IN THE SUPREME COURT OF NEW ZEALAND SC 107/2009

BETWEEN **ATTORNEY-GENERAL**
(MINISTER OF IMMIGRATION)
Appellant

AND **X**
First Respondent

AND **REFUGEE STATUS APPEALS AUTHORITY**
Second Respondent

AND **Y**
Third Respondent

Hearing: 10 June 2010

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Appearances: I Carter and R Kirkness for the Appellants
R E Harrison QC with C S Henry for the First Respondent

CIVIL APPEAL

MR CARTER:

As the Court pleases. Mr Carter appearing for the appellant and with me Mr Kirkness.

ELIAS CJ:

Thank you Mr Carter, Mr Kirkness.

MR HARRISON QC:

As Your Honours please, I appear for the first respondent with my learned friend Mr Henry.

ELIAS CJ:

Thank you Mr Harrison, Mr Henry. Yes Mr Carter?

MR CARTER:

Thank you Your Honour. There are just one or two housekeeping matters to tidy up with at the beginning. One is to renew the orders prohibiting publication of identifying particulars of both X and Y in this Court so we're covered up to this point by orders of the Court of Appeal which are set out on the front of the appellant's submissions. But because also there is a number of identifying details and particulars throughout the Court file, not only in relation to X and Y, but also in relation to a particular refugee decision in the first respondent's bundle of authorities, the parties have conferred and request an order that the Court file not be searched without leave of the Court.

ELIAS CJ:

All right. Well we'll make those orders for now but it may be that we'd want to review the reasons why the Court file shouldn't be searched. Which references are you particularly concerned about Mr Carter?

MR CARTER:

Well there's all the detail of the evidence that was before the Refugee Status Appeals Authority –

ELIAS CJ:

Oh I see, yes.

MR CARTER:

Which comprises I think at least two volumes of the case on appeal and also there's a particular, as I mentioned, a particular decision relied on by the first respondent at tab 8 of the first respondent's authorities and that decision is not published at all, even in anonymised form, there's just the – on the Refugee Status Appeals Authority website there is simply the briefest of summaries of two or three sentences and that is because of the particular circumstances of that particular case.

ELIAS CJ:

Well we'll make the order for non-publication of the names or identities of X and Y and an order that the Court file not be searched without leave.

MR CARTER:

Yes Your Honour, particulars identifying might be –

ELIAS CJ:

Particulars identifying yes, indeed, thank you.

MR CARTER:

Now there's also just one or two things to repair in the appellant's bundle of authorities handed up to Your Honours with copies provided to my friends this morning is a complete copy of articles 30 to 32 of Vienna Convention on the Law of Treaties, we were missing a page from the bundle, a United States case of *McMullen v Immigration and Naturalization Service* [1981] 685 F 2d 1312 (Ninth Circuit) (CA), which goes in at tab 29, volume 2, and we simply put the wrong case in the original volume. And we've also handed up a copy of a recent decision of the Extraordinary Chambers in the Courts of Cambodia which – the reason for providing that to the Court is that the Chamber basically adopts the views expressed in Professor Cassese's Amicus Curiae brief which is included in the appellant's volumes of authorities.

ELIAS CJ:

Yes, thank you.

MR CARTER:

Well as the Court pleases. A Sri Lankan organisation called the LTTE figures prominently in this appeal. The LTTE is the Liberation Tamil Tigers of Eelam which in approximately 1983 was the dominant Tamil rebel group fighting the Sri Lankan government to establish an independent Tamil state known as Eelam in the North East of Sri Lanka. From approximately 1985 until its defeat last year the LTTE consistently engaged in systematically murdering civilians, deliberately bombing civilian targets and murdering police officers and members of the armed forces in their custody and that's described in the challenged decision in this appeal, the Refugee Status Appeals Authority decision.

This appeal concerns X who is a Sri Lankan national and whether his involvement with the LTTE constitutes grounds for excluding him from refugee status. X claims refugee status on the basis that if he returns to Sri Lanka there is a real chance that he would be persecuted by Sri Lankan government authorities by reason of his publicised involvement as chief engineer as the LTTE vessel *Yahata* which sank off the Indian coast in mid-January 1993 carrying arms and explosives following interception by the Indian navy. X also claims that if he returns to Sri Lanka the LTTE will pressure him into assisting the LTTE in the future and X's case for refugee status is that should he refuse he will be harmed by the LTTE. Should he agree he will increase the risk of coming to harm from Sri Lankan government authorities.

X challenges the Refugee Status Appeals Authority decision which rejected his claim for refugee status in New Zealand on the basis that he was excluded from protection as a refugee by articles 1F(a) and (b) of the Refugee Convention. This in terms by reason of X's six month involvement as chief engineer of the LTTE vessel *Yahata* which carried cargo including arms and explosives that would assist the LTTE in committing international crimes. The Authority found that X's involvement was voluntary and that X knew that the *Yahata* was a LTTE vessel. X knew what cargo it carried including arms and explosives and that it would assist the LTTE in committing international crimes. On this basis the Authority concluded that X was complicit in the LTTE's activities of committing international crimes by murdering civilians and police officers. The Authority excluded X from refugee protection because either there were serious reasons for considering that X had committed a war crime or crime against humanity or there were serious reasons for considering that X had committed a serious non-political crime before coming to New Zealand. There was considerable evidence before the Authority, accepted by the High Court and the Court of Appeal, that the LTTE had committed war crimes and crimes against humanity during the period from 1985 and July 1992 when X joined the *Yahata* as chief engineer and that X knew of these crimes. The appeal turns on the correct interpretation of the exclusion provision in article 1F(a) and (b) of the Refugee Convention and whether it was open to the Authority to conclude that X's level of involvement with the LTTE was sufficient to find X complicit in that organisation's war crimes or crimes against humanity, or that X had committed serious non-political crime.

At this point, following that introduction, I was proposing to address key features of the appellant's written submissions in the order that the submissions are written. I have set out in some detail the facts as found by the Authority in arriving at its determination. I won't go through them all but among them the key findings were that the – during the period in question, the LTTE was a terrorist organisation which used terror tactics to eliminate virtually all who opposed it, including widespread human rights abuses involving deliberate targeting of innocent civilians and the bombing of civilian targets. That the LTTE operated a fleet of at least 10 freighters, which tended to be crewed by Tamils originating from the north-eastern seaport of Valvettithurai, which X was born and lived for at least 20 years. The LTTE was partly funded by profit-making businesses such as shipping, and for 95 percent of the time the LTTE shipping fleet transported legitimate commercial goods. But for the remaining 5 percent they played a vital role in supplying explosives, arms, ammunitions and other war-related material to the LTTE.

X was employed as a chief engineer on the *Yahata.* He boarded it, that's the *Yahata,* in Phuket on the 5th of July 1992. The crew of the *Yahata* was a relatively small vessel, comprised nine persons including X, most if not all the nine crew members came from, or near, Valvettithurai.

On or about the 4th of January 1993 at Phuket, cargo was loaded from trawlers onto the *Yahata*, comprising 110 tonnes of explosives and arms of various descriptions. During the loading 10 persons boarded from one of the trawlers. The 10 passengers were members of the LTTE and included the LTTE's second-in-command, Kittu. Mohan, a low-level crew member and subordinate to X, was a member of the LTTE and knew that the *Yahata* was an LTTE ship carrying arms and 110 tonnes of explosives. The Authority found that X was not telling the truth when he claimed that he did not know that the *Yahata* was an LTTE vessel and did not know the cargo it was carrying, particularly the explosives, at the time the cargo was loaded on 4 January 1993. This necessarily included rejection of X's account of absence of volition with no opportunity to escape the vessel before it was intercepted by the Indian navy and, importantly, the RSAA or the Authority found specifically that X knew that the *Yahata* was involved in the secretive smuggling operations of the LTTE and was dedicated to its aims, objectives and methods. He was on the *Yahata* because he was a trusted member or supporter or the LTTE and was willingly engaged in assisting it to smuggle weapons and explosives into Sri Lanka. He also knew that the weapons and explosives he help smuggle into Sri Lanka would as

likely be used in conventional warfare against the Sri Lankan government, as in perpetrating gross human rights abuses against innocent civilians.

TIPPING J:

I think it's really the key aspect, isn't it, as to whether there was enough evidence for them to draw those inferences?

MR CARTER:

Yes, Sir, it is.

TIPPING J:

On the facts, on the factual matters.

MR CARTER:

On the material that was before the Authority and, bearing in mind the particular nature of refugee decision-making and the inherent limitations on information that is available to it.

TIPPING J:

But if those findings are insecure, the case goes, doesn't it? I'm not positing the view one way or another.

MR CARTER:

Yes, well, if those, yes, if those last findings that I mention –

TIPPING J:

In your paragraph 22 on page 8.

MR CARTER:

Yes, yes, that's correct. But the appellant's position is that there is no permissible way to attack those findings in the circumstances of this case. Essentially, the first respondent's submissions amount, in my submission, to an assertion that there was no evidence before the authority to support those findings and the Authority's adverse credibility determination against X.

Now, I've discussed the nature of refugee decision-making, beginning at paragraph 33 of the appellant's submissions, and highlighted in paragraph 38 the

particular features of refugee decision-making in New Zealand, which brings about some of the limitations on the evidence and information that's available to the Authority or, indeed, any refugee decision-maker, including the general obligation of confidentiality in relation to refugee matters, potential for refugee surplus claims, delays in making enquiries in the country of origin where infrastructure may be unsophisticated, practical difficulties in making enquiries at a distance, corruption, verification difficulties, expense and limited resources. And there are evidentiary voids inherent in the subject matter of its inquiry. The Authority can't seek the high degree of evidentiary certainty which characterises conventional criminal and civil proceedings.

McGRATH J:

Are you at about paragraph 35, Mr Carter?

MR CARTER:

I'm at 39.

McGRATH J:

39, I thought you might have gone past it. I'd just like to take you back to a statement in paragraph 45, at about the fifth line, where you say, "The decision-maker, in addressing exclusion issues, does –

ELIAS CJ:

35.

McGRATH J:

– not determine –

ELIAS CJ:

35?

McGRATH J:

Paragraph 35 of the written submissions, yes. Sorry. You say he doesn't, the decision-maker doesn't determine guilt or innocence. I'd just like to ask you whether that's right and whether your point isn't rather that there is a different standard from the general criminal process as we understand it in domestic law for determining guilt

or innocence. But isn't the actual nature of the determination that's made one of guilt or innocence, albeit under the standard that the Convention states?

MR CARTER:

No, no, Sir, it's not a determination of guilt or innocence, it's a matter of the Authority or other refugee decision-maker determining whether there are serious reasons for considering that one or other crime that is the subject of article 1F of the Convention, whether there are serious reasons for considering that it may have been committed.

McGRATH J:

So you say it's sufficient that the evidence indicates mere possibility, do you?

MR CARTER:

Not mere possibility, the standard that the appellant advances is that formulated by Lord Justice Sedley in the *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222 (CA) case, which that there is a standard set above mere suspicion, but beyond that it is a mistake to try to paraphrase the straightforward language of the Convention.

McGRATH J:

Well, I appreciate we're now right into the heart of what these difficult words mean, but I suppose that is, it's just the way you've formulated it there still does trouble me a little, because while I can understand that the standard is not the normal standard, certainly not of proof, if you like, what we are considering is whether there are serious reasons to consider guilt or innocence of the claimant for refugee status.

MR CARTER:

Well, it certainly is a standard, but it doesn't require a certain determination that there necessarily has been actual committal of offences and actual guilt.

MCGRATH J:

It's your affection for the word 'may' in your submissions, that is causing me a bit of concern. It seems to me to be a word indicating possibility.

MR CARTER:

Well, it's not intended to indicate possibility, which is quite close to the notion of mere suspicion.

MCGRATH J:

Yes.

MR CARTER:

But the Authority has for some time, based on a Canadian authority, applied effectively the test that there's a standard above mere suspicion but lower than the balance of probabilities.

MCGRATH J:

Yes.

MR CARTER:

Civil standard.

MCGRATH J:

I understand what you're saying about the standard but I just wanted to flag that. No doubt you'll take us to the major cases but when we get to them, that will be - that's the question in my mind. I just wanted you to know that.

MR CARTER:

Thank you Sir.

ELIAS CJ:

Where do you, I'm just trying to remember, where do you identify what the crime, you say, against humanity or peace, where do you identify what it is?

MR CARTER:

Well the Authority has identified the crimes against humanity and war crimes in its decision in –

ELIAS CJ:

What paragraphs do you rely on?

MR CARTER:

As to crimes against humanity the Authority refers to the elements at paragraph 123 of its decision.

MCGRATH J:

So where's that? Where are we finding that? I've got a separate copy but I'd like to work now from the case. So where do we find that?

MR CARTER:

It's – the Authority's decision is volume 1, tab 3 of the case on Appeal.

ELIAS CJ:

And para?

MR CARTER:

123. So that's the crimes against, specific crimes against humanity.

TIPPING J:

Well, they're the generic crimes.

ELIAS CJ:

Yes.

MR CARTER:

Yes.

TIPPING J:

They're not particular manifestations of the generic and that's enough as I understand the literature.

MR CARTER:

Yes, that's correct Sir, although the Authority does detail in considerable detail at the beginning of its decision a whole series of specific crimes in paragraph 23, which is a very long list of activity, criminal activity by the LTTE, covering the period from approximately 1985 to 1992 when X was in Sri Lanka, and incidentally each of those specific instances of international crime described, or summarised, in paragraph 23 of the Authority's decision were individually put to X in evidence during the hearing. The Authority, you will recall, prepared a summary of country information that it had compiled itself and supplied that to X, and his counsel and the summary that appears in paragraph 23 reflects the summary supplied to X prior to the hearing and each of

those matters that are detailed, or summarised, in paragraph 23 were put to X and he acknowledged, in relation to each of them, that he knew and was aware that those things had occurred in Sri Lanka.

MCGRATH J:

Now, you're going to give us references because clearly there's so much material. If you want to give us a further statement like that, for my part I'd at least like a record. You don't have to go to the particulars but I would like to know where I should be reading later.

MR CARTER:

Yes, well I can do that now Sir. Now, in volume 2 of the case on appeal, there is at the beginning in tab 16 a summary headed 'timeline' and then a series of subject headings. It was that summary, which includes details of the LTTE criminal actions. That was the focus of questioning in the RSAA hearings and the - because this information was supplied after the end of the first hearing, X and his counsel didn't have it until the second hearing and it was – the information in the summary was carefully put to X in questioning as to whether he accepted it so that, in the transcript of the hearing, the second hearing, which appears in volume 3 at tab 25 on page 961, the Authority puts to X the extract, or extracts, from the Historical Dictionary of Sri Lanka, which is part of – which is set out in the Authority's decision, and X accepts that he agrees with the summary, and beginning at page 963 through to 969, each of the individual criminal acts of the LTTE are put to X and he agrees that he was aware of the actions that are described in summary, summarised in the Authority's own summary.

MCGRATH J:

Thank you.

ELIAS CJ:

Which is the party provision of the Convention? Is there a party provision?

MR CARTER:

As in the sense of party to –

ELIAS CJ:

Adherence –

MR CARTER:

– criminal acts?

ELIAS CJ:

– yes.

MR CARTER:

In the Refugee Convention?

ELIAS CJ:

Yes.

MR CARTER:

There isn't –

ELIAS CJ:

There isn't?

MR CARTER:

There isn't one. The source of – the Refugee Convention refers to various categories of crime as described in international instruments. You go to the international instruments to identify the crimes, the most obvious one being murder of civilians, and the international instruments and customary international law creates party, party liability.

BLANCHARD J:

Can you give us a reference to that?

ELIAS CJ:

Yes. Any that you're relying on.

MR CARTER:

In relation to what creates the liability as a party?

BLANCHARD J:

Yes.

MR CARTER:

What – the principal reliance – well, the source of party liability –

TIPPING J:

Isn't the simplest place to find it the Rome Statute which is in your bundle, volume 1 of 3 authorities and it's tab 1 and it's in that part of it, part 3 which deals with general principles of criminal law and then goes on to define when you're a principal and when you're a party.

MR CARTER:

Well that is one of the sources –

TIPPING J:

One of the better ones if you like or one of the clearer ones.

MR CARTER:

Yes. But as far as, as far as that goes –

TIPPING J:

I know you say that it wasn't in action at the time but it's simply a compilation, isn't it, of accepted international law principles?

MR CARTER:

Yes in terms of party status it is declaratory of –

TIPPING J:

Yes.

MR CARTER:

– customary international law.

TIPPING J:

And everyone agrees with that. For me, anyway, that was the simplest place to find it and I don't know if Mr Harrison disagrees with that or he doesn't.

MR CARTER:

Yes well there have been issues in the history of the case as to timing which is why in the appellant's submissions we've taken some trouble to set out in appendix 2 all the preceding international instruments which also –

TIPPING J:

They're not going to make a difference to this case which one you pick on I wouldn't have thought.

ELIAS CJ:

Well are they relevant? If you're saying that they're simply declaratory of customary international law, do we need to go to it?

MR CARTER:

Well the Rome Statute is, as far as party or accomplice liability is concerned, is declaratory of customary international law and that's in part based on all of these preceding instruments as well but the key for the appellant is the notion of joint criminal enterprise liability which in the *JS (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15, a UK Supreme Court case. The derivation of the principles of joint criminal enterprise liability was based on the Rome Statute but as is explained very clearly in Professor Cassese's Amicus Curiae brief in the Cambodian Tribunal, that is declaratory – the Rome Statute is simply declaratory of international, customary international law and joint criminal enterprise liability has been part of customary international law since at least 1975 and that opinion, expressed by Professor Cassese has been adopted in the Cambodian Tribunal decision that –

ELIAS CJ:

Do we have a copy though of Professor Cassese's opinion?

MR CARTER:

Yes, that's volume 3 of the appellant's bundle of authorities and it may be appropriate to take Your Honours through that now because it was, the Cassese brief was very influential in the *JS* decision but it also gives a very clear, helpful summary of the development of joint criminal enterprise liability in international criminal law.

McGRATH J:

Mr Carter, sorry this is a very basic question but I just want to make sure I'm on the right basis, all of this is for the purposes of clarifying the language of 1F(a) of the Refugee Convention in relation to persons who are assisting or providing logistical or operational support?

MR CARTER:

Yes.

McGRATH J:

As to when they commit war crimes, crimes against humanity and so forth?

MR CARTER:

Yes.

McGRATH J:

So these are wider materials that it fits the purpose of – you're referring them as to clarify that provision in the Convention?

MR CARTER:

Yes Sir.

McGRATH J:

Thank you.

MR CARTER:

So paragraph 20, Professor Cassese –

McGRATH J:

Sorry what tab are we at in volume 3?

MR CARTER:

Tab 43 of volume 3.

McGRATH J:

Thank you.

MR CARTER:

And he says at paragraph 20 that joint criminal enterprise liability is not a crime but a form of criminal liability and the doctrine is a crucial part of international criminal law ensuring that individual culpability is not obscured in the fog of collective criminality and accountability evaded and he then sets out three categories of JCE as a mode of liability, the basic one 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. Secondly, a systemic form, essentially a variant of the first category applicable to detention in concentration camp cases and lastly 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. That last one is similar to the commonplace scenario in domestic criminal law of two people conducting an armed robbery and one goes outside the original common intention or common design by killing someone. So the third category is not relied on in this case. The second category, the systemic form, in *JS* the UK Supreme Court held that or expressed the view that it was merely a variant of the first and not really a second category at all –

ELIAS CJ:

Well that's what he says too.

MR CARTER:

And the primary reliance for the purposes of this case is to category 1 except the Amicus Curiae brief goes on to discuss the different kinds of intent required for the, for each of these different categories and the appellant's submission is that the professor's analysis of intent in relation to category 2 cases also applies equally to this case, as it's just a variant of category 1, and so you will see in the reference I've just given you too, that the systemic form has typically arisen in cases involving institutions such as concentration camps, but in our submission, which is consistent with the *JS* decision of the Supreme Court, it is by no means limited to institutional concentration camp cases because –

BLANCHARD J:

Mr Carter, is conducting yourself, knowing that there is a real risk that what you're doing will assist in the commission of a crime, a qualifying crime, within the concept of intent?

MR CARTER:

Well, yes, although that is not, that is not necessarily to adopt a test of recklessness.

BLANCHARD J:

No, I'm not suggesting a test of recklessness.

MR CARTER:

Yes.

BLANCHARD J:

I deliberately avoided that –

MR CARTER:

It's – yes.

BLANCHARD J:

– word.

MR CARTER:

Real risk in the sense of –

BLANCHARD J:

Because for me, sooner or later I'd like to have as much help as you can give in that area.

MR CARTER:

Yes, real risk is tied up Sir, with the notion that is explained in the *JS* Supreme Court case that this form of accomplice liability does not require intent to commit a specific crime or knowledge of a specific crime. So, real risk that a more general category of crimes may be committed is all that's required.

BLANCHARD J:

Why do you say real risk qualifies - running an appreciated real risk qualifies as intent. What is the authority for that?

MR CARTER:

Real risk qualifies intent Sir?

BLANCHARD J:

Qualifies as intent, in other words, is within the concept of intent for present purposes. I know some of the Canadian cases add on risk but almost as an afterthought. But what I want to know, not necessarily here and now, but at some stage during your argument, because for me, at least provisionally, this comes close to the heart of this case, as to law.

MR CARTER:

Thank you Sir.

ANDERSON J:

Is it really an issue of intent or is it a question of knowing participation?

MR CARTER:

Well, knowing participation is an aspect of, aspect of intent Sir.

BLANCHARD J:

Well, what is the – a key question as to what your actions are going to achieve or are likely to achieve?

ELIAS CJ:

Or has.

BLANCHARD J:

Or has.

ELIAS CJ:

Have.

BLANCHARD J:

Yes.

ELIAS CJ:

Because he has committed a crime.

BLANCHARD J:

Yes, but being the accomplice is, of course, the crime, for present purposes.

ELIAS CJ:

But adherence to a terrorist organisation – I would like to hear more about why that qualifies under the exception.

