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PS (Ltte – Internal Flight – Sufficiency of protection) Sri Lankan CG [2004] UKIAT 00297

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 4 October 2004

Date Determination notified:

28 October 2004

Decision reserved

Before:

Mr J Barnes (Vice President)
Mr K Drabu (Vice President)
Professor D B Casson

Secretary of State for the Home Department
APPELLANT

and

RESPONDENT

Representation

For the appellant : Miss J. Richards, Counsel, instructed by the Treasury Solicitor

For the respondent : Mr N. Param-Jothy, Counsel, instructed by S. Satha & Co.

DETERMINATION AND REASONS

1. This appeal concerns a Sri Lankan national of Tamil ethnicity who claimed to have a well-founded fear of persecution and of treatment in breach of his protected human rights under Article 3 of the European Convention of both the Sri Lankan government and the Liberation Tiger Tamils of Eelam (LTTE) in Sri Lanka. His claimed fear of the state authorities was rejected by reason of the changed circumstances which now apply in Sri Lanka and there is no appeal before us in relation to that part of the Adjudicator's decision. The issues before us are firstly, whether, as found by the Adjudicator, the appellant

has such a fear of the LTTE in his home area, and, if so, whether he may safely and reasonably relocate to another part of Sri Lanka where either he will have no such fear or he will be offered a sufficiency of protection by the state authorities. The first issue was not pressed before us with any vigour by Miss Richards and this determination is primarily concerned with the second issue which we have identified. This determination gives the Tribunal's country guidance on the second issue before us.

2. The appellant was born on 12 June 1982 at Uddaippu in Puttalam in western Sri Lanka which is currently under the control of the Sri Lankan government. He lived there with his family who were fishermen. On 12 July 2001 LTTE members came and demanded that he should transport goods for them by boat to Vidathalthivu and he agreed to do so. He was arrested by the Sri Lankan navy off the coast there together with his cousin-brother (a term which denotes a first cousin) and they were both detained, initially at Pesalai camp for one week and thereafter at Thalladi camp where they were interrogated and, under torture, told the authorities of two places where the LTTE hid such goods. He said they were isolated places and that only he and his cousin, Jegan, knew where they were. Whilst at Thalladi camp two LTTE members were brought in and he said that they admitted loading the goods at one of the sites identified. Two months after their arrest he and Jegan were released as the result of payment of a bribe and the intervention of PLOTE (Peoples' Liberation Organisation for Tamil Eelam) a Tamil organisation opposed to the LTTE and supportive of the government. Immediately following their release they were sought by the LTTE who killed Jegan whilst the respondent was staying at a friend's house in hiding in Uddaippu.
3. In December 2001 he was once more arrested on suspicion of being an LTTE member and held at the police station there, from which he was released on payment of a further bribe by his family conditionally on reporting to sign on at the police station every week. He did not do so but stayed in hiding at a friend's house for two or three weeks after his release. During this time his family arranged for an agent to take him out of the country and he left Sri Lanka by boat from Negombo on 7 January 2002. He arrived in the United Kingdom on 11 April 2002 and claimed asylum.
4. Following an interview, the Secretary of State refused the respondent's asylum application for the reasons set out in a letter dated 26 October 2002. On 7 November 2002 he issued directions for his removal to Sri Lanka as an illegal entrant after refusal of his asylum application. The appellant

appealed against that decision on both asylum and human rights grounds and his appeal was heard on 14 August 2003 by Mr R.J. Oliver, an Adjudicator. He found him credible in the account which we have set out above but rejected his claimed fear of persecution by the Sri Lankan authorities by reason of the change in country conditions which had then come about. As we have noted above, there is no challenge to that part of his decision which is wholly in accordance with current Tribunal jurisprudence on such issues, where the Tribunal has held that it will be only in exceptional circumstances that an ethnic Tamil will succeed in showing a real risk on return from the government authorities following the ceasefire which came into effect in February 2002. Such exceptional circumstances would usually require there to be cogent evidence that the appellant is wanted by the Sri Lankan authorities.

4. So far as the appellant's fear of the LTTE was concerned, however, the Adjudicator concluded that the appellant would be at risk from them. He deals with this, after reviewing the specific and objective evidence as to the behaviour of the LTTE, in the following terms at paragraphs 41 and 42 of his determination:

'41. Having noted all these information [sic] this reinforces my findings that the appellant faces a serious risk of being targeted and persecuted and even made 'to disappear' by the LTTE for being a traitor. I have noted that they do have informants and what happened to his cousin's brother could happen to the appellant. I believe that they would have long memories and it only be a matter of time for the appellant to be tracked down [sic]. His identity would be known, I also find that the appellant could not avail himself of the opportunity and the obligation of internal flight because the LTTE now have "a free run" of the island.

42. I have also considered whether they will be agents of persecution. I have to consider whether the Sri Lankan authorities can afford effective and sufficient protection for the appellant but it seems to me by the nature of the ruthlessness which the LTTE are still capable of, the appellant would not be treated as an average Sri Lankan citizen from whom he could receive the

protection for ordinary crime. The LTTE have shown themselves capable of terrorist activities, they still are capable of carrying arms and explosives and also have, as I pointed out, an effective network of informants. The appellant therefore is over and above average risk and can therefore not count on any sufficient or effective from the Sri Lankan authorities. [sic]'

5. For those reasons, the Adjudicator allowed the appellant's appeal on both asylum and human rights (Articles 2 and 3 of the European Convention apparently) grounds.
6. The Secretary of State now appeals with leave to us against that decision and it is appropriate we set out the grounds of appeal in full.

'The Adjudicator erred in law by allowing the appeal on asylum grounds and under human rights Articles 2 and 3 in particular:

- (i) He erred in law in finding that the respondent would not be able to seek protection from the Sri Lankan authorities as he failed to consider Hovath [2000] ImmAR 552 [sic] in deciding whether there was effective protection of the respondent. There is no assessment of whether there is a functioning judicial system or a system in place that the respondent could avail himself of. The Secretary of State submits that following Hovath there is a sufficiency of protection for the respondent.
- (ii) Furthermore, the Adjudicator's finding that the Sri Lankan authorities could not protect the respondent, is unreasonable and amounts to an error in law. The Adjudicator states "... It seems to me by the nature of the ruthlessness which the LTTE are still capable of, the appellant would not be treated as an average Sri Lankan citizen from whom he could receive the protection of ordinary crime" (paragraph 42). However, the Adjudicator does not give any reasons as to why the LTTE's "ruthlessness" would stop the Sri Lankan authorities from offering the

respondent protection. The Adjudicator concluded that the respondent is not an “exceptional case” (paragraph 31) and is not wanted by the Sri Lankan authorities, therefore the Secretary of State submits that the Sri Lankan authorities would offer the respondent protection.

(iii) The Adjudicator erred in law as he has not made a credibility finding of the respondent [sic] or clearly stated which parts of the evidence he accepts or rejects as he is obliged to do following the Court of Appeal in Karanakaran [2000] ImmAR 271 25 January 2000. The Adjudicator has stated he accepts the respondent's evidence (paragraph 36) but has given no reason why he believes the respondent despite the challenges to the credibility in the refusal letter.'

