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**Case law study on the Refugee Status Determination
of ‘Tamil’s’ in Australia and New Zealand and the
interpretation of the Refugee Convention**

JAMM04 Master Thesis

International Human Rights Law

30 higher education credits

Supervisor: Matthew Scott

Term: Spring 2016

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Summary

International Refugee Law, which, is a part of the International Human Rights Law is controlled by the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees (The Convention). The Convention, which, builds on the number of human rights principles contains the complete codification of the rights of the refugees at the international level and basic minimum standards of the treatment of refugees, without prejudice to States granting more favorable treatment. States parties to the Convention have an obligation to comply with the Convention's substantive provision. But the countries have no obligation to follow a particular procedure for the determination of the status of the refugees and the implementation of the Convention because the Convention itself not provides any specific rule of procedure for the determination of the refugee status and for the implementation of these Treaties.

Also regarding the interpretation of the Convention, domestic courts of the States Parties are not following any uniform or single approach to the interpretation. Because of the absence of any single interpretation and the absence of any Refugee court under the Convention to deals with the issues of interpretation and application of the Refugee Convention. Only the UNHCR provides guidelines for the States regarding the interpretation and application of the Refugee Convention under its supervisory capacity. But these provisions are not binding for the States parties. So the States Parties have the discretion to follow any of the approach from the existing approaches for the interpretation of the Refugee Convention, according to their domestic law considering the obligation under the Conventions substantive provisions.

For the purpose of the Refugee Status Determination, interpretation of the Convention definition of refugee and its elements is essential. So this thesis examines the question if different States Parties to the Convention are following different approaches for the interpretation of the definition of refugee and its each element then how they interpret the refugee definition and its elements in the case of 'one group'. The 'one group' who have a similar situation and similar grounds for seeking asylum in another country like 'Tamil' from SriLanka. Those Tamil's who are persecuted basically the reason is related with their race and imputed political opinion. If the Tamil's are seeking asylum in the two different countries, then how these two different States interpret the Refugee Convention definition and its elements for

the purpose of the refugee status determination of Tamil. This thesis examines this question in the two States, and they are Australia and New Zealand.

So precisely this thesis examines how Australia and New Zealand interpret the refugee definition and its each element for the purpose of the determination of the refugee status of 'Tamil' from SriLanka. And further, examine the question what are the approaches used by these two countries for the interpretation? Are the approaches similar in the both countries or different from each other? And finally from the study of the case law, this thesis examines what are the outcomes of the similar approaches or different approaches of interpretation used by these two States? Are the results similar in the both countries or different from each other in the cases regarding the refugee status determination of Tamil?

Preface

This thesis is written as a part of my studies at the Master's program in International Human Rights Law at the University of Lund in Sweden in the period of 2014-2016.

At first my greatest gratitude to "Swedish Institute" for awarding me the prestigious "Swedish Institute Study Scholarship" and giving me the excellent opportunity to study in Sweden. Without this scholarship benefit and the financial support from the Swedish Institute in my entire study period, this journey would have not impossible for me. I am always honored and grateful for this opportunity.

I would like to express my gratitude to my supervisor Matthew Scott, who has provided me with support and guidance throughout the writing process. I would also want to thanks, all of my teachers in the International Human Rights Law programmer at the Faculty of Law, Lund University, who help me to acquire knowledge in the field of Human Rights.

Finally, I want to extend my gratitude to my parents and closest members of my family who have been supportive all the time. And I want to dedicate this thesis to my parents.

Urmi Acharjee

26/5/2016

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
COI	Country of Origin Information.
ECHR	European Convention of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
OAU Convention	Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa
The Convention-	The 1951 Convention relating to the Status of Refugees and 1967 protocol relating the Status of Refugees
RSB	The Refugee Status Branch of the New Zealand
RRT	The Refugee Review Tribunal (Australia)
RSAA	The Refugee Status Appeals Authority (New Zealand)
ExCom	Executive Committee on the International Protection of Refugees
IPT	The Immigration and Protection Tribunal (Tribunal)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nation High Commissioner for Refugees

Chapter 1: Introduction

1.1 Background

The 1951 Convention relating to the Status of the Refugee and its 1967 Protocol is the core of the International Refugee Law. State parties have obligations to comply with the substantive provisions of the Convention but the protection decision and the procedure to determine the status of the refugee are on the hand of each State Party. The reason is that, the 1951 Convention does not establish any procedures for the refugee status determination and gives the deciding power to the hand of the States for protection decision¹. So the States Parties have the discretion to choose the procedure for the determination of the refugee status of the claimant according to their domestic law.

The Refugee Convention only defines who is a refugee but does not define the meaning of the term ‘refugee’ and its each element. And there is not any court established under the Refugee Convention to interpret the provisions of the Convention. Only if a dispute arises between the State Parties regarding the interpretation or application of the Convention, then the State Parties can seek the help of the International Court of Justice (ICJ) to settle the dispute under the Art -38 of the Refugee Convention and the Art. IV of the 1967 Protocol relating to the Status of the Refugees². But this provision remains unused for a long time by the State Parties to the Convention³.

¹ James Hathaway, A Reconsideration of the Underlying Premise of Refugee Law, Harvard International Law Journal, Vol. 31 No. 1 (Winter 1990) p.166, Asylum and the Rights of Refugee, International Justice Resource Center, available at <http://www.ijrcenter.org/refugee-law/>.

²According to the Art 38 of the Refugee Convention and Art IV of the 1967 Protocol “Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute”, see Art-38 of the 1951 Convention relating to the Status of Refugee, adopted Jul.28,1951, entered into force Apr.22,1954 and UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at <http://www.refworld.org/docid/3ae6b3ae4.html> [accessed 12 April 2016]

³ Hathaway, Supervising the Refugee Convention: Introduction (September 10, 2013). J. Refugee Stud. 26, no. 3 (2013): 323-6, U of Michigan Public Law Research Paper No. 350. P 2, available at SSRN: <http://ssrn.com/abstract=2323495> or <http://dx.doi.org/10.2139/ssrn.2323495>, Jane McAdam, “Interpretation of the Convention” in Andreas Zimmermann (ed.), Jonas Dörschner and Felix Machts (assistant eds.), The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary, Oxford University Press Oxford, England 2011, p. 77

Domestic court of each State Parties to the Convention are regularly interpreted and applied the Refugee Convention for the purpose of the determination of refugee status⁴. And in the absence of a single interpretation of the Refugee Convention, there is no signal practice or uniform practice among the States Parties to the Convention. regarding the interpretation of the Refugee Convention especially relating to the definition of refugee and each of its elements. For example: what is the meaning of the term ‘well -founded fear’ and ‘persecution’, what constitute an element of persecution or what does it meant by the term ‘particular social group’ etc. So the States Parties are following different approaches to interpreting the refugee definition and its elements for the purpose of the refugee status determination.

Among the different approaches to interpretation, the UNHCR approach of interpreting the Refugee Convention is an important source of reference which has been published in the UNHCR Handbook called the ‘UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees’.⁵This approach of the UNHCR, is often used by the State’s Judicial body as an important source of reference when interpreting their national legislation under the Convention⁶.

The UNHCR also provides help and assistance to the States Parties regarding the application of the Convention because of its supervisory role under the Convention Art-35⁷and Para 8 of the UNHCR Statute⁸. An example of the UNHCR supervisory work is, “in Australia and New Zealand, UNHCR has monitoring decision-making process, and use diplomatic and public

⁴ Hathaway, and Anthony M. and Pobjoy, “Supervising the Refugee Convention: Introduction” (September 10, 2013). *J. Refugee Stud.* 26, no. 3 (2013): 323-6 (Forthcoming); U of Michigan Public Law Research Paper No. 350. P 2.

⁵ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV. 3, available at <http://www.refworld.org/docid/4f33c8d92.html> [accessed 2 March 2016]

⁶ UN High Commissioner for Refugees (UNHCR), *Self-Study Module 1: An Introduction to International Protection. Protecting Persons of Concern to UNHCR*, 1 August 2005, available at <http://www.refworld.org/docid/4214cb4f2.html> [accessed 1 March 2016]

⁷ According to the Art -35 of the Refugee Convention,” The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.” See Art-35 of the Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137 [Refugee Convention] ; Protocol relating to the Status of Refugees (31 January 1967) 606 UNTS 267.

⁸ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para -8(a). available at: <http://www.refworld.org/docid/3ae6b3628.html> [accessed 8 March 2016]

advocacy to focus on preserving the non-discriminatory implementation of asylum, irrespective of how asylum-seekers arrive”⁹

States Parties to the Convention are not bound to follow the UNHCR Guidelines on the interpretation and application of the Refugee Convention. States Parties to the Convention can also follow other different approaches regarding the interpretation of Refugee Convention established by the leading scholars of International Refugee Law. Among the other approaches, James C. Hathaway’s Human Rights based approach to interpreting the Refugee Convention is followed by the several States Parties (one example is the New Zealand). A. Grahl-Madsen, Guy S. Goodwin -Gill, Jane McAdam, Andreas Zimmermann, Michelle Foster all of them contribute to developing the approaches to interpreting the Refugee Law. All these approaches have significant influence in the field of interpretation and application of the Refugee Law. Some States are using their domestic judicial bodies interpretation of the Refugee Law or following the UNHCR Guidelines of the interpretation and application of the Refugee Convention only to the extent relevant to their domestic law.

1.2 *Scope of the Problem*

The States Parties to the Convention are not using any single procedure for the purpose of the refugee status determination and also are not following any single or uniform approach to the interpretation of the Convention definition of Refugee and its elements.¹⁰ The Absence of any single or uniform practice of interpreting the Refugee Convention among States Parties may result in one problem. That is when one specific group of a similar situation like “Tamil” from Sri Lanka seeking asylum in different countries. And those host countries determined the refugee claim by adopting the different approach of interpretation of the refugee definition and its elements. What will be the outcome of the different approaches only the study can reveal the answer?

One may argue that every asylum claim is an individual claim even it is related to the one group of people of a similar situation. Though every claim is individual, but there is some same reason behind the asylum claim of the people who were fleeing from persecution. Like Tamil’s from Sri Lanka those who are persecuted is because of their Tamil ethnicity and suspected connections with the Liberation Tigers of Tamil Eelam (LTTE) as being Tamil. Lots of the

⁹UNHCR sub regional operations profile - East Asia and the Pacific: New Zealand, 2015 Available at <http://www.unhcr.org/pages/49e488b36.html>

¹⁰ Jane McAdam, “Interpretation of the Convention in Andreas Zimmermann (ed.), 2011, p 77

reports¹¹ acknowledged that Tamil's are the victim of the human rights violation and persecuted because of their ethnicity and political opinion. So the grounds for the asylum claim of Tamil who are persecuted and seeking asylum in another country may be based on the reasons for their race and imputed political opinion.

1.3 Purpose and the Research Question-

The purpose of the thesis is to test, if the States Parties have different practice regarding the interpretation and application of the Refugee Convention, then how the States interpreted the definition of refugee and applied the provisions of the Refugee Convention regarding the 'one group' like "Tamil" from Sri Lanka? And seek to test the outcome of the different or similar interpretation of the Refugee Convention between two States regarding the refugee status determination of Tail. Does the different interpretation of Refugee Convention produce a different outcome for the 'one group' of people" Or the different interpretation does not matter for that specific group because whatever the difference in the interpretation of the States, outcome of the refugee status determination is the same for that one group.

So this project aims to test the question regarding the different interpretation and application of the Refugee Convention for the one group of people and aim to see the outcome of the interpretation. So this project comparatively researches these research questions-

- 1) How the Australian and New Zealand (two different States) judicial body interpreted and applied the Refugee Convention regarding the asylum claim of the 'one group' that is 'Tamil' asylum seeker from Sri Lanka?

- 2) Are the judicial body of the Australia and New Zealand followed the similar approaches to interpreting the Refugee definition or its elements or there is a difference between the two States approaches of interpretation?

- 3) What is the outcome of the different or similar interpretation of the definition of refugee and its elements in the two States? Also, do the similar approaches of the interpretation of the refugee definition produce the same result, or different approaches produce the different result?

1.4 Disposition

¹¹ see Chapter -2 for the reports.

The second chapter of this thesis discussed the different reports regarding the human rights situation of ‘Tamil’ in Sri Lanka. Also their treatment as a failed asylum seeker and the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum -seekers from Sri Lanka which categorized the risk profile for Tamil, who need the international protection in this post -war situation has also described here.

Chapter -3 based on the discussion on the general overview of the International Refugee Law. This chapter includes a brief discussion of the 1951 Refugee Convention and its 1967 protocol and discussion on how the Refugee Convention implemented and interpreted in the domestic level. Further discussion on the UNHCR supervisory role, the definition of refugee in the different international and regional instrument also included in this chapter. Then the same chapter discussed the interpretation of each element of the refugee definition and different approaches to interpretation including the UNHCR approach and other approaches. Discussion on the credibility assessment of the applicant in the determination of refugee status including the UNHCR approach and other approaches also mentioned in the chapter.

In Chapter -4 and 5, Australian and New Zealand domestic refugee legislation has been discussed. How the judicial body of Australia and New Zealand interpret the refugee definition and its elements under the art-1A (2) of the 1951 Refugee Convention also discussed in the chapter. After that which approaches of interpretation both countries have taken to interpret the element of refugee definition in their decision when determining the refugee claim of Tamil people has been discussed. The same subsection also includes how the Tribunal of the respective country applied the 1951 Refugee Convention in their decision. Finally, the chapters discussed the cases regarding the refugee status determination of Tamil and assessment of the decision of Tribunal.

In chapter -6 conclusion drawn by the case law discussion on the refugee status determination of ‘Tami’. By the case study comparison made between the New Zealand and Australia to see the approaches followed by the Tribunal of the both countries to interpreting the refugee definition and its elements. And finally, the conclusion has made on the issue that, what is the outcome of the different or similar approaches followed by the Tribunal of the two States.

1.5 Delimitation

The purpose of the thesis is to test how Australia and New Zealand, these two States interpreting the Conventional definition of refugee and its elements when determining the refugee status of 'Tamil'. For the purpose of the thesis, this paper will not examine the provision of the 'exclusion and cessation' clauses under the definition of refugee and different interpretation of these provisions. Also the 'Complementary Protection' provision for the refugees under the Refugee Convention. Because the present study only focused on the definition of refugee and its interpretation. So the discussion regarding the complementary protection in the case law and complementary protection provision in the domestic law of Australia and New Zealand will not examine by this thesis.

This thesis will not discuss the interpretation of the terms "nationality", "member of the particular social group" and "religion" which are the three Conventional grounds of the refugee definition because for this study on Tamil from Sri Lanka these Conventional grounds have not related with the study. In some cases, Tamil asylum seekers claim were related to the Conventional ground of the particular social group, but later the court findings make it clear that the Tamil asylum seekers are persecuted because of their political opinion and race. So only these two Conventional grounds have been discussed in the section of the Conventional grounds.

1.6 Methodology

This present thesis based on the comparative study of cases regarding the determination of the refugee status of Sri Lankan Tamil in Australia and New Zealand. To answer the research question that is "how different States Parties interpreted the Convention definition of refugee and applied the provisions of the Refugee Convention regarding the 'one group' in a similar situation, 'Tamil' from Sri Lanka has chosen for the study.

Before choosing Tamil, another group like 'Rohingya' from Myanmar and Roma from Europe has primarily selected for the study, but there are less number of cases on 'Rohingya' or Roma in the two different countries to compare the cases and to complete the study. But there are enough cases on Tamil's compare to the other two groups in the two separate countries and the countries are Australia and New Zealand.

There are other countries where Tamil from Sri Lanka are also seeking Asylum like the United Kingdom and Canada. But the Australia and the New Zealand has chosen because at first, both of them are the Common Law countries. And second, like the United Kingdom and all the other European countries, these two countries have not employed with the procedural resection on

asylum procedure. Canada is not selected also because of the small number of the case law on Tamil from SriLanka.

All these cases for this study are found by using the website Refworld.org. This website is the UNHCR-online protection and research tool that helps those who have to decide on refugee and statelessness status and also the collection of the refugee case law. Only those cases which are recent in time i.e. within the period of 2015 to 2011 has been chosen for the thesis.

Ten cases have been selected from the Australian Refugee and Review Tribunal and ten cases from the New Zealand Immigration and Refugee Tribunal. But among ten cases in New Zealand, the Tamil applicants in three cases were not nationals of Sri Lanka and in one case the decision was made by the previous body called Refugee Status Appeal Authority which is replaced by the Immigration and Protection Tribunal (IPT) in 2010. So these four cases are not included in the list of cases. Only six cases which were decided by the IPT has chosen for the thesis.

All the empirical research materials used in this thesis including all scholarly articles, Journal, books, reference article found through the refugee law reader database by the desk research. This thesis used the comparative research methodology to study the cases and to compare the cases regarding the determination of the refugee status of Tamil in Australia and New Zealand. To answer the research question, regarding the issue of different interpretation of the refugee definition between Australia and New Zealand and to compare them, the UNHCR approach of interpreting the Refugee Convention in the UNHCR Handbook is used in this thesis.

This thesis also used other approaches to interpreting the Refugee Convention established by the leading Refugee law scholar. This discussion of the different approaches to interpreting the Refugee Convention also served the another purpose of the thesis and that is understanding of the approaches that two states are following to interpret and apply the Refugee Convention.

Chapter-2: Overview of the situation of ‘Tamil’ in Sri Lanka and the UNHCR Guidelines

One of the longest-running civil wars in Asia was the conflict between the Sri Lankan Government and the Liberation Tigers of Tamil Eelam (LTTE) which has lasted nearly three decades¹². “The LTTE was formed in 1976 with the main aim of establishing an independent Tamil state and they pursued this aim through a military campaign against the Sri Lankan government which lasted, apart from a ceasefire from 2002 to 2006, until May 2009”¹³.

The war ended in May 2009, but the ethnic Tamil people are continuously victim of human rights abuses, torture, arbitrary arrest, detention and killing because of their direct and indirect connection with the LTTE as being Tamil. To escape the persecution many Tamil left their country unlawfully and wanted to seek asylum in different countries. The “UNHCR’s Global Statistics from 2011 indicate that, at the end of 2011, there were 136,605 refugees from Sri Lanka in some 65 countries, with the majority in India, followed by France, Canada, Germany, the United Kingdom, Switzerland, Australia, Malaysia, the United States and Italy”¹⁴.

Many reports have been published since the civil war end regarding the after post-war human rights situation in Sri Lanka, major human rights violation of Sri Lankan Tamil and their treatment as a returned or a failed asylum seeker in Sri Lanka. The UNHCR also published Guidelines for the States to identify the Tamils who need international protection in the post-war situation and recommend the States through the guideline for the effective refugee status determination of Tamil from Sri Lanka.

This chapter discussed the various reports regarding the human rights situation of Tamil in Sri Lanka, their treatment as returnees or failed asylum seekers and the UNHCR Guidelines which are related to the refugee status determination of ‘Tamil’ from Sri Lanka.

2.1 Human Rights Situation of ‘Tamil’ in Sri Lanka

¹² Bajoria, Jayshree. "The Sri Lankan Conflict." CFR.org. Council on Foreign Relations, 18 May 2009. Web. 22 May 2016.

¹³ DFAT Thematic Report, People with Links to the Liberation Tigers of Tamil Eelam, 3 October 2014; DFAT Country Report on Sri Lanka, 3 October 2014

¹⁴ UN High Commissioner for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 21 December 2012, HCR/EG/LKA/12/04, p 6 available at <http://www.refworld.org/docid/50d1a08e2.html> [accessed 24 May 2016]

The United State Department of their “Country Reports on Human Rights Practices 2013: Sri Lanka (27 February 2014)”¹⁵ mentioned about the human situation of ‘Tamil ‘in Sri Lanka. According to this report, “ The major human rights problems were: attacks on, and harassment of, civil society activists, journalists, and persons viewed as sympathizers of the Liberation Tigers of Tamil Eelam (LTTE) terrorist organization by individuals allegedly tied to the government, creating an environment of fear and self-censorship; involuntary disappearances and a lack of accountability for thousands who disappeared in previous years; and widespread impunity for a broad range of human rights abuses, particularly torture by police and attacks on media institutions and the judiciary. Disappearances and killings continued to diminish in comparison with the immediate post-war period. Other serious human rights problems included unlawful killings by security forces and government-allied paramilitary groups, often in predominantly Tamil areas; torture and abuse of detainees by police and security forces; poor prison conditions; arbitrary arrest and detention by authorities; and neglect of the rights of internally displaced persons (IDPs).”¹⁶

“Rape and sexual violence has also been a key element of broader torture of suspected LTTE members and supporters even since the war’s end”¹⁷ reported by the Human Rights Watch (HRW)¹⁸ in January 2014.

2.2 Treatment of the Return Asylum Seekers

In July 2014, Amnesty International commented on Tamil asylum seekers returned to Sri Lanka¹⁹ and mentioned that “All ethnic groups in Sri Lanka are at risk of torture and other ill-treatment in police custody, including sexual violence because Sri Lankan Tamils remain a target of harassment and arrest upon return because of their ethnicity and suspected links to the Liberation Tigers of Tamil Eelam (LTTE).”²⁰

¹⁵US State Department, Sri Lanka 2103 Human Right Report (27 February 2014), p.1, available at <http://www.state.gov/j/drl/rls/hrrpt/2013/sca/220404.htm>

¹⁶ Ibid

¹⁷ Human Rights Watch 2014, *World Report 2014 – Sri Lanka*, 21 January. Available at <http://www.hrw.org/world-report/2014/country-chapters/srilanka> ,

¹⁸ Ibid

¹⁹Amnesty International 2014, *Urgent Action: Asylum Seekers at risk of return to Sri Lanka*, ASA 12/003/2014, 9th July, available at <http://www.amnesty.org/en/library/asset/ASA12/003/2014/en/8cc91d75-f243-4194-be9888fcb3d693b9/asa120032014en.pdf>

²⁰ Ibid

But in August 2011, the Immigration and Refugee Board of Canada (IRBC)²¹ reported on the treatment of Tamils returning to Sri Lanka, including failed asylum seekers and they mentioned, “The screening process is the same for all persons returning to Sri Lanka - whether voluntarily or by escort. The process is not impacted by ethnicity”.

They also mentioned “The process for persons removed to Sri Lanka begins with verification of the person’s citizenship by Sri Lankan Immigration. Once a person’s right to enter has been established, clients are then interviewed at the airport by Criminal Investigations Division (CID), followed by an interview by the State Intelligence Service (SIS). Sri Lankan State Intelligence Service’s questions are often in regards to how a client departed the country. They are seeking information about human trafficking and smuggling from the country. The CID conducts criminal background check[s] of returnees by contacting police stations in all districts that a client may have lived. As criminal records are not accessible through a national databank, the final criminal checks may take 24-48 hours to complete depending on the day of the week a person arrives in Colombo. Generally, police record checks may be completed in a few hours, but if a client arrives on a Saturday or Sunday it may take a bit longer to contact appropriate offices. Following this admission process deported Sri Lankan Nationals are free to enter the country.”²²

There are lots of different reports reported regarding the human rights violation of Tamil in Sri Lanka and the treatment of Tamil asylum seeker. But there are vast controversies regarding the post-war situation of Sri Lankan Tamil. The UNHCR in 2012, published Guidelines to assist the host countries regarding the determination of the refugee status of Tamil asylum seeker. This Guidelines mentioned about the risk category of Tamil people, who need international protection and other provisions.

2.3 The UNHCR Eligibility Guidelines

The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka ‘2012 was published by the UNHCR “against the backdrop of the situation in Sri Lanka where ongoing human rights concerns are reported, including in particular with regard to reports of post-conflict justice, torture and mistreatment, disappearances, arbitrary detention and freedom of expression.”²³

²¹ Immigration and Refugee Board of Canada 2011, Information on the Treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport, LKA103815.E, 22 August.

²² Ibid

²³UNHCR Eligibility Guidelines,2012 at page 5

The UNHCR recommend in the Guidelines that, “All claims lodged by asylum-seekers need to be considered on their merits, according to fair and efficient status determination procedures and up-to-date and relevant country of origin information”²⁴.

a) Risk category of persons

The UNHCR also provide a non-exhaustive list of persons and according to the UNHCR “that individuals with these profiles may be, and in some cases are likely to be in need of international refugee protection, depending on the individual circumstances of their case.”²⁵

And the general risk category of individual are-

- “(i) persons suspected of certain links with the Liberation Tigers of Tamil Eelam (LTTE);
- (ii) certain opposition politicians and political activists;
- (iii) certain journalists and other media professionals; (iv) certain human rights activists;
- (v) certain witnesses of human rights violations and victims of human rights violations seeking justice;
- (vi) women in certain circumstances;
- (vii) children in certain circumstances; and
- (viii) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals in certain circumstances”²⁶.

b) Internal flight relocation option for ‘Tamil’

The UNHCR Guidelines mentioned about the Tamil asylum seeker from SriLanka, who has the above mentioned risk profile, if return to their country of origin for them an internal flight or relocation alternative is not a possible option. The reason is that “the feared persecution emanates from the State itself or elements associated with it. An internal flight or relocation alternative may be available in cases where the feared persecution emanates from non-State agents. In instances where an internal relocation option would be relevant, it may nevertheless not be reasonable, depending on the circumstances of the individual case. Serious social and economic challenges remain in areas previously affected by armed conflict, where livelihood opportunities are extremely limited.”²⁷

²⁴ Ibid

²⁵ UNHCR Eligibility Guidelines 2012, p 5

²⁶ Ibid

²⁷ Supra note 25

Chapter-3: General overview of the International refugee law

The Universal Declaration of Human Rights 1948' was first recognized the international "right to seek asylum" in its article- 14(1)²⁸.According to which "everyone has the right to seek and enjoy in other countries asylum from persecution²⁹" Further some regional human rights instruments protected the "right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions"³⁰.

Who will be the international right holder means the term "refugee "was first defined by the 1951 Convention relating to the Status of Refugees which is the core of the International Refugee Law including its 1967 Protocol. Apart from the Convention and Protocol international refugee law also consists of regional treaties, customary international law, judicial decision and academic opinion, soft law instruments³¹.

