ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES) OR PARTICULARS IDENTIFYING X HIS WIFE

IN THE SUPREME COURT OF NEW ZEALAND

SC 107/2009
[2010] NZSC 107

BETWEEN	THE ATTORNEY-GENERAL (MINISTER OF IMMIGRATION) Appellant
AND	TAMIL X First Respondent
AND	REFUGEE STATUS APPEALS AUTHORITY Second Respondent

Hearing: 24 June 2010

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: I C Carter and R Kirkness for Appellant
R E Harrison QC and C S Henry for First Respondent

Judgment: 27 August 2010

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The respondent's application for recognition of refugee status is remitted to the Refugee Status Appeals Authority for consideration in accordance with the Court of Appeal's order.

C Costs are reserved and counsel may submit memoranda if necessary.

REASONS

(Given by McGrath J)

CONTENTS

Introduction

[1] The protection accorded by the 1951 Convention Relating to the Status of Refugees[1] extends generally to those to whom the Convention accords the status of refugee. Included are those who fear persecution for reasons stated in the Convention and who generally meet its requirements for recognition as a refugee. There are, however, persons who are excluded by the Convention from receiving its protection because there are serious reasons for considering they committed specified criminal acts before arriving in the country in which they seek refuge. This appeal raises questions concerning the meaning and scope of the exclusionary provision of art 1F of the Convention:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
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> (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;
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> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

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1 United Nations Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954).

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[2] The first respondent (whom we will call "the respondent") is a Sri Lankan citizen who claimed refugee status shortly after his arrival in New Zealand and admission under a visitor's permit in 2001. The context in which the issue arises of whether he is excluded from holding refugee status is the respondent's association with the Liberation Tigers of Tamil Eelam (Tamil Tigers) and their activities. While the Tamil Tigers is an organisation striving for political change which has been engaged in armed conflict against government forces, it has also committed many crimes against humanity during the period of conflict in Sri Lanka. The appellant, the Attorney-General, contends that the respondent became complicit in these international crimes in the course of his employment as Chief Engineer on a vessel, *MV Yahata*. This cargo vessel, which was owned by the Tamil Tigers, transported legitimate goods but also, at times, munitions and weapons for the Tamil Tigers' use in both conventional military and other operations, in some of which war crimes and crimes against humanity were committed. The appellant also contends that the respondent has committed serious non-political crimes during his involvement in the scuttling of the *Yahata*, after it had been apprehended in international waters by an Indian coastguard vessel. The appellant submits that in consequence of his actions, under art 1F(a) and (b) respectively of the Refugee Convention, the respondent is disqualified from being a refugee.

[3] Following inquiry, the Refugee Status Appeal Authority[2] held that, because of his past conduct, the respondent is so disqualified under both paragraphs of art 1F. The High Court[3] dismissed his appeal against that decision but, on a further appeal, the Court of Appeal[4] held that it had not been shown on the evidence before the Authority that the exclusion provision in the Convention applied to the respondent. The Crown has appealed against the Court of Appeal's judgment. The appeal raises the question of what more is required than merely membership of or an association

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2 *Refugee Appeals No 74796 and No 74797* RSAA Wellington, 19 April 2006, RPG Haines QC and M Hodgen.

3 *X v Refugee Status Appeals Authority* HC Auckland CIV-2006-404-4213, 17 December 2007.

4 *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73.

with an organisation that commits crimes against humanity for a person to become complicit in such actions so as to be excluded from qualifying as a refugee under the Convention. Related issues in the appeal concern what is meant by the requirement that there be "serious reasons for considering" that a claimant has committed a crime covered by art 1F(a) or that conduct amounts to a "serious non-political crime" under art 1F(b).

Background

[4] The respondent was born in 1956 and grew up in Velvettiturai, in the north of Sri Lanka, an area in which the local population is strongly sympathetic to the Tamil Tigers. In 1981 he left Sri Lanka to go to sea. He was initially based in the Middle East, working in engine rooms first as an oiler and then as a third assistant engineer in the Persian Gulf. He spent brief periods in Sri Lanka in 1986 for personal reasons and returned in 1989 for his marriage when he remained for six months. At the end of 1989 he took up a position as fourth engineer on a container ship sailing between Singapore, Malaysia and Indonesia. He returned to Velvettiturai in April 1990 to be with his wife for the birth of their first child and remained in Sri Lanka for two years. During this period he was regularly moving between towns as the area was the focus of hostilities between the Tamil Tigers and the Sri Lankan Army.

[5] From the mid-1980s the Tamil Tigers built up its own network of freighters. In general they were crewed by Tamils from Velvettiturai. For 95 per cent of the time these vessels transported legitimate commercial goods but during the remainder they also carried explosives, arms and ammunitions from a number of countries in Asia to areas of the Tamil Tigers' operations in Sri Lanka where they were offloaded and transferred to jungle bases. The Tamil Tigers had established a cell in Trang, a coastal town in Thailand, later shifting it north to Phuket.

[6] The respondent said that in June 1992 he was contacted by an employment agent about an opportunity to work as Chief Engineer on a vessel owned by a Thai company. He was not told its name. He travelled to Trang where he met the ship's agent and then to Phuket where, on 5 July 1992, he boarded the *Yahata*, a cargo

vessel with a total crew of nine. For the next six months the vessel worked routes in South Asia travelling to ports in Thailand and Singapore. The respondent told the Authority that he did not know the nature of the cargo during these voyages. He said he had little interaction with other crew members and knew nothing about them other than that most came from Velvettiturai, which is a fishing port and at that time a centre of commercial and maritime contacts for the Tamil Tigers. He also said he did not know that, as is established to have been the case, most of the vessel's crew were members of or sympathetic to the Tamil Tigers.

[7] On 4 January 1993 the *Yahata* departed Phuket with the respondent on board. He said he had no knowledge of the cargo, which he had observed comprised packets and barrels when it was loaded from a trawler. During loading 10 extra persons joined the ship. Soon afterwards, the respondent said, he was advised that the *Yahata* was a Tamil Tigers' ship. He wanted to leave but was told he could not do so until the vessel reached Sri Lanka. He learned that the 10 persons who had boarded were from the Tamil Tigers and that one was Krishnakumar Sathasivam (Kittu) who had been the organisation's second-in-command until being injured during hostilities in Sri Lanka. The respondent acknowledged that at the time he knew who Kittu was.

[8] During the *Yahata's* voyage to Sri Lanka, when the vessel was some 440 nautical miles off Chennai, the Master told the respondent that the vessel had reached its destination. The engines were stopped. The vessel drifted for about 10 hours without displaying its national flag and while displaying "not under command" lights. An Indian coastguard vessel approached and sought to board the *Yahata* for verification purposes. The Master warned the coastguard that the *Yahata* was carrying 110 tonnes of explosives and that dire consequences would follow if any attempt were made to board her. The *Yahata* then tried to flee and was chased for two and a half hours, when the Master agreed to proceed to Chennai. Near that port the *Yahata* was surrounded by vessels of the Indian navy and dropped its anchors. The respondent said that Kittu informed the crew members that the Indian navy had agreed that they would be repatriated to Sri Lanka. The Indian vessels came under rocket propelled grenade and small arms fire which they returned. The *Yahata* began burning and its crew jumped into the sea. They were rescued and placed in custody.