7. Although by reason of the date of the determination this appeal is governed by the provisions of the Immigration and Asylum Act 1999, it was not heard by the Adjudicator until after 7 June 2003 and, by reason of the provisions of the Nationality, Immigration and Asylum Act 2002 (Commencement Order No. 4) Order 2003 (SI No. 754), the provisions of Section 101(4) of that Act apply to the appeal from the Adjudicator to the Tribunal which is accordingly restricted to an appeal on a point of law only. Following and applying the ratio of CA v Secretary of State for the Home Department [2004] EWCA Civ 1165, there must be a material error of law on the part of the Adjudicator before the Tribunal will have any jurisdiction to interfere with his decision but if such an error is established the Tribunal must then consider the appeal on the basis of the facts applicable at the date of the hearing before it.
8. We have already noted that the third ground of appeal was not pressed before us with any vigour by Miss Richards. In our view she was right not to do so. The Adjudicator gives detailed consideration to issues of credibility and the effect of the objective evidence from paragraphs 28 to 40 of his decision, and whilst it is correct that he does not at any point say that he finds the appellant generally credible, that is undoubtedly the irresistible inference from the specific findings which he does make; we are satisfied that the determination must be construed on such a basis. Moreover, contrary to what is asserted at ground (iii), it seems to us that the Adjudicator has given adequate reasons as to why he

accepts the respondent's account of his personal history. We therefore approach this appeal on the basis that we are bound by the Adjudicator's factual findings in relation to the respondent's personal history. On that basis, it was conceded by Miss Richards that there was no arguable error of law in the Adjudicator's conclusion that the respondent would be at risk in his home area where his return would be reasonably likely to become quickly known. The Adjudicator's reasoning in this respect is contained at paragraph 41 of the determination prior to the reference to internal flight. As a matter of construction, it seems to us that the words 'His identity would be known' which appear at the beginning of the last sentence of that paragraph, are more properly referable to the reasoning which precedes that phrase as having particular reference to the situation in his home area. It does not seem to us that the position in relation to the lack of opportunity of internal flight or relocation is, as a matter of law, adequately reasoned simply by reference to the LTTE now having 'a free run of the island'. Whether they avail themselves of such a facility for the purposes of pursuing those in whom they may retain an adverse interest in their home area is a matter which must depend upon the objective evidence, and there is nothing to suggest that the Adjudicator has properly directed himself to any objective evidence to support this proposition.

9. So far as the question of whether there is adequate reasoning in relation to the provision of sufficiency of protection, it was specifically conceded by Mr Param-Jothy in his submissions that the Adjudicator had failed to take into account those matters which ought properly to be considered by reference to the ratio in Horvath v Secretary of State for the Home Department [2001] 1 AC 459 as aided by the analysis which has, since the Adjudicator's decision, been given by the Court of Appeal in R (Bagdanavicius and Bagdanaviciene) v Secretary of State for the Home Department [2003] EWCA Civ 1605. We are satisfied that those omissions on the part of the Adjudicator are material errors of law and that it is therefore appropriate for us to reconsider all issues relating to internal relocation as at the date of this hearing.
10. To that end we have considered the report and oral evidence of Professor Anthony Good as well as the substantial volume of objective evidence filed by both parties to which we have been referred in the course of the hearing. We are grateful to both advocates for the assistance which they have provided in their written and oral submissions to us.

11. So far as they are relevant to the issues before us, the objective material which we have considered includes the following principle sources:
- (a) UNHCR Background Paper on Refugees and Asylum Seekers from Sri Lanka issued in April 2004;
 - (b) The Home Office CIPU Country Report of April 2004;
 - (c) US State Department Report for 2003 published in February 2004
 - (d) Information Bulletins 32 and 36 from the University Teachers for Human Rights (Jaffna) of 2 May 2003 and 29 May 2004 respectively;
 - (e) Human Rights Watch Report of 7 August 2003 concerning political killings during the ceasefire;
 - (f) Amnesty International Open Letter of 12 August 2003 concerning recent politically motivated killings and abductions in Sri Lanka;
 - (g) Professor Good's general report on his visit between 2 and 15 August 2003 published on 29 August 2003;
 - (h) A further report from Professor Good dated 27 March 2004 expanding on his own visit report by reference to what was said in R (Oppilamani) v Secretary of State for the Home Department [2004] EWHC 348 (Admin) and a further report dated 21 September 2004 prepared specifically in relation to the present respondent;
 - (i) The Asian Human Rights Commission Report of 4 February 2004;
 - (j) Various newspaper reports up to and including 23 September 2004 as supplied by both parties.
12. The Secretary of State's position was summarised by Miss Richards in her skeleton argument in three general submissions. Firstly, that although there inevitably have been (and may continue to be) fluctuations in the peace process, the Sri Lankan authorities remain committed to the process and to the eradication of human rights abuses.
13. Secondly, that whatever the precise number of killings which may be properly attributed to the LTTE in Colombo, the various reports do not provide any foundation for a conclusion that the LTTE is carrying out serious human rights abuses in Colombo on a wide scale. The targets of

those killings which had been reported appear to have been mainly senior members of parties opposed to the LTTE, police and military informants and close aides of Colonel Karuna, a senior LTTE member.

14. Thirdly, that given this background, the respondent could safely relocate to Colombo or to any other government controlled areas outside the north and east of the country and away from his home region, where not only would he not be at real risk of adverse attention from the LTTE, but where there would be a sufficiency of protection available to him from the state authorities in any event.
15. The broad thrust of Mr Param-Jothy's submissions is that there is sufficient evidence both of intent and ability on the part of the LTTE to target their opponents to demonstrate that there is a reasonable likelihood that they will seek to target the respondent in government controlled areas of Sri Lanka outside his home area. He relies on the summary killing of Jegan immediately after he and the respondent were released from army detention in October 2001 as illustrative of the degree to which the LTTE are intent on harming the respondent. The fact that there have been some killings in Colombo and other areas outside the factual control of the LTTE is, he submits, illustrative of their ability to strike at will throughout Sri Lanka since travel restrictions have been substantially eased. As to the ability of the state to provide a sufficiency of protection to its citizens, he submits that the evidence is that the police allow the LTTE generally to act with impunity and that there is evidence that the state will not actively pursue the perpetrators for fear of upsetting the peace process. Whilst he concedes that the essential machinery for the provision of a sufficiency of protection exists, it is his case that it is not applied.
16. There are a number of generalised statements in the objective material which go some way to support his submissions. For example, the April 2004 UNHCR Background Paper contains the following passages at paragraphs 2.11 and 2.12 as to the possibility of internal relocation:

'2.11 Since the ceasefire agreement came into force, most checkpoints between the government and LTTE controlled areas have been removed. The checkpoints that were approved after the MoU [the Memorandum of Understanding which led to the ceasefire] between the government and the LTTE are listed in the ceasefire agreement and generally adhered to.

However, although it is occasionally possible for high ranking members of the LTTE to seek national protection when fleeing the LTTE, there are numerous reports of suspicious deaths of former LTTE cadres, including persons who have sought national protection, occurring in government controlled areas. In cases where inter-Tamil fighting occurs, the government stand has been to not intervene as any such intervention would be a violation of the ceasefire.

2.12 In general it is no longer possible to use the internal flight option for Tamils fleeing the LTTE as the organisation is present in every part of the country and has a well developed information/ intelligence network.'

The difficulty with that passage is that it is not sourced and its generalisations do not appear to be borne out by what is contained earlier in the paper.

17. At paragraph 44, the paper records that in 2002 and 2003 'The LTTE reportedly committed several unlawful killings' [our emphasis] and at paragraph 46 records that of its political rivals, the EPDP and EPRLF(V) have had thirty-two 'members or supporters killed or missing' since the ceasefire, PLOTE 'at least fifteen members or former members killed or injured' (of which at least five deaths and six injuries are accounted for in a single bombing incident in May 2003); and that TELO has 'at least four members killed or missing'. All these are rival Tamil political organisations who have been generally supportive of the Sri Lankan government, but there is no breakdown as to how many are claimed as killed, or injured or missing, or where these incidents are said to have occurred.
18. This information appears to have been derived from the Human Rights Watch paper of 7 August 2003 and the Amnesty International Open Letter of 12 August 2003. The former records twelve killings of current or former prominent members of the four Tamil pro-government parties referred to. Of these all but one were in the north and east of Sri Lanka and the report refers to them as being politically motivated. The Amnesty International letter of 12 August 2003 refers to twenty-two documented politically motivated killings but the only two cited specifically are amongst those referred to in

the Human Rights Watch paper. The Amnesty International Letter says:

‘Since the signing of the agreement there have been tens of killings, abductions and other human rights abuses against civilians in Sri Lanka.’

It is clear from the context that these are identified as politically motivated acts against prominent members or former members of pro-government Tamil groups but it is not suggested that the total number of killings exceeds twenty-two on this information. Although the LTTE are claimed to be responsible, it is also noted that they have consistently denied responsibility.

