concerning what he has now been told by his sister is true, these findings can no longer be supported.

[19] As to the security forces, the officer took the view that the only ground upon which they might take an interest in the appellant was if they discovered that he had worked, albeit unwillingly, for the LTTE. As there was less than a real chance that they would discover this information, there was no real chance that the appellant would be seen either as an LTTE terrorist or collaborator.

[20] As to the general human rights abuses committed by the security forces, the officer took the view that the appellant could avoid such abuses by staying away from the army's forward defence line. The officer did not, however, address the risk faced by the appellant behind army lines, and in particular the risk he faced in Colombo. Given that the officer had accepted that the appellant had been arrested and tortured in Colombo, the omission is a serious one.

[21] While the officer accepted that the security forces did commit human rights abuses, he interpreted the country information as showing that the abuses did not

constitute persecution because such violence was sporadic and unplanned. The officer relied on the unreported decision of a single Judge of the Federal Court of Australia in *Periannan Murugasu v Minister for Immigration and Ethnic Affairs* (28 July 1987, Wilcox J) in which the following statement appears:

> "The word 'persecuted' suggests a course of systematic conduct aimed at an individual or at a group of people. It is not enough that there be fear of being involved in incidental violence as a result of civil or communal disturbances".

[22] The officer then referred to *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 311A; [1998] 2 WLR 702, 713B; [1998] 2 All ER 453, 463e (HL) where Lord Lloyd (with whom Lord Goff, Lord Nolan and Lord Hope agreed) stated:

> "... where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show that Mr Pannick calls a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare."

[23] Relying on these authorities the refugee status officer concluded that the appellant had not shown a fear of persecution for a Convention reason over and above the ordinary risks of civil war. The conclusion was that the appellant's fear was of civil war, not of persecution.

[24] The officer's decision goes on to record that as in his opinion there was no real chance that the appellant would be persecuted upon return to Sri Lanka, the fear of persecution was not well-founded. The last sentence of this paragraph records, somewhat strangely, that it was therefore unnecessary to examine whether the fear of persecution was for a Convention reason.

[25] We say "strangely" because it is necessarily implicit in the officer's earlier finding that he had found that the risks faced by the appellant were not at all for reason of being a Tamil.

SIGNIFICANCESIGNIFICANCE OF FIRST INSTANCE DECISION

[26] The Authority was told by Ms Robins, who is not without experience in this area, that since at least late 1996, virtually all young Tamil males from Sri Lanka have been granted refugee status at first instance. In April 1999 that pattern was reversed. In a number of decisions issued at the end of that month, virtually all applications were declined, essentially for the reason that the applicants had a fear of civil war, not of persecution. Produced to the Authority were two further examples of such decisions. Mr Menezes did not dispute the account given by Ms Robins. He advised the Authority that the Refugee Status Branch does indeed apply the unreported decision of Wilcox J in *Periannan Murugasu* (1987) as well as a decision of the Australian Refugee Review Tribunal, namely *N 97/16416* (12 August 1998) which cites not only *Periannan Murugasu* but also the decision of Hill J in *Mohamed v Minister of Immigration and Multicultural Affairs* (1998) 51 ALD 666. The Refugee Status Branch also relies on the decision of the House of Lords in *Adan*. Mr Menezes said that the Refugee Status Branch sought the guidance of the Authority on cases arising from civil war and civil war-like situations.

[27] The Authority is now called upon to decide whether the decisions relied on by the Refugee Status Branch were correctly decided and should be followed and applied in New Zealand. In this regard, it is not without significance that the Full Court of the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 162 ALR 105 (O'Connor, Tamberlin and Mansfield JJ) expressly declined to follow *Adan* on the civil war point and the decisions of Wilcox J and Hill J must now be considered to have been overruled unless, of course, the issue comes before the High Court of Australia and a different view of the law is taken there. The issue was expressly left open by Hayne J sitting as a single Judge of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte SE* (1998) 158 ALR 735, 742.

[28] All of the case law and related legal material cited in this decision has been disclosed both to the appellant and to the Refugee Status Branch and an opportunity has been afforded to them to make submissions.

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[29] In view of the approach taken by the Refugee Status Branch not only to this case but also to the others drawn to our attention, and in view of the request for guidance, the Authority must now determine, for the purpose of New Zealand domestic law, the legal principles to be applied to refugee claims arising from civil war situations. If the discussion which follows travels beyond the specific confines of the present case, the explanation lies in the need to provide a hopefully coherent exposition of the basic principles.

[30] It is common to find that in civil wars and other situations of generalized violence that human rights abuses are committed not only by the combatants on the different sides (the state and the opposing group(s)), but also by other groups and individuals who may have no connection with either the state or any of the warring factions. Very often the reasons for the commission of the human rights abuses will be mixed. As far as the victims, or potential victims of the abuses are concerned, the identity of the agent of persecution and the reasons for the persecution matter little.

[31] The response of the international community to the plight of such persons has not, however, been a uniform one. The Organization of African Unity Refugee Convention, otherwise known as the *Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969*[1] specifically includes within its Article 1 definition of the term "refugee" not only persons who have a well-founded fear of persecution

[1] The text of the *Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969* is conveniently reproduced in the UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* Vol II (Geneva, 1995) p 3 and in Plender (ed), *Basic Documents on International Migration Law* 2nd rev ed, (The Hague, Martinus Nijhoff, 1997) p 187.

for reasons of race, religion, nationality, membership of a particular social group or political opinion, but also persons who are compelled to leave their place of habitual residence in order to seek refuge:

> "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the while of his country of origin or nationality...."