Kittu and those others who had joined the *Yahata* for her last voyage remained on board and all died. The ship sank.

[9] The respondent and other members of the crew were prosecuted in the Indian courts. In June 1996 the trial Judge acquitted them of all charges. The prosecution appealed to the Supreme Court of India, which, in March 1997, held that:[5]

> [T]he accused had used criminal force against the Indian Naval Officers while they were performing their duty and that was done with an intention to prevent or deter them from discharging their duty. They are, therefore, held guilty of having committed the offence punishable under Section 353 IPC [Indian Penal Code] read with Section 34 IPC.
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> ...
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> [T]he accused had, in furtherance of their common intention, destroyed their ship. We, therefore, hold that the accused thereby have committed an offence punishable under Section 438 IPC read together with Section 34 IPC.

[10] Section 34 of the Indian Penal Code 1860 provides that when an act is done by several persons in furtherance of the common intention, all are liable for that act. Section 353 provides that a person who uses criminal force to any person who is a public servant in execution of his duty commits an offence. Sections 437 and 438 provide that any person who attempts to commit mischief by any explosive substance to a vessel of 20 tons or more intending to destroy or render it unsafe is punishable by imprisonment for up to 10 years. Undoubtedly these are serious crimes.

[11] The respondent and other crew members were all sentenced to three years' imprisonment. The respondent was eventually released from custody and permitted to leave India for Singapore in August 2001. He obtained a New Zealand visitor's visa and arrived in New Zealand on 13 September 2001 where he was issued with a visitor's permit. His wife and children also secured visitors' visas and arrived in New Zealand on 24 December 2001. On that day the respondent filed his refugee status application. His wife also made an application on 18 January 2002.

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5 *State v Jayachandra* [1997] INSC 288 (Criminal Appeal No 823 of 1996).

Refugee Convention and legislation

[12] The provisions of Part 6A of the Immigration Act 1987 applied to the respondent's claim to be recognised as a refugee in New Zealand.[6] Under the legislation, claims are determined at first instance by a refugee status officer.[7] A person whose claim is declined may appeal to the Refugee Status Appeals Authority.[8] Decision-makers at each level are required to act in a manner that is consistent with New Zealand's obligations under the Convention.[9] Article 1A of the Convention says who is included in the term "refugee". It states that a refugee is any person who, being outside his or her country of nationality, is unable or unwilling to return to the person's country of nationality or habitual residence owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

[13] The provisions of the Convention do not apply to a claimant who comes within the exclusionary terms of art 1F.[10] Whatever the merits of the claim under art 1A(2), such a claimant cannot be recognised as a refugee. It is open, although not mandatory, for decision-makers first to address exclusionary aspects, where they arise, before addressing the merits. That is the course followed by the Authority in this case.

Procedural history

[14] A refugee status officer declined the respondent's claim to recognition of refugee status in a reasoned decision on 27 June 2003. The officer was not satisfied that there was a real chance that the respondent would be persecuted if he returned to Sri Lanka, so the requirements of art 1A(2) were not met. Article 1F was not specifically addressed. The decision records the officer's concerns that the respondent had taken up employment on a Tamil Tigers' vessel without knowing which company had employed him or what cargo the *Yahata* was carrying at any

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6 Immigration Act 1987, s 129.
7 Ibid, s 129E(1).
8 Ibid, s 129O.
9 Ibid, ss 129A and 129D. The text of the Convention is set out in sch 6.
10 Set out in [1] above.

time during his six months of employment. These concerns were, however, considered by the officer to be satisfied, principally because he found the respondent to be credible. At the same time, the application of the respondent's wife was also declined.

[15] The respondent appealed to the Refugee Status Appeals Authority. After he had given evidence, the Authority indicated to the respondent's counsel that it would have to address the issue of whether the exclusionary provision applied to the respondent. Subsequently the Authority decided to conduct its own researches and collated two volumes of documentary material, including extensive information about the Tamil Tigers and its activities. It made this material available to the respondent with an explanatory memorandum. The difficulty in assembling the material about the Tamil Tigers and the respondent caused a major part of the long delay in the determination of this aspect of the respondent's appeal to the Authority.

[16] The information referred to what the Authority in its decision described as a "consistent and flagrant pattern of human rights abuses" committed by the Tamil Tigers.[11] Its comprehensive decision contains summaries of more than 20 atrocities including attacks on large groups of civilians, on unarmed police or military personnel or involving assassinations. These incidents took place between 1985 and 1996. At the hearing, the respondent accepted that he knew the Tamil Tigers were responsible for such incidents and that they were typical of what had been happening throughout that period.

[17] The respondent in his evidence denied that he knew he was on a Tamil Tigers' vessel before the final voyage commenced. The Authority was, however, also provided with an account of events on the *Yahata* from a crew member who had been an oiler, and thus subordinate to the respondent, during the last voyage. The oiler had proved himself to be a loyal and dedicated member of the Tamil Tigers before taking up his position on the *Yahata*. He said that he knew at the time that the vessel was carrying arms and explosives for the Tamil Tigers.

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[11] At [24].

[18] In its decision the Authority found that the *Yahata* was part of the Tamil Tigers' fleet and was used to smuggle arms, ammunition and explosives into Sri Lanka for use by the Tamil Tigers. It was undertaking such an operation when it was intercepted on its final voyage. The respondent's assertion that he did not know of these matters was disbelieved. The Authority concluded that the Tamil Tigers would not have put a person whose loyalty was uncertain into such a responsible position on the vessel as that held by the respondent, particularly on a voyage carrying the Tigers' former second-in-command and a cargo of munitions. His assertion that after six months on the vessel he did not know the nature of its cargo on the last voyage was inherently implausible. The Authority said that the impression given by the respondent when questioned was that he was a witness who was turning a blind eye to the obvious. This related to his claim that he knew nothing of his fellow crew members' backgrounds, that he had never been asked if he supported the Tamil Tigers and that he had no grounds for suspicion until Kittu arrived on board.

[19] The Authority inferred that the respondent's denials were made to cover up the fact that he was a trusted supporter of the Tamil Tigers who was willingly assisting the organisation to smuggle war material into Sri Lanka through his skills and ability to ensure continuing propulsion of the *Yahata*. It concluded that he knew that the arms which he was helping smuggle into Sri Lanka would be as likely to be used by the Tamil Tigers in perpetrating further human rights abuses as in conventional warfare against the Sri Lankan army. This showed he was dedicated to the aims, objectives and methods of the Tamil Tigers. Smuggling arms and explosives was vital for its aims. The Authority found that there were serious reasons for considering that the respondent was a knowing and willing accomplice and party to the commission of war crimes by the Tamil Tigers. It followed that he was excluded from refugee status under art 1F(a) of the Convention.

