REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76157

AT AUCKLAND

Before:	A R Mackey (Chairman) C M Treadwell (Member)
Counsel for the Appellant:	D Ryken & C Khan
Appearing for the Department of Labour:	No Appearance
Date of Hearing:	21, 22 January & 10 April 2008
Date of Decision:	26 June 2008

DECISION

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[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Sri Lanka.

INTRODUCTION

[2] The appellant is a national of Sri Lanka, born in Jaffna in 1969. He is of Tamil ethnicity. Because of the complexity of this case, that arises from the need to assess evidence and events relating to the appellant, both in Sri Lanka and in Canada over a period of time from approximately 1990 to the present date, this decision commences with a chronology against which all the evidence can be set.

[3] Briefly, the appellant's family suffered attacks from the Sri Lankan army (SLA) in the late 1980s and his father died as a result of head injuries sustained in such an attack. To avoid being forcibly conscripted into the LTTE, the appellant moved to Colombo and there suffered maltreatment at the hands of the authorities. He then travelled to Canada to avoid risks of serious harm. He applied and obtained refugee status in Canada in 1991. While pursuing his education in Canada, he became involved with some Tamil gangs in Toronto and

this led him into some criminal activities for which he was convicted in 1996-1998.

[4] In 2000, as part of a programme by Canadian Immigration (CI) to deport key members of Tamil gangs, the appellant was detained and made the subject of a deportation order. His detention was reviewed on many occasions by the Immigration Appeal Division (IAD) of the Canadian Immigration and Refugee Board (IRB). Several judicial reviews to the Federal Court of Canada were also undertaken and ultimately, in 2006, the appellant was deported from Canada to Sri Lanka. Soon after his return, the Sri Lankan authorities made enquiries about the appellant with family members. He left the country and went to India because of concerns about his safety, returning about a month later, after discussion with his family which showed no further visits or interest by the Sri Lankan authorities. However, he soon found that the authorities were still seeking his whereabouts. He then contacted an uncle who arranged for him to come to New Zealand, using his own passport and a false passport. He claimed refugee status in September 2006 and interviews took place between October 2006 and April 2007. This was followed by a detailed RSB investigation of the many Canadian cases in which he was involved and exclusion issues related to this case.

[5] On 30 October 2007, the RSB declined his application by finding that he should be excluded under Article 1F(b) of the Refugee Convention. Investigation of his possible inclusion under the Convention was thus not undertaken.

[6] While the Authority realises that it is not essential to reach conclusions on inclusion, prior to moving to consideration of exclusion (*Refugee Appeal No 74796* (19 April 2006)), we have done so in this case to ensure that the totality of the appellant's case is assessed, including his being found to be a refugee in Canada in 1991. As many of the inclusion and exclusion issues in the evidence overlap, after setting out a summary of the overall evidence presented as the appellant's case and making our own credibility assessment, we have firstly reached our conclusions on inclusion. As we find that the appellant falls within the inclusion clause (Article 1A(2) of the Refugee Convention), we have then gone on to assess the complex exclusion issues that arise in this case.

CHRONOLOGY

[7] 1969 - The appellant was born in Jaffna, Sri Lanka. He is the third child with two elder sisters.

[8] 1974 - 1990 - Schooling in Jaffna.

[9] 1987 - After a shelling attack by the Sri Lankan army (SLA), part of the family home was destroyed and the appellant's father died from head injuries.

[10] 1989 - One of the appellant's sisters was sponsored for residence by her husband to Canada and moved there.

[11] 1990 - The appellant moved to Colombo to avoid being forcibly conscripted into the LTTE.

[12] 1991 - The appellant obtained a genuine Sri Lankan passport. He was arrested due to his Tamil ethnicity, taken to the notorious "4th Floor" of police headquarters in Colombo, where he was physically maltreated and eventually released after payment of a bribe. Two weeks later, he travelled to Canada, where he applied for refugee status and obtained it later that year. The following year he became a permanent resident of Canada.

[13] 1993 - 1994 - The appellant completed a diploma course and began studying for [a] degree at a university in Ottawa. He also successfully sponsored his mother for residence in Canada. About that time, he began associating with Sri Lankan Tamils who were at the same college, known as the AA [gang] and then later with a gang known as the BB. The appellant sought and cultivated friendships with many of the leaders of the BB and participated in sports and cultural events with gang members. The BB were involved in many violent acts and confrontations with a rival gang, CC, although the appellant claimed he did not participate in acts of violence or criminal activity with the BB.

[14] 1995 - The appellant became involved in an altercation with CC members and was charged with a criminal offence. His application for citizenship was unsuccessful because of the outstanding charges.

[15] 1996 - The appellant pleaded guilty and was convicted of the above 1995 offence of "possession of a weapon for a purpose dangerous to the public peace" (a machete). He was given a suspended sentence and probation for one year, together with a fine of CAD$500. He was prohibited from possessing firearms, ammunition and explosive substances for five years. Later that year he was also charged and convicted with failure to comply with bail conditions.

[16] 1997 - The appellant renewed his Sri Lankan passport so that he could

travel to the USA for work, which he did approximately 10 times. The Toronto police, in response to public concern relating to violence and criminal activity on the part of Tamil and other street gangs, set up a special task force - “Project Paper Tiger”. The police got judicial approval to intercept telephone conversations (“wire tap”) of suspected gang members, including the appellant and 14 others. From this surveillance, the appellant was arrested on conspiracy to commit assault when it was alleged he took steps to procure a gun for one of the AA for use against the CC. Later in 1997, the AA and BB members attacked a shop frequented by the CC gang and fired several shots from different firearms. A member of the public was killed and two others wounded. The appellant claimed he was not involved.

[17] 1998 - The appellant was charged and pleaded guilty to “conspiracy to commit assault” following the wire tap incident. He was sentenced to five months and 22 days in prison and 18 months on probation. The judge, in an oral decision, noted that the appellant was “not a gang member but knowingly associated in the gang”. In that year, CI completed a report alleging that the appellant was removable from Canada because of his criminal conviction for conspiracy to assault. A later report was prepared which alleged that he was a member of an organisation (the BB) involved in criminal activities. After release from prison, he resumed his studies and began working in Ottawa and made serious commitments to his future wife, who was based in Toronto.

[18] 1999 - The appellant was awarded a BSc degree.

[19] 2000 - The appellant moved to a new job in Montreal. Also that year, Z, one of the BB leaders, ran over one of the CC leaders in his car, seriously injuring him. Z was charged, convicted and imprisoned. Z’s brother was killed in a drunk-driving incident. The driver, Y, also a BB member, was charged, convicted and imprisoned. At the funeral of Z’s brother, the appellant also discovered that another gang leader, X, did not have family support. The appellant, who had consciously decided not to associate with the BB, however visited X, Z and Y while they were in prison.

[20] 2000 - The appellant was charged with driving a motor vehicle with an open bottle of liquor and fined. The appellant made arrangements for his wedding and accidentally, after meeting some BB members, effectively invited them to the wedding. Some BB members attended the wedding. The appellant realised that this was a mistake as it gave the impression he was associated with them again.

[21] 2001 - Along with 50 others, he was arrested on a deportation warrant obtained by CI as a result of the so-called “Project 1050”. His arrest was based on the grounds that he was a danger to the public of Canada because he allegedly was one of the leaders of the BB and because of his 1998 conviction for conspiracy to commit assault. His first detention review before the Immigration Appeal Division (IAD) of the IRB took place before [an IAD member] soon after his initial detention.

[22] 2002 - The appellant was made subject of a deportation order based on the allegations in the first CI report that he was a danger to the public (based on his 1998 conviction). Another detention review took place before [the same IAD member]. After a seven-day hearing, the appellant’s continued detention was ordered on the basis that he was a danger to the public of Canada and a flight risk. Two police officers gave evidence, stating that they believed the appellant was a leader of the BB. The IAD member noted a number of “KGB” statements (statements from co-conspirators) that were found to be persuasive towards the appellant‘s involvement in the BB. Later that year, after being contacted by the appellant’s lawyer, three of the so-called “KGB” witnesses recanted their statements, claiming that they had felt intimidated by the police, had been charged with crimes themselves and wanted to deflect attention from themselves onto the appellant. In May, August and September 2002, there were further detention reviews before other members of the IAD. These reviews, despite some deficiencies in the KGB statements, concluded there was substantiation of the appellant being a member and the leader of the BB. In October 2002, CI set out a claim that the appellant was a danger to the public. The reasons for this were his 1996 conviction for possession of a weapon, his implication in a number of criminal occurrences, including provision and disposal of firearms, and his specific identification as a member and leader of the BB. CI noted that gang activities included car theft, credit card fraud, official document fraud, assault with weapons, possession of weapons and the use of unregistered firearms, coercion, aggravated assault, attempted murder and murder. In [the IAD member’s] second detention review decision, she found that despite lies and prevarication, there was a common binding thread that placed the appellant clearly in the role of leader, or interim leader, of the BB.

[23] In late 2002, in another detention review, [a second IAD member] found the appellant not to be a danger to the public on the basis of the evidence from the police witnesses, as that material was “notoriously and demonstrably unreliable”.

The evidence was conceded as insufficiently credible and trustworthy and the [second IAD] member found it fell below the required balance of probabilities standard. That decision was then challenged by CI before the Federal Court.

[24] In late 2002, CI issued a document entitled "Ministerial Opinion Report" (MOR). This gave further assertions that the appellant had been identified through police wire taps and other evidence from gang members as a leader of the BB and involved in other criminal activities.

[25] 2002-2003 - The appellant received information from Tamil friends who had returned to Sri Lanka that, during their return, they had been questioned by the LTTE due to the fact that they were travelling on foreign passports. His friends were shown photographs, including one of the appellant. This indicated to him that the LTTE had a file on him. His friends were told they were looking for him.

[26] 2003 - In March, a further IAD detention review took place before [the third IAD] member. This member found the appellant not to be a danger to the public of Canada on the evidence presented. This member agreed with [the second IAD] member who had made similar findings the previous year and expressed agreement with the lack of credibility of the KGB witness statements. For this reason, the statements of the constables could not be given any weight. [The third] member stated that the materials produced contained:

> "… statements by untrustworthy people contradicting one another's statements and contradicting their own statements. The police officers who were confident that [the appellant] is the leader of the BB, and was involved in a conspiracy to commit murder, were not able to provide satisfactory justification or reasons for holding their opinions, judgment and conclusions."

[27] 2003 - October - The [third IAD member] decision was then challenged by CI in the Federal Court (Justice [GG]). [GG] dismissed the judicial review application by CI and held it was CI who must establish, on the balance of probabilities, that the appellant was a danger to the public for his detention to continue. That decision was further challenged by CI to the Federal Court of Appeal.

[28] 2004 - In early 2004, the Federal Court of Appeal dismissed the application of CI as it did not demonstrate flaws in the finding by GG relating to the appellant's BB gang membership and that it had not been established that the appellant was a danger to the public. The appellant was then released from detention. He began working for a telecommunications company in Toronto.

[29] 2005 - In February, a further judicial review decision by [Justice LL] quashed the MOR that had determined the appellant was a danger to the public of Canada. The matter was referred back to CI for re-determination.

[30] 2005 - In August 2005, the appellant's daughter was born.