MR CARTER:

Well, it's the, the –

ELIAS CJ:

Because there's no specific rule to that effect.

MR CARTER:

Yes, while both the appellant's submission and the Authority's decision in its description of LTTE activities, uses the word, 'terrorist', in neither the case of the Authority's challenge decision or for the purposes of the appellant's argument is the status of a –

ELIAS CJ:

No, it's not –

MR CARTER:

– terrorist organisation.

ELIAS CJ:

– necessary.

MR CARTER:

No.

ELIAS CJ:

But I'm a little bit, I'm perhaps even further behind than at this stage of intent and wanting some help on how it is said that one has committed a crime against peace by adhering to an organisation which has in the past committed such crimes.

MR CARTER:

Yes, well I'll – the way that you get there, through the concept of joint criminal enterprise liability –

ELIAS CJ:

The concentration camp example is quite straight forward because this is all ex post facto really, but it's the prospective dimension of this case that bothers me.

MR CARTER:

Yes, well I think you get there, Your Honour, from the formulation of intent knowledge based on JCE liability. That appears in paragraphs 38 and 39 of the *JS* case, but before I take you to that –

McGRATH J:

Just, are you – I know the passage you mean in that case, but I think your argument really is that we should be focussing on the second form of Professor Cassese, the systemic form because it does not actually require that a crime be committed subsequently. Is that – I may have misunderstood you. Is that what you're essentially arguing?

MR CARTER:

Yes.

McGRATH J:

When you say, "Concentration camp cases do indicate that." Now I'd be interested to know how that is because I think that's at the heart of the Chief Justice's question, and in some way I think you're, what you're saying is that the *JS* case, and these principles remove the need for the participant to be contributing to a crime that's actually committed. He's –

MR CARTER:

Yes, the contribution is to –

McGRATH J:

It's rather contributing to a state of affairs that is known to exist where crimes have been committed, and I'm just, I'm having a bit of difficulty, like the Chief Justice, grasping this, but am I right as far as I go?

MR CARTER:

Yes, yes that is, that does I think accurately capture the appellant's argument. It's the contribution to the organisation rather – the organisation in facilitating its ability to continue to commit crimes generally.

ANDERSON J:

Do you – does the appellant rely at all on the Rome treaty, article 25(3)(d)?

ELIAS CJ:

Article –

ANDERSON J:

Five, clause 3 there. It's on the appellant's authorities tab one, page 15, "Contributing to the attempt of commission of a crime by a group of persons acting with a common purpose."

MR CARTER:

Twenty five, 25(3)(d) Sir.

ELIAS CJ:

Then what's the crime, the crime, which is the first question I asked, and it is those crimes listed are they, in para 123?

MR CARTER:

Well the crimes are the past crimes of the LTTE.

TIPPING J:

But he didn't do anything. Surely your argument has to be that because he knew that all these terrible things had been going on and here he was knowingly, in your case, helping to take arms to Sri Lanka, there was a distinct prospect that these arms would be used in one of those crimes in the future and that is enough. It has to be your case, doesn't it?

MR CARTER:

Yes, yes because we have no – we are unable

TIPPING J:

You're going to show he helped in the past. What you're saying is he's helping in the future in the sense that it was 50/50 apparently whether or not these would be used for lawful purposes or unlawful purposes, therefore he was running a real risk that they would be used for unlawful purposes, therefore he's an accomplice. That has to be your argument but you have to hook it in with how that becomes an accomplice under these international rules.

ANDERSON J:

What happened in the past was only evidence –

McGRATH J:

That's right.

ANDERSON J:

– of a policy which involved terrorism, because there's nothing to show that he participated in any of the stipulated events.

MR CARTER:

Well, that's the whole – but the whole idea of JCE accomplice liability is that you don't have to participate in a specific criminal event.

ANDERSON J:

I understand that, but it still leaves that as evidence of the policy of LTTE, how they will act in the future, as they have in the past, that's their relevance.

TIPPING J:

Well, there's a specific finding by the Authority that these weapons, that they found he knew were on board and for what purpose, would be used, or might be used, 50/50, in lawful or unlawful purposes. So you have to be able to show that running that sort of risk makes him an accomplice.

MR CARTER:

Well, it's not –

TIPPING J:

I'm not expressing a view one way or the other, I'm just simply saying, surely that is what you've got to hook him in, assuming those are the facts, properly found, that that makes him an accomplice. I mean – we're going round and round a bit.

McGRATH J:

Mr Carter, this is another way, I suppose, of saying that you have to concede that no crime was actually committed in respect of these weapons, because they ended up on the bottom of the sea –

MR CARTER:

Of this particular shipment, yes.

McGRATH J:

Of this particular shipment. But in terms of past events and the state of affairs in relation to the organisation and so forth, do you believe that that is accommodated in the concept of joint criminal enterprise liability, in terms explained by Professor Cassese in the second of his categories? Then you're going to take us later, I think, to show some endorsement of that, if I understand your arguments correctly, that's by the House of Lords, at least by comparison with the Court of Appeal, Toulson LJ, in the *JS* case.

MR CARTER:

Yes, and the kind of intent that is required for each of the three categories is also discussed in Professor Cassese's brief and, in particular, at paragraph 43, which was the first category, and that was where there were circumstances where all members of the joint criminal enterprise shared in the same criminal intent and played varying roles, which is one aspect of the facts of the case that the Authority was dealing with here.

TIPPING J:

His mens rea, to use a domestic phrase, was surely voluntarily running the risk that these weapons would be used to commit crimes against humanity.

MR CARTER:

Well, the Authority has, in my submission, put it higher than simply running the risk –

TIPPING J:

Well –

MR CARTER:

– knowing that they would.

TIPPING J:

But there was a risk that they wouldn't be used. According to the Authority, it was a 50/50 chance, whether they would be used for bad purposes or less bad purposes.

MR CARTER:

That part of the decision is not dealing, in my submission, with a risk or notions of recklessness, it is simply dealing with knowledge and intent to assist the organisation, the LTTE, in a manner that would assist it to commit crimes.

TIPPING J:

But this man was participating in a future crime, on the appellant's thesis, wasn't he?

MR CARTER:

Well, facilitating the organisation's ability to continue to commit crimes.

TIPPING J:

Yes, precisely.

ELIAS CJ:

Mr Carter, does Professor Cassese in his opinion, which I haven't read and I've just been flipping through, because the examples he gives are all of completed crimes, so far as I can see. Does he actually deal with this sort of case of adherence to an organisation which is likely to commit such crimes in the future?

MR CARTER:

Well, the second category has similarities, yes.

ELIAS CJ:

Well, I understand how you argue that the second does, but the examples he draws on, I can't see any which fit this sort of case. Are there examples that he draws on?

The examples he gives under the second category seem to me to be again completed killings and atrocities and things of that sort.

MR CARTER:

Yes, I think that's correct, Your Honour, there isn't an example given in the brief that is a case involving a similar sort of factual situation that we have in this case.

ELIAS CJ:

So, does that mean that this is a development in customary international law that the Courts are adopting?

MR CARTER:

What the appellant is arguing for is not a development in this form of liability, it's simply –

ELIAS CJ:

An application of it.

MR CARTER:

– an application, yes.

ELIAS CJ:

Well, yes, perhaps, except that the Convention could easily have included something that was prospective looking, and it hasn't.

BLANCHARD J:

Well, the Convention itself is, in a sense, skeletal. It's intended that those applying it draw on international law, and international law has to proceed to develop by sensible steps. You could take a scenario in which there were several loads, let's say truck loads of ammunition, being delivered to an ammunition dump under the control of an organisation, and that ammunition, once it's arrived, is then drawn from for various things that the organisation does, some of which are going to be lawful and some of which are going to be internationally unlawful. It would be very strange if a person who is complicit in, say, the driving of the truck of one load of ammunition, is not guilty in relation to the possibility that the ammunition that he delivers will be used for a bad purpose, even though he won't know at the time whether that is actually going to be the case, and probably no-one will know afterwards, because

they won't keep records about what arrived on what truck and what it was used for. This case is one step removed from that because, by analogy, the truck crashed before it got to the ammunition dump, so it didn't ever arrive. But I would have thought that at least there's the attempt to get the truck to the ammunition dump.

MR CARTER:

Yes, although the appellant's argument is not relying on specific, another specific category of accomplice – well, I suppose it's not accomplice liability, but another possible source of liability, which is attempts, and the Authority hasn't relied on that either, and that's partly because the international law in an area of attempts is relatively undeveloped and there is not a lot to draw on but the –

ELIAS CJ:

Can I just ask, because it was a query I had when we reading the respondent's submissions where there is reference, I think, in a footnote to the UN, I guess it's the Human Rights Commission's guidelines, are they? There are guidelines anyway. Are they, is there anything relevant in those guidelines?

MR CARTER:

Yes we, the appellant has noted in the appellant's submissions that the appellant's argument is consistent with UNHCR guidelines on this particular argument. I'm just trying to find the part in the submissions where we refer to it.

ELIAS CJ:

It's your footnote 112. Which struck me as something that might be worth looking at.

MR CARTER:

Yes and while UNHCR guidelines aren't binding and are just that, guidelines, it is significant, in the appellant's submission, that the appellant's argument happens to be consistent with –

ELIAS CJ:

Well do we have those?

MR CARTER:

Yes. Volume 3 of the appellant's bundle of authorities at tab 44. Individual responsibility at the beginning of paragraph 8 – 18 under the heading "D – Individual

Responsibility." So that uses the language of not – a person not only having committed but having made a substantial contribution to the commission of the criminal act and the knowledge that his or her act or omission would facilitate the criminal conduct.

ELIAS CJ:

Well that doesn't envisage the risk of future criminal acts, it's referring to completed criminal acts, which is the area of concern that I have.

McGRATH J:

You've got to finish that, perhaps you could read out the remaining parts of that paragraph?

MR CARTER:

The individual need not physically have committed the criminal act in question: instigating, aiding and abetting and participating in a joint criminal enterprise can suffice.

ANDERSON J:

That again assumes that the offence has occurred?

MR CARTER:

Well in my submission it doesn't, doesn't necessarily assume that. If the focus is on the significant contribution to the organisation –

ELIAS CJ:

You see it could have provided that. The Convention could have provided for that and it hasn't and so far the international materials you've taken us to, and it does seem to me that it's the international materials which should be our principal source. I know you've going to come on to the domestic law applications of them, and they may be wholly persuasive, but is there anything else in the international materials that helps us on this identification of a crime when there isn't a completed crime here?

MR CARTER:

Well *JS* itself is, of course, pivotal to the –

ELIAS CJ:

Yes.

MR CARTER:

– appellant's case and –

ELIAS CJ:

No I understand that but Professor Cassese, on my quick reading of him, isn't looking to this sort of situation. The guidelines don't seem to be looking to this situation. Is there anything else in the international materials that you want to draw to our attention which does assist you?

MR CARTER:

I think not specifically in the way that Your Honour is envisaging. It is, as I said before, an application of principles summarised and captured in the *JS* decision.

TIPPING J:

The Rome Convention has an article, an article 30, mental element which seems to me to be about as good as we're going to get as a collation, if you like, of what has to be in the accused's mind and by inference I would read that you can be a participant in a crime that hasn't yet happened in a sense that you're aiding and abetting.

ELIAS CJ:

There's no actus reus do you mean?

TIPPING J:

Well the actus reus is your assistance. You are willingly running the risk of the consequence of your assistance the article does talk about in relation to consequences. It's quite tricky this because there isn't anything that I've read directly on it. And I don't know whether you can discuss with something – some discussion of a future crime that doesn't actually come about but like my brother Blanchard it would be very, very peculiar if it fell on account of whether this particular consignment was going to be used for a good or a bad purpose. It would be very odd. Provided that there was a reasonable possibility, if you like, that it was going to be used for a bad purpose. If it was purely fanciful that it would – then you'd be probably outside of the compass of what the mind was envisaging. But in this case there was an equal likelihood, wasn't there, according to the finding, that it would be

used for a good or a bad purpose, this particular load of ammunition and explosives. Is that a fair assessment of –

MR CARTER:

There is a phrase used in the Authority's decision to that effect.

TIPPING J:

Yes. Now what makes the man liable when the crime hasn't actually been committed? If it had been committed they wouldn't probably be so difficult. Is the very fact of him assisting in some endeavour that stood a chance of leading to a war crime or a crime against humanity, is that enough?

MR CARTER:

Well there's the significant, significant contribution which will vary according to circumstances so the truck driver, in His Honour Justice Blanchard's example, may, subject to other facts, have been making a significant contribution. The appellant says that X in this case was making a significant contribution to the LTTE as an organisation –

TIPPING J:

"Contribute significantly to the commission or attempted commission"? If it hasn't actually happened, and you're not relying on an attempt, what are you relying on?

MR CARTER:

Well we're relying on the formulation in *JS* which the appellant says is in substance this – the same, with some variants, but in substance the same as the position reached in the Canadian authorities.

McGRATH J:

Looking forward to a part of the argument you haven't yet come to but I thought your argument was that it is sufficient, and I suppose necessary for your argument, that you can establish that there was a joint criminal enterprise as that concept is understood in international law, as that concept is explained, but I thought your argument was if you can show that you don't have to, and there was participation in that by X, you don't have to show that the crime was actually committed?

MR CARTER:

That's correct Sir, yes.

TIPPING J:

Well where did you get that from I think is the key point?

MR CARTER:

Well –

ELIAS CJ:

Not from the terms of 1(a)...

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[Inaudible]

MR CARTER:

That's correct, Sir, yes.

TIPPING J:

Well, where do you get that from, I think is the key point that…

ELIAS CJ:

Not from the terms of 1F(a).

MR CARTER:

Well, where you get it is from the test and approach that's formulated in *JS* in the Supreme Court of the UK.

ELIAS CJ:

Shall we go there then?

MR CARTER:

Yes.

ELIAS CJ:

So, the answer is there's nothing really that you're able to point us to in the international materials and you rely on the UK latest case and also the Canadian cases?

MR CARTER:

Yes.

ELIAS CJ:

Yes.

MR CARTER:

So *JS* is contained in volume 1 tab 14, and the key paragraphs that the appellant –

McGRATH J:

It is now reported, of course.

MR CARTER:

Yes, I think the reported decision wasn't available when we put this together, or if it was we failed to put in the reported copy, Sir. The key paragraphs are paragraph 10 at the end, that on the material available to the decision-maker in that case, the LTTE in general and the intelligence division in particular, were guilty of widespread criminal acts and atrocities, the most obvious being suicide bombings, attacks on civilians, assassinations, kidnapping and forcible recruitment of children, but for the principles the key passages are paragraphs 38 and 39 – or 37 and 38 of the judgment, but especially the last sentence of paragraph 38, where His Honour Lord Brown says, "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."

ELIAS CJ:

What was the war crime in issue here?

MR CARTER:

It was general crimes, Your Honour.

ELIAS CJ:

Well, was it comparable to this case, is really what I'm feeling for.

MR CARTER:

Well, it is comparable, in that the crimes that are described in paragraph 10, the passage that I read out earlier, are pretty much the same as the extensive list of crimes that –

ELIAS CJ:

But were they relying on completed crimes and participation in the organisation which had committed it?

MR CARTER:

No, because the whole key to the decision is you don't have to have a specific or identifiable crime.

ANDERSON J:

Yes, but JS though, as one can see from paragraph 4, had been an active soldier, as it were, in the LTTE for some years, had actually participated in activities.

MR CARTER:

Yes –

ANDERSON J:

From the age of 16.

MR CARTER:

Yes, that's correct, Sir, so he had a different role in the organisation than –

ANDERSON J:

He had a role of proven activity, whereas in the present case the only activity is that related to this particular voyage.

MR CARTER:

Well, no, Sir, it's not this particular voyage, being the voyage that was terminated in mid-January 1993. The evidence of his participation and significant contribution to the aims of the organisation is comprised of a six-month voyage on the vessel, the

Yahata, as chief engineer, an important role which X acknowledged in cross-examination, meant that he was crucial to maintaining the propulsion of the vessel, so –

ELIAS CJ:

But 90 percent of the trade – 95 percent, is it, of the trade – carried out under this line was legitimate.

MR CARTER:

Well, it doesn't matter whether it's legitimate or not, the key findings were that X knew it was an LTTE vessel and that he knew what the cargo was, legitimate and –

ELIAS CJ:

Ah, yes, but that's in respect of this voyage, I thought you were saying that there was more evidence than could be derived from the participation in this voyage.

MR CARTER:

Well, the evidence I'm referring to is, on an overall reading of the Authority's specific findings of fact, that – well, what they add up to is that X was a voluntary knowing supporter, the decision says, "Supporter or member," but let's use "supporter" to use a neutral phrase to get away from this membership thing that seems to have caused a few problems, "Supporter of the LTTE dedicated to its aims and objectives," which involve the commission of international crimes. So, he was –

ANDERSON J:

Suppose the cargo for the previous six months had been jute rope and nothing else, does that make him complicit in intended activities of LTTE?

MR CARTER:

Well, it depends on other facts as to how that cargo was used. If it's a money-making activity, it's an LTTE vessel, it's making money for the LTTE which goes into financing, or it's supplying material, not necessarily war material but supplying material to other arms of the organisation –

ANDERSON J:

It rather sounds as though he's guilty of crimes against humanity by reason of his status, rather than status as a supporter.

MR CARTER:

Well, no, of course what we have here is specific evidence of carriage of war material in the form of arms and explosives, so we have that additional information.

ANDERSON J:

For the particular trip.

MR CARTER:

Yes, for one trip. We don't have specific information or the Authority didn't have specific information about the nature of the cargo for all the other trips, but all of the voyages and carriage of cargo by the vessel were for the purpose of assisting the organisation's aims, which –

ELIAS CJ:

But what's the crime?

MR CARTER:

Well, the crime is article 1F(a) and – 1F(a) war crimes and crimes against humanity.

ELIAS CJ:

To be committed, and you rely on that. I'm not saying that your argument isn't a powerful one, Mr Carter, I'm just really trying to see where it fits within the framework of article 1F(a). Would you prefer to finish your reference to *JS*, would that be helpful? And then you perhaps do need to go to the evidence, is that what you're wanting to do then?

MR CARTER:

Well, I can, yes, I can do that.

TIPPING J:

I think we should have a close look at this *JS,* and we should also look at these Canadian cases, where they do talk about things –

ELIAS CJ:

Yes.

McGRATH J:

It's not only in the House of Lords – I'm sorry, the Supreme Court, that we have to look at *JS.*

ELIAS CJ:

No.

McGRATH J:

I mean the judgment of the Court of Appeal is premised very firmly on Toulson's LJ judgment on behalf of the Court of Appeal and we really have to understand the current interpretation of the Convention in the Supreme Court by reference to what happened in the Court of Appeal which helps us understand – the United Kingdom Court of Appeal, the English Court of Appeal, which helps us understand our own Court.

MR CARTER:

But they expanded –

McGRATH J:

But you are not actually really helping by going to the passage, which I do appreciate is the best passage you've got in the judgment and it's always tempting to leap to it, but I think we need to understand a lot more about these cases to really do justice to the present case.

TIPPING J:

Well, before you leave your good passage according to my brother –

ELIAS CJ:

Which one's that?

TIPPING J:

That's the one at paragraph 38.

ELIAS CJ:

Thank you.

TIPPING J:

You do have a little bit of difficulty from the last few words, "Aware that his assistance will, in fact, further that purpose – " Now that doesn't seem to me to be entirely harmonious with the proposition that you're advancing. It suggests that you've got to know that what you're doing will actually assist, not just have the potential to assist, but will actually assist. Now I'm not saying I necessarily would confine myself to that but, at least on the face of it, it's a bit confining.

MR CARTER:

Well, it's assisting the –

TIPPING J:

The purpose.

MR CARTER:

– the purpose rather than, rather than –

TIPPING J:

When in fact this is the purpose.

MR CARTER:

Well, but the focus is on assisting the purpose –

TIPPING J:

But this shows me, you have to read this judgment, as my brother McGrath says, in terms of what has led up to that key passage, and one of the factors is that this case does not engage does it, with this sort of situation. These are all past events in which this man had clearly involved himself, and once you've satisfied that it was reasonable for thinking that he had actually involved himself in actual war crimes, or crimes back then, the case becomes much easier.

BLANCHARD J:

Was there any evidence that he had been involved himself in war crimes?

MR CARTER:

No.

TIPPING J:

Well, paragraph 4 seems to suggest that he had, perhaps I spoke too loosely, he had, was an accomplice to actually committed war crimes.

ELIAS CJ:

The application of Professor Cassese's analysis clearly catches him but it's the crime that is the occasion, since you're not relying on attempts.

BLANCHARD J:

I'm not sure that paragraph 4 describes war crimes or crimes against humanity in which this man has personally participated.

ELIAS CJ:

But it's not personal participation that's required and presumably there's a lot of evidence again of the sort of atrocities that were being committed during the period in which he was a fighter with them, and so I have no problem with that because it does fit within the participation that is envisaged by customary international law as you've taken us to it, but it does seem to be a long way from this particular case.

MR CARTER:

Well, there is the reference in paragraph 4 to one of the features being of his background, *JS*'s background, that he was involved in a mobile unit responsible for transporting military equipment to other members of the intelligence division through the jungle.

ELIAS CJ:

I don't have any problem with that, but he's come out, they look back at the atrocities that were committed during that period and they say you've been involved in facilitating those, through transport, through whatever. I don't have a problem. My hang up is with the crime which, except in the case of attempts, seems to be with a completed crime or pattern of crimes as it's likely to be. Anyway, sorry, carry on with your analysis of this case and then perhaps then you will take us to the other English cases and the Canadian case on which you rely.

MR CARTER:

Well 37 is important as well, that there's the definition of mens rea, is "when the accused is participating in (in the sense of assisting 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 1(F) crimes generally, no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission." So as we've said in the appellant's written submissions, it's not necessary, and this is the key difference between the UK Court of Appeal and the UK Supreme Court: that it's not necessary to identify a specific crime. So the appellant's submission is that, given there is no need to identify a specific crime, you don't have to identify a specific future crime either.