3.1 The 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the status of Refugees³²

The 1951 Convention relating to the Status of Refugees together with its 1967 Protocol relating to the Status of Refugees are recognized as the cornerstone of the international refugee

²⁸ Migration and International Human Rights Law. Practitioners Guide No. 6, International Commission of Jurists, 2014, p.54, Guy S. Goodwin-Gil, The Refugee in International Law, Oxford University Press, 2nd Edition, 1998, p. 175;

²⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 13 April 2016]

³⁰ The American Declaration on the Rights and Duties of Man protects the right, in Article XXVII, protects the right "to seek and receive asylum" The American Convention on Human Rights, in Article 22.7, protects the right "to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions and AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS in art 12(3) protects the right, "to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions". See American Declaration on the Rights and Duties of Man, AG/RES. 1591(XXVIII-O/98), American Convention on Human Rights, 1144 UNTS 123, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www.refworld.org/docid/3ae6b3630.html> [accessed 26 May 2016]

³¹ UN High Commissioner for Refugees (UNHCR), Self-Study Module 1: An Introduction to International Protection. Protecting Persons of Concern to UNHCR, 1 August 2005, available at <http://www.refworld.org/docid/4214cb4f2.html> [accessed 1 March 2016]

³² Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137 [Refugee Convention] ; Protocol relating to the Status of Refugees (31 January 1967) 606 UNTS 267.

protection regime by the United Nations High Commissioner for Refugees (UNHCR) Executive Committee³³. Though 1951 Convention and its 1967 protocol “do not provide a right to be granted asylum”³⁴ but it provides the most comprehensive codification of the rights of refugees at the international level, and the 1967 Protocol removed geographical and temporal limitations³⁵ from 1951 Convention and gave the Convention universal coverage³⁶.

The 1951 Refugee Convention defines, who is a Refugee, their rights, basic minimum standards for the treatment of Refugees. And its Protocol 1967 expands the definition of a Refugee as “the 1951 Convention was a post-Second World War instrument and originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe”³⁷. The 1967 Protocol also imposed obligations upon the States to comply with the substantive provisions of the Convention but without the Convention’s time or geographical limitations³⁸. States may ratify the 1967 Protocol without becoming Parties to 1951 Convention as the Protocol is an independent instrument. Even the protection decision and procedure to determine the status of refugees are on the hand of each State Party as 1951 Convention does not establish any procedures for the refugee status determination and gives the deciding power to the states for protection³⁹.

The convention based on the number of fundamental principles of human rights especially non-discrimination, non-penalization and non-refoulement which makes the Convention full complement of human rights standards for refugees. The States parties can make a reservation to the certain articles of the Convention except to the article which provides the definition of refugee, Art which provide the principle of non-refoulement and the principle of non-

³³ UNHCR Executive Committee Conclusion no.103 (LVI), “Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection.” UN Doc A/AC.96/102(Oct.7,2005), Preamble, para.1. available at <http://www.unhcr.org/43576e292.html>

³⁴ Roman Boed, The State of the Right of Asylum in International Law, 5 *Duke Journal of Comparative & International Law* 1-34 (1994), Available at <http://scholarship.law.duke.edu/djcil/vol5/iss1/1>

³⁵ The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. See, Convention and Protocol Relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly, with an introductory note by the Office of the United Nations High Commissioner for Refugees. <http://www.unhcr.org/3b66c2aa10.pdf>

³⁶ Convention and Protocol Relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly, introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR).

³⁷ Ibid

³⁸ The Convention and Protocol Relating to the Status of Refugees, Ibid

³⁹ Supra note 1

discrimination⁴⁰. “1951 Refugee Convention does not apply to those Refugees who benefit from the protection or assistance of a United Nations agency other than UNHCR⁴¹ and refugees who have a status equivalent to nationals in their country of asylum”⁴².

3.2 Implementation and interpretation of the Refugee Convention at domestic level and the UNHCR supervisory role

The 1951 Refugee Convention and its protocol do not establish any procedures for the implementation of these treaties and there is no “international refugee court under the convention to resolve the issues of interpretation of the Refugee Convention”⁴³. “States have a degree of discretion in determining the way in which States can implement their obligation under the Refugee Convention”⁴⁴. States parties implementing their obligation under these instruments by incorporating the provisions of these instrument in the domestic legislation for refugee protection⁴⁵.

Regarding interpretation of the Refugee Convention domestic courts interpreted and applied the convention regularly.⁴⁶ And in practice States can take the “different approaches both in interpretation and application of the convention because of the absence of single interpretation or uniform international practice of the interpretation of the Refugee Convention⁴⁷ and in the absence of “any interstate supervisory body to check states accountability if they fail to meet protection obligation under the Convention.”⁴⁸

⁴⁰ Art-42 of the Refugee Convention speaks about the provision of “Reservation “. According to the Art 42(1) of the Convention “At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.” See, Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137 [Refugee Convention].

⁴¹ “Such as refugees from Palestine who fall under the auspices of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)”. See supra 31, Introductory note of Refugee Convention.

⁴² Convention and Protocol Relating to the Status of Refugees, (28 July 1951) 189 UNTS 137(Refugee Convention),

⁴³ Jane McAdam, “Interpretation of the Convention” in Andreas Zimmermann (ed.), Jonas Dörschner and Felix Machts (assistant eds.), The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary, Oxford University Press Oxford, England 2011, p. 77

⁴⁴ UN High Commissioner for Refugees (UNHCR), Self-Study Module 1: An Introduction to International Protection. Protecting Persons of Concern to UNHCR, 1 August 2005, pp 2.7,

⁴⁵ Ibid

⁴⁶ Hathaway and Anthony M. and Pobjoy “Supervising the Refugee Convention: Introduction” (September 10, 2013), p 2 supra note 4

⁴⁷Jane McAdam, “Interpretation of the Convention in Andreas Zimmermann (ed.), 2011, p 77, Supra note 43

⁴⁸ supra note 46

If a dispute arises between State Parties regarding the interpretation or application of the convention and there are no other means to settle the dispute then State Parties can seek the help of the International court of justice to settle the dispute under Art -38 of the Refugee Convention and Art. IV of the 1967 Protocol relating to the status of the Refugees⁴⁹ but several scholarly Articles made it clear that this provision has never been invoked by the States Parties regarding refugee law questions⁵⁰.

“The Refugee Convention in Art. 35 supports UNHCR’s supervisory role by providing for modes of cooperation⁵¹”. The UNHCR Statute in para 8 makes a list of functions of it where the UNHCR’s task of “Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto” was also listed⁵². The Convention in Art-35 declares that “States must cooperate with UNHCR in the exercise of its functions and facilitate its task of supervising the proper implementation of the Convention”⁵³ and Art -II of the protocol confirms the UNHCR ‘duty of supervising the application of the present Protocol’⁵⁴.

States can take advice from the UNHCR to implement the Convention and Protocol at national legislation, and individual countries can also take help from UNHCR to improve their ability to provide international protection⁵⁵. Regarding interpretation of the Refugee Convention, UNHCR provides guidance on interpretation of the 1951 Convention through UNHCR’s

⁴⁹According to the Art 38 of the refugee convention and Art IV of the 1967 Protocol “Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute”, see Art-38 of the 1951 Convention relating to the status of refugee, adopted Jul.28,1951, entered into force Apr.22,1954 and UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at <http://www.refworld.org/docid/3ae6b3ae4.html> [accessed 12 April 2016]

⁵⁰ Hathaway, *Supervising the Refugee Convention: Introduction* (September 10, 2013) P 2, Jane McAdam, “Interpretation of the Convention” in Andreas Zimmermann (ed.), p 77, supra note 3

⁵¹ Ingo Venzke, “How Interpretation Makes International Law: On Semantic Change and Normative Twists”, Oxford University Press Oxford, 2012, p 111.

⁵² Ibid, UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), para -8(a). available at: <http://www.refworld.org/docid/3ae6b3628.html> [accessed 8 March 2016]

⁵³An Introduction to International Protection. Protecting Persons of Concern to UNHCR (2005), page 27, supra note 27

⁵⁴ Ibid and “The UNHCR derive this “supervisory role under its Statute in conjunction with Article 35 of the 1951 Refugee Convention and Article II of the 1967 Protocol”. Cambridge University Press, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond*, June 2003, available at: <http://www.refworld.org/docid/470a33c00.html> [accessed 11 April 2016]

⁵⁵ An Introduction to International Protection, Protecting Persons of Concern to UNHCR, (2005) pp 2.7, supra note 31

*Handbook on Procedures and Criteria for Determining Refugee Status*⁵⁶ which is often used by the State's Judicial body as an important source of reference when interpreting their national legislation under the Convention⁵⁷. The UNHCR also published Guidelines and Guidelines notes on international protection, and the UNHCR Executive Committee Conclusion (EXCOM) are also carried similar importance for the interpretation and application of the Refugee Convention.⁵⁸“All these documents are interpretations of international refugee law and form part of the practice of interpretation that shapes the meaning of the relevant provisions”.⁵⁹

Though there is difference in opinion among the leading scholars of the International Refugee Law regarding the supervisory role of the UNHCR⁶⁰ but everyone agreed that the UNHCR has an important role regarding the application and interpretation of the Convention. Domestic courts and institutions are not bound by the interpretations of the UNHCR, but those

⁵⁶ Jane McAdam, “Interpretation of the Convention” in Andreas Zimmermann (ed.), 2011, p 79

⁵⁷ Supra note 55

⁵⁸ Supra note 56

⁵⁹ Supra note 51, Ingo Venzke, ‘UNHCR and the Making of Refugee Law in How Interpretation Makes International Law’, page 116,

⁶⁰ According to TÜRK, the UNHCR has the competence to act as a supervisor of the 1951 Convention and it “should understand as supervisor of the refugee convention” but his view denied by Hathaway and he mentioned the UNHCR Statute has not granted the UNHCR the authority to declare breaches of the Convention, nor even authoritatively to decide the meaning of that treaty.” See, UN High Commissioner for Refugees (UNHCR), UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate-Keynote Address by Volker Türk, 20 May 2010, available at <http://www.refworld.org/docid/4bfb8c962.html> [accessed 12 April 2016], Hathaway, James C. and North, Anthony M. and Pobjoy, Jason M, Supervising the Refugee Convention: Introduction (September 10, 2013), and TÜRK, Volke “New Issues in Refugee Research, Working Paper No. 67: UNHCR’s Supervisory Responsibility.” Geneva: UNHCR Evaluation of Policy Analysis Unit, (October 2002) p 3; McAdam’s view on that issue is that, “UNHCR has played a supervisory role regarding the application and interpretation of the Convention but this agency can only give guidelines on interpretation of the Convention, its supervisory role cannot understand that it has mandate to give authoritative rulings or opinion on the meaning of particular terms of the convention.” See Jane McAdam, “Interpretation of the Convention in Andreas Zimmermann (ed.), 2011, p 77; Ingo Venzke in “How Interpretation Makes International Law: On Semantic Change and Normative Twists” present the UNHCR as an International bureaucrats and give opinion on support of the UNHCR role as he mentioned that the “UNHCR Statute and Art. 35 of the Refugee Convention endow it with a supervisory function and its role includes preventing contracting states from unilaterally projecting their preferences onto the definition of refugee. It counteracts parties’ self-serving interpretations”. He also mentioned that “UNHCR turned out to be more active in the further development through interpretation of the law that is already out there. If the Convention could not realistically be updated to fit the needs of refugee protection and new treaty law was not forthcoming, UNHCR would need to make the best of it and interpret the Convention according to its interests and convictions.” See, Ingo Venzke, UNHCR and the Making of Refugee Law in How Interpretation Makes International Law: On Semantic Change and Normative Twists, Oxford Scholarship Online: January 201, page 78 & 114

“institutions and the courts have repeatedly relied on Art. 35 Refugee Convention to support their resort to UNHCR’s statements on the law”⁶¹.

The U.K. House of Lords in the *Islam v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal* mentioned that “The UNHCR Handbook is not binding on states, but courts have referred to it as an instrument for guidance”⁶².

Lord Steyn, in *R v Secretary of State for the Home Department, ex parte Adan and Aitseguer*, 19 December 2000, [2001] 2 AC 477 (UK), 516, 520, mentioned that the “UNHCR plays a critical role in the application of the Refugee Convention...It is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals.”⁶³

Ingo venzke, in “*How Interpretation Makes International Law: On Semantic Change and Normative Twists*”⁶⁴ mentioned about the domestic court reliance on the UNHCR interpretation. He gave example of the New Zealand Refugee Status Appeals Authority which in *Re S.A.*, Refugee Appeal No 1/92, argued that “it related its reasoning to UNHCR’s interpretations due to their ‘considerable persuasive authority’”⁶⁵ But he makes comment about the Australia High Court that there is different opinion regarding the UNHCR interpretation as the “Australian High Court in the Minister for Immigration and Multicultural and Indigenous Affairs had expressed misgivings about the use of UNHCR documents in adjudication, but Judge Kirby rejected that concerns”⁶⁶. Judge Kirby mentioned,

“[t]his Court has frequently resorted to the UNHCR Guidelines and the Handbook in construing and applying the Convention. This has been done because of the expertise of the UNHCR in the application of the Convention . . . In effect, in deciding cases such as the present, national courts are exercising a species of international jurisdiction.

⁶¹ Ingo Venzke, UNHCR and the Making of Refugee Law in *How Interpretation Makes International Law*, 2013, page 117

⁶² European Council on Refugees and Exiles, *ELENA Research Paper on Non-State Agents of Persecution*, 1 September 2000, pp 2.1, available at: <http://www.refworld.org/docid/3ae6b3460.html> [accessed 21 April 2016] and See, the U.K. House of Lords in *Islam v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] UKHL 20 (25 March, 1999).

⁶³ *R v Secretary of State for the Home Department, ex parte Adan and Aitseguer*, 19 December 2000, [2001] 2 AC 477 (UK), 516, 520 cited in Ingo Venzke, UNHCR and the Making of Refugee Law in *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, Oxford Scholarship Online: January 2013, page 117

⁶⁴ *Supra* 61 at page 117

⁶⁵ *Re S.A.*, Refugee Appeal No 1/92, New Zealand, Refugee Status Appeals Authority, 30 April 1992 cited in Ingo Venzke, UNHCR and the Making of Refugee Law in “*How Interpretation Makes International Law: On Semantic Change and Normative Twists*”, 2013, page 118

⁶⁶ *Ibid*

The more assistance courts can receive from the relevant international agencies, in discharging such international functions, the better”⁶⁷

Ingo venzke also mentioned that “these examples from domestic practice are offered in support of UNHCR’s standing as an actor with semantic authority in the making of refugee law by way of interpretation⁶⁸.

There are other sources like Judicial decisions of the Higher Court of States Parties regarding the interpretation and application of the relevant provisions of the Convention and opinion of the leading academic scholars in the field of refugee law like Atle Grahl-Madsen, James C. Hathaway, Guy S. Goodwin-Gill, Andreas Zimmermann, on the issue of interpretation and application of the Convention are also played an important role in the application and interpretation of the Refugee Convention.⁶⁹

3.3. Refugee status and refugee

(1) Refugee status

Refugee status is not a status that is granted by the States⁷⁰ because the determination of an applicant refugee status by the authorities of the contracting States Parties of the 1951 Convention is declaratory in nature rather constitutive⁷¹. A person is become a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition, according to the UNHCR Handbook⁷².The Handbook also recognized that “Recognition of his refugee status does not therefore, make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee”⁷³So a person seeking asylum attain the status of refugee even before the state of asylum affirmed his

⁶⁷ Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004, High Court of Australia, 15 November 2006, [2006] HCA 53, J Kirby, paras 76–78 cited in Ingo Venzke, UNHCR and the Making of Refugee Law in “How Interpretation Makes International Law: On Semantic Change and Normative Twists”, 2013, page 118

⁶⁸Supra 59 at page 119

⁶⁹ An Introduction to International Protection. Protecting Persons of Concern to UNHCR (2005)

⁷⁰ Hathaway, J.C and M. Foster, The Law of Refugee Status, Cambridge University Press, 2nd edition, August 2014, page-1

⁷¹Zimmermann, Andreas. and Dörschner, Jonas. and Machts, Felix. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary / edited by Andreas Zimmermann; assistant editors Jonas Dörschner, Felix Machts, Oxford University Press Oxford, England 2011, p. 298, pp 4

⁷² Refugee Convention 189 UNTS 137, UNHCR Handbook, 2011

⁷³ Ibid

status with necessary documentation under domestic law and procedures.⁷⁴With the status of refugee a person entitled to claim critical civil rights, socio-economic rights and also other rights that exist with the status of refugee⁷⁵although the entitlement of the rights continues to exist “ until and unless an individual is found not to be a refugee.”⁷⁶

(2) Definition of refugee

The 1951 Refugee Convention is in the core position to define the term ‘refugee’, but other instruments like the UNHCR Statute and some regional treaties (OAU Refugee Convention, Cartagena Declaration on Refugees, EU Qualification Directive) also define the term ‘refugee’. In this section refugee definition in the 1951 Refugee Convention and definition in other regional instruments are also discussed but for the purpose of the thesis only the 1951 Refugee Convention definition of refugee is used in the whole paper.

i) 1951 Refugee Convention definition of Refugee

The 1951 Refugee Convention first applies to any person considered to be refugee under earlier international arrangements also known as “Statutory refugees”⁷⁷. The 1951 Refugee Convention then provide general definition of a Refugee in Art-1A (2) now which have to read together with the 1967 Protocol and without the time limit⁷⁸. These provisions of Art- 1A (1)(2) termed as “inclusion clause” as the Art 1A of the 1951 Convention consists of three parts. Other two parts are the “cessation” and “exclusion” clauses.⁷⁹ The cessation clause makes provision that several categories of people no longer need protect under the Convention when they can avail again the protection from their country of nationality or access alternative protection. And

⁷⁴ International Commission of Jurists (ICJ), Migration and International Human Rights Law, 2014, Practitioners Guide No. 6, Updated Edition, available at <http://www.refworld.org/docid/4dcbac872.html> [accessed 3 March 2016]

⁷⁵Supra note -70

⁷⁶ ibid

⁷⁷ Article 1 A (1) of the 1951 Convention states that “For the purposes of the present Convention, the term “refugee” shall apply to any person who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; “See Art-1 A (1) of the 1951 Convention relating to the status of refugee, Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137 [Refugee Convention]

⁷⁸ supra note 7, Introductory note by Guy S. Goodwin-Gill, CONVENTION RELATING TO THE STATUS OF REFUGEES, PROTOCOL RELATING TO THE STATUS OF REFUGEES, accessed 4th March 2016 from United Nations Audiovisual Library of International Law, <http://legal.un.org/avl/ha/cssp/cssp.html>

⁷⁹ Article 1 C (1) to (6) for “cessation clauses” and Sections D, E and F of Article 1 of the 1951 Convention for exclusion clauses. see Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137 [Refugee Convention]

under the exclusion clause certain people are not allowed or excluded to be recognized as refugee because of serious crime or being as international criminal⁸⁰. According to the Article 1A (2) of 1951 Convention the term “refugee” shall apply to any person who:

*“..... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*⁸¹

Guy S. Goodwin-Gill in his introductory note to the “Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees” mention that “where country of origin (citizenship) is understood as “country of former habitual residence” ,stateless persons may also be refugees in this sense and within the Convention meaning those who possess more than one nationality will only be considered as refugees if such other nationality or nationalities are ineffective (that is, do not provide protection)”⁸²

ii) Refugee definition in the UNHCR Statute:

The UNHCR Statute⁸³ provides protection to those persons to whom the competence of the High Commissioner extends⁸⁴. The UNHCR Statute provides the definition of Refugee in Provision 6 of the Statute. This definition of a refugee is almost similar to the Conventional

⁸⁰ Hathaway, James C. "Refugees and Asylum." In Foundations of International Migration Law, edited by B. Opsin, R. Perruchoud, and J. Redpath-Cross, 177-204. Cambridge: Cambridge Univ. Press, 2012, p 189.

⁸¹ Art- 1A (2) of the Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137

⁸² See Art-1 A (1) of the Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137 [Refugee Convention], Introductory note by Guy S. Goodwin-Gill, CONVENTION RELATING TO THE STATUS OF REFUGEES, PROTOCOL RELATING TO THE STATUS OF REFUGEES.

⁸³ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), supra note 8

⁸⁴ UNHCR Handbook (2011), pp 15.,

definition of Refugee. But the definition contains in the Prov. 6A(ii)⁸⁵ and Prov. 6 B⁸⁶ of the Statute limit the scope of the Refugee definition by not including ‘persecution’ based on the reason of “membership in a particular social group” which is an important nexus requirement of the 1951 refugee Convention⁸⁷.

Andreas Zimmermann in a Commentary regarding the Art-1A, para.2 of the Refugee Convention mentioned that “it has been argued that Refugees persecuted on account of ‘membership in a particular group’ would also be covered by the High Commissioner’s competences⁸⁸.

Later subsequent the General Assembly Resolution and the ECOSOC resolution widened the mandate of the UNHCR by adopting various document. The refugee definition under the UNHCR statute, GA, and ECOSOC resolution together with the 1951 Convention is that “a refugee is any person who falls within the refugee definition as contained in Article 1A (2) of the 1951 Convention or who is outside his/her country of origin or habitual residence and is unable to return there because of serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order⁸⁹”.

iii) Definition of the Refugee in Regional Instruments

⁸⁵ According to the Prov. 6 A (ii) of the UNHCR Statute, the competence of the High Commissioner shall extend to, “Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.” Supra note 83

⁸⁶ According to the Prov. 6 B of the UNHCR Statute , the competence of the High Commissioner shall extend to “Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.” , Supra note 8

⁸⁷ Zimmermann, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol: (2011), P 315, pp 82.

⁸⁸ Ibid

⁸⁹ UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (2011) p 61, International Commission of Jurists (ICJ), Migration and International Human Rights Law, 2014, Practitioners Guide No. 6, pp 85,

The term “Refugee” is also defined in some regional instruments like the OAU Refugee Convention⁹⁰ and the Cartagena Declaration⁹¹. These two instruments extended⁹² the 1951 Convention definition of Refugee by making specific reference to the political violence in the definition of refugee which was not mentioned in the 1951 Convention⁹³.

a) The EU Qualification Directive

In European Union the Council of the European Union according to the EU Qualification Directive⁹⁴ define the term “refugee” as third country nationals. The Qualification Directive close the door for the EU member states nationals to seek asylum in another EU member states as the refugee definition in Art 2(d)⁹⁵ is limited only to the third country nationals outside Europe. EU Qualification Directive include the stateless person directly in refugee definition. According to Art- 2(d) of the EU Qualification Directive(recast), ‘refugee’ means, “a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country

⁹⁰ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted Sept. 10, 1969, entered into force Jun. 20, 1974, 1001 UNTS 45.

⁹¹ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984.

⁹² **OAU Refugee Convention** define the term refugee in Art 1(1) similar to the definition of 1951 Refugee Convention but extend the scope of the definition of refugee in Art-1(2) according to which the term "refugee" shall also apply to every person who, “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”, **Cartagena declaration** also extends the 1951 Convention definition of refugee as it contains that, “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.” See, Art- 1(2) of OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted Sept. 10, 1969, entered into force Jun. 20, 1974, 1001 UNTS 45.

⁹³ Gibney Mark, global refugee crisis, A Reference Handbook, 2nd Edition, ABC-CLIO, 2010, p 12

⁹⁴ **European Union: Council of the European Union, Directive 2011/95/EU** of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at <http://www.refworld.org/docid/4f197df02.html> [accessed 6 March 2016]

⁹⁵ Art- 2(d) of the EU Qualification Directive, *ibid*

of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it....”⁹⁶.

3.3.1 Refugee Convention criteria for the Refugee status

To be recognized as a Refugee under the 1951 Refugee Convention a claimant has to fulfill the following criteria’s define in the Convention definition of refugee. This section discussed both the UNHCR approaches and the approaches taken by the of leading scholars to interpret the definition of refugee and its elements, to understand the difference in approaches regarding the interpretation of the Refugee Convention. And also the general rule for treaty interpretation is briefly discussed in this subsection to understand the difference in interpretation of Refugee definition.

a) General rule of Treaty interpretation

Regarding the interpretation method of the Refugee Convention, UNHCR in “Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees”⁹⁷ adopt the method of the Article 31(1) of the Vienna Convention on the Law of Treaties. According to the Vienna Convention, a treaty such as the 1951 Convention is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁹⁸

“The Vienna Treaty Convention specifies that the context includes, inter alia, the preamble, as a source of the object and purpose of the instrument”⁹⁹. Though the Vienna Convention postdate the Refugee Convention and is, therefore, inapplicable¹⁰⁰ but as an ‘authoritative statement of customary public international law on the interpretation of treaties, the Vienna Convention is considered as a matter of convenience’¹⁰¹.

From the wording of the Refugee Convention “the ordinary meaning of the elements of Article 1 is often clear and the Preamble of Convention explains the object and purpose of the

⁹⁶ Ibid

⁹⁷UN High Commissioner for Refugees (UNHCR), Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, pp 2, available at <http://www.refworld.org/docid/3b20a3914.html> [accessed 20 May 2016]

⁹⁸ Article 31 (1) of the Vienna Convention on the Law of Treaties, done at Vienna 23 May 1969, 1155 U.N.T.S. 331, (1969) 8 I.L.M. 679.

⁹⁹ Ibid

¹⁰⁰ Rodger Haines, QC, THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS STANDARDS IN NEW ZEALAND: THE REFUGEE CONVENTION, University of Auckland 2004, pp 19, Available at http://www.refugee.org.nz/spring.html#THE_PRINCIPLES_OF_INTERPRETATION

¹⁰¹ Ibid

instrument which is to ensure the protection of the specific rights of refugees, to encourage international cooperation in that regard, including through UNHCR, and to prevent the refugee problem from becoming a cause of tensions between states”¹⁰². And the Preamble indicates about the human right language.¹⁰³ So the Refugee Convention needs to be interpreted in line to protect the human rights of the refugees.

b) Elements of the Refugee Definition-

i) Alienage

A person who is outside of his or her country of nationality is qualified only as a refugee under the 1951 Refugee Convention.¹⁰⁴ **Hathaway and Foster** in the “Law of the Refugee Status” mentioned that, “the Refugee Convention does not give protection to all person who forcefully migrated but to a specific group of persons who were outside their own countries [and] who lacked the protection of a Government¹⁰⁵.” He also argued that “the Convention distinguishes refugees from other forced migrants not to signal that refugees are more important or more deserving, but simply in recognition of the distinctiveness of their needs¹⁰⁶”.

According to the UNHCR Handbook, “for a refugee claim being outside the country of the claimant nationality is a general requirement and there is no international protection for a person as refugee within the within the jurisdiction of his country of nationality or habitual residence”¹⁰⁷.