[31] 2006 - Following the re-determination by the Minister directed above, a further hearing had taken place before [a fourth member]. This was published, after a nine-day hearing, on 6 January 2006. In the ultimate, it was actually a decision on an appeal against an original deportation order made in February 2002. This decision, after very lengthy analysis, found, on the balance of probabilities, that the appellant was one of the leaders of the BB gang and that his two main convictions (1996 and 1998) were gang related. The appellant contested that decision but, on 24 March 2006, a deportation order was issued. After a short review of that decision by [Justice MM], the appellant was deported from Canada to Sri Lanka on 27 March 2006. There was considerable coverage of the deportation in the Canadian media which included reports that he was a leader, or had been the leader, of the BB and that the BB had links to the LTTE.

[32] 2006 - 29 March - On arrival at the airport in Colombo, travelling on a Travel document issued by the Sri Lankan Embassy in Canada, the appellant was arrested. He was questioned for six to eight hours, particularly about whether he had raised funds for the LTTE or if he had aided the LTTE while in Canada. A representative of the Canadian government was present at the airport, but waited outside the room while the questioning took place. The appellant was not mistreated by the Sri Lankan authorities, which he attributed to the presence of the Canadian representative. It was claimed that the Canadian government had an arrangement with the Sri Lankan government to ensure that "Project 1050" returnees would not face problems on arrival in Sri Lanka. It was claimed that the agreement also stipulated that the appellant could not be arrested for anything that had happened while he was residing in Canada. However, the Canadian government would take no responsibility for what happened once the appellant or other deportees left the airport. The Sri Lankans were, however, given a copy of the summary of what had happened in Canada. The appellant was released without any reporting conditions. His return to Sri Lanka was covered in the Sri Lankan media extensively, including a report that he had been interrogated by the Criminal Investigation Division (CID) and that he was a supporter of the LTTE who had fund-raised for them in Canada and been involved with LTTE activities. The

appellant began living in Colombo in a small hotel under the identity of a friend.

[33] 2006 - In April, the [MM] decision was issued which refused to grant a stay of the deportation.

[34] 2006 - In late April, the appellant's uncle assisted him to obtain a genuine Sri Lankan passport, in his own name. This was done because the appellant was afraid of what would happen to him because of the newspaper and media publicity linking him to the LTTE. Within a few days, officers from the SLA visited the appellant's aunt's and uncle's home and searched for the appellant and went through his possessions. They asked his whereabouts. The aunt stated he was staying with a friend. She later told him, on a mobile telephone, not to visit her.

[35] 2006 - In May, the appellant travelled to India, on his new Sri Lankan passport because he was concerned about his safety. He had no problems in leaving the airport, as he presumed there were no warrants officially issued against him in Sri Lanka and that his deportation judicial review case was still active before the Federal Court in Canada.

[36] 2006 - In June, he returned to Sri Lanka on his own passport as he thought the situation in Sri Lanka may have improved due to peace talks and because the SLA had not returned to his aunt's home. He checked into a different hotel on return.

[37] 2006 - In August, four members of the SLA visited the aunt's home in search of him. He was not there. They searched the house and questioned the appellant's aunt and uncle about his whereabouts. When the aunt and uncle denied any knowledge of this, they were threatened with death. The appellant's uncle thereupon contacted an agent and paid a substantial sum to send the appellant "somewhere safe".

[38] 2006 - On 1 September, the appellant departed Sri Lanka for Singapore, on his own passport. He then moved to Malaysia and on to New Zealand, using a false (possibly Singaporean) passport.

[39] 2006 - On 24 September, he arrived in New Zealand and claimed refugee status on arrival. He was transferred to the Mangere Accommodation Centre. The initial claim he presented was, after he obtained legal advice, admitted as being untrue and a full written statement was then presented in October 2006, setting out the whole of his background, including his deportation from Canada

and all the cases that had proceeded in Canada.

[40] 2007 - The appellant's wife visited him in New Zealand for a period of three weeks in the early part of the year.

[41] 2007 - On 5 June, the Canadian Federal Court, [GG] issued the decision on the judicial review of the deportation decision of [the fourth IAD] member. His case was dismissed as no error of law was found in the IAD decision.

[42] 2007 - The RSB proceeded with its assessment of his claim and, in the meantime, obtained extensive material from Canada, including copies of the many decisions referred to above. During the assessment, the issue of exclusion pursuant to Article 1F(b) was raised with the appellant and his lawyers.

[43] 2007 - On 30 October, the decision to decline his application was made, solely on the basis of the exclusion provisions (Article 1F(b)) of the Convention. The issue of inclusion was not considered. On 8 November 2007, the appellant then appealed to this Authority.

BRIEF SUMMARY OF THE RSB DECISION

[44] The refugee status officer identified four issues to be addressed in the assessment of the exclusion of the appellant. These were:

(a) the evidential basis for establishing the appellant's BB leadership;

(b) the BB gang and its commission of serious, non-political crimes;

(c) the appellant's culpability "in virtue of his BB leadership" (sic); and

(d) specific allegations against the appellant.

[45] In reaching their conclusion, the RSB relied significantly on the 6 January 2006 removal decision of [the fourth IAD] member and the finding therein that the appellant was a leader of the BB gang and that gang was responsible for numerous crimes in Canada that met the Article 1F(b) definition of serious non-political crime. It was therefore concluded:

> "On a generic level, [the appellant]'s leadership position in the BB alone clearly establishes serious reasons for considering that he has aided and abetted the commission of such crimes. A specific finding can also be made in relation to one of the allegations of criminal conduct garnered from [the appellant]'s Canadian detention and removal decisions. That is that there are serious reasons for

> considering that [the appellant] has conspired, counselled or attempted to procure the murder of rival CC gang members, a serious non-political crime in terms of Article 1F(b) of the Convention."

THE ISSUES

[46] It is appropriate in this determination to set out all the issues for determination at this point because conclusions on several of the issues can only be reached by examination of all of the evidence given on all the issues before the Authority.

[47] For reasons that are perhaps self-evident from the chronology, the Authority has taken the perhaps more traditional approach of considering the issue of inclusion before moving on to the assessment of exclusion.

[48] The Inclusion Clause in Article 1A(2) of the Refugee Convention 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[49] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

[50] As noted, because of the appellant's accepted history in Canada, the issue of exclusion from the terms of the Convention arises in this case. Article 1F provides:

> **"Article 1F of the 1951 Convention:**
>
> 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."

[51] As there is no indication of Article 1F(a) or (c) being applicable, exclusion under Article 1F(b) only is considered, and whether the appellant should be excluded, and thus refused status, because he falls within Article 1F(b).

THE APPELLANT'S CASE

[52] The summary of the appellant's case which follows covers firstly evidence relating to Sri Lanka, his country of nationality, and the risks of being persecuted if he is returned to Sri Lanka. This evidence, therefore, largely relates to evidence in support of "inclusion". The summary of his evidence in relation to his time in Canada then follows. This, for self-evident reasons, relates largely to the exclusion issue, although he claims that the profile he obtained in Canada and the manner in which he was returned to Sri Lanka, with the attendant publicity, contributes significantly to his case that he should be included within the terms of Article 1A(2) of the Refugee Convention.

SRI LANKAN EVIDENCE

[53] As noted, the appellant is a Sri Lankan Tamil from Jaffna. His father was killed when the Sri Lankan army (SLA) made an attack on Jaffna in the late 1980s. The appellant, as a young man, considered he was about to be forcibly conscripted into the LTTE and so moved to Colombo. However, he was picked up by the Sri Lankan authorities in Colombo and suffered maltreatment at their hands. He therefore decided, particularly as he had a sister already living there, to move to Canada and seek refugee status. That application was successful and he obtained refugee status in Canada in 1991. He remained in Canada from 1991 until 27 March 2006 when he was deported back to Sri Lanka.

[54] The appellant arrived in Sri Lanka on 29 March 2006, accompanied by two immigration officers from Canada. On arrival at the airport in Colombo, they were met by a consular representative from the Canadian embassy, SS, who then took over from the two immigration officers, although they remained, in attendance. He then met two CID members of the Sri Lankan police and one Sri Lankan immigration officer. He was taken for an interview with the two CID officers and an immigration officer. The Canadian officers stayed outside the room. The Sri

Lankan officers had a big bundle of files in front of them which they said were related to the appellant and had been given to them by the Canadian officials. The appellant claimed that the files included details about his cases in Canada and newspaper articles about his deportation. The discussions with the CID and immigration officers largely took place in Sinhalese which he did not understand. The appellant had stated that an emergency passport from the Sri Lankan embassy in Canada had been obtained prior to his departure to assist his entry and that he had provided all personal details for that, although he did not have any form of identification from Sri Lanka available in Canada.

[55] After the immigration interview, he was taken into police custody. He was allowed a brief discussion with SS who explained that his questioning and detention would relate to matters that had happened to him in Canada and that if there was anything that had happened to him before he left Sri Lanka or any warrant outstanding for him, the Sri Lankan police could well detain him and the Canadians could not do anything to stop that. During questioning with high level Sri Lankan policemen, the Canadians again remained outside.

[56] The Sri Lankan police asked if all the allegations made about the appellant in the papers were correct and, in particular, his relationship with the LTTE and the contacts he had with them in Canada and Sri Lanka. The appellant told them that he had no contacts at all and that the speculation relating to his LTTE association was entirely untrue. He felt that they did not believe him but they believed all the things that were on the file and therefore they decided to send him for further questioning. All of his luggage was then checked, including the contents of his laptop computer.

[57] A further detailed interview then followed, where a Tamil interpreter was provided. Again, the Canadians were outside the room. He considered the interpreter was not fluent in Tamil but was a Muslim from Colombo. The interview was a wide-ranging one covering all his personal history, his time in Jaffna and Colombo, questions about any LTTE relatives, his departure to Canada and considerable detailed coverage of allegations of what he had done during his time in Canada, with particular emphasis on associations to the LTTE. He explained that his activities in Canada were not related to the LTTE but again they did not appear to believe him and referred to many newspaper articles from the Canadian files. The newspaper “allegations” made against him were that he was close to the LTTE leader and had collected money for their cause whilst in Canada, to the

extent of CAD$10m. The police claimed that he was a major contributor to the LTTE and a trained militant before he went to Canada. That allegation was actually printed in one of the Canadian papers, along with him being a member of the BB gang who had been trained, before he moved to Canada, by the LTTE, and had been involved in a military mission in 1990 in Jaffna. The appellant denied all of these allegations and stated that he had been a student in Jaffna, living in a Hindu village at that time. Again, he claimed that they did not believe him, even though he explained that his files relating to his school examinations and time in Jaffna had been lost.

[58] Further allegations were covered with him relating to the legal cases in Canada and the status of his wife and daughter in Canada. He was informed that he had to provide details of where he would live in Colombo. They would not let him go until he provided an address. He accordingly stated he would stay in an hotel. He then was asked to sign a statement in Sinhalese, to which he objected as he did not know what it was about. He was informed that if he did not sign, he would go to jail. Accordingly, he signed the document, the content of which he did not know. He was then left for approximately one hour when a CID officer came along and stated that someone was waiting for him outside and was ready to take him to their place of residence in Colombo. These people turned out to be his uncle and aunt.