[20] The Authority then went on to consider the application of art 1F(b) in relation to the respondent's involvement in the sinking of the *Yahata*. The Supreme Court of India had decided that he was party to the intentional destruction by fire of a vessel carrying explosives and convicted him of serious crimes. That act had endangered

the lives of those on board the *Yahata*, the members of the naval boarding party and others on navy and coastguard vessels nearby.[12]

[21] The Authority decided that these acts were not committed for a political purpose but, rather, to prevent seizure of the vessel and cargo by the Indian Government. The Authority concluded that he had committed serious non-political crimes within the exclusionary provision of art 1F(b).

High Court and Court of Appeal judgments

[22] An application to the High Court for judicial review of the Authority's decision was dismissed by Courtney J. The Judge held that the Authority was entitled to find, in relation to the last voyage, that it was implausible that the Tamil Tigers would have accepted as an officer someone of whose loyalty they were at all uncertain. It followed that, in assuming the position of Chief Engineer on the last voyage, the respondent was a willing participant in an attempt to smuggle arms and explosives into Sri Lanka. This evidenced his dedication to the Tamil Tigers' objectives and methods and directly assisted them. The subsequent sinking of the vessel with the armaments did not detract from that. The respondent provided assistance, knowing of the real possibility the armaments might be used against civilians.[13]

[23] On the basis of Canadian authority,[14] Her Honour held:[15]

> ... it is clear that a person will be complicit in a crime against humanity if he or she participates, assists or contributes to the furtherance of a systematic and widespread attack against civilians knowing that his or her acts will comprise part of it or takes the risk that it will do so. There need not be a specific event identified that is linked to the accomplice's own acts.

[24] Applying this test to the findings of fact and inferences drawn by the Authority, the Judge decided it had been open to it to conclude that the respondent was complicit in crimes against humanity committed by the Tamil Tigers.

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12 At [140] of the Refugee Status Appeal Authority's decision.
13 At [85]–[86].
14 The main decisions are discussed at [58]–[62] of this judgment.
15 At [81].

[25] In relation to the Authority's finding that the respondent had "committed a serious non-political crime" outside the country of refuge, Courtney J was concerned that the judgment of the Supreme Court of India did not make specific reference to the position of the respondent, nor indeed that of any individual accused in relation to the criminal act of destroying the *Yahata*. The Judge was also troubled that the Supreme Court's conclusions on guilt were expressed in terms that were not consistent with the criminal standard of proof. The Authority did not, however, have the evidence that was before the Supreme Court and was entitled to take into account its earlier finding that the respondent was a loyal supporter of the Tamil Tigers who was on board the *Yahata* with knowledge of its cargo. In those circumstances, the Supreme Court of India's decision, coupled with the Authority's findings, had provided a sufficient basis for the conclusion that there was serious reason to consider the respondent had committed the serious crimes for which he was convicted. The respondent's application for review was, for these reasons, dismissed.[16]

[26] The respondent then appealed to the Court of Appeal.

[27] The Court of Appeal's approach differed from that of the High Court.[17] Pointing out that the international crimes with which art 1F(a) was concerned were "as defined in the international instruments" making provision for them, it saw the principal source of reference as being those instruments. Hammond J, who delivered the leading judgment, said that the starting point was the Rome Statute of the International Criminal Court[18] which made specific reference to crimes against humanity and set out principles of international criminal liability. The Court said that complicity in the criminal conduct of others could be ascertained by reference to principles of joint criminal enterprise liability as laid down by international tribunals.

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16 An application for review by the respondent's wife succeeded and the High Court remitted her refugee status application back to the Authority. The Court of Appeal dismissed the Crown's appeal against that determination. The Crown has not sought to challenge in this Court the judgment in favour of the wife.

17 The Court of Appeal adopted the approach taken to art 1F(a) by the English Court of Appeal in a judgment delivered after the High Court's judgment in this case: *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2009] EWCA Civ 364, [2010] 2 WLR 17.

18 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002).

[28] The Court of Appeal proceeded on this basis to determine whether there were "serious reasons for considering" that the respondent was complicit in crimes against humanity or a serious non-political crime. Hammond J rejected the Crown's contention that the respondent's participation in the final voyage, knowing of the real possibility that the explosives and weapons would be used against civilians, met the "serious reasons" test. The physical presence of the respondent on the vessel, together with the implausibility of his account of how he came to be there, was not enough to justify the inference that he had intended to perpetrate a crime against humanity in terms of joint criminal enterprise liability.[19]

[29] Arnold J concurred, holding that the "serious reasons for considering" test required that it be shown the respondent had contributed to the illegitimate designs of the Tamil Tigers with the intention of furthering them. A finding that he knew the weapons were as likely as not to be used for that purpose did not meet the standard.[20] Baragwanath J agreed, observing that "there was at most an unquantified possibility that the armaments might be used for [the illegitimate] purpose".[21] Baragwanath J also took issue with the inferences drawn about the respondent's knowledge by the Authority which the High Court had upheld.

[30] The Court was accordingly unanimous that it had not been shown that there were serious reasons for considering that the respondent had committed a crime against humanity in terms of art 1F(a) of the Convention.

[31] On the second issue, of whether the respondent had committed a serious non-political crime at the time of the sinking of the *Yahata*, Hammond J was satisfied that at all times the respondent's purpose was the political one of achieving a separate Tamil state. It was artificial to treat the destruction of the vessel to prevent seizure of its cargo as not being closely and directly linked with or as falling outside that purpose.[22] Baragwanath J agreed.[23] Arnold J, however, held that the scuttling of the *Yahata* was not a political act as it was not sufficiently close to the

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19 At [111].
20 At [169]–[171].
21 At [279].
22 At [121]–[123].
23 At [310].

respondent's political purpose. But both Arnold J and Baragwanath J also saw no basis in the evidence, and in particular the judgments of the Courts of India, implicating the respondent in the sinking of the vessel.[24]

Nature of refugee decision-making

[32] When incorporating in the Convention a provision excluding certain persons from holding refugee status, whatever the strength of their claims to be at risk of persecution, the state parties required the countries in which refuge was being claimed to assess whether the claimant was disqualified by previous wrongful conduct. Under art 1F(a) that test concerns conduct involving commission of specified international crimes. Under art 1F(b) it is conduct amounting to serious criminality more generally. Article 1F(c) is concerned with a claimant's guilt of acts contrary to the purposes and principles of the United Nations and has not been raised in this case.

[33] The purpose of the exclusionary provision was to ensure that the Convention was accepted by state parties and to maintain its integrity over time. As Professor Hathaway has put it:[25]

> The decision to exclude such persons, even if they are genuinely at risk of persecution in their state of origin, is rooted in both a commitment to the promotion of an international morality and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees.

[34] A standard is set by the Convention for what is required to establish that a claimant is excluded from the protection of the Convention because he or she may have committed crimes or acts described in art 1F. The degree to which decision-makers must be persuaded is that they are satisfied that there are "serious reasons for considering that" the person concerned has committed such a crime. Furthermore, it must be borne in mind that in New Zealand, as in many countries, decisions on refugee status are not made in court proceedings.

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[24] At [180] and [309] respectively.

[25] James Hathaway *The Law of Refugee Status* (Butterworths Canada Ltd, 1991) at 214 (footnotes omitted).