[32] The later *Cartagena Declaration on Refugees, 1984* adopted by Central America, Mexico and Panama built on the OAU Convention. Conclusion 3 includes among refugees person who:

> "have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[2]

As noted by Professor James C Hathaway in *The Law of Refugee Status* (Butterworths, 1991) at 20, this definition was approved by the 1985 General Assembly of the Organization of American States, which resolved "to urge Member States to extend support and, insofar as possible, to implement the conclusions and recommendations of the Cartagena Declaration on Refugees".

[33] The similarities between these two expanded definitions are discussed by Eduardo Arboleda in "The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention - A Comparative Perspective" (1995) IJRL *Special Issue* 87.

[34] But the 1951 Refugee Convention and the 1967 Protocol remain the principal international instruments benefiting refugees in Europe, Canada, the United States of America, Australia and New Zealand. The Convention is more narrow in its application, applying only to a person who:

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2 The text of the *Cartagena Declaration on Refugees, 1984* is conveniently reproduced in the UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* Vol II (Geneva, 1995) p 206 and in Plender (ed), *Basic Documents on International Migration Law* 2nd rev ed, (The Hague, Martinus Nijhoff, 1997) p 192.

> "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 ..."

[35] In the result, while civil wars and situations of generalized violence are expressly included in the OAU Convention and in the Cartagena Declaration, their inclusion in the 1951 Convention rests on the interpretation of the language of the Convention as informed by the Vienna Convention on the Law of Treaties, 1969.

The State Complicity Issue

[36] In some European countries, notably Germany and France, a narrow interpretation has found favour. In relation to the state complicity issue, both countries subscribe to what has been called the "accountability" theory in contrast to the "protection" theory adopted by the majority of the other state parties to the Convention, including many of the European countries, together with the United States, Canada, Australia and New Zealand. The "accountability" theory has very recently been described by Laws LJ delivering the decision of the English Court of Appeal in *R v Secretary of State for the Home Department; Ex parte Adan* (unreported, 23 July 1999) at para 43 as follows:

> "Put shortly, the "accountability" theory limits the classes of case in which a claimant might obtain refugee status under the Geneva Convention to situations where the persecution alleged can be attributed to the State. German law requires an asylum-seeker to show that he fears persecution (on a Convention ground) by the State, or by a quasi-State authority. If he relies on persecution by non-State agents, it must be shown to be tolerated or encouraged by the State, or at least that the State is unwilling to offer protection against it. The German courts hold that the Convention has no application in cases where there is no effective State authority, as in a situation of civil war."

[37] Laws LJ goes on to observe at para 45 that the distinct approach in France is to deny refugee status where there is a functioning state authority in the country of feared persecution, but it is unwilling (cf unable) to afford protection.

[38] The accountability theory has not escaped criticism. Indeed in the judgment of

the English Court of Appeal delivered by Laws LJ in *R v Secretary of State for the Home Department; Ex parte Adan* (unreported, 23 July 1999), the "accountability" theory is wrong in law. See paras 71 and 72:

> "[**71**] From all these considerations it follows that the issue we must decide is whether or not, as a matter of law, the scope of Art. 1A(2) extends to persons who fear persecution by non-State agents in circumstances where the State is not complicit in the persecution, whether because it is unwilling or unable (including instances where no effective State authority exists) to afford protection. We entertain no doubt but that such persons, whose case is established on the facts, are entitled to the Convention's protection. This seems to us to follow naturally from the words of Art. 1A(2): '... is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'; and this involves no technical or over-legalistic reading of the provision. This interpretation is supported by the approach taken in paragraph 65 of the UNHCR Handbook. We have described the Handbook's genesis, to which we attach some importance. While the Handbook is not by any means itself a source of law, many signatory States have accepted the guidance which on their behalf the UNHCR was asked to provide, and in those circumstances it constitutes, in our judgment, good evidence of what has come to be international practice within Art. 31(3)(b) of the Vienna Convention.
>
> [**72**] This view of Art. 1A(2) is sought to be contradicted by the proposition that the historical *matrix* of the Geneva Convention shows that the evil it was designed to confront was that of persecution by the State. Certainly it is plain that in the years immediately following the Second World War - the Convention was made in 1951 - State persecution was perceived as a terrible vice which fell to be countered by the civilized international community: witness not only the Geneva Convention, but also the European Convention on Human Rights and Fundamental Freedoms, the Universal Declaration of Human Rights, and the very institution of the United Nations. But this argument as to the scope of Art. 1A(2) is in our judgment deprived of all its force by the 1967 Protocol to the Convention, whose preambles we have set out. It is clear that the signatory States intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded. Looked at in this light, the Geneva Convention is apt unequivocally to offer protect (sic) against non-State agent persecution, where for whatever cause the State is unwilling or unable to offer protection itself."

[39] We mention only a handful of other challenges to the accountability approach. First there is the UNHCR critique in *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (1995) 27-30. Second, Dr Joachim Henkel, a Judge at the German Federal Administrative Court, Berlin, has challenged the accountability theory from, as it were, within. See his paper delivered at the First International Judicial Conference on Asylum Law held at the Inner Temple, London in December 1995 entitled "Who is a Refugee: Refugees from Civil War and Other International Armed Conflicts" reproduced in *Asylum Law* (1995) at 17. At the second conference of the International Association of Refugee Law Judges

held at Nijmegen in January 1997, an equally direct challenge was made by Frédéric Tiberghien, Maître des requetes, Conseil d'Etat, Paris, France in his paper "Persecution by Non Public Agents" which is reproduced in *Refugee and Asylum Law: Assessing the Scope for Judicial Protection* (Nederlands Centrum Buitenlanders, 1997) 105. Useful reference might also be made to Walter Kälin, "Refugees and Civil Wars: Only a Matter Of Interpretation? (1991) 3 IJRL 435 and the *ELENA Research Paper on Non-State Agents Persecution* (London, November 1998) which is reproduced on the UNHCR CD-Rom *Refworld* 7th ed (January 1999).