[59] The checking went on for a further hour, during which it was stated that the authorities were preparing a National Investigation Bureau (NIB) report on him prior to letting him go. The appellant was then taken outside the airport with two CID officers and the Canadians. He was then left briefly with the Canadians who asked what had happened. He explained all the allegations to which he had been subjected and stated that he was scared for his life and asked how he could be protected in Colombo. The Consular official, SS, stated he could take no responsibility after the airport and that there was a mutual agreement between the Canadian and Sri Lankan officials that deportees would not be detained because of allegations made in Canada. The appellant obtained a business card from SS, who explained he could not help anymore and went away. The appellant then met up with his maternal aunt and uncle and other family members, and left the airport for Colombo. He checked into an hotel on the way, adopting the name of a friend and using his friend’s ID card.

[60] In the following days, radio, newspaper and internet articles about him, in three languages, were being broadcast in Colombo, including pictures of the appellant who was stated to be a high-ranking LTTE member. They also stated that information from the CID said that the appellant had been detained in the past in the notorious "4th Floor" of the investigation department in Colombo. The appellant was terrified by what was happening, as were his aunt and uncle and his family in Canada. Accordingly, he did not go out of the hotel, as he felt there was no security in Colombo. He rang the Canadian embassy to explain where he was living. However, the Canadians were not helpful, again stating that they could not assist him and that their help was limited. He finally wrote a letter to the Canadian embassy, addressed to SS, giving all the details of the allegations and fears for his life and that he was too frightened to step out of the hotel.

[61] He stayed in the hotel for approximately one month using money that he had obtained from his wife and her mother in Canada which had been sent to his aunt. His aunt, uncle and friends visited him at the hotel, where they tried to decide what to do next. As he had no identification or ID documents and could receive no assistance from the Canadian embassy, they decided the first thing to do was to obtain some form of ID.

[62] His uncle went to work on this and took him through the application process with the assistance of a paid helper.

[63] Apart from all the media interest which continued, nothing else happened to him or his aunt and uncle during the few weeks he was at the hotel. The Sri Lankan authorities knew the address of his relatives.

[64] In the latter part of April 2006, through the services of his uncle and the helper, and the payment of bribes to various government officials, both in Colombo and in the appellant's home village in Jaffna, they were able to obtain a birth certificate and identification card and then ultimately a Sri Lankan passport. The appellant provided a detailed explanation of the various bribes and levels of officials that he and his helpers had to deal with to accomplish all of these steps.

[65] The appellant explained that he obtained the passport on about 20 April 2006 and then took steps to obtain air tickets to leave Sri Lanka to go to India. On 2 May 2006, he obtained the tickets and departed for Chennai. He was able to pass through the airport at Colombo, including the required computer checks, without problems and also had no problems on his arrival in Chennai.

[66] His fears of maltreatment or detention by the Sri Lankan authorities were heightened on 22 April 2006 when a group of Sri Lankan army intelligence officers arrived at his aunt's home and asked for the appellant. His relatives explained he was not living there. Every room of the house was searched in an attempt to find any trace of the appellant or his belongings. His relatives explained that they did not know where the appellant was staying or what his contact address was, even though he had visited them. The intelligence officers radioed in their report whilst at the relatives' home and then decided to leave after informing his relatives that they were not to tell anyone of the visit.

[67] The aunt and uncle immediately made contact with the appellant, stating that they were terrified. He decided he must leave Sri Lanka. He went to India as this was the country he could most readily get a tourist visa for a short visit. He thought he would not have to disclose any criminal convictions, although even if he had been required to do so, he would have lied to save his life at that time.

[68] While in India, he attended a Hindu festival which was a type of pilgrimage at a temple near Bangalore. He was able to obtain cheap accommodation there and stayed for some 15 - 16 days. He then returned to [the city] to wait and see what to do next and to talk to his family and find out what the situation was in Sri Lanka. The news that he received in June from Sri Lanka by way of Indian television, newspapers and internet reports was that the violence had calmed down and the situation appeared to be getting better and that there were possibilities of peace talks between the LTTE and the Sri Lankan authorities. He therefore decided to see if a family reunion could be achieved in Sri Lanka, on the basis that the situation was improving and possibly he could be safe there. In addition, he only had a three-month visa for India. After a discussion with the family and a trusted friend, he flew back to Colombo. He had no problem travelling on his own valid passport and went straight through. He considered that this was because he had returned within the period of the validity of his visa and, accordingly, no alert on the computer systems came up.

[69] When it was put to him that this might have suggested that the Sri Lankan authorities did not consider him a person of high profile or risk because of possible LTTE associations or other activities in which he had been involved in Canada, he stated that he believed the Sri Lankans still had contacts with the Canadians and that, at that time, the case before the Federal Court of Canada, which could have possibly quashed his deportation order, was still pending. Thus, the Sri Lankans

feared any Canadian reaction to any detention or maltreatment of him at that time. He considered that for these reasons, there was no alert on the computer system, even though he may have been suspected of being a high level LTTE supporter.

[70] After his return from India and discussions with his relatives and friends, they decided he should stay in a small hotel. He was able to remain there for a period of two months. However, about one month later, the same SLA intelligence officers again visited his aunt's home. Again, they asked for the appellant, searched the property and did not believe his relatives who stated they did not know the appellant's whereabouts. They were then threatened that they would be killed if they did not tell the truth. Again, they were told not to report the incident to anyone. The uncle and aunt immediately informed the appellant.

[71] After the second visit to his relatives' home in late August, the appellant decided he must leave Sri Lanka for his own safety and immediately instructed a people smuggler to assist him. Using a combination of his own passport and a false passport, and travelling via Singapore, Malaysia and Thailand, the appellant was able to make his way to New Zealand, arriving on 24 September 2006.

[72] The appellant reported that he was unaware of any further visits to his relatives' home, even after he left Sri Lanka. He did not consider this strange as he believed the airport authorities now knew that he had left the country. He considered that the Sri Lankan authorities were monitoring his situation, particularly in the worsening relationships between the Sri Lankan authorities and the LTTE. Thus, if he arrived back at this time, as there was no continuing Canadian litigation before the courts, and therefore no Canadian involvement with this case, he would be stopped at the airport and taken, detained and tortured so that additional information could be extracted from him before he was handed to "unauthorised" people who would kill him.

[73] His relatives have advised his wife that they are happy the appellant is not in Colombo any more as they were worried about their lives after the second visit of the authorities to their home.

THE CANADIAN EVIDENCE

[74] For clarification, the appellant explained that a judicial review of the negative IAD appeal on his deportation (the decision of [the fourth member]) had been lodged with the Federal Court of Canada by his Canadian lawyer in 2006.

This was the case that was still outstanding when he was deported to Sri Lanka. The decision in this case was finally published by [GG] on 5 June 2007. This decision dismissed the appellant's judicial review.

[75] The appellant explained that the only other matter outstanding in Canada was an application for a pardon to the Parole Board of Canada which again had been presented by [his Canadian lawyer] on his behalf before he left Canada. This application is still waiting a decision and delays had come about through the need to provide additional documentation. He explained that the Parole Board would decide how serious his convictions were and whether he should be given a clearance on all of his convictions. If such a pardon were given, he would be in a position to apply to rejoin his wife, his daughter and mother, who are all Canadian citizens. Mr Ryken explained that he was continuing to follow up for information on this application to the Parole Board. Nothing further was heard as at the date of the preparation of this decision, though Mr Ryken clearly had been in constant correspondence with [the Canadian lawyer] who provided a statement in support of the appellant's appeal to this Authority.

[76] In 1991, when the appellant left for Canada in view of predicted fears of maltreatment from the LTTE and the Sri Lankan authorities, he initially went to the United States and then crossed the border into Canada, claiming refugee status on arrival. He obtained status in Canada in late 1991 and was given "landed immigrant status" in 1992. After three years, when he considered he was eligible for Canadian citizenship, he made an application but, because of the then outstanding criminal charges against him, set out above, his application was never granted.

[77] The appellant's younger sister went to Canada in 1989 as the spouse of a Sri Lankan who had permanent residence and is now a citizen. His mother was sponsored by the appellant himself in 1994 and now has citizenship. His eldest sister went to Canada in 1995 with her husband and two children and was granted refugee status in 1995.

[78] In the application made in 1991, he claimed that he feared forcible recruitment by the LTTE and maltreatment from the Sri Lankan police who had detained him in Colombo in the notorious "4th Floor" for a period of two weeks on suspicion of his LTTE association. His brother-in-law in Colombo had paid a bribe for him to be released from the "4th Floor" and then arranged an agent to send the appellant to the USA and Canada.

[79] Once settled in Canada, the appellant completed his schooling in Toronto, by way of adult education in technical courses. He was then admitted, in 1994, to [a university] in Ottawa, where he later went on to complete his degree.

[80] While at high school as an adult student, he came in contact with younger members of the local Tamil community, including members of the AA. These boys were aged 15 or 16 and he associated with them by playing cards and going to soccer matches. He also began to associate, from approximately 1993 onwards, with some members of the BB gang, in particular, one of its leaders, X, who was an unofficial team member of a soccer team. He explained that there was an ongoing "turf war" between the west side Toronto BB (whose younger supporters included the AA) and the CC, who came predominantly from the east side of Toronto. The "turf war" related to the protection of drugs and prostitution activities. He claimed that he was not involved in these activities but did like to join in, showing off at clubs, with girls, fast cars and other related gang activities. He thought it was "cool" and good for his image and gave him a secure environment in which he thought he could gain respect. His brother-in-law and other family members did advise him not to be involved, but he did not listen to them and did become involved in some fights and incidents.

[81] In September 1994, he went to [a university in Ottawa], which was some four to five hours' drive from his Toronto home where his mother lived. He travelled back and forth on the weekends to see his fiancée. During those short return visits, he did meet with his friends in the AA and the BB. His university studies in electrical engineering involved a four and a half year course, including a period of time involved in work experience. During his time in Ottawa, he stayed in a hostel or a flat with other Tamil boys but was not involved in any violence or gang activities.

[82] Whilst in Toronto on one occasion in May 1995, he became involved in the "machete" incident briefly described in the chronology above. His evidence to us in relation to this now highly relevant incident, was that on 7 May 1995, after receiving a telephone call from a friend, he drove to collect that friend from a restaurant in Toronto. When he arrived there and parked his car in a car park, he found that there was a fight going on between two groups of Sri Lankan youths who had been drinking at a nearby establishment and got into an argument. The appellant said he did not know who all the people were, apart from his friend. He got out of his car, in the boot of which he kept a machete for protection purposes.

A man then came at his friend and tried to push him around. This man was stated to have a steel pipe.

[83] The appellant then, to support his friend, opened the boot of his car and took out his machete. He also became anxious for his own safety. He then moved to assist his friend who was unarmed and hit a member of the opposing gang with the machete. The victim put up his hand which took the blow from the machete. The resulting cut in the man who was hit by the machete needed some 14 stitches. The appellant advised us that if the man had not put up his hand, the machete could have hit him on the arm/shoulder and, as the machete was in good condition, it could perhaps have caused serious damage to the arm. He informed us that the youths involved in the fight were carrying machetes, baseball bats and pipes.

[84] It soon became evident that someone called the police and so the appellant threw his machete into a nearby bush and drove away with his friend. The man with the cut hand disappeared.