ANDERSON J:

Are there issues of degree of involvement?

MR CARTER:

Well, that's captured by the phrase "significant contribution" or "contributed in a significant way."

ANDERSON J:

So the person who sweeps out the tearoom may not have contributed significantly enough.

MR CARTER:

Yes. They also, by virtue of the role played, may not have the knowledge of the common plan.

ANDERSON J:

So you're saying then that during this last trip, throughout the whole of that trip, he was contributing significantly to aims of LTTE and supporting them?

MR CARTER:

The whole – contributing significantly to the aims of the LTTE for the whole six months, not just the last trip, and that's important Sir, because there's knowledge of an LTTE vessel that is dedicated to the aims and objectives of the LTTE, which involve the commission of crimes against humanity and war crimes in a systematic way. So that even the carriage of cargo, other than war material, fits within that in the same way as, you know, to take a different factual example, in the same way as the person who finances an organisation.

ANDERSON J:

They're contributing to the financial means of the organisation.

TIPPING J:

A German case referred to in paragraph 34 of the Supreme Court of the United Kingdom, although it doesn't directly address the present point, it may help indirectly when the German Court, I thought quite neatly said, "[c]overs not only... participants in the criminal sense, but also persons who perform advanced acts in support of terrorist activities." When I was doing my reading, I found that particularly helpful, simple way of expressing the concept. Now, I still think it's probably anticipated that the ultimate activity has taken place, but it does focus on the advanced acts, and it may be that it's not really relevant whether the ultimate act. It's simply that if you're willing to perform an advanced act, as the German Court put it, that in itself is enough to make you complicit, even though the actual act that you were acting in advance of hasn't actually taken place. But that's what it has to amount to doesn't it?

MR CARTER:

Yes Sir, and I would repeat what I said to Her Honour, the Chief Justice a minute ago, that if the whole principle is that you don't have to identify an actual specific crime, then that's wide enough to include a specific future crime, including one that isn't necessarily ultimately committed.

ELIAS CJ:

Well I'm not sure that that follows, but there is one Court of Appeal English case isn't there, in which the prospect of crime is noted and there's some remark as to that's a different matter, or that might require more anxious consideration or something. I might be wrong. We'll take the morning adjournment now.

MR CARTER:

As Your Honour pleases.

ELIAS CJ:

And you can carry on with whatever else you need to say about this case and then go on to the other cases. Thank you.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.50 AM

ELIAS CJ:

Yes Mr Carter?

MR CARTER:

Thank you Your Honour. In terms of Your Honour's question about the facts said to be a problem for the appellant, the factual circumstances of this case where there wasn't an identifiable actual future crime that occurred in this case, again I would just reiterate that the effect of the principles established in *JS* is not to require the identification of a specific future crime. The focus is on the criminal purpose of the organisation and that is borne out by the, in the paragraphs that I have already drawn Your Honours' attention to, 10, 37 and 38. There is also, in paragraph 56 of the *JS* judgment in the judgment of Lord Hope, tab 14 of the appellant's authorities volume 1.

TIPPING J:

Did you say at 56 Mr Carter?

MR CARTER:

Paragraph 56.

TIPPING J:

That's Lord Kerr I think.

MR CARTER:

Oh sorry, yes Lord Kerr. That the nature of the participation has been described in various ways but it is important to think of the participation and whether it is such as allowed the institution to function or that it allowed the crimes to be perpetrated or that it was an indispensible cog and so what matters in terms of law is that the accused lends a significant contribution to the crimes involved in the joint common enterprise and of course participation must go beyond their passivity or continued involvement in the organisation after acquiring knowledge of the war crimes or crimes against humanity. So that on the facts or the information before the Authority in this case the focus must be on the complete six month odd voyage of – or series of voyages of the *Yahata* because before that period international crimes were being committed by the LTTE during that period and after that period and the contribution

made by X, which in the appellant's submission was significant during the six month period, enabled the organisation to function and carry on its continuing and systematic committing of war crimes. So that on that basis on the application of the principles derived from the *JS* case, and in turn the joint criminal enterprise doctrine at international criminal law, it's not necessary that there wasn't a specific future crime because the organisation – the significant contribution was –

ELIAS CJ:

Are you saying they weren't future crimes, they are the crimes that you say were committed while he was working for the LTTE, is that what you mean? The six months?

MR CARTER:

Well perhaps by way of clarification it's, as I say the emphasis is on the contribution to the criminal purpose of the organisation.

ELIAS CJ:

Well what's the crime?

MR CARTER:

Well it's crimes plural.

ELIAS CJ:

Oh crimes plural.

MR CARTER:

Crimes plural.

ELIAS CJ:

What are the crimes plural, when are they committed? Are they prospective crimes or are you saying – they can't be the past crimes before he's shown to have had any participation in this organisation so are you saying they are the crimes participated by the organisation during the period he was serving on this ship?

MR CARTER:

Well during and prospective. So during and after.

ELIAS CJ:

So including prospective?

MR CARTER:

Yes.

ELIAS CJ:

Okay, thank you.

BLANCHARD J:

The way Lord Kerr puts it in the final sentence of paragraph 56 seems to suggest that all you have to have is knowledge that the organisation has committed these kinds of crimes and then a participation in further – a significant participation in furtherance of its objectives?

ELIAS CJ:

Allowed the crimes to be perpetrated?

BLANCHARD J:

I'm looking at the final sentence of paragraph 56.

McGRATH J:

Is that the essence of joint criminal enterprise as you are putting it to us, the way Lord Kerr has expressed it there?

MR CARTER:

That participation "went beyond mere passivity or continued involvement in the organisation after acquiring knowledge of the war crimes."

TIPPING J:

Participation there, supposed or not, has to go beyond involvement after acquiring knowledge. I don't think His Lordship is suggesting that continued involvement after acquiring knowledge is in itself an indicator of complicity?

MR CARTER:

Not of itself because of course there must be the significant contribution.

BLANCHARD J:

That's why I added in significance because I think the significance comes in, in the next paragraph, it's an added element.

TIPPING J:

I think you'll find more assistance, frankly, in the Canadian cases than your – although I don't disagree that the broad thrust of this is consistent with your thesis. Because the Canadian cases, as I read some of them, seem to encompass this prospective concept.

MR CARTER:

Yes well in *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100 the test that was adopted was that the accused must have knowledge of the attack, the attack being a widespread and systematic attack and must know that his or her acts are part of the attack or at least take the risk that they are part of the attack. So –

ELIAS CJ:

Sorry, which case are you referring to there?

MR CARTER:

That's *Mugesera*.

ELIAS CJ:

Oh, yes.

McGRATH J:

Before you move into Canada, do you derive any assistance from paragraph 58, still with Lord Kerr, the Supreme Court, I think towards the end of that paragraph?

MR CARTER:

Yes, yes, Sir, thank you, that's again emphasising the principle that it's not necessary to show participation in individual crimes, and participation can only be determined by focusing on the role that he actually played so again, no need for a specific crime.

McGRATH J:

But you do, it's rather a question of relevant criminal activity

MR CARTER:

Yes.

McGRATH J:

It shifts the difficulty a bit, I suppose, but it seemed to me that that was a further consistent line that Lord Kerr was pursuing.

ELIAS CJ:

Is there anything in any of the other English cases you wanted to take us to before we go to the Canadian ones?

MR CARTER:

No, nothing that I wanted to highlight in the English cases, Your Honour.

So if we go to Canada, in volume 2 of the appellant's bundle of authorities, there are three that I would highlight to Your Honours. The first is *Bazargan v Canada (Minister for Citizenship and Immigration)* (1996) 205 NR 282 (FC:CA) at tab 16 of volume 2, and that was a 1F(c) case, so the ground for exclusion was that there were serious reasons for considering Mr Bazargan had been guilty of acts contrary to the principles and purposes of the United Nations. (C) is not relied on in this case.

Mr Bazargan joined the Iranian national police in 1960 and pursued a career there until 1960. From 1960 to 1977 he rose to the rank of colonel. He worked in Tehran from 1974 to 1977 as officer in charge of liaison between police forces and SAVAK, which was the internal security agency under the Shah's personal authority, and during that period he was in charge of a network for exchange of classified information between the police forces and SAVAK. In 1977 he was appointed chief of the police forces in Hormozgan province and he held that position until the fall of the monarchist regime in 1979 and, while he collaborated with SAVAK, he was never a member of the organisation. There was evidence that SAVAK was a brutal, violent organisation that terrorised all levels of Iranian society and the decision-making board decided that his role as a liaison officer with SAVAK and knowledge of its activities, that in the light of that he was an accomplice to those activities. And in the Federal Court, at paragraph 11, the Court said that, "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 outside the organization," and later, in the same paragraph, "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." So, it's different facts but, in the appellant's submission, the principle is nevertheless relevant and the reasoning relevant to this particular case.

ELIAS CJ:

But the crimes relied on were those committed between 1974 and 1978 and so on, so they're past, so although it's expressing it as prospective in terms of what he was doing, there are completed crimes that are being referred to here.

MR CARTER:

Yes, but no emphasis or focus on the fact that there were completed crimes, the focus is, on my reading of the case, on the organisation and the organisation's activities.

Next, a Canadian case that I wanted to highlight for Your Honours was *Harb v Canada (Minister for Citizenship and Immigration)* (2003) 27 Imm LR (3d) 1 (FC:CA), which is at tab 18 of the same volume, that was decided under both article 1F(a), war crimes and crimes against humanity, and (c), principles and purposes of the UN. The first instance decision-maker found Mr Harb excluded because of his membership and activities in the Amal movement, and also because of his complicity in the South Lebanon army, two organisations that in the decision-maker's view were engaged in crimes against humanity. The Court found that if the organisation persecutes the civilian population the fact that the appellant himself only persecuted the military population does not mean that he will escape exclusion as a refugee if he is an accomplice by association as well. And the Court cites a line of authority from the Federal Court in *Ramirez v Canada (Minister for Citizenship and Immigration)* (1992) 89 DLR (4th) 173 (FCA)*, Moreno v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 (Fed CA); (FC:CA) *and Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 (Fed CA) authorities on complicity, where persons were members of organisations involved and cites an ICC case of *Bazargan* for extension of this case law to complicity by a non-member.

The Court observed that membership makes it easier to conclude there was personal and knowing participation, then, "Membership ... makes it easier to conclude that there was 'personal and knowing participation', ... than when there was no membership, but the difference affects the evidence, not the principles." So the expression "membership in a group" "suggests the existence of an institutional link between the organization and the person, accompanied by more than nominal commitment to the organization's activities."

The appellant maintained that there was no evidence. He supported the objectives adopted by the SLA. "*Ramirez* had required the existence of a shared common purpose in the knowledge that all of the parties in question may have of it." The appellant referred to that passage in his testimony where he said he did not support the aims of the South Lebanon Army. The Court found that a simple denial, even if it was found credible, which it was not, cannot suffice to negate the presence of a common purpose. A plaintiff's actions can be more revealing than his testimony and the circumstances may be such that it can be inferred that a person shares the objectives of those with whom he is collaborating.

McGRATH J:
Which paragraph are you at right now?

MR CARTER:
I'm just, I was really just trying to summarise –

McGRATH J:
Right so you're just summarising in your own words.

MR CARTER:
Yes, yes. And my friend is helping me with – it's paragraph 26 and 27.

McGRATH J:
Thank you.

MR CARTER:
Zrig v Canada (Minister of Citizenship and Immigration) [2003] 3 FC 761 (FC:CA), which is tab 22 of the same volume of Authorities. That was a 1F(b) and (c) case,

and an issue in the case was whether principles under 1F(a) on complicity are applicable to 1F(b), which is the serious non-political crime article. "[I]f so, can a refugee status claimant's association with an organization responsible for perpetrating 'serious non-political crimes'" under 1F(b) amount to complicity "simply because that person knowingly tolerated such crimes, whether committed during or before his association with the organization". The key paragraph of the decision in *Zrig* is paragraph 11, where the Court says that, "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 – "

BLANCHARD J:

I'm sorry, did you say paragraph 11?

MR CARTER:

Of *Zrig,* yes I've got it.

BLANCHARD J:

No, that's just about the opportunity and police carrying out a search.

MR CARTER:

I'm sorry, I've got my references muddled Sir.

BLANCHARD J:

Incidentally, why haven't we been given a reported version of this case?

MR CARTER:

It must have been an oversight.

BLANCHARD J:

Well it shouldn't occur.

MR CARTER:

Yes Sir.

ANDERSON J:

Do you mean paragraph 111 Mr Carter?

MR CARTER:

Yes Sir, dealing with complicity by association as recognised in international criminal law. The Court in *Zrig,* refers in paragraph 72 to the rules on complicity by association stated in *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 (Fed Ct) then refers to *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 158 ALR 289 (Aust Fed Ct) in paragraph 81. That's all I wanted to refer the Court in *Zrig.*

Ramirez appears at tab 21 of the same volume and at page 180 of the report there's a paragraph beginning, "What degree of complicity then is required to be an accomplice or abettor?" And there's the observation that mere membership is not enough. "It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may – " so it's 'may' " – by necessity involve personal and knowing participation in persecutorial acts. Similarly, mere presence at the scene of an offence is not enough to qualify ... [M]ere on-looking, such as occurs at public executions, where the on-lookers are simply bystanders with no intrinsic connection with the persecuting group, can never amount to personal involvement, however humanly repugnant it might be. However, someone who is an associate of the principal offenders can never, in my view, be said to be a mere onlooker. Members of a participating group *may* be rightly considered to be personal and knowing participants, depending on the facts." And at bottom, "Complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it." And finally in *Sivakumar v Canada,* which is not in the volume of Authorities but there is a passage from *Sivakumar v Canada* set out in the Authority's decision which is volume 1 of the Case on Appeal, tab 3. "A person who aids in or encourages –

BLANCHARD J:

Where are we finding this?

MR CARTER:

Sorry, this is at page 63 of the Case on Appeal, paragraph 109 of the Authority's decision.

ELIAS CJ:

What are you taking us to this for?

MR CARTER:

Well again to another example of the way the Canadian Courts have approached complicity and the passage here traces through a number of Canadian decisions, including *Ramirez,* and ends with the statement, those involved – well a quote from *Ramirez* "At bottom, complicity rests in such cases ... on the existence of a shared common purpose and the knowledge that all the parties in question may have of it. Moreover, those involved in planning or conspiring to commit a crime, even though not personally present at the scene, might also be accomplices, depending on the facts of the case."

TIPPING J:

Is that the end of your discussion of the Canadian cases?

MR CARTER:

Yes.

TIPPING J:

I just wondered, Mr Carter, whether the case of *Mugesera*, which you mentioned briefly for the passage which refers to taking the risk that they were part of the attack, you remember?

MR CARTER:

Yes.

TIPPING J:

Mugesera was a case where a man had made a speech and it was held that the very making of the speech, encouraging people to commit atrocities, was within the compass of criminal complicity. It doesn't seem to have depended in any way on the fact that the encouraged atrocities had in fact taken place. It was simply the fact that the man had, by making this very vivid speech, stirred up – and the way the Canadian Supreme Court put it in that context at 177, I think it was a joint judgment, from memory, but anyway at 177 they talked about knowledge that this conduct would have the effect of furthering the attack. Now, that seems to me to be an indication that they were basing it – the knowledge came from the past but what was being promoted, if you like, was a future furtherance of the attack, and I thought that was really the significant part about, or at least one of the significant parts about that particular case, from the point of view of futurity.

MR CARTER:

Yes, well, that's correct, Sir. In addition, there's the four principles adopted by the Authority of the elements of a crime against humanity, at paragraph 119 of the *Mugesera* decision, which were also adopted and applied by the Authority.

TIPPING J:

You say that, it's just a couple of paragraphs after the one I was referring to.

ELIAS CJ:

173 I think has the risk –

TIPPING J:

Was it 173, was it? 176 is the risk paragraph.

ELIAS CJ:

And 173.

TIPPING J:

And 173, thank you. Anyway, I just thought that that shouldn't be lost sight of, the actual factual context of that particular case.

ELIAS CJ:

Though they, however, seemed to regard the actual incitement as itself a crime against humanity, don't they, in this case that is.

TIPPING J:

It's not exactly on all fours.

ELIAS CJ:

No, no –

TIPPING J:

I agree, entirely, it is –

ELIAS CJ:

I'm just thinking aloud, yes.

TIPPING J:

But, in a sense, the aiding and abetting is itself the crime, if you like, like under our Crimes Act, you commit the offence either by actually committing it or by aiding and abetting, you equally commit it by one of the qualifying steps and, although I agree that this doesn't precisely cover our case, it does seem to suggest that you don't actually have to have an atrocity, if you are actually proved –

ELIAS CJ:

But they did, of course.

TIPPING J:

Well, there was, yes, there was, there's no doubt about it, but it wasn't a precondition, if you like, it wasn't a requirement. Anyway, I'm sorry, I've diverted you, Mr Carter.

MR CARTER:

I've also mentioned in the written submissions that there are cases from around the world, other cases, in addition to those that I've just been through, that assist the appellant's argument in this case, and we've summarised those at paragraph 71. I've already – 71.1 discusses the Canadian cases in summary and 72.2 deals with Australia, and in particular the *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 561 (Full Court) case, which held that it was not necessary to find that a person's acts led to a specific consequence, rather there would be serious reasons if there were many incidents of article 1F(a) crimes and the applicant took steps with the knowledge that his acts would likely lead to consequential commission of international crimes.

And then we've mentioned the German Federal Administrative Court decision under article 12(3) of the European –

ELIAS CJ:

Sorry, do we have that Australian case – just give me the reference to it in the bundle.

MR CARTER:

Volume 2, tab 24.

ELIAS CJ:

Thank you.

MR CARTER:

The German case in *B* BVerwG (10 C 48.07) (Federal Administrative Court) (unofficial translation), the Court concluded that a person will be personally responsible for an international crime within the meaning of the Convention if he or she has made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct, and this principle was said to apply not only to active terrorists and participants in the criminal sense but also persons who perform advance acts in support of terrorist activities, the passage that was discussed earlier this morning.

So, now dealing with the facts in applying article 1F(a) to the facts of this case, in the light of the –

ELIAS CJ:

Can you, before getting on to that and with the benefit of this discussion that we've had, take us to the parts of the Refugee Status Appeal Authority decision in which they actually look at the participation point? I'd just like to be reminded of it.

MR CARTER:

Yes, the Authority's decision is in volume 1 tab 3. In relation to article 1F(a), the section dealing with accomplices and parties begins at paragraph 108. So there's a discussion in 109 of some of the Canadian cases. At the end of 109, that the starting point for complicity is personal and knowing participation and a shared common purpose, citing *Ramirez,* and that this is essentially a factual question that can only be answered on a case by case basis.

TIPPING J:

If conspiracy is, obviously as it is under the London Charter, and I think it is accepted generally to be a form of accomplice liability, that you don't have to prove the completed crime to prove a conspiracy, do you?

MR CARTER:

No, no.

TIPPING J:

So, it might be asked, why then should you have to prove the completed crime for other forms of accomplice liability? Normally you will, obviously, but is it a necessary precondition? And perhaps it could be said that it would be a bit odd to distinguish what could often be a fine line between conspiring and aiding and abetting.

ELIAS CJ:

Well, isn't it – I'm just looking at this London Charter, I don't know what that is a reference to. What's that a reference to?

TIPPING J:

That's the 48, isn't it?

ELIAS CJ:

Oh, the 48 one, yes. Well, that's a, responsible for all acts, this is, if you've joined the conspiracy you're responsible for all acts performed in execution of such a plan.

TIPPING J:

Certainly, it's –

ELIAS CJ:

So, it does suggest –

TIPPING J:

– a step beyond that.

MR CARTER:

Well, it doesn't necessarily mean completion of the plan.

ELIAS CJ:

No, but it's, again it the article 1F(a) expression of it.

TIPPING J:

But if you were to catch conspirators in the middle of their conspiring to blow up the Beehive – just take a stupid example – and you caught them.

ELIAS CJ:

Is it?

TIPPING J:

I won't engage upon that matter – and you were to catch them before they'd actually achieved anything, take that into an international environment, it would be pretty odd, through want of any completed crime, if they couldn't be dealt to.

MR CARTER:

Yes, that's right.

TIPPING J:

I'm just thinking aloud, Mr Carter, I'm sorry, it's a bad habit I've got into.

MR CARTER:

The Authority then goes on to discuss in 110 the decisions, or many of the decisions that I've just been through, including *Zrig* and *Harb*, goes on to discuss the Rome Statute.

ELIAS CJ:

What I was more interested in was the application, because you've taken us through the principles, and it appears from para 115 as if that's addressed later in the decision, so it's really that that I'd just like to check again, how they applied those principles in the particular case.

MR CARTER:

Well, that passage of the decision begins at paragraph 121.

ELIAS CJ:

I see, that's that again.

MR CARTER:

Well, 123 is dealing with the general crimes systematically committed by the organisation, the LTTE, and 126 is dealing with the application of the complicity principles to X himself.

ELIAS CJ:

So, it's really 126, isn't it?

MR CARTER:

Well, yes, but in the light of the specific findings, specific findings made elsewhere in the decision, and one reason why I tried to set out in chronological form in the appellant's submissions, tried to isolate the specific findings and put them in subject and chronological order in the appellant's submissions, was that the decision itself doesn't follow, in dealing with its factual findings, doesn't follow a chronological or subject order.

ELIAS CJ:

No, but this makes it quite clear that the basis is joining and participating in the activities of LTTE, in the knowledge that the arms they found, he knew were on the ship, would as likely be used in conventional – well, more relevantly, would be likely to be used in perpetrating gross human rights abuses, so that's the prospective, yes.

TIPPING J:

I don't think we have any help, do we, from any of the Court or Tribunal below on this prospective issue, or do we?

MR CARTER:

I don't think so, Sir, not this particular specific point. Just in relation to Your Honour Justice Tipping's example of the uncompleted blowing up, the Beehive – that seems to –

ELIAS CJ:

It's like that man who made the speech in Rwanda.