19. Dealing with the number of killings, Miss Richards helpfully provided details of all those that occurred in Colombo or its environs since the ceasefire (the earliest is in fact in July 2002) down to 23 September 2004, by reference and cross-reference (since many were covered in more than one source) to all the objective evidence before us, including Professor Good’s report. She said that she believed this list to be exhaustive, and this was not disputed by Mr Paramjorthy. There were fourteen separate incidents but one involved a suicide bomber who killed four police officers as well as herself (early July 2004) and another was the murder of eight LTTE members (late July 2004) so that there were in all twenty-five deaths in the Colombo area during this period including the suicide bomber. Of these five were police officers: the four killed in the suicide bomb incident and a senior police intelligence officer shot in his police station on 6 July 2003 by a Tamil double agent; nine were LTTE members (one on 27 April 2004 and the eight referred to above), all of whom were believed to be associates of Colonel Karuna and were related to the internal schism in the LTTE identified with him; four were current or former members of anti-LTTE Tamil parties who had a high profile, either politically or because of their association with Sri Lankan military intelligence, and in one case allegedly also with Colonel Karuna; a further four were former LTTE members, one of whom was from the intelligence section and in course of seeking to leave the country (3 December 2002), two of whom had subsequently worked for the government Directorate of Military Intelligence and the last of whom had become an outspoken opponent of the LTTE. Of the remaining two, one was the subject of the first recorded incident in July 2002 when the ceasefire was in its early stages. He had perceived connections with the EPDP and had left his home area for Colombo because he refused to comply with threats of extortion by the LTTE. The other

dates from September 2002, when the victim was a Tamil who had been settled in Australia and had refused to allow the temple in Australia, of which he was a trustee, to succumb to extortion threats from the LTTE representatives there. He was killed when he came to Sri Lanka for a holiday.

20. Based on this analysis, it was Miss Richards' submission that all the Tamils killed were either high profile politicians and former politicians or current (in the case of those considered associates of Colonel Karuna) or former LTTE members who were either formerly of some standing in the LTTE or had subsequently acted in such a way as the LTTE would consider them renegades and traitors.
21. In order to put the scale of such killings in perspective, she pointed out that the total population of Sri Lanka was some 17.5 million of which 18% (approximately 3,150,000) are Tamils (CIPU Report paragraph 2). In Colombo itself, there are estimated to be some 400,000 Tamils originating from the north and east of Sri Lanka, of whom some 250,000 have been resident since before 1983 and the remainder have come during the civil strife, principally from the Jaffna area. There are additional concentrations of Tamils in greater Colombo as well as in Puttalam where the respondent comes from (CIPU Report paragraph 6.58). As will be seen from the earlier analysis, the total number of Tamils killed in or around Colombo since the ceasefire, excluding the suicide bomber, is nineteen, an insignificant number when placed against the 150,000 Tamils who have come to Colombo by reason of the conflict.
22. Quite apart from the issue of whether there is a real risk that someone of adverse interest to the LTTE in their home area may be targeted if they relocate to Colombo or other areas outside north and east Sri Lanka, there is the further question of whether, in any event, the Sri Lankan authorities provide a sufficiency of protection to their citizens outside these areas. It is inherent in what UNHCR says at paragraphs 2.11 and 2.12 of its paper that it questions the existence of a sufficiency of protection but the basis of doing so is by no means clear from the paper as a whole.
23. At paragraph 19, it confirms that there is a 60,000 strong police force responsible for internal security 'in most areas of the country' which was formerly controlled by the Ministry of Interior but is now intended to be under a new separate Ministry of Internal Security. At paragraphs 128 to 130 the judicial system is described as being independent and properly constituted with the initial criminal process commenced in magistrates courts, with provision for trial by

jury of the more important criminal cases in the High Court. At paragraphs 151 to 154 the paper says this:

‘151. Before the ceasefire agreement civilians deaths and injuries on the Jaffna Peninsula were reported in the hundreds, but casualty figures could not be confirmed because relief agencies and journalists were barred from the hardest hit areas. On the Peninsula, and also in eastern Sri Lanka, many conflict related deaths were the result of errant shells and gunshots.

152. Since the ceasefire agreement some paramilitary actors, as well as the LTTE, have continued the traditional political killings and disappearance. The Sri Lankan Monitoring Mission (SLMM) issued a press statement in May 2003 stating that the continuing attacks and killings of members of political parties and locally elected representatives pose a serious threat to the ceasefire. SLMM further stated that various political parties operating in the north and east have formally complained to SLMM due to repeated threats and attacks on their offices, individual members and their families and elected representatives.

153. Although LTTE was pointed out as a main perpetrator in the majority, but not all of the attacks, police investigations rarely led to the accusations being proven. The SLMM stated that the police seem to have had difficulties in arresting the perpetrators and that available witnesses to the crimes are too afraid to come forward as fear of repercussions seems to be an everyday concern for some people in the north and east.

154. In addition, in the autumn of 2003, international human rights groups publicly appealed to actors in Sri Lanka, including the police forces and the LTTE, after having received confirmation that the political killings continued with impunity. UNHCR field officers who continue to report on disappearances and killings in 2003 confirm these findings. More than forty cases of

suspected political killings after the ceasefire have been reported to the UNHCR field office.'

What seems to us noteworthy about this passage is that the first three paragraphs are clearly concerned with the situation in north and east Sri Lanka. The reference in paragraph 154 is again to the Human Rights Watch and Amnesty International documents previously referred to. It is again instructive to look at what these documents actually say.

24. Human Rights Watch says of the ceasefire:

'... It has also given the LTTE free access to towns like Batticaloa, Jaffna, and Trincomalee, previously under army control, for the purpose of opening political offices. Although the pact prohibits LTTE cadres from carrying arms in these areas, prohibition is not well enforced. According to critics, the LTTE's new political offices have become useful points from which to coordinate surveillance, recruitment, and extortion and, when necessary, the assault, abduction and assassination of rivals.'

25. The fact that the reference is to the situation in north and east Sri Lanka is underlined in the passage dealing with the Sri Lankan Monitoring Mission, which does not have direct investigative powers comparable to those of the police and in any case considers them outside its remit, where it says:

'The police remain primarily responsible for investigations, but they have often failed to undertake them. With the current ceasefire in place and the military confined to barracks, police are once again the main security force active in the north and east. But they are relative strangers to the areas they police and are vulnerable to attacks should hostilities resume. The result is that they either forge relationships with the more powerful and locally influential LTTE, or try to stay out of the way. Police officers are well aware that when the LTTE broke the fifteen month ceasefire in 1990, LTTE forces overran police stations throughout the north and east, abducting and killing hundreds of police officers.'

26. It later cites specific examples to support this general statement as to the position in the north and east which were both, of course, formerly under the control of the LTTE and are areas of Tamil predominance, but these issues relate largely to the operational effectiveness of the police and their ability to effect arrests rather than a failure to carry out investigations which the report refers to as being carried out in most examples cited. These investigations had also led to two arrest warrants being issued by the local magistrate in one of the cases cited.
27. The Amnesty International Open Letter makes it clear that in respect of each of the specific examples it gives, the police are carrying out investigations but complains that there has been a failure to take measures 'to guarantee the safety of those who are most at risk' or to bring anyone to trial. The letter says that:

'Amnesty International recognises the difficulties that the SLMM and the police face in investigating these cases, particularly in regard to securing the testimony of witnesses'

But it says in cases where witnesses who claim to be able to identify those responsible are willing to give evidence: '... both the police and SLMM should, if they have not already done so, initiate investigations'. It goes on to say that cooperation of witnesses 'can only be achieved in the majority of cases by creating a secure environment free from the fear of reprisals' and complains that :

'The SLMM and police need to ensure at the earliest opportunity the systematic protection of witnesses involved in these investigations in order to guarantee their safety and facilitate the collection of evidence. In addition, police should provide protection to those who request it. ...'