[40] In terms of Commonwealth jurisprudence, the English courts accept that included in the refugee definition are not only those subject to state persecution, but also those who are subject to persecution by factions within the state. If, for whatever reason, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete: *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305H; [1998] 2 WLR 702, 708D; [1998] 2 All ER 453, 458j (HL) (per Lord Lloyd of Berwick).

[41] The law in Australia is the same. See *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 430 (HCA) per McHugh J and more recently *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (HCA) where Brennan CJ at 233 said the definition spoke of "a fear of persecution that is official, or ***officially tolerated*** or ***uncontrollable*** by the authorities of the country of the refugee's nationality" (emphasis added). In the same case McHugh J at 258 said:

> "Persecution by private individuals or groups does not by itself fall within the definition of refugee ***unless the State either encourages or is or appears to be powerless to prevent that private persecution***". [emphasis added]

[42] For a recent application of these principles in the context of Tamil refugee claimants, see *Paramananthan v Minister for Immigration and Multicultural Affairs*

(1998) 160 ALR 24, 33 per Wilcox J (FC:FC) (Wilcox, Lindgren and Merkel JJ). This decision was followed and applied in *Nagaratnam v Minister for Immigration and Multicultural Affairs* (1999) 164 ALR 119 (FC:FC) (Lee, Moore and Katz JJ). It should be observed that in the former case the Refugee Review Tribunal had declined refugee status for reasons very similar to those offered by the refugee status officer in the present case. The country information referred to by all three Judges convincingly challenges the notion that young displaced Tamil males who had previously resided in the Jaffna peninsular can presently relocate in Colombo. Yet this decision was not referred to in the refugee status officer's decline decision in the present case.

[43] In the United States of American, asylum law explicitly recognizes that a state is obligated to take reasonable measures to ensure the enjoyment and protection of fundamental rights, including, under certain circumstances, protection against their violation by non-state or "private" actors. It is well established, therefore, that in addition to governmental agents, persecutors may include non-state entities or persons that the government is unable or unwilling to control. See the analysis by Deborah E Anker in *Law of Asylum in the United States* 3rd ed (Refugee Law Centre, 1999) at 184-199. Reference can also be made to Mark R von Sternberg, "The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status" (1997) 9 IJRL 169.

[44] The point which was emphatically made in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 709 (SC:Can) is that under the Refugee Convention there is no requirement that persecution emanate from the state and it does not matter whether a claim to refugee status is based on the "unable" or "unwilling" branch of the definition. While finding little in the *travaux préparatoires* of assistance, La Forest J, delivering the decision of the Supreme Court of Canada, found support in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 65, academic writing, decisions of the Federal Court of Canada and jurisprudence from the United States of America, and in particular, *McMullen v Immigration and*

Naturalization Service 658 F. 2d 1312 (1981). As to the state complicity issue, the Supreme Court of Canada concluded at 716-717 that:

> "The international community was meant to be a forum of second resort for the persecuted, a 'surrogate', approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution. The former is, of course, comprised in the latter, but the drafters of the Convention had the latter, wider purpose in mind. The state's inability to protect the individual from persecution founded on one of the enumerated grounds constitutes failure of local protection.
>
> I, therefore, conclude that persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but it is simply unable to protect its citizens."

[45] As to the unable and unwilling issue, the Supreme Court at 719 rejected the suggestion that "unable" requires no state complicity, but that "unwilling" does. The Court found that the dichotomy is not supported by the text of the Convention or by the relevant authorities. The conclusion of the Court at 719 was that ineffective state protection is encompassed within the concept of "unable" and "unwilling" and at 720 that:

> "Whether the claimant is 'unwilling' or 'unable' to avail him-or-herself of the protection of a country of nationality, state complicity in the persecution is irrelevant. The distinction between these two branches of the 'Convention refugee' definition resides in the party's precluding resort to state protection: in the case of 'inability', protection is denied to the claimant, whereas when the claimant is 'unwilling', he or she opts not to approach the state by reason of his or her fear on an enumerated basis. In either case, the state's involvement in the persecution is not a necessary consideration. This factor is relevant, rather, in the determination of whether a fear of persecution exists."

[46] The holding in *Ward* that state complicity in persecution is not a pre-requisite to a valid refugee claim has been expressly adopted and applied by this Authority in *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) at 17-18. As that decision records, this Authority has from its first hearings in June 1991 (see *Refugee Appeal No. 11/91 Re S* (5 September 1991)) accepted that there are four situations in which it can be said that there is a failure of state protection:

(a) Persecution committed by the state concerned.

(b) Persecution condoned by the state concerned.

(c) Persecution tolerated by the state concerned.

(d) Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.

[47] The principle that state complicity in persecution is not a pre-requisite to a valid refugee claim flows from the language of Article 1A(2) itself and has been confirmed by the overwhelming trend of international case law. With the principal exceptions of France, Germany, Austria and Switzerland, it can be said that the international consensus is that the Refugee Convention applies where the state is unable to protect its inhabitants from persecution at the hands of an agent of persecution, be it a state agent or a non-state agent. Thus, at a distance of eight years, the Authority confirms its unbroken line of authority since *Refugee Appeal No. 11/91 Re S* (5 September 1991).