[85] Two days later, the police came to his home, arrested him and took him to the police station. He was released on police bail. The initial charge made against him was assault causing bodily harm with a dangerous weapon. When the matter came before the courts some 18 months later, he pleaded guilty to a charge of "possession of a weapon for a purpose dangerous to the public peace". In his evidence to us, he explained that it appeared the police did not have evidence to sustain any assault charge and that some form of plea bargain was agreed between counsel and the judge. Unfortunately, there is no transcript available of the sentencing comments by the judge. He understood that had the higher (assault) charge proceeded, he may have received four to six months' imprisonment. However, as it was a first offence on a lower charge, he was not given a sentence involving detention. He was aware that other gang members who had been involved in the May 1995 fight were looked for by the police but nobody else, apart from him, was charged.

[86] The actual conviction, with which the appellant was ultimately found guilty and sentenced upon in approximately November 1996, was for possession of the weapon for a purpose dangerous to the public peace (a machete). He was sentenced to a suspended sentence of probation for one year, a fine of CAD$500 and prohibited from possessing firearms for a period of five years. The victim he cut with the machete later complained to the police in an endeavour to implicate

the appellant in the so-called "[…] shop" incident where a young Tamil bystander was shot dead. In the event, although the appellant was held for some three months in remand for that alleged offence, no evidence was found that implicated him and it appeared from the investigation by the Canadian police that he was not involved in the incident at all.

[87] In 1997, as part of the "Project Paper Tiger", the Toronto police obtained approval to intercept the appellant's telephone conversations and this led to his ultimately pleading guilty to a crime of "conspiracy to commit assault". The core evidence he gave us relating to this incident was obtained via a "wire tap" when the Canadian police, in an attempt to clean up the gang rivalries between the BB and CC, were given approval to have 15 wire taps put in place. The appellant's telephone was one of the 15. This incident, and the trials, attracted a considerable amount of newspaper attention, TV coverage and other media interest.

[88] Some AA, who knew of the appellant's association with some of the leaders of the BB, asked him to assist them by getting a gun as they had been involved in a fight with the rival CC gang, some four to five days earlier, where there had been a stabbing of an CC member. Accordingly, the CC gang were looking for members of the AA in order to exact revenge. The AA sought the protection of the BB gang in their dispute with the rival CC gangs.

[89] The appellant said that he felt sorry for the AA and thought he would try to help them. He also thought that it would give the AA the impression that he was a close associate of senior members of the BB. In addition, the BB leader whom he telephoned (X) would have been impressed by his willingness to get involved. He therefore called X and asked for a small .22 calibre hand gun. He did not personally intend to take possession of the gun (because of the five-year restriction against him) but would go with some of the AA and take responsibility for the gun when any incident took place. He suggested that the small calibre of the gun would mean that it would only kill at very close range and therefore there was a lesser risk of the AA, who were largely inexperienced, killing somebody.

[90] In addition, he and the AA were trying to promote a rumour that the AA had a gun with the hope that this rumour would scare off CC members.

[91] After telephoning X, the appellant met the AA and told them of his conversation. However, very shortly thereafter, the problems between the two gangs were solved by some higher level telephone calls between the gang leaders

and the heat was then taken out of the incident, so nothing further happened. The gun never came into the appellant's possession, nor that of any of the AA.

[92] This conspiracy was picked up by the wire tap evidence that the police were using and the appellant, about 10 CC members and 10 BB members, were arrested. The appellant was charged with two offences: conspiracy to commit aggravated assault and obstruction of justice. Leaders of the BB gang including the appellant's friends, X and two others, were also arrested. When the matter came for hearing, the appellant gave evidence and there was then a discussion in chambers that he should again be involved in a plea bargain and plead guilty to conspiracy to assault.

[93] As explained, he was convicted and sentenced to five months and 22 days' prison, plus probation for 18 months. He was released after four months in jail. Two of his friends, X and W, were sentenced to some four years' jail and had additional charges brought against them.

[94] After his release from prison in 1998, he went back to Ottawa and completed his studies in April 1999. He then worked full-time as a intern with a telecommunications company in Ottawa. This continued until 2000, although the appellant did travel back and forth to Toronto from time to time. There were no other incidents or problems over this period of time, apart from a traffic violation.

[95] In October 2001, the appellant was informed for the first time that CI were taking steps towards his removal. At this time he was living with his wife in Ottawa and working in Montreal. He stated his only association with the BB and others over the period 2000-2001 was when a number of them came to his wedding after he had inadvertently invited them and subsequently he visited three of them whilst they were in prison. He claimed that these visits were to give moral support, along with some minor financial support to one of them.

[96] The basis of the immigration warrant that was served on him in October 2001 was the claim that he had been participating in a criminal organisation as defined under the criminal law. The CI arrived at his home in Ottawa and served the warrant for deportation upon him and undertook a search of his home. After the search, he was handcuffed and taken away. His wife was also moved from the residence. Various documents were taken from him, but not his computer. The police were in attendance and stated they were going to charge him, but after

the search, all documents were handed over to CI only and no criminal charges were levied against him.

[97] CI then took him to Toronto where he joined some 30 other Tamil men who were in detention on immigration and related criminal matters. He was fingerprinted and placed in detention. He was held on the immigration charge that he was a "flight risk and a danger to society". Three days later, he appeared before an immigration adjudicator without the assistance of counsel. At the next hearing, he was represented and had to go back to the IAD every 30 days. [His Canadian lawyer] represented the appellant on about 15 occasions, when the continuation of his detention was reviewed. Altogether, he remained in detention for some three years in a remand prison. The proceedings against him related not only to his deportation, but a certification requirement that he was a danger to the Canadian public. This latter certification was required under Canadian law in order to deal with the deportation of Convention refugees and the associated *non-refoulement* issues.

[98] As noted above, some of the decisions by the IAD members concluded strongly that the appellant had been involved and was a leader of the BB gang involved in criminal activities whilst others, based on conflicting evidence from the investigating constable involved and the highly unreliable "KGB" evidence, concluded that there was no basis for the appellant to be detained. One of the IAD decisions which found for the appellant was ultimately upheld on judicial review by the Federal Court of Appeal. However, the [fourth IAD member's] decision, which went against the appellant and led to his deportation was, 15 months after his deportation, unsuccessfully judicially reviewed before [GG] in the Federal Court. The chronology above records a brief summary of the many proceedings which ultimately led to the decision to deport and the unsuccessful judicial review of that decision.

[99] Before us, the appellant agreed that he had, at various times before the Canadian authorities and in his initial interview on arrival in New Zealand, given false evidence and lied under oath. He claimed, however, that on each occasion this had been in order to save his life, or had come about through misunderstanding.

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[100] The appellant, by his own admission, has on several occasions in the past lied where he considered the situation required him to tell a false story. Whilst we have carefully noted that in our assessment of the evidence he gave to us, the reality of the situation, in respect of most of the relevant evidence both as to inclusion and exclusion, is supported by a considerable amount of corroborative evidence. In the Sri Lankan situation, the publicity that attached to him on his deportation from Canada is widely reported and available and indeed, even in-putting his name in a search engine such as "Google", brings up a significant number of hits, both from Sri Lankan and Canadian sources. He therefore has a considerable "profile" in Sri Lanka, which we accept as credible as to its existence, if not its truth. It is highly relevant to his risk on return.

[101] We are satisfied his evidence, relating to risks in Sri Lanka, because of its consistency with the objective country information from a wide range of reputable sources, is credible. The evidence he gave us in relation to the events that happened upon his return to Sri Lanka in March/April 2006, his trip to India and the visits by the Sri Lankan authorities to his aunt's home in search of him, we therefore accept.

[102] In respect of all of his activities in Canada, we do not have anywhere near the same degree of confidence in his credibility, particularly given the considerable and often opposing conclusions reached in relation to his gang membership and activities in Canada by the various IAD members who reviewed his deportation/detention cases. For the purposes of this determination, however, credibility findings, in the Canadian context, are predominantly required in the assessment of the exclusion issue.

[103] In this regard, we have the clear evidence of the cases and convictions before the Canadian courts and the Canadian IAD cases. These provide the details of those offences and the circumstances surrounding them. The appellant's evidence in regard to these offences was frankly and openly given to us and we have no reason to doubt his evidence in this regard. In many ways the evidence he gave could be considered more detrimental to his case than the terms of the actual convictions and sentences imposed by the Canadian courts.

[104] The predominant question in the deportation and certification cases before the Canadian IAD, and on judicial review, related to the issue of his membership and/or leadership of the BB gang. The appellant has not been convicted or charged with any offence in this regard, although ultimately, particularly in the decision of [the fourth IAD member], which was not found to be at fault under judicial review by the Canadian Federal Court, it was found that the appellant had been a significant leader in the BB.

[105] We have not gone into a detailed assessment on this issue of possible leadership of the BB as the evidence in this regard from the Canadian IAD assessments is highly conflicting, there are clearly significant faults in the evidence from [the police constable], the "KGB" statements and the general reliability of the Tamil community the appellant associated with in Canada. For the reasons set out below, we have therefore concentrated our findings on the exclusion issue predominantly on the actual convictions and sentencing in Canada and the issue of "membership of a criminal gang". We then consider comparative criminal offences and sentencing (in New Zealand particularly) in that regard. We consider that he was frank to us on all matters surrounding those offences. In our assessment, we have taken into account the elements of "plea bargaining" in Canada and the range of comparable offences and sentences in the New Zealand context.

INCLUSION

[106] In reaching our conclusions on whether the appellant falls within Article 1A(2) of the Refugee Convention, we have taken into account all of the submissions put forward by Mr Ryken, along with a considerable amount of objective country information and recent jurisprudence.

[107] Useful assistance was found in a country guidance determination of the Asylum and Immigration Tribunal (UK) published in August 2007: *LP* (LTTE Area - Tamils - Colombo - risk?) Sri Lanka CG [2007] UKAIT 00076, and a decision the Authority has relied on in the past in *Refugee Appeal No 76140* (30 November 2007). The UK case was heard and published prior to the complete breakdown of the ceasefire in Sri Lanka at the beginning of 2008, but reflects the, by then, sharply deteriorating situation. That decision found that Tamils were not *per se* at risk of serious harm from the Sri Lankan authorities in Colombo. However, it pointed to a number of factors that may increase the risk, which on some

occasions, on a case by case basis, could rise to the level of a well-founded fear of being persecuted. At paragraph 161 of the decision in *LP*, the Tribunal set out a list of some 12 risk factors that were relevant in the assessment of returning Tamils. They then went on to make an analysis of each of the 12 factors. From those factors, those with relevance to the appellant's case are:

(a) Tamil ethnicity

(b) previous record as a suspected or actual LTTE member or supporter;

(c) previous criminal record and/or outstanding arrest warrant;

(d) having signed a confession or similar document;

(e) returned from London, UK or other centre of LTTE activity or fund-raising (in this case, Toronto);

(f) lack of ID card or other documentation;

(g) having made an asylum application abroad.

[108] The AIT also concluded that, in every case, the various factors have to be assessed and given appropriate weight, both individually and cumulatively. In addition, if a person was actively wanted by the police and/or named on a watched or wanted list held at Colombo airport, there was additional risk of detention at the airport.