MR CARTER:

That seems to be specific, that sort of scenario seems to be specifically covered by article 25(3)(f) of the Rome Statute, which is tab 1 of volume 1 of the appellant's authorities. But that's dealing with attempts, but in a situation where a substantial step is taken but the crime does not occur because of circumstances independent of the person's intentions.

ELIAS CJ:

Yes, you see I –

TIPPING J:

Well, I don't, with respect, agree that it had got to the point of an attempt in my example. That's why I deliberately short of attempt, because no overt act had been done, it was just an agreement between – anyway, I've said enough about it.

ELIAS CJ:

Sorry, I thought your example was that they were at the Beehive, with the explosives on them –

TIPPING J:

Oh, no, no, I didn't have them anywhere near the Beehive.

ELIAS CJ:

All right.

TIPPING J:

I had them just contemplating their navels, as this coming up as a good idea and an agreement to do it, constituting the conspiracy, but no overt act. That is a conspiracy to commit wilful damage at the very least. Now, that is a substantive crime, and the question is whether in international law a conspiracy along those lines would be caught. I don't know, I'm not sufficiently versed in the intricacies of international law.

ELIAS CJ:

Not under article 7 perhaps, is what you're saying, Mr Carter, is it, except as an attempt? There's no specific conspiracy to commit murder, as such.

MR CARTER:

I don't think so, Your Honour.

TIPPING J:

It would be very odd if you couldn't intervene, on the basis of the commission of a crime before it, you know, before some overt act. Sometimes it's necessary for the authorities to intervene, even in domestic law, before overt acts, because otherwise it

gets too dangerous. I really think perhaps I am distracting you from the facts, and I've moved aside from the Chief Justice's point too.

MR CARTER:

If I could just attempt to summarise how the Authority applied the principles that it had identified, primarily out of the Canadian decisions, to the particular facts as found, and –

ELIAS CJ:

Well, I think it is just in para 126, isn't it, drawing on some of their earlier findings of fact? But that's really the application, it seems to me.

MR CARTER:

Yes, it's the key application.

ELIAS CJ:

Yes.

MR CARTER:

Although it is important to be conscious of all the other findings of fact –

ELIAS CJ:

Yes.

MR CARTER:

– that the Authority has made, and see them in the round.

ELIAS CJ:

Yes.

MR CARTER:

Now, the Authority's approach to war crimes is quite brief, and that's at paragraph 27 of the decision. That's not to say that the Authority is placing any less weight on that particular series of findings and conclusion. It's just that it hasn't gone through the same analysis as to complicity, again in relation to a different category of crime. So, if it was right on its approach to crimes against humanity, then it was also right on war crimes and there's no error of law.

Turning to article 1F(b) which is the serious non-political crime. The key issue, or perhaps the most important issue there, there are several, is whether the crime that was identified here, which was the subject of convictions entered by the Indian Supreme Court, amount to serious non-political crimes, and the definition relied on by the Authority of whether the Indian Supreme Court convictions were for non-political crimes, was the definition of political crime in Lord Lloyd's judgment in *T v Secretary of State for the Home Department* [1996] AC 742 (HL), and the principle identified by Lord Lloyd was whether there is a sufficiently close and direct link between the crime and the alleged political purpose, and the Authority in this case, characterised correctly, in my submission, the convictions as not having a sufficiently close and direct link with a political purpose, the political purpose being the purpose of the LTTE, because it was not committed with the objective of overthrowing or subverting or changing the Sri Lankan government. It was more on the information available, it was more about evasion of capture and destroying evidence.

Now Arnold J in the Court of Appeal didn't disagree with that analysis, and as the party involved was not the - or one of the key players involved was not the Sri Lankan government, but rather the Indian Government Navy involved in the destruction of the *Yahata*, there was no sufficiently close link between the objectives of the LTTE and the political purpose.

What is raised as an issue in this Court and also in the Court of Appeal was the issue of whether the Indian Supreme Court judgment was safe in the circumstances. The argument for the first respondent being that because the Indian Supreme Court judgment does not specifically deal with evidence, or specifically discuss evidence concerning X, that the convictions entered were therefore, unsafe. Several responses to that argument for the first respondent; first of all the Indian Court documents were provided by X's counsel, so they were provided by X and his counsel to the Authority, unlike the example given by my learned friend's submissions for the first respondent, the example being *Appeal No. 74540 (Ahmed Zaoui)*, Refugee Status Appeals Authority, 1 August 2003, where refugee status was granted by the Authority. Unlike that case, there was no submission made by X's then counsel, counsel for X in this Court being different to counsel who represented X before the Authority. There was no submission made on behalf of X to the Authority, that the Indian convictions were unsafe.

ANDERSON J:

Where in the documents is the copy of judgment Mr Carter?

MR CARTER:

It's in the case on appeal, yes volume 4 at tab 37.

ANDERSON J:

37?

MR CARTER:

Tab 37, yes, of the case on appeal.

ELIAS CJ:

What was the charge? It was –

MR CARTER:

There were several charges –

TIPPING J:

Wilful destruction or something.

ELIAS CJ:

Yes.

BLANCHARD J:

You find them at page 75.

ELIAS CJ:

Thank you.

BLANCHARD J:

Para 138 of the –

ELIAS CJ:

Right, yes.

MR CARTER:

Yes, there is also an addition to paragraph 75, there's also a footnote at the beginning of the decision. Footnote 1 on page 15 of the case on appeal, page 7 of the decision, which sets out the statutory provisions as a footnote, but there were a number of other charges brought against the crew members of the *Yahata*, and they resulted in acquittals before the first instance Judge.

At page 1316 of the case on appeal, it's the third page of the Supreme Court judgment, there's reference to A3, who was the chief engineer. So A3 is X, and discussion at the foot of the page that, "The investigation revealed ... that [the *Yahata*] was on a clandestine voyage and was carrying explosives for terrorist operations. ... [A]ll the 19 accused had conspired to throw overboard all the boxes containing explosives and to destroy evidence as regards their links and not to surrender to Indian Navy or to allow them to inspect their vessel." And further on in the middle of page 1317, "They had set fire to the ship in order to destroy evidence and to strike terror amongst people including Naval Officers on board the Indian Naval Coast Guard ships who were involved in the said operation." Page 1320 in the middle of the page, it's a reference to the first instance Judge. On the basis of certain factual findings, he held that the prosecution had failed to establish any of the charges levelled against the accused. On appeal to the Supreme Court, it was contended by counsel on behalf of the Indian government that the Judge had not correctly appreciated the evidence, and also the correct legal position. There are then a number of references in the judgment to how the Supreme Court found that the first instance Judge had not only misdirected himself as to law, but had also not understood the evidence that was before him. In particular, the passage, or almost the entire page on page 1322, 1323, right over to 1325. A summary at page 1327, near the top of the page, where the Court finds no reason to disbelieve evidence of certain naval officers, and that "the reasons given by the learned Designated Judge for not believing this part of the prosecution evidence are not at all proper and sufficient. We therefore, hold that the prosecution had satisfactorily established that the accused had used criminal force against the Indian Naval Officers while they were performing their duty, and that was done with an intention to prevent or deter them from discharging their duty." They were, therefore, held guilty. Now, another point to be made about the Indian Supreme Court –

McGRATH J:

Can you just tell me, one of the things, the points that's made against you in this respect is that the persons on board who were directly involved in military operations for LTTE were all killed, and that we had left the civilian crew, if I can put it in those terms. In particular, we have X as one member, albeit a senior member of the crew. Now, can you tell us, whether from this judgment or the evidence if you have it, of the people identified as P1322 et cetera, how this was sheeted home, in particular to X?

MR CARTER:

Well, it's not apparent on the face of this Supreme Court judgment. The difficulty with attempting to achieve that, i.e. sheet matters home to X as one individual is, again, the incomplete nature of the information, because we have a copy of the first instance judgment, but it's apparent from that that the first instance prosecution hearing took place over approximately a month, and what we don't have is any of the documentation associated with that month-long hearing, other than the judgment. So we don't have notes of evidence that would enable either this Court or the Authority as the challenged decision-maker to analyse out whether there was information, was evidence to sheet matters home to X as an individual. And given the fairly strong reservations expressed by the Supreme Court about some aspects of the first instance Judge's approach to both law and fact, it would be dangerous to try to conduct that sort of analysis off the face of the first instance judgment alone, without the benefit of all this other material that might have once existed in India in the early 1990s, but probably doesn't exist now, or, if it does, it probably couldn't be accessed.

McGRATH J:

I understand, then, that your argument comes down to saying that the Supreme Court of India is a final Court that has reached these findings, and that you can rely on that as evidence, I think, because, essentially what you're saying is that – I'll just be helped – is there any authority for the extent to which the Court can rely on it in evidence in circumstances where there is no underpinning material that can be considered?

MR CARTER:

Well, not –

McGRATH J:

Mr Harrison addresses this, of course, in his submissions by reference to analogy with the domestic law, I think, in particular.

MR CARTER:

What is the appellant is relying on, and we've footnoted it in the submissions, we're relying on the principle of comity, that you have a regular judgment of a superior Court of a foreign country which appears regular on its face, and you shouldn't go behind it, unless you've got reason for doing so. And in circumstances where a safety submission wasn't made before the first instance decision-maker here, and nothing else that I can identify arising from the transcript of what occurred before the Authority, and the transcript does include, at the end of the second hearing, a record of the submissions made by the claimant's counsel, in these circumstances, there's nothing to justify going behind the Supreme Court judgment.

McGRATH J:

I understand the submission, but it comes back, as you've rightly said, to the principle of comity. Now, is there anything that applies, any authorities that support the application of comity in these circumstances, this sort of circumstance that you can point to? I mean, perhaps not necessarily in the refugee context, but in other contexts. There must have been some consideration of this somewhere in the common law world, at some stage.

MR CARTER:

Well, there is at least one example, but perhaps I can identify the precise case during the luncheon adjournment. There is one example, it might even be mentioned by the Refugee Status Appeals Authority itself, that a 1F exclusion decision was made on the basis of the existence of an extradition request alone. So it's not, you know, not a final judgment of the final Court in the land. It's a mere extradition request.

McGRATH J:

There might not be a lot, but I would have thought there'd be something that would discuss comity in this sort of situation, where a judgment of an overseas Court of authority, indeed, a very high authority, is used as evidence of guilt, of participants, although the reasoning and the underlying support for it is not fleshed out in full. I'm looking for something that would discuss how a Court in the position of this Court should apply comity in those circumstances.

MR CARTER:

We'll see what we can find, sir. One matter to bear in mind, of course, is that the Authority relied on the Supreme Court of India judgment as evidence, as Your Honour said, evidence of the fact of having committed a non-political crime, and the standard that is to be applied is whether there are serious reasons for considering, so it doesn't have to be absolute, 100 percent certain that there was the committing of a crime.

COURT ADJOURNS:1.01 PM

COURT RESUMES: 2.15 PM

ELIAS CJ:

I should say that we're planning to sit till five, if that's convenient to counsel, and to take an adjournment at 3.30. The reason for that being it will be difficult for us to sit after 12 or 12.30 tomorrow, and so we'd like to see whether we can go as far as we can tonight. Is that convenient to counsel?

MR CARTER:

Yes, fine with me, Your Honour.

ELIAS CJ:

We'll take an adjournment at 3.30 and we may need to confer about whether we will maintain that.

MR CARTER:

As the Court pleases. We did search in the lunch adjournment in response to Your Honour Justice McGrath's question. We haven't come up with anything specific as yet, the closest we've got is the suggestion that a foreign conviction, evidence by a foreign judgment, may have been used in New Zealand in a similar fact evidence, but I'm not sure that that's quite close enough for present purposes to what Your Honour was –

TIPPING J:

Can I commend to you a passage from *Halsbury* volume 8(3) at 662 is a useful starting point. I may not get you to the ultimate destination, but it's a discussion about judgments in rem from foreign Courts, and the question here would be whether

this was a judgment in rem. If it's a judgment in persona I think there are difficulties, but if it's in rem, so, that might be helpful to you.

MR CARTER:

Thank you, Sir. Just on the, still on 1F(b) serious non-political crime and the Indian Supreme Court judgment, as I mentioned just before lunch, the mere existence of a valid warrant or extradition request may be sufficient to establish serious reasons for considering, and that's discussed briefly in the *Zrig* Canadian judgment that I discussed this morning. What the first respondent, in my submission, suggests is required by a refugee decision-maker is a full retrial of X under Indian domestic law in New Zealand with all the, or at least an inquiry into criminal liability, with all the problems associated with trying to get evidence and understand foreign law. That's all I was intending to address on the Indian Supreme Court judgment and 1F(b). Just before I leave it, I would draw Your Honour's attention to the fact that after the Supreme Court judgment was delivered, it seems from the documents that were before the RSAA that, at least within officialdom in India, the group were all considered for administrative purposes as effectively members of the LTTE, so that the surviving crew were effectively members, and they are documents that appear in, just after the Supreme Court judgment, in the case on appeal at volume 4 in tab 39 and 40 they appear to relate to administrative detention for immigration purposes, but there are several references scattered throughout the documents to the surviving crew, who were then in detention in India, are described as LTTE cadres. So at least India was still, it appears, officially treating, was treating them in that way.

TIPPING J:

What I don't understand your argument – I don't understand what your argument is against the view of the majority of the Court of Appeal, that this was a political crime. You mentioned Justice Arnold didn't think so, but as I recall it the other two members of the Court were of the other view, and it seems that their reasoning was that it was certainly political up to the moment of the sinking and how's that it ceased to be political on the sinking. What's the argument against that?

MR CARTER:

That as far as can be inferred from the limited available information, that the reason for the sinking was to avoid capture and destroyed evidence. That's a matter of inference rather than direct evidence.

TIPPING J:

So if they're avoiding capture, they're trying to make sure that they're available to continue the fight on another day.

MR CARTER:

Well –

TIPPING J:

I, too, have great difficulty seeing how you carve this up into political first and then non-political at some later point, it seems to me totally artificial: it's political while it's going like this, but as soon as it goes like that it ceases to be.

MR CARTER:

Well, the political purpose, the distinction I would draw for the appellant is that the political purpose of the LTTE is in respect of the Sri Lankan government, not the Indian government. So the sinking, if it's a correct characterisation that the sinking was to avoid capture and avoid seizure of the *Yahata's* cargo, that didn't have anything to do with the political objective of the LTTE.

ANDERSON J:

What about preventing the commissariat from falling into the hands of people who would extradite them to Sri Lanka?

MR CARTER:

Well, again, in refugee law there's a commonly-discussed distinction between prosecution for ordinary criminal purposes and persecution for political purposes or other Convention reasons. I would submit that a similar sort of distinction can be made here in the sort of example that Your Honour Justice Anderson is postulating is still in the realms of an ordinary criminal prosecution for an ordinary criminal prosecution purpose rather than a political purpose.

ANDERSON J:

I also have difficulty with the idea of some minute dissection that says, "This bit of the activity is political and this bit isn't."

MR CARTER:

Well, my response to that is that it's not a minute dissection, it's based on inferences properly drawn on the limited information that's available.

TIPPING J:

Is a fair question to say, were they still motivated by the overriding political purpose? I mean, this sufficiently close and direct link test, it sounds very good in theory but it isn't awfully easy to administer, is it? How far away do you have to get from an overriding political context so as not to have a sufficiently close or direct link? You say far enough away –

MR CARTER:

Yes, I –

TIPPING J:

– but that doesn't help me much as to what the sort of…

MR CARTER:

Well, if one gets into the area of motivation, what motivates it, that's really, on the material available that is speculative material, a speculative area.

BLANCHARD J:

Well, one has to make as much sense of it as one can, but it seems to me that, take another example, if they'd been part of a group which had attacked soldiers of the side they were fighting against and they'd come off second best and started to run away, and in order to get away they had, for example, held up the driver of a car and taken the car away, you wouldn't surely say that their purpose had become non-political at that stage?

MR CARTER:

No, I wouldn't, I think in that example there is a sufficiently close link.

BLANCHARD J:

Well, you said a little while ago that one of their purposes was probably to get away.

MR CARTER:

In the sense of avoid capture.

BLANCHARD J:

Yes. And the fact that they're running from the Indians rather than from the Sri Lankans doesn't seem to make much difference. The Indians were essentially acting in aid of the Sri Lankan government in taking this action. They may well have had their own purposes as well, one could well understand that, but I really don't think the fact that it's the Indians who've done it makes much difference.

MR CARTER:

It's not clear that the Indian government was acting in aid of the Sri Lankan government. According to evidence that's discussed before the Indian Supreme Court, the reason for interception was that the vessel was come upon without flying any nationality flag and its name, because the letters of the name of the vessel, two of the letters had been removed, meant that it was not possible to identify the vessel. The closest that you get to the notion of the Indian government assisting, on my recollection of the evidence, is there is a suggestion, I think sourced from a news report, that at the time the *Yahata* departed Phuket an Indian submarine was sighted in the area, but that's it, the suggestion being that perhaps the Indian government had the area under surveillance, the Phuket area under surveillance, because of the *Yahata's* activities, but there's no direct evidence of that.

BLANCHARD J:

It would be a bit naïve to think that the Indian government wouldn't have had a pretty fair idea of who was operating this boat and therefore its likely purpose.

MR CARTER:

Well, that's a possibility but there is, as I say, no direct evidence of that.

McGRATH J:

Well, isn't the position really on the Supreme Court's findings, at page 1315, that the vessel was intercepted because the coastguard entertained a suspicion about the nationality and intentions of the ship, and that's why they demanded the right to board?

MR CARTER:

Yes, but that was because the flag, suspicions about the nationality was because the flag wasn't flying.

McGRATH J:

Yes, and because the boat was drifting.

MR CARTER:

Yes. So just on those facts alone that doesn't, in my submission, get one nearer to a sufficiently close and direct link between the crime and the alleged political purpose. Well, that's all I had on that subject, and I was just going to move briefly to address disposal, depending on how the Court ultimately views the case.

If, as I've said at paragraph 105 of the appellant's submissions, if ultimately, depending on what the Court decides, is the correct approach, whether it's a *JS* or a Canadian variant or another variant, if the Authority reached the right legal conclusion on the facts as found and applying the test ultimately formulated by this Court, if it's possible to characterise the position then that the Authority made no material error of law then, in my submission, there should be no order setting aside the Authority's decision in directing reconsideration. Alternatively, if in substance the *JS* test was applied, in that's what is ultimately adopted, and the Canadian authorities relied on by the RSAA did not cause it to apply a substantially different test, and again, there would be no material error of law, in my submission. So again, if that's how it pans out, there should be no setting aside of the Authority's decision and direction back to reconsider.

ELIAS CJ:

Is that simply a submission, if the Authority hasn't made an error of law, it shouldn't be sent back?

MR CARTER:

Well, yes. But the approach that ultimately finds favour with the Court might not, at least formally in the way it's expressed, match up with the legal test in principles applied by the Authority. But if the result on the facts as found, assuming no interference by this Court in the factual findings, if the result would be the same, then there's no material error of law.

ANDERSON J:

There's an error of law, but it's not material to the outcome?

MR CARTER:

Yes.

McGRATH J:

As we said in that earlier case, the result must inevitably be the same, mustn't it?

MR CARTER:

Yes, well, that's another – the inevitable outcome approach.

McGRATH J:

They got the law wrong, but on the right law, the answer must have been the same is the point you're addressing at the moment?

MR CARTER:

Yes. If the appeal is dismissed, then, again, it depends on what approach is ultimately fixed on by this Court. But if the appeal is dismissed, the order directing the Authority to limit its reconsideration to inclusion-only issues should be varied to allow the Authority to reconsider exclusion issues under 1F(a) and (b) in the light of the Court's interpretation and directions. Just finally, it's not a matter that was specifically pleaded before the High Court in terms of an allegation of bias or pre-determination by the Authority, but a submission that was made by the first respondent in the Court of Appeal has been renewed in this Court, that if there is a reconsideration that the decision-maker who made the decision challenged in this case, Mr Haines, should not be on the panel. In fact, there were two members of the panel, Mr Haines and Mr Hodgen, who is no longer a member of the Authority. But in the absence of any allegation of bias or pre-determination, which there cannot be, in my submission, there's no good reason or basis for any direction as to the constitution of the panel that ultimately re-hears the matter in the event of a reconsideration. So unless there are any further questions from Your Honours, that's all I was intending to address.

ELIAS CJ:

Yes, thank you, Mr Carter. Yes, Mr Harrison.

MR HARRISON QC:

If I can start by just stating a roadmap for the submissions I would like to address. We've got article 1F(a), and, incidentally, we can find that provision at page 89 of volume 1 of the case on appeal, that's in paragraph 29 of the judgment of Hammond J, I think it is. Yes. So we've got 1F(a), various crimes, including, of course, crimes against humanity, and I'll call those collectively international crimes, for convenience, as a catch-all for the 1F(a), then you've got 1F(b). So under 1F(a), the points are threefold. The first is a submission that the RSAA engaged in flawed credibility reasoning, and when you analyse that and take away the flawed conclusions, you end up with no evidence of complicity, and that, of course, that argument is set out in the submissions in administrative law terms as no evidence/unfairness/unreasonableness conclusion for the RSAA to have misused its approach to credibility findings. The second point is, in the alternative, that the mental element of complicity is lacking. The third is, in the alternative, that the physical element of complicity is lacking, and, of course, we use complicity as a shorthand for quite a lot here.

In relation to article 1F(b), the points, again, are threefold. First, we argue for an error on the part of the RSAA in its approach to reliance on the Indian convictions. The error can be treated as one of automatically accepting the convictions as definitive when, in my submission, they were no more than evidence that a crime, in the terms of the finding of the conviction, had been committed. They couldn't be definitive. So that, in that sense, the RSAA's error can be put as an error in treating the convictions as definitive. Equally, an error in failing to address the other evidence to the contrary, in particular, to address X's own evidence denying any criminal behaviour, rather than what might have been open to the Tribunal saying X said this, this and this about the events of the day of the sinking. Having heard his evidence, we do not believe him. We reject his explanation. We therefore have the evidence of the convictions. That solves that part of the issues. They mishandled the convictions.