28. In her opening submissions, Miss Richards helpfully analysed the objective evidence as to police responses in the case of the killings in Colombo which she had identified as we have recorded above, as well as their general response to the security situation there.
29. In the case of the four police victims of the suicide bomber in early July 2004, her intended victim had been a government minister and it was following police intervention that she had detonated her bomb, killing four of the investigating officers in the process. Her accomplice had been arrested and when

brought before the court had volunteered a full confession, leading to her remand in custody. A special police team was then deployed to trace the LTTE members who had brought the women to Colombo and had also arrested a further four suspects employed by the government and alleged to have been involved in issuing forged identity cards. They were also remanded in custody by the court.

30. The killing of the police intelligence officer in June 2003 had resulted in the capture of the killer during his attempted flight from the scene.
31. In the case of the LTTE members believed to be associated with Colonel Karuna (27 April 2004 and late July 2004 respectively) there were police investigations but in the earlier case the gunmen were unidentified. In the latter case, when eight high ranking LTTE members had been attacked in a safe house managed by the Karuna faction, a major police investigation was instituted under the direction of a magistrate who had ordered the arrest of those suspected.
32. Of the current or former members of anti-LTTE Tamil parties, all were the subject of police investigations. In the case of 'PLOTE Mohan' (31 July 2004), there are extensive reports of the police investigations by Colombo crime division in newspaper reports, including reports that at least one of those sought in connection with the investigation had fled to an LTTE controlled area, and a special police team had been dispatched to Batticaloa to pursue lines of enquiry.
33. In the case of the four LTTE members, it is clear that there was a police investigation into the earliest recorded incident (3 December 2002) but the references to the second incident (26/27 April 2003) are sparse and do not refer to the police. Of the two incidents in August 2004, there is no direct reference to police investigation in the first case in the newspaper reports, but in the second case it is clear from reports that there are intensive investigations to which two police teams were assigned (Sunday Observer 29 August 2004). This report makes it clear that the Minister of Public Security, Law and Order is directly involved in what are referred to as reprisal killings in Colombo and elsewhere following 'exposure of the army safe house since when names of informants have been revealed to the enemy. The informants are now being hunted and killed indiscriminately ...' As to the last two killings in July and September 2002 respectively, there is only a single report in the first case which is very brief and does not make any reference to police investigations. In the second case, concerning a Tamil who had returned from Australia for a

holiday, there is a brief contemporary press report quoted by Professor Good which makes it clear that there are ongoing police investigations which had to date identified that the killing was concerned with the failure to pay protection money.

34. In regard to general police responses, Miss Richards directed our attention to a series of extracts from newspaper reports. The first was from The Island dated 2 February 2004 recording the arrest by the police of twelve Tamils suspected of being members or ex-members of the LTTE in the course of investigations on an attack which had taken place not long before on two policemen near a cinema in the Colombo area. From the same source there was a report of 1 April 2004 recording the arrest of four members of the Karuna faction of the LTTE with weapons following routine checks of vehicle movements. Those arrested were to be produced in court. The Daily News of 28 April 2004 records that the Inspector General of Police had requested the public to be more vigilant and provide information of suspected LTTE activities following reports of the Karuna and Prabhakaran factions (the LTTE faction opposing Karuna) being in Colombo, which also made it clear that operationally the process of identifying cadres of either faction and arresting them was difficult without public cooperation. The Island on 23 May 2004 reported that special police teams were on a massive hunt for Colonel Karuna's army in Colombo and the fear that attacks between the two LTTE factions were spreading in the south of the island. It recorded that special police anti-terrorist squads were on the alert for the movement of the two factions. The Daily News of 2 August 2004 reported that in the investigations into the killing of PLOTE Mohan (see above) the Colombo Crime Division had taken over investigations and had dispatched a special police team to Batticoala to trace the mastermind behind the killing, a suspect whom they learned had left his lodgings in Colombo immediately after the incident. It noted also that the assassinated man was a close associate of Colonel Karuna.
35. Finally, Miss Richards pointed out that the situation now in Colombo could be contrasted with that which had applied before the ceasefire where, in its section dealing with the position from 1994 until that date, the CIPU Report made it clear that there had been substantial deaths and injuries caused by penetration of suicide bombers into the Colombo area, when it was clear that there had been an ability on the part of the LTTE before the restrictions on travel were eased to make effective attacks in the south when they wished to do so. By reference to paragraphs 4.14 to 4.32 of the report, there had, between November 1995 and September 2000,

been a total of over 300 killed and 2,400 injured in ten recorded incidents in Colombo, as well as the major military assault on the Sri Lankan Air Force base and adjacent international airport outside Colombo on 24 July 2001 when eight military aircraft and six passenger planes were destroyed or severely disabled.

36. We turn now to Professor Good's written and oral evidence before us. Whilst all three written reports are concerned with general issues in relation to the whole of the country, we have considered only those parts of the report which are relevant to the issue of whether a Tamil with a localised fear of the LTTE in his home area may safely and reasonably relocate to Colombo and whether there is a sufficiency of protection provided there by the Sri Lankan authorities. As to whether it is reasonable – that is not unduly harsh under the Robinson test – to relocate there, the Tribunal has made it clear in many earlier determinations that in general terms it is the considered view of the Tribunal on the objective evidence, having particular regard to the substantial Tamil population in Colombo and its environs, that relocation there for a Tamil is not in principle unduly harsh. That was not a proposition which was in issue before us insofar as the generality of Tamils from the north and east and other areas of substantial LTTE influence are concerned. The issues before us depend entirely on whether the localised fear of the LTTE can arguably be said to extend to Colombo and its environs on the objective evidence and, if so, whether the state will in any event provide a sufficiency of protection to its citizens in that area so that international surrogate protection is not arguably needed.
37. The earliest in point of time of Professor Good's reports followed his fact finding visit to Sri Lanka between 2 and 15 August 2003, which was intended by him to be in the public domain as he made clear in his second report prepared specifically to deal with issues that had been raised by Charles J in Oppilamani in which the first report and its effect had been considered. The third report, of 21 September 2004, was prepared specifically for the purposes of the appeal before us.
38. Professor Good holds the Chair of Social Anthropology in Practice at the University of Edinburgh where he was Head of Department of Social Anthropology until 1999. He also holds doctorates in chemistry and social anthropology from the universities of Edinburgh and Durham respectively and is a past committee member of the Association of Social Anthropologists of the Commonwealth which he describes as a leading professional body of his discipline. His knowledge of

Sri Lanka is derived in part from holding the position of senior lecturer in physical chemistry between 1970-72 at the (then) University of Ceylon, and he had also lived for some years in the Tamil Nadu State in south India and continues to make regular visits to both countries. He teaches, writes and researches on south Asian society, history and culture with special reference to Tamils and was last in Sri Lanka for the purposes of preparation of his first report. He has written numerous reports for use in asylum and human rights appeals and publishes academically on general issues as to expert evidence.

39. The only relevant section in the first report for the purpose of this appeal is at paragraphs 10 to 15 dealing with the security situation in Colombo, partly by reference to his personal observations (which are limited to a large reduction in checkpoints since his previous visit in 1996 although he refers to recent tightening of security in Colombo and increased numbers of temporary checkpoints) and otherwise on the basis of three named informants, all of whom are Tamil lawyers: two are respectively the founder of and associated with the Forum for Human Dignity, the former being an EPDP Parliamentary candidate; the third informant is also an MP for Jaffna District representing the All Ceylon Tamil Congress. On the basis of information provided to him by those informants, he says this at the relevant paragraphs in this section:

'12. A senior officer in the police department said a few months ago that the police believed several LTTE groups to be operating in Colombo. The Freedom of Movement consequent upon the ceasefire has facilitated Colombo's penetration by the LTTE. They extort money from Tamil businesses in the city, and there has been a recent series of killings by the LTTE in Colombo and elsewhere for people whom they see as enemies, particularly those they believe have been informing on them. There are however no effective police investigations into political murders by the LTTE at present. The authorities do not wish to arrest LTTE members committing political assassinations in Colombo, because they are anxious to do nothing which might disrupt the peace process.