[109] We also noted recent decisions of this Authority in *Refugee Appeal No 76006* (16 July 2007), *Refugee Appeal No 76140* (30 November 2007) and *Refugee Appeal No 76040* (28 February 2008). These decisions note the deteriorating situation in Sri Lanka with the breakdown of the ceasefire, the formal notice of that in January 2008 and the growing risks to Tamils who have an accepted profile of association with the LTTE.

[110] The country of origin information was reviewed in extensive detail in the AIT decision in *LP* (Sri Lanka) as at mid-2007. However, with the assistance of considerable material from Mr Ryken, we have been able to update the objective country information by considering more recent reports. These were:

(a) United Nations - *Special Rapporteur on Torture concludes visit to Sri Lanka* (29 October 2007);

(b) Tamil Information Centre (London) - "Sri Lanka: Human Rights defenders need strong international support and protection" (25 December 2007);

(c) Amnesty International: *ASA37/021/2007* (Public) *Sri Lanka: Amnesty International condemns mass arrests* (4 December 2007); *ASA37/001/2008 Sri Lanka: Silencing dissent* (7 February 2008); and *Journalists in danger in Sri Lanka* (5 February 2008);

(d) Human Rights Watch: *Return to war - Human rights under siege* Vol 19, No 11(c) (August 2007); and *Recurring nightmare: State responsibility for disappearances and abductions in Sri Lanka* (March 2008) Vol 20 No 2(c);

(e) United States Department of State *Country Reports on Human Rights Practices 2007: Sri Lanka*, (11 March 2008); and

(f) United Kingdom Home Office Border and Immigration Agency *Country of Origin Information Report: Sri Lanka* (3 March 2008).

[111] The highly relevant UNHCR report *UNHCR position on the international protection needs of asylum seekers from Sri Lanka* (December 2006) and the Australian *Hotham Mission field trip to Sri Lanka* (October 2006), both of which are extensively reviewed in *LP* (Sri Lanka) were also noted by us.

[112] Mr Ryken's submissions on the inclusion issue also refer to a number of recent online reports from newspapers and news agencies.

[113] We have noted in full his written submissions on this issue and take particular account of:

(a) The United States Department of State *Country Reports on Human Rights Practices 2007: Sri Lanka*:

> "The government's respect for human rights continued to decline due in part to the escalation of the armed conflict. While ethnic Tamils composed approximately 16 percent of the overall population, the overwhelming majority of victims of human rights violations, such as killings and disappearances, were young male Tamils. Credible reports cited unlawful killings by government agents, assassinations by unknown perpetrators, politically motivated killings … disappearances, arbitrary arrests and detention, poor prison conditions, denial of fair public trial, government corruption and lack of transparency, … infringement of freedom of movement, and discrimination against minorities. There were numerous reports that the army, police, and progovernment paramilitary groups participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity."

(b) Human Rights Watch *Recurring Nightmare* 2008 (p3) which states:

> "Hundreds of enforced disappearances committed since 2006 have placed Sri Lanka among the countries with the highest number of new cases in

> the world. The victims are primarily young ethnic Tamil men who "disappear" - often after being picked up by government security forces in the country's embattled north and east, but also in the capital, Colombo. Some may be members or supporters of the LTTE, but this must not justify their detention in secret or without due process.
>
> In the face of this crisis, the government of Sri Lanka has demonstrated an utter lack of resolve to investigate and prosecute those responsible. Families interviewed by Human Rights Watch all talked about their failed efforts to get Sri Lankan authorities to act on the cases of their "disappeared or abducted relatives". … This report provides extensive case material and data about enforced disappearances and abductions since mid-2006. It details the Sri Lankan government's response, which to date has been grossly inadequate. The government shows every sign of repeating the failures of past administrations, making lots of noise - including launching a spate of new mechanisms to investigate "disappearances" - but conducting little actual fact finding and virtually no prosecution of perpetrators."

[114] The same report goes on to note that relatives frequently described those responsible as members of the Sri Lankan military, uniformed policemen, and the security forces.

[115] On 25 June 2008, we received some additional submissions, dated 22 June 2008, from Mr Ryken. These referred to the latest United Kingdom Home Office *Country Report: Sri Lanka* (11 June 2008). We were particularly referred to paragraphs 8.26 to 8.32 and 8.53 to 8.61. Mr Ryken submitted that these paragraphs, setting out additional evidence of recent risks and problems for ethnic Tamils in Sri Lanka, particularly those with perceived links to the LTTE, strengthens the well-foundedness of the appellant's claim.

[116] We now consider the well-foundedness issue set against all of the facts as found and the country information before us.

[117] This appellant, on return to Colombo, has a real chance of recognition by the Sri Lankan authorities as somebody with a recent but notorious profile, based largely on his activities and the cases against him in Canada. The published perception of him in many of those articles, both from Canada and in Sri Lanka, are that he is a very high profile LTTE supporter who assisted in the fund-raising efforts of the LTTE whilst he was in Canada. In addition to that, the Sri Lankan authorities have all of the Canadian material from the various cases in which the appellant was involved, both in the criminal courts and in the IAD. These clearly set out his involvement in the gang activities in Toronto and conclusions (in the [fourth IAD member's] decision) that he was one of the leaders of the BB gang. The connection between the BB and the LTTE in Canada, based upon the

newspaper reports and the appellant's evidence of the questioning he received when he returned, show that at least there is a firmly held perception by the Sri Lankan authorities of a strong connection between the BB and the LTTE. This is despite the appellant's denial of such a connection and our own findings that, on the evidence we were able to consider, that connection is a dubious one.

[118] Set against this, however, there is no evidence of any actual charges or outstanding warrants for arrest against the appellant for activities in which he may have been involved in Sri Lanka and his own evidence that he was able to pass in and out of the Colombo airport to go to India and then to Singapore, using his own valid passport. On these occasions he was not stopped or treated as a person of concern.

[119] The appellant submitted that the reasons why he was not detained when passing through the airport, or at least investigated, was because of the knowledge held by the Sri Lankan authorities about him that had been handed to them by the Canadian authorities. This indicated that there was still, *at that time*, outstanding cases before the Canadian courts which could have led to the overturn of his deportation by the Canadian authorities and then his possible return to Canada. He submits that, since the decision by [GG] in July 2007, this is not now the position and that accordingly he will be of significant interest to the Sri Lankan authorities should he return.

[120] Based on his profile and the facts as found, if he were now returned from New Zealand as a failed asylum-seeker, we find that there is a real chance that he would be detained at the airport. Then, noting there is not any form of agreement between New Zealand and Sri Lanka, in the nature of the agreement between the Canadians and Sri Lanka, of which we are aware, he would be at a real risk of detention, torture or maltreatment with impunity by the Sri Lankan authorities for reasons of his Tamil ethnicity and perceived associations with the LTTE in Canada and Sri Lanka.

[121] If, in the alternative, he were able to pass through the airport authorities in Colombo, he would then be at a real risk of being detained, either through detection at the home of his relatives, which would be the only place of possible support he would have available to him, or in an hotel or lodge where he would need to find accommodation. The country information indicates that Tamil men in such situations have a real likelihood of being reported to the authorities. In addition, round-ups of Tamils in Colombo take place in a random manner. We are

therefore satisfied that, on the totality of the evidence before us and the acceptance of his profile as set out above, the appellant does have a real chance of being persecuted on return to Sri Lanka for one or more of the Refugee Convention reasons. He therefore falls within the inclusion clause.

THE EXCLUSION ISSUE

[122] As noted above, however, findings on inclusion, in this appellant's case, are not the end of the matter. Assessment must be made of whether or not this appellant falls within Article 1F(b) of the Refugee Convention. To do this requires us to reach a conclusion on whether the Convention shall not apply to the appellant as there are "serious reasons for considering that: …. he has committed a serious non-political crime outside the country of refuge prior to his admission" to New Zealand.

[123] The Authority, in *Refugee Appeal No 74796 & 74797* (19 April 2006) considered the exclusion issue in some depth. The conclusions on exclusion in that determination were then upheld in a judicial review of that decision by the High Court, Courtney J in *X & Y* v *Refugee Status Appeals Authority* (CIV-2006-404-4213-17 December 2007). We have been guided by the analysis carried out in *Refugee Appeal No 74796 & 74797* [86] to [142]. We have also taken into account the UNHCR *Background note on the application of the exclusion clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* reproduced at 15 IARL 502 (2003). We have also noted the comments set out at [81] in *Refugee Appeal No 74796 & 74797* in relation to those guidelines. As noted at [86] in *Refugee Appeal No 74796 & 74797*:

> "[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."

[124] We also note exclusion is not premised on the individual being charged or convicted of the relevant crime (although this appellant has been charged, convicted and served the sentence on offences carried out in Canada). Exclusion occurs where there are serious reasons for considering that the relevant crime or act has been committed. The term "serious reasons for considering" is well established as a standard which is well below that required either under the

criminal law (beyond a reasonable doubt) or the civil law (on a balance of probabilities); see *Refugee Appeal No 74796 & 74797* at [89]. It has been established in Canada and Australia that the standard of proof applies only to questions of fact; see *Moreno v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 (FC:CA) at 313; *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 ALR 394 (FC:FC) at [79] and also in the United Kingdom in *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115 and *AA (Exclusion Clause) Palestine* [2005] Imm AR 593 at [48] (both UK decisions being by the Immigration Appeal Tribunal). In New Zealand, that lower standard of proof was adopted in *Refugee Appeal No 1248/93 Re TP* (31 July 1995) at [32] and this same lower standard 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)).

[125] In the assessment of crimes committed under Article 1F(a) and (c), reference is readily made to international instruments and their interpretation by international tribunals; see *Refugee Appeal No 74796 & 74797* [95] to [120]. In the assessment and comparability exercise required for serious non-political crimes pursuant to Article 1F(b), however, guidance from international instruments or international criminal law is not so readily available as the jurisdiction of the various tribunals involved is limited to genocide, crimes against humanity and war crimes. For example, the International Criminal Court addresses only the above issues. Part 2 of the Rome Statute of the International Criminal Court sets out its jurisdiction and states, at Article 5:

> "Article 5
>
> Crimes within the jurisdiction of the court
>
> 1. The jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole. The court has jurisdiction in accordance with this statute with respect to the following crimes:
>
> a. the crime of genocide;
>
> b. crimes against humanity;
>
> c. war crimes;
>
> d. the crime of aggression."

[126] The International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for Yugoslavia (ICTY), the Special Court for Sierra Leone and

Extraordinary Chambers for Cambodia also limit their jurisdictions to genocide, crimes against humanity and war crimes.

[127] The most significant jurisprudence on this issue in New Zealand is set out in *S v Refugee Status Appeals Authority* [1998] NZLR 91 (Court of Appeal) and the High Court decision by Smellie J in *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301. The Court of Appeal in *S v Refugee Status Appeals Authority* endorsed the use of New Zealand domestic law as a starting point for assessing the seriousness of criminal offending. This Authority has referred to that finding in subsequent decisions, including *Refugee Appeal No 74796 & 74797* and *Refugee Appeal No 74273* (10 May 2006).