[35] The Convention does not stipulate any process by which such determinations are to be made by state parties. To meet its Convention obligations, New Zealand has enacted legislation that provides for an administrative process. The initial determination of refugee status is made by a refugee status officer who is a government official designated to undertake that role.[26] A person whose claim is declined may appeal to the Authority.[27] The Authority is an independent specialist body with inquisitorial powers. It may "seek information from any source" or request the chief executive of the Department of Labour to seek and provide it with relevant information.[28] Although it is not a commission of inquiry, it has the powers of one under the Commissions of Inquiry Act 1908 and may make such inquiries and obtain such reports as it considers necessary.[29] In doing so it will consider and may build on information obtained by the refugee status officer at the earlier stage. The Authority is not bound by any rules of evidence but may inform itself in such manner as it thinks fit.[30] At both levels these decision-makers must act in a manner that is consistent with New Zealand's obligations under the Convention.

[36] The inquisitorial nature of the process is further reflected in the language of the statutory provisions concerning the procedure on appeal. It is "the responsibility of an appellant to establish the claim" before the Authority.[31] As the Court of Appeal pointed out in *Jiao v Refugee Status Appeals Authority*,[32] Parliament has avoided the common law terms "onus" or "burden" by using "responsibility". Likewise it has used "establish" instead of "prove".

[37] There are special reasons for the legislature to prefer an inquisitorial process for refugee status determinations. There are particular problems in obtaining evidence on the crucial questions and determining its reliability. The position was

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26 Immigration Act 1987, ss 129B and 129E.
27 Ibid, s 129O.
28 Ibid, s 129P(2)(a) and (4).
29 Ibid, sch 3C, cll 7 and 9.
30 Ibid, sch 3C, cl 9.
31 Ibid, s 129P(1).
32 *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA) at [23] per Keith J.

well expressed by Professor Houle in the context of determinations by the Refugee Protection Division (RPD) of the Canadian Immigration and Refugee Board:[33]

> The process of assessing the weight of evidence to determine refugee status is complex and difficult, mainly because of the absence of credible evidence on which to base the refugee claims. The events related by the claimant cannot be checked directly: they took place in a foreign country and often a considerable period of time before the RPD hearing. In most cases, the decision-maker is given an incomplete story, namely the claimant's version of events, and even then this is usually done through an interpreter. Therefore, Board members are required to make sound decisions based on scanty, ever-changing information about the claimants' countries of origin and, more significantly, information about a culture that is alien to them. In fact, Board members are required to assess the credibility of testimony in something of a cultural vacuum. These factors often impede Board members from fully understanding the claimant's story.

The Authority itself has discussed the evidential difficulties it faces, and the practical limits on its process:[34]

> Largely because of [such] considerations ... the Authority's general approach to refugee claims is to focus primarily on the credibility of the refugee claimant as assessed against publicly accessible information.

In this context, inferences have to be drawn both as to the credibility of the claimant concerning matters of fact and in the evaluation required to decide if a claimant is entitled to protection as a refugee under Convention provisions.

[38] The Convention drafters recognised there would be inherent evidential difficulties in fact finding in relation to events addressed by art 1F. Their adoption of the standard of "serious reasons to consider" that a claimant had committed the specified crimes, or was guilty of other acts referred to in art 1F(c), was a policy choice as to the degree of satisfaction to be required of decision-makers on refugee status. That formulation met the aims of parties to the Convention and was consistent with a fair and workable procedure for making decisions under art 1F. Parliament has incorporated it in the process by requiring that decision-makers act consistently with Convention obligations.

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33 France Houle "Pitfalls for Administrative Tribunals in Relying on Formal Common Law Rules of Evidence" in Robin Creyke (ed) *Tribunals in the Common Law World* (The Federation Press, Sydney, 2008) 104 at 107.

34 *Refugee Appeal No 72668/01* [2002] NZAR 649 (RSAA) at [45].

[39] Standards of persuasion that apply to ordinary judicial proceedings do not provide helpful comparisons or analogies in applying the standard. Article 1F is not concerned with individual accountability of applicants but with whether they are excluded from refugee status under the Convention. This is consistent with the inquisitorial nature of the role of the Authority. The "serious reasons to consider" standard must be applied on its own terms read in the Convention context. As Sedley LJ has observed, in a passage approved by the United Kingdom Supreme Court, art 1F:[35]

> ... clearly sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.

Application of art 1F:

(a) Factual conclusions

[40] In this case the Authority tested the credibility of the respondent's evidence by questioning him and assessing his answers against wide ranging information it had gathered concerning the internal conflict in Sri Lanka. The assessment also took into account the statement of the oiler who was a member of the *Yahata's* crew on its last voyage. That man acknowledged that he had known the *Yahata* was carrying arms and explosives for the Tamil Tigers on that voyage and that he had proved himself a loyal and dedicated member of the Tamil Tigers before coming on board the *Yahata*.

[41] In the Court of Appeal, Hammond J and Arnold J both accepted that the appeal should be decided on the basis of the Authority's factual findings. Mr Harrison QC for the respondent has, however, challenged them in this Court, adopting and relying on critical comments made by Baragwanath J.[36]

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35 In *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, (2009) Imm AR 624 at [33], cited in *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2010] 2 WLR 766 at [39] per Lord Brown JSC.

36 At [288]–[307].

[42] Baragwanath J considered that the Authority's finding that 110 tonnes of armaments had been loaded on the vessel for its final voyage was based on unreliable evidence. As well, he said, it was not established that the respondent knew the Tamil Tigers owned the vessel before the last voyage. His Honour declined to accept that the Tamil Tigers would not have appointed the respondent to be the Chief Engineer unless he had previously proved to the organisation that he could be trusted with that level of responsibility.

[43] Disagreeing with Baragwanath J, we see no basis for any departure from the approach of the Authority to fact finding in this case. The Authority's approach was a straightforward application of its specialised function to test and evaluate the primary evidence in the course of the inquisitorial process required by the Act. That involved the application of the standard set by the "serious reasons to consider" test in art 1F of the Convention as required. The Authority's method recognises that the Convention places on an applicant the responsibility of establishing a claim to refugee status, which will include, when the circumstances raise the issue, establishing that an applicant is not excluded by art 1F.

[44] The inapplicability of rules of evidence gives the Authority a broad discretion as to what material it obtains and uses in its consideration of a claim. A realistic and careful approach to that material must be taken by the Authority, having regard to the evidential gaps and other difficulties that refugee claimants face in making out their claims. A proper analysis and evaluation is required, in the course of which a legitimate and important consideration will often be whether what the applicant says in evidence relevant to his or her status is credible and plausible in the circumstances. In reaching factual conclusions the Authority must usually assess the credibility of those giving evidence. This will itself often require evaluation of the reliability and value of independent sources of information relevant to that credibility that come before the Authority. The overall factual assessment on art 1F issues is in the end to be made on the "serious reasons to consider" standard stipulated by the Convention.