13. In recent weeks, however, the police and army have been carrying out numerous

roundups in Colombo, especially after the killing of a senior CID intelligence officer in Mount Lavinia by an LTTE operative who had won the officer's trust by working for him as an ostensible informant. In one round-up alone about 600 Tamils were detained. These round-ups were carried out by the police and army jointly, and those detained were released after questioning. Raids and round-ups focussing on Tamil single "lodges" in the city are weekly events at present, with the result that Tamils are not safe in certain areas of Colombo, such as Maradana, Grand Pass and Wellawatte. ...

15. There have been about one hundred murders by the LTTE since the ceasefire, including about fifty murders of informants. The fact that so many killings have occurred in Colombo and other government controlled areas, indicates that the dangers of those regarded as enemies by the LTTE is not confined to LTTE controlled areas.'
40. That report was before Charles J in Oppilamani and these paragraphs are quoted in paragraphs 36 to 38 of his judgment. He is also referred to paragraphs 89 and 90 of the first report which are set out at paragraph 31 of his judgment where Professor Good repeats his assertion as to it being government policy that even in government controlled areas a blind eye is to be turned to LTTE attacks on political rivals and that 'the government will go on failing to provide adequate protection to Tamils opposing the LTTE, or who have fallen foul of the LTTE, because it is not motivated to do so.'
41. Mrs Oppilamani, like the present respondent, claimed to be of adverse interest to the LTTE and feared that she would not be safe from them in Colombo if returned there. In her case, the Secretary of State had certified her claim for asylum as being clearly unfounded under Section 94(2) of the 2002 Act and she sought judicial review of that decision. Charles J dealt with the weight to be given to the evidence on Professor Good in the following terms at paragraphs 43 to 45 of his judgment:
 - '43. At the heart of the reasoning of the Secretary of State, and the submissions made on his behalf, is the point that the

information and evidence as to specific attacks, killings or persecution in the Colombo area are extremely limited and that the more generalised statements in Dr Good's reports have to be read against that background.

44. The generalised statements if taken in isolation and thus without that background would, it seems to me, found the first stage of the claimant's position, namely that it cannot be said that no Adjudicator would by reference to those paragraphs find that there was an insufficiency of state protection.

45. However, it seems to me that when those passages are read against the source of the information contained and identified in Dr Good's report and the very limited number of incidents in Colombo that can be pointed to specifically, namely (i) the two I have identified [which were both derived from the Human Rights Watch report we have considered above] and (ii) the additional unspecific incident in the footnote to paragraph 12 of Dr Good's report [which refers to examples of reports on LTTE political killings in Colombo which could not be identified by any source reference before Charles J and reports as to 'thirty-six known political killings by the LTTE across the country since the MOU came into effect'] (that counsel for the Secretary of State has not been able to track down), I have reached the conclusion that an application of the test set out by Lords Clyde and Hope [in Horvath], which is based on a system, leads to the result that no Adjudicator could properly, on the basis of the information presently before me, conclude that there was an insufficiency of state protection.'

42. The second written report, produced to us by the Secretary of State, was one dated 27 March 2004 prepared for a specific claimant in which Professor Good refers to what Charles J said in Oppilamani. In that report he said that the first report was explicitly confined almost entirely to the matters 'that I was

told (in which case the source is specified) or observed for myself during my visit'. This report seeks to deal at paragraphs 13 to 40 with the issues raised by Charles J on the basis of identifying specific examples of killings in Colombo, all of which are included in the extensive survey made by Miss Richards to which we have referred in some detail above. On that basis he effectively repeats the views which he had previously expressed in the first report which we have already set out. Whilst properly acknowledging that it would be improper for him to express any view as to whether or not the legal test for sufficiency of protection is met in any particular case, he maintains his views previously expressed and adds:

- '28. What is beyond doubt is that the ceasefire and lifting of the ban have increased the LTTE's freedom of manoeuvre significantly. The greater the progress in any future peace talks, the greater would be the single 'legitimacy' accorded to the LTTE and its activities, and the greater its ability to strengthen its presence in Colombo.
- 29. Taking into account all the above evidence, it is clear that opportunities for the LTTE to intimidate, abduct, and even kill those it perceives as enemies or traitors have been significantly enhanced by the ceasefire, in Colombo as well as in areas in the north and east ostensibly under government control.
- 30. If the court accepts that [the subject of the specific report] does have reason to fear the LTTE (and I repeat that I do not know the circumstances of his case) the objective evidence summarised above indicates that he would be at risk in Colombo as well as elsewhere in Sri Lanka. It is clear that the government can offer him no protection at all in LTTE controlled areas, and that even in Colombo the LTTE has targeted and executed a number of persons.'
- 43. The third report was, as we have noted, prepared specifically for the appeal before us. It was the view of Miss Richards, with which we concur, that paragraphs 75 to 98 of that report, which deal with Dr Good's views as to risks for Tamils from

the government authorities, are irrelevant to the issues with which we are concerned. At paragraphs 16 to 37 of the report, Professor Good deals with the question of risk from the LTTE, including risk in Colombo. In that section we hope we do no injustice to Professor Good by saying that it largely repeats the views which we have set out in the extracts from the earlier reports above, adding further examples but none which do not appear in the comprehensive analysis by Miss Richards as to killings in Colombo since the ceasefire. The core of his argument is, however, perhaps contained at paragraph 35 of the report where he says:

‘... In my opinion, however, any debate over just how many killings the LTTE has carried out in Colombo is largely a red herring. The fact that there have been any at all shows they have the capacity and willingness out carry them out, and the question then becomes whether there is anything in appellants’ backgrounds to differentiate them as particular targets.’

44. He then continues, after quoting from the UNHCR paper to which we have already referred, as follows as paragraph 37:

‘In sum, the LTTE has always taken very strong action, including assassination against those it regards as traitors. This applies above all to those suspected of revealing information to the authorities, and even more forcibly, now, to those belonging to the Karuna faction. Any such risk would of course be most acute in LTTE-controlled territory, in the Vanni and Jaffna Peninsula, and in east coast regions where both factions are present, but as the above evidence demonstrates, those seen as informers, traitors and deserters, are at risk in Colombo too should the LTTE wish to target them. What is true of Colombo is also true, in my opinion, of all other parts of Sri Lanka, and in this connection I draw attention again to paragraph 2.12 of the UNHCR’s April 2004 Assessment, quoted above [it is set out by us earlier in this determination at paragraph 16], which appears to me wholly consistent with the available evidence and with which I agree.’

45. He then deals with the question of risk to informants from the LTTE and expresses the following views at paragraph 39 of his report:

'I am, with respect, in broad agreement with the Adjudicator's assessment of the LTTE at paragraphs 39-42 of the determination. [Paragraphs 41 and 42 are set out at paragraph 4 of this determination and paragraphs 39 and 40 set out the Adjudicator's analysis of the objective evidence as to the behaviour of the LTTE which we have not thought it necessary to reproduce.] His analysis accorded with the evidence available at the time, and is confirmed by more recent evidence, as explained above. In particular the LTTE takes very great interest in anyone who has been detained by the security forces, particularly those held for long periods. This is mainly because it assumes they would have been tortured to obtain information, but they may have been used as masked informers to pick out LTTE members at checkpoints, and that they may have been released on condition that they act as informers in the future. I think it is certain that, at the very least, the LTTE would indeed have wished to interrogate [the respondent] about his own very lengthy detention [we note it was for some two months only], all the more so in view of the detention of two of their members under circumstances which pointed to him as a likely source of information.'