[128] At first instance, in *S v Refugee Status Appeals Authority*, Smellie J upheld the decision of the Authority that the plaintiff in that case had committed a serious, non-political crime through his involvement in the aggravated robbery of 35 or 40 shop-keepers in Colombo from whom he and his co-offenders had collected, in Sri Lankan terms, a substantial amount of money. Smellie J found that the crimes in which the plaintiff had been involved were of a similar nature to aggravated robbery pursuant to s235(1)(b) of the Crimes Act 1961 in New Zealand, which carried a maximum penalty of 14 years' imprisonment and if, as he considered probable, there were threats to kill or do grievous bodily harm, then under s306 of the Crimes Act, there was potential for a term of imprisonment not exceeding seven years. He noted that:

> "In New Zealand terms, although the first offence would not qualify as serious, by the time the halfway mark of 17-20 (robberies) had been reached, the rating would have shifted to serious aggravated robbery."

[129] He then went on to try and ascertain, which was not possible, how the Sri Lankan courts would have regarded the conduct of the plaintiff and his associates and concluded, at 311:

> "I think it unrealistic to suggest that the punishment would not have been up to eight years of rigorous imprisonment which is described in s52 of the Code as "imprisonment … with hard labour"."

[130] Based on this reasoning, he found that the Authority had been well justified in reaching the conclusion that the "aggravated robbery rampage" in which the plaintiff had been involved, would inevitably be regarded as serious.

[131] Consideration was given as to whether a balancing exercise was called for between the harm the plaintiff (refugee claimant) could anticipate, on return, from

his risk of persecution and the penalty for the criminal offence. He concluded, after a substantive analysis of the law and the academic commentary, that the approach taken by the Authority, namely that Article 1F was mandatory and imposed no discretion in the decision-maker, was a valid one and thus there was no error of law on the part of the Authority.

[132] The Court of Appeal also agreed with that conclusion, rejecting the "balancing exercise" submission. That Court of Appeal decision has recently been cited with approval before the Supreme Court in New Zealand in the case of *Zaoui* v *Attorney-General* (No 2) [2006] 1 NZLR 289 at [29]-[42].

[133] At page 297, the Court of Appeal in *S* v *RSAA* stated:

> "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 person who would otherwise qualify for refugee status. The enquiry therefore must be whether the crime is of sufficient gravity to justify withholding the benefits conferred by the Convention …"

[134] The Court of Appeal (Henry J) went on consider the phrase "serious crime" and accepted a submission that it had to be construed in the context of the Convention and its stated purposes. Henry J, at 296, stated that the Convention had not intended to allow exclusion except where the crime was a "*crime grave*". The Court stated:

> "… We agree that the exclusion clause 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. It is impossible to be any more precise but the general intention is clear and in the New Zealand criminal jurisdiction it can safely be said that the crime which is described as serious will be a "*crime grave*"."

[135] It is also relevant to take into account the guidance of the House of Lords in *T* v *Secretary of State for the Home Department* [1996] AC 742 at 786-787 where Lord Lloyd put forward a definition of the words "non-political crime" used in Article 1F(b):

> "A crime is a political crime for the purposes of Article 1F(b) of the Geneva Convention if, and only if, (i) it is committed for a political purpose, that is to say […] object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (ii) 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 it was aimed at a military or

> government target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve indiscriminate killing or injuring of members of the public."

[136] Before turning to Mr Ryken's submissions on the exclusion issue, we are satisfied that following the guidance of *T* v *Secretary of State for the Home Department*, all the offences in which the appellant was involved in Canada are clearly of a non-political nature. We now turn to decide whether the Convention shall not apply to this appellant because there are serious reasons for considering he has committed a serious crime outside the country of refuge.

[137] Mr Ryken's submissions firstly concentrated on the reasons the RSB considered the appellant should be excluded. He argued the RSB had wrongly relied on inferences arising out of the appellant's purported leadership of an organisation (the BB) (which findings had been largely supported in some of the IAD findings). This was an error of law on the part of the RSB not only through the importing of the findings of another court into the decision-making process by the RSB, but also because it relied on a misinterpretation of the Canadian decision in *Zrig* v *Canada* [2003] 3 FCA 718 and that the appellant had not even been charged with such offences in Canada. Their (IAD) consideration, in his submission, only arose in the immigration context and deportation, where the issue under consideration was a separate ground, based on criminal gang association, and there was thus no nexus to a serious non-political crime, certainly not in the New Zealand context.

[138] We find that we are largely in agreement with Mr Ryken on this submission. The issue of his possible leadership of a criminal gang in Canada certainly was not at a level we consider establishes there were serious reasons for considering he had been in such a position. The significantly conflicting evidence that was actually presented before the Canadian authorities and findings on that evidence, coupled with the fact that the assessment carried out in Canada was for purposes of immigration and deportation, not on any criminal charge, lead us to put far less weight on this part of his possible criminal activities in Canada. We have however considered it comparatively.

[139] Our assessment therefore proceeds predominantly on the basis of the actual criminal charges and circumstances surrounding them, which we consider is the correct application of the guidance given by the Court of Appeal in *S*, set out above.

[140] In this regard, Mr Ryken submitted that we did not have to conduct an exercise of predicting a likely sentence as suggested by the High Court in *S*, as in this situation we actually had evidence of the sentences imposed, both for the machete and the conspiracy offences. Additionally, they occurred in Canada and not in Sri Lanka. We do not concur with Mr Ryken in this regard and follow the guidance of Henry J as the appropriate approach.

[141] The terms of Article 1F(b) only require us to have "serious reasons for considering" the appellant has committed a serious crime and thus, in the situation where there has been apparent "plea bargaining", we must, again as guided by the Court of Appeal, look not only at the elements which form the crime, but also its facts and circumstances, as well as the circumstances of the offender, which are relevant. In this case, from the appellant's own evidence, some form of "plea bargain" was agreed upon with the judge, the prosecutors and his own counsel, such that the initial charge of "assault causing bodily harm" was dropped and the appellant pleaded guilty to the lesser charge of "possession of a weapon for a purpose dangerous to the public peace". The appellant's evidence in that regard was that he did actually use the weapon against the victim in a situation which appears to have been partly aggressive and partly in defence of his friend and himself. Thus, the appellant clearly went to the gang brawl, taking with him a dangerous weapon, which he then used to assault the victim with at least the intention to injure him. We therefore consider it unrealistic to make only a comparative assessment of the plea bargained sentence the appellant received for the charge, to which he pleaded guilty. We consider that any comparison or investigation of actual sentencing should take into account the full facts of the situation and set them against the likely sentencing for such offences, both in New Zealand and also in Canada.

[142] Of the remaining convictions relating to the appellant, we consider only the conspiracy offence is of significance. Again, we must look at the totality of the evidence surrounding that incident, as well as the "plea bargained" sentence and the actual charge.

[143] We also assess the evidence relating to the appellant's accepted involvement with the BB and AA gangs and whether those involvements bring him within the auspices of Article 1F(b). We move next to carry out the necessary comparative analysis of the criminal offences and gang membership and then the

comparative sentencing we consider most likely to be applicable, both in New Zealand and in Canada.

COMPARATIVE OFFENCES IN NEW ZEALAND CONTEXT AND MAXIMUM SENTENCES

The machete incident

[144] The possible offences in the New Zealand context appear to arise from Part 8 of the Crimes Act 1961 (the NZ Act) which addresses crimes against the person. This creates a hierarchy of offences based on assaults of differing gravity. The appellant's actions could conceivably fit within the elements of one or more offences. Because of the nature of what occurred, our finding is that his offending goes beyond common assault or assault with intent to injure, which are at the lower end of offending. There are three offences which we consider most relevant to the current facts. These are s188 – Wounding with intent, s189 – Injuring with intent, and s202C – Assault with weapon. These three sections state:

> "**188 Wounding with intent**
>
> (1) Everyone is liable to imprisonment for a term not exceeding 14 years who, with intent to cause grievous bodily harm to any one, wounds, maims, disfigures, or causes grievous bodily harm to any person.
>
> (2) Everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to injure anyone, or with reckless disregard for the safety of others, wounds, maims, disfigures, or causes grievous bodily harm to any person.
>
> **189 Injuring with intent**
>
> (1) Everyone is liable to imprisonment for a term not exceeding 10 years who, with intent to cause grievous bodily harm to any one, injures any person.
>
> (2) Every one is liable to imprisonment for a term not exceeding 5 years who, with intent to injure any one, or with reckless disregard for the safety of others, injures any person.
>
> **202C Assault with weapon**
>
> (1) Everyone is liable to imprisonment for a term not exceeding 5 years who –
>
> (a) In assaulting any person, uses any thing as a weapon; or
>
> (b) While assaulting any person, has any thing with him or her in circumstances that prima facie show an intention to use it as a weapon."

[145] We note that the *mens rea* element for both s188 and s189 is the same and both sections create two offences each. The *actus reus* element of s188 is wounding, maiming, disfiguring or causing grievous bodily harm (GBH) (collectively referred to as wounding). The *actus reus* element of s189 is injuring.

Garrow and Turkington's Criminal Law in New Zealand (Lexis Nexis New Zealand, CD Rom, accessed on 7 May 2008) (*Garrow and Turkington)* at CRI188.4 notes that a wound

> "… requires an injury to the person by which the skin is severed and not merely the upper cuticle or upper skin."

[146] In *R* v *Scott & Lewis* [2007] NZCA 589, the Court of Appeal reviewed New Zealand and English case law and noted at [49] that:

> "… we confirm that any rupture of the tissues of the body, internal or external, with one of the two intents in the section can amount to a "wound" for the purposes of charges brought under s188."

[147] Maiming refers to a loss of the use of part of the body or one of the senses (*Garrow and Turkington*, CRI188.5). Disfigurement refers to an injury which detracts from a person's physical appearance (*Garrow and Turkington* CRI188.6). There is no definition for GBH. "Injure" is statutorily defined by the Act at s2 which states:

> "to injure means to cause actual bodily harm."

[148] *Adams on Criminal Law* (Brookers, Wellington, 1992, brookersonline.co.nz, accessed on 18 June 2008) at CA2.1601 notes that it is only necessary to show a hurt or injury calculated to interfere with health or comfort; that it may be internal or external; and that the injury need not be permanent or dangerous but cannot be merely trifling. The Court of Appeal in *Scott & Lewis* elaborated:

> ""Grievous bodily harm" is not statutorily defined but has a meaning well entrenched in law: "bodily harm" needs no explanation and "grievous" means no more and no less than "really serious": *Director of Public Prosecutions* v *Smith* [1961] AC 290 at 334; *Waters* at 379. "Injure" is defined in s2 as "actual bodily harm" and, in the statutory hierarchy, "wound" falls between the two."

[149] By way of illustration sentencing decisions related to s189 record that the following harms have been classified as injuries: broken nose and broken jaw requiring stitches and metal plates; loss of consciousness due to being struck on the head; a cut to the shoulder requiring four stitches. The following harms have been classified as wounds under s188: a cut across a cheek from jaw-line to eye requiring 50 stitches and plastic surgery with lasting effects of numbness and nerve damage to the eye; cuts to hand and thighs with a dagger which required medical treatment but did not result in permanent consequences, lacerations to the face requiring 30 to 40 stitches.

[150] This appellant caused a gash to the victim's hand which required some 14 stitches. There is no evidence to suggest that there would be permanent damage.