And the fear of persecution of a claimant must be related to his/her country of nationality or if there is a confusion regarding the nationality of a person seeking asylum then that person’s former habitual residence will be considered instead of his nationality¹⁰⁸. To be recognized as a refugee under the Convention the element “fear of persecution” need not be extended every time in the whole part of the applicant country of nationality. In the specific situation like during the “civil war’ or ‘grave disturbance” persecution of a specific group (ethnic or national

¹⁰² Ibid at para 3

¹⁰³ (UNHCR), Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, pp 4

¹⁰⁴ J. Hathaway and M. Foster, *The Law of Refugee Status*, Cambridge University Press, 2nd edition, August 2014, p 17, J. Hathaway, *The Law of Refugee Status*, Cambridge University Press (1991), Analysis of the rationale for the alienage requirement.

¹⁰⁵ J. Hathaway and M. Foster, *The Law of Refugee Status*, Cambridge University Press (2014) p17.

¹⁰⁶ *ibid*

¹⁰⁷ UNHCR Handbook (2011), pp 88

¹⁰⁸ *Ibid*, pp89

group) of people in a part of the country if exist is enough under the Convention. Because that situation give understanding that the applicant will be in the same situation even if he/she could be another part of the same country.¹⁰⁹

Goodwin-Gill mentioned in “The Refugee in International Law” that, the Convention general requirement is that a person has to flee from his country of origin or crossed international border for well-founded fear of persecution. But the convention does not necessarily require that the situation which turns to well-founded fear of being persecuted or the event of persecution actually happened must be present at the time when the person leaves the country.¹¹⁰ According to the UNHCR, a person may leave his/her country legally but in the absence of the person, the circumstance of his country may change for which the situation well-founded fear of persecution may arise if the person returns to the country of his nationalities. In this situation, person can ask to recognize his refugee status and t that type of person known as a “*Refugee sur place*”¹¹¹.

So the alienage requirement is important to establish refugee the claim under the 1951 Refugee Convention. This requirement of “out of country of origin or habitual residence can easily be established, and it is uncontroversial in most cases as it is a factual issue”¹¹², mentioned by the UNHCR in the Interpretation of Art -1 of the 1951 Convention Relating to the Status of Refugees.¹¹³

ii) Well -Founded Fear

Well-founded fear is the second key requirement of the refugee definition under the 1951 Refugee Convention. The UNHCR Handbook mentioned, the person seeking protection under the Refugee Convention must have situation related to the Conventional ground for which he/she has fear of persecution and the fear must be well founded¹¹⁴. As mention earlier in the alienage requirement¹¹⁵ that, all person who is a force migrant are not considered for refugee

¹⁰⁹ UNHCH Handbook (2011), pp89

¹¹⁰ Ibid, pp 94-98, Guy S. Goodwin-Gill, The Refugee in International Law (2d ed.) (1996) Determination of Refugee Status: Analysis and Application. p 40.

¹¹¹ UNHCR Handbook (2011), pp 94-98, ibid; Gibney Mark, Global refugee crisis, P 14.

¹¹² UNHCR, Interpreting Article 1 of the 1951 Convention (2001), supra note 97

¹¹³ Ibid

¹¹⁴ UNHCR Handbook (2011), pp 37-39; UNHCR, The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, p 3-4, para 11, UNHCR,” An Introduction to International Protection. Protecting Persons of Concern to UNHCR” (2005), p 56

¹¹⁵ See, Alienage in page 31

protection under the 1951 Refugee Convention. Only those persons, in view of Hathaway, “who faced genuine risk of being persecuted” in the country of nationality or habitual residence for any reason which mention in the Convention” are not considered for refugee protection ¹¹⁶.

- *The UNHCR Approach*

The approach is taken by the UNHCR to interpret the term “well-founded fear” is bipartite or combined approach of both subjective and objective factors¹¹⁷. Regarding the elements of well-founded fear, the UNHCR mentioned in the Handbook,

“To the element of fear – a state of mind and a subjective condition – is added the qualification “well-founded”. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.¹¹⁸”

So the term well- founded fear consists of both subjective and objective elements, where the fear of a concerned person is subjective and independent evidence to such fear (state of mind) is an objective element, and both elements are required to claim that the fear was well founded¹¹⁹.

According to the Handbook, the Subjective element requires examination of the applicant personal statement and behavior because in similar situation there may be different psychological reaction of different person¹²⁰.Assessment of the credibility is necessary where the fact of the case is not too clear to examine the subjective element which includes all the information regarding applicant “that may serve to indicate that the predominant motive for his application is fear¹²¹”.

And the objective element requires “an evaluation of the applicant’s statements in the context of relevant country of origin information”¹²² Nor the applicant statement alone neither a

¹¹⁶ Hathaway and Foster, The Law of the Refugee Status (2014), p 91

¹¹⁷ ibid

¹¹⁸ UNHCR Handbook (2011), pp 38

¹¹⁹ An Introduction to International Protection. Protecting Persons of Concern to UNHCR (2005), page 56

¹²⁰ Ibid, UNHCR Handbook (2011), pp 40

¹²¹ UNHCR Handbook (2011), pp 41

¹²² Ibid pp 37

judgement on the situation prevailing in his country of origin alone sufficient for the assessment of the element so both is important for the purpose. Applicant country of origin information and condition of the country is important for the credibility assessment of the claim.¹²³.

An applicant can establish his well-foundedness of fear based on the past persecution for Conventional reason in his country of origin but risk of persecution in future for a Conventional reason also be considered as well-founded¹²⁴. “If the applicant establishes his fear in a reasonable degree that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there then fear can be considered as well-founded.”¹²⁵

UNHCR in their advisory opinion on the interpretation of the refugee definition¹²⁶ mentioned,

*“The refugee definition, in the sense of the 1951 Convention, is forward looking. The wording “well-founded fear” does not require past persecution, although past persecution is a strong indication of the well-foundedness of continued fear. International refugee protection is preventive in its nature and therefore a person does not need to wait until she or he has been detected and persecuted before she or he can claim refugee status.”*¹²⁷

- ***View of the leading scholars***

Zimmermann in “The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary”¹²⁸ and **Hathaway and Foster** in the “Law of Refugee Status” indicates about the UNHCR’s bipartite approach¹²⁹. They mentioned that in bipartite approach of well-founded fear, “First, personal experience of “terror of persecution” of the person seeking recognition of refugee status is needed in view of the prospect of being returned to his or her home country which is a subjective feeling of apprehension”¹³⁰. Second, “In order to

¹²³ UNHCR Handbook (2011), pp 42

¹²⁴ Ibid, pp 45

¹²⁵ UNHCR Handbook (2011), pp 42

¹²⁶ UN High Commissioner for Refugees (UNHCR), UNHCR Advisory Opinion on the Interpretation of the Refugee Definition, 23 December 2004, pp 12, available at <http://www.refworld.org/docid/4551c0374.html> [accessed 16 April 2016]

¹²⁷ Ibid, pp 12

¹²⁸ Zimmermann, “The 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011) P 337, pp187.

¹²⁹ Supra note 116

¹³⁰ According to Hathaway & Foster, “well-founded fear” entails two requirements “*The first criterion is that the person seeking recognition of refugee status perceive herself to stand in “terror of persecution”;* her very personal response to the prospect of return to her home country must be an extreme form of anxiety that is neither feigned nor overstated. Second, this

determine the subjective element, available information relating to the conditions in the respective country of origin must confirm that the applicant's fear is reasonable and thus well-founded¹³¹”.

Zimmermann's view is that “In bipartite approach ,the subjective element being perceived as the more crucial one but judicial body does not always determine the existence of such an element in their decisions, while acknowledging the requirement of such a subjective component”¹³².According to **Hathaway and Foster's** bipartite approach of “well-founded fear” requires both “evidence of subjective fear and objective validation of that fear” but the objective validation of that fear cannot be used as principle or defense under international law¹³³.

Zimmermann mentioned about the another approach called “objective approach” to determine the term well-founded fear in refugee definition. This objective approach only requires the existence of the objective evidence where consideration of the subjective element as a mere additional factor. The subjective element, state of mind or frame of mind of the person concerned is not conclusive for the refugee hood under this approach rather the persons claim need to be consider in pure objective manner¹³⁴.

Hathaway and Foster's view supported this objective approach according to him, “Well-founded fear has nothing to do with the state of mind of the applicant for refugee status ...” “The concept of well-founded fear is inherently objective. It denies protection to persons unable to demonstrate a real chance of present or prospective persecution, but does not in any sense condition refugee status on the ability to show subjective fear”. “Fear must be

subjective perception of risk must be consistent with available information on conditions in the state of origin, as only those persons whose fear is reasonable can be said to stand in need of international protection”, see, Hathaway, James C. and Foster. M, “The Law of the Refugee Status “(2014) p 91 and According to Zimmermann, “Fear can be understood as trepidation underlying the individual's state of mind, i.e. a subjective feeling of apprehension. In this understanding, the person seeking refugee status must experience a personal ‘terror of persecution’ in view of the prospect of being returned to his or her home country”. See Zimmermann, “The 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011), p 339, pp190

¹³¹ Zimmermann, “The 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011) P 338, pp191.

¹³² Ibid P 337, pp187

¹³³ Hathaway & Foster, “The Law of the Refugee Status” (2014), p 92

¹³⁴ According to Grahl-Madsen who stated: ‘The adjective “well-founded” suggests that is not the frame of mind of the person concerned which is decisive for his claim to refugee-hood, but that his claim should be measured with a more objective.’ A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. I, 1966), Cited in Zimmermann, Andreas. “The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary” (2011) P 340, pp 195-197

understanding as objective apprehension of risk¹³⁵” **Hathaway** and **Hicks** make it clear by referring that “The Convention definition's reference to "fear" was intended simply to mandate an individuated, forward-looking appraisal of actual risk, "not to require an examination of the emotional reaction of the claimant¹³⁶”.

Goodwin-Gill and McAdam view in “The Refugee in International Law¹³⁷” regarding the subjective element of well-founded fear is that, “It is by not clear how much of a role the subjective element is expected to be played in a determination process from any of the means -refugee definition, jurisprudence or commentary’.... ‘If the statement of the applicant regarding his fear is found consistent and credible then formal proof is less required’¹³⁸

And according to **Hathaway** the “well-founded fear” requirement – “mandating an anticipatory, objective assessment of risk rather than an evaluation of the claimant’s subjective state. And the object and purpose of the Convention strongly support an interpretation of “fear” that emphasizes its anticipatory rather than emotive qualities”. “irrespective of what the claimant has or has not already experienced, the question to be asked is whether there is reason to believe that she requires safe haven from apprehended risk in her state of origin”¹³⁹.

Hathaway also mentioned that there is some leading well-founded fear test to identify “situations of risk that fall significantly below a probability of harm, but which give rise to more than a speculative chance that persecution may ensue” namely ‘reasonable possibility’, ‘reasonable degree of likelihood’, ‘serious possibility’, and ‘real chance’ test.”¹⁴⁰ This test consists of some combination of credible testimony and country data but no requirement for the applicant to show past persecution or the applicant has been singled out or targeted. It is enough to show that “the applicant is in a relevant at-risk group and evidence of past persecution if exists are a good evidence of forward-looking risk.”¹⁴¹

• *Concluding Remarks*

¹³⁵ Supra note 65-97,105

¹³⁶ Hathaway, James C. "Is there a Subjective Element in the Refugee Convention's Requirement of 'Well-Founded Fear'?" W. S. Hicks, co-author. Mich. J. Int'l L. 26, no. 2 (2005): 505-62, p 507, Hathaway, & Foster, “The Law of the Refugee Status” (2014), p 108

¹³⁷ G. Goodwin-Gill and J. McAdam, “The Refugee in International Law”, Oxford: Oxford University Press, 2007.

¹³⁸ Ibid, p 64

¹³⁹ Hathaway& Foster, The Law of the Refugee Status (2014), p 108

¹⁴⁰ Hathaway, James C. "Refugees and Asylum." In Foundations of International Migration Law, edited by B. Opsin, R. Perruchoud, and J. Redpath-Cross, 177-204. Cambridge: Cambridge Univ. Press, 2012.pp 7.2

¹⁴¹ ibid

From the above mention discussion, it is understandable that there are two leading approaches to interpreting the term “well-founded”. One is the UNHCR’s bipartite approach which consists of both subjective and objective elements and another is the objective approach of well-founded fear which can be termed as Hathaway’s approach of well-founded fear. In the bipartite or combined approach of well-founded fear the subjective element requires the examination of the applicant personal experience of fear or state of mind and in the context of the country of origin information to validate the statement of the applicant is required by the objective element. But Hathaway’s objective approach only requires the objective assessment of the forward looking risk which can be determined by the ‘real chance’ test. Past persecution in the UNHCR approach considered for the establishment of the well-foundness of fear but in the objective approach, past persecution is just a good evidence for establishing the real risk of harm.

iii) Persecution

- *The UNHCR Perspective*

There is no universal accepted definition of the term “persecution. Because neither the 1951 Convention nor any other International Law instruments define the term ‘persecution’ although the term is considered the key element to determine the refugee status¹⁴². The UNHCR in its “advisory opinion on the interpretation of Refugee definition” and “interpreting Art-1 of the Convention relating to the Status of Refugees” mentioned that, “the concept of persecution was intentionally not defined by the drafters of the 1951 Convention and the drafter’s original intention was to allow for a sufficient degree of flexibility in order to encompass all future types of persecution by the term.”¹⁴³

Art. 31, para. 1, and Art. 33, para. 1 of the 1951 Convention only these Arts give assumption that “persecution is only taking place where the applicant's ‘life or freedom’ is being threatened, on account of race, religion, nationality, political opinion or membership of a particular social group¹⁴⁴”. The UNHCR Handbook includes “other serious violations of human rights would also constitute persecution for the convention reasons of race, religion, nationality, political

¹⁴² Zimmermann, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011) P 345, pp 216, Hathaway & Foster, “The Law of the Refugee Status” (2014), p 182.

¹⁴³ UNHCR Advisory Opinion on the Interpretation of the Refugee Definition (2004), pp 8, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees (2001), pp 16

¹⁴⁴ Zimmermann, Andreas. “the 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary” (2011), p 346, pp 221, UNHCR Handbook (2011), pp 51.

opinion or membership of a particular social group”¹⁴⁵. And the UNHCR clarification in several instruments regarding persecution is that “persecution is understood to comprise serious human rights abuses or other serious harm often, but not always, perpetrated in a systematic or repetitive way. Thus, death, torture, physical assault, unjustified imprisonment, and illegitimate restrictions on political or religious activities are all examples of persecution.”¹⁴⁶

Discrimination does not amount to persecution itself in the normal sense but, “a persistent pattern of consistent discrimination will amount to persecution on cumulative grounds.”¹⁴⁷ and “discrimination which leads to consequences of a substantially prejudicial nature for the person concerned, including serious restrictions on that person right to earn a livelihood, right to practice a religion, or access to normally available educational facilities” will amount to persecution according to the UNHCR Handbook ¹⁴⁸.

Prosecution or punishment for a common law offence is different from persecution on the Conventional grounds. Punishment or prosecution of a common law offence may amount to persecution if it involves excessive punishment in comparison of the offence. If the offence is not so serious in nature for which a person may be excluded from the refugee status under one of the exclusion clauses of the Convention or penal prosecution may itself amount to persecution if it is for a Conventional reason.¹⁴⁹ The UNHCR Handbook also mentioned, ‘prosecution’ amounts to persecution or not, to determine that it needs to refer the law of a country concerned. If the law is not in conformity with the standards of human rights law (i.e. International Covenants on Human Rights which contain binding commitments for the States parties and those instruments to which many States parties to the 1951 Convention have acceded) will amount to persecution¹⁵⁰. Or if the application of the law is discriminatory not the law itself than prosecution may amount persecution¹⁵¹.

Fear of persecution as a return asylum seeker will be justified for the refugee status. A person can leave his country of origin reason illegally or stay abroad without the consent of the State authority because of the fear of persecution on the Conventional grounds. But when the

¹⁴⁵ UNHCR Handbook (2011), pp 51.

¹⁴⁶ “An Introduction to International Protection. Protecting Persons of Concern to UNHCR”, page 56, “Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees”, April 2001, pp 17

¹⁴⁷ An Introduction to International Protection. Protecting Persons of Concern to UNHCR”, page 56,

¹⁴⁸ UNHCR Handbook, pp 52-55, UNHCR, “Advisory Opinion on the Interpretation of the Refugee Definition” (2004), pp 8.

¹⁴⁹ UNHCR Handbook, pp 56-59

¹⁵⁰ Ibid, pp 60

¹⁵¹ Ibid

legislation of his country of origin imposes severe penalties on him due to his illegal departure or unauthorized stay abroad¹⁵² in that situation the person's fear as a return asylum seeker can be justified for the refugee status.

- *View of the leading scholars-*

There is no uniform practice among the scholars to define the meaning of the term 'persecution' through academic and judicial interpretation are influential towards the development of the meaning of the term 'persecution'.

Leading scholars of international refugee law mentioned that the term 'persecution' consists of two essential elements. One is the serious violation of human rights and another one is the failure of state protection. Among the scholars **Zimmermann** view is that "the notion of 'persecution is interwoven with the protection of human rights" and "persecution often been referred to as the severe violation of human rights accompanied by a failure of the State to protect the individual"¹⁵³. Thus "persecution contains two elements namely a sufficiently severe human rights violation and a determination regarding the perpetrator of the violation".¹⁵⁴

Goodwin-Gill also mentioned that "fear of persecution and lack of protection are themselves interrelated elements¹⁵⁵". He explained that, to create a presumption as to the likelihood of persecution and to the well-foundedness of any fear, it is clearly needed that, the victim of persecution does not avail himself of the protection of his country of origin, and evidence shows there is a lack of State protection in his country of origin on either the internal or external level¹⁵⁶.

Hathaway and Foster also mentioned that the 'bifurcated understanding of the term' "being persecuted enquires two essential elements: one element is the 'serious harm and another is the 'failure of state protection'.¹⁵⁷ **Hathaway** explained that, "A person is a refugee only if he or she apprehends a form of harm that amounts to a risk of 'being persecuted'. This use of the passive voice (rather than 'persecution') signals the need to demonstrate a predicament of risk

¹⁵² UNHCR Handbook, pp 61

¹⁵³ Zimmermann, "the 1951 Convention relating to the Status of Refugees and its 1967 Protocol" (2011) P 345, pp 216.

¹⁵⁴ Ibid

¹⁵⁵ Guy S. Goodwin-Gill, Introductory note on "CONVENTION RELATING TO THE STATUS OF REFUGEES and PROTOCOL RELATING TO THE STATUS OF REFUGEES", United Nations Audiovisual Library of International Law, p 3, Available at <http://legal.un.org/avl/ha/prsr/prsr.html>

¹⁵⁶ Ibid

¹⁵⁷ Hathaway and Foster, The Law of the Refugee Status (2014), P 183-185

that calls for surrogate international protection”¹⁵⁸. He modifies the concept by including ‘sustained or systematic violation of human rights’. According to him,

*“the risk of being persecuted requires evidence of 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.”*¹⁵⁹

The first element in Hathaway’s test of persecution required that the “risk of ‘serious harm’ demonstrated in the sense of a risk to basic human rights. But this test does not restrict refugee status to persons able to show the possibility of consequences of life or death proportions”¹⁶⁰. And the second element is evidence that the individual's State cannot or will not respond to that risk.¹⁶¹

Hugo Storey Judge mentioned in a paper that –

*“Persecution consists in acts that are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights; or that are an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner”*¹⁶² but he argues that, “Persecution can arise even if the violations of human rights concerned are not “sustained”, “systematic” or “systemic” or “persistent.”¹⁶³

So from the above discussion, it is clear that there is an interrelation between the severe violation of human rights and the failure of state protection in regards to the construction of the term ‘persecution. But what is not clear is that which human rights violation constituting persecution? There are different approaches for the analyzation of the question. Leading

¹⁵⁸ Supra note 140 at pp 7.2.3, p 185

¹⁵⁹ Hathaway and Foster, *The Law of the Refugee Status* (2014), p 185, Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991, pp. 104-105

¹⁶⁰ Supra note 158

¹⁶¹ *ibid*

¹⁶² Hugo Storey, “What Constitutes Persecution? Towards a Working Definition”, *International Journal of Refugee Law*, 2014, volume 26, no 2: 272-285, p 13

¹⁶³ *ibid*

scholars of the International Refugee Law are using human rights norms as a framework for analyzing the types of harm that amount to ‘persecution’¹⁶⁴.

Hathaway first **introduced** the ‘human rights approach’ and again **Hathaway** and **Foster** in “the Law of Refugee Status” mentioned about the “human rights based approach’. They mentioned “human rights is the benchmark” to interpret the term “being persecuted.”¹⁶⁵ Because they argued that the context, object, and purpose of the 1951 Convention is the protection of human rights and from the Preamble of the Convention it is clear that the ‘human rights norms figure prominently in the Convention’s preamble’.¹⁶⁶ **Hathaway and Foster** also mentioned that “reliance on international human rights law to identify serious harm relevant to finding an individual to be at risk of “being persecuted” is both principled and practical”¹⁶⁷

Goodwin -Gill and Jane McAdam mentioned in ‘The Refugee in International Law’ that, “the general notion of persecution to be related to development within the broad field of human rights¹⁶⁸. And “such development takes the concept of persecution far beyond the grounds spelled out in the Refugee Convention.”¹⁶⁹

Gibney in the ‘Global Refugee Crisis’ pointed out that, “there is a direct connection between the notion of persecution and international human rights standards and there seems to be common agreement that the prospect of the denial of certain rights such as freedom from torture, the right to life, and liberty of the person, would constitute persecution”¹⁷⁰

According to **Hugo Storey**, Hathaway’s Human Rights based approach in ‘The Law of the Refugee Status’ is one of the dominant in the Refugee Law and ‘the locus classicus’¹⁷¹.

Hugo Storey also mentioned there is another approach named the ‘circumstantial approach’. This “approach ‘has its *locus classicus* in the 1979 UNHCR Handbook’ and ‘entails the

¹⁶⁴ De Andrade, Jose H. Fischel, “On the Development of the Concept of ‘Persecution’ in International Refugee Law”, *Brazilian Yearbook of International Law*, no. III, vol. 2, 2008, 114-136. P 123

¹⁶⁵ Hathaway and Foster, *The Law of the Refugee Status* (2014), p 193

¹⁶⁶ *Ibid*

¹⁶⁷ *Ibid* at p 206

¹⁶⁸ Goodwin-Gill and McAdam, *The Refugee in International Law* (2007), p 91, Ingo Venzke, “How Interpretation Makes International Law: On Semantic Change and Normative Twists (2012), p 124

¹⁶⁹ Goodwin-Gill and McAdam, *The Refugee in International Law* (2007), p.93, Ingo Venzke, *How Interpretation Makes International Law* (2012), p 124

¹⁷⁰ Gibney Mark, *global refugee crisis, A Reference Handbook*, 2nd Edition, ABC-CLIO, 2010, p 17

¹⁷¹ *Supra* 162 at p 6

conclusion that a human rights approach is unduly restrictive’.”¹⁷²The UNHCR Handbook includes ‘discrimination’ in the persecution list on the cumulative grounds, other severe human rights violation on the Conventional ground which already discussed in persecution in UNHCR perspective section¹⁷³.

Foster argued in the “International Refugee Law and Socio-Economic Rights” that through Hathaway’s Human Rights based are not universally accepted but “the human rights approach is generally agreed to be ‘the dominant view’.”¹⁷⁴

Erika Feller’s comments on persecution in 2002, who was the UNHCR’s then Director of International Protection makes it clear that the UNHCR approach is different from Hathaway’s ‘Human Rights approach’¹⁷⁵. According to **Erika Feller**,

“Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin”.¹⁷⁶

- ***Concluding Remarks***

In all these approaches violation of human rights is accepted by all as the element of persecution. But there is no unique approach to interpret the term ‘being persecuted’. There is a defense in opinion regarding the issue whether the violation of human rights or serious harm needs to be constitute systematic or sustained way and whether the International human rights norms is appropriate as a framework for analyzing the types of harm amount to ‘persecution to serve the purpose of the Convention.

¹⁷² *ibid*

¹⁷³ See, the UNHCR perspective in this section at page 37-38

¹⁷⁴ Michelle Foster, International Refugee Law and Socio-Economic Rights: Refuge from Deprivation, Cambridge University Press, 12 Jul 2007 at page 28-31

¹⁷⁵ Cited in Hugo Storey, ‘What Constitutes Persecution? Towards a Working Definition’ (2014), p 6

¹⁷⁶ *Ibid* and see, UN High Commissioner for Refugees (UNHCR), Statement by Ms. Erika Feller, Director, Department of International Protection, UNHCR, SCIFA (Brussels, 6 November 2002), 6 November 2002, available at <http://www.refworld.org/docid/42bab1b52.html> [accessed 23 April 2016]

The UNHCR interpretation of persecution includes situation where applicant life and freedom is being threatened for the Conventional reasons and also serious violation of human rights on the Conventional grounds of race, religion, nationality, political opinion or member of a particular social group. And the violation of human rights need not to be conducted always in systematic and repetitive way. The UNHCR circumstantial approach widens the interpretation of persecution by including ‘severe discrimination or various harm on cumulative grounds’. Scholars like Zimmermann mentioned that persecution often referred to a severe violation of human rights and consists of two elements. One is the serious violation of human rights and another is the failure of state protection.

Hathaway’s human rights based approach of interpreting the term ‘being persecuted’ also requires the violation of basic human rights but in the systematic or sustained way and failure of state protection. And to identify the violation of human rights according to Hathaway the International Human Rights Law is the appropriate framework. Hathaway’s human right approach works as a dominant view to interpret the them persecution. But Erika Feller opposed the view that the term persecution can be define on the basis of the human rights violation only.

a) Actors of persecution:

“Persecution is always conducted by one or more individuals that inflict harm on another individual or group of individuals”¹⁷⁷. The perpetrator of the harmful act or persecutory act can either be State actors that are persons acting on behalf of a State or non-State actors. “There is a widely accepted rule; persecution is carried out by State actors”¹⁷⁸ and thus refugee status can seek only against the persecution of State actors.