[48] It follows that the fact that the appellant's case is based (in part) on fear of persecution at the hands of non-state agents does not affect the basic inquiry mandated by the Refugee Convention. In both state and non-state agent cases the inquiry is the same, that is, does the claimant have a well-founded fear of persecution for a Convention reason and is he or she unable, or owing to such fear, unwilling to avail him or herself of the protection of the country of his or her nationality.

Establishing the Nexus in a Civil War SituationEstablishing the Nexus in a Civil War Situation

[49] The Refugee Convention requires that the fear of persecution be ***for reason of*** one of the five permitted Convention grounds. That is, there must be a link or nexus between the anticipated harm and the claimant's race, religion, nationality, membership of a particular social group or political opinion. Unless this link can be established, the claim to refugee status must fail. See generally Professor James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 135-141.

[50] Addressing the nexus issue in the specific context of civil war and conflict, Professor Hathaway at *op cit* 185 sees two points emerging from the drafting history of the Refugee Convention:

> "First, victims of war and conflict are not refugees ***unless*** they are subject to differential victimization based on civil or political status. Second, it follows that it is incumbent on decision-makers to examine the claims of persons in flight from violence in order to ascertain whether their particular circumstances disclose any evidence of a link between the harm feared and their civil or political status." [emphasis in original]

[51] It follows, says Professor Hathaway at *op cit* 187 that the mere fact that the conflict escaped is based on religion or politics is not relevant unless persons of a particular religion or political perspective are differentially at risk. Two specific situations of differential risk are then referred to by Professor Hathaway in this passage. First, where the civil war or violence is directed at a particular social subgroup or second, where there exists a risk of serious harm specific to persons defined by a particular form of civil war political status. With this analysis we agree. The practical difficulty, however, is that the very nature of civil war situations will often preclude access to the facts required for judgments of this kind to be made. More often the decision-maker will, of necessity, be forced to make a broad and general assessment. In this process there is a danger of too readily arriving at a pronouncement that no-one is "differentially at risk."

[52] This brings us to the question of what is meant by "differentially at risk" and how

one determines whether a specific refugee claimant is at differential risk for a Convention reason. Suppose that a civil war is between two opposed religions, with every citizen of the state at real risk of persecution because he or she belongs to one religion or the other. On one view, as every citizen faces exactly the same risk of persecution, there is no "differential" risk. But if one were to ask why any specific refugee claimant from that country was at risk of persecution, the answer would have to be that it was "for reason of" his or her religion. We believe that this answer would satisfy this element of the Convention definition. One must not confuse equality of ***risk*** of harm with the equality of ***reason*** for that harm. The well-foundedness element (ie, the risk issue) is a separate inquiry to that of the "for reason of" element (ie, the nexus issue). So while it is convenient to speak in the short-hand of a differential risk in order to emphasize the specific focus of the "for reason of" element, the very phrasing of the short-hand expression can, unfortunately, lead to a conflation of the risk element with the "for reason of" or nexus requirement. If this happens, a person at real risk of serious harm for reason of his or her religion will be required to establish that he or she is ***more*** at risk of serious harm for reason of his or her religion than others who are equally at real risk of serious harm for reason of their religion. This is a requirement to establish a double-differential risk. Such approach, we believe, amounts to a misdirection in law.

[53] The difficulties inherent in both the fact finding exercise and in determining the "for reason of" element are possibly illustrated by the very recent *Adan* case.

TheThe Decision in Adan

[54] In *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107; [1997] 2 All ER 723 (CA) the English Court of Appeal determined two issues:

(a) A present fear of persecution is not required by the refugee definition. A fear of persecution when the claimant leaves his or her country of origin (historic fear) is enough;

(b) A state of civil war, whose incidents are widespread clan and sub-clan based killing and torture can give rise to a well-founded fear of persecution, notwithstanding that the individual claimant is at no greater risk of adverse treatment than others who are at risk in the civil war for reasons of their clan and sub-clan membership.

[55] In *Refugee Appeal No. 70366/96 Re C* (22 September 1997); [1997] 4 HKC 236 this Authority held in relation to (a) that the English Court of Appeal was wrong in law and should not be followed in New Zealand on this point. The Authority was not, on the facts of the appeal, called on to determine the correctness of the holding in (b).

[56] Subsequent to the delivery of the Authority's decision, the House of Lords heard the appeal in *Adan* in January 1998. In a judgment delivered on 2 April 1998, the House of Lords in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293; [1998] 2 WLR 702; [1998] 2 All ER 453 (HL) held, in relation to (a) that the Court of Appeal decision was indeed wrong and that the Convention requires a current well-founded fear of persecution. A historic fear was not sufficient. The Authority's decision in *Refugee Appeal No. 70366/96 Re C* was cited with apparent approval. As to (b), the House of Lords held that killing and torture incidental to a clan and sub-clan based civil war did not give rise to a well-founded fear of being persecuted within the meaning of the Refugee Convention where the asylum-seeker was at no greater risk of

such ill-treatment by reason of his clan or sub-clan membership than others at risk in the war.

[57] The Authority must now determine whether the House of Lords ruling in relation to (b) should be followed and applied in New Zealand.