46. Finally, he deals with the issue of whether the state is capable of affording protection to persons like the respondent, not by reference to the legal meaning of 'sufficiency of protection' but 'simply to comment on the ability and willingness of the security forces to protect persons targeted by the LTTE'. Apart from making reference to the UNHCR paper and to paragraph 211 of that paper which we have already set out, he says this at paragraph 42:

'The suicide bombing apparently aimed at Douglas Devananda [this is the incident in early July 2004 when four police officers were killed following arousal of suspicion of the intentions of the suicide bomber]; the mass murder of eight Karuna supporters in Colombo [this is the incident of 8 July 2004 already noted]; the assassination of the intelligence source known as PLOTE Mohan

[the incident of 31 July 2004 already noted]; and the killing of the EPDP leader K Bala Nadarajah [the incident of 23 September 2004], all of which have occurred in the past few months, confirm how much freedom the LTTE has to operate outside the law in Colombo ... The Karuna supporters were indeed placed in a supposedly 'safe house' and one of the dead was (according to the LTTE, though the government denies this) a 'minder' from military intelligence. Clearly the authorities could not provide sufficiency of protection in this instance, even when they had specifically set out to do so. [This appears to be derived from the article in the Daily News of 26 July 2004 which is the only objective evidence before the Tribunal in this respect. That referred to the safe house being one 'supposed to be managed by the Karuna faction' and the information provided by the police was that those killed were from the Karuna faction. The only reference to a Sri Lanka military intelligence operative being among those killed comes from the Tamil net website said to be quoting sources in Batticaloa and therefore clearly reflecting opposition LTTE views, but the suggestion is reported as being categorically denied by the Director of Military Intelligence, so that it is difficult to see on what basis Professor Good concludes that the authorities had 'explicitly set out' to provide protection to those who were killed when general reports make it clear that the police are, as previously noted, seriously seeking to trace and arrest members of both LTTE warring factions.]'

47. The remaining relevant section of the report at paragraphs 44 to 74 was his response to the question of what was the general objective situation in Sri Lanka with his prognosis of the ceasefire and the peace process talks. Insofar as this is concerned with his opinions as to what may happen in the future, this is not a matter with which we are directly concerned. The task of the Tribunal is to consider the situation of the respondent on the basis of his hypothetical return to Sri Lanka at the date of this hearing. Professor Good deals initially in this section with the stalling in the peace process which has resulted from the LTTE proposal for interim self-governing authority published on 1 November 2003 and which led to the well-known initial political crisis in the Sri

Lankan government when the president dismissed three ministers and prorogued parliament, subsequently calling a general election which took place on 2 April, 2004. Despite the volatile nature of the elections, particularly on the part of the LTTE in their areas of control, the elections were successfully concluded in the greater part of Sri Lanka although the outcome is that no party has achieved an overall majority. The government opposition in fact commands a small majority of the votes provided that the alliance of parties supporting it holds, but made it clear in June 2004 that it would not seek to topple the government at the present time. Nevertheless Professor Good expressed the view that 'the political situation is thus highly uncertain and unpredictable at present' (paragraph 54) and that the internal schism in the LTTE between the northern and eastern wings (Colonel Karuna is from the eastern wing) remains unsettled. Professor Good records some details about the factional inter-fighting and says at paragraph 63 of his report that following three killings of Karuna supporters in early August 2004, Sri Lankan security forces detained two LTTE members near Batticaloa, 'something they have previously been loath to do for fear of disturbing the ceasefire'. He notes that on 17 June 2004 police found a suicide bomber's kit in north Colombo, which he says is unlikely to have lain undiscovered since previous campaigns by the LTTE ante-dating the ceasefire, and that :

'The discovery resulted in a decision to beef up security by sending hundreds of extra police and army personnel to key points around Colombo. On 21 June 2004 the LTTE renewed its allegation that Karuna was being aided by the army, although it is still officially denied ...'

48. Professor Good then reviews the various incidents which are already detailed in Miss Richards' analysis. He then records his view that this whole sequence of events marks a significant worsening of the situation, and a very significant escalation of the level of violence in Colombo of which:

'One consequence has, naturally, been a stepping up of security in Colombo. On 28 July 2004, news agencies reported that the government "has decided to strengthen the security measures to prevent smuggled weapons to enter the city". Following a meeting between police and the heads of security forces, a spokesman said "We discussed the matter and decided to put some

special measures to prevent smuggling of weapons into the city. The efforts are being made that the general public don't suffer because of the security checks.”

49. We then heard the oral evidence of Professor Good. In examination-in-chief he agreed that Miss Richards' analysis of the level of LTTE violence in the Colombo area prior to the ceasefire was accurate and that these were attacks against the state, but there had been a drastic change insofar as the LTTE was not carrying out such attacks now but seeking to eliminate or neutralise those it regarded as traitors within the Tamil community. Apart from the attempted attack on the government minister by the suicide bomber, the other actions were intra-Tamil and normally by the different method of shooting. He adhered to his view that the actual number of killings was a red herring as previously expressed. Although Colombo was the only sizeable conurbation in Sri Lanka, it still functioned on the basis of inter-personal relationships rather than the situation of anonymity which would apply in, say, London because Sri Lanka was a face to face society where you knew your neighbours and what they were doing. There was much social interaction in Sri Lankan society which led to substantial knowledge of one's neighbours and daily associates. By informer, he refers to someone who provided the state or the LTTE with valuable information. That was what the respondent had done. The LTTE generally targeted those they regarded as traitors although the meaning of that term might vary. Certain categories, such as members of rival political Tamil groups, members of the Karuna faction and those regarded as giving information leading to adverse results for the LTTE were regarded with particular adversity. It was his impression that the LTTE were interested in finding out from anyone detained for a long time what information they had divulged. There would be routine questioning at least on release, but in the case of the respondent it appeared that the result of information given was that two cadres were arrested and this would suggest more than a routine interest, although the witness was unable to provide any citations to support this it was his impression from seeing many similar accounts. Although this had occurred some three years ago, the LTTE had a long memory and in his view it was unlikely that someone who had given information leading to arrest of cadres would be forgotten, but this again was a matter of impression and the witness could cite no specific example.
50. It was his view that the views expressed by the UNHCR should be taken very seriously because of their presence in the country. In his view the objective evidence supported that the

LTTE had political offices in parts of Sri Lanka and other parts where they were in de facto control, but they were also able to target people in Colombo. There was no question of their being present in the same way throughout Sri Lanka but in his view it was clear they could get to any part of the country which they wished. As to whether the state could offer a sufficiency of protection to the respondent in Colombo, the witness was in some difficulty because that was a legal term which required legal interpretation, but, if the question was considered in relation to protection from a lay point of view, he considered it was a matter of will on the part of the LTTE. It was clear the authorities could not prevent attacks on the Karuna faction supporters in Colombia but he did not wish to give any view as to whether this amounted to a lack of sufficiency of protection in the legal sense. He did take a pessimistic view of the situation in Sri Lanka because there was no obvious route to an enduring peaceful solution, partly because, given the nature of the LTTE, there was no sign of acceptance of a pluralist democratic process involving the participation of other Tamil groups, and partly because of the division of the major Sinhalese political groups where any federalist solution would require a two-thirds majority to ratify it. Until the two major Sinhalese parties agree, there was no mechanism to achieve a federalist solution.

51. In cross-examination, when asked about his assertion at paragraph 35 of his latest report that the question of numbers attack in Colombo was something of a red herring, he agreed that the principal issue was the background of the individual applicant. Whilst the number of killings which had taken place was relevant to the ease or lack of ease with which the LTTE could operate, he accepted that it was also relevant to the question of the will of the LTTE to carry out such attacks. He agreed that the respondent had never been a member of the LTTE or any other political grouping and that the respondent's action had been limited to giving assistance to the LTTE, which he had accepted had brought many young Tamils under suspicion on the part of the authorities, leading to his detention and the giving of information in detention. Asked why, if the respondent's position was similar to that of hundreds or thousands of other Tamils during the period prior to the ceasefire, there was no record of pursuit of Tamils in a similar position in Colombo, Professor Good said that he could not put himself in the minds of the LTTE but did draw attention to the fact that what was in his view distinctive about the respondent's position was that two LTTE members had been arrested and that Jegan, detained and released with him, had been shot by the LTTE shortly after his release. Pressed on the basis that such a story was fairly common and that there was no record of people in a comparable position

being targeted by the LTTE, he responded that he was not persuaded that such examples were absent although he pointed to none. He accepted that those in Miss Richards' analysis who had been shown to have a systematic organisational link with the Sri Lankan security services were in a different category from the respondent, but he assumed that in referring to informers they would be dealing with a range of circumstances from high level activities to those occasionally giving such information to the security forces. He maintained that it was impossible to tell from the reports into which category those identified in the analysis fell. Pressed further, however, by reference to the specific recorded killings and their analysis, Professor Good finally conceded that none in the specific examples bore resemblance to the factual account of the respondent who fell into none of the identified categories.