The fifth point, in other words, the second under 1F(b), is that the convictions ought to be deemed unsafe in any event, for reasons I'll go into. The sixth point is that, in any event, the crimes for which X was convicted, even if they are taken at full face value, were not serious, non-political crimes. That is to say they were political, whether serious crimes or not. Now, before I get to the detail of the submissions, I will attempt to focus on some of the key points of debate that have occurred this

morning. Your Honour Justice Tipping put a finger on a crucial point earlier on when you invited my learned friend to explain how, as a matter of law, there could be a test in this area of simply knowing that there is a real risk that an international crime would be committed, that's an aspect of the mens rea. But perhaps a starting point is, as usual, to go back to the facts and the – there are two critical points here, in my submission. The first is that one must take into account the dual roles and the differing goals of the LTTE. One set legitimate, in a sense I'll explain in a moment, and the other sense plainly illegitimate and indefensible. That's to say the second illegitimate ones are all the terrorism acts and the war crimes. None of those we dispute. The legitimate goals are those of a participant in the civil law and there's a very helpful passage in *JS* in the House of Lords and I'll just have to find – I think it's volume 1 of the case of the bundle of authorities, tab 14, the judgment of Lord Brown at paragraph 25, and this puts the point far more neatly than I could, is His Lordship – so that's at page 15 to 16 of the printout, His Lordship at paragraph 24 has said that he derives the most assistance from, in among the prior cases, from a Court of Appeal judgment in *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292 and then referring to that case he then at para 25 cites from, Stanley Burnton LJ, and this is the critical point. "37. The application of 1F(c) – " here talking about 1F(c) but nonetheless I submit a more general application, " – will be straightforward in the case of an active member of organisation that promotes its objects only by acts of terrorism." Straightforward there. "38. However, the LTTE – " during the period in question, " – was not such an organisation . It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the Government of Sri Lanka. The application of article 1F(c) is less straightforward in such a case. A person may join such an organization, because he agrees with its political objectives, and be willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities." Of course, the higher up you are the inference is stronger. "But it seems to me that a foot soldier in such an organisation – " who has not personally participated " – in acts of terrorism, and in particular has not participated in ... murder" has not been guilty of the 1F(c) offence. Of course there is an elaborate discussion in the judgment of Baragwanath J explaining why the participation in a civil war is not unlawful at international law. I mean it may well be – Sri Lankan law may well have made it unlawful but the international law that we're concerned with, participation in a civil war is not.

I wonder if I could just take Your Honours, while on that topic, to the first respondent's casebook materials, and I'll take you straight to tab 13 which helpfully makes some points along these lines. Now this is only an extract, of course, from a total publication by UNHCR which is available on its website, from April 2009, and of course events in Sri Lanka have moved on since then but these were dedicated guidelines aimed at the situation in Sri Lanka as at that time. If we go to page 36 of the printout. I have bracketed the last paragraph but if we just start the second paragraph under the heading, here we're talking about war crimes: "Potential exclusion due to involvement in the commission of war crimes ... is of particular relevance in the context of Sri Lanka. War crimes are serious violations ... committed during an armed conflict. In determining whether a particular act constitutes a war crime, it is necessary to determine whether an armed conflict existed at the time, and, if so, whether the armed conflict was international or non-international in nature, as different legal provisions are applicable to acts committed in either."

The current conflict in Sri Lanka is a non-international armed conflict so this is the point I'm making backing up the Stanley Burnton LJ analysis which the House of Lords – the Supreme Court approved. Then the bit in brackets at the bottom: "How these acts are qualified for purposes of exclusion from refugee status depends, in part, on when they were committed. Criminal liability for violations of international humanitarian law applicable during non-international armed conflicts." Then there's a reference to it "was not established" over the page "until the mid 1990s. As such, only those violations of [International Humanitarian Law], that occurred after this time would be considered 'war crimes' within the scope of Article 1F(a). Violations of IHL committed before this time would need to be assessed" under other types of crime and of course that timing factor is significant here because the alleged war crimes that the RSAA was prepared to uphold occurred prior to this transition but also when we look at the more focused statement about individual responsibility it is said in the paragraph I've identified: "It is noted in this regard that many individuals are forced to support the LTTE or to join the organization. The defence of duress will need to be closely examined. With regard to support provided to the LTTE, it will need to be determined whether the individual made a 'substantial contribution'" - that's consistent with *JS* of course – "to any crimes that were committed … whether the individual provided the support with the necessary intent and knowledge to be held individually responsible for the commission of those crimes". Then there's a section on LTTE –

TIPPING J:

That doesn't state anything other than what's implicit in all the treaties and conventions does it?

MR HARRISON QC:

Agreed, agreed. Yes Your Honour. At the end LTTE leadership and membership, membership not a sufficient basis, again this is consistent with *JS* –

TIPPING J:

Well why are you taking us to all this if it's not –

MR HARRISON QC:

Because this is the, this is the material at the international, UNHCR level. It is part of the pool of material but its significance is that of course it is directly focusing on the situation in Sri Lanka so in that sense it is, it is of some substance, I submit. But that's all I wanted to bring your attention to. That report had a couple of maps of Sri Lanka annexed to it but just the last two maps I put in for, I'm afraid it's only Google and this is my research, it was – Googling Valvettithurai and amending this map, I just point out that's where it is an on the right-hand map you can see where Chennai is so it's a fairly small place right at the top of Sri Lanka and probably the closest large town or city is Jaffna. Anyway, there you are, that's that material.

Now – so the critical point, I submit, is the dual role and goals, one critical point and the second critical point is X's limited involvement and I'll come to my learned friend's argument about the involvement is for six months and the last journey. Our case is and the RSAA's view was that it was the last voyage that mattered. Now, can I also try and deal with this question of participation, revisiting the Rome Statute provisions. I'm working from tab 11 of my bundle of materials, but the Rome Statute is also in the Crown casebook. Just go back a little, and I'm sure whether this is in the Crown materials, but at page 126 of my tab 11 of the printout, we have the preamble –

ELIAS CJ:

Sorry, tab –

BLANCHARD J:

Could you give us the references just to the Statute?

MR HARRISON QC:

This is the preamble to the Rome Statute.

ELIAS CJ:

But it doesn't seem –

BLANCHARD J:

The Crown's copy hasn't got that.

MR HARRISON QC:

No, well, I supplied a bit more material.

ELIAS CJ:

But you said at tab 11, is that right?

MR HARRISON QC:

Tab 11 of a document called, "First respondent's bundle of authorities."

ELIAS CJ:

Yes.

MR HARRISON QC:

Tab 11, you start, I have included our statute –

ELIAS CJ:

Oh, I see.

MR HARRISON QC:

This is our Act and the Rome Statute is in a schedule.

ELIAS CJ:

Thank you.

MR HARRISON QC:

So, if you're looking at the pagination at the bottom of my printout and you go to page 126, you can see the preamble, and I just refer to the preamble because it does stress that it is dealing with grave crimes, "The most serious crimes of concern," so it

is, that ties into a passage from *Mugesera*, which I have in the body of my submissions, where the Supreme Court said, "it is important not to trivialise these most grave crimes by applying them to conduct, shall we say, at the lower end of a scale or continuum to the small fry with a minor role, to put it in the vernacular. So the preamble underscores that. At page 129 we have the definition, article 7, definition of "crimes against humanity," and I'll have to come back to that when I get to *Mugesera.* Then we've got article 8 defining war crimes, at page 132, and then we get to part 3 at page 147, which deals with general principles of criminal law, and the provisions dealing with participation are among that section.

Now, I know we've been there already, but can I just talk Your Honours through article 25. 25(3) says that, "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…" and then you've got a series of categories that are very familiar to us in this country. (a) is the actual commission, (b) is ordering, soliciting or inducing commission, (c) "For the purpose of facilitating the commission of such a crime, aids, abets," et cetera, "in its commission or its attempted commission, including providing the means for its commission," (d) is the one that the Crown relies on, and that spells out its own actus reus, contributing to the commission or attempted commission by a group of persons acting with a common purpose, and then spells out the mental element. And then, (f) "Attempts to commit such a crime by taking action," and please note this wording, "that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of that person's actions." Now, this is –

TIPPING J:

Intentions.

MR HARRISON QC:

Pardon?

TIPPING J:

Intentions, not actions

MR HARRISON QC:

Sorry, of that – oh, sorry, independent, yes, of that person's intentions. Sorry, I misread it, yes. So, this is the definition of "attempt" which, as I argue in the written

submissions, links back to the notion of attempt, where it is in (c) and (d), where it talks of "attempted commission". Now this means, and here I'm turning to Justice Tipping's musings, if I may put it that way, with respect about conspiracy, there is no conspiracy participation offence in this Statute or, I submit, at international law. The closest you get to conspiracy is article 3D, that's the only provision that's doing the work of conspiracy, and if the attempt provision is deliberately narrow, down to, it's the kind of, it's the interrupted bomber type of scenario, where the bomb doesn't go off or the car bomb is removed to a rubbish tip or something. It's that sort of scenario that is an attempt, and I argue in the body of our submissions that it is quite plain, therefore, as a matter of construction of these provisions, that either a crime, either an international crime must have occurred and the relationship to the crime must be one of the specified ways, aiding and abetting, inciting, et cetera, or an attempted crime must have occurred, which means a crime that reaches the point identified in paragraph (f), so that if you have, even with full mental element, if you have an action taken which never – for example, with aiding and abetting – never aids or abets either a completed crime or a crime which reaches the stage of attempt, as defined, you simply don't have participation known to law, known to article 25, unless of course you find yourself falling under some other dedicated provision like article 28, which deals with responsibility of commanders and other superiors. And in this context I found Your Honour Justice Blanchard's example of the several truckloads of ammunition delivered to an ammunition dump very helpful, because for the purpose of my argument I have no trouble accepting that if you're one of 10 truck drivers who've delivered ammunition to the ammunition dump and, subsequent to that, international crimes occur using explosives drawn from that dump, the principle that the Crown relies on is perfectly valid. It is to say, if you have contributed to the pool of resources which then brings about an international crime, it is not required for the prosecution to demonstrate that your truckload was used to commit that atrocity. That is perfectly sound and I don't have a quarrel –

TIPPING J:

Do they have to prove that it contributed to some atrocity, not necessarily a specific one?

MR HARRISON QC:

Well, I would go so far as to submit that if it's the truck driver whose conduct and criminality is being scrutinised, they have to prove that ammunition from the dump was used to commit the atrocity.

TIPPING J:

Is the culpability of the truck driver in that event because he knowingly carries the explosives, knowing that they may well be used for atrocity?

MR HARRISON QC:

The culpability is, well, I mean there's, he's got to have the mens rea. I'm actually talking about the actus reus at the moment really.

TIPPING J:

Well I don't think there's any problem with the actus reus. I mean, it's the mens rea, isn't it, that's the difficult one here, particularly with a crime that – well actus reus I suppose is problematical as well if the crime hasn't been committed. But the actus reus of assisting is clear enough, but this truck driver, he becomes guilty because he's done something knowing that it may well be used for an atrocity. Is that the thesis?

MR HARRISON QC:

Can I, Your Honour, can I park the mental element and come at it full on –

TIPPING J:

Yes.

MR HARRISON QC:

– rather than just in answer to this question because I want to deal with the *Mugesera*, what I call recklessness.

TIPPING J:

I thought you were – I was just using my brother's example of the truck.

MR HARRISON QC:

Mmm.

TIPPING J:

To try and flesh out why you agree with him.

BLANCHARD J:

The truck's about to be parked.

TIPPING J:

Why you agree with my brother that that's, of course that person's guilty but this chap isn't.

McGRATH J:

Your contemplating that the resources are used for the crime I think, aren't you?

MR HARRISON QC:

Yes, yes, I am and I'm coming to that point but I also want to, I just want to put a refinement twist on my truck driver as well.

TIPPING J:

You're risking in my case, just getting too convoluted. If there is a key point, it would be useful to have it right out front, like the one my brother McGrath might have just happened upon.

MR HARRISON QC:

Well I'm trying to articulate a point of common ground because there is this principle and what I'm trying to make plain is that we don't challenge it. If you're an aider and abettor or under (d), if you do an act which is an act of assistance of the actual terrorist perpetrators, or even if it contributes to their overall resources by being one of the trucks, it's the arms dump, and after that an international crime, using the resources from that arms dump as committed, the law is clear, and we do not challenge it, that the prosecution does not have to prove your explosives from your delivery went in to that atrocity. So that's what I'm saying, common ground. Short of that you have – this case falls several steps short of that for a number of reasons. One is the point I made at the outset about a group such as the LTTE, which has more than one set of objectives. As soon as you superimpose on Justice Blanchard's scenario, the fact that the organisation has different purposes and methods, you then need a much more focussed inquiry, and that is when, Justice Tipping, you need to be very discerning about the mental element. You may have a sufficient actus reus on the analysis that you are a significant drop in the bucket and you've substantially contributed, but then there's the mental element. But of course this case falls far short of that because it is the case of the truck that didn't arrive, the truck that broke down or whatever.

BLANCHARD J:

Blew up.

MR HARRISON QC:

Mmm?

BLANCHARD J:

Blew up.

MR HARRISON QC:

Or blew up, and that's why I've been emphasising my, in my submission, the analysis of article 24, and of course, not only has, even if you say, "Well article 25 of the Rome Statute may not be the be all and end all," but my learned friend was unable to provide you with an authority for the proposition that doing an act which fails completely in any physical sense to contribute substantially to a future crime, and indeed we can't even identify a future crime, a specific one anyway, is a mode of participation. It's not under article 25 and it's not under any other authority at international law that I'm aware of. So these are the problems.

TIPPING J:

Might it not be under 25(3)(f)?

MR HARRISON QC:

No, because –

TIPPING J:

But the Crown apparently have disavowed any concept of attempt.

MR HARRISON QC:

My submission is that that is – (f) deals with the principal offender. That is to say, the suicide bomber or whomever, the suicide gang, the terrorist gang, they are trying to commit an international crime, and they start the execution of – they actually start on executing the principal offence.

TIPPING J:

So (f) only applies to what we would call primary offenders.

MR HARRISON QC:

A primary offender, and the primary – not only –

ELIAS CJ:

Well it may not be the primary offender. It could be an aider or an abettor but it has to be a substantial step towards the commission of the crime against humanity.

MR HARRISON QC:

Yes, and then, you can then, under C and D, you can then be a party, a secondary party to that attempt. You can aid those who take the, commence execution by means of a substantial step under (f), but you still have to have a crime or an attempted, an international crime or an attempted international crime, before those provisions work. So that's at the level of what we call actus reus, physical element, and that's – given, if I'm right in that interpretation of article 25, and there is no other international law doctrine that gives the Crown a leg up, really that's I submit, pretty much the end of it.

McGRATH J:

I understand your position on (f) clearly. Could you just recapitulate why it is it fails (d)?

MR HARRISON QC:

Yes, sorry, just one moment Your Honour. I dealt with this in – at page 19, paragraphs 62 to 66 of my written submissions and I sum it up at 66, just to save Your Honour noting it down, paragraph 66.

McGRATH J:

Thank you.

ELIAS CJ:

Isn't it put shortly, simply that it still has to be taken back to a crime, in this case within the jurisdiction of the Court, in our case a crime, a qualifying crime?

MR HARRISON QC:

It does, and that crime must either have occurred and been completed, or have occurred to the point of –

ELIAS CJ:

Yes.

MR HARRISON QC:

– an article 25(3)(f), attempt.

ELIAS CJ:

And also, you've said that article 25 isn't the be all and end all necessarily but I take it from your perspective, you're content that it should apply even though it post dates the circumstances that we're dealing with, because you accept it is –

MR HARRISON QC:

Yes, that has been formally –

ELIAS CJ:

Yes.

MR HARRISON QC:

– conceded. There is an Australian decision at Federal Court of Appeal level which is right on the point. But obviously, *JS* (*Sri Lanka)* considers that the Rome Statute is really sufficient for present purposes.

ELIAS CJ:

Yes.

BLANCHARD J:

Is the Federal Court case *SHCB*?

MR HARRISON QC:

Something like XXY something or other. I can provide you with that citation immediately after the break. I don't have a copy, I don't think, with me but –

BLANCHARD J:

Is it one that's not been referred to?

MR HARRISON QC:

It may not have been. I think I mentioned in a footnote to my submissions that the concession I'm making – it's not really a concession that the Rome Statute is retrospective.

ELIAS CJ:

No, it's just an acceptance, so we don't need to worry about it.

MR HARRISON QC:

It's a concession that it states international law. So that's the –

TIPPING J:

Is this your fundamental point, I suspect, Mr Harrison, what you've just said, that the crime alleged must have either been completed or have reached the point of an attempt within (f) before you can have any accessory liability for that crime?

MR HARRISON QC:

That's it in a nutshell. At the actus reus level.

TIPPING J:

At the actus reus level. Of course. If there's no actus reus, then –

MR HARRISON QC:

That's it, yes.

McGRATH J:

Are you going to address the idea of joint criminal enterprise at some stage, because I think that's how the Crown endeavoured to anticipate your submissions.

MR HARRISON QC:

Well, yes, I am. But equally, the points I've been making apply to the joint criminal – (d) is the –

BLANCHARD J:

(d) is joint criminal enterprise, isn't it?

MR HARRISON QC:

Yes. So 25(3)(d) is the joint criminal enterprise provision that is said by the Supreme Court in *JS* to take the liability view on, shall we say, the common law principles.

BLANCHARD J:

So what you're saying is that (d) applies where the group actually commits a crime, or where it attempts to commit the crime, but that this case hasn't got to the point of an attempted commission of a crime?

MR HARRISON QC:

Correct. In terms of the –

BLANCHARD J:

It's a preliminary step.

MR HARRISON QC:

In terms of the only actions that the RSAA relied on, which was being on the last voyage with the explosives.

ANDERSON J:

So there hasn't been a substantial step?

MR HARRISON QC:

I mean, in a nutshell, you can't provide substantial assistance if your truck broke down on the way. You've never provided assistance, substantial or otherwise, which is the *JS* test.

ANDERSON J:

But I take you to be saying that attempted commission, in terms of (d), requires a substantial attempt, because it's covered by (f).

MR HARRISON QC:

Yes, obviously, that's about attempts. But the *JS*, the reaffirmation in *JS* that you have to have contributed in a significant way – I'm getting my wires crossed. You've got to have substantially contributed to either a completed international crime, or an attempted one.

ELIAS CJ:

Or a contemplated one. It's got to be contemplated, because otherwise you'll never be able to work out whether it's a substantial step towards it. So it is very much identifying the crime that is critical, it seems to me, here. After the event, you can identify the crimes, and that's why in most cases it has been applied after the event, and you can have a joining a group in having achieved those crimes much more readily. But if there isn't a crime in contemplation, or if there isn't a crime that has been committed, then it seems to be that there's a gap here. Because otherwise you're simply saying that it is a qualifying crime to adhere to a group that may, or is likely to, commit one of these offences.

MR HARRISON QC:

Yes, entirely, and with all due respect to my learned friend, much of his argument, I submit, was dancing around trying to find a way around the *JS* fundamental proposition that I don't think he ever mentioned that mere membership of, or involvement, in a group such as the LTTE is not sufficient. So both the RSAA and the Crown argument do a huge dance around, trying to find something, but really find nothing to demonstrate that what he's alleged to have done went beyond active involvement which is denied, but that was the finding. So that is the gist of the submission there. I want to – can I just go back. I don't want to – in terms of speaking to my submissions, that was all introduction. I just, noting my submissions at page 5 when we look at general considerations and principles, I make the point that both the Crown and the first respondent do focus on methodology of approach, and it's really quite important to get these concepts of approach to the inquiry correct. It's not merely about onus of proof and so on, but the point I make at paragraph 7 – page 7, sorry, paragraph 22 – in my submission, one has to distinguish between a claim for inclusion and a claim or contention that the claimant is excluded. They are really two quite different things, because there's a provision in the Immigration Act that makes it plain what the burden of establishing a claim for inclusion is, and the treatment of credibility, as I go on to submit, the treatment of credibility when you're assessing a claim for inclusion is necessarily quite different, because you've got to be alleging that you have a subjective fear of persecution for a convention reason, and it has to be well-founded. Well, if the claimant's credibility is rejected on the central contention, it's goodbye. The onus is there. But it can't be the case, in humanitarian law terms, that a claimant has the onus of disproving the exclusion

grounds, proving I didn't commit an international crime. And that's the burden here. So when you get to assessing –

ELIAS CJ:

Sorry, why do you say that?

MR HARRISON QC:

Well, because it's a – well, my argument is that if we look at the provision set out in paragraph 22 of the submissions, it's the responsibility of an appellant to establish the claim, and to adduce the evidence, et cetera, that you wish to have considered in support of the appeal.

TIPPING J:

Establish a claim means establish a claim for refugee status, presumably.

MR HARRISON QC:

Well, my submission is – I know what Your Honour is saying, I know the point Your Honour is making.

TIPPING J:

You can see me coming.

MR HARRISON QC:

Yes, I see Your Honour coming, and not for the first time. But no, my point is that a fairer reading of that provision is to have it refer to the claim for inclusion. The notion that you have to – and this is a provision which says up-front you've got to provide this material. So you wouldn't be up-front, coming along to the Authority and saying, look, look, I haven't committed any crimes against humanity. It's an issue which gets raised if it has to be, as it was in this case. The RSAA raised it of its own motion and turned that into quite an exercise.

ELIAS CJ:

I really think this may be too much refinement, Mr Harrison, because if there's a mandatory exclusion, and an applicant has to show that they're eligible, well, then the applicant has to satisfy that the exclusion doesn't apply. I'm not satisfied, in the sense of any particular onus, but it seems a little odd to say that there's no requirement to show that the exclusion doesn't apply.