[58] Lord Slynn of Hadley at 302C; 704H; 455f accepted, both on the authorities and on principle, that there can be persecution of a group and that the individual in the group does not have to show that he has a fear of persecution distinct from, or over and above, that of his group. He went on to explain:

> "Thus if in a state two groups exist, A and B, and members of group A threaten to or do persecute members of group B the latter should, other necessary matters being established, be able to claim refugee status. If at the same time members of group B are persecuting or threatening to persecute members of group A the claim should be the same. The position is even stronger if the persecution is not exactly simultaneous but those in power change from time to time so that the persecutors become the persecuted."

[59] Lord Lloyd of Berwick, with whom Lord Goff, Lord Nolan and Lord Hope agreed, equally accepted these principles and at 310B; 712B; 462e said:

> "It is now accepted that generalised oppression may indeed give rise to refugee status, as Professor Hathaway makes clear. It is not necessary for a claimant to show that he is more at risk than anyone else in his group, if the group as a whole is subject to oppression. This is clearly right. But it does not touch on the more difficult questions which arise when a country is in a state of civil war."

[60] As can be seen from the last sentence of this passage, their Lordships did not accept that these principles applied in a civil war situation.

[61] Lord Slynn based his conclusion on "the language of the Convention and its object and purpose", though he offered no analysis of the language, object or purpose. He simply stated that the Convention did not apply to those caught up in a civil war when law and order have broken down and where every group seems to be fighting some other group or groups in an endeavour to gain power. He stated at 302E; 705C;

455j:

> "In such a situation what the members of each group may have is a well-founded fear not so much of persecution by other groups as of death or injury or loss of freedom due to the fighting between the groups."

[62] His holding was that in such a situation the individual or group has to show a well-founded fear of persecution ***over and above*** the risk to life and liberty inherent in civil war.

[63] The approach taken by Lord Lloyd at 311B; 713B; 463e was very much the same:

> "I conclude from these authorities, and from my understanding of what the framers of the Convention had in mind, that where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show what Mr Pannick calls a differential impact. In other words he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare."

The Decision in Adan Assessed

[64] If their Lordships' ruling is that unless a refugee claimant can demonstrate a real risk of persecution for a Convention reason the grant of refugee status cannot be justified, we would respectfully agree.

[65] The difficulty, however, arises in the application of the principle to the facts. At one end of the spectrum one could suppose a civil war which, while based on religion or politics, results in the persecution of civilians irrespective of their religion or politics; the persecution is indiscriminate and not affected by the religion or politics of the individual victim. In such a situation, a refugee claimant would not satisfy the "for reason of" requirement by showing, without more, that he or she came from a situation of civil war. Refugee status would only be appropriate if it could be established that he or she came within one or other of the two exceptions identified by Professor Hathaway, namely that there was in the claimant's case a differential risk based on

civil or political status, or a risk of serious harm specific to persons (including the claimant) defined by a particular form of civil or political status. At the other end of the spectrum, however, is the situation postulated in para 52 above in which a civil war based on religion results in every citizen being at real risk of persecution for reason of his or her religious beliefs with the result that there is no "differential" risk as such. A refugee claimant from such situation would not, in our view, be required to establish a differential risk as the "for reason of" element is already satisfied on the facts.

[66] In our opinion, the civil war in Somalia falls towards the latter end of the spectrum. That is, with the greatest of respect to the view taken in the United Kingdom, it is one which is pre-eminently based on race, as understood in the broad and non-technical sense explained in *King-Ansell v Police* [1979] 2 NZLR 531, 533 line 50 per Richmond P; 536 line 30 per Woodhouse J and 542 line 40 per Richardson J (CA); *Mandla v Dowell Lee* [1983] 2 AC 548, 563-564 (HL) and *Refugee Appeal No. 1222/93 Re KN* (5 August 1994) 23. This does not mean that all Somalis are refugees. But the context of the conflict might go some considerable distance towards explaining why, in any particular case, the refugee claimant is at risk of persecution for a Convention reason.

[67] If a refugee claimant from such a civil war is at risk of persecution because of his or her race, it is not possible to ignore that fact simply because it is a civil war situation and to require the individual to show a super-added risk, that is, in the words of Lord Lloyd, to show a fear of persecution for Convention reasons ***over and above*** (emphasis added) the "ordinary risks of clan warfare". Yet on our interpretation, this is precisely what the decision in *Adan* requires, a fact underlined by the explicit recognition in the passage taken from the judgment given by Lord Lloyd that the civil war in Somalia is "clan warfare". The implicit holding is that to be at risk of serious harm in a civil war because of one's race is not enough to meet the Convention definition.

[68] If the *Adan* decision is to be so understood, the Authority declines to follow it. For the reasons given earlier, the risk of persecution and the reasons for that persecution are separate elements. And as to the latter, there can be no requirement that a person who, along with others, is at risk of persecution for a Convention reason must also show that he or she is ***more*** at risk for that Convention reason than those others. The essential point is that once a refugee claimant shows that he or she faces a real risk of persecution "for reason of" one of the five Convention reasons, nothing more can be required.

[69] The danger inherent in any other approach is that it will have the effect of re-introducing the notion, at least in civil war situations, that a refugee claimant at risk for one of the five Convention reasons must also establish that he or she will be singled out. This is an old heresy, but an apparently enduring one: James Crawford & Patricia Hyndman, "Three Heresies in the Application of the Refugee Convention" (1989) 1 IJRL 155, 159-167; Professor James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 90-97 and 185-188; Professor Guy S Goodwin-Gill, *The Refugee in International Law* (2nd ed, Oxford, 1996) 76-77; Deborah E Anker, *Law of Asylum in United States* 3rd ed (Refugee Law Centre, 1999) 67-74. This Authority has long identified the "singled out" requirement as a misdirection in law. See *Refugee Appeal No. 4/91 Re SDJ* (11 July 1991).