Regarding the rule **Zimmermann** argued that “from the wording of the Art 1 A (2) of Refugee Convention it is clear that Art. 1 A, para. 2 does not restrict the meaning of ‘persecution’ to *State* persecution as no reference to the State being the perpetrator of the persecution can be found”¹⁷⁹. The object and purpose of the Refugee Law are the ‘protection of an individual in case of severe and discriminatory human rights violations’¹⁸⁰ which is also not restricted the meaning of persecution to the State Protection only. Discriminatory human rights violations’

¹⁷⁷ Zimmermann, “the 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011), p 358. Pp 265

¹⁷⁸ Supra note 164 at p 125

¹⁷⁹ Supra note 177 at p 362, pp 283

¹⁸⁰ Ibid

can be done by non-State actors too. So elimination of the act or non -State actor not in line with the object and purpose of the refugee law.¹⁸¹.

Grahl-Madsen in the ‘Status of Refugees’ also mentioned that “It does make obvious sense from the perspective of the individual to treat refugees persecuted by non-State actors in the same way as those fleeing from State action, after all, they may just as destitute.”¹⁸²

The UNHCR’s view in the Handbook’s is that, act of the authorities of the State are normally known as persecution but paragraph 65 of the UNHCR Handbook makes it clear that acts of the non-State actors or agents are also consider under the 1951 Refugee Convention as persecution¹⁸³.” According to the UNHCR Handbook, “Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection”¹⁸⁴.

“Government of a country concerned if unable or unwilling to offer protection against persecution threatened by a non-State agent on one or more of the five Convention grounds or government facilitates, encourages, or tolerates acts of persecution by a non-State agent, such as a paramilitary organization, such persecution is covered by the Convention’s definition”¹⁸⁵.

- ***Concluding Observation-***

From the above discussion, it is clear that the actors of persecution can be State actors or non - State actors or can be both. The UNHCR Handbook and the Scholars have same concept on this point that actors of persecution include both State and non-State Agent. If persecution arises from State-actors that undoubtedly leads to refugee status but if persecution from non - State agent arises based on the Conventional ground it is necessary to demonstrate that State is failure to and unwilling to protect the person from the hand of the persecutor.

iv)Nexus Requirements

All person fleeing from persecution are not entitled to the protection under the Refugee Convention but “only those able to show that their fear of being persecuted is ‘for reasons of’

¹⁸¹ Ibid, p 363, pp 286

¹⁸² See Grahl-Madsen, ‘The Status of Refugees in International Law’ (1966), p 191 Cited in Ingo Venzke, “How Interpretation Makes International Law: On Semantic Change and Normative Twists (2012), p 125

¹⁸³ UNHCR Handbook, pp 65

¹⁸⁴ Ibid

¹⁸⁵ UNHCR, “An Introduction to International Protection. Protecting Persons of Concern to UNHCR”, page 56, pp 3.3.1

race, religion, nationality, membership of a particular social group or political opinion"¹⁸⁶ are entitled to the protection of the Refugee Convention."¹⁸⁷ So a person seeking asylum need to show his well-founded fear of persecution must have a causal link with one of the reasons stated in the Art 1A (2) of the Refugee Convention to be eligible for refugee status under the Convention¹⁸⁸. And the reasons mention in the refugee definition is race, religion, nationality, membership of a particular social group or political opinion.

Like the other elements of the Refugee definition, interpretation of this “for reason of” clause is important for the determination of the refugee status. **Zimmermann** mentioned that “the phrase ‘for reasons of’ and its determination are of increasing importance when dealing with claims for refugee status and have in some jurisdictions even become the most important reason for denying refugee status”¹⁸⁹. But “Art. 1A, para. 2 of the 1951 Convention does not provide any guidance as to the specific nature of the causal relationship required by the ‘for reasons of’ clause”¹⁹⁰. So there are different approaches to interpreting the clause ‘for reason of’ which require a causal relationship between the risk of being persecuted and the protected ground.

- *The UNHCR Approach-*

The UNHCR Handbook mentioned that, “persecution arises from any single one of these reasons or from a combination of two or more of the reason is not material”¹⁹¹ and in individual case combination of reasons of persecution may be relevant to evaluate the person’s well-founded fear.¹⁹² The UNHCR mentioned in the ‘Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’ that, “In the UNHCR practice, the Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause”¹⁹³.

One important aspect mentioned by the UNHCR in their Resettlement Handbook, 2011¹⁹⁴ that, “neutrality may also form the basis of a refugee claim, for example in the context of a civil

¹⁸⁶ Hathaway, James C. "The Causal Nexus in International Refugee Law." Foreword to Mich. J. Int'l L. 23, no. 2 (2002): 207-9, p 207

¹⁸⁷ Ibid

¹⁸⁸ UNHCR Handbook, pp 66

¹⁸⁹ Ibid

¹⁹⁰ Zimmermann, “the 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011), pp 323, p 372

¹⁹¹ UNHCR Handbook, pp 66

¹⁹² Ibid, pp 67

¹⁹³ UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees (2001), pp 23

¹⁹⁴ UN High Commissioner for Refugees (UNHCR), UNHCR Resettlement Handbook, 2011, July 2011, available at <http://www.refworld.org/docid/4ecb973c2.html> [accessed 20 May 2016]

war, as a person who remains neutral in such circumstances may be perceived by either side as a political opponent, which in turn may result in his/her persecution”¹⁹⁵

Other Approaches

There are also other approaches to interpreting the phrase ‘for reasons of’ developed by the leading scholars of International Refugee law. Some of the leading approaches are discussed here.

- ***‘But for test’ Approach***

Among the approaches to interpreting the phrase “for reasons of” the “but for test” according to **Zimmermann** is applied by the some common law countries.¹⁹⁶ “This test requires the individual to be able to demonstrate that the risk of being persecuted would not exist ‘but for’ a 1951 Convention ground.”¹⁹⁷ **Zimmermann** mentioned that “the test is criticized as being too high barrier for refugee applicants, especially in cases where the applicants fear of persecution because of a mixture of 1951 Convention grounds and non-1951 Convention grounds”¹⁹⁸.

- ***Motivation Approach***

Another approach called the ‘motivation approach’ which requires “to determine the ‘real motivation for the actions of the persecutor’ because the ‘potential persecutor intends to harm the applicant on the basis of the applicant’s (real or perceived) relationship to one of the 1951 Convention’s grounds’.”¹⁹⁹ **Zimmermann** argued, “where there is no evidence exists as to the intention of the persecutor this triggers the question of whether there really is a need to prove the intention of the persecutor in order to satisfy the nexus requirement of the 1951 Convention.”²⁰⁰ **Hathaway & Foster’s** opinion about the approach is that “establishing nexus via persecutory intent may be straightforward”²⁰¹ but “viewing persecutory intention as the exclusive method of establishing nexus imposes a difficult and, in some cases, impossible burden on applicants for refugee status”²⁰².

¹⁹⁵ Ibid at pp 3.4.4, p 85

¹⁹⁶ Zimmermann, “the 1951 Convention relating to the Status of Refugees and its 1967 *Protocol*” (2011) at pp 327, p 273, Michelle Foster, Causation in Context: Interpreting the Nexus Clause in the Refugee Convention, 23 MICH. 1. INT’L L. 265 (2002) at page 274

¹⁹⁷ Zimmermann, “the 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011) at pp 327, p 373

¹⁹⁸ Ibid

¹⁹⁹ Zimmermann, “the 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011) at pp 330, p 373

²⁰⁰ Ibid

²⁰¹ Hathaway and Foster, *The Law of the Refugee Status* (2014), pp 5.2.2, p 373

²⁰² Ibid

- ***Bifurcated Approach***

Hathaway mentioned that “In those States that have adopted the bifurcated understanding of 'being persecuted' the nexus can be to either of the two constituent elements – the serious harm or the failure of State protection-since in either case the predicament of 'being persecuted' is by reason of the Refugee Convention ground.”²⁰³ So at least one of the constituting element of the term “being persecuted” need to have a causal relationship with one or more of the Conventional grounds for the nexus requirements.

Hathaway & Foster also mentioned that “even where the perpetrator of the serious harm is thought to be motivated by personal or other non-Convention reasons, nexus is still established where the state is unwilling to protect for a Convention reason.”²⁰⁴ But there is some problem adopting this approach as **Hathaway** mentioned, “this approach fails to do justice to the protective goals of refugee law, and has proved particularly problematic where the home State is unwilling to afford protection to women on the grounds of their sex.”²⁰⁵

- ***The predicament approach***

Hathaway & Foster preferred the “predicament approach” to satisfy the nexus requirement of refugee definition. They mentioned that, “while it is still widely and frequently assumed that evidence of intention is the only method of satisfying the “for reasons of” clause in refugee law, there is an emerging “predicament approach” that more closely comports with the text, object, and purpose of the Convention”²⁰⁶.

“Predicament approach” requires that a Convention ground explains the reason of the applicant exposer to the risk of being persecuted to establish that there is a causal connection between a Convention ground and the reason for the applicant’s well-founded fear of being persecuted.²⁰⁷ Under this approach, the nexus clause can be satisfied without the evidence of the intention of the persecutor or State in withholding protection. **Hathaway & Foster** mentioned this “predicament approach focuses attention not simply on the intent of the persecutor or of the state in failing to protect, but more broadly on the reason for exposure to the risk”²⁰⁸.

- ***Contributing Cause Approach:***

²⁰³ Hathaway, "Refugees and Asylum." (2012), pp 7.2.5, p 187

²⁰⁴ Hathaway and Foster, *The Law of the Refugee Status* (2014), pp 5.2.2, p 373

²⁰⁵ *Supra* note 169

²⁰⁶ Hathaway and Foster, *The Law of the Refugee Status* (2014), pp 5.2.3, p 382

²⁰⁷ *Ibid* at p 376

²⁰⁸ *Ibid*

To satisfy the nexus requirement under the ‘contributing clause approach’ a Convention ground need not be the sole, or even the dominant cause of the risk of being persecuted, but it must be a contributing cause to the risk²⁰⁹. *Michelle Foster* mentioned that the “causation standers in refugee law should be context specific.”²¹⁰ And according to **Foster** "contributing cause" approach to causation best realizes the objectives of the Refugee Convention, taking account in particular of the practical context within which protection decisions must be made²¹¹.

- ***Concluding remarks:***

Regarding the interpretation of the phrase “for reason of” like other elements of refugee definition, there is no uniform practice among the State Parties to the Convention. And the domestic court of the States Parties may follow any of the approaches to determine the status of the refugee. Difference approaches to interpreting the phrase ‘for reasons of ‘may produce different outcome among the States. The ‘Motivation approach’ requires to examine the intention of the persecutor to inflict harm related to the Convention reason and the ‘bifurcated approach’ requires either the intention of the persecutor or the failure of state protection have a causal relationship with one or more of the Conventional grounds to satisfy nexus requirements of the refugee definition. Rejecting all these approach *Michelle Foster’s* preferred the “contributing clause approach” to satisfy the nexus requirement of the refugee definition. To fulfill the object of the Convention this approach requires ‘a Convention ground need not be the sole, or even the dominant cause of the risk of being persecuted, but it must be a contributing cause to the risk’. The **UNHCR** also adopt the approach of ‘contributing clause’. But **Hathaway** preferred the ‘predicament approach’ to satisfy the object, purpose of the Convention. According to this evidence of the intention of the persecutor or State in withholding protection is not required, it is enough if a Convention ground explains the reason of the applicant exposer to the risk of being persecuted. But none of this predicament or contributing clause approaches are always mutually exclusive.

v) Convention Grounds

²⁰⁹ Michelle Foster, Causation in Context: Interpreting the Nexus Clause in the Refugee Convention, 23 MICH. 1. INTL L. 265 (2002) at page 338

²¹⁰ Ibid at page 291, Hathaway, James C. "The Causal Nexus in International Refugee Law." Foreword to Mich. J. Int'l L. 23, no. 2 (2002): 207-9, p 209

²¹¹ M. Foster cited in Hathaway, James C. "The Causal Nexus in International Refugee Law." Foreword to Mich. J. Int'l L. 23, no. 2 (2002): 207-9, p 209, Michelle Foster, Causation in Context, 2002 at page 340

Tamil asylum seekers from Sri Lanka faced real risk of harm basis of their Tamil ethnicity (race) and their certain perceived or actual links to the LTTE (imputed political opinion) according to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka issued on 21 December 2012²¹². This section discussed those Convention grounds (race and political opinion) that are related to the persecution of the Tamil mentioned in the UNHCR Guidelines.

Race

The notion never specifically defines by the Refugee Convention²¹³. The UNHCR Handbook defines the notion of “Race... has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as “races” in common usage”. So in the wider context ‘race’ includes color, descent or national or ethnic origin²¹⁴ and furthermore, ‘it entails members of a specific social group of common descent forming a minority within a larger population’²¹⁵.

Discrimination on the basis of ‘race’ is one of the severe violation of human rights so “racial discrimination is an important element in establishing persecution in the sense of 1951 Refugee Convention”.²¹⁶ The UNHCR Handbook also mentioned that “the mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status”²¹⁷ but when in a particular situation such group affected then membership in such group is enough to prove fear of persecution²¹⁸.

The wider understanding of the notion ‘race’ also accepted by the scholars of the International Refugee Law. According to **Hathaway**, “all kind of identifiable ethnicity are included in ‘race’²¹⁹ and “race” for the Convention purposes may be defined by ethnicity or cultural or linguistic distinctiveness...”²²⁰ To explain his words **Hathaway** adopted **Grahl-Madsen** observation on race and mentioned that “the Convention’s notion of race includes not only

²¹² UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 21 December 2012, HCR/EG/LKA/12/04.

²¹³ Gibney, global refugee crisis, A Reference Handbook (2010) p 18, Hathaway & Foster, The Law of the Refugee Status (2014), p 394, pp 5.5

²¹⁴ Declaration and Action Programme on Racism, Racial Discrimination, Xenophobia and Related Intolerance, para. 2 cited in Migration and International Human Rights Law. Practitioners Guide No. 6, International Commission of Jurists, 2014, p 58

²¹⁵ UNHCR Handbook (2011), pp 68, Migration and International Human Rights Law. Practitioners Guide No. 6, p 58

²¹⁶ *ibid*

²¹⁷ UNHCR Handbook, pp 70

²¹⁸ *Ibid*

²¹⁹ Hathaway, "Refugees and Asylum." In Foundations of International Migration Law, (2012), P 187, pp 7.2.5

²²⁰ Hathaway and M. Foster, The Law of the Refugee Status (2014), p 396, pp 5.5

persons at risk by reason of their membership in a particular racial category, but also other groups.... defined by physical, linguistic, or cultural distinctiveness.”²²¹

Scholars like **Zimmermann and Hathaway** observed that, for the border understanding of the notion ‘race’ there is “chances of overlapping of the Conventional ground ‘race’ with other Conventional grounds like religion, nationality and membership of a particular social group but this is not problematic as claims may be based on one or a combination of grounds mentioned in Art. 1 A, para. 2 of the 1951 Convention.”²²²

The wider understanding of the definition ‘race’ in the UNHCR Handbook ‘is in harmony with the definition of the ‘racial discrimination’ set out in the 1966 Covenant on the Elimination of all Forms of Racial Discrimination, (ICERD) mentioned by **Hathaway and Gibney**.²²³ Article-1 of the ICERD²²⁴ defines “racial discrimination” as including differential treatment based on “race, color, descent, or national or ethnic origin”²²⁵. **Goodwin -Gill and Jane McAdam** in ‘The Refugee in International Law’ also mentioned that the “account should be taken of art-1 of the 1966 Covenant on the Elimination of all Forms of Racial Discrimination which defines that practice to include distinction based on race, color, descent, or national or ethnic origin .”²²⁶

Political opinion-

‘The term ‘political’ generally indicate about something which is “connected with the state, government or public affairs”²²⁷. “Art 1A (2) of the Refugee Convention contains liberal board

²²¹ A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. I, 1966), p 218 Cited in Hathaway & Foster, *The Law of the Refugee Status* (2014), p 394, pp 5.5

²²² Zimmermann, “The 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011), p 376., Pp 338, Hathaway& Foster, *The Law of the Refugee Status* (2014).

²²³ Gibney, *global refugee crisis, A Reference Handbook* (2010) p 19, Hathaway, *The Law of the Refugee Status* (2014), p 396

²²⁴ According to the art -1 of the Covenant on the Elimination of all Forms of Racial Discrimination 1966, “...the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” See, Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, entered into force Jan. 4, 1969, 660 UNTS 195 (“Race Convention”)

²²⁵ Hathaway& Foster, *The Law of the Refugee Status* (2014), p 396, pp 5.5

²²⁶ Goodwin-Gill and McAdam, *The Refugee in International Law* (2007), p 70

²²⁷ Zimmermann, “the 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011), p 398, pp 421

understanding of the term ‘political opinion’ for the purpose of the Convention.”²²⁸ And this view is confirmed by the drafting history of the convention,”²²⁹ mentioned by **Zimmerman** in a commentary regarding ‘The 1951 Convention relating to the Status of Refugees and 1967 Protocol’²³⁰ and reaffirmed by **Hathaway and Foster** in ‘Law of the Refugee Status’²³¹. For the liberal interpretation and border understanding of the notion ‘political opinion’, “1951 Refugee Convention term ‘political opinion’ should be understood in relation to developments in human rights law”²³² to cover “any opinion on any matter in which the machinery of state, government, and policy may be engaged”.²³³

International Human Rights Law especially, interpretations of Art. 19 of the International Covenant on Civil and Political Rights ‘1966 (ICCPR) and Art 19 of the Universal Declaration of Human Rights(UDHR) confirmed the liberal interpretation of the term ‘political opinion’²³⁴. Article 19 of the UDHR mentioned, ‘Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’²³⁵ Art 19 of the ICCPR²³⁶ also mentioned the same principle of the Art 19 of the UDHR.²³⁷

The UNHCR Handbook also took the liberal interpretation of the term ‘political opinion’ with confirmation of the international Human Rights norms. According to the UNHCR Handbook, individual holding or expressing political opinion opposite to the Government or ruling party for which he/she fear of persecution by the authority will create ground for refugee claim²³⁸. The UNHCR Handbook further clarify that to eligible for the refugee status under the Convention, the element fear of persecution can be based on the person’s political view or opinion. But the “individual must has to hold an opinion that either has been expressed and has

²²⁸ Ibid, p 399, Pp 421 and Hathaway & Foster, *The Law of the Refugee Status* (2014), p 405, pp 5.8

²²⁹Zimmermann, “the 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2011), p 399, Pp 421, Hathaway & Foster, *The Law of the Refugee Status* (2014), p 405, pp 5.8

²³⁰ Supra note 227

²³¹ Hathaway & Foster, *The Law of the Refugee Status* (2014), p 405, pp 5.8

²³² Goodwin-Gill and McAdam, *The Refugee in International Law* (2007), p 87

²³³Supra note 231 at p 406, pp 5.8, Goodwin-Gill and McAdam, *The Refugee in International Law* (2007), p 87

²³⁴ Supra note 230 at pp 423

²³⁵ See Art 19 of the, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 25 April 2016] and Supra note 219

²³⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 25 April 2016]

²³⁷ Ibid and Supra note 235

²³⁸ UNHCR Handbook (2011), para 80

come to the attention of the authorities, or in respect of which there is a reasonable possibility that the authorities will become aware for which he will be persecuted or the person is persecuted because perceived by the authorities to hold a certain political opinion”²³⁹

Even the individual holds an opinion opposite to the Government or the ruling party, he does not require show that he already expressed his opinion through speeches or in writing before his refugee claim. It is enough to show that the person political behavior will lead him to persecution by the authority on that ground.²⁴⁰

The UNHCR Handbook also mentioned that it may be the case where “a person has suffered any discrimination or persecution by the authority because he has concealed his political opinion but still he has fear of persecution and refuse to avail himself of the protection of his Government, or a refused to return. Here may be the reason of refusing to return or avail himself of the protection of his Government is the applicant’s true state of mind which give rise to fear of persecution that he will be persecuted if he returns”²⁴¹. “In such circumstances, the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned”²⁴².

- *Concluding remarks*

The UNHCR view is that a person can seek asylum on the basis of the race and political opinion that he has fear being persecuted relating to this conventional ground. Only membership of an ethnic group or particular social group will not make a person eligible for the refugee status. There need to be shown that the group suffer persecution because of their ethnicity. However, if a person holds an opinion opposite to the Government or the ruling party and never expressed his opinion, it is enough to show for the refugee claim that he will be persecuted by the authority because of his political behavior.

Hathaway’s concept regarding the term ‘race’ is that ‘race’ includes all group defined by racial, physical, linguistic or cultural distinctiveness. And according to Hathaway’s concept of ‘political opinion’, the understanding of the term ‘political opinion’ should be in relation to the development of human rights to include any opinion on any matter related to the machinery of

²³⁹ Migration and International Human Rights Law. Practitioners Guide No. 6, p 59, UNHCR Handbook, paras 80-86

²⁴⁰ Gibney, ‘global refugee crisis’, A Reference Handbook (2010), p 19, UNHCR Handbook, paras 80-82

²⁴¹ UNHCR Handbook, para 83

²⁴² Ibid

State, Government, and policy. The UNHCR also adopt the interpretation of the term ‘political opinion with the conformity of Human Rights norms.

In the adjudication of the asylum applications, credibility assessment is an important part together with the interpretation of the definition of the refugee. Applicant may have denied to grant the refugee protection in any specific country where he seeks asylum on the ground of his impugned credibility. So the next section discussed the assessment of the credibility of the applicant in the asylum claim.

3.3 Assessment of the Credibility

When a person claims refugee status, he will be qualified for the protection under the Refugee Convention if the person has a well-founded fear of being persecuted for one of the Convention reasons. In asylum procedures, it is necessary to determine whether an applicant has such a well-founded fear which can be determined from the relevant statement of the applicant and evidence related to the claim. In this context assessment of credibility plays a central role in the process of refugee status determination.²⁴³

The UNHCR Handbook mentioned that in order to establish subjective and objective element of the case related to the refugee status claim of applicant assessment of the applicant’s credibility and evaluation of the evidence is necessary²⁴⁴.

The word ‘credible’ is normally defined as “able to be believed or convincing.”²⁴⁵”In the context of refugee law “the term ‘credibility assessment’ is used to refer to the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decision-makers, and determining whether the statements of the applicant relating to the material elements of the claim can be accepted, for the purpose of the

²⁴³ According to the UNHCR report, ‘*Beyond Proof, Credibility Assessment in EU Asylum Systems*’, “The term credibility is used to refer to the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decision maker, and determining whether the statements of the applicant relating to material elements of the claim can be accepted, for the purpose of the determination of qualification for refugee and/or subsidiary protection status”. See UN High Commissioner for Refugees (UNHCR), *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, page 13, available at <http://www.refworld.org/docid/519b1fb54.html> [accessed 26 April 2016]

²⁴⁴ UNHCR Handbook, pp 205

²⁴⁵ (UNHCR), *Beyond Proof, Credibility Assessment in EU Asylum Systems*, 2013, p 27, *The Concise Oxford Dictionary*, Ninth Edition, Oxford University Press, 1995

determination of qualification for refugee a status”²⁴⁶. “The credibility assessment involves a determination of whether and which of the applicant’s statements and other evidence can be accepted, and therefore may be taken into account in the analysis of well-founded fear of persecution and real risk of serious harm.”²⁴⁷

“The aim, of the credibility assessment is not to determine the accuracy of statements provided by an applicant instead, is to determine what relevant information provided by the applicant should be considered for the purpose of the determination of qualification for refugee and subsidiary protection status” mentioned by the UNHCR in the report regarding credibility assessment in EU asylum systems.²⁴⁸

The 1951 Refugee Convention and other international Refugee Law instruments do not specifically regulate the procedures relating to the determination of the refugee status. So there is no common approach practiced by the State Parties for the assessment of credibility of the applicant ²⁴⁹.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status²⁵⁰ and the UNHCR Note on Burden and Standard of Proof mentioned, different approaches are in practice within the national jurisdiction of different States Parties to the Convention which result different outcome of similar type of cases among the States Parties.²⁵¹

Later the UNHCR published report on the credibility assessment in EU asylum systems which provides an international standard, better structured and harmonized credibility assessment practices in asylum procedures conducted by the EU Member States.²⁵² This report includes Guidelines from the UNHCR Handbook and UNHCR Note on Burden and Standard of Proof. This UNHCR report also mentioned that States authority need to follow some standers and principles for the assessment of credibility²⁵³. And the principles are the principle of shared

²⁴⁶ UNHCR report, ‘Beyond Proof, 2013, p 27

²⁴⁷ *ibid*

²⁴⁸ UNHCR, Beyond Proof, p 28

²⁴⁹ *Ibid*, p15, UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, pp 2, available at <http://www.refworld.org/docid/3ae6b3338.html> [accessed 26 April 2016]

²⁵⁰ UNHCR Handbook, pp 195–205

²⁵¹ UNHCR, note on Burden and Standard of Proof, 1998, pp 2

²⁵² (UNHCR), *Beyond Proof*, May 2013

²⁵³ *Ibid*, p 34-50

duty²⁵⁴, principle of benefit of doubt²⁵⁵, individual assessment of applicant.²⁵⁶ Also need to apply the principles of objective and impartial assessment of claim, focus on the material claim, assessment need to be based on the material facts and creditability assessment need to be clear and structured approach²⁵⁷.

Moreover, in the assessment of credibility to minimize the subjectivity, authorities need to use the credibility indicators.²⁵⁸ Indicators included in the report are assessment of sufficient and specific individual and contextual detail of the applicant, assessment of the internal consistency of the applicant statements²⁵⁹. “Consistency in the facts asserted by the applicant with any statements made by dependents, other family members, or witnesses may be also considered an indicator of credibility”²⁶⁰.

Consistency in the applicant statements regarding the specific and general information which includes country of origin information (COI), is also an important indicator for assessment of credibility²⁶¹. Also “the authority must be careful not to base a credibility finding on subjective assumptions, preconceptions, conjecture and speculation, but rather on independent, objective, reliable and time-appropriate evidence”²⁶² which is known as ‘plausibility’. Finally, the authority need to use the applicant’s ‘demeanour’²⁶³ as an indicator. ‘Demeanour’ refers the examination of the applicant behavior, expression and manner during his personal interview.