TIPPING J:

There would have to be a suggestion that it did, perhaps, before you had to trouble yourself with it. But once it's suggested that it does –

MR HARRISON QC:

Well, you've also got the benefit of the doubt principle which I refer to in paragraph 23. You've got the proposition I put at paragraph 26 that evidence is required. At the end of the day, if the RSAA is going to take this very serious step of excluding, and this is Baragwanath's J point and he goes into it at great detail, it has to be on evidence. There may be a lesser standard of belief, grounds for belief, than the bounds of probabilities, but it still comes down to evidence. Even if I don't get hung up on the onus point, the point I was wanting to emphasise is that it must be the case that the credibility assessment and its consequences has a quite different role when you're considering inclusion on the one hand and exclusion on the other. I simply make the point that – to repeat myself – with inclusion, if the claimant is disbelieved on his central contention of his fear of persecution, out the claim goes. But if the claimant denies involvement in an international crime, and that denial is rejected, the RSAA still has to act on evidence.

TIPPING J:

I'm sure that's right, Mr Harrison, but the very evidence that led them to reject his denial is the evidence which asserts that he did. The evidence that they're looking to, to reject his denial, must logically be evidence that tends to suggest that he was complicit. I must say, I find this point of yours very, very –

BLANCHARD J:

When they came to summarise their conclusion, they didn't refer to their disbelief.

MR HARRISON QC:

They only reached their conclusion by reason of their disbelief.

BLANCHARD J:

No, no. I don't read them that way at all.

TIPPING J:

They were able to disbelieve him because there was evidence from which they drew inferences as to what had happened. What had happened was different from what he was saying. Therefore they disbelieved him. I mean – I think, with great respect, you're on a difficult wicket here.

MR HARRISON QC:

Well, I'm going to persist for – if I may – for just a short while longer. It is set out on page 12 and following of the submissions.

BLANCHARD J:

Well, I have to say I have read that, and I found it completely unpersuasive. I went back and had another look at the RSAA, and it just confirmed my view. But if you wanted to pursue it rather than getting onto better points, I'm in no position to stop you.

MR HARRISON QC:

Well, I just invite further consideration of the point, because in my submission, if you look at the way in which the Authority approached the matter, they do engage in what I describe as a snowballing credibility assessment. They reject his denial that he was aware that it was an LTTE ship, and they use, they then say that because he was aware it was an LTTE ship because we've rejected his denial, we find it incredible to say that he was unaware that the ship was – what the ship's cargo was. And from there, they say, well, if that's the case, it's incredible that you didn't know about the last cargo. And it just goes one after another.

BLANCHARD J:

What's wrong with that?

MR HARRISON QC:

What is wrong with that is that they are not using evidence that's before them. They are simply taking one adverse finding of credibility to make the next adverse finding of credibility.

ELIAS CJ:

But it isn't just credibility, Mr Harrison. It isn't just credibility. From the disbelief, they get to the point affirmatively that he knew that the ship was carrying armaments and

explosives. So once they'd got to that point, surely the leap that you're criticising is more one of law than credibility. I don't see how they're heaping error on error in terms of their factual analysis here.

MR HARRISON QC:

Well, what evidence, other than disbelieving his denials, is there of the following ultimately and damning finding which is in paragraph 126, page 71 of volume 1 of the case. It's the last three lines. "He voluntarily and in full knowledge joined the *Yahata*. His engagement in the secretive smuggling operations of the LTTE was ... a fully knowing one and evidence of his dedication to the aims, objectives and methods". And then there's a finding he was helping smuggle items into Sri Lanka, despite the fact that that ship never got to Sri Lanka once. Now, in my respectful submission, to – even if you –

ELIAS CJ:

The information to answer your question, the information they're clearly relying on is his status in terms of the ship, the position he occupied, and the fact that the oiler acknowledged knowing all these things, and the very implausibility that he wouldn't. So there does seem to be evidence from which they could come to this conclusion.

MR HARRISON QC:

Other than – there is no evidence independent from their rejection of his denials of knowledge.

ANDERSON J:

There's lots of circumstantial evidence. You've got nine men working on a ship, only nine of them, for months and months and months. The oilers know that it's an LTTE ship, and it just beggars belief that he didn't know what was going on.

MR HARRISON QC:

All right. Let's assume that, for the sake of argument. How can you then make the leap to the proposition that he was dedicated to the aims, objectives and methods of the LTTE? That is, I submit, quite simply a leap too far.

ANDERSON J:

But isn't that derived from the view on the part of the Authority that the best ship of the line, the LTTE, carrying the second-in-command and other members of the high

command, apparently, would not have had him in that position unless they knew he was allied in spirit with them? I think that's the reason they apply.

MR HARRISON QC:

I mean, I know that the RSAA reason that he must be LTTE, because they would have checked him out and they wouldn't put someone in such a crucial position unless he was full-blown LTTE. But he doesn't have to be full-blown LTTE. He's from Valvettithurai, which is all Tamil, a huge LTTE presence. His family is left there. Does he have to be a full-blown LTTE member to know that he has to show loyalty to them? He doesn't have to be. At every point, it's the most uncharitable possible inference and consequential fact-finding that you can imagine. "Aims, objectives and methods." And as I'm having this exchange with Your Honour Justice Anderson, I just refer to Your Honour's decision in *K v Refugee Status Appeals Authority*, High Court, Auckland, M No. 1586-SW99, 22 February 2000, a passage from which I've set out at the bottom of page 14, where in a case that was a lot weaker than my argument on this score, Your Honour said, it's the passage in bold in footnote 18, "It is axiomatic that the plaintiff's claim should be assessed on the basis of what facts were found, and not on the basis of what evidence was rejected."

TIPPING J:

That's where I really think, Mr Harrison, you're pushing this one uphill. They found facts. They drew inferences from facts. You criticise the extent of the inferences, but I'm more or less certain that they didn't reason backwards. You can say that the inferences were not reasonable inferences, and I'm not sure where that'll get you. I can understand that argument. But they didn't add anything on account of their disbelief. The disbelief was the consequence of the inferences they drew. They wouldn't add anything to the weight of the case against your client from the disbelief per se.

MR HARRISON QC:

Well, again, I don't want to go on and on about that sentence at the bottom of page 71 of the case. They found he's engaged in a secretive smuggling operation, that he's dedicated not merely to the aims and objectives, but to the methods. And he's, in effect, been helping to smuggle items that would as likely be used in conventional warfare as perpetrating gross human – I submit that that is a clear step or steps too far. Whether we call it a misuse of credibility or a finding without evidence, and at no stage does the RSAA say to itself, well, maybe he's not being as frank as he could

be, but there are reasons other than full-blown LTTE commitment for being less than frank.

ANDERSON J:

You say in any event this is an overstatement of his commitment?

MR HARRISON QC:

Complete over the top, with respect. And so I'll move on, and indeed, it's 3.30.

COURT ADJOURNS: 3.31 PM

COURT RESUMES: 3.41 PM

MR HARRISON QC:

Would it assist if I provided the citation of the Australian Federal Court on the retrospectivity of the Rome Statute?

ELIAS CJ:

Yes please.

MR HARRISON QC:

It's a case, there are two cases, two decisions relating to the same applicant I think. The first is called *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 42, that's the universal citation, and the discussion of the point at issue is at paragraphs 59 to 77, and I don't have copies for the Court. But the case came back to the Federal Court with a different set of initials in 2006, FCA 1759, [2006] FCA 1759, that's the citation, but it's the first of those two decisions which is rightly put.

ELIAS CJ:

Thank you.

MR HARRISON QC:

Right, now I want to turn now to this question of the mental element for complicity, and I point out at the outset, that in my submission our argument is, that the Crown submissions wholeheartedly adopt *JS* in the Supreme Court, but the problem with their approach was, as we pointed out in reply, the RSAA's approach cannot be said to have been consistent with *JS* in the Supreme Court, and that is what I explore in

some length in paragraphs 52 and following of the written submissions. So we had today a shift away from a total reliance on *JS* in the Supreme Court, and quite a much greater reliance on the Canadian Authorities.

Now the RSAA definitely does rely on the formulation in *Mugesera* in the Supreme Court, to which Your Honour, Tipping J has referred more than once, and of course it really has to do so because of the conclusion, the critical conclusion that the armaments being transported could just as well have been used for the illegitimate terrorist activities as for the civil war activities, meaning that there was no clear finding as to the use which they were likely to be put. And in that sense, the repeated reference in the RSAA to the *Mugesera* standard of taking the risk of being part of the attack, must be seen as a critical part of the RSAA's reasoning on the mental element concerned. All this is in my submissions. So we of course, are prepared quite happily to rely on the definition of the mental element in the Rome Statute provisions, and equally *JS* which is to the same effect, which doesn't contemplate recklessness as an aspect of mens rea.

Now how to explain *Mugesera*? I'll just get the case if I may. That's at tab 19 of volume 2 of the Crown casebook. Now in a nutshell...

AUDIO STOPS: **15:46:27**
AUDIO RESUMES: **15:55:47**

TIPPING J:

... actually that perhaps gets closer to what – it's not the passage to which the Supreme Court of Canada referred interestingly. It's on page 105 of the decision, paragraph 229 where, "We're making a distinction between aiding and abetting in the strict sense and participating in a common purpose or design," and in the latter case it is said, "That foresight that the crimes against humanity were likely to being committed," would be sufficient, but it doesn't of course touch on the question of what happens if they are not committed.

MR HARRISON QC:

Right and in that sense we have a unique case.

TIPPING J:

Yes.

MR HARRISON QC:

And when in doubt, leave it out, or something. In my submission there is simply no principled basis for extending complicity to Mr X.

Moving on, I would like to turn now to the question of 1F(b) exclusion, and the - I've set out my argument about the wrongful reliance on the convictions as being effectively, decisive. The suggestion was made this morning, that then counsel for X did not challenge the safety of the Indian convictions and was left dangling, but perhaps the suggestion was, that he's waived his right to run that argument now. On page 25 of our submissions, in footnote 30, I give a number of transcript references in the third line there. If you could amend the second to last so that it reads, "1004–8," rather than, "7." Those are the passages where you have heard, during the hearing and submissions, exchanges between counsel and the Authority, mainly Mr Haines QC.

ANDERSON J:

Sorry, where is that again?

MR HARRISON QC:

That's footnote 30 on page 25 of my submissions, the third line, there's a series of transcript references there.

ANDERSON J:

Yes.

MR HARRISON QC:

Now I can take Your Honours' through them, but the flavour is, in essence, that Mr Haines QC is saying to this fairly junior counsel, "How can you say that? You've got an Indian Supreme Court decision holding otherwise. You can't possibly make that submission." So counsel is trying to say, "Well my client says this about the events on the day of the sinking," and the Authority is saying, "There's a decision. He's been convicted." That flavour comes right through all of that. So it might have been a brave counsel facing the leader of the refugee law profession in this country who – he stood up reasonably well, as you'll see if you read those extracts right to the end. He didn't say, "These convictions are unsafe." He didn't use that expression, but it's plain that, on behalf of X he was trying to get the Authority to go behind the convictions and the Authority wasn't having a bar of it. I'll save time and not go

through those unless Your Honours want me to. What I do want to address though is the question of safety of the convictions on the merits. I'll take as read the argument that there's a misdirection in law in treating them as binding, but if I can go to the, first the first instance conviction, which is at volume 4 of the case at page 1230 – sorry, yes, 1230, tab 36. Now, I attempt – this is very poor quality, in my bundle I try to give a slightly better quality copy but it's not much –

ELIAS CJ:

I'm sorry, I've lost the place, was it tab 36?

MR HARRISON QC:

Tab 36.

ELIAS CJ:

What page?

MR HARRISON QC:

1230 of the case. Now, there are some key features of the case to be brought out by reference to this, and I feel my duty to my client is such that I need to spent a minute or two on it. This is a decision of a single Judge sitting – it's very hard to read, at the top – in the Court of the sessions Judge and dedicated Judge under the Terrorists and Disruptive Activities Act or something like that, they call it the TADA Act, and it's a decision on 29 June. You can see the accused are as numbered on that front page and number 3 you can just read the name of X there, as the third accused. And then the judgment goes through the Crown allegations, it starts by doing that, and one can see reading these from page 1232 on what the prosecution case was. A critical issue at the trial was this, did the Indian navy and coastguard vessels fire at the *Yahata* then at anchor off Madras first or, as was contended by prosecution witnesses, were only warning shots fired, i.e. shots that weren't directed at the vessel, followed by counter-shots and those on board setting fire to the vessel in some way? The defendant was the coastguard and navy fired and their firing of armaments set fire to the ship. That was the defence, and I mention that for a specific fair trial reason I'll come to. But we can see what those allegations were there.

Now, the trial Judge took the view, and this is at page 1268 at the top, that the *Yahata's* intersection, 440 nautical miles off Madras, was unwarranted and there was

no need to demand boarding – this is at the top of that page – and I'll come back to that when I come to the Indian Supreme Court decision.

So, he concludes at 1269, about a third way down, "The action of [the Indian vessels] in escorting the ship ... from the High Seas to Indian Territorial waters, was not lawful," that was his finding. Now then there is a discussion at 1271 to 1272 of what was said to be carried by way of armament, in other words that they were heavily armed and they had a rocket launcher, all of which the RSAA relied on, but it's also set out several times in the basic summary of facts that when they – the vessel caught fire and actually remained afloat for quite some time. It caught fire, those who escaped jumped off, and it must have been six hours I think, from the summary, before the ship went down. The Indian servicemen got on board and only found one or two revolvers. They also found dead personnel who had been shot, and the issue is discussed – it's so hard to read this that I tend to get lost a bit – at 1273 and following.

The Judge discusses the evidence as to whether it is plausible that the ship was carrying 110 tonnes of arms and ammunition besides lots of petrol and oil, and he concludes not. Then at 1281, I think it is, he notes how little was found on board. He deals with the question of who fired first and whether it was warning shots from 1282 on, and at 1289 at the bottom he notes that two people received bullet injuries and the prosecution did not – this is the very bottom – "the prosecution did not choose to produce the wound certificates relating to their injuries. The prosecution failed to explain as to how they received injuries. If really the shots fired from the Indian navy ships were warning shots, there was no need for the prosecution to suppress the wound certificates relating to the injuries."

ELIAS CJ:

Mr Harrison, what submission are you going to make to us following this review?

MR HARRISON QC:

There are two aspects in which the trial Judge, three aspects in which the trial Judge was thoroughly unimpressed. First, this critical issue of whether only warning shots were fired was potentially negated by the fact that those on board the *Yahata* had suffered bullet wounds, there was refusal to allow the defence access to the medical information as to the injuries. Secondly, and I'm trying to find the passage, there was also a refusal to allow the logs of the Indian naval and coastguard vessels which

would have shown what had happened on board those vessels, including the firing of shots, to be provided to the defence. And, thirdly, the Judge made much of the fact that none of those who claimed that only warning shots were fired had ever made that statement on first police interview. So there are those three features of the trial Judge. But on the safety issue you have a situation where a critical issue, who fired first and fired at what, was the subject of less than satisfactory disclosure by the prosecution, critical aspects of the evidence were excluded. So, that's really the nub of it, and it comes through from this material.

So, if that's sufficient for those purposes I'll move on to the Supreme Court judgment, which is at page 37. The judgment is a judgment of two Judges only, or so it appears, because two ultimately sign it at page 1329. There is a summary at the start of the judgment. If we go to page 1315, a third down, it was the prosecution case, and then the prosecution case is set out until halfway down 1317 where it ends, "With these allegations the CBI chargesheeted A1 to A9." You'll find that prosecution case reproduced in the RSAA decision, as being the findings of fact of the Indian Supreme Court. In fact, it was not the findings of fact, it was merely a retelling of the prosecution case. But there is at 1316 the reference, a little before halfway down, to what was found on the vessel when commandos boarded it, "two dead bodies, two assault rifles and a hand grenade," which is barely consistent with what they said had happened.

Now, there is criticism of the sessions Judge's findings about the legality of the taking of the *Yahata* into Indian waters, and that is rejected at page 1321 to 1322. Baragwanath J, for his part, considered that that couldn't possibly have been right and I, to the extent that it matters, it is plain, in my submission, that even if there was a right to demand boarding for inspection that couldn't extend to forcing a vessel on the open seas in international waters to travel 400 knots, nautical miles, to a foreign port. But at 1332 they say, about two-thirds one down, it was a charge of conspiracy, "it is not necessary to re-appreciate the evidence and record any finding with respect to the right or justification for demanding boarding," because the charge of conspiracy was dropped, so that's as far as they get with that. They then go on, at page 1323, to the only point which survives, which is the offences of which they were found guilty. And the reasoning works this way, two-thirds down, "Though the accused had stated that they were unjustly forced to take their vessel near the Madras Sea Coast, we do not find any evidence or even suggestion in the cross-examination of the prosecution witnesses that either [vessel] had threatened to use

force." As regards what happened in the morning of the 16th, the defence was that none of the accused had fired and, then the statement goes, the evidence of PW, prosecution witness 9 and all the other numbers, is to the effect that at about 10.00 am they had started the operation for boarding, warning shots were fired, there was retaliatory fire, and so it's all discussion of prosecution witnesses who've been found lacking in credibility, and then there's a reference to the captain of one of the vessels, "He has also stated that when he fired warning shots ... there was retaliatory fire," and this is the reasoning, "Nothing has been brought out in the cross-examination of this witness which would create any doubt regarding his credibility and reliability of his version. His evidence has been disbelieved by the learned Designated Judge on [a particular ground], but that is rejected," and then so they go through looking at whether there were good reasons for disregarding the evidence of prosecution witnesses and basically say that there weren't any, page 1327, this sums it up really, a few lines in, "We have perused the evidence of [prosecution witnesses numbered…] closely on this point and we find no reason to disbelieve the same. The reasons given by the learned Designated Judge for not believing this part of the prosecution evidence are not at all proper and sufficient. We, therefore, hold that the prosecution has satisfactorily established the accused had used criminal force against the Indian Naval Officers while they were performing their duty ... They are therefore guilty [of that offence, obstruction]. We also hold that the finding of the learned Designated Judge that the *M.V. Yahata* was, in all probability, hit by a shot fired from one of the Indian Naval ships and, therefore, caught fire ... is against the weight of evidence on record," and again it's just the prosecution witnesses they rely on. "The learned Judges" down the bottom, "disbelieved this evidence for the reason that in their earlier version before the police they had not stated that the shots, which they had fired, were only the warning shots and also because the investigating officer had not seized gunnery reports maintained by the ships," that's the point about non-disclosure of critical evidence, and then that is dismissed. "The prosecution witnesses appear to be right in their say that the warning shots were fired with a view to make the accused surrender," and I omit words, "In view of the facts and circumstance of the case it can be reasonably inferred that the accused, finding it was no longer possible to avoid boarding of their vessel by the Indian Naval Officers, thought it proper to destroy their ship in order to avoid detection of the true state of affairs and consequential action ... The prosecution can be said to have satisfactorily established that the accused had, in furtherance of their common intention, destroyed their ship."

So that was it and, as the Court of Appeal Judges who dealt with this issue know, Justice Arnold, I think, noted that there's no flavour of beyond reasonable doubt, there's no discussion of the defence evidence, there is and on the papers apparently a review of the prosecution evidence alone to say that it's all, that they find no reason to disbelieve it. So when you put that, with respect, quite suspect approach to criminal guilt finding alongside the inadequacies of disclosure you do, I submit, end up with a decision that is unsafe, unsafe for all of the accused, but if we focus on X and bear the mind the point I've made and Your Honour Justice McGrath made earlier, that the crew of the ship jumped off as soon as they could and the hardcore LTTE stayed on and went down with the ship.

Perhaps the worst feature of this decision is that there is no separate discussion of X as an accused who would have to have been party in some way to a common design or complicit in some kind of joint action. There is just no, if you go through both decisions, you just do not get anything that indicates why he in particular ought to have been seen as participating in the events of which he was convicted, either as a principal offender or as a secondary party. Now, that's all I want to say about the –

McGRATH J:

They made confessions of some kind, did they? I'm just looking at page 1319.

MR HARRISON QC:

Yes, they made –

McGRATH J:

Do we know anything more about that?

MR HARRISON QC:

The positions is that they made confessions, I think all alleged that they had been tortured, Mohan in his statement, for example, not in a passage that's in the RSAA decision but in the full statement which is in evidence, Mohan says he was tortured, I think it said he was tortured, but the short answer is because they were only proceeding on charges that weren't under the Indian TADA Act, the interviews were excluded. The so-called confessions were inadmissible on the charges on which they were ultimately convicted, and that comes through from the Indian Supreme Court decision itself.

Now, I just want to go to this serious non-political crime issue, and I'm conscious of the exchanges, but I think, with respect I can add just a little bit of value if we start at page 3 of the submissions and an introductory point or two I've made. Now what I want to draw to Your Honours' attention, if we're at page 3 of the submissions, and Lord Lloyd's definition, which is set out in paragraph 9. I've just got to find the – the case of *T v Secretary of State for the Home Department*, is at tab 15 of volume 1 of the appellant's bundle of Authorities. Lord Lloyd's, I'll call it for short his "definition" but put inverted commas around that, is at page 786, and I'll come to it in just a moment, but the argument, the complaint here, the complaint against the RSAA is that it simply mechanically applied that definition. But we need just to take another look at it.

Starting at page 786, Lord Lloyd at just below B, refers to the UN Handbook, and then to a European Convention at E, and then he goes on at H, "Taking these various sources of law into account one can arrive at the following definition. A crime is a political crime for the purposes of article 1F(b) of the Geneva Convention if, and only if, (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2), there is a sufficiently close and direct link." Then, this is key and ignored by the RSAA, "In determining whether such a link exists, the court will bear in mind the means used, ... have particular regard to whether the crime was aimed at a military or government target, on the one hand, or a civilian target on the other ... likely to involve indiscriminate killing."