[70] Lying behind the majority decision delivered by Lord Lloyd was the overt concern (308E; 710H-711A; 461d) that otherwise, participants on both sides of the civil war would be entitled to protection under the Convention, but not those "lucklessly endangered on the sidelines". In our view the intended effect of the Refugee Convention was to exclude from protection both those among the participants and those among the lucklessly endangered who cannot show a well-founded fear of persecution for a Convention reason. Put another way, it would be quite insufficient

for a participant to assert, without more, that because he or she comes from one or other of the sides to the conflict that therefore he or she is a Convention refugee. Much more must be shown and the factual context will be all important, as illustrated by the example given at paragraph 52 above where on the extreme facts given in the hypothetical, because ***every*** citizen is in danger of persecution for a Convention reason, refugee status would be appropriate.

[71] In the result, while the Authority accepts the principle that those at risk of serious harm in a civil war are not by reason of that fact alone entitled to the protection of the Convention, where individuals are at risk of serious harm because of their civil or political status, recognition of refugee status is appropriate. The decision in each case will turn on the evidence as to whether there is a Convention reason for the anticipated harm. See *Refugee Appeal No. 2/92 Re NS* (23 July 1992) 6-7 and Professor James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) at 185-188. Once the evidence establishes the required nexus, refugee status cannot be denied simply because of the civil war context and it is not necessary that the Convention ground should be the ***sole*** reason for the fear. See *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 133 ALR 437, 443 (French J) approved in *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 162 ALR 105, 112 (FC:FC) (O'Connor, Tamberlin and Mansfield JJ).

[72] In *Adan*, the House of Lords upheld the decision of the Immigration Appeal Tribunal to decline refugee status on the following facts found by the Tribunal (311H; 713H; 464c):

> "Likewise, we find that there is no evidence that [Mr Adan] would suffer persecution on account of his membership of the Habrawal sub-clan of the Isaaq clan, from members of the armed groups of other clans or sub-clans, and we find that, while we accept that inter-clan fighting continues, that fighting and the disturbances are indiscriminate and that individuals from all sections of society are at risk of being caught up therein, and that the situation is no worse for members of the Isaaq clan and the Habrawal sub-clan than for the general population and the members of any other clan or sub-clan."

[73] This Authority's assessment of the human rights situation in Somalia is very different, as can be seen from the recent decision of the Authority in *Refugee Appeal No. 71314/99* (10 June 1999). The Authority's perception of the present country conditions accords more with the findings made by the Committee Against Torture in *Elmi v Australia* (Communication No. 120/1998, 14 May 1999) and with the reports of the independent expert on the situation of human rights in Somalia, appointed by the Commission on Human Rights, the most recent of which is *Situation of Human Rights in Somalia: Report of the Special Rapporteur, Ms Mona Rishmawi, Submitted in Accordance with the Commission on Human Rights Resolution 1998/59* E/CN.4/1999/103 (18 February 1999). It may be that the explanation for such differences as there are between the New Zealand and the United Kingdom approaches is to be found in this divergent assessment of the facts.

[74] It is of relevance that *Adan* has not been followed by the Full Court of the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 162 ALR 105 (FC:FC) (O'Connor, Tamberlin and Mansfield JJ), though for differently expressed reasons. In that case the refugee claimant was also a national of Somalia. Addressing the nexus issue in a civil war context, the Full Court stressed at para 21 that the inquiry is a broad and purposive one:

> "In order to appreciate what is covered by such civil or clan warfare, it is essential for a decision-maker to look beyond the existence of a state of war and to determine whether the war is directed to objectives such as securing power, property and access to resources, or whether in reality it is directed against persons or groups because of race, religion or group membership. Unless attention is focused on the reasons for the war, it is difficult, if not impossible, to determine whether the antagonism is based on Convention grounds. It is not enough to dismiss an application simply on the basis that there is a war without looking at the motivations or purposes involved. Civil wars vary greatly in character and objectives. Of course, it is not necessary that the Convention ground should be the ***sole*** reason for the fear: see *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 61 FCR 293 at 299; 133 ALR 437 at 443. This is because the adoption of a sole purpose test would render the Convention protection largely ineffectual."

[75] After analysing the speeches given by Lord Slynn and Lord Lloyd in *Adan*, the Court held at paras 37, 38, 39, 40 and 42:

"[**37**] In approaching the question of persecution in the context of a civil war, it is important to keep firmly in mind the wording of the Convention definition. The definition makes no reference to any different approach being adopted where the persecution exists in the context of civil war. There is no exclusion. The relevant question raised by the language of the definition requires a determination, on the evidence, of whether the harm or detriment is for a Convention reason. In the present case there appears to be a risk of serious harm in Somalia even to bystanders and those on the sidelines who are incidentally caught up in what might be called the 'cross-fire'. This, however, is not sufficient. The evidence must go further and disclose a Convention connection between the persecution of the applicant or the clan to which he belongs and the risk of harm. This in turn calls for a consideration, so far as can be determined on the evidence, as to the purpose and nature of the war, the way it is conducted, and the objectives sought to be achieved by the war.