52. Questioned as to the claim that there would be no effective police investigation into LTTE killings and other crimes, Professor Good agreed that this observation was dependent upon what one of his informants had said to him. He accepted there had been occasional arrest of LTTE members throughout the period of the ceasefire and that where, at paragraph 72 of his report, he quoted a BBC reporter as referring to 'a low level guerrilla war' or 'proxy war', that was in relation to what was happening on the east coast of Sri Lanka and had no reference to the situation in Colombo. He accepted that in the international conference held in June 2003 very substantial monetary aid had been promised to Sri Lanka, dependent on the continuation of the peace process, and said he thought that was the reason why both parties to the former conflict have stated that they did not wish to return to all out war. It was his view that one of the reasons for the insistence of the LTTE in its proposals for an interim self-governing authority, published in November 2003, was that it hoped to share directly in such funding and because that would constitute an international recognition of its authority in its own areas, taking into account that internationally it still remained a proscribed organisation. He accepted that in the week before the hearing the President had given assurances to those in Colombo and the south that the government was committed to providing protection to the public and that the government was sincere in such declarations but to his mind the issue was how far it could effectively do so.
53. We are indebted to both counsel for their closing submissions, based upon their written skeleton arguments, which we have noted in our record of proceedings. Those submissions, together with the totality of the evidence before us, have

been fully considered by us. The nature of the submissions has already been sufficiently indicated for it to be unnecessary for us to rehearse them further, but we do draw on them as appropriate in reaching our conclusions and findings. Similarly, in our consideration of the objective evidence we have not found it necessary to deal specifically with all sources because we consider that the three sources from which we have extensively quoted, the UNHCR, Human Rights Watch and Amnesty International, effectively cover the areas dealt with in the other reports before us.

54. The accepted facts specific to the respondent have been set out at paragraphs 2 and 3 above and we have already made it clear that the Tribunal has in broad terms considered for some years that Tamils from the north and east of Sri Lanka, under the direct control of the LTTE, and from those areas where the degree of control has fluctuated, can in general terms safely relocate to Colombo to avoid localised fear of the LTTE. Prior to the ceasefire in February 2002, movement between LTTE and army controlled areas was subject to strict controls although, as has been seen from the numbers killed and injured in LTTE attacks, principally by way of suicide bombing, in the Colombo area prior to the ceasefire, it has never been possible to prevent penetration of Tamil cadres into government controlled areas. Although both the government and the LTTE maintain controls at the borders between those parts of Sri Lanka which remain under the de facto control of the LTTE and the remainder of the country, it is the case that travel restrictions have been greatly and progressively eased since the ceasefire, with a reduction in the numbers of checkpoints other than at those borders. The LTTE is no longer an illegal organisation in Sri Lanka and has been permitted to open up offices in certain of the towns of predominantly Tamil ethnicity which remain under government control.
55. Prior to the ceasefire it was, as we say, generally accepted that Tamils who feared persecution in the north could safely relocate to Colombo and this is evidenced by the very substantial numbers who did so, greatly increasing the existing Tamil population in Colombo as we have recorded above. It is the post-ceasefire situation which is reflected in paragraphs 211 and 212 of the UNHCR Background Paper extensively relied on by the respondent. If anything, it puts the position higher even than that promoted by Professor Good in its conclusion at paragraph 212 that 'in general it is no longer possible to use the internal flight option for Tamils fleeing the LTTE.'

56. Whatever may be the position of Tamils having a localised fear of the LTTE as a result of their ability to have increased influence in the Tamil dominated areas in the northern part of the country which remain under government control, it seems to us quite clear that the evidence which we have considered does not support that broad proposition.
57. As we have indicated, the issues for our decision are two-fold. Firstly, whether as a matter of fact on the totality of the evidence, there is a real risk that the LTTE would pose generally a threat to Tamils in Colombo who are at potential risk in their home areas. Secondly, if so, whether that risk is one in respect of which the state in any event provides a sufficiency of protection so as to negate any need for surrogate international protection.
58. Whilst these questions are, of course, intertwined, we look first at whether there is a potential risk from the LTTE in Colombo for such Tamils.
59. We accept that it is physically possible for LTTE members to travel to Colombo although, in times when they have provoked public concern by their actions there, they would face heightened security measures, albeit not on the scale of the former cordon and search operations regularly carried out prior to the ceasefire. Nevertheless, it is clear that they do not choose to do so on an indiscriminate basis in order to find all those against whom they may harbour some suspicion. There is simply no evidence to support such a proposition. What the careful analysis made by Miss Richards clearly demonstrates is that those who are reasonably likely to be targeted have a high profile which makes them particularly likely to be the object of LTTE reprisals. The analysis demonstrates that prominent present or past supporters of Tamil political parties which have aligned themselves with the government against the LTTE, LTTE defectors (particularly those who have then aligned themselves with the Sri Lankan army military intelligence units) and, more recently, those closely associated with the internal LTTE schism as supporters of Colonel Karuna, are at potential risk of being targeted. As Professor Good finally conceded, the respondent does not fall into any of those categories. The only examples outside those categories of Tamils who have been killed in Colombo and its environs, both occurred in 2002 and the available evidence about them is very limited: in the first case it appears that the person concerned was known locally to be friendly with the EPDP and to have refused to submit to extortion threats before leaving for Colombo so that there is again, even on the little information available, some political overtone and open defiance of the LTTE in his home area; in

the case of the Tamil from Australia, the reports suggest that he had fallen foul of LTTE organisations in Australia whose financing operations he had opposed and it seems reasonably likely that he was identified as a result of information being passed that he had come to Sri Lanka for a holiday. This appears to be a very fact specific example in the early period after the ceasefire.

60. We are, of course, aware from the numerous Sri Lankan appeals which we have heard over the years that the respondent's account of being suspected of having divulged information or assistance to the army whilst in detention is by no means uncommon. Similar suspicion must, as a matter of commonsense, apply to many of those Tamils who have sought refuge in Colombo, but there is no evidence that people in such a category have been targeted by the LTTE there at any time since the ceasefire.
61. On a factual basis alone, therefore, it seems to us that the generalisation by the UNHCR at paragraph 212 of its background paper is unsustainable on the available evidence and no more than speculation on its part in the absence of some specific and defining characteristic which would arguably put an individual claimant at real risk as, for example, by falling into one of the categories of high level activists or opponents identified above. The numbers referred to in the generalisations both in their paper and that of Human Rights Watch and the open letter of Amnesty International do not fairly and objectively reflect the specific circumstances in Colombo as Ms Richards' analysis has demonstrated. A similar position applies to the general comments of Professor Good in his reports which must be read as quite substantially modified by what he has said in the course of his oral evidence. In particular, we cannot accept his view that numbers are 'a red herring' – the very limited numbers are a factor which must be taken into account in assessing the evidence as to the level of the LTTE's activities in Colombo and its environs. As a matter of fact, it is clear on looking at the totality of the evidence that its attacks are limited to high profile targets. That it voluntarily so limits its targets may arguably be because of the deterrent effect of the criminal law system and the police force available to enforce it. The LTTE is a highly structured organisation and it is not reasonably likely that its operatives act other than under strict control on specific missions. That is the clear inference from an analysis of the identified killings which have taken place in Colombo.
62. Even in the case of those at potential risk, however, it would still be necessary for them to show to the lower standard

applicable in asylum and human rights appeals that the Sri Lankan state would not provide them a sufficiency of protection against such a risk.

63. That brings us to the area where Professor Good very properly acknowledged that the provision of a sufficiency of protection by a home state depends upon the application of the legal principles involved in that concept.
64. Those principles have been recently and helpfully set out once more in Bagdanavicius in the judgment of Auld LJ at paragraph 55 which we quote insofar as relevant to the issues before us:

‘Asylum claims ...