While this fits squarely within the "wounding" category, the case law in our view suggests it would be defined as the lesser offence of "injuring". It is our conclusion that it could not be said to be so "serious" as to constitute GBH.

[151] For the *mens rea*, both sections require that the prosecution establish (regardless of the actual harm inflicted) that the accused had an intention *either* to cause GBH *or* to injure the victim. The lesser standard of intention to injure includes reckless disregard for the safety of others. *Garrow and Turkington* (CRI188.2) notes in this regard:

> "It must be established that the accused intended to cause grievous bodily harm or to injure, as the case may be, in the sense that he desired to bring about those consequences or foresaw their occurrence as certain. Mere foresight that such harm was likely, or recklessness will not suffice." *Moloney* [1985] AC 905, [1985] 1 All ER 1025; *Hancock* [1986] AC 455, [1986] 1 All ER 641 (HL), *Nedrick* [1986] 3 All ER 1 (CA); *Attorney-General's Reference (No 3 of 1994)* [1997] 3 All ER 936 (HL)

[152] Discussing intention in relation to both sections, the Court of Appeal in *Scott & Lewis* stated:

> "[27] Analytically, it is clear, first, that the sections create a hierarchy of diminishing seriousness in either of the two intents which the prosecution must prove and, secondly, they create a series of consequences which cover the range of results of accused persons acting in accordance with one or other nominated intent.
>
> [28] The more serious intent is that of causing grievous bodily harm either under ss188(1) or 189(1).
>
> […]
>
> [32] In framing an indictment under ss188 or 189, it therefore follows the prosecution must first consider whether it believes it can prove intent to cause grievous bodily harm within that definition or intent to injure within the s2 definition."

[153] Given, in this case, that the appellant struck the victim with a machete, there can be little doubt that he foresaw that injury was certain. In the context of entering a melee primarily to protect his friend, we do not consider it would be possible to establish an intention to commit GBH. In reaching this conclusion, we have taken into account the appellant's own statement that if the victim had not raised his arm at the right moment, he may have suffered far more serious damage. We therefore conclude he acted with intent to injure or with reckless disregard for the safety of others as in ss188(2) or 189(2).

[154] With the crime of assault with a weapon (s202C), the *actus reus* and *mens rea* requirements of the offence are those of assault, that is, *inter alia*, intentionally applying force to the person of another (s2), together with the use or presence of a

weapon. In striking the victim with a machete, the appellant satisfies both elements of this offence.

The AA conspiracy incident

[155] On the facts as found above, we consider the possible offences in the New Zealand context. Given that no action actually took place, the logical starting point is therefore conspiracy. Section 310 of the Crimes Act sets out this offence:

> "**310 Conspiracy to commit offence**
>
> (1) Subject to the provisions of subsection (2) of this section, every one who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years' imprisonment, and in any other case is liable to the same punishment as if he had committed that offence.
>
> (2) This section shall not apply where a punishment for the conspiracy is otherwise expressly prescribed by this Act or some other enactment.
>
> (3) Where under this section any one is charged with conspiring to do or omit anything anywhere outside New Zealand, it is a defence to prove that the doing or omission of the act to which the conspiracy relates was not an offence under the law of the place where it was, or was to be, done or omitted."

[156] The *actus reus* requirement of the offence is the agreement to do an unlawful act. The Court of Appeal in *R* v *Morris (Lee)* [2001] 3 NZLR 759 at [15] stated:

> "A conspiracy is a conscious common design of two or more persons to do an unlawful act or to do a lawful act by unlawful means (*R v Humphries* [1982] 1 NZLR 353 at p 356: *Ahern v R* (1988) 165 CLR 87 at p 93). As this Court said in *R v Gemmell* [1985] 2 NZLR 740 at p743, it is of the essence of a conspiratorial agreement that there must be not only an intention to agree but also a common design to commit some offence, that is, to put the design into effect."

[157] The *mens rea* element of conspiracy is an intention to achieve the purpose of the agreement, at the time the agreement was made (*Garrow and Turkington* CRI310.4). The Court of Appeal in *R* v *Gemmell* [1985] 2 NZLR 740 stated at page 744:

> "To have the necessary knowledge for conspiracy a person must know what he is supposed to have agreed to do. That is to say there must be an intention to be a party to an agreement to commit the specific offence to which the conspiracy is directed […]
>
> An apparent agreement which stops short of an intention to carry the offence through to completion is not enough."

[158] From the facts as found, it appears that there was a conscious common desire between the appellant and the AA (and the BB gang leader, X) for the appellant to supply the AA with a gun, and accompany them to a gang confrontation where the gun may have been fired, either at someone or in warning. As conspiracy is an agreement to do an unlawful act, it is necessary to identify which unlawful acts the appellant and others had agreed to do.

[159] On the facts, it would appear that there are a range of offences which the appellant could be found to have agreed to do. Starting at the lower end, there are four charges that come under the Arms Act 1993 and these relate to supplying the AA with a firearm or pistol and unlawful possession of a firearm or pistol.

[160] There appear to be four possible offences under the Arms Act which differ depending on the classification of the weapon. The statutory definition for "firearm" is defined in s3 of the Arms Act and "pistol" is defined in s2 as

> "any firearm that is designed or adapted to be held and fired with one hand; and includes any firearm that is less than 762 millimetres in length."

[161] In his testimony the appellant described to us a small .22 calibre gun; this would appear to be in the nature of a pistol. The supply of a pistol of this nature we consider most closely equates with s44 of the Arms Act which provides:

> "**44 Selling or supplying pistol, military style semi-automatic firearm, or restricted weapon to person who does not hold permit to import or to procure**
>
> (1) Every person commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 3 years or to a fine not exceeding $4,000 or to both who sells or supplies a pistol, military style semi-automatic firearm, or restricted weapon to any person other than a person who is authorised…" [by permit]

[162] We consider we can safely assume the AA did not have a licence for the gun they sought, and there was then an agreement between X, the appellant and the AA to supply the AA with a firearm/pistol. The fact that the appellant had turned his mind to facilitating the supply of the gun, without taking physical possession, could be said to demonstrate an intention to carry out the offence through to its completion.

[163] Section 20 of the Arms Act relates to possession of a firearm without a licence and states that every person commits an offence and is liable to summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding $1,000 or to both who contravenes that section.

[164] Section 50 of the Arms Act creates the offence of unlawful possession of a pistol or restricted weapon and imposes "imprisonment for a term not exceeding three years or to a fine not exceeding $4,000 or to both".

[165] We find from the appellant's evidence that there was a common intention for the AA to take possession of the weapon. This would bring them, and the appellant, squarely within the offence of conspiracy to unlawfully possess either a firearm or a pistol.

[166] The conspiracy incident could also be linked to possible offences under the Crimes Act. On the appellant's evidence, he agreed with the AA and X not only to supply them a gun but also to take responsibility for the gun. This would appear to have involved him in attending a possible confrontation with rival gang members where there was a possibility that the gun would be used. The two sections of the Crimes Act that appear to be relevant are s198 "Discharging firearm or doing dangerous act with intent", and s202C "Assault with weapon". These state:

> "**198 Discharging firearm or doing dangerous act with intent**
>
> (1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to do grievous bodily harm, -
>
> (a) Discharges any firearm, airgun, or other similar weapon at any person; or
>
> (b) Sends or delivers to any person, or puts in any place, any explosive or injurious substance or device; or
>
> (c) Sets fire to any property.
>
> (2) Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to injure, or with reckless disregard for the safety of others, does any of the acts referred to in subsection (1) of this section.
>
> **202C Assault with weapon**
>
> (1) Everyone is liable to imprisonment for a term not exceeding 5 years who, -
>
> (a) In assaulting any person, uses any thing as a weapon; or
>
> (b) While assaulting any person, has any thing with him or her in circumstances that prima facie show an intention to use it as a weapon."

[167] While we find from the appellant's evidence he turned his mind to the possibility that the gun would be discharged in a confrontation, we are satisfied that there is not enough evidence to establish that there was a conscious common design between him and the AA to discharge the gun at any person or use it for assaulting any person. The evidence we accept does not indicate there was a shared knowledge as to how events would play out and the appellant's own evidence does not go far enough to resolve this issue. Set against this, he was

originally charged with aggravated assault and ultimately pleaded guilty to conspiracy to assault. There is thus indications of a planned incident that was of a serious nature. At worst, s202(c) coupled with conspiracy under s310 would come into play.

Participation in organised criminal gang

[168] The relevant provisions in the New Zealand Crimes Act are:

> "**98A Participation in organised criminal group**
>
> (1) Every one is liable to imprisonment for a term not exceeding 5 years who participates (whether as a member or associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group, and –
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity; or
>
> (b) reckless as to whether his or her participation may contribute to the occurrence of criminal activity.
>
> (2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or as one of their objectives –
>
> (a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
>
> (b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment of 4 years or more; or
>
> (c) the commission of serious violent offences (within the meaning of section 312A(1)) that are punishable by imprisonment for a term of 10 years or more; or
>
> (d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences (within the meaning of section 312A(1)) that are punishable by imprisonment for a term of 10 years or more."

[169] From the facts as found, we are satisfied the appellant was associated with the AA and the BB. We do not consider, on the evidence before us, that he was a leader. He was, however, in our conclusions on the evidence, involved and wished to be perceived as a seriously involved member on several occasions. His involvement in the machete incident, conspiracy to provide the gun and the visits and involvement he had with the leaders of the BB and AA confirms to us that this was his level of commitment and involvement. The findings in the various IAD hearings, while they reach somewhat conflicting conclusions on the appellant's actual role indicate, to our satisfaction, that the BB gang in particular was involved in a wide range of criminal activity and that that activity would at least fall within

s98A(2) of the Crimes Act in New Zealand if not, on occasion with s98A(2)(c) of the New Zealand Act.

[170] We have considered the commentary on this offence set out in *Adams on Criminal Law* (CA98A.01 - CA98A.05). None of the evidence before us indicated that he was involved in activities of either gang which led to his personally obtaining material benefits from the commission of offences. From our findings on his evidence, we could not establish serious reasons for considering he had personal involvement in the gang-orchestrated commission of "serious violent offences". He did, on the other hand, contribute to criminal offending by being involved in the conspiracy incident.

[171] Our conclusion therefore, in relation to this evidence, is that it would be much harder to establish that he has committed, even at the level of "serious reasons", such a crime. If a conviction were established, we consider, on the facts of his involvement, the sentence that he would receive would be at the lower end of the available range of imprisonment, which extends up to five years.

LIKELY SENTENCING IN NEW ZEALAND

The machete incident

[172] Our research into the New Zealand case law did not reveal factual circumstances that neatly mirrored that of this appellant's offending. We have, however, considered a selection of sentencing decisions which has enabled us to reach logical and sustainable conclusions. We noted, at the outset, some aggravating and mitigating factors that can be identified.

[173] Aggravating factors will include the fact that the appellant had the machete in the boot of his car and that he carried it around with him, either for self-defence or for part of the bravado that he enacted to show that he wished to be seen as associated with the gang activities. He drove his car to the incident knowing that the machete was in the boot and he was quickly able to access it when he entered into the brawl.

[174] The mitigating factors are that this was a first offence, he only struck the victim once and that he appears to have entered a guilty plea at an early stage.