[45] We are satisfied that the Authority's factual evaluation in this case was in accordance with the required approach which we have identified. In the absence of a

right of appeal, it is not the role of a court in a judicial review proceeding to undertake a broad reappraisal of the factual findings of the Tribunal. We are satisfied that the Authority's factual findings were within its powers in that evidence was available to support its factual conclusions, and it has not been shown those findings were unreasonable. Indeed, they seem well justified.

(b) Complicity in a crime against humanity

[46] The Authority's findings of the respondent's involvement in supporting Tamil Tigers' operations were largely based on the circumstances of the final voyage of the *Yahata*. The Authority apparently accepted that it had not been shown that he was implicated in any armaments and munitions shipments by the *Yahata* during the earlier period of his engagement. The general information it had obtained indicated that 95 per cent of the operations of such ships involved legitimate commercial activity. The next matter to consider is whether on the factual conclusions there are serious reasons for considering that the respondent had committed a "crime against humanity".[37]

[47] Under art 1F(a), the meaning of "crime against humanity" must be ascertained from definitions in international instruments drawn up to make provision for such a crime. As the United Kingdom Supreme Court has recently pointed out, the sources for ascertaining that meaning are not confined to international instruments existing at the time of making of the Convention.[38] As earlier mentioned, the Rome Statute of the International Criminal Court, which came into force on 1 July 2002, is a recent international instrument which directly addresses the principles that govern liability for international crimes including those of particular relevance to this case. It is appropriate to refer to it for authoritative assistance on what is a "crime against humanity".

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37 While the area covered by war crimes and crimes against humanity can overlap, it is sufficient to decide this case solely on the issue of whether a crime against humanity was committed.

38 *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2010] 2 WLR 766 at [2].

[48] Article 7 of the Rome Statute defines "crimes against humanity" as meaning any of the listed proscribed criminal acts, including murder, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[39] An "[a]ttack directed against any civilian population" means a course of conduct involving the multiple commission of the proscribed acts against a civilian population pursuant to or in furtherance of a state or organisational policy to commit such attack.[40]

[49] In its decision, the Authority summarised more than 20 instances of attacks by the Tamil Tigers between May 1985 and April 1996, mostly against groups of civilians. In the instances of Tamil Tiger crimes cited by the Authority, the common underlying offence is the proscribed act of murder. It is plain that those who were directly involved caused death and intended to do so. Both physical and mental elements of the underlying proscribed act of a crime against humanity committed by the perpetrators are made out in these instances. It is also plain that the instances concerned demonstrate a course of conduct involving multiple proscribed acts of violence by the perpetrators in furtherance of the Tamil Tigers' policy of committing such attacks. The acts were part of an attack that was widespread because of the scale, frequency and seriousness of the incidents involving a multiplicity of victims. It was systematic because the incidents were part of an organised and regular pattern of violence. Further analysis is not required of the underlying acts by the Tamil Tigers. There has been no dispute in this proceeding that they constituted crimes against humanity.

[50] The Crown next contends that the respondent has himself committed crimes against humanity within art 1F(a) of the Convention because of his complicity in these crimes of the Tamil Tigers. The Crown accepted in this Court that the respondent's conduct fell short of being an attempt in terms of art 25.3(f) of the Rome Statute.

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39 Article 7.1.
40 Article 7.2(a).

[51] It is well established that a person may commit crimes against humanity as an accomplice without personally undertaking the criminal acts effecting such crimes. What, however, has long been uncertain is the degree to which the person must be complicit in the perpetrator's actions to become liable as an accomplice for such an international crime.

[52] Articles 25 and 30 of the Rome Statute prescribe when persons have individual criminal responsibility. Article 25.3, relevantly, provides in relation to complicit liability:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> ...
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> ...

[53] Article 25 must be read with art 30 which addresses the necessary mental element and provides:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

[54] Individual criminal responsibility under art 25.3(d) articulates a concept of joint enterprise liability in response to the complexity often found when acts which are international crimes are committed by a group or groups of persons, each playing different roles. Joint criminal enterprise liability is a form of liability which covers all such participants in a common criminal plan. Under it, all those taking part in such a plan, being aware of its purpose and character and sharing criminal intent, will be liable.[41] This form of liability is drawn from principles of national and international case law which crystallised as customary international law in the post-World War II period. The leading modern international law authority on joint criminal enterprise is *Prosecutor v Tadic*,[42] where the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia synthesised the post-World War II domestic and international jurisprudence.

[55] Professor Cassese emphasises that this is a form of criminal liability rather than itself constituting a crime. The doctrine ensures that "individual culpability is not obscured in the fog of collective criminality and accountability evaded."[43] Professor Cassese identifies three categories of joint criminal enterprise liability:[44]

> (1) a "basic" form where all participants acted pursuant to a common design and possessed intent to commit the crime, even if each participant carried out a different role and offered varying levels of contribution;
>
> (2) a "systemic" form – essentially a variant of the first category applicable to detention and concentration camp cases – and
>
> (3) an "extended" form ensuring accountability where another perpetrator commits a crime that, though outside the common design, was a natural and foreseeable consequence of effecting the common purpose.

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41 Antonio Cassese *International Criminal Law* (2nd ed, Oxford University Press, Oxford, 2008) at 190–191.

42 *Prosecutor v Tadic* (ICTY, Appeals Chamber) 38 ILM 1518 (1999) at [185]–[229].

43 Antonio Cassesse "Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine" (2009) 20 Criminal Law Forum 289 at 294. Professor Cassesse was a member of the ICTY Appeals Chamber panel which decided *Tadic*.

44 Ibid, at 295.

[56] The present case involves the third category of responsibility which Professor Cassese says:[45]

> ... concerns those participants who agree to the main goal ... but do not share the intent that one or more members of the group entertain to also commit crimes incidental to the main concerted crime ... This mode of liability only arises if the participant, who did not have the intent to commit the "incidental" offence, was nevertheless in a position to foresee its commission and willingly took the risk.

[57] The third category of joint criminal enterprise is justified by considerations of public policy. There is a "need to protect society against persons who band together to engage in criminal enterprises and who persist in their criminal conduct though they foresee that more serious crimes outside the common enterprise may be committed".[46] In a domestic context, Lord Steyn[47] has recognised that the criminal culpability lies in participating in the criminal enterprise foreseeing that another may commit a criminal act. He observed:[48]

> Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed.

[58] A line of Canadian Federal Court of Appeal authority addressing art 1F attempted to define what was necessary to give rise to joint enterprise liability beyond formal membership of, or an association with, an organisation that is engaged in committing international crimes.

[59] In 1992 that Court, in *Ramirez v Canada (Minister of Employment and Immigration)*,[49] expressed the test for joint enterprise (or complicit) liability in terms of crimes involving "a shared common purpose and the knowledge that all of the parties in question may have of it". In 1996 the same Court, in *Bazargan v Canada (Minister of Citizenship and Immigration)*, elaborated:[50]

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45 Ibid, at 297.
46 Ibid, at 327.
47 In *R v Powell (Anthony)* [1999] 1 AC 1 (HL) at 12–13.
48 At 14.
49 *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173 (FCA) at 180 per MacGuigan JA.
50 *Bazargan v Canada (Minister of Citizenship and Immigration)* (1996) 205 NR 282 (FCA) at [11] per Decary J.