- 4) Sufficiency of state protection, whether from state agents or non-state actors, means a willingness *and* ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear; *Osman, Horvath, Dhima*.
- 5) The effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event; *Horvath, Banomova, McPherson and Kinuthia*.
- 6) Notwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well-founded fear of persecution if he can show that the authorities know or ought to know circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require; *Osman*.

Article 3 claims ...

- 10) The threshold of risk required to engage Article 3 depends on the circumstances of each case, including the magnitude of the risk, the nature and severity of the ill-

treatment risked, and whether the risk emanates from a state agency or non-state actor; *Horvath*.

- 11) In most, but not necessarily all, cases of ill-treatment which, but for state protection, would engage Article 3, a risk of such ill-treatment will be more readily established in state agency cases than in non-state actor cases – there is a spectrum of circumstances giving rise to such risks banning the two categories, ranging from breach of a duty by the state of a negative duty not to inflict Article 3 ill-treatment to a breach of a duty to take positive protective action against such ill-treatment by non-state actors; *Svazas*.
- 12) An assessment of the threshold of risk applicable in the circumstances to engage Article 3 necessarily involves an assessment of the sufficiency of state protection to meet the threat of which there is such a risk – one cannot be considered without the other whether or not the exercise is regarded as ‘holistic’ or to be conducted in two stages; *Dhima, Krepel, Svazas*.
- 13) Sufficiency of state protection is not necessarily a guarantee of protection from Article 3 ill-treatment any more than it is a guarantee of protection from an otherwise well-founded fear of persecution in asylum cases – nor, if and to the extent that there is any difference, is it eradication or removal of risk of exposure to Article 3 ill-treatment; *Dhima, McPherson, Krepel*.
- 14) Where the risk falls to be judged by the sufficiency of state protection, that sufficiency is judged, not according to whether it would eradicate the real risk of the relevant harm, but according to whether it is a reasonable provision in the circumstances; *Osman*.
- 15) Notwithstanding such systemic sufficiency of state protection in the receiving state, a claimant may still be able to establish an

Article 3 claim if he can show that the authorities there know or ought to know particular circumstances likely to expose him to risk of Article 3 ill-treatment; *Osman*.

16) The approach is the same whether the receiving country is or is not a party to the ECHR, but in determining whether it would be contrary to Article 3 to remove a person to that country, our courts should decide the factual issue as to risk as if ECHR standards apply there – and the same applies to the certification process under Section 115(1) and/or (2) of the 2002 Act.'

65. The clear objective evidence is that the Sri Lankan state provides an appropriate criminal law system which is enforceable through an independent judicial system, and supported by a nationwide police force charged with the enforcement of criminal law without discrimination between Sri Lankan citizens. In those circumstances it was properly conceded by Mr Param-Jothy that the systemic means of providing a sufficiency of protection exist in Sri Lanka in government controlled areas and, for the purposes of this appeal, in Colombo in particular.
66. It was his submission that although the means existed there was a lack of willingness on the part of the state authorities to enforce them and it has been suggested by commentators that the reason for such unwillingness is that the state as a matter of policy has decided that it will not take steps against Tamils carrying out acts in breach of the criminal law in government controlled areas in case this should disturb or jeopardise the peace process.
67. In the specific cases which have been the subject of analysis by Miss Richards in her submissions to us, it is abundantly clear that in the normal course the police do carry out serious investigations into such activities which have, in certain cases which we have set out in the body of this determination, resulted in arrests and committal for trial. In his evidence, Professor Good accepted, as we have recorded above, that the government was clearly sincere in wishing to provide a sufficiency of protection to the generality of its citizens. We agree and, on the basis of the objective evidence, are satisfied that this is clearly so, at least in the Colombo area with which we are concerned. All the objective evidence makes it clear that the task of the police in bringing the

perpetrators of these actions to justice is directly hampered by the unwillingness of witnesses to come forward to testify. It is endemic to any fair system of criminal justice anywhere in the world that the prosecution must prove its case either by confessions voluntarily made or by the credible testimony of witnesses or other compelling circumstantial evidence. The fact of operational difficulties in prosecuting cases to a successful conclusion is not of itself indicative of a lack of willingness on the part of the authorities to utilise the system which is in force in their country. Moreover, successful criminal prosecutions take time to progress through the criminal justice system and it is only some two-and-a-quarter years since the first recorded such killing in Colombo in July 2002 and all but three of such recorded killings have occurred within the last eighteen months.

68. In our judgment, the objective evidence does not support the suggestion of some commentators that it is deliberate government policy not to take appropriate action in investigating the killings which have taken place. That would be effectively to find that the clear intensive investigations which have been carried out are a mere charade and to ignore the cases where prompt and immediate action has enabled the police to arrest and charge the perpetrators.
69. The alternative argument put forward on behalf of the respondent is that the authorities cannot effectively provide such protection but it is difficult to see what is the difference between that proposition and a requirement that sufficiency of protection must guarantee the safety of each individual citizen from the risk which he fears. That approach seems to us to be endemic in the position taken by UNHCR, Human Rights Watch and Amnesty International, as well as Professor Good. It misconceives what is meant in our refugee law by the provision of a sufficiency of protection by the state concerned, as is apparent from the summary from Bagdanavicius which we set out above. In Horvath, the formulation of Stewart Smith LJ in the Court of Appeal was cited with approval by Lord Clyde in the following passage at page 511:

‘It seems to me that the formulation presented by Stewart Smith LJ in the Court of Appeal may well serve as a useful description of what is intended, where he said ... :

“In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences

commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders.”

And in relation to the matter of unwillingness, he pointed out that inefficiency and incompetence are not the same as unwillingness, that there may be various sound reasons why criminals may not be brought to justice, and that the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection. “It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy.” The formulation does not claim to be exhaustive or comprehensive, but it seems to me to give helpful guidance.’

70. In terms of Strasbourg jurisprudence, it is important also to bear in mind what was said in Osman v United Kingdom [1998] 29 EHRR 245 as to the need to take into account operational responsibilities and the constraints on the provision of police protection so that the obligation to protect must not be so interpreted as to impose an impossible or disproportionate burden upon the authorities. Contrary to the practicality of the approach of the European Court in Osman, Amnesty International is preaching a counsel of perfection far beyond what is necessary in law to provide a sufficiency of state protection in the passage quoted at paragraph 27 above. That is not, of course, to say that in appropriate cases specific steps to provide protection may not be warranted but, simply to apply it as a blanket requirement, as is suggested in the passage referred to, puts the duty on the State at too high a level having regard to the relevant case-law and the principles which it establishes.
71. As we have already observed, those whom the LTTE has on the objective evidence targeted in Colombo since the ceasefire have all been high profile opposition activists, or those whom they would see are renegades or traitors to the LTTE. Whether it could be successfully argued that even those of so high a profile would not be provided with a sufficiency of protection in Colombo in the Horvath sense,

may be doubted, but what seems to us quite clear on the background evidence is that there is no arguable basis for saying that the Sri Lankan state does not provide a sufficiency of protection to the generality of Tamils having a localised fear of the LTTE in their home area who do not reach a similar high profile.

72. Having therefore had the opportunity of considering more detailed evidence than we suspect was available to Charles J in Oppilamani, we reach the same conclusion as he did and is recorded at paragraph 45 of his judgment (see paragraph 41 above).
73. We cannot, of course, say that the safety of the respondent is guaranteed if he is now returned to Sri Lanka, but there is simply no objective evidence to support a claim that ethnic Tamils with his characteristics are in fact currently at risk from the LTTE in Colombo, or that, if they are, it is a risk in respect of which the Sri Lankan state does not provide a sufficiency of protection applying the ratio in Horvath.
74. In the result, removal of the respondent to Sri Lanka will not be in breach of the United Kingdom's obligations under either the 1950 European Convention or the 1951 Refugee Convention because, accepting the factual findings of the Adjudicator as to his past history and characteristics, he may safely and reasonably relocate from his home area of Puttalam to Colombo.
75. The appeal of the Secretary of State is accordingly allowed.

**J. BARNES
VICE PRESIDENT**