[**38**] In relation to *Adan*, we do not accept that a clan or race-based war cannot, without some further and differential degree of risk, amount to persecution in the sense that an individual is selected out for persecution treatment because he is a member of a particular clan. If evidence establishes, for example, that the objective of a war is to harm the opposing party for one or more Convention reasons, then "persecution" will be made out. It is somewhat odd to suggest that claimants are precluded from refugee status solely on the ground, for example, that a conflict based on race or religion which gives rise to the fear can be described as a "war". The task of the decision-maker in these circumstances must be to investigate the reasons underlying the war and the way it is conducted in order to ascertain whether it is based on a Convention ground or has an objective which is covered by the Convention, namely, race, religion or other stated reasons. This responsibility cannot be curtailed by a conclusion that there is a state of war.

[**39**] It is difficult, with respect, to see the basis on which a super-added requirement of 'greater risk', 'differential risk' or 'risk over and above that arising from clan warfare' can be derived as a criterion for application of the Convention definition where the war is based on race or religion rather than, for example, a quest for property, power or resources. For example, once it is established that a person is at risk of being killed or tortured in a war by reason of clan membership, in circumstances where that is one of the objectives of the war, one might properly ask what further degree of danger or exposure needs to be established before the required nexus with a Convention reason is made out? Given the purpose of the Convention and the well-settled principle that a broad, liberal and purpose of interpretation must be given to the language, it is difficult to see the reason why a 'second tier' of 'differential' or super-added persecution should be imposed on an applicant for refugee status.

[**40**] If their Lordships in *Adan* intended that the reference to clan warfare meant warfare engaged in between clans or sub-clans for reasons such as the acquisition of dominance or power, the control of territory, or to obtain access to resources, then the broader statements of their Lordships would, in our view, be in accordance with accepted principles. Indeed, Lord Slynn (at 705) speaks of a type of civil war which is a struggle to gain power. He does not refer to a civil war which is necessarily concerned with racial or religious considerations. However, in contrast to the approach of Lord Slynn it is evident that Lord Lloyd, and the other three members of the House who concurred in his judgment, intended to impose the additional and undefined requirement of some form of fear of harm 'over and above' that 'ordinarily incidental' to a civil war, even where the civil war is fought on racial or religious grounds. In our view, there is no basis for the imposition of this additional requirement of differential treatment either in the language or objectives of the Convention.

[**41**] ...

[**42**] In our view the statements made in *Adan* travel beyond the requirements of the Convention by imposing additional or differential requirements where the civil war in question

> is based on racial or clan grounds and not grounds such as a struggle for power or dominance, the acquisition of territory, the appropriation of property or the acquisition of access to strategic resources or facilities. In the latter examples, examples where the civil war is not directed to racial persecution, it is necessary of course, to establish the existence of selective harassment on a Convention ground, whereas in the former example such a ground is already present because the civil war is properly characterized as race based."

[76] With these statements we respectfully agree.

Civil War - Conclusions

[77] The inquiry mandated by Article 1A(2) of the Refugee Convention in civil war situations is no different from that required in other situations. What must be borne in mind, however, is that the factual inquiry may be more complex and there is a need to ensure that what the refugee claimant faces is not generalized violence, but a specific risk of harm "for reason of" one of the Convention reasons. These two points are made by Professor Hathaway in *The Law of Refugee Status* (1991) at 188:

> "This decision underscores the critical importance of inquiring into all of the circumstances of a claimant coming from an area which suffers from generalized violence in order to discern whether or not the risk faced by a particular individual or group is in fact rooted in civil or political status, in which case refugee status may follow.
>
> Thus, while the general proposition is that the victims of war and violence are not by virtue of that fact alone refugees, it is nonetheless possible for persons coming from a strife-torn state to establish a claim to refugee status. This is so where the violence is not simply generalized, but is rather directed toward a group defined by civil or political status; or, if the war or conflict is non-specific in impact, where the claimant's fear can be traced to specific forms of disfranchisement within the society of origin."

PERSECUTION DOES NOT REQUIRE 'SYSTEMATIC CONDUCT'

[78] It is a misdirection to require, (as the refugee status officer did in the present case), that an applicant for refugee status demonstrate "systematic conduct" aimed at the refugee claimant. As pointed out by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 430 (HCA), it is not a necessary element of "persecution" that the individual should be the victim of a series of acts. A single act of oppression may suffice. However, as a matter of evidence, systematic conduct, if present, will go towards showing the fear to be well-founded. But there is no requirement in law that, for an application for refugee status to succeed, the claimant must show a series of co-ordinated acts directed at him or her which can be said to be not isolated but systematic. See *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11, 19-20 (FC:FC) (Burchett, Tamberlin and Emmett JJ); *Mohamed v Minister of Immigration and Multicultural Affairs* (1998) 51 ALD 666, 671-673 (Hill J) and *Anjum v Minister for Immigration and Ethnic Affairs* (1998) 52 ALD 225, 230-232 (Sackville J).

THE ISSUES

[79] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."

In terms of *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996) the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being

persecuted if returned to the country of nationality?

2. If the answer is Yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[80] The Authority accepts, without reservation, the account given by the appellant and it follows that his case falls to be determined on the facts previously set out under the heading "The Appellant's Case".

Whether a Real Chance of Persecution

[81] We turn to the first issue, namely whether on the facts as found, there is a real chance of the appellant being persecuted if returned to Sri Lanka.