²⁵⁴The UNHCR report mentioned, shared duty means “duty to provide statements and submit documentary or other evidence in support of an application lies in principle with the Applicant”. see UNHCR, *Beyond Proof*, p 255

²⁵⁵ According to the UNHCR report on credibility assessment, “decisions can involve matters of life and death, and because, despite the best efforts of the Applicant and the authority to gather evidence in support of the material facts, there may still be a measure of doubt on some facts, consideration of the principle of the benefit of the doubt is often needed. see *Ibid*, p 255

²⁵⁶“Credibility assessment must be conducted on an individual basis taking into account the individual and contextual circumstances of the Applicant” see UNHCR, *Beyond Proof*, p 255

²⁵⁷ *Ibid*

²⁵⁸ UNHCR, *Beyond Proof*, p 135-191

²⁵⁹ According to the UNHCR report ‘internal consistency of the applicant statements ‘means applicant consistency within an interview, or within the written and oral statements, or between the statements and documentary or other evidence submitted by the applicant, see *Ibid*, p 260

²⁶⁰ UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems*. *ibid*

²⁶¹ The UNHCR view on credibility assessment report is that ‘the authority must assess the credibility of the material facts presented by the applicant against what is generally known about the situation in the country of origin or place of habitual residence; accurate, independent and time appropriate COI; available specific information; or other expert evidence (medical, anthropological, language analysis, document verification reports.’ See UNHCR report ‘*Beyond Proof, Credibility Assessment in EU Asylum Systems*, p 260

²⁶² UNHCR report ‘*Beyond Proof, Credibility Assessment in EU Asylum Systems*, p 260

²⁶³ In the UNHCR report on credibility assessment, the term ‘demeanour’ mentioned as “the term describes the outward behavior and manner of a person, including their manner of acting, expression or reply (for example, hesitant, reticent, evasive,

The UNHCR report, in the conclusion, described to the States Parties the necessity of the structured approach to the assessment of the credibility. According to this report, “the absence of a structured approach may lead to a failure to apply key principles and standards underpinning the assessment of credibility. Moreover, a structured approach contributes to the objective of similar cases being decided in a similar way.”²⁶⁴

- *Views of the Scholars*

Hathaway & Foster in “The law of the Refugee Status” discussed the relevancy of the related country of origin information, necessity of the applicant evidence including credibility assessment of the applicant for the assessment of the well-founded fear.²⁶⁵ **Hathaway’s** objective approach of assessing well-founded fear makes the credibility assessment is a relevant part of the determination of the well-founded fear of the applicant based on the Convention reasons²⁶⁶.

Hathaway & Foster in “The law of the Refugee Status” also indicated about the problems regarding the credibility assessment practiced by the States. One of the problem is the decision maker’s preconception regarding the claim of the applicant. Decision makers often have preconception that the applicant wants to seek asylum to secure immigration benefit or the applicant is an economic migrant. This preconception of the decision makers negatively affects the assessment of applicant credibility. Regarding this issue, **Hathaway and Foster** argued that-

*“In keeping with the general principle that a person is a refugee so long as she has a well-founded fear of being persecuted for a Convention reason, whatever her other goals or ambitions, the credibility of her testimony as regards protection needs must be assessed without regard to the fact that she wishes to live in the asylum state, or is otherwise committed to migration”*²⁶⁷

confident, spontaneous, or direct), tone of voice, modulation or pace of speech, facial expression, eye contact, emotion, physical posture, and other non-verbal communication. See UNHCR report ‘*Beyond Proof, Credibility Assessment in EU Asylum Systems*, p 185

²⁶⁴UNHCR report ‘*Beyond Proof, Credibility Assessment in EU Asylum Systems*, p 250

²⁶⁵ Hathaway & Foster, “The Law of the Refugee Status” (2014), p 105-174

²⁶⁶ Ibid

²⁶⁷ Supra note 265 at pp 2.6.1, p 139

Hathaway & Foster also mentioned about the indicators used in credibility assessment of the applicant. According to them, “the assessment of credibility necessarily involves more nuanced forms of analysis. In practice, credibility assessment is most commonly conducted on the basis of an assessment of the (1) plausibility, (2) relevant knowledge, (3) demeanor, and (4) consistency of testimony.”²⁶⁸ However, they found using these indicators to assess the credibility of the applicant is associated with problem as they mentioned, “the tools available to assess the credibility of an applicant’s testimony are each highly flawed.”²⁶⁹

Regarding the use of ‘plausibility’ and ‘relevant knowledge’ in the credibility assessment, Hathaway and foster argued that “reliance on plausibility is prone to inferences based on assumptions of rationality often at odds with conditions in the country of origin. Moreover, the use of knowledge tests is problematic. This test gives difficulties to identify both true core knowledge and knowledge that is appropriate to a person in the applicant’s particular circumstances.”²⁷⁰

The use of ‘demeanor’ in the credibility assessment according to them, negatively affect the credibility of the applicant. **Hathaway and Foster** mentioned that “demeanor assessment is of necessity benchmarked against some assumption of universal normalcy (which does not actually exist), and can prove especially ill-suited to assessing the claims of women, children, and victims of trauma.”²⁷¹ The reason is that “a person who have undergone trauma often present with symptoms of “depression, indecisiveness, indifference, poor concentration, long pauses before answering, as well as avoidance or disassociation” – precisely the sorts of symptoms that will make demeanor seem less than normal.”²⁷²

Hathaway and Foster also mentioned about the problem associated with the use of ‘consistency of testimony’ in credibility assessment. Use of this indicator also negatively affects some people like people suffer torture, sexual violence, mental ill- health etc. According to them, “the applicant’s testimony may not be adjudged unreliable on the basis of inconsistencies in “isolated snippets of [the] record” the inconsistencies identified must rather call into question an important component of the applicant’s evidence that is needed to establish the existence of a relevant well-founded fear.”²⁷³

²⁶⁸ Ibid

²⁶⁹ Ibid at 148

²⁷⁰ Ibid

²⁷¹ Hathaway & Foster, “The Law of the Refugee Status” (2014), pp 2.6.1 p 149

²⁷² Ibid at page 143

²⁷³ Hathaway & Foster, “The Law of the Refugee Status” (2014), pp 2.6.1, p 148

Finally, they come to the decision that “Real caution is thus appropriate before any adverse inference regarding credibility is drawn on one of these bases.”²⁷⁴

- *Concluding Remarks*

The assessment of the credibility of the applicant is the difficult part in the asylum procedure. But it also plays a central role in the refugee status determination process. The UNHCR report on credibility assessment provides guidelines to the States for the successfully Credibility assessment in the asylum claim. The UNHCR mentioned about the necessity of the structured approach for the credibility assessment and give guideline to States to use the indicators for credibility assessment. Regarding the use of indicators, Hathaway and Foster’s oppose the UNHCR guideline. According to them use of the indicator in assessment of credibility is associated with problem which should be acknowledged²⁷⁵ and need to take real caution before any decision based on the use of the tools of available credibility assessment²⁷⁶.

Like the interpretation of the elements of refugee definition, for the credibility assessment of the applicant there is no uniform practice among the State Parties to the Convention. States may follow the guidelines of the UNHCR report on Credibility Assessment or may use the approach develop by their judicial body for the credibility assessment of the applicant. But the difference in approaches to the assessment of credibility may result in different outcome even for the same group of people in different States.

The next chapter four and chapter five examined how Australia and New Zealand determined the Refugee Status of “Tamil”. Discussion regarding the application of the Refugee Convention in Australian and New Zealand domestic Law has mentioned. And the interpretation of the elements of the refugee definition by these two States judicial body mentioned to examine the difference or similarities between the two States.

²⁷⁴ Ibid at page 149

²⁷⁵ Ibid

²⁷⁶ Ibid

Chapter -4: Analysis of the Australian case law

*4.1 Refugee legislation in Australia*²⁷⁷:

Australia is a signatory State of the 1951 Refugee Convention and its 1967 Protocol. Australia has an obligation to protect those who fall within the definition of refugees under the 1951 Refugee Convention fleeing from persecution. Australia also has international obligations to respect and protect the human rights of the refugee and asylum seeker under the various international human rights instruments²⁷⁸. Under the various international instruments like (the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International human rights instrument like International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC)) Australia has also protection obligations towards the people who have not been recognized as a refugee. These people are not recognized as refugee but they are fleeing from persecution as they faced violation of their human rights under these instruments. And there is a real risk that these people would suffer the violation of their human rights under this instrument, if they send back to the third countries from Australia²⁷⁹.

In the domestic level, Migration Act 1958 (The Act)²⁸⁰ deals with the entry and presence of non-citizen in Australia, and departure or deportation of non-citizen from Australia²⁸¹. In

²⁷⁷ Refugee legislation in Australia govern by the Migration Act 1958(cth) which includes lots of amendments and refugee legislation in Australia includes wide range of information under the Act. But for the purpose of the project this chapter only discussed relevant issues with refugee definition and meaning of the different terms in Australian Migration Act and general overview of the process related to the refugee status determination in Australia.

²⁷⁸ International human rights instruments like International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights(ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC).

²⁷⁹ Asylum seeker and refugee guide, Australian Human Rights Commissions, last updated 14th August ,2015 available at <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/asylum-seekers-and-refugees-guide>

²⁸⁰ Australia: Act No. 62 of 1958, Migration Act 1958 - Volume 1 [Australia], 8 October 1958, (Act No. 62 of 1958 as amended, taking into account amendments up to Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.) available at <http://www.refworld.org/docid/4e23f3962.html> [accessed 17 March 2016]

²⁸¹According to the sec 4 of the Migration Act 1958, “**Object of Act-** (1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act is the only source of the right of non-citizens to so enter or remain. (3) To advance its object, this Act provides for non-citizens and citizens to be required to provide personal identifiers for the purposes of this Act or the regulations. (4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act. (5) To advance its object, this Act provides for the taking of unauthorised maritime arrivals”. *ibid*

Australian, asylum seekers through the Australian onshore component of Refugee and Humanitarian Program²⁸² can apply for the protection Visa²⁸³ under Migration Regulations 1994 (*Cth*) (The Regulations),²⁸⁴ made under the Migration Act 1958. This protection visa, in part, a mechanism by which Australia ensures its obligations under the principle of non-refoulement²⁸⁵ as a signatory of the Refugee Convention by incorporating Art 1 A (2) of the Refugee Convention into their domestic law²⁸⁶.

The Migration Act made provision to grant a protection visa to a ‘non-citizen in Australia under its Section 36(2). According to the Sec-36(2a) “A non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol”²⁸⁷. So the applicant for the protection visa must meet one

²⁸²“Australian Refugee and Humanitarian Program has two main components: offshore resettlement for people who are found to be refugees (and others whose need for protection has been acknowledged) in another country before they come to Australia, and onshore protection for people who come to Australia with a valid visa and make a successful claim for asylum after they arrive”, see Refugee law in Australia, Australian Law Reform Commission, available at

<http://www.alrc.gov.au/publications/22-refugee-law/refugee-law-australia-0>. And Temporary and Permanent residence visa granted under both offshore and onshore components, see Vrachnas John & Boyd Kim & Bagaric Mirko, & Dimopoulos Penny, Migration and Refugee Law, Principles and Practice in Australia, Cambridge University Press (2005).

²⁸³ Protection Visa (Class XA) (Subclass 866) regulated by the Migration Regulations 1994 (*Cth*) Schedule 2 and Section 35(2) of Migration Act 1958 make provisions regarding the Protection Visas with classes of visas. See Migration Act 1958, Volume 1, (compilation no 126, compilation date 16th February 2016, registered 16 February 2016, include amendments up to Act no 161 of 2016).

²⁸⁴ Protection visas, Chapter -1, Guide to refugee law in Australia, Migration and Refugee Division Legal Service, Tribunal, Commonwealth of Australia, 2016, p 4, available at

http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20Law/Chapter1_Protection_Visas.pdf, National Legislative Bodies / National Authorities, Australia: Statutory Rules 1994 No. 268, Migration Regulations 1994, Volume 5, 1 September 1994, available at <http://www.refworld.org/docid/4e23f7a82.html> [accessed 18 March 2016]

²⁸⁵ According to the Art 33 of the Refugee Convention States have obligations not to return a person in any manner whatsoever to the frontiers of territories where the person’s life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. See Convention Relating to the Status of Refugees, 189 UNTS 151 (entered into force on 22 April 1954). And Guide to refugee law in Australia, Migration and Refugee Division Legal Service, Administrative Appeals Tribunal, Commonwealth of Australia 2016.

²⁸⁶ Refugee Law: Refugee law in Australia. Australian Law Reform Commission, Published on 20 May 2010, Last modified on 22 July 2014, available at <http://www.alrc.gov.au/publications/22-refugee-law/refugee-law-australia-0>.

²⁸⁷“For protection visa applications made prior to 16 December 2014, s.36(2)(a) of the Act effectively draws into municipal law the Convention definition of ‘refugee’ contained in Article 1. However, for applications made on or after that date, the Act does not refer to the Convention, but instead defines ‘refugee’ for the purpose of s.36(2)(a), drawing on concepts from the Convention definition” Sec Protection visas, , Chapter -1 ,Guide to refugee law in Australia , 2016 p 4 and 36 (2) of Migration Act 1958, Volume 1 [Australia], 8 October 1958, (Act No. 62 of 1958 as amended, taking into account amendments up to Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.)

of the alternative criteria in s.36(2)(a), (aa), (b), or (c)²⁸⁸. “That is, the applicant is either a person in respect of whom Australia has protection obligations under the ‘refugee’ criterion, or on other ‘complementary protection’ grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class²⁸⁹. “If any applicant is failed to meet the refugee criterion in s.36(2)(a), that applicant may nevertheless meet the criteria for the grant of a protection visa if he or she is a non- citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations”²⁹⁰

4.1.1 The Migration Act ‘1958

In Australia, the term “**Refugee**” also bear the same meaning as define in the Art 1A (2)²⁹¹ of the Refugee Convention. According to the section 5H of the Migration Act 1958 “refugee” means the person who is outside the country of his or her nationality or former habitual residence and owing to a well-founded fear of being persecuted, is unable or unwilling to return to it²⁹².

Regarding the term “**well-founded fear of persecution**” Sec 5J (1)(a) mentioned that, “the person has a well-founded fear of persecution if the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”²⁹³

²⁸⁸ Section 36 (2) (aa),(b),(c)of the Migration Act 1958 mention that, (aa)“a non-citizen in Australia (other than a non-citizen mentioned in sec 36 (2) paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.(b)a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and (ii) holds a protection visa of the same class as that applied for by the applicant; or (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who: (i) is mentioned in paragraph (aa); and (ii) holds a protection visa of the same class as that applied for by the applicant” (the complementary protection criterion). see the Migration Act 1958 - Volume 1, compilation no 126.

²⁸⁹ RRT Case No. 1405747, Australia: Refugee Review Tribunal, 5 May 2015, available at <http://www.refworld.org/docid/55b210a94.html> [accessed 16 March 2016]

²⁹⁰ *ibid*

²⁹¹ See Art 1A (2) of the 1951 Refugee Convention” See the Convention Relating to the Status of Refugees, 189 UNTS 151.

²⁹² According to Sec 5H(1) of the Migration Act 1958 “Refugee” mean “, the person is a refugee if the person: (a) in a case where the person has a nationality--is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or (b) in a case where the person does not have a nationality--is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it”. See Sec 5H (1) of the Migration Act 1958, Act No. 161, 2015

²⁹³According to the Sec 5J (1) of the Migration Act 1958,” for the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if: (a) the person fears being persecuted for reasons

The Migration Act extend the term “well-founded fear of persecution” in sec 5J (1)(b) and Sec 5J(1)(c) by including, real chance of future persecution if the person returns to the receiving country for one or more Conventional reasons or all area of a receiving country.²⁹⁴

The Australian High Court also acknowledged the elements of refugee definition in the case *MIEA v Guo & Anor*²⁹⁵ by referring that “the definition of "refugee" in the Art 1A (2) of the Convention contains four key elements:

(1) the applicant must be outside his or her country of nationality; (2) the applicant must fear "persecution";

(3) the applicant must fear such persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and (4) the applicant must have a "well-founded" fear of persecution for one of the Convention reasons.”²⁹⁶

For the application of the Migration Act and the Regulations to a particular person, some aspects of the Art-1A (2) of the 1951 Convention qualified by the Act.²⁹⁷ The term “**Persecution**” qualified by the Sec 91R of the Migration Act. According to the Sec 91R (1) of the Migration Act, “Art 1A (2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct”²⁹⁸.

Sec 91R (2) of the Migration Act provides a non-exhaustive list of instances of ‘**serious harm**’ which includes-

of race, religion, nationality, membership of a particular social group or political opinion; and (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and (c) the real chance of persecution relates to all areas of a receiving country, See Sec 5J(1) of the Migration Act 1958 , Act No. 161, 2015

²⁹⁴ Ibid, Sec 5J(1)(b) & 5J (1) (C) of the Migration Act 1958, Act No. 161, 2015

²⁹⁵ Minister for Immigration and Ethnic Affairs v Guo Wei Rong and Anor, S151 1996, Australia: High Court, 13 June 1997, available at: <http://www.refworld.org/docid/3ae6b703c.html> [accessed 19 March 2016]

²⁹⁶ *ibid*

²⁹⁷ Vrachnas John & Boyd Kim & Bagaric Mirko, & Dimopoulos Penny, Migration and Refugee Law, Principles and Practice in Australia, Cambridge University Press (2005), p 221 and see Refugee Law: Refugee law in Australia. Australian Law Reform Commission, Published on 20 May 2010.

²⁹⁸ Sec 91R (1) of Migration Act 1958, Australia: Act No. 62 of 1958, Migration Act 1958 - Volume 1 [Australia], 8 October 1958 and see Asylum seeker and refugee guide, Australian Human Rights Commissions, last updated 14th August ,2015

“a) a threat to the person’s life or liberty; b) significant physical harassment of the person’s; c) significant physical ill-treatment of the person; d) significant economic hardship that threatens the person’s capacity to subsist; and e) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.”²⁹⁹

The Migration Act 1958 made provision regarding the membership of a particular social group in sec 91S. This Sec requires that the decision makers to disregard the membership of a particular social group that consists of the applicant’s family in a situation where any fear of persecution or persecution which has never experienced by the applicant or any of the applicant’s family member. Also the reason for the fear or persecution does not base on any reasons mentioned in Art 1A (2) of Refugee Convention.³⁰⁰

Regarding the provisions of cessation and exclusion, the Migration Act 1958 mentioned that “if a person has committed war crime, crime against humanity, serious non-political crime before entering Australia or guilty for acts contrary to the purposes and principles of the United Nations then they will not be recognized as refugee.”³⁰¹ Furthermore, the Migration Act excludes the applicant “who has a right to enter and reside in the third country where he does not have a fear of persecution under the Sec 36(2) to Sec 36(6).”³⁰²

The Department of Immigration and Border Protection are primarily responsible for the assessment of a person refugee claim for a protection visa in Australia under the Migration Act.

²⁹⁹ Sec 91R (2) of the Migration Act 1958 - Volume 1, Australia: Act No. 62 of 1958, Migration Act 1958 - Volume 1 [Australia], 8 October 1958.

³⁰⁰ Sec 91S of Migration Act 1958 mentioned regarding the ‘membership of particular social group’ that “For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person’s family: (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A (2) of the Refugees Convention as amended by the Refugees Protocol; and (b) disregard any fear of persecution, or any persecution, that: i) the first person has ever experienced; or ii) any other member or former member (whether alive or dead) of the family has ever experienced; where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed”, Sec 91(c) ,Australia: Act No. 62 of 1958, Migration Act 1958 - Volume 1 [Australia], 8 October 1958 and Vrachnas, Migration and Refugee Law, (2005) p 180.

³⁰¹ Under the Sec 5H (2) of the Migration Act 1958, “Subsection 5H (1) does not apply if the Minister has serious reasons for considering that: a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or b) the person committed a serious non-political crime before entering Australia; or c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.” Sec Section 5H (2) of the Migration Act 1958, Volume 1, compilation no 126.

³⁰² See Sec 36 (2B) to Sec 36(5B) of the Migration Act 1958, Australia: Act No. 62 of 1958, Migration Act 1958 - Volume 1 [Australia], 8 October 1958 and Vrachnas, Migration and Refugee Law (2005) p 180.

If the delegate of Minister of Immigration refused to grant the protection visa at the primary stage then applicant can seek independent merits review by the Refugee Review Tribunal (RRT),³⁰³ or the Administrative Appeals Tribunal (AAT)³⁰⁴ in some circumstances³⁰⁵.

- **Concluding Remarks**

In essence, it can be said that Australia made provision under the Migration Act 1958 to fulfil its obligation for the protection of the people fleeing from persecution based on the Convention reasons of race, religion, nationality, political opinion or particular social group. A non-citizen in Australia can seek protection as a refugee through its onshore competent program. But the person need to enter with a valid visa in Australia to apply for the asylum claim. Under the Migration Act 1958, Australia exclude the person who has a right to enter in the third country. The Australian Migration Act defines ‘refugee’ in similar way to the Refugee Convention. The Migration Act 1958 restrict the scope of the term “well-founded fear”. Because it includes in the provision, ‘real chance’ of persecution as a return asylum seeker in the country of origin or all area of receiving country. The Migration Act also describe the term ‘well-founded fear’ in a subjective way as it mentioned, ‘a person has well-founded fear if he fears being persecuted for the convention reasons’³⁰⁶.

Under the Migration Act the term ‘persecution’ includes serious harm to the person and systematic and discriminatory conduct. The Migration Act also provides a non-exhaustive list of serious harm and mentioned the reason of serious harm need to be essential and significant reason. Taking all these essential requirement of the refugee definition together, it seems the Migration Act actually narrowed the Scope of the refugee definition.

³⁰³ Under Sec 411 of the Migration Act “the tribunal has no jurisdiction to review offshore refugee decisions and to make decisions on humanitarian or compassionate grounds if those grounds are not related to the Refugees Convention”. see Vrachnas John, Migration and Refugee Law, Principles and Practice in Australia (2005) p 322 and sec 411 of the Migration Act 1958 Act, No. 161, 2015, Volume 1, compilation no 126.

³⁰⁴ Sec 134 and 501 of the Migration Act 1985, see, Australia: Act No. 62 of 1958, Migration Act 1958 - Volume 2 [Australia], 8 October 1958, available at: <http://www.refworld.org/docid/4e23f4062.html> [accessed 25 March 2016]

³⁰⁵ From July 2015 the Refugee review Tribunal merged with the Administrative Appeals Tribunal and from then the AAT’S Migration and Refugee Division reviews decisions made by the Department of Immigration and Border Protection under the Migration Act 1958 and by the new amendment of Migration Act 1958, compilation no 126, sec 411 mentions that Administrative Appeals Tribunal in its Migration and Refugee Division review the decisions of Department of Immigration and Border Protection. See Australia: Act No. 62 of 1958, Migration Act 1958 - Volume 2, ibid sec 411

³⁰⁶ Supra note 293

4.2 Application of the Refugee Convention

“Australia acceded to the Refugees Convention in 1954 and the Protocol in 1973, thereby undertaking to apply their substantive provisions.³⁰⁷” However, the “Migration Act 1958 does not incorporate the Refugee Convention in its entirety into the municipal law. The phrase in respect of whom...Australia has protection obligations under [the Convention] ‘in s.36(2)(a) describes no more than a person who is a refugee within the meaning of Article 1.’³⁰⁸ But “in generally speaking Australia has protection obligation in respect of people who are refugee as define in Art 1 of the Refugee Convention. ”³⁰⁹

Respectively the Australian High Court in number of cases considered the Conventional definition of refugee “notably in *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.”³¹⁰.

4.3 Interpretation of the Convention definition of refugee and approaches are taken by the Australian domestic court for the interpretation:

4.3.1 Elements of the Convention definition of Refugee:

The Australian High Court interpretation of the elements of the refugee definition gives guidelines to the domestic jurisdiction to determine whether an applicant situation meet the requirements of refugee definition. The RRT also based on the interpretation of the Australian High Court, made its assessment when determining the refugee claims of the Tamil applicants in Australia. Here the discussion based on the interpretation adopted by the RRT from Australian High Court regarding the element of the refugee definition.

³⁰⁷ Protection visas, Chapter -1, Guide to Refugee Law in Australia, Migration and Refugee Division Legal Service, Administrative Appeals Tribunal ,Commonwealth of Australia 2016, p 4

³⁰⁸ Ibid

³⁰⁹ Protection visas, Chapter -1, Guide to refugee law in Australia, 2016, p 4

³¹⁰ All these cases cited by the RRT in RRT Case No. 1304279, [2013] RRTA 420, Australia: Refugee Review Tribunal, 2 July 2013; RRT Case No. 1301660, [2013] RRTA 624, Australia: Refugee Review Tribunal, 9 September 2013; RRT Case No. 1215212, [2012] RRTA 1165, Australia: Refugee Review Tribunal, 5 December 2012

The Australian High Court in *MIEA v Guo & Anor*³¹¹ mentioned about the elements of the definition of refugee where they adopt the Conventional requirements of refugee definition. According to the court those elements are – applicant must be outside of his/her country, fear of persecution, persecution based on one or more conventional reasons and fear of persecution must be well founded³¹².

a) Fear of being persecuted

‘Persecution’ is in the central of the refugee definition so an applicant seeking refugee status must prove that he has feared harm which constitutes persecution³¹³. In Australia “the act of persecution must involve serious harm”³¹⁴ and ‘systematic and discriminatory conduct’ under the Migration Act Sec 91R. In the cases reviewed by the RRT for determination of the status of Tamil also mention that ‘persecution’ involves ‘serious harm’ and ‘systematic and discriminatory conduct’.³¹⁵ Moreover “the language in which each of these conditions is expressed calls for a qualitative judgment in order to determine whether it is satisfied in any given case.”³¹⁶

In Australia “there is a significant body of domestic law on the meaning of persecution in the Convention context.”³¹⁷ The Australian High Court in a number of cases explained the meaning of persecution³¹⁸.

³¹¹ *MIEA v Guo Wei Rong and Anor*, S151 1996, Australia: High Court, 13 June 1997, Supra note 281

³¹² Ibid

³¹³ Vrachnas John, *Migration and Refugee Law, Principles and Practice in Australia* (2005) p 220.

³¹⁴ See serious harm, sec 91R (2) of the Migration Act 1958 - Volume 1, Australia: Act No. 62 of 1958, Migration Act 1958 - Volume 1 [Australia], 8 October 1958.