[175] Under s188(2), wounding with intent, we note only a few decisions. These are:

i *R v Bossom* CRI-2005-091-919 (High Court Wellington, 4 July 2006, Miller J);

ii *R v Ngarangione* CRI-2005-225-115 (High Court Invercargill, 20 April 2007, Miller J); and

iii *R v Adlam* CRI 2006-063-4350 (High Court Rotorua, 1 April 2008, Woodhouse J).

[176] In *Bossom*, the offender got into a confrontation with the victim and beat him with a metal bar, causing, concussion and headaches. The mitigating factors were the guilty plea, remorse, otherwise good character, self-defence of another party (his mother who had been assaulted by the victim), provocation, and seeking to provide assistance to the injured victim. This resulted in 18 months' imprisonment.

[177] In *Ngarangione*, the offender struck a stranger in the face with a broken beer bottle, causing lacerations. The offence was aggravated by previous convictions of a like nature and mitigated by the offender being 16 years of age. The term of imprisonment here was also 18 months.

[178] In *Adlam*, a decision which addressed offending that arose in a fight where two of the accused produced knives and two people received multiple stab wounds, Woodhouse J made the point that knives were brought to the scene:

> "And it is plain enough that knives were brought to the scene. And it was not a case of a fight suddenly starting out of the blue and you finding knives from somewhere else. You had them. And that is an important matter that I have got to take into account."

[179] It was accepted that one of the young offenders had stabbed one of the victims and that the first victim received seven wounds. In discussing the proposed sentence, His Honour noted the offender's age, the early guilty plea and lack of prior convictions and stated at [28]:

> "If you had been 18 or 19 at the time, things I have just referred to would have warranted a prison sentence, reduced from around 3 to 4 years to around 2 years. At that point, approaching the sentencing in one way, serious consideration could have been given to home detention […]"

[180] In relation to the possible injuring with intent offence, s189(2), we have noted three relevant cases:

i *R* v *Douangmanivanh* CA154/02 (CA, 19 July 2002, McGrath, Robertson, Gendall JJ); and

ii *R* v *Walker* CA420/01 (CA, 13 March 2002, Keith, Robertson, Gendall JJ); and

iii *R* v *McDonald* CA457/93 (16 May 1994).

[181] In *Douangmanivanh*, the appellant got into a dispute with the victim at a party, took a knife from the kitchen, and then attacked the victim, despite attempts to restrain him. This caused a cut to the forearm and a severe cut across the face, requiring 40 stitches. The appellant was sentenced to two years' imprisonment. The Court of Appeal noted:

> "Among the aggravating factors were the introduction of the knife and the fact that it was applied to the head area." [16]

[182] The introduction of the knife was also a factor that contributed to the denial of leave for home detention.

[183] In *Walker*, the appellant was found guilty of a charge of wounding with intent to injure after he had broken a beer glass and struck the first victim in the face. The impact was serious and the victim required 50 stitches, two nights in hospital, two weeks off work and suffered some lasting effects. There was also a second victim who was punched. The initial sentence imposed by the lower court was three years' imprisonment. The Court of Appeal reduced the sentence to two years and three months and, at [21], noted:

> "We have concluded that the salient factors in this case are:
>
> a. the glass was broken so that it could be used as a weapon;
>
> b. the glass was used more than once;
>
> c. there are serious long-term consequences for one of the complainants;
>
> d. although the appellant's criminal record is less serious than some, he is not a first offender;
>
> e. the elapse of time since the offending and his proven record in that time coupled with his support and work record;
>
> f. the need for deterrent sentences so that those who act after over-consumption of alcohol in ways which they would not at other times, understand the risks involved in their excess drinking; and
>
> g. the need for condemnation of the prevalence of mindless violence and its corroding effect in the community."

[184] In *McDonald*, an 18 month sentence was upheld for a 20 year-old first time offender who had struck a victim with a broken glass without premeditation.

[185] In relation to the offence of assault with a weapon (s202C),we note these are often dealt with as either wounding with intent or injuring with intent, with the presence of a weapon being an aggravating factor. The case of *R v McMillan* CA317/01 (CA 31 October 2001, Gault, Gendall, William Young JJ) gives some guidance. Here, the offender pushed a metal gate at the victim, catching his head against a brick wall and then proceeded to strike him about the head with a long piece of wood. Whilst noting aggravating factors, which included the manner in the offender used the weapon, knowledge that the victim was already injured and five previous convictions involving weapons, the Court of Appeal considered a sentence of two years nine months' imprisonment was excessive.

The AA Incident

[186] From s310 of the Crimes Act, we are aware that an offender will be liable for a term of imprisonment which matches the term that would have been imposed had the actual offence been committed. Thus there is a need to look at the sentencing for the offences which the accused conspired to commit. Here, from our analysis above, s44 of the Arms Act, supplying a pistol, and s50 of the Arms Act, unlawful possession of [a] pistol, need to be considered.

[187] Our conclusions in this regard are that sentences in relation to supply and possession are likely to be in the vicinity of a term of 12 months' imprisonment, to be served concurrently. In accordance with section 84 of the Sentencing Act 2002, it is highly unlikely that an offender would receive a cumulative sentence in relation to these offences because they are not of a different type and are connected.

[188] Alternatively, if the prosecution elected to choose between possession or supply, our view is the same - that a likely sentence of 12 months' imprisonment would be imposed. If, however, a more serious offence of conspiracy to commit assault with a weapon were pursued, which we consider, on the facts, is the best comparison for this offence, then the comparative sentencing is that under s202C of the Crimes Act as discussed above.

[189] In relation to the Arms Act offences of possession, we found some useful guidance given by New Zealand decisions in:

i. *R v Keenan* [1997] BCL 409 (CA, 24 February 1997, Tompkins, Thomas, Heron JJ);

ii. *R v Gunbie* CRI-2005-044-001951 (High Court Auckland, 16 May 2006, Frater J);

iii. *R v Richardson* CA450/02, (CA, 25 March 2003, Blanchard, Robertson, William Young JJ); and

iv. *R v Wharewaka* [2005] BCL 497, CRI-2004-092-4373 (High Court Auckland, 28 April 2005, Baragwanath J)

[190] In *Keenan*, a 31 year-old pleaded guilty to two counts of unlawfully supplying a pistol and a burglary charge. The High Court sentenced the offender to 18 months' imprisonment and two years' imprisonment in respect of two supply charges, to be served cumulatively. The offender had prior convictions of unlawful possession of firearms, and aggravated robbery. The Court of Appeal, in that case, noted:

> "The Court must do its duty to ensure as far as possible firearms are not made available to those who intend to do wrongful deeds and it is necessary for the Courts to take such steps as it can to stamp out the supply of such firearms in the hope fewer firearm related offences will occur."

[191] The Court of Appeal dismissed the appeal and considered the sentences were wholly appropriate.

[192] In *Gunbie*, the defendant was charged on one count of reckless discharge of a firearm and one of unlawful possession of a pistol. These arose as part of an ongoing feud between the offender and the victim, in a like nature to the "AA incident". Justice Frater stated at [25]:

> "There is no dispute that the possession charge should be dealt with by a concurrent sentence, notwithstanding that the pistol was found some months later. In my view a sentence of one years imprisonment is sufficient to reflect the gravity of that particular offending, and I impose that sentence also."

[193] In *Richardson*, there was a conviction on one charge of unlawful possession of a firearm and one of unlawful possession of a pistol. This offender was sentenced to 18 months' imprisonment on the first count and 12 months' on the second count, served concurrently. The Court of Appeal considered that a starting point of two years' was too high and that insufficient credit had been given for mitigating circumstances.

[194] In *Wharewaka*, four defendants were sentenced in relation to their involvement with a chapter of the Black Power gang and one of them was convicted of unlawful possession of a pistol and knowingly participating in an organised criminal group. That defendant had earlier convictions for possession. Reviewing the original sentences as being too high and noting that the weapon was not used in a confrontational mode, the starting point made by the High Court was stated to be 18 months with a reduction to 14 months for a guilty plea. The participation in the gang resulted in an eight month cumulative sentence.

[195] The decision in *Wharewaka*, is, on the facts, the best guidance we could obtain in relation to a possible comparative offence of participation in an organised criminal group (s98A Crimes Act).

CONCLUSIONS ON COMPARATIVE SENTENCING

[196] Our conclusions on the comparative sentences take into account, as we have noted, the more appropriate comparative with the offences in which the appellant was involved, and are addressed prior to any plea bargaining. We consider, on the facts as found, that for the "machete incident", taking into account both aggravating and mitigating factors, the sentence would be in the vicinity of 18 months to two years' imprisonment, probably at the lower end of these, taking into account this was a first offence.

[197] On the conspiracy charge, we consider that the most likely and appropriate comparative is that with the New Zealand offence of "assault with a weapon", although sentences under the Arms Act could well be imposed. Again, our conclusions are that the likely sentencing would be between 18 months and two years' imprisonment. As the appellant was then a second offender, we consider it unlikely that home detention or a lesser sentence set off by a longer probation period would have been met with favour by the New Zealand courts.

[198] Finally, in relation to a possible conclusion that there are serious reasons for considering the appellant committed an offence comparable to s98A - participation in an organised group - we find, on the best comparisons available, that the most likely sentence would be between eight and 12 months' imprisonment.

APPLICATION OF THE RELEVANT LAW

[199] We must now apply the directly relevant guidance of the Court of Appeal in *S v Refugee Status Appeals Authority* and have carefully noted the findings of Henry J and the preliminary assessment made by Smellie J (at first instance) that we set out above. The issue is, therefore, whether the crime or crimes in which this appellant has been involved are "of sufficient gravity to justify withholding the benefits conferred by the Convention". Henry J, at 296, expressed his agreement that

> "The exclusion clause is directed to offending at the upper end of the scale which is likely to attract a severe penalty, at least in the nature of an imprisonment for an appreciable period of years."

[200] From the assessment we have carried out above, none of the three crimes on which the appellant was either convicted or originally charged (before plea bargaining), are "offending in the upper end of the scale which is likely to attract a severe penalty". The likely comparative New Zealand sentences of 18 months to two years for the Canadian charges, (ie before Canadian plea bargaining), we consider, cannot be stated to be "in the nature of an imprisonment for an appreciable period of years".

[201] On the basis of these conclusions, we find his offences, whilst clearly repugnant, are not of such a nature that the appellant should be excluded under Article 1F(b) for having committed "serious non-political crimes".

CONCLUSION

[202] On the first issue, we find that there is a real chance of the appellant being persecuted if returned to Sri Lanka, his country of nationality. That persecution, we find, would be for reasons of his ethnicity, and imputed political opinion or being a presumed significant supporter of the LTTE.

[203] The appellant therefore is found to be included within Article 1A(2) of the Refugee Convention.

[204] From a careful analysis of the exclusion issue (Article 1F(b)) of the Convention, which clearly needed full assessment in this case, we are satisfied that this appellant should not be excluded as, on application of the relevant jurisprudence, any offences he has committed outside his country of refuge prior

to his admission to this country as a refugee, were not “serious non-political crimes”.

[205] Accordingly, we find that the appellant is a refugee and refugee status is granted. The appeal is allowed.

”A R Mackey”
A R Mackey
Chairman