[82] As to the LTTE, he was detained by them in the period September 1997 to February 1998. During this time he was tortured, put to work (sometimes while under fire) and subjected to harsh living conditions. Past persecution alone, however, is not enough to satisfy the forward-looking assessment mandated by the Refugee Convention: *Refugee Appeal No. 70366/96 Re C* (22 September 1997); [1997] 4 HKC 236. As to whether there is a real chance of the appellant facing persecution in the future, it must be remembered that the appellant was only released by the LTTE when he became too ill to work. On his release he was warned not to go anywhere. Following his escape from the north his sister was questioned by the LTTE who wanted to know his whereabouts and why he had left the north without their permission. The sister, in turn, was held for two months, beaten and made to cook for the LTTE. On these facts the only rational conclusion is that should the appellant return to the north, there is a real chance that he will suffer serious harm at the hands

of the LTTE. His fear of persecution at their hands is accordingly well-founded.

[83] We turn now to the appellant's fear of persecution at the hands of the Sri Lankan security forces. It is significant that as soon as the appellant entered the Government controlled area at Vavuniya he was detained and questioned. While he was able to bribe his way out of this difficulty, he was arrested immediately upon his arrival in Colombo. His arrest was due to the fact that he is male, a Tamil, from the north and without identity papers. He was detained at a Colombo police station for three days and tortured there for reason only of the fact that the characteristics we have just listed identify him as someone who, in the eyes of the authorities, is a member of the LTTE. Again, while past persecution is not required of a refugee claimant, where evidence of past persecution exists, it is unquestionably an excellent indication of the fate that may await the individual upon return to the country of origin: *Refugee Appeal No. 70366/96 Re C* (22 September 1997) 32. The risk of harm must be assessed against the known conditions in the country of origin.

[84] The country information to which we have been referred establishes that the Sri Lankan security forces carry out mass arrests of Tamils, particularly in Colombo. The main targets of these mass arrests are young Tamil men and women. The numbers involved in these Colombo arrests are considerable. For example, in late March and early April 1998 1,500 Tamils from around Kotahena and 300 from Welawatte and Bambalapitiya were taken in for questioning. It is estimated that 5,000 Tamils were arrested in early April from residential areas, hotels and lodges. Other sources estimate that the total for March and early April was 10,000 Tamils questioned from the Colombo suburbs of Maradana, Kotahena, Pettah, Modera, Fort, Welawatte, as well as Mount Lavinia and Dehiwela. Most were released in 72 hours, but an unknown number were detained further: Research Directorate, Immigration and Refugee Board, Ottawa, Canada, *Sri Lanka: Internal Flight Alternatives: An Update* (October 1998). As of April 1998, according to the Attorney General, there were 1,000 cases pending before the Colombo courts, "almost all against Tamils" under the Emergency Regulations and Prevention of Terrorism Act and over 600 detainees in

Colombo and Kalutara prisons. It is not clear how long these detainees had been held: *Sri Lanka: Internal Flight Alternatives: An Update* (October 1998). The Department of State, *Country Reports on Human Rights Practices for 1998: Sri Lanka* Vol II (April 1999) 1963, 1970 reports that security forces continue to conduct mass detentions and arrests of young Tamils, both male and female and major sweeps and arrests occur in Colombo. Further reference can be made to the UNHCR *Background Paper on Sri Lanka for the European Union High Level Working Group on Asylum and Migration* (18 March 1999).

[85] We are satisfied on the voluminous information we have sighted (not all of which we have cited), that should the appellant return to Colombo, or indeed to any other part of Sri Lanka, he will remain at real risk of further detention and torture by reason of the same factors we have mentioned, namely he is male, a Tamil, from the north and without identity papers. His fear of persecution at the hands of the state authorities is well-founded. It follows that the first issue must be answered in the affirmative.

Convention Reason

[86] The civil war and related violence in Sri Lanka is undoubtedly based on issues of both race and politics. Because the evidence is one way, we do not intend to rehearse it. It is sufficient to note that we have found the following sources of the greatest assistance: Professor Virginia A Leary, *Ethnic Conflict and Violence in Sri Lanka* (Report of a Mission to Sri Lanka in July-August 1981 on behalf of the International Commission of Jurists, August 1983); Paul Sieghart, *Sri Lanka: A Mounting Tragedy of Errors* (Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists, March 1984); Patricia Hyndman, *Democracy in Peril - Sri Lanka: A Country in Crisis* (LawAsia, June 1985); Walter Schwarz, *The Tamils of Sri Lanka* (Minority Rights Group Report No 25, 1988).

[87] Turning to the second issue against this background, there can be no doubt, on the facts we have found, that there are at least two Convention reasons for the anticipated persecution of the appellant at the hands of the authorities, namely his Tamil race and his (imputed) political opinion, being his perceived support of or allegiance to the LTTE. The Convention reason in relation to the persecution feared at the hands of the LTTE is an (imputed) political opinion of supporting the government. The second issue must accordingly be answered in the affirmative.

Internal Protection Alternative

[88] No extended discussion is required of the issue whether the appellant can genuinely access domestic protection which is meaningful. The country information to which we have referred quite clearly establishes that a person of his profile (male, of the Tamil race, from the north and without identity papers) will be at risk of serious harm at the hands of the security forces wherever he might go in Sri Lanka. There is no site of internal protection where he will not face a risk of persecution at their hands for a Convention reason. Our finding is consistent with the country information discussed in greater detail in *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24 (FC:FC) (Wilcox, Lindgren and Merkel JJ).

CONCLUSION

[89] Applying the law to the facts as found, the appellant is a person who holds a well-founded fear of persecution for a Convention reason. Refugee status is granted. The appeal is allowed.

.....

[Chairperson]