³¹⁵ RRT Case No. 1405747, Australia: Refugee Review Tribunal, 5 May 2015. RRT Case No. 1304279, [2013] RRTA 420, Australia: Refugee Review Tribunal, 2 July 2013, RRT Case No. 1301660, [2013] RRTA 624, Australia: Refugee Review Tribunal, 9 September 2013, RRT Case No. 1300825, [2013] RRTA 889, Australia: Refugee Review Tribunal, 17 October 2013, RRT Case No. 1214918, [2013] RRTA 650, Australia: Refugee Review Tribunal, 18 September 2013, RRT Case No. 1215212, [2012] RRTA 1165, Australia: Refugee Review Tribunal, 5 December 2012.

³¹⁶ *MIBP v WZAPN; WZARV v MIBP* (2015) 320 ALR 467 per French CJ, Kiefel, Bell and Keane JJ at [35] cited in Persecution, Chapter -4, Guide to refugee law in Australia (2016), p 2, available at http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20Law/Chapter4_Persecution.pdf

³¹⁷ Chapter -4, Guide to refugee law in Australia (2016), p 1

³¹⁸ *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Respondent S152/2003* (2004) 222 CLR 1. and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473. See Persecution, Chapter -4, Guide to refugee law in Australia, 2016, p 1

In *Ram v MIEA*³¹⁹ the Court held that “persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors³²⁰”.

The Australian High Court also used the systematic and discriminatory conduct to examine the motivation of the persecution. In *VSAI v MIMIA*³²¹ the High Court stated that “where conduct shown to be serious harm falls to be assessed as to whether it is ‘systematic conduct’ for the purposes of s.91R(1)(c), it would be wrong to require the applicant to show anything more than that it is deliberate or premeditated, that is, motivated. It would not be necessary to show that the conduct is widespread or frequently recurring³²². The Full Federal Court of Australia observed in *SZTEQ v MIBP*³²³ that ‘systematic is used in s.91R(1)(c) in the same way that ‘discriminatory’ is used – to direct the decision-maker’s attention to the motivation of the alleged persecutor. It conveys deliberate behavior on the part of the persecutor, rather than behavior that is random or accidental³²⁴”

“It is well established that ‘persecution’ within the meaning of the Convention involves a discriminatory element³²⁵. In *Applicant A v MIEA*, the High Court mentioned “... the feared persecution must be discriminatory. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination (“race, religion, nationality, membership of a particular social group or political opinion”) mentioned in Art 1(A)(2)³²⁶”

The RRT adopt the approach of Australian High Court in *Applicant A v MIEA*³²⁷ which mention that “persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially

³¹⁹ *Ram v MIEA* (1995) 57 FCR 565 at 568. Approved in *Applicant A v MIEA* (1997) 190 CLR 225 at 284 cited in REFUGEE GROUNDS AND NEXUS, chapter-5, Guide to refugee law in Australia, 2016, p 4 available at http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20Law/Chapter5_GroundsNexus.pdf

³²⁰ Ibid

³²¹ *VSAI v MIMIA* [2004] FCA 1602 (Crennan J, 8 December 2004) at [53] cited in Persecution, Chapter -4, Guide to refugee law in Australia (2016), p 12

³²² Ibid

³²³ *SZTEQ v MIBP* (2015) 321 ALR 44 at [72] cited in Persecution, Chapter -4, Guide to refugee law in Australia (2016), p 12

³²⁴ Ibid

³²⁵ Chapter -4, Guide to refugee law in Australia (2016), p 12

³²⁶ *Applicant A v MIEA* (1997) 190 CLR (1997) 190 CLR 225 at 233 cited in Chapter -4, Guide to refugee law in Australia (2016), p 13

³²⁷ Ibid, *Applicant A v MIEA* (1997) 190 CLR 225 at 257-8

tolerated or uncontrollable by the authorities of the country of nationality”³²⁸. However, “the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution”.³²⁹

From the above interpretation of persecution by the Australian High Court and under the Migration Act it can be said that Australian judicial body to interpret the term persecution, developed its approach on the basis of the human rights. Hathaway’s and Foster described the ‘Human Rights based approach to interpreting the term persecution’ in the Law of the Refugee Status³³⁰. They mentioned, “risk of being persecuted requires evidence of sustained and systematic violation of basic human rights demonstrative of a failure of state protection.”³³¹ This test of persecution requires the risk of serious harm demonstrated in the sense of a risk of basic human rights. The Australian Migration Law also includes serious harm which consists of discriminatory and systematic conduct. Also in *Chan v MIEA* (1989) 169 CLR 379 the Australian High Court mentioned about the official quality of persecution which includes the involvement of the State. And the involvement of State in this context means that the government has failed or is unable to protect the applicant from persecution.

For the refugee status determination of Tamil in Australia the RRT adopted the approach which is also based on the Human Rights framework. But Australia never expressed the view that they adopt Hathaway’s human rights based to interpret the term ‘persecution’ though Australian approach has resembled with Hathaway’s approach. So it can be said Australian Judicial body has developed their unique way to interpret the term persecution.

b) Nexus requirement and Persecution based on the one or more Conventional reasons

The persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social

³²⁸ Ibid

³²⁹ *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 430 cited in Chapter -4, Guide to refugee law in Australia (2016), p 15, this approach mentioned by the RRT in RRT Case No. 1405747, 2015. RRT Case No. 1304279, [2013] RRTA 420, RRT Case No. 1301660, [2013] RRTA 624, RRT Case No. 1300825, [2013] RRTA 889, RRT Case No. 1214918, [2013] RRTA 650, RRT Case No. 1215212, [2012] RRTA 1165.

³³⁰ See chapter 3 for full discussion on Human Rights based approach

³³¹ Hathaway, *The Law of Refugee Status* 1991, pp 104-105, Hathaway & Foster, *The law of the Refugee Status* (2014) p 183-185

group or political opinion. “The phrase ‘for reasons of’ serves to identify the motivation for the infliction of the persecution³³².” “The persecution feared need not be solely attributable to a Convention reason³³³. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared under s.91R(1)(a) of the Migration Act.”³³⁴

From the previous sub-section and this subsection, it is clear in Australia there are several elements of persecution. And “in order to constitute persecution, it is not sufficient that an individual is at risk of serious harm. There must also be a nexus between the serious harm and one of the Convention grounds. This nexus has several different elements”³³⁵ under the Australian Migration Law. And the elements of the nexus requirement are -i) the conduct must be systematic, discriminatory conduct, ii) persecution implies the element of motivation, and iii) essential and significant reason of persecution. So Australia also adopted different approaches to interpreting the “for reason of” clause.

Regarding the first element ‘Guide to Australian Refugee Law’ mentioned that “Courts have consistently held that the discriminatory element of persecution involves an element of motivation on the part of the persecutor”³³⁶. Also the Australian High Court in both *SZTEQ v MIBP*³³⁷ mentioned, discriminatory and systematic conduct both describe in the same way and both elements – ‘direct the decision maker’s attention to the motivation of the alleged persecutor’.³³⁸ So discriminatory and systematic conduct both elements are required under the Australian approach to fulfil the nexus requirement of the Convention definition of Refugee.

Regarding the second element, the Australian Higher Court mentioned in *Ram v MIEA* that ‘persecution implies an element of motivation on the part of those who persecute for the

³³² Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565, 568.

³³³ *SZLWE v MIAC* [2008] FCA 1343 (Perram J, 19 September 2008) at [27], *Mahesparam v MIMA* [1999] FCA 459 (Madgwick, 15 April 1999) cited in chapter-5, *Guide to refugee law in Australia* (2016), p 9

³³⁴ *Supra* note 317

³³⁵ Vrachnas, *Migration and Refugee Law*, (2005) p 230

³³⁶ chapter-4, *Guide to refugee law in Australia* (2016), p 13

³³⁷ The Full Federal Court of Australia in *SZTEQ v MIBP* (2015) 321 ALR 44 observed that “systematic is used in s.91R(1)(c) in the same way that ‘discriminatory’ is used – to direct the decision-maker’s attention to the motivation of the alleged persecutor. It conveys deliberate behavior on the part of the persecutor, rather than behavior that is random or accidental” See subsection 4.3.1(a) at page 67

³³⁸ *ibid*

infliction of harm³³⁹ And from the wording, it is understandable that Australian Court adopted the ‘motivation approach’ to satisfy the nexus requirement which requires determination of the intention of the persecutor.

The Australia judicial body was also taken the approach of ‘Contributing Cause’ as the High Court of Australia mentioned ‘persecution feared need not be solely attributable to a Convention reason’ but it must be sufficiently attributable to at least one of the grounds. But for multiple motivation, the test need to be satisfied with one significant and essential Convention reason. So under the Australian approach if there are several motivations then one reason must be essential and significant and related to’ one of the Convention grounds to constitute persecution.

c) Well -founded fear

‘Well-founded fear’ is one of the important elements of the definition of refugee. Refugee definition requires that “an applicant’s fear of persecution for a Convention reason must be a ‘well-founded’ fear. This adds an objective requirement that an applicant must in fact hold such a fear³⁴⁰. “The test for determining well-founded fear was enunciated by the High Court in Chan v MIEA³⁴¹”. The Court held that “the phrase “well-founded fear of being persecuted...” contains both a subjective and an objective requirement. There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear³⁴².”

And “A person has a ‘well-founded fear’ of persecution under the Convention if they have genuine fear founded upon a ‘real chance’ of being persecuted for a Convention stipulated reason.”³⁴³ “Whether an applicant has a genuine fear is a question of fact. While the requirement of a genuine fear cannot be ignored, in many cases it will not be an issue. The decision makers are entitled to consider, whether an applicant objectively has a well-founded fear of persecution before examining whether such a fear is subjectively held, or to proceed on the assumption that such a fear is held³⁴⁴”

³³⁹ Supra note 319

³⁴⁰ Supra note 315

³⁴¹ Chan v MIEA (1989) 169 CLR 379 at 396 cited in well-founded fear see Chapter -3, Guide to refugee law in Australia (2016), p 2.

³⁴² Ibid

³⁴³ Chan v MIEA (1989) 169 CLR 379

³⁴⁴ Persecution, Chapter -4, Guide to refugee law in Australia (2016), p 3

In *Chan v MIEA*, Mason CJ preferred the “real chance” test to determine well-founded³⁴⁵. “A ‘real chance’ is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent”³⁴⁶. The RRT adopted the ‘real chance’ test of well-founded fear to determine the refugee status of Tamil as the Tribunal mentioned about the test of real chance in the cases.³⁴⁷

Regarding the interpretation of the term ‘well-founded fear’ the Australian High Court mentioned about the subjective element and objective elements. Subjective element is the state of mind which shows fear of being persecuted and the objective one is the basis of the fear that is well-founded. Also in the cases regarding refugee status determination of Tamil in Australia the RRT adopted the ‘real chance test’ to establish the genuine fear of persecution through objective approach. This objective approach also mentioned by Hathaway & Foster in “The Law of the Refugee Status.”³⁴⁸ According to this approach ‘fear must mean an objective apprehension of risk’ and thus well-founded fear requires ‘objective assessment of risk’³⁴⁹. Here also the Australian approach has similarities with the approach mentioned by Hathaway and Foster but the judicial body of Australia nowhere mentioned that they adopted the Hathaway and Foster’s approach. So it can be said Australia developed its unique approach to interpret the term well-founded which also based on the objective assessment of the well-founded fear.

4.4 Credibility Assessment

In Australia for assessment of the credibility of the applicant guidelines provide by the “Guide to Refugee Law”³⁵⁰ to help the domestic body responsible for the successful refugee status determination. The Guidelines mentioned that “the assessment of credibility in each case is a

³⁴⁵ Ibid

³⁴⁶ Australia: Refugee Review Tribunal, 17 October 2013, RRT Case No. 1214918, [2013] RRTA 650, Australia: Refugee Review Tribunal, 18 September 2013, RRT Case No. 1215212, [2012] RRTA 1165, Australia: Refugee Review Tribunal, 5 December 2012, and Persecution, Chapter -4, Guide to refugee law in Australia (2016), p 4

³⁴⁷ RRT Case No. 1405747, Australia: Refugee Review Tribunal, 5 May 2015. RRT Case No. 1304279, [2013] RRTA 420, Australia: Refugee Review Tribunal, 2 July 2013, RRT Case No. 1301660, [2013] RRTA 624, Australia: Refugee Review Tribunal, 9 September 2013, RRT Case No. 1300825, [2013] RRTA 889,

³⁴⁸ Supra note 135

³⁴⁹ See chapter-3 subsection 3.3.1(ii) at page 32

³⁵⁰ Chapter -5, Guidelines on assessment of credibility, Guide to refugee law in Australia (2016)

matter for the member constituting the tribunal to determine, having regard to the individual circumstances and evidence.”³⁵¹ From the Guide some important guidelines mentioned below-

1) Evidence and findings-

- “The tribunal should make clear and unambiguous findings as to the evidence it finds credible or not credible and provide reasons for such findings.
- The rejection of some of the evidence on account of a lack of credibility may not lead to a rejection of an applicant’s claim for a protection visa.”³⁵².

2) Tribunal hearings-

- “Procedural fairness requires an applicant to be made aware of the case against him or her and to be provided with an opportunity to respond to the issues arising in his or her case.
- The tribunal should take care to ensure that vigorous testing of the evidence and frank exposure of its weaknesses does not result in the applicant being overborne or intimidated.”³⁵³

3) Oral evidence-

- “Members need to be mindful that a person may be anxious or nervous due to the environment of a hearing and the significance of the outcome. (because of the person different social and cultural environment, traumatic experience or be suffering from a disorder or illnesses, educational social and cultural background)
- Claims relating to a person’s sexual orientation or to sexual assault or domestic violence, require particularly sensitive investigation.
- The tribunal should exercise special care when taking evidence from children to ensure that the tribunal’s questions are understood and to make allowances for their age and the effect on them of an appearance before the Tribunal”³⁵⁴

4) Contradictions, inconsistencies and omissions-

- “When forming a view on the credibility of claims, the tribunal should consider the overall consistency and coherence of an applicant’s account
- Traumatic experiences including torture may impact upon a number of aspects of an applicant’s case including the timeliness of an application, compliance with immigration laws, or the consistency of statements since arrival in Australia. They may also impact adversely on an applicant’s capacity in providing testimony of such events.
- contradictions, inconsistencies and omissions in evidence may, although not necessarily, mean

³⁵¹ Guideline 5, Ibid at page 3

³⁵² Guideline 10 &11, Ibid at page 4

³⁵³ Guidelines 17 & 19Chapter -5, Guidelines on assessment of credibility, Guide to refugee law in Australia (2016)

³⁵⁴ Guidelines 22 ,24, 26 Ibid at page 6

that a person's evidence is unreliable and, therefore, lacks credibility. The lack of credibility of a person's account because it is unreliable does not necessarily imply that the person is dishonest

- The tribunal should be mindful not to impose too high a standard when assessing an individual person's level of knowledge.³⁵⁵

5) Demeanour:

- "The tribunal should exercise care if it makes adverse credibility findings based on demeanour. The tribunal should also be aware of the effect of cultural differences on demeanour and oral communication.
- If 'demeanour' has formed a basis for an adverse assessment of a person's credibility, the tribunal should clearly explain the evidence on which this finding is based".³⁵⁶

6) Delay in making an application for protection:

- "A delay in applying for protection should not be the sole reason for doubting an applicant's claims."³⁵⁷

7) Expert evidence-

- "It is the tribunal's task, as the decision-maker, to weigh each piece of evidence and make appropriate findings of fact. The tribunal should not substitute its own lay opinion for that of a reliable expert."³⁵⁸

8) Documentary evidence-

- "The tribunal should assess the significance of documents submitted to the tribunal and whether the authenticity of such documents is material to an applicant's claims.
- The use of false documents does not necessarily mean that an applicant's claims are untrue
- Where the tribunal rejects the authenticity of a document submitted by an applicant, the tribunal should provide reasons for its finding that a document is not genuine."³⁵⁹

And finally, the 'Guide to Refugee Law in Australia' mentioned that "the assessment of credibility is an important and difficult aspect of the Tribunal decision-making process. The Tribunal must maintain an open mind when assessing individual cases and when deciding whether an applicant's evidence is to be believed and how much weight is to be given to the

³⁵⁵ Guidelines 28-30 &33, Ibid at page 6-7

³⁵⁶ Guidelines 34&35, Guidelines on assessment of credibility, Guide to refugee law in Australia 2016 at page 7

³⁵⁷ Guideline 37, ibid

³⁵⁸ Guideline 42, Guidelines on assessment of credibility, Guide to refugee law in Australia 2016 at page 8

³⁵⁹ Guideline 43,46,49, Ibid at page 8-9

evidence before the tribunal.”³⁶⁰

Discussion from the guidelines gives the clear understanding that for the Assessment of Credibility of the applicant, Australia adopted its own approach. Though some elements mentioned in the UNHCR approach to credibility assessment are also found in the Australian approach of credibility assessment like internal consistency of the applicant statement, use of demeanor, use of documentary evidence, etc. But the Australian ‘Guide to refugee Law’ did not adopt fully the UNHCR mentioned approach to the credibility like it did not mention about the use of ‘plausibility’ as indicator and use of some principles like ‘objective and impartial assessment of claim, focus on the material claim etc.

4.5 Determination of the refugee status of ‘Tamil’ by the RRT:

In Australia Tamil people from Sri Lanka who was fleeing from persecution based on the civil conflict between the Liberation Tigers of Tamil Eelam (LTTE) and the government was applied for the refugee protection. Even the war ended in 2009 still lots of reports shows that Tamil people from Sri Lanka are still fleeing from persecution because of their Tamil ethnicity and their imputed political opinion because almost all LTTE members and supporters are Tamil.³⁶¹. This subsection discussed ten cases review by the Refugee Review Tribunal (RRT)³⁶² against the refusal decisions made by the delegate of Minister of Immigration to grant a protection visa to the Tamil applicants.

Among ten cases only in two cases, the RRT granted protection visa to the Tamil applicants and in other eight cases refusal decision made by the delegate of Minister of Immigration confirmed by the RRT.

4.5.1 Cases where the refusal of the protection decision confirmed by the RRT

³⁶⁰ Guideline 50, Ibid at page 9

³⁶¹ Department of Foreign Affairs and Trade (DFAT) Country Report, Sri Lanka (16 February 2015), paras 3.10-3.12

³⁶² Before the merger of RRT with AAT in July 2015, under sec 411 of the Migration Act 1958, RRT reviews decisions made by the Department of Immigration and Border Protection regarding refusal to grant protection visa, see supra note 85. As all the cases for this thesis related to the Tamil who seeks asylum in Australia before July 2015 so the review decisions of RRT taken in this thesis.

In this section discussion based on the eight cases reviewed by the RRT and refusal decision to grant protection visa is confirmed by RRT. Cases, where RRT used similar steps for the assessment of the review application is discussed together.

In **RRT Case No.1311465 [2015] RRTA 143(case no:1)**³⁶³ and in the **RRT Case No. 1405747 [2015] RRTA 316(case no:2)**³⁶⁴ both the applicants were Sri Lankan Hindu and belonged to Tamil ethnicity. In the **case no:1**, the applicant claimed that ‘he is a supporter of the Tamil National Alliance (TNA) and assisted a candidate during the 2010 elections. He was harassed, assaulted and threatened with death by members of the Tamil Makkal Viduthalai Pulikal (TMVP), a paramilitary group also known as Karuna for his involvement with TNA. The applicant fears harm by Karuna specially Leader ‘A’ and moved to Colombo where he was also tracked by Karuna’s leader Mr. A. He also feared harm throughout Sri Lanka at the hands of the Sri Lanka military and its authorities’³⁶⁵

In the **case no:2**, the applicant left Sri Lanka when he was a child and moved in India. He never returns to Sri Lanka and claimed that “he will be harmed if he was to return to Sri Lanka because of his relatives’ role in the LTTE .”³⁶⁶ And the applicant also mentioned that ‘he has no family in Sri Lanka for which it will be difficult for him to obtain employment and if he is arrested there is no one in Sri Lanka to bail him, also he has an injury which will prevent him from obtaining employment in Sri Lanka. And if he will return as a failed asylum seeker he will be harmed for his Tamil ethnicity with LTTE connections.’³⁶⁷

In the both case, the applicants left Sri Lanka unlawfully to reach Australia and in Australia they claimed for a protection visa but applicants claim for a protection visa was refused by the delegate of the Minister and confirmed by the RRT.

According to the Tribunal, the issue in the **case no:1**, was ‘whether the applicant has a well-founded fear of persecution for one or more of the five Convention reasons in Sri Lanka and the convention reasons, in this case, were the fear of harm to the applicant because of his Tamil ethnicity, his religion as a Hindu, his political opinion as a supporter of the TNA, his imputed

³⁶³ RRT Case No. 1311465, [2015] RRTA 143, Australia: Refugee Review Tribunal, 13 April 2015, available at: <http://www.refworld.org/docid/55b20fc74.html> [accessed 4 May 2016] (**case no:1**)

³⁶⁴ RRT Case No. 1405747, Australia: Refugee Review Tribunal, 5 May 2015, available at <http://www.refworld.org/docid/55b210a94.html> [accessed 16 March 2016] (**case no:2**)

³⁶⁵ RRT Case No. 1311465, [2015] RRTA 143, para 2- 13

³⁶⁶ RRT Case No. 1405747, Australia: Refugee Review Tribunal, 2015, para 2

³⁶⁷ Ibid

and actual support for the LTTE and membership of a particular social group as a family member of wealthy Tamils in eastern Sri Lanka'³⁶⁸. The applicant also claimed that, for the above mention Convention reasons, 'there is real chance that he will suffer serious harm and significant harm in the form of being detained, tortured and killed and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm.'³⁶⁹ And in the *case no:2*, the issue was also whether the applicant has a well-founded fear of persecution for a Convention related reason, for the reasons of his relatives LTTE connection, for his Tamil ethnicity, his Lack of family connections in Sri Lanka/Disability and as a failed asylum seeker. The Tribunal mentioned that, 'the Tribunal has considered each of these individually and cumulatively but is not satisfied that the applicant has a well-founded fear of persecution for a Convention related reason'³⁷⁰.

The Tribunal started the review procedure in both of the case by describing the background of the claims and considering the claims and evidences. This includes the evidence to the Department regarding entry Interview, application for a protection visa to the Department of Immigration (the department), protection visa interview by a delegate of the Minister, evidence regarding submissions and additional documents and the Delegate's decision regarding the protection claim which includes the reason of the refusal made by the delegate of the Minister stated when considering claims and evidence. Then the Refugee Review Tribunal in the both cases considered the evidence before it which includes the statement made by the applicant in the pre-hearing submissions, an oral statement of the applicant made in the hearing before the Tribunal and the applicant statement in the post-hearing submission.

In the both pre-hearing and post-hearing submission the applicant supported his argument by giving reference to the reports regarding the situation of the Tamil people in Sri Lanka, treatment of Tamil's as failed asylum seeker in the airport and reports regarding the issue of relocation. After considering the evidence, the Tribunal mentioned about the relevant provisions of Australian Migration Act 1958, under which the protection visa will be granted, this is already discussed in the previous subsection. Then the Tribunal reached to the part of analysis, reasoning's and findings.

- ***Credibility and Risk Assessment***

³⁶⁸RRT Case No. 1311465, [2015] RRTA 143, para 25

³⁶⁹ Ibid

³⁷⁰ RRT Case No. 1405747, Australia: Refugee Review Tribunal, 2015, para 25

To examine the question ‘real chance of harm’ based on the above mentioned claims of the applicants the Tribunal made an assessment of credibility of the applicants claims. For the assessment of credibility, the tribunal considered the relevant country of origin information (COI)³⁷¹. Also reports specially the human rights situation in Sri Lanka and risks faced by Tamils prepared by US State Department, the Department of Foreign Affairs and Trade (DFAT) Country Report on Sri Lanka regarding the treatment of Tamil, force Disappearances and Torture of Tamil, Torture or mistreatment of returnees, the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka ,2012 and Human Rights Watch report 2014 on torture of LTTE supports and member and mistreatment of returnees or failed asylum seekers to the extent relevant to the assessment of the risk for the refugee status determination.³⁷². For the assessment of credibility of the applicants the written and oral statements of the applicants and relevant evidence were also considered by the Tribunal.

Real chance of harm because of the imputed political opinion

In the *case no:1*, the Tribunal assessment regarding the claim of fear of harm by the leader of Karuna was that ‘the applicant evidence regarding his claim in some point is unpersuasive and the applicant evidence shows that he was a low-level supporter of TNA’³⁷³. In the view of the Tribunal “the combination of the applicant’s past political support for the TNA, his activities during the 2010 elections and his personal disputes with [Mr. A] may continue to put at risk of harm by [Mr. A] and his associates”³⁷⁴. But “on the basis of the evidence before it, the Tribunal finds that if the applicant were to return to his village, there is real chance that he would be subjected to serious harm at the hands of [Mr. A] and his associates”³⁷⁵. But there was no real chance of harm in Colombo after he moved from his village.

Regarding the applicant claim that he will be harmed because of his imputed political opinion (i.e. connection with LTTA and TNA supporter) ,the Tribunal found that the applicant did not

³⁷¹ The Tribunal taken consideration of “any country information assessment prepared by the Department of Foreign Affairs and Trade (DFAT) expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration. The Tribunal has had regard to DFAT’s *Country Information Report – Sri Lanka* (3 October 2014); *Country Information Report – Sri Lanka* (16 February 2014) and *Thematic Report, People with Links to the Liberation Tigers of Tamil Eelam* (3 October 2014)”. See RRT Case No. 1311465, [2015] RRTA 14, para 34

³⁷² See chapter-2 for discussion of report

³⁷³ RRT Case No. 1311465, [2015] RRTA 143, paras 37-38

³⁷⁴ Ibid at para 38

³⁷⁵ RRT Case No. 1311465, [2015] RRTA 143, para 39

have that type of risk profile³⁷⁶ as mentioned by the UNHCR in the eligibility guidelines and in the other reports that would put him at risk of serious harm for the reason of his actual or imputed pro-LTTE political opinion.³⁷⁷ Because at first he was a low level supporter of the TNA and the applicant had no involvement with the TNA after he moved to Colombo in 2010. So for the tribunal it was “difficult to believe that a year after his departure from the village, [Mr. A] had decided to track him down in Colombo and threaten him by phone because of his support for the TNA during the 2010 elections”³⁷⁸. And secondly, the applicant did not claim that he, or any other member of his immediate family, had ever come to the attention of the authorities, or had been harmed in any way due to their actual or imputed support for the LTTE.³⁷⁹

So the Tribunal was not satisfied that “the applicant will be perceived to hold anti-government views or pro-LTTE links of a nature that would put him at a risk of serious harm. And the Tribunal is not satisfied that there is a real chance that the applicant will be seriously harmed by the Sri Lankan Army (SLA), the Sri Lankan authorities or anyone else for the reason of his actual or imputed political opinion if he were to relocate to Colombo”³⁸⁰.