Now then, this is critical, "Although I have referred to the above statement as a definition," then to paraphrase, "it's a question which is unlikely now to receive a definitive answer. The most that can be attempted is a description of an idea." So it's quite plain and understandable that Lord Lloyd was not attempting some kind of all purpose for all time definition, and yet that is the way that it has been subsequently treated, perhaps even in the Court of Appeal, but it must be read in the light of what was, of what *T* had been doing. He had been involved in an airport bombing in Algeria following the military coup that featured of course, in the *Ahmed Zaoui* case. So he'd been personally involved in an airport bombing and it was because he objected to the military overthrow of a legitimately elected government. So in those circumstances you would naturally formulate your definition of what is political in those terms, but in my submission, given that this appears in an international convention, that it would be a mistake to put a straight jacket round it.

Now can I just give a couple of illustrative, hopefully contemporary, examples. If people seeking to break the Israeli blockade of the Gaza Strip by taking a ship through the blockade, injure or kill an Israeli soldier landing on their ship and had those people been tried and convicted by an Israeli Court, would that be, leaving aside the seriousness, would that be a political crime? They are not in direct political relationship acting against Israel. It is pretty remote to say, that by trying to block the blockade for humanitarian reasons, they are attempting to change Israeli Government policy but that must surely be political crime subject only to the next issue of proportionality and how far they've gone. And equally, if you take the actions of the man, Peter Bethune, who boarded the Japanese whaling ship because the Japanese had sunk his ship, the *Ady Gill.* Is it to be said that when he protests in that way, he can't, and if this cropped up later, he isn't acting by way of a political crime.

ELIAS CJ:

What is – accepting for the moment that you're right in this, where does it take you? What are you putting forward instead of –

MR HARRISON QC:

Right.

ELIAS CJ:

– this definition, because I didn't understand it to be something that you did regard as a straight jacket. I thought you worked with it.

MR HARRISON QC:

Well obviously I'm supporting the decision of the two Judges of the Court of Appeal who worked within the definition.

ELIAS CJ:

Yes.

MR HARRISON QC:

I am simply also emphasising that around the margins it's a big mistake, with respect, to regard this Lord Lloyd definition as engraved on stone.

ELIAS CJ:

Yes.

MR HARRISON QC:

It cannot be, it should not be, and I'm giving you contemporary illustrations, and I've stopped now, to demonstrate why you wouldn't –

ELIAS CJ:

But what's it in aid of? To say that if there's an area of doubt, the fact that it doesn't fit right within the definition should be ignored or...

MR HARRISON QC:

No, what I'm submitting is that there is error of law in saying, as the Crown does, because LTTE is an organisation fighting the Sri Lankan government, the fact that their dealings were on the occasion with the Indian government, falls outside this definition.

TIPPING J:

I wasn't moved by that proposition at all Mr Harrison.

MR HARRISON QC:

Well I know Your Honour.

TIPPING J:

I'm slightly more troubled by the, "with the object of overthrowing or subverting or changing the government," now how immediate does that object have to be?

MR HARRISON QC:

Well this is my point. My submission is that you don't need that object.

TIPPING J:

Ah.

MR HARRISON QC:

That's my point.

TIPPING J:

I thought you might – were flirting with that but you hadn't actually said it.

MR HARRISON QC:

Well I obviously said it with insufficient clarity. That's the point in my – that's the point of my illustration about the Gaza Strip.

TIPPING J:

But if it's not done with the object of overthrowing or subverting or changing the government of a state, or inducing it to change its policy, how can it be a political crime? I thought that was fundamental to the concept of a political crime. You shoot the president with a view to getting rid of his regime, but if it lacks that object, I can't understand how it can even get off the ground as a political crime.

MR HARRISON QC:

Well, but implicit in what Your Honour is saying, is that Lord Lloyd's definition of what is a political purpose governs. My point is that political purposes can be wider than – can go beyond subverting or changing the government of a state.

TIPPING J:

Well there's also a helpful comment –

BLANCHARD J:

Before inducing it to change its policy.

MR HARRISON QC:

Yes.

TIPPING J:

Yes.

MR HARRISON QC:

That is the point. So therefore, if we – whether or not that requires me to give an alternative definition, which I'd try and avoid, if step 1 is accepted, that this definition should not be applied as a straight jacket then we have as an alternative to the analysis of the majority in the Court of Appeal, the proposition that they were, that those involved in damaging the ship, were doing so for a political purpose, namely avoiding capture. Regardless of whether you see that as capture by the Indians or capture by the Sri Lankans, it doesn't matter. It's still sufficiently political that the

number 2 LTTE and those who follow him, do not want to fall into government hands, whichever government.

TIPPING J:

So you're saying there's a sufficient ulterior object, namely the overthrowing or changing policy et cetera, to make this one a directly linked with a political purpose?

MR HARRISON QC:

Well I'm happy to rely of course as part of the analysis, on their ultimate purpose which undoubtedly is political, but it's artificial to take this definition as a straight jacket and say they weren't ranged against Sri Lanka, they were ranged against the Indian Navy.

McGRATH J:

Isn't that really a question of proximity though? I mean, what you're saying is, never mind the intervention of an Indian element, the proximity we're concerned with, which identifies the political purpose is their objective in relation to the Sri Lankan government's control of the area they're concerned about. And it seems to me that it's –

MR HARRISON QC:

Yes, there are any number, with respect there are any number of ways you can put it and that is one way of putting it. The concern, when approaching this issue is of course, not to allow dreadful criminal wrongdoing by some political fanatic to come within the political crime definition, and thus to escape justified exclusion. And the case of *McMullen* which was handed in because the casebook had the wrong case, is actually quite instructive on this. *McMullen* was an IRA bomber and what the Court does of course, is emphasise the other elements which are partly referred to by Lord Lloyd, where he talks about taking into account who the target was. Was it civilian or military? Was it indiscriminate against members of the public? A perfect example here because the target was simply a ship which was trying to take custody of the LTTE vessel. There was no indiscriminate killing. There was no killing at all and it wasn't a civilian target, but with *McMullen*, if you read, Your Honours read through that, you'll see how they emphasise the point that the ultimate safety valve, or call it what you like, for the application of this definition is to exclude the disproportionate offending. You can't create carnage, particularly among non-military people and property and claim an immunity from exclusion under 1F(c). It's a proportionality test.

So that's another element of control of the outcome, which ought to be able to be controlled but not by an artificially narrow definition of political and non-political. I think I've hopefully covered just about all of what I have said or want to say on that topic.

I'll just go to this question of disposition. Now it depends of course on how the chips fall but I'm inviting Your Honours to conclude that the Court of Appeal was right, that as a matter of law, or mixed law and fact, there was and is no prospect of a lawful exclusion of my client under either 1F(a) or 1F(b), and if so then you uphold, I submit, the decision of the Court below to send back limited to the question of 1A inclusion. He doesn't have, after all these years, to go back and face that again, and I do try and do a little sidestep around, this is page 30, the case of *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, where the Authority said, "There is no..." when you're looking at 1F exclusion, you don't look to see whether it's a proportionate response to the criminality or whatever. You can't look to the consequences of exclusion. I'm not challenging that. What I do submit is that when it comes to the exercise of discretion, ground of review having been upheld, you do have some leeway to look at the fact that this man spent years in an Indian prison, and has spent years here battling over refugee status. He still has to prove that he's an included refugee. Let him and his wife get on with that discretion not to send back the 1F exclusion issue.

ELIAS CJ:

I didn't understand, the Crown is, and perhaps I misunderstood.

MR HARRISON QC:

Oh yes they are. Yes Ma'am. They are submitting that even if we win we succeed in upholding the Court of Appeal decision. The Court of Appeal was wrong in not sending article 1F exclusion back to the RSAA. They're inviting you to send all back, both inclusion and exclusion, and I'm arguing against that.

And the only other point I make is that I do submit, have submitted, and do submit that if you send back, whatever you send back, it should be to a different panel. Mr Haines QC and the other member cannot continue to sit because the other member is no longer a refugee, an RSAA member. So it should not go back to Mr Haines QC alone. It would be entirely inappropriate to send it to Mr Haines QC and a fresh member for re-hearing.

And finally –

ELIAS CJ:

Don't you need to develop that? It has quite substantial implications, if you're making the submission that a panel that has heard a case should never re-hear it.

MR HARRISON QC:

No, that is not the submission I am making. The panel that heard the case, which is Mr Haines QC and a Mr Hodgen, cannot be reconstituted for a re-hearing.

TIPPING J:

Because Mr Hodgen is no longer qualified to sit.

MR HARRISON QC:

That's right.

TIPPING J:

And he doesn't even have the ability to sit on something that he has earlier. It has to be re-heard.

MR HARRISON QC:

That's correct.

TIPPING J:

Right.

MR HARRISON QC:

You cannot send it back to the same panel as heard the case the first time round.

ELIAS CJ:

Would we be doing that in any event?

MR HARRISON QC:

I'm inviting Your Honour not to.

ELIAS CJ:

But would we not simply remit it to the RSAA?

MR HARRISON QC:

Well the problem with that is that, if we look at the Court of Appeal, Hammond J said it could go back before the same panel, while in fact it can't. Baragwanath J said it should not, and Arnold J expressed no view. So you're being invited by both sides to express a view on the issue, and my submission is, you can't send it back to the same panel because it doesn't exist in law, but secondly, it should not be a panel with Mr Haines QC on it because of the serious credibility findings that he make.

ANDERSON J:

An apparent bias situation was it?

MR HARRISON QC:

Correct, yes. I go so far as to raise that as an issue.

Now I know there's authority on this with Judges who've done trials and made credibility findings but the findings are fairly far reaching. They are quite capable of spilling over into a limited re-hearing of the inclusion question, and on balance, given the way this case has been handled rather badly in terms of the time involved, and the error, if that error is upheld, that is the safest and appropriate course, is to direct that it go back to a panel other than a panel comprising either of the members who heard it the first time round.

ANDERSON J:

Can I take you back to a point earlier? It's a factual matter. Am I correct in my belief, that even after the prison sentence had been served, your client was detained for some years –

MR HARRISON QC:

That's correct.

ANDERSON J:

– because of immigration irregularities –

MR HARRISON QC:

Yes that –

ANDERSON J:

– but these have been created by the Indian government in unlawfully taking him off the high seas and within their jurisdiction.

MR HARRISON QC:

Yes they promptly declared that he was unlawfully present in India, having been taken there against his will, and served his sentence. And there were – I forget how many years –

ANDERSON J:

Four I think.

MR HARRISON QC:

Four extra years on top of his sentence for offending.

ANDERSON J:

And you invoke that as one of the discretionary aspects?

MR HARRISON QC:

I do. Yes I do Your Honour. Unless I can be of further assistance, those are my submissions.

ELIAS CJ:

No, thank you Mr Harrison. Yes Mr Carter.

MR CARTER:

I wonder Your Honour whether a reply might be permitted in the morning?

ELIAS CJ:

Well are you not in a position to respond at the moment.

MR CARTER:

There are, I think I would be able to respond far more pithily and briefly if I was able to do so tomorrow morning.

ELIAS CJ:

All right.

BLANCHARD J:

We've only got 20 minutes now anyway.

ELIAS CJ:

We'll take the adjournment and resume in the morning thank you.

COURT ADJOURNS: 4.41 PM

COURT RESUMES ON FRIDAY 11 JUNE 2010 AT 10.00 AM

MR HARRISON QC:

If Your Honours please, I did realise overnight that there was one point I hadn't addressed.

ELIAS CJ:

Yes, of course.

MR HARRISON QC:

And that relates to the argument that the entire period of service on the *Yahata* gave rise to the complicity, not merely the last voyage. So if I may be permitted to spend two minutes on that?

ELIAS CJ:

Yes.

MR HARRISON QC:

The position is that we say that the correct test of any inter-relationship between either action or involvement by way of what's loosely called, complicity under article 25(3)(d), is substantial contribution to a crime which is capable of identification, that is subject to the gloss that you don't need to prove a precise relationship between act and specific crime, but nonetheless there has to be an identifiable crime or group of crimes. So that the short response to the argument about the entire period spent on the *Yahata* is that the period prior to the final voyage, which we've analysed in detail, cannot possibly be said to have made a substantial contribution to any crime or crimes, there's just no link. In other words, to put it at the generality of service as a chief engineer on a vessel which, other than the last voyage, was simply plying and trading, as Justice Anderson suggested yesterday, possibly just carrying jute or

something like that, and certainly not even going to Sri Lanka, is far too remote in terms of any contribution to the crime, let alone substantial contribution.

But, pondering on that point, I did note that there is a difference in the way Lord Brown expresses himself in at least two key passages in the judgment in *JS* at tab 14, which I ought to draw to Your Honours' attention, if you have that authority, volume 1 of the bundle. At paragraph 35 and elsewhere –

ELIAS CJ:

Sorry, what tab is it?

BLANCHARD J:

Sorry, I just for the moment can't find it. What colour is it?

MR HARRISON QC:

It's a light blue, it's volume 1 of three, bundle of authorities.

ELIAS CJ:

Which tab?

MR HARRISON QC:

Tab 14, Your Honour. And if we go to the page that has paragraph 35 onwards, 34 onwards. So at paragraph 35 His Lordship states, "It must surely be correct to say – " as was also said by the German Court, " – that article 1F disqualifies those who make 'a substantial contribution to' the crime," with the knowledge. So here the formulation is "substantial contribution to the crime" but if you compare the last sentence of paragraph 38 it's put slightly differently, "voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes." "War crimes" is His Lordship's generic term for what I've been calling "international crimes" so it's put differently. My submission, if anything turns on it, is that formulation goes too far and, indeed, it has to be, as he and other Judges say, I think, a substantial contribution to the crimes or crimes subject to the gloss that you don't have to trace through in a minute causative way.

TIPPING J:

So you cavil at His Lordship's use of the word "ability"?

MR HARRISON QC:

Yes, yes. Well, it's –

McGRATH J:

The –

MR HARRISON QC:

– not necessarily just a cavil either, it –

TIPPING J:

Well, you suggest that that is not sound?

MR HARRISON QC:

I suggest, I submit, with respect, that it goes too far, particularly if a heavy reliance on it supports the Crown's argument that I am trying to rebut.

McGRATH J:

He's referring in paragraph 35 back to that German case, isn't he?

MR HARRISON QC:

Yes and, indeed, a whole lot of other authority and international material that talks about substantial contributions to the crime.

McGRATH J:

To "the" crime, and I just really wondered whether the difference in the formulation in 35 from that in 38 is that the former is concerned with cases where there is a particular crime to which contributions have been made, but the latter is this sort of case where no particular crime linked to the activity that actually took place, and that that's the distinction in his mind.

MR HARRISON QC:

It may be that that is the case. I still adhere to my submission, but if forced to argue against an application of the paragraph 38 test to X, I would argue that the period prior to the final voyage, service on one freighter without any involvement with armaments or smuggling of them, cannot be said to have contributed in a significant way to the LTTE's ability to pursue its purpose of committing war crimes, even if you

said that the operation of conveying freight commercially improved the organisation's financial position, and there's no evidence that it did.

TIPPING J:

Mr Harrison, if you would be good enough just to drop down in paragraph 35? I take your point that in the first formulation His Lordship refers to "the" crime, but then, am I not right in thinking, he also acknowledges that you'll be criminally liable if you substantially assist the organisation to continue to function effectively in pursuance of his aims?

MR HARRISON QC:

Yes, he does, it's formulated in that way. At some points it's formulated in one way and –

TIPPING J:

Well, that is very similar to the concept of ability, contributing to the ability of the –

MR HARRISON QC:

It is, yes.

TIPPING J:

With respect, I think that there are two streams of thought here, aren't there? One where you've got a specific crime that you can latch on to and another where you haven't, and we're in the second category. But generic assistance, with the requisite knowledge and intent, is enough, isn't it?

MR HARRISON QC:

I wouldn't put it in those words, in terms of generic assistance. You've still got to have a substantial contribution, whether it's to the commission of the crime or to the organisation's ability to commit the crime, you still have to have something that can be characterised in that way.

TIPPING J:

I agree with the substantial, I don't disagree at all about that, and I just omitted that from my generic assistance. Substantial assistance that is designed to facilitate the effective pursuance of the aims of the organisation is enough, is it not?

MR HARRISON QC:

Well, I'm not, one has to, it's a category, it is one thing to say, substantial assistance to the commission of the crime, when you have a crime or crimes in mind. As soon as you move beyond that you start to have to be very cautious, I submit, in applying any wider test, and all the more so in a case such as the present, where the organisation has a legitimate set of aims and tactics and an illegitimate set. So that also, of course, merges into the question of the mental state. If he's serving on this commercial, on these commercial voyages and the best you can say about the first six months is that maybe, in some very remote way, it's improving the LTTE's financial position, that is so remote that that impinges not only on the physical element of substantial assistance, but also makes it very difficult to draw an inference that he is thereby intending to assist the LTTE in its illegitimate operations.

ELIAS CJ:

Is it not that, on your argument, this language is sloppy in referring effectively to adherence to purpose, and I take it you would have no difficulty with the last sentence in paragraph 38 if it was, "To contribute in a significant way to the organisation's ability to commit the war crimes"?

MR HARRISON QC:

Yes.

ELIAS CJ:

Yes.

MR HARRISON QC:

That is helpful, yes, Your Honour, I couldn't quarrel with that.

ELIAS CJ:

No, and the case of course was not about this sort of future potential atrocity.

MR HARRISON QC:

Well, none of the cases are about as small a cog in an overall machine, with both legitimate and illegitimate aims, as this man.

ELIAS CJ:

That's a different point.

MR HARRISON QC:

At the end of the day – some of the case law talks about being an essential cog in the machine. He's only just an essential cog in one aspect of the shipping venture, which is 95 percent legit, or so it seems. So, I don't think I can say anything more, but I am grateful for the opportunity to address Your Honours on that further point.

ANDERSON J:

The greater the numbers of some organisation, the more careful one would have to be to identify substantial assistance, otherwise the net would be too wide.

MR HARRISON QC:

Yes, I would adopt that comment, Your Honour.

ANDERSON J:

Whereas if you have a smaller group it's easier to see what they're doing, to link it into specific conduct.

MR HARRISON QC:

Yes, yes.

McGRATH J:

Mr Harrison, before you sit down, could I just ask, one thing's been occurring to me, trying to think ahead in this case, but is the judgment of the Supreme Court of India and the judgment of first instance of the trial Court, are they both public documents, do you know? I'm just really trying to establish how far we are going to have to go as we consider this, when we look forward to judgment in this case, with maintaining secret – suppressing details. But if they are both public documents, at least the incidents and the debate over the responsibility of X for them might not have to be suppressed.

MR HARRISON QC:

My understanding is they are public documents and, indeed, it is part of X's claim for inclusion, that is to say under 1A, that the very publication of the fact of his convictions and naming as an LTTE cadre, it gives rise to his reasonable apprehension of persecution if returned to Sri Lanka, so in that sense, I wouldn't be suggesting otherwise.

McGRATH J:

But nevertheless you seek suppression of his true name, still.

MR HARRISON QC:

Yes, yes, and –

McGRATH J:

But that's as far as it goes?

MR HARRISON QC:

Yes, certainly, we continue to seek that. But that's not only, I mean, there are various reasons for that, not merely the prospect of his return.

McGRATH J:

No, I'm not asking you to argue the point, I'm just clarifying your position.

MR HARRISON QC:

Yes, that is the position.

McGRATH J:

But if his name is protected we needn't be worried about matters in offshore, in India, leading to his identification?

ELIAS CJ:

He wasn't identified, of course, in the Indian –

McGRATH J:

Yes, yes, I know. He was A3.

MR HARRISON QC:

Yes, he was identified, in India. I mean, obviously, his name appears in records and his case on the claim for inclusion is that that is also known in Sri Lanka, so if returned to Sri Lanka he would be a convicted LTTE operative, if that Indian narrative were accepted, as he fears it would be.

ELIAS CJ:

Yes, thank you, Mr Harrison. Yes, Mr Carter.

MR CARTER:

Thank you, Your Honours. The subject matter of this appeal is, if nothing else, topical, because in this morning's news there was an item that the International Criminal Tribunal for Yugoslavia has just entered convictions against seven people based on joint criminal enterprise liability in relation to events in Srebrenica. So, we're dealing in topical territory but –

ELIAS CJ:

Unfortunately.

MR CARTER:

Yes, unfortunately. Now, just dealing with a few matters in reply to Mr Harrison's submissions both yesterday and briefly this morning. The involvement, it was submitted by Mr Harrison that the involvement of X in the LTTE was limited to the last voyage of the *Yahata* and that this was how the Authority, the RSAA, saw the position as well, but that is incorrect, in my submission. The Authority in its key paragraph, which is paragraph 126 of its decision, clearly focuses, in my submission, on X's participation in the LTTE's smuggling operations for at least the six-month period when X was chief engineer on many voyages for that vessel. The Authority doesn't mention the final voyage in the paragraph, the focus is on the significant LTTE asset of the *Yahata* and its secretive smuggling operations, the choice of X as chief engineer, as someone who could be relied on to keep the *Yahata* going, knowledge of the scale of LTTE violence from having been born and raised in Valvettithurai and having spent most of his life living in northern Sri Lanka, and the smuggling of arms and explosives into Sri Lanka was vital to the LTTE aims involving the terrorising of the civilian population and cleansing of the north.

BLANCHARD J:

Are you suggesting that the smuggling operations were being carried on earlier in the six-month period? Is there any evidence of that?

MR CARTER:

Well, there is. The appellant's submission is that the last voyage, and the approach of the Authority, the last voyage simply provides the best evidence here of one actual shipment of arms and explosives.

ANDERSON J:

Well, it's the only evidence, isn't it?

MR CARTER:

Well, no, there is other indirect evidence that was available to the Authority, which Your Honour Justice Blanchard has asked me to identify. There was – and this is described in the Authority's decision – the modus operandi of the LTTE in running a fleet of ships, the carriage on those ships of war material from time to time, so that was the 95 percent –

ELIAS CJ:

Where are the findings on that? Because paragraph 126 is a sort of wrap-up, isn't it?

MR CARTER:

Yes, well, perhaps the best place to find the specific findings is the appellant's submissions, if I just… So, beginning at paragraph 13 of the appellant's submissions.