> In our view, it goes without saying that "personal and knowing participation" can be direct or indirect and does not require formal membership in the organization that is ultimately engaged in the condemned activities. It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization. ... Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.

[60] In *Sumaida v Canada (Minister of Citizenship and Immigration)*,[51] the Federal Court of Appeal held that liability on the basis of complicity did not require a causal connection with particular acts of the principal perpetrator of the international crimes. In the international law context, there was no requirement that the crimes committed by an organisation be necessarily and directly attributable to specific acts or omissions of the person concerned.

[61] The Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*,[52] referring to international jurisprudence, held that it was "well settled" that an accused must have knowledge of the event constituting the crime and must know that his or her acts comprise part of that event or at least take the risk that his or her acts will comprise part of it.[53]

[62] It was on the basis of this line of cases that the Authority held that the respondent's actions amounted to complicity in the crimes against humanity committed by the Tamil Tigers. The High Court also relied on these cases.

[63] The Court of Appeal was of the view that the participation of the respondent in the final voyage of the *Yahata*, knowing of the real possibility that its cargo of armaments and explosives would be used against civilians, fell short of making the respondent complicit in a crime against humanity. It was not sufficient that the respondent knew the weapons were as likely as not to be used for that purpose.[54]

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51 *Sumaida v Canada (Minister of Citizenship and Immigration)* (2000) 183 DLR (4th) 713 (FCA).

52 *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40, [2005] 2 SCR 100.

53 At [173] and [176], citing jurisprudence from the International Criminal Tribunals of Yugoslavia and Rwanda.

54 As found by the Refugee Status Appeals Authority, at [65].

[64] In his reasons in the Court of Appeal Hammond J adopted the approach taken to joint enterprise liability under art 25.3(d) of the Rome Statute by Toulson LJ in the Court of Appeal of England and Wales in *R* (*JS (Sri Lanka)) v Secretary of State for the Home Department*.[55] In determining whether there were serious reasons to consider that a claimant had committed an international crime under art 1F(a) it had to be established whether the claimant had participated in the furtherance of a joint criminal purpose in a way that made a significant contribution to a common design involving commission of such a crime. Becoming a member of an organisation that was involved in such crimes, and participating in military actions against the government, was not on its own enough. Rather, there had to be serious reasons for considering that the claimant was a party to the design who had participated in furthering the joint criminal purpose, making a significant contribution to the commission of the crime.

[65] Arnold J agreed with Hammond J. Both concluded that the Authority's findings concerning the participation of the respondent on the last voyage did not meet the requirement for joint enterprise liability of the respondent in relation to intention to further a crime under the Rome Statute. In particular, it was not shown that the respondent's participation was with the intention of furthering a crime against humanity.

[66] Since the Court of Appeal's judgment in this case the Supreme Court of the United Kingdom has delivered judgment in an appeal by the Crown against the English Court of Appeal's judgment in *R (JS (Sri Lanka))*.[56] While agreeing with much of the lower Court's judgment, the Supreme Court differed from it on aspects of joint enterprise liability that are directly relevant to the respondent's position.

[67] In the leading judgment, Lord Brown JSC said that Toulson LJ's approach had been too narrow in its approach to joint enterprise liability. It was not necessary to show that the claimant was engaged in a criminal enterprise of a kind that would lead to conviction under domestic criminal law. The focus should rather be on the

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55 *R* (*JS (Sri Lanka)) v Secretary of State for the Home Department* [2009] EWCA Civ 364, [2010] 2 WLR 17.

56 *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2010] 2 WLR 766.

wider concept of common design such as the accomplishment of an organisation's purpose by whatever means are necessary, including the commission of crimes covered by art 1F:[57]

> Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.

[68] In expressing his agreement generally, and with this passage in particular, Lord Hope DPSC emphasised the words "in a significant way" and "will in fact further that purpose".[58] Joint enterprise liability under the Rome Statute did not require participation in the criminal act. The Deputy President[59] adopted a passage in a judgment of the German Federal Administrative Court[60] in further explanation of the underlying concept:[61]

> Thus the person seeking protection need not have committed the serious non-political crime himself, but he must be personally responsible for it. This must in general be assumed if a person has committed the crime personally, or made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct ... Thus this principle covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities.

Both Lord Brown and Lord Hope emphasised the importance of the facts of each case and of evidence of actual involvement of the claimant, rather than an assumption of it derived from membership of the organisation perpetrating the crimes.[62] Lord Kerr JSC made similar observations, referring to the need to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.[63]

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57 At [38].
58 At [49].
59 At [47]–[48].
60 Germany's Supreme Administrative Court.
61 *Bayerischer Verwaltungsgerichtshof* (Case No 10C 48.07) 14 October 2008, at [21].
62 At [29]–[30] per Lord Brown and [44] per Lord Hope.
63 At [55].

[69] Lord Brown saw the requirement of a mental element for joint enterprise liability under art 25 as:[64]

> ... defin[ing] mens rea in a way which recognises that, when the accused is participating in (in the sense of assisting in or contributing to) a common plan or purpose, not necessarily to commit any specific or identifiable crime but to further the organisation's aims by committing article 1F crimes generally, no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission.

[70] We agree with these observations. Refugee status decision-makers should adopt the same approach to the application of joint enterprise liability principles when ascertaining if there are serious reasons to consider that a claimant seeking recognition of refugee status has committed a crime or an act within art 1F through being complicit in such crimes or acts perpetrated by others. That approach fully reflects the principle that those who contribute significantly to the commission of an international crime with the stipulated intention, although not direct perpetrators of it, are personally responsible for the crime. This principle is now expressed in arts 25 and 30 of the Rome Statute and was earlier well established in customary international law. Its application recognises the importance of domestic courts endeavouring to develop and maintain a common approach to the meaning of the language of an international instrument which is given effect as domestic law in numerous jurisdictions of state parties.

(c) Was any crime against humanity committed?

[71] We return to the Authority's findings of fact in relation to the respondent's conduct as Chief Engineer of the *Yahata* during its last voyage, thereby being prepared to contribute to criminal activities of the Tamil Tigers within art 1F. At all times he knew the vessel was transporting its cargo of armaments and munitions for use by the Tamil Tigers. By applying his expertise in a pivotal role for the voyage he was making a significant contribution to the Tamil Tigers' activities. He knew of the crimes against humanity that were being committed by that organisation and must have foreseen the likelihood that the arms, if delivered, would be used by the Tamil Tigers to commit future offences. His assistance, albeit in advance of

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64 At [37].

operations, would further that purpose. It matters not on a test based on joint criminal enterprise principles that the actual cargo for the voyage might equally have been used only for legitimate purposes in military operations. The respondent took the risk that the armaments would be used to commit a crime against humanity. The Authority was entitled to hold that all this established the necessary elements of the respondent's personal responsibility as part of a joint criminal enterprise under arts 25 and 30 of the Rome Statute.

[72] It does not, however, necessarily follow from this reasoning that the respondent has actually committed crimes against humanity. The difficulty lies in identifying criminal acts of the Tamil Tigers in which his conduct made him complicit.