In the *case no:2*, the Tribunal found, the applicant's evidence was not consistent, credible and persuasive regarding his claim that his relatives (three relatives) were involved in the LTTE. Because he failed to provide much detail about his relatives' roles in the LTTE and credible evidence. Also there was a contradiction of his written statement and statement made during the oral hearings.³⁸¹ For the reasons of failure to provide consistent evidence and statements in entry interview before the delegate Minister and oral hearing before the Tribunal it was also found by the Tribunal that, ‘applicant's evidence in relation to his claim that his family has LTTE connections to be inconsistent, vague and unpersuasive’³⁸².

³⁷⁶ “The UNHCR Guidelines suggest that persons with certain profiles, other than prior residency within an area controlled by the LTTE, continue to require protection. Those at risk appear to be persons who have a certain level of LTTE links. DFAT also refers to the Guidelines in emphasizing that a person's real or perceived links with the LTTE may give rise to protection. However, whether a person is at risk of harm depends on the nature of the links. The decision of United Kingdom's Upper Tribunal on Immigration and Asylum in *GJ and Others (post-civil war: returnees)* Sri Lanka CG [2013] UKUT 00319 (IAC) refers to similar categories of persons at real risk of persecution or serious harm on return to Sri Lanka”. See RRT Case No. 1311465, [2015] RRTA 143, para 45

³⁷⁷ RRT Case No. 1311465, [2015] RRTA 143, paras 45-46

³⁷⁸ Ibid at para 41

³⁷⁹ RRT Case No. 1311465, [2015] RRTA 143, paras 44

³⁸⁰ Ibid at para 46

³⁸¹ RRT Case No. 1405747, Australia: Refugee Review Tribunal, 2015, paras 12-21

³⁸² Ibid at para 12

For this above mentioned reasons Tribunal's view is that, the applicant has not been truthful in relation to his relatives roles in LTTE and "the Tribunal is not satisfied that the applicant's [relative]s held leadership roles in the LTTE that would lead to there being a real chance that the applicant would be imputed with a pro-LTTE profile on the basis of his relationship with them (i.e. as a member of the particular social group "relatives of his [relative]s" even if such a group exists) if he was to return to Sri Lanka."³⁸³

Also the Tribunal found that the applicant did not have a pro-LTTE profile or risk profile in Sri Lanka as mentioned by the UNHCR Guidelines 2012 and "would not be considered to be a threat to the Sri Lankan authorities or a person interested in reviving the LTTE if he was to return to Sri Lanka now or in the reasonably foreseeable future."³⁸⁴

- ***Real chance of harm because of the Tamil ethnicity***

The Tribunal in the both cases made reference to the UNHCR Eligibility Guideline 2012 and the DFAT's recent country information report for the assessment of the real chance of being harmed bases on the applicant's 'Tamil ethnicity'.

In the both cases the Tribunal mentioned that, "the Tribunal accepts that historically Tamil's' in Sri Lanka have faced discrimination in the hand of the Sri Lankan authority and human rights violation which leads Tamil towards the civil war."³⁸⁵ But independent country information indicated that after the civil war some Tamils in Sri Lanka continued to face a level of societal discrimination and human rights violation which includes sexual violence, arrests, detention, disappearances, torture, extrajudicial killings, discrimination, attacks on media and violations of housing, land and property rights.³⁸⁶

But the Tribunal mentioned about the UNHCR Guideline 2012 which indicates that certain persons have "risk profiles" which refers to those who has a reasonable level of the LTTE links.³⁸⁷ Also the DFTA country report indicated that "Tamil falls within the risk profiles referred to earlier, is likely to be more vulnerable to 'arbitrary detention, abductions and forced disappearances."³⁸⁸ The UNHCR Guidelines 2012 stated that "in light of the improved human rights and security situation in Sri Lanka 'there is no longer a need for group-based protection

³⁸³ RRT Case No. 1405747, Australia: Refugee Review Tribunal, 2015, para 22

³⁸⁴ Ibid at para 29

³⁸⁵ RRT Case No. 1311465, [2015] RRTA 143, para 47

³⁸⁶ Ibid and RRT Case No. 1405747(2015) at para 25

³⁸⁷ Ibid at 28

³⁸⁸ RRT Case No. 1311465, [2015] RRTA 143, para 47

mechanisms or a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country”³⁸⁹

In the *case no:2*, the Tribunal mentioned that “The Tribunal does not accept that the evidence establishes that Tamils are at risk of serious harm on the basis of their ethnicity alone. Whilst the Tribunal accepts that there continues to be persecution of persons with certain profiles, such as persons who had the LTTE connections, the Tribunal does not accept that the applicant has any particular profile such that there is a real chance that he will suffer serious harm for reason of his ethnicity as a Tamil, because he is a young Tamil male or because he originally comes from the Northern Province”³⁹⁰.

And in the both cases, the Tribunal was not satisfied that, there is a real chance that the applicant will be seriously harmed by the Sri Lankan authorities or anyone else on account of race as a Tamil or Tamil from north.³⁹¹

- ***Real chance of harm as a failed asylum seeker:***

The Tribunal in the both case depending on the credible country information and evidence before it made an assessment whether the individual applicants had a real chance of being harmed upon return to Sri Lanka on the basis of the unlawful departure and as a failed asylum seeker.

In the *case no:1*, the Tribunal mentioned about the DFTA Country information where it was indicated that, “the principal focus of the Sri Lankan authorities has been ‘persons considered to be LTTE members, fighters or operatives or persons who have played an active role in the international procurement network responsible for financing the LTTE and ensuring it was supplied with arms.”³⁹² And also other reports like Freedom from Torture report in 2012 and the UK Upper Tribunal Country Guidance Decision in *GJ v Secretary of State for the Home Department (post -civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC)* which mentioned “certain categories of persons to be at real risk of persecution or serious harm on return to Sri Lanka”.³⁹³ “The Tribunal has found that the applicant did not have a profile as an

³⁸⁹ Ibid at para 47 and RRT Case No. 1405747(2015) at para 27

³⁹⁰ RRT Case No. 1405747(2015) 31

³⁹¹ Ibid at para 31 and RRT Case No1311465, [2015] RRTA 143, para 49

³⁹² RRT Case No1311465, [2015] RRTA 143, para 55

³⁹³ Ibid and Freedom from Torture 2012, Sri Lankan Tamils tortured on return from the UK, 13 September, pp.1-2, http://www.tamilnet.com/img/publish/2012/09/Freedom_from_Torture_briefing92012.pdf. & Upper Tribunal (Immigration

LTTE supporter or member and that he will not attract any adverse interest from the authorities or paramilitary groups in Colombo’.

The Tribunal also mentioned about the Immigration and Refugee Board of Canada (IRBC) report³⁹⁴ from August 2011. IRBC reported on the treatment of Tamils returning to Sri Lanka, including failed asylum seekers based on the information provided by the Canadian High Commission in Colombo. This report noted that, “[t]he screening process is the same for all persons returning to Sri Lanka – whether voluntary or by escort. The process is not impacted by ethnicity”.³⁹⁵ And the ‘October 2014 and February 2015 reports of DFAT “continued to indicate that Sri Lankan returnees are treated according to standard procedures regardless of their ethnicity”³⁹⁶.

After considering all the evidence, the Tribunal’s view in the first case was that “the Tribunal is not satisfied that the applicant has any profile as an LTTE supporter and there is no real chance that the applicant will be persecuted for reasons of any pro-LTTE or anti-government political opinion that may be imputed to him because he has lived in Australia or because he has sought asylum in Australia. And according to the Tribunal there is no a real chance that the applicant will be persecuted for reason of his membership of the particular social group of ‘failed Tamil asylum seekers’, or because he is a Tamil who left Sri Lanka illegally and who has applied for asylum in Australia.”³⁹⁷

In the *case no:2*, the Tribunal considered the above mention country reports that is the report of the Immigration and Refugee Board of Canada (IRBC) and the DFTA country information report and mentioned ,“In light of the applicant’s lack of a pro-LTTE or anti-government profile, the Tribunal is not satisfied on the basis of the evidence before it that there is a real chance that the applicant will be subjected to serious harm at the airport or in his home area as a failed asylum seeker, including from a western country such as Australia”³⁹⁸

- ***Real chance of harm for illegal departure***

and Asylum Chamber) United Kingdom Country Guidance Decision in GJ v Secretary of State for the Home Department (post -civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC) cited in RRT Case No1311465, [2015] RRTA 143, para 55

³⁹⁴ Immigration and Refugee Board of Canada, Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport ‘, LKA103815.E, 22 August 2011 CIS29896 cited in RRT Case No1311465, [2015] RRTA 143, para 56.

³⁹⁵ *ibid*

³⁹⁶ RRT Case No1311465, [2015] RRTA 143, para 58

³⁹⁷ *Ibid* at para 61

³⁹⁸ RRT Case No. 1405747[2015] at para 47

Regarding the claim that the applicant will be tortured if return to Sri Lanka for the illegal departure, the Tribunal in the *case no :1*, referred to the DFTA country information report and mentioned “the most likely penalty for leaving Sri Lanka illegally would be a fine, unless the person is suspected of facilitating or organizing a people-smuggling venture.”³⁹⁹ But “there is no information before the Tribunal to indicate that returnees held in remand awaiting bail hearings have been subjected to torture or ill-treatment”⁴⁰⁰.

“The applicant may be questioned at the airport, charged and placed in remand for a short period. The Tribunal also accepted that the prison conditions in Sri Lanka may be poor. However, as it was put to the applicant at hearing, the sources consulted suggest that the treatment, the applicant might face upon his return applies to all persons, regardless of race or religion. Tamils are not singled out. The Tribunal is not satisfied, therefore, that being questioned, arrested, charged and detained for a short period in poor conditions, which may include overcrowding and poor sanitation, amount to systematic and discriminatory conduct as required by s.91R(1)(c). The Tribunal finds that the processing of returnees and any penalties that may be imposed on the applicant are the result of the non-discriminatory enforcement of a law of general application”⁴⁰¹.

In the *case no :2* the Tribunal was not satisfied, “in light of the country information that the applicant would be prosecuted for having left the country illegally when he was only [a small child].”⁴⁰² The Tribunal also mentioned that, there is no real chance of the applicant being prosecuted for having left the country illegally ⁴⁰³.

In the *case no:1*, regarding all other claims including real chance of being harmed on the basis applicant religion (Hindu) and as wealthy Tamil from Sri Lanka, the Tribunal mentioned there is no information that Tamil Hindus and wealthy Tamil from Sri Lanka suffered harm for the reason of their religion or member of a particular social group called wealthy Tamils⁴⁰⁴. And found that “that there is no real chance that the applicant will be seriously harmed for the reason of his race, religion, actual or imputed political opinion or membership of the particular social

³⁹⁹ RRT Case No1311465, [2015] RRTA 143, para 63

⁴⁰⁰ Ibid at para 66

⁴⁰¹ RRT Case No1311465, [2015] RRTA 143, para 67

⁴⁰² RRT Case No. 1405747[2015] at para 35

⁴⁰³ Ibid at para 46

⁴⁰⁴ RRT Case No1311465, [2015] RRTA 143, para 50-53

groups of ‘wealthy Tamils in eastern Sri Lanka’ or ‘wealthy Tamil landowners who are targeted for extortion’ if he returned to Sri Lanka and relocated to Colombo”⁴⁰⁵.

In the *case no:2*, the Tribunal also did not find that the on the basis of the evidence before it that there is a real chance that the applicant would suffer from serious harm as a result of his leg injury or there is a real chance of the applicant suffering serious harm as a result of his lack of family in Sri Lanka⁴⁰⁶.

- *Decisions*

In the *case no:1*, the Tribunal mentioned that, “based on all of the evidence before it, considered individually and cumulatively, the Tribunal is not satisfied there is a real chance that the applicant would face serious harm amounting to persecution for the Convention reasons of his Tamil race/ethnicity, his actual or imputed political opinion or his membership of a particular social group if returned to Sri Lanka and relocated to Colombo”⁴⁰⁷.

Regarding the question of the Internal relocation, the Tribunal in the *case no:1*, did not find the applicant relocation to Colombo will be unreasonable and the Tribunal was not satisfied that “requiring the applicant to relocate to Colombo would ‘mute’ his profile, either as a family member of wealthy Tamil landowners in eastern Sri Lanka, or as a wealthy Tamil in eastern Sri Lanka”⁴⁰⁸. The Tribunal found, “it would be reasonable and practicable for the applicant to safely relocate to Colombo and there is no real chance that the applicant will face serious harm for a Convention reason by anyone if he were to internally relocate.”⁴⁰⁹

And in the both cases, the Tribunal mentioned that the applicants did not meet the conditions for complementary protection and reached in a decision that in the both cases that, the applicant’s fear of persecution for a Convention reason in Sri Lanka was not well-founded. The Tribunal finally mentioned that, “the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore, the applicant does not satisfy the criterion set out in s.36(2)(a). The Tribunal affirms the decision not to grant the applicant a Protection visa.”⁴¹⁰

⁴⁰⁵ Ibid at para 53

⁴⁰⁶ RRT Case No. 1405747[2015] at paras 52-53

⁴⁰⁷ RRT Case No1311465, [2015] RRTA 143, para 68

⁴⁰⁸ Ibid, paras 72-73

⁴⁰⁹ RRT Case No1311465, [2015] RRTA 143 at para 74

⁴¹⁰ Ibid, paras 83-85 and RRT Case No. 1405747[2015] at paras 60-61.

Other six cases

In the other six cases⁴¹¹ the tribunal almost similarly like the previous two cases, reviewed the applications against the refusal decision to grant a protection visa in Australia. The Tribunal started the review proceedings by describing the relevant provision of Migration Act '1958 and then considered the claims and evidence. The claims and evidence includes the initial claims of the applicant and the delegate's decision, application to the Tribunal and further submissions, Tribunal hearing, post hearing submission. Then the Tribunal considered the country of origin information (CIO) on the basis of the general Tribunal research on the situation of Tamils in Sri Lanka. After that the Tribunal explained the findings and reasoning's which includes assessment of the country of nationality and origin report, assessment of applicant credibility, and assessment of risk on the basis of the applicants claims of real chance of harm for Tamil Ethnicity, political opinion, as a return asylum seeker and for illegal departure and other chances of harm mentioned by the applicants. Then the Tribunal discussed whether relocation is possible and complementary protection will be granted or not and then reached to the final decision.

- ***Facts of the case and claim of the applicant***

In the ***RRT Case No. 1304279, [2013] RRTA 420(case no:3)***,⁴¹² and ***RRT Case No. 1214918, [2013] RRTA 650(case no 4)***,⁴¹³ both the applicants were businessman and belongs to Sri Lankan Tamil race. In the ***case no:3***, the applicant claimed he was interrogated and accused by the CID as a LTTE supporter and tortured by them in several time. Because of the fear of torture and death from CID, he unlawfully left Sri Lanka and claimed that 'he would suffer persecution in Sri Lanka because of his Tamil race, an imputed political opinion as a supporter of the LTTE and opponent of the government, also for his membership of a particular social group and being a failed asylum seekers returning to Sri Lanka. He also claimed that

⁴¹¹ RRT Case No. 1304279, [2013] RRTA 420, Australia: Refugee Review Tribunal, 2 July 2013; RRT Case No. 1301660, [2013] RRTA 624, Australia: Refugee Review Tribunal, 9 September 2013, RRT Case No. 1300825, [2013] RRTA 889, Australia: Refugee Review Tribunal, 17 October 2013, RRT Case No. 1214918, [2013] RRTA 650, Australia: Refugee Review Tribunal, 18 September 2013, RRT Case No. 1304427, [2013] RRTA 689, Australia: Refugee Review Tribunal, 11 October 2013 and RRT Case No. 1215212, [2012] RRTA 1165, Australia: Refugee Review Tribunal, 5 December 2012

⁴¹² ***RRT Case No. 1304279, [2013] RRTA 420***, Australia: Refugee Review Tribunal, 2 July 2013, available at: <http://www.refworld.org/docid/528a2bba4.html> [accessed 16 March 2016] (case no 3)

⁴¹³ ***RRT Case No. 1214918, [2013] RRTA 650***, Australia: Refugee Review Tribunal, 18 September 2013, available at: <http://www.refworld.org/docid/52c54c7a4.html> [accessed 16 March 2016] (case no 4)

because of his Tamil race and imputed political opinion as supporter of LTTE he suffered ‘significant harm ‘as defined in the Migration Act.’⁴¹⁴.

In the *case no:4*, the applicant ‘left Sri Lanka because of his business problems. His business started when he started to accumulate debts as a result of money owed to him by a Sinhalese man, who threatened to report him to the authorities as an LTTE supporter. On the other hand, his creditors reported him to the police who came to his house and beat him⁴¹⁵. The applicant claimed that “he fears harm as a returned asylum-seeker, because of his illegal departure from Sri Lanka, because he is Tamil and at the hands of the corrupt CID members, the [military] or police as a suspected LTTE member. He also fears harm because of his membership of the particular social groups of Sri Lankan Tamils and Tamils from the North or East of Sri Lanka and his real or imputed political opinion.”⁴¹⁶

In the case *RRT Case No. 1301660, [2013] RRTA 624(case no :5)*,⁴¹⁷ the applicant’s fear of persecution also based on the Convention reason of race and political opinion and also as failed asylum seeker. In this case the applicant was made to perform forced labour by the Army, sexually assaulted and asked by the army two times to report to them because the Army thought his father has the LTTE involvements⁴¹⁸. The applicant claimed that “he is afraid to return to Sri Lanka because he left the country illegally and before he left Sri Lanka the officers were looking for him. He also referred to being sexually assaulted in 2010 and he would not have freedom if living in fear of the authorities in Sri Lanka.”⁴¹⁹

In the *RRT Case No. 1304427, [2013] RRTA 689 (case no:6)*⁴²⁰ and *RRT Case No. 1215212, [2012] RRTA 1165(case no:7)*⁴²¹ applicants claim was also related to their Tamil ethnicity and imputed political opinion in support of the LTTE. In the *sixth case* , the applicant also mentioned, “he faces harm in Sri Lanka also for reason of he was in opposition to the Sri Lankan authorities; his membership of particular social groups characterized by his

⁴¹⁴ RRT Case No. 1304279, [2013] RRTA 420 at para 23

⁴¹⁵ RRT Case No. 1214918, [2013] RRTA 650 at para 3

⁴¹⁶ Ibid

⁴¹⁷ RRT Case No. 1301660, [2013] RRTA 624, Australia: Refugee Review Tribunal, 9 September 2013, available at: <http://www.refworld.org/docid/5280e5ad6.html> [accessed 16 March 2016] (case no 5)

⁴¹⁸ Ibid at para 21

⁴¹⁹ RRT Case No. 1301660, [2013] RRTA 624 (2013), at para 40

⁴²⁰ RRT Case No. 1304427, [2013] RRTA 689, Australia: Refugee Review Tribunal, 11 October 2013, available at: <http://www.refworld.org/docid/52c572094.html> [accessed 16 March 2016] (case no 6)

⁴²¹ RRT Case No. 1215212, [2012] RRTA 1165, Australia: Refugee Review Tribunal, 5 December 2012, available at: <http://www.refworld.org/docid/516eb14d4.html> [accessed 16 March 2016] (case no 7)

representative as “illegal emigrant from Sri Lanka” and/or “failed asylum seeker returned to Sri Lanka”.⁴²² He claimed that “his risk profile is heightened by the “enmity of his former Sinhalese (sic) employer,” who has connections within the Sri Lankan Army”.⁴²³ Where in the seventh case, the applicant also feared that “ he would be at risk as a “wealthy Tamil businessman in Sri Lanka.”⁴²⁴

And the case *RRT Case No. 1300825, [2013] RRTA 889 425(case no :8)*, is regarding a Tamil fisherman who was born in the North-Western province of Sri Lanka. The applicant was originally from [village 1] but he lived in another [village 2] with his wife where he was engaged in fishing. The applicant claimed that “he and his wife have been subjected to increasing harassment by Sinhalese police who damaged his house and his work equipment and frightened his family.”⁴²⁶ And “the applicant and his wife were physically assaulted and verbally abused by their Sinhalese neighbors and that after the applicant complained to the police his wife was seriously assaulted by the police and/or the military.”⁴²⁷

The applicant claimed “he has to fear harm for reason of his race as a Tamil, his real or imputed political opinion arising from his race and his former residence in a predominantly Tamil region, his membership of the particular social group of Tamils who have fled Sri Lanka illegally and have unsuccessfully made claims for asylum in Australia and because of his illegal departure and what would be his involuntary return. He also claimed that he owes seven lakhs to the man who organized his travel who is threatening to bring people to beat them.”⁴²⁸

- *Issue before the Tribunal*

In all these above mentioned cases, according to the Tribunal the issue in each individual case was “whether the applicant is credible regarding his/her claim and whether the applicant has a well-founded fear of persecution for a convention reason, or whether there is a real risk the applicant will face significant harm as a necessary and foreseeable consequence of the applicant return to Sri Lanka.”⁴²⁹

⁴²² RRT Case No. 1304427, [2013] RRTA 689 at para 4

⁴²³ Ibid

⁴²⁴ RRT Case No. 1215212, [2012] RRTA 1165 at para 28

⁴²⁵ RRT Case No. 1300825, [2013] RRTA 889, Australia: Refugee Review Tribunal, 17 October 2013(case no 8)

⁴²⁶ Ibid at para 3

⁴²⁷ Ibid at para 59

⁴²⁸ RRT Case No. 1300825, [2013] RRTA 889 at para 37

⁴²⁹ RRT Case No. 1214918, [2013] RRTA 650 at para 22; RRT Case No. 1304427, [2013] RRTA 689 at para 6; RRT Case No. 1301660, [2013] RRTA 624 at para 30; RRT Case No. 1300825, [2013] RRTA 889 at para 22; RRT Case No. 1215212, [2012] RRTA 1165 at paras 28,65; RRT Case No. 1304279, [2013] RRTA 420 at paras 79-85.

- *Credibility and risk assessment.*

The Tribunal in all cases except in the *case no :8*, found the applicant was not credible in relation to the applicant claim or the Tribunal was not satisfied ‘of the truth of significant aspects of the applicant’s claimed circumstances in Sri Lanka’.⁴³⁰ To made an assessment of credibility of the applicant the Tribunal relied on claims of applicant, total evidence before it and the applicant written and oral statements and also country of origin information in the same way as discussed⁴³¹ earlier in this subsection.

In the *case no :8*, the Tribunal found that “the applicant’s evidence overall has been straightforward and unembellished. His evidence regarding the circumstances that led to his departure and what he fears would happen if he returns has been mostly consistent and the Tribunal finds that he is overall a credible witness.”⁴³²

The Tribunal in that case made an assessment of ‘real chance of significant harm’ based on the Convention reasons that is the applicant’s Tamil ethnicity, imputed political opinion. Also assessment made by the Tribunal regarding the real chance of harm as a failed asylum seeker and for the illegal departure. “The Tribunal after considering the applicant’s claims both individually and cumulatively found that, there is a real chance that if he returned to Sri Lanka the applicant would be seriously harmed now or in the reasonably foreseeable future for a convention reason⁴³³. The Tribunal also found regarding the applicant another claim that he was threaten by the person from whom he owed money’ that “state protection would not be available to the applicant, including in the event that non-state actors sought to harm him.”⁴³⁴

But in this case the refusal of the protection visa confirmed by the Tribunal because the Tribunal found that relocation is possible for the applicant where he was born in [village 1]’. According to the Tribunal “the real chance of harm to the applicant is localized, in that it derives from past events in the [Village 2] area and the applicant’s relations with local Sinhalese fishermen and his complaint to the local police. But there would not be a real chance the applicant would be seriously harmed if he did not return to live and work in the [Village 2] area. The Tribunal has therefore considered whether the applicant could relocate to an area

⁴³⁰ RRT Case No. 1304279, [2013] RRTA 420 at para 79-85; RRT Case No. 1301660, [2013] RRTA 624 at 104-113; RRT Case No. 1214918, [2013] RRTA 650 at para 28, RRT Case No. 1304427, [2013] RRTA 689 at para 25; RRT Case No. 1215212, [2012] RRTA 1165 at para 55-57

⁴³¹ See discussion credibility and risk assessment at page 47

⁴³² RRT Case No. 1300825, [2013] RRTA 889 at para 37

⁴³³ Ibid at para 66

⁴³⁴ RRT Case No. 1300825, [2013] RRTA 889 at para 59

where there would not be a real chance of serious harm”⁴³⁵. And the Tribunal findings is that, “the applicant would not face a real chance of serious harm in [Village 1] due to his Tamil ethnicity or for any other convention reason. He could return to work as a fisherman and make a basic living and on that basis, and as his adult children live there and his wife is currently living with their daughter in their former home, the Tribunal finds that it would be practicable, in the sense of reasonable, for the applicant to relocate to [Village 1].”⁴³⁶

Except this case discussed above, in all other five cases the Tribunal based on the country of origin information and evidence before it found that there is no real chance of being harmed for the Convention reasons of race, imputed political opinion and also for illegal departure and as a failed asylum seeker for the applicant.

Regarding real chance of harm based on the Tamil ethnicity in the *case no:3*, the Tribunal mentioned, “as a result the Tribunal does not accept simply being of Tamil ethnicity is of itself sufficient to give rise to a real chance of persecution if the applicant was to return to Sri Lanka now or in the reasonably foreseeable future”⁴³⁷

In the *case no:4*, the Tribunal mentioned that “having regard to the country information, the Tribunal does not accept, on the evidence before it, that the applicant faces a real chance of serious harm for reason of his Tamil race or ethnicity if he returns to Sri Lanka now or in the reasonably foreseeable future”⁴³⁸.