ELIAS CJ:

What paragraph are you referring to in the Authority's decision? I'm sorry, I didn't open up your submissions because I'm trying to work from the Authority's decision.

MR CARTER:

Well, I've set out in the submissions a series of findings with footnoted specific references to the Authority's decision.

TIPPING J:

And that was what paragraph of your submissions?

MR CARTER:

Beginning at paragraph 13 of the appellant's submissions.

TIPPING J:

13, 1-3, thank you.

MR CARTER:

So there's general findings relating to the LTTE as a terrorist organisation in paragraph 13. In paragraph 14, the LTTE operated a fleet of at least 10 freighters, which tended to be crewed by Tamils originating from the north-eastern seaport of Valvettithurai. And that place has long been the centre of a web of Asia-wide LTTE commercial maritime and smuggling contacts. An important cell was established in the town of Trang in Thailand where X joined the vessel. LTTE was partly funded by profit making businesses such as shipping, that gives us the financing point that I made to His Honour Justice Anderson yesterday afternoon. There's the 95 percent, 5 percent split, legitimate commercial goods and supplying arms, explosives and ammunition, other war related material. The *Yahata* was part of the LTTE fleet and was used to smuggle war material including arms ammunition and explosives. Now to that I would add a further reference that was identified by Her Honour Courtney J in the High Court at paragraph 48 of her decision. That vessels were transporting – vessels that the LTTE used to transport armaments restricted their crew and passengers to Sri Lankan Tamil cadres of the LTTE and the reference to that is a *Sunday Times* military column article which appears in the case on appeal, volume 2, at 589.

TIPPING J:

Is your ultimate submission that it's a reasonable inference which the Authority drew, and was entitled to draw, but some of this voyaging in the six months must have been knowing gun-runnings and explosives –

MR CARTER:

Yes, at least some of it.

TIPPING J:

We don't know how much.

ELIAS CJ:

To whom? Because they didn't go to Sri Lanka.

MR CARTER:

No on the last, the last voyage we know they didn't but it is a reasonable inference on this indirect evidence that it was on some of the voyages during the six month period as a LTTE ship, it was engaged in, transported arms and war material.

McGRATH J:

This was an inference to High Court you said? Wasn't it –

MR CARTER:

No that inference wasn't drawn by the High Court. I'm really saying that if you take away the last voyage, so you get the focus away from the last voyage, and you refocus on the entire six month period of operations, knowing all the information, general information admittedly, about the LTTE and its shipping activities, and the *Yahata* was a LTTE vessel, that it was possible to draw an inference that given X's role on the vessel, possible to draw an inference that he was supporting the – making a significant contribution to the LTTE's criminal purpose by serving as chief engineer on a vessel that may well have transported arms and ammunition and war material during the six month period. So that's the significant contribution –

McGRATH J:

Whose inference – is this a speculative inference that was perhaps unexpressed by the Authority?

MR CARTER:

No I'm not, it is not an inference that the – it's not the basis or the whole basis that the RSAA has rested its decision because it has this other information, namely the last voyage and the fact of significant quantity of arms and 110 tonnes of explosives. So it has that – it has the information but if it didn't, if we didn't have the last voyage, there was still material there before the Authority that would have justified a 1F(a) enquiry and possibly an exclusion decision.

ANDERSON J:

I have difficulty understanding why they would be running weapons to places other than Sri Lanka where the conflict is. How could you possibly infer that? it seems to me it's just pure speculation and the alternative is to suggest well because he was prepared to serve as part of a fleet, which from time to time engaged in gun running, that makes him complicit in the internationally unlawful sense.

MR CARTER:

Well the appellant's argument is – I'm really just making – suggesting this hypothetical possibility, take away the ingredient in this case of the last voyage –

TIPPING J:

If you don't get home on the last voyage, what does the rest of it add?

MR CARTER:

The reason for suggesting that you take the last voyage out of the equation for argument is for the purposes of argument that it is not the only basis on which the RSAA made its decision.

ELIAS CJ:

But this wasn't the basis on which they made their decision, as you've acknowledged, so you're left without finding, findings on the critical facts. You're simply pointing to evidence from which you say they might have inferred that he was within the exception?

MR CARTER:

Yes. Now in relation to his knowledge he knew, on the basis of the Authority's findings, he knew of instances of LTTE civilian killing before joining the *Yahata*, and that's as listed in the list of atrocities in paragraph 23 of the decision. In that list there were two instances in July 1992, after joining the *Yahata*, and the killing of civilians and so on continued after, after joining the *Yahata* in July 1992 but in terms of identifying some specific crimes, which the appellant says is not necessary to do, it's a matter of focusing on the overall criminal purpose of the organisation and its activities, there are two specific crimes in July 1992, after he joined the *Yahata*.

Now Mr Harrison mentioned yesterday the *KJ (Sri Lanka)* case in relation to the dual roles and goals of the LTTE organisation. That case was concerned solely with the question of *KJ*'s membership of the LTTE role – LTTE in the role of reconnaissance and surveying and the decision that was overturned was based largely on the presumption, a presumption of membership of an organisation with mixed activity led to the exclusion decision. However in this case the Authority did not base its decision solely on X's membership but on the series of findings in paragraph 126 that I've just tried to summarise and in any event as stated in *JS* at paragraph 36 of the

decision, "if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent."

Mr Harrison submitted that participation in a civil war was not unlawful at international law at the relevant time although he recognised that it may well be unlawful under domestic Sri Lankan law but in terms of international law his submission was that any acts done by the LTTE could not have been a war crime for the purposes of article 1F(a), and he took Your Honours to the first respondent's bundle of authorities, and the UNHCR guidelines at tab 13. That contains a summary of the position under international criminal law as to whether it was possible for there to be criminal liability for war crimes during non-international armed conflicts, such as a civil war as in this case. And at the bottom of page 36 and top of page 37, the statement is made that such crimes in the context of a non-international armed conflict was not established until the mid-1990s. Now, the authority cited or footnoted for that proposition is the *Prosecutor v Tadić* Interlocutory Appeal case of 2 October 1995. The citation is set out in footnote 141 of the UNHCR guideline document. But although that case was decided in 1995, the interlocutory decision relates to acts of which Mr Tadić was accused of committing between May and December 1992. So we're looking at as early as May 1992, at least, for it being possible for war crimes to be committed in the context of a non-international armed conflict.

Mr Harrison referred to the actus reus requirement for joint criminal enterprise liability both yesterday and today as "substantial contribution". However, the words used by Lord Brown in *JS* are "significant contribution", and this reflects the international criminal law derived from a case cited in *JS* at paragraph 20 of *JS*, called *Prosecutor v Brđanin* and the citation is IT/99/36/A 3 April 2007.

BLANCHARD J:

Have we got this?

MR CARTER:

No, it's not before Your Honours. We do have copies available if you'd like us to hand it up.

ELIAS CJ:

Well, we'd better have it, I think, if you're referring to it.

MR CARTER:

But I'm referring to it here for a very short and simple proposition.

McGRATH J:

You said footnote 20. Is that right?

MR CARTER:

The reference in the UNHCR gives the citation at footnote 141.

McGRATH J:

I'm sorry, I thought you were referring to a footnote in the *JS* case.

MR CARTER:

It's referred the same. The *Brđanin* case is referred to in paragraph 20 of the *JS* case.

McGRATH J:

I see, thank you.

ELIAS CJ:

There's just one case coming in.

TIPPING J:

Whereabouts in this judgment do we find this use of the word "significant", as opposed to "substantial"?

MR CARTER:

At paragraph 430, and there, the ICTY Appeals Chamber held in respect of characterising contribution, the Chamber said, "Although the contribution need not be necessary or substantial, it should at least be a significant contribution."

TIPPING J:

Is the reference to the case at footnote 913 disagreeing with the use in that case of the word "substantial"?

MR CARTER:

Yes, it is. "Need not be necessary, need not be substantial, but should at least be a significant contribution." And Lord Brown picks up on the phrase "significant contribution" rather than "substantial".

TIPPING J:

Well, substantial is a word of notoriously flexible meaning. It can mean "of substance" rather than just "trivial" or it can mean "huge". But I think it means more the former in this jurisprudence, doesn't it? Of substance, not just minor. There isn't much difference, I would have thought, between that and "significant".

MR CARTER:

Well, Lord Brown has specifically chosen to use the word "significant" and he was obviously aware of the *Brđanin* case. In *JS* at paragraph 35, Lord Brown – this is the paragraph that Mr Harrison was referring to earlier – ends the paragraph by saying that article 1F encompasses those who provide the gunmen et cetera with the physical, logistical support that enable modern terrorist groups to operate. So that's what – in giving that example, that's the sort of significance that he is talking about there.

ELIAS CJ:

Sorry, what was that a reference to? What paragraph was that?

MR CARTER:

The same paragraph, 35, of Lord Brown. Mr Harrison submitted yesterday afternoon that the appellant was unable to provide authority for the proposition that doing an act which fails to commit a further crime is an international crime. In my submission, this is a common plan or purpose case, focusing on the criminal purpose of the organisation, and the crime is participation in the common purpose, and it is not required that the purpose be actually achieved. Paragraphs 36, 37 and 38 of *JS* highlight that if a person is aware, in the ordinary course of events, that a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent. And when the accused is participating in the sense of assisting in, or contributing to, a common plan or purpose, it is only necessary to establish that the accused had personal knowledge of such aims, and intended to contribute to their commission.

BLANCHARD J:

Sorry, where are you reading from?

MR CARTER:

I'm now at paragraph 37 of *JS*. The basic submission is in response to Mr Harrison's, and that it is not necessary to demonstrate that any specific or identifiable crime has been committed.

TIPPING J:

I wonder, Mr Carter, if some guidance can be had on this point from the way in which article 25 of the Rome Statute is phrased, because I notice that paragraph 3(b) in your casebook of volume 1 of authorities, tab 1. 25(3)(b) in the case of ordering, soliciting or inducing talks about a crime which, in fact, occurs or is attempted, whereas when you turn over to the joint criminal enterprise in paragraph (d), the emphasis is on common purpose, and therefore it might be thought that the distinction between crimes that have been committed or attempted and those that are simply contemplated is actually drawn to some extent in article 25.

MR CARTER:

Yes, I think that's right, Sir, and 3(d) also uses the words in the first line, "Contributes to the commission or attempted commission."

TIPPING J:

Yes, well, that doesn't help you. I don't know why you refer to that, that's dead against you. I thought I was coming to your aid, not…

MR CARTER:

Well, in terms of the comparison between (b) and (d) –

TIPPING J:

It's not wholly consistent, one has to accept that, but I just think a little clue in the referencing, (b), is it, to, "In fact occurs or is attempted" whereas I agree with you that it isn't as clean cut as you would like, by dint of the very presence of the words that you highlighted in (d), but the flavour of it, it seems to me, to be assisted slightly by that dichotomy.

MR CARTER:

Yes, I think that's right, Sir. I just wanted to move on to a reference that Mr Harrison made to a comment in *Mugesera* about the risk of trivialisation of crimes against humanity. Now, it's accepted by the appellant that crimes against humanity should not be trivialised by applying the concept to fact situations which do not warrant it, but the facts of X's case in the appellant's submission are strong, involvement in a smuggling operation intended to bring into Sri Lanka a substantial quantity of explosives, and war material transportation is the very fact scenario that *JS* at paragraph 28 appears to accept properly falls within article 1F. And it should be remembered that the international criminal tribunals that grapple with these issues typically target the leaders of war crimes and crimes against humanity and deal with the most serious categories of international criminal offending. However, in refugee cases around the world individuals of varying degrees of involvement in international crimes raise issues as to whether crimes against humanity have been committed. Enquiring into whether there are serious reasons for considering that an individual refugee claimant may have been complicit in war crimes, war crimes against humanity, is required by the Refugee Convention, and careful consideration in individual cases is not a trivialisation.

Just a brief note in response to Mr Harrison's submissions on the approach to credibility assessment being different, the first respondent argues for exclusion compared to inclusion, submitted that that's incorrect. There's one definition of "refugee" in article 1 of the Convention, and that article requires an inquiry into inclusion and exclusion. In practice, both issues are dealt with at the same time.

Mr Harrison also mentioned in his submissions the benefit of the doubt test. Now, that requires some care, it was discussed in the *Jiao* case in the Court of Appeal, which is included in the appellant's bundle of authorities, volume 1 tab 4. I don't need to take Your Honours to the case, but just note that it's made clear in that case that the idea of giving a refugee claimant the benefit of the doubt applies when there is some specific factual discrepancy about which there is doubt about a particular matter, and then there's an accepted principle in refugee law that it may be appropriate in some circumstances to give the claimant the benefit of the doubt, given all the difficulties about getting information from the country of origin and so on. But the Court of Appeal in *Jiao* made it clear that the benefit of the doubt principle and the relevant passages are in paragraphs 28, 33 and 34 of the *Jaio* decision.

The benefit of the doubt principle only applies when the decision-maker is satisfied of the claimant's credibility so I don't have that here. Secondly, the claimant's counsel needed to identify to the Authority the particular aspect of his client's case to which the benefit of the doubt should be applied, and that hasn't occurred here either. Thirdly, the Refugee decision-maker has to have expressed no doubt about – or where the Authority has expressed no doubt about the particular factual matter in issue there's no room for the benefit of the doubt principle and that's the case here.

Mr Harrison referred to a passage in the *Mugesera* decision at paragraph 1703 which in turn cited, among others, paragraph 248 from the ICTY decision in *Tadić* in support of a recklessness standard. He then suggested that it was incorrect that *Tadić* contemplated recklessness. While the appellant accepts that the particular paragraph doesn't – referred to in *Mugesera* does not stand for the proposition it was cited for, *Tadić* nevertheless does deal with recklessness at paragraph 204 of the *Tadić* decision.

But in any event, the Authority's decision here, in my submission, does not apply a recklessness standard and the point made by the Authority at paragraph 119 of its decision is simply that it is not necessary that the individual know the precise crime intended. All that the Authority is saying, when it stated that X knew that the items he helped smuggle into Sri Lanka would as likely be used in conventional warfare as perpetrating gross human rights abuses, was that X was aware that in the ordinary course of events a particular consequence will follow from his actions and he is taken to have acted with both knowledge and intent.

Mr Harrison suggested that the appellant had exhibited a shift from *JS* to the Canadian authorities. The appellant relies on *JS*, obviously, but says that the Authority applied, the Canadian authorities, in a manner consistent with *JS*.

Mr Harrison took the Court, yesterday afternoon, through the first instance decision of the Indian first instance criminal Court –

ELIAS CJ:

Sorry what was the submission of *JS* rather than the Canadian authorities? Was there a submission there?

MR CARTER:

That the – we haven't, the appellant hasn't dropped *JS* in favour of going back to the Canadian authorities, it's –

ELIAS CJ:

I see, yes.

MR CARTER:

We're relying on *JS* but the way the RSAA approached its – approached the case consistent with the Canadian authorities is also consistent with *JS*.

ELIAS CJ:

I see, thank you.

MR CARTER:

I was then moving to the Indian first instance decision –

TIPPING J:

We're now into political crime territory are we?

MR CARTER:

Well not exactly. The reason why I'm wanting to go to the Canadian first instance – sorry Indian first instance decision is it was used, as I apprehend the first respondent's submissions, part of the analysis yesterday afternoon going through that decision was to cast doubt on the idea of whether there were 110 tonnes of explosives, or indeed any explosives, on board the *Yahata* at the time that it was sunk and this was picked up on by His Honour Baragwanath J in the Court of Appeal decision.

TIPPING J:

I don't think Mr Harrison was suggesting that there were no explosives on board the *Yahata*, or that there was some issue in that respect. It's a clear matter of fact. It's been found. I don't think Mr Harrison – I may be wrong, but I didn't understand him to be challenging that as a matter of fact.

MR CARTER:

Well, if that's so, then I probably don't need to dwell on the matter, but I did want to just be clear that although the first instance in the Indian judgment at paragraph 31 of his decision found, well, seems to find on my reading of it, that it is improbable – this is the top of page 155 of the decision – that the *Yahata* was carrying 110 tonnes of arms and ammunition. Because he's using the 110 tonnes figure, he presumably is referring to the explosives figure. But this is based on a statement immediately before that, on the previous page, in paragraph 31, that the prosecution allegation that the *Yahata* was carrying 110 tonnes of explosives could not be right, because in the evidence before the first instance Judge, the weight of the vessel was only 139 tonnes. But, in fact, in the evidence that was before the Authority, there are several places in the evidence where it was accepted that the *Yahata* had a considerably greater tonnage of somewhere between 300 to 400 tonnes. There are various figures used. One is 400 tonnes, which is sourced from a UPI press report in the case on appeal volume 2 page 571. Another is 450 tonnes, which X initially gave in evidence before the Authority, at case on appeal 3 page 835. X later revised that in evidence to 300 to 350 tonnes at case on appeal 3 page 971. In relation to safety of the Indian Supreme Court judgment, Mr Harrison suggested that counsel for X before the Authority was relatively junior, and did not press a safety submission. In fact, counsel for X in the Authority was and is a very experienced immigration and refugee lawyer.

Finally, in relation to disposal, the submission was made for the first respondent that if there is a reconsideration directed, Mr Haines should not be on the panel. As I submitted yesterday, there's never been any pleaded allegation of bias or pre-determination. In my submission, the making of an error of law and/or an adverse credibility finding does not disqualify a decision-maker from conducting a reconsideration.

BLANCHARD J:

It can hardly be a pleading of bias at this stage, anyway. We haven't got to the point of it going back to the Authority.

MR CARTER:

My submission is that the constitution of a new panel for a new reconsideration should simply be left to the chairperson of the Authority.

ELIAS CJ:

If there's any question of bias, one would have thought that instead of dealing with it in this rather oblique way, there should then be an application for review, or some sort of process to actually deal with them.

MR CARTER:

I just have one final point, which, as I apprehend Mr Harrison's submissions yesterday afternoon on disposal, he made a reference to the length of time taken to deal with X's case as a whole, and of course there's the time in India, including administrative, immigration detention of four years, which the Authority itself recognised and took into account as hardship in its decision. But the timing to dispose of this case in New Zealand simply, in my submission, reflects on the scrupulous fairness applied by refugee decision-makers in ensuring that the claimant has a reasonable opportunity to be heard on all relevant matters. And, of course, with all processes, there's time for researching evidence, preparing submissions and so on. That occurred in the initial decision before the Refugee Status Officer over approximately a year. The time before the Refugee Status Appeals Authority is partly explained in the Minute of the Authority, which is the last document in volume 1 of the case on appeal, tab 15, which details some of the procedural history in the Authority. But the short point is that the Authority provided ample opportunity for the claimant to present his case, took some time to provide, to research country information of its own initiative, and supplied that to the claimant and the claimant's counsel, as that information was not initially forthcoming from the claimant or the claimant's counsel, and it's apparent from the transcript that the date for filing submissions in response to the country information that the Authority supplied was extended quite substantially, leading to the second hearing.

In the High Court, the application for judicial review was filed on the last day, or near the last day of the three month appeal period, and in the Court of Appeal, it was necessary for the appellant, X's appellant in the Court of Appeal to seek an extension of time for filing the notice of appeal, which was granted, and also file the case on appeal near the end of the six month period for doing so. Now, this is not any criticism of the claimant or the claimant's counsel. I'm just trying to put things into perspective, and to the extent that Mr Harrison may have been submitting that the time taken was somehow attributable to the Authority –

ELIAS CJ:

I didn't understand his submission to complain about the time in this process at all.

MR CARTER:

Well, there was a reference to time towards the end in relation to disposal and remedy.

ELIAS CJ:

Yes, yes.

MR CARTER:

So I won't take that any further. I just didn't want there to be any suggestion that there's some kind of institutional delay in the refugee decision-making process. So unless Your Honours have any questions, that's all I was intending to address in reply.

ELIAS CJ:

Thank you, Mr Carter. Thank you, counsel, for your submissions. We will reserve our decision in this difficult matter, thank you.

COURT ADJOURNS:11.00 AM

IN THE SUPREME COURT OF NEW ZEALAND SC 107/2009

BETWEEN **ATTORNEY-GENERAL**
(MINISTER OF IMMIGRATION)
Appellant

AND **X**
First Respondent

AND **REFUGEE STATUS APPEALS AUTHORITY**
Second Respondent

AND **Y**
Third Respondent

Hearing: 24 June 2010

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Appearances: I C Carter and R Kirkness for the Appellants
R E Harrison QC and C S Henry for the First Respondent

CIVIL APPEAL

MR CARTER:

May it please the Court, Carter for the appellant.

ELIAS CJ:

Yes Mr Carter. Yes Mr Harrison.

MR HARRISON QC:

If Your Honours please, Harrison for the first respondent.

ELIAS CJ:

Thank you for appearing at short notice Mr Harrison. This hearing is occasioned because or an irregularity in the composition of the Court when we heard the matter before. What we will do is invite counsel to agree that we should proceed on the papers that were before the Court together with the transcript taken at the irregular hearing.

BLANCHARD J:

And treating this as the hearing.

ELIAS CJ:

Yes and to treat this now as the hearing of the appeal.

MR CARTER:

For the appellant, I can confirm that the appellant consents to that course Your Honour.

ELIAS CJ:

Thank you Mr Carter.

MR HARRISON QC:

For the respondent, I can confirm consent to that course also Your Honours.

ELIAS CJ:

Thank you very much Mr Harrison.

MR HARRISON QC:

There is one minor matter that my learned friend has drawn to attention which is that, as luck would have, there's a gap in the transcript but it's only my argument apparently.

ELIAS CJ:

If there's any – are you content to leave it Mr Harrison, on the basis that if we are in any difficulties about that part of the argument, we may make enquiry of you?

MR HARRISON QC:

Yes, I'm perfectly happy with that, just flag that issue.

ELIAS CJ:

Yes, thank you and similarly, if when you receive the transcript, it seems to you that there is something of importance that has been omitted in the break in the tape, you could of course put in a further memorandum on the topic.

MR HARRISON QC:

I'm obliged.

ELIAS CJ:

Thank you. Thank you counsel and thank you for attending today.