[73] The Authority's findings concerned the Tamil Tigers' criminal operations undertaken between May 1985 and April 1996. This includes the periods before and after the last voyage of the *Yahata* which took place between 4 and 16 January 1993. No findings were made concerning the earlier period of six months that the respondent spent on the *Yahata*. It is not appropriate for this Court to reach conclusions concerning this period. As to the last voyage, the munitions and armaments on board the *Yahata* were all destroyed, along with the vessel, on 16 January 1993. The support given to the Tamil Tigers' operations by the respondent during the last voyage did not result in any actual use of the weapons concerned, let alone for any proscribed purpose.

[74] In his submissions for the Attorney-General, Mr Carter relied on passages in the Supreme Court's judgment in *R (JS (Sri Lanka))*,[65] but these were addressed to elements of an accomplice's conduct giving rise to joint enterprise liability. They were not addressed to the acts of the principal perpetrator with which the accomplice was said to be associated.

[75] It is inherent in the notion of criminal complicity that liability arises only once a primary criminal act has been committed, with which the accomplice has

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[65] Principally at [37]–[39] of Lord Brown's judgment.

become associated by reason of his or her conduct.[66] There must be "a predicate offence committed by someone other than the accomplice",[67] whose conduct itself will not usually amount to an autonomous separate crime, because its criminality lies in facilitating the criminal enterprise of another. This reflects the general position in domestic criminal law where an accomplice's acts are not usually criminal in themselves and become so only because they made the accomplice a party to the principal's completed crime.

[76] As Mr Harrison QC, for the respondent, pointed out, the concept of joint enterprise liability being for a completed offence committed by someone other than the accomplice is reflected in the language of art 25.3(d) of the Rome Statute. That provision is expansive in relation to modes of participation stipulated in preceding sub-paragraphs. It speaks of "[i]n *any other way* contribut[ing] to the commission or attempted commission of such a crime".[68] But the latter part of that phrase requires that some crime has been committed or attempted. Had those drafting the Rome Statute been of a mind to expand joint enterprise liability to catch conduct where an actual or attempted crime does not eventuate, they could easily have provided for that in art 25.3(d). They did not do so. Nothing equivalent to the common law crime of conspiracy is included in the Rome Statute.

[77] Both the Authority and Courtney J saw it as sufficient that the respondent was complicit in the Tamil Tigers' crimes generally committed. The respondent's assistance during the last voyage, knowing that the *Yahata* carried explosives and weapons likely to be used against civilians, sufficed.

[78] While the *Yahata* may have provided support for the ability of the Tamil Tigers to commit crimes over the period prior to its last voyage, we are not satisfied that on the Authority's findings there are serious reasons to believe the respondent provided support prior to the last voyage. His conduct during the last voyage, while

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66 See the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Brdjanin* Case No IT-99-36-A, 3 April 2007 (ICTY, Appeals Chamber) at [430] and the decisions of the International Criminal Tribunal for Rwanda in *Prosecutor v Akayesu* Case No ICTR-96-4-T2, (1998) 9 IHRR 608 at [528]–[530] and *Prosecutor v Musema* Case No ICTR-96-13-T 27 January 2000 at [170]–[173].

67 *Prosecutor v Akayesu* Case No ICTR-96-4-T2, (1998) 9 IHRR 608 at [529].

68 Emphasis added.

capable of doing so, is not shown to have supported the commission of any completed crimes covered by art 1F(a).

[79] Although joint enterprise liability makes liable those who contribute to the commission of crimes by assisting or contributing to a common plan or purpose, it is concerned with holding responsible those who in that way contribute to crimes that are actually committed. The link between the respondent's conduct on the *Yahata* in 1993 and crimes committed or attempted between 1985 and 1996 is too tenuous to provide serious reasons for considering he was complicit in that offending. Had it been shown that he participated in voyages where armaments were delivered to the Tamil Tigers in Sri Lanka and subsequently that organisation committed crimes against humanity, the position would be different.

[80] But as the evidence stands it must follow that the respondent is not disqualified from being a refugee by virtue of art 1F(a) of the Refugee Convention.

(d) Were serious non-political crimes committed?

[81] Under art 1F(b) of the Convention the respondent is excluded from holding refugee status if he committed a serious non-political crime before coming to New Zealand as the country of refuge. The conduct in issue is the actions of those on the *Yahata* involved in the scuttling of the vessel. The Crown's submission is that there are serious reasons for considering that the respondent was a party to or complicit in those crimes. It is not in dispute that the destruction of the vessel was a serious crime. The issues in this part of the appeal are whether that criminal action was of a political nature and whether the respondent was shown to have been complicit in it.

[82] In excluding from refugee status those who have committed a serious non-political crime, art 1F(b) reflects two Convention purposes. The first is to ensure those who commit serious non-political crimes do not avoid legitimate prosecution by availing themselves of Convention protection. The language of the provision cannot, however, be read as confining exclusion to those who are fugitives from justice. A further purpose is to protect the security of states in which refuge is

sought by providing an exception from Convention obligations in respect of those with a propensity to commit serious non-political crimes.[69]

[83] The Authority found that the appellant was party to the intentional destruction by fire of a vessel carrying explosives in circumstances where danger to the lives of those on board the nearby Indian naval and coastguard vessels was likely.[70] Other findings concerning the firing of weapons at the Indian vessels from the *Yahata* were not relied on in the Authority's determination that the respondent had committed a serious non-political crime.

[84] There is no doubt that, if the Authority's factual findings concerning the destruction of the *Yahata* are upheld, there were crimes committed which were serious crimes in terms of art 1F(b). The respondent was held to be implicated in the deliberate burning of the vessel, putting others in great danger. The serious criminal nature of the conduct has not been an issue in the appeal or earlier in the proceedings. The real issue on this part of the appeal arises from the Crown's contention that the Court of Appeal was in error in concluding both that the crimes were political and that the respondent had not been implicated in the criminal conduct.

[85] Extradition law has had a political crimes exception since the nineteenth century. It was developed in many countries through inclusion of provisions in bilateral extradition treaties. Historically, states often wanted to have flexibility in cases where a request by another state for extradition to enforce its criminal law might be seen as a pretext for persecution of a political dissident by an unfair trial and/or excessive punishment. This exception from the obligation to extradite reflected the respect felt in many countries for those who sought refuge from dictatorships, even if the political crimes they had committed were serious.[71] Historically, it was also seen as generally unlikely that in the different political situation of the country of asylum the dissidents would repeat their criminal conduct.

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69 *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7, (2002) 209 CLR 533 at [15] per Gleeson CJ.

70 At [140]–[142].

71 *T v Immigration Officer* [1996] AC 742 (HL) at 752–753 per Lord Mustill.

[86] Courts have frequently drawn on extradition law over the years to determine what is a non-political crime. But it should not be thought that the Refugee Convention was simply adopting that concept in its historic form in art 1F. By 1951 the romantic perception of the refugee who had committed serious crimes was out of date and it was recognised that:[72]

> Not all refugees were worthy of compassion and support. As article 1F of the Convention recognised, war criminals and offenders against the law of nations could properly be sent home to answer for their crimes, and there were others whose criminal habits made it unreasonable for them to be forced on to a host national against its will.

[87] Extradition involves a process of removal under statutory powers on the application of a foreign government. The process is in accordance with a treaty. There is nothing in the text of the Convention that refers to extradition law or indicates an intention that a non-political crime under art 1F(b) is the same concept. There is no definition of when a serious crime is "non-political". The focus of the Convention is on the seriousness of the crime as well as whether it was of a non-political nature. It is not on whether particular conduct could be the subject of extradition proceedings.[73] Nor is the gravity of the offending to be balanced against the risk of persecution if the claimant is returned home.[74]

[88] Bearing in mind the wider purposes of the Convention, overseas jurisdictions and academic commentators have not given the concept of a "serious non-political crime" a broad meaning that would catch all serious criminal offending which had some element of political motivation. In this respect, valuable guidance on whether a crime is political has been given by Professor Goodwin-Gill in a passage often cited by courts applying art 1F:[75]

> The nature and purpose of the offence require examination, including whether it was committed out of genuine political motives or merely for personal reasons or gain, whether it was directed towards a modification of the political organization or the very structure of the State, and whether there

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72 Ibid, at 761.

73 *Zrig v Canada (Minister of Citizenship and Immigration)* (2003) 229 DLR (4th) 235 (FCA) at [67] and [126].

74 *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 (CA) at 297.

75 Guy Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007) at 177. This passage is cited in *T v Immigration Officer* [1996] AC 742 (HL) at 784 by Lord Lloyd and in *McMullen v Immigration and Naturalization Service* 788 F 2d 591 (9th Cir 1986) per Circuit Judge Wallace.

> is a close and direct causal link between the crime committed and its alleged political purpose and object. The political element should in principle outweigh the common law character of the offence, which may not be the case if the acts committed are grossly disproportionate to the objective, or are of an atrocious or barbarous nature.

[89] To similar effect is Lord Lloyd's description of a political crime in *T v Immigration Officer*:[76]

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

[90] How the context, methods, motivation and proportionality of a crime relate to a claimant's political objectives are accordingly all important in determination of whether a serious crime committed by a claimant was of a political nature. This requires an exercise of judgment on whether, in all the circumstances, the character of the offending is predominantly political or is rather that of an ordinary common law crime.

[91] In the course of this evaluation by decision-makers in New Zealand it must, however, be borne in mind that while politically motivated violent crime is not part of our history, violence has been an incident of political action in many other countries. As Kirby J has pointed out:[77]

> The Convention was intended to operate in a wider world. It was adopted to address the realities of "political crimes" in societies quite different from our own. What is a "political crime" must be judged, not in the context of the institutions of the typical "country of refuge" but, on the contrary, in the circumstances of the typical country from which applicants for refugee status derive.

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[76] *T v Immigration Officer* [1996] AC 742 (HL) at 786–787.

[77] *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7, (2002) 209 CLR 533 at [106] per Kirby J. See also Gleeson CJ at [16].

[92] At all relevant times the Tamil Tigers was an organisation having the goals of self-determination for Tamils and securing an independent Tamil state in northeast Sri Lanka. The principal objective was to induce the government of Sri Lanka to concede such political change. These characteristics made the Tamil Tigers a political organisation notwithstanding its use, at times, of proscribed methods of advancing its cause. That much is not in dispute.

[93] The respondent's motivation in becoming involved in the Tamil Tigers' activities was plainly to give his support to that organisation's political objectives. He provided it with the benefit of his practical experience as a marine engineer to facilitate the moving of munitions into Sri Lanka for the benefit of the Tamil Tigers' operations.

[94] The criminal conduct in issue took place in the course of a voyage intended to support the armed capacity of the Tamil Tigers. It involved the deliberate and illegal scuttling of the *Yahata* while laden with munitions. We can disregard the earlier firing upon the Indian vessels as there is no finding the respondent was implicated in that. The respondent was found by the Authority to be implicated as a party to the intentional destruction but not to have the same culpability as the primary offenders who were members of the military unit led by Kittu.

[95] The Authority found that the destruction endangered the lives of the Indian sailors. They were of course from a different nation to that which was the target of the Tamil Tigers' operations and the engagement with them was, no doubt, not part of the original intention of the Tamil Tigers in relation to the *Yahata's* voyage. But while the sailors were put in danger, the criminal conduct to which the respondent was found to be a party did not involve and cannot be equated to indiscriminate violence against civilians which would make the link between the criminal conduct and any overall political purpose too remote.

[96] The Authority decided that the act of destruction of the vessel and its cargo was committed to prevent its seizure by the Indian authorities. The Authority also considered that this made the criminal conduct non-political. But the purpose of transporting munitions on the *Yahata* should properly be regarded as directed to

securing the political aims of the Tamil Tigers. Being a party to the act of destruction to prevent their seizure by Indian authorities unsympathetic to the Tamil Tigers must be seen as sufficiently connected to the political aims to be within them. The scuttling was not an act of an indiscriminate kind such as should be regarded as separating that link.

[97] In these circumstances we are satisfied that the connection between the respondent's crimes and the political purposes he sought to serve was sufficient to result in his crimes being of a political nature.

[98] It is therefore unnecessary to go on to address the question of whether the Authority's factual finding that the respondent was implicated in the acts of destruction was justified. The Court of Appeal took the view it was not, differing from the High Court. Courtney J in her judgment had expressed concerns over aspects the Supreme Court of India's reasoning in convicting the respondent and other crew members, saying:[78]

> There was no attempt at all to consider the position of any individual accused. If there was evidence, one might have expected some reference to it, given the careful consideration given to other aspects of the evidence. If there was no evidence one might reasonably expect some reference to that fact and an explanation as to why the accused were all to be nevertheless regarded as equally culpable. Secondly, whilst judges can be expected to apply the criminal standard without necessarily re-stating it, it is of concern that the Court's conclusion was expressed in terms contrary to the criminal standard.

[99] The Court of Appeal agreed with this criticism. It held that on the facts it was not established that the respondent was implicated. The approach of Courtney J correctly recognised, however, that the Supreme Court of India's decision was evidence that the respondent had committed serious crimes which the Authority was entitled to take into account. The finding of that Court was not determinative of the question before the Authority but, as evidence, it had to be assessed against the art 1F standard. Also relevant to this issue was that the respondent was a supporter of the Tamil Tigers on board the *Yahata* and aware of its cargo.

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78 At [98].

[100] Courtney J's approach was accordingly correct. But, as we have decided that any offence committed was a political one, it is not necessary for us to decide whether the conclusion reached by the Authority was supportable.

Conclusion

[101] We conclude that the respondent was not shown to be excluded from refugee status under art 1F(a) and (b). The appeal is accordingly dismissed with the result that the respondent's application for refugee status will now be remitted to the Authority for further consideration. We see no reason why either member of the panel, if otherwise eligible, should not participate in the Authority's resumed consideration of the matter. Otherwise, reconsideration should be in accordance with the Court of Appeal's order.

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