The Tribunal’s findings on the real chance of being harmed for the reason of imputed political opinion in the *case no:6* was “without more, and in the context of what is accepted of the applicant’s claimed circumstances, this imputes the applicant with any political opinion linked to the LTTE or opposed to the Sri Lankan authorities or gives rise to a real chance of serious harm in the reasonably foreseeable future in connection with any actual or imputed political opinion.”⁴³⁹

Also for leaving the country illegally the Tribunal found in the *case no: 3*, that “on the evidence before it, the tribunal does not accept, that the applicant will be subjected to serious penalties for his illegal departure from Sri Lanka”⁴⁴⁰. “if the applicant returned to Sri Lanka now or in

⁴³⁵ Ibid at para 60

⁴³⁶ RRT Case No. 1300825, [2013] RRTA 889 at para 65

⁴³⁷ RRT Case No. 1304279, [2013] RRTA 420 at para 86

⁴³⁸ RRT Case No. 1214918, [2013] RRTA 650 at para 57

⁴³⁹ RRT Case No. 1304427, [2013] RRTA 689 at para 37

⁴⁴⁰ RRT Case No. 1214918, [2013] RRTA 650 at para 66

the reasonably foreseeable future there is not a real chance that the applicant would face serious harm as a result of his illegal departure from Sri Lanka”⁴⁴¹.

And finally regarding real chance of harm as a failed asylum seeker the tribunal found in the *case no:5*, that “the possibility of the applicant being held briefly in remand in poor conditions before being brought before a magistrate does not equate with a real chance of suffering serious harm. There is no reliable substantiated country information demonstrating that Tamils sent back to Sri Lanka after seeking asylum abroad suffer harm at the airport or after their arrival because they have been abroad and sought asylum.”⁴⁴²

In the *case no :6*, the Tribunal mentioned “on balance, based on the totality of the evidence before it, the Tribunal is not satisfied that the evidence reveals a real chance of persecution involving serious harm in connection with the applicant’s unsuccessful application for asylum, either singularly or cumulatively with what is accepted of the balance of his circumstances, in Sri Lanka in the reasonably foreseeable future.”⁴⁴³

- ***Decisions***

After considering the applicants claims both individually and cumulatively in all the eight cases the Tribunal findings was similar that the applicant if returned, will not face a real chance of serious harm amounting to persecution for the Convention reasons. According to the Tribunal in the *case no :4* “if returned to Sri Lanka, the applicant would not face a real chance of serious harm amounting to persecution for a convention reason now or in the reasonably foreseeable future. Accordingly, the Tribunal is not satisfied that the applicant has a well-founded fear of persecution should he return to Sri Lanka now or in the reasonably foreseeable future”⁴⁴⁴.

And the Tribunal confirmed the delegate decision to refuse the applicant protection visa in Australia.

- ***Concluding remarks***

In all the eight cases the RRT where confirmed the refusal decision was almost followed the similar procedure for the assessment of the review application. And for the assessment of credibility in all cases the Tribunal similarly followed the guidelines provided in the Guide to

⁴⁴¹ Ibid at para 71

⁴⁴² *RRT Case No. 1301660*, [2013] RRTA 624 at para 144

⁴⁴³ *RRT Case No. 1304427*, [2013] RRTA 689 at para 47

⁴⁴⁴ *RRT Case No. 1214918*, [2013] RRTA 650 at para 74 and also similarly decide by the tribunal in the *RRT Case No. 1304427*, [2013] RRTA 689 at para 52, *RRT Case No. 1215212*, [2012] RRTA 1165 at para 65, *RRT Case No. 1304279*, [2013] RRTA 420 at para 101, *RRT Case No. 1301660*, [2013] RRTA 624 at para 150, *RRT Case No. 1300825*, [2013] RRTA 889 at para 66.

refugee Law in Australia. In all these cases except the case *RRT Case No. 1300825, [2013] RRTA 889(case no 8)* the Tribunal found the applicant were not credible to their claim after considering the applicant statements and evidence in the tribunal. And accordingly found based on the evidence and relevant COI that no real risk of serious harm exists in all these cases except *the eight case*. In the *case no :8* the real risk of serious harm was based on the applicant Tamil ethnicity, imputed political opinion and as a return asylum seeker for which applicant has well-founded fear of being persecuted.

Only in the *case no:8, the* Tribunal found that the applicant was credible and he has real chance of serious harm based on the Conventional grounds and as a return asylum seeker. But in this case the Tribunal found relocation was possible for the applicant so Australia has no protection obligation for him. So it can be said the applicants were refused to grant protection in above mention cases except the applicant in the eighth case because for the applicants there was no a real chance of serious harm. Because they did not fall in the category of risk profile and the applicants were not found credible to their claim. In none of this case the Tribunal need not discussed the question regarding the issues of interpretation of the refugee definition. Nor any situation aroused in these cases where the Tribunal need to reinterpret the refugee definition or its element. For these cases the Tribunal adopted the interpretation of the Australian High Court as discussed in the previous subsection and made assessment of the claim.

4.5.2 Discussion of the cases where protection granted

In the *RRT case no 1400923 [2015] RRTA 168 (case no 9)*⁴⁴⁵ and *RRT Case No. 1400859, [2015] RRTA 167(case no 10)*⁴⁴⁶ the Refugee Review Tribunal accepted the refugee claim and granted the protection visa to the applicants because the applicants had a well-founded fear of being persecuted for the reasons of a combination of their race that is Tamil ethnicity and imputed political opinion. In these two cases applicants were found credible in respect to their claims.⁴⁴⁷

In these two cases, the Tribunal reviewed the refusal decisions made by the delegate of Minister of Immigration to grant a protection visa to the Tamil applicants. The RRT started the review

⁴⁴⁵ *RRT Case No. 1400923, [2015] RRTA 168, Australia: Refugee Review Tribunal, 13 April 2015, available at <http://www.refworld.org/docid/55b20f044.html> [accessed 14 March 2016] (case no 9)*

⁴⁴⁶ *RRT Case No. 1400859, [2015] RRTA 167, Australia: Refugee Review Tribunal, 24 July 2015, available at <http://www.refworld.org/docid/55b20d724.html> [accessed 14 March 2016] (case no 10)*

⁴⁴⁷ *RRT Case No. 1400923, [2015] RRTA 168, para 75; RRT Case No. 1400859, [2015] RRTA 167, para 35*

process by considering the claim and evidence of the applicants. Before the assessment of the background and claim of the applicants, the RRT mentioned about the relevant provisions of the Migration Act 1958 including s36 of the Migration Act 1958. According to that provision of Migration Act, Australia has protection obligation under the Refugee Convention and the Protocol to give protection visa to a non-citizen when asking for refugee status and fulfils the refugee citation in the s36 of the Act⁴⁴⁸.

In the both cases, the RRT found that the issue was the credibility of the applicants. Also whether the applicants fulfill the criteria for the protection based on their claim that both the individual applicants will be persecuted because of their Tamil ethnicity and imputed political opinion and also being a returned asylum seeker ⁴⁴⁹.

In the both cases, the applicants had almost similar claim that they were interrogated, insulted and were a victim of torture and harassment by the Sri Lankan authority because the Army suspected that they were connected with, and sympathetic to the LTTE.⁴⁵⁰ Both the applicants left Sri Lanka unlawfully because they suffered harm in the hand of the authorities. And both of them also feared that, if they return they will be severely punished, arrested, detained, tortured and then killed by the authority for leaving the country illegally.⁴⁵¹ The applicant in the case no 9, to support his claim indicated about the independent country information from sources like the UNHCR, Amnesty International, Human Right Watch, the Sri Lankan campaign for peace and other reports which are credible and ‘have commented on patterns of abuse visible post-war targeting Tamil civilian population in northern Sri Lanka’⁴⁵².

The RRT on the basis of the claim, evidence and personal statement of the applicants made an assessment of the credibility of the applicants. After assessment of the personal statement and evidence, in the case no 9, the Tribunal’s view was that, the applicant was credible and mentioned that “the applicant provided a true and honest account of what has happened to him...” though in tribunal view ‘there was minor problem with applicant evidence.’⁴⁵³ But the tribunal was overall satisfied regarding his claim that he was detained, tortured because the authority thinks he has linked with the LTTE as being Tamil and left his country of origin because of the past occurrence.

⁴⁴⁸Ibid at para 6

⁴⁴⁹ RRT Case No. 1400923, [2015] RRTA 168, para 75; RRT Case No. 1400859, [2015] RRTA 167, para 35

⁴⁵⁰ RRT Case No. 1400923, [2015] RRTA 168, para 19; RRT Case No. 1400859, [2015] RRTA 167, para 9 (d) and 9 (j)

⁴⁵¹ Case No. 1400923, [2015] RRTA 168, para 19 and Case No. 1400859, [2015] RRTA 167, para 9 (k)

⁴⁵² Case No. 1400859, [2015] RRTA 167, para 12(a)

⁴⁵³ Case No. 1400923, [2015] RRTA 168, para 35

In the last case, the Tribunal after considering whole evidence also satisfied that the applicant was credible because ‘the applicant’s evidence in the course of the hearing was generally consistent with his written claims and applicant’s central claims have not changed throughout the process.’⁴⁵⁴ The Tribunal view was regarding the applicant’s imputed political opinion and adverse profile of having a link with LTTE that ‘it is as plausible that the applicant has experienced the claimed incidents of harm and that those incidents amount to serious and significant harm’⁴⁵⁵

- ***Credibility and Risk Assessment***

The RRT after considering the applicant’s claim of suffered harm in the both case determined the question whether there is a real chance or risk of harm to the applicants based on a combination of their race and political opinion and being a returned asylum seeker. To determine the question of real chance of harm the RRT was considered the relevant country of origin information (CIO) as already mention in the previous subsection to the extent relevant to the assessment of the risk.⁴⁵⁶ The Tribunal also considered the 2013 decision of **the United Kingdom Upper Tribunal (Immigration and Asylum Chamber) in GJ and others (post-civil war returnees) Sri Lanka CG [2013] UKUT 00319 (AIC)**⁴⁵⁷ to determine the question of real chance of harm.

After considering all the country information, the Tribunal assessment in the case no 9 was that the ‘human rights situation in Sri Lanka continues to be problematic. Tamil citizens are disproportionately affected by human rights abuses. The key catalyst in the human rights abuses for Tamils is most often certain perceived or actual links to the LTTE. Tamils in Sri Lanka face continuing discrimination, including harassment by authorities.’⁴⁵⁸

And in the last case, Tribunal mentioned that “on balance, credible independent country information fundamentally indicates that it is those who have actual or perceived strong LTTE

⁴⁵⁴ Case No. 1400859, [2015] RRTA 167, para 16

⁴⁵⁵ Ibid at para 24 & 25

⁴⁵⁶ Reports discussed in chapter-2

⁴⁵⁷ 2013 decision of the United Kingdom Upper Tribunal (Immigration and Asylum Chamber) in GJ and others (post-civil war returnees) Sri Lanka CG [2013] UKUT 00319 (AIC) which comprehensively considered the available information on the treatment of Tamils in Sri Lanka and the treatment of those returning and taken into consideration Upper Tribunal findings that, “the establishment of former links to the LTTE are not determinative of an asylum claim today” see Case No. 1400923, [2015] RRTA 168, para 46

⁴⁵⁸ Case No. 1400923, [2015] RRTA 168, para 63

links/sympathizers who can be targeted”⁴⁵⁹.

In the case no 9, the Tribunal accepted that, the applicant has a real chance of significant physical harassment or significant physical ill-treatment during the process of questioning on his return as a failed asylum seeker.⁴⁶⁰ The Tribunal mentioned that depending on the credible country information and evidence⁴⁶¹ which shows, in Sri Lanka returned asylum seeker may arrest, detained and tortured based on their connection with the LTTE. But in the last case the Tribunal’s findings were that ‘there is not a real chance that the applicant would suffer harm amounting to persecution simply on the basis of being a Tamil failed asylum seeker but here is a real chance that the applicant would suffer serious harm on the basis of the adverse profile.’⁴⁶²

- ***Decision***

Regarding the individual applicant claim the Tribunal in *case no:9*, summaries that “the applicant is facing a real chance of harm; in the reasonably foreseeable future should he return to Sri Lanka. That harm includes significant physical harassment or significant physical ill-treatment in terms of s.91R (2) of the Act, thus constituting serious harm in term of 91R(1)(b) of the Act. And essential and significant reason for the persecution in terms of section 91R(1)(a) of the Act would be a combination of the applicant’s Tamil ethnicity and imputation of LTTE involvement which would involve systematic and discriminatory conduct and thus satisfy s.91(R)(1)(c) of the Act.”⁴⁶³

In the last case the Tribunal “in consideration of the evidence as a whole and for the stated reasons, the Tribunal is satisfied that when considered cumulatively, there is a real chance that the applicant faces serious harm amounting to persecution on the basis of his Tamil ethnicity and imputed political opinions”⁴⁶⁴ and regarding unlawful departure from Sri Lanka the Tribunal mentioned that “because of his specific profile, that there is a real chance of serious harm occurring as a result of differential treatment the applicant faces during interrogation, questioning, detention, and penalty. Therefore, the applicant does now and in the reasonably

⁴⁵⁹ Case No. 1400859, [2015] RRTA 167, para 34

⁴⁶⁰ Case No. 1400923, [2015] RRTA 168, para 72

⁴⁶¹ See chapter-2 for the discussion regarding treatment of failed asylum seeker in Sri Lanka.

⁴⁶² Case No. 1400859, [2015] RRTA 167, para 47

⁴⁶³ Case No. 1400923, [2015] RRTA 168, paras 74-76

⁴⁶⁴RRT Case No. 1400859, [2015] RRTA 167 464 at para 35

foreseeable future has a well-founded fear of persecution arising essentially and significantly for one or more of the five Convention reasons if he returns to Sri Lanka”⁴⁶⁵.

In the both cases, the Tribunal mentioned to the UNHCR guidelines⁴⁶⁶ regarding the relocation of the applicant. The UNHCR guidelines mentioned, “when the agent of persecution is the State itself then relocation is not possible for applicant elsewhere in the country of origin as the agent of persecution would be able to pursue the individual throughout the territory”⁴⁶⁷ and was reached in a finding that, the applicant has a real risk of harm if return to the country of origin. And the Tribunal in both cases concluded that the applicant has a well-founded fear of persecution for convention reasons and under s36 (2a) applicants is a refugee to whom Australia has protection obligation.

- **Concluding Remarks**

Two cases where the protection visa granted by the RRT, in both case the applicant found credible regarding their claim of well -founded fear of being persecuted for the Convention reason of race and political opinion after considering their statement and evidence before the Tribunal. In these two cases, the Tribunal also used the similar approach of credibility assessment which was also used in the cases where refusal decision to grant protection visa confirmed by the Tribunal. The Tribunal also based on the evidence and credible country report found both the applicant has a risk profile for which they have real chance of serious harm. Though in one case, the Tribunal found the applicant has no real chance of serious harm as return asylum seeker but cumulatively found that both applicant have real chance of serious harm which amount to persecution in their country of origin. Also found, relocation is not possible because the persecutor itself the Government who searched the applicant any part of the country. Here also the applicants were grant protection visa based on their credibility findings that they have adverse profile or risk profile for their specific situation. Like the previous cases in none of this two cases the Tribunal grant the protection to the applicant based on the interpretation of the Convention definition of refugee and its elements. For the ‘Tamil’ applicants the situation was well established to understand they were persecuted because of their risk profile related to their Tamil ethnicity and imputed political opinion as mentioned by

⁴⁶⁵ Ibid at para 54

⁴⁶⁶ see, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 21 December 2012.

⁴⁶⁷ RRT Case No. 1400923, [2015] RRTA 168 and RRT Case No. 1400859, [2015] RRTA 167

the UNHCR guidelines. And the applicants need international protection because of their risk profile.

4.6 Does the interpretation matters for the determination of the refugee status of Tamil in Australia

In all these ten reviewed cases where the protection visa granted or refused to the Tamil applicants, the Australian Refugee Review Tribunal interpreted the element of refugee definition similarly as already mentioned in subsection 4.3. The Tribunal determined the well-founded fear of the applicant based on the 'real chance' test and objectively made assessment of the genuine fear. The Tribunal determined the serious harm based on the Convention reasons (race and imputed political opinion) which includes systematic, discriminatory conduct, and Convention reasons as significant and essential reasons of persecution. In none of these case the Tribunal seek to revise the interpretation of the element of the refugee definition or in none of the cases any issues aroused regarding the interpretation of the refugee definition or regarding the approach adopted by the Tribunal for refugee status determination of Tamil from SriLanka. Eight cases where the protection visa refused to grant by the Tribunal as already discussed found the applicants were not found credible. Even in one case where the applicant found credible was not granted protection because it was found, relocation of the applicant in other part of Sri Lanka is possible. It was also not the case where refusal granted because of the issue of the interpretation of the refugee definition or its constitute elements. Also, the cases where protection granted it was found that the applicant have the risk profile for which they have the fear of being persecuted and that why claimed for protection. Findings regarding the applicants risk profile and their credible to the claim was interrelated. In the cases where the claim refused, the applicant was found not credible and the applicant was not belonged to the category of risk profile.

So after all the discussion, it is clearly understandable that for the assessment of the refugee claim of the Tamil in Australia, interpretation of the element of refugee definition played a smaller role than credibility assessment of the applicant. If Australia adopted another approach to interpreting the refugee definition may be it resulted in a different outcome or maybe not. But for present discussed cases interpretation of the definition of refugee was not influential for the determination outcome.

Chapter 5: Case law analysis from New Zealand

5.1 Refugee law legislation in New-Zealand

New Zealand is a signatory to the 1951 Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugees. The Government of New Zealand ratified the 1951 refugee Convention on 30 June 1960 and later acceded to the 1967 Protocol on 6 August 1973⁴⁶⁸. As a party to both the Convention and the Protocol, New Zealand acknowledged the protection obligations under the Convention and the Protocol. “New Zealand also has the protection obligations under the 1984 Convention Against Torture (Cat) and 1966 Covenant on Civil and Political Rights (ICCPR)”⁴⁶⁹.

In domestic level Immigration Act 2009 ⁴⁷⁰ is “the major guiding legislative document establishing the framework for implementation of New Zealand’s commitments under the 1951 Convention.”⁴⁷¹ and its 1967 Protocol. According to the Section -3(2d)⁴⁷² of the Immigration Act 2009, “one objective of the Act is to ensure compliance with New Zealand’s ‘immigration-related’ international obligations”⁴⁷³.

5.1.1 The Immigration Act 2009(the Immigration Amendment Act 2015):

Part 5 of the Act ensures New Zealand obligations under the Refugee Convention.⁴⁷⁴ According to this provision, New Zealand determine the refugee and protection status of a non-

⁴⁶⁸ UN High Commissioner for Refugees (UNHCR), Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: New Zealand, November 2008, available at: <http://www.refworld.org/docid/49b6273f0.html> [accessed 9 May 2016]

⁴⁶⁹ UN High Commissioner for Refugees (UNHCR), UNHCR Resettlement Handbook, Country Chapter - New Zealand, October 2014, pp 2.1, available at: <http://www.refworld.org/docid/5458b4794.html> [accessed 9 May 2016]

⁴⁷⁰ Immigration Act 2009 is amended by the Immigration Amendment Act 2015 (the Amendment Act). which received Royal Assent on 6 May 2015. See New Zealand: Immigration Act 2009 [New Zealand], 2009 No 51, 16 November 2009, available at <http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440303.html> [accessed 9 May 2016]

⁴⁷¹ A report by TAMILLA DAULETBAYEVA, REFUGEES AND NEW ZEALAND: GLOBAL RESPONSIBILITIES, DISCUSSION PAPER #2, UNITED NATIONS ASSOCIATION NEW ZEALAND, WELLINGTON, 2014, p 3.

⁴⁷² According to the s3(2d) of the Immigration Act 2009 “To achieve this purpose, the Act establishes an immigration system that—(d) provides a process for implementing specified immigration-related international obligations.” See s3(2d) of the New Zealand: Immigration Act 2009.

⁴⁷³ Ibid

⁴⁷⁴ Human Rights in New Zealand, Human Rights Commission, published 2010, available at https://www.hrc.co.nz/files/7014/2388/0544/Human_Rights_Review_2010_Full.pdf

citizen seeking protection or recognition of his refugee status in its territory. Section 124 of this Part 5, speaks about the purpose of the Part and the purpose “is to provide a statutory basis for the system by which New Zealand determines to whom it has obligations under ‘the Convention’ (1951 Refugee Convention and its 1967 Protocol); and 1984 Convention Against Torture (Cat) and 1966 Covenant on Civil and Political Rights (ICCPR).”⁴⁷⁵

In New Zealand, “the definition of a refugee is that found in the Article 1A (2) ⁴⁷⁶ of the Refugee Convention. This has not been interpreted, amended, narrowed or enlarged by legislation, regulations, guidelines, or policy”⁴⁷⁷. Section 129 (1) of the Immigration Act mentioned that, “A person must be recognized as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention”⁴⁷⁸.

Under the s129 (2) of the Immigration Act 2009, New Zealand has obligation not to deport a person who has been recognized as a refugee under s.129(1) of this Act unless specifically allowed for under the Act or the Refugee Convention⁴⁷⁹. And section 164(3) mentioned that, “A refugee or a claimant for recognition as a refugee may be deported but only if the Article - 32.1 or the Art -33 of the Refugee Convention allows the deportation of the person”⁴⁸⁰.

Any person except the people mention in the sec 132⁴⁸¹ of the Act who entered in New Zealand either lawfully or unlawfully can apply for the recognition of their refugee status in New

⁴⁷⁵ According to the s124 of the Immigration Act 2009, the purpose of this Part is to provide a statutory basis for the system by which New Zealand—(a)determines to whom it has obligations under the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees; and (b)codifies certain obligations, and determines to whom it has these obligations, under—(i) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;(ii) the International Covenant on Civil and Political Rights. See s.124 Of the New Zealand: Immigration Act 2009 [New Zealand], 2009 No 51, 16 November 2009.

⁴⁷⁶ Art – 1A (2) of the Convention Relating to the Status of Refugees, 189 UNTS 151

⁴⁷⁷ Paper presented in a seminar by Jeanne Donald, Solicitor, Ryken & Associates, WE DON’T KNOW HOW LUCKY WE ARE, MATE, Australian and New Zealand Refugee Law - A Comparison, 12 April 2002 in Sydney, pp 21, available at <http://www.refugee.org.nz/lucky.html>

⁴⁷⁸ Section 129(1) of the New Zealand: Immigration Act 2009.

⁴⁷⁹ According to the sec 129(2) of the Immigration Act “A person who has been recognized as a refugee under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(3). see New Zealand: Immigration Act 2009.

⁴⁸⁰ See section 164 (3) of the New Zealand: Immigration Act 2009

⁴⁸¹ According to the sec 132(1) of the Act, “a refugee and protection officer must not consider a claim by a person who is— (a) a New Zealand citizen; or (b) a resident or permanent resident, unless— (i) the person has been served with a deportation liability notice; or (ii) the person is named in an Order in Council made under section 163.” See sec132(1) of the New Zealand: Immigration Act 2009 [New Zealand], 2009 No 51, 16 November 2009.

Zealand⁴⁸². “Any person who seeking recognition as a refugee in New Zealand under the Refugee Convention must have that claim determined in accordance with this Act and whether or not a person should continue to be recognized in New Zealand as a refugee under the Convention must be determined in accordance with the Act”⁴⁸³ mentioned in the sec 125 (a)(c) of the Immigration Act 2009.

“The authorities who are responsible for the processing of the applicant claim for asylum in New Zealand at first the Refugee Status Branch (RSB) and then the Immigration and Protection Tribunal (Tribunal)⁴⁸⁴. According to the sec 127(1), when an applicant applies for asylum in the RSB, a Refugee and Protection officer must be determined every claim made by the applicant under the Part -5 of the Act⁴⁸⁵.

If the Refugee and Protection officer decline to accept for consideration the person’s claim to be recognized as a refugee, then the applicant has right to appeal in the Immigration and Protection Tribunal (Tribunal) according to the section 194 of the Act⁴⁸⁶. And under the sec 198 of the Act, the Tribunal has power to determine the appeal against the decision where the officer declined the claim of the appellant for the recognition of the refugee status or cancel the refugee status of the appellant.⁴⁸⁷

⁴⁸² Ibid and Immigration New Zealand Operational Manual, Refugees and protection, Published by Immigration New Zealand, Government of New Zealand, Issue Date: 19 August 2013, available at

<http://www.immigration.govt.nz/NR/rdonlyres/60E7836A-D2B6-4628-BC63-4EFBAB2825DF/0/C8.10.15>

⁴⁸³ See s. 125 (a) (c) Of the New Zealand: Immigration Act 2009 [New Zealand], 2009 No 51, 16 November 2009.

⁴⁸⁴ Claiming Refugee Status in New Zealand, published by Ministry of Business, innovation and employment, Government of New Zealand, Publishing date: June 2015, Available at <http://www.immigration.govt.nz/NR/rdonlyres/E809F05F-60EF-4483-9272-92B0EACDB440/0/claimingrefugeestatusinNewZealand.pdf>

⁴⁸⁵ According to section 127(1) of the Act, “Every claim under this Part must be determined by a refugee and protection officer”. See sec 127(1) of the New Zealand: Immigration Act 2009 [New Zealand], 2009 No 51, 16 November 2009.

⁴⁸⁶ According to sec 194 of the Act, “a person may appeal to the Tribunal against a decision by a refugee and protection officer—(a) to decline to accept for consideration the person’s claim to be recognized as a refugee or a protected person on the grounds that—(i) in light of an international arrangement or agreement the person may have lodged, or had the opportunity to lodge, a claim for refugee status in another country:

(ii) in light of an international arrangement or agreement the person may have lodged, or had the opportunity to lodge, a claim for protection in another country:

(c) to decline the person’s claim to be recognized under any of sections 129, 130, and 131 as a refugee or a protected person (whether or not the refugee and protection officer recognized the person as a refugee or a protected person under the grounds set out in another of those sections, or both of those other sections)” See sec 194 of the New Zealand: Immigration Act 2009 [New Zealand], 2009 No 51, 16 November 2009.

⁴⁸⁷ According the sec 198(1) (a) and 198(1) (bi) of the Immigration Act, “Where an appeal is brought under section 194(1) (c), (d), or (e), the Tribunal must—(a) determine the matter de novo; and (b) determine, in the following order:

- *Concluding Remarks*

The New Zealand Immigration Act 2009 does not provide any interpretation of the elements of the refugee definition. The Immigration Act just provide a statutory basis for the system by which New Zealand determines to whom it has obligations under ‘the Convention’ that is the person who is a refugee within the meaning of the Refugee Convention “and adopted the definition of refugee definition without modification or amendment.one aspect of Immigration Act that the single appeal system under the Act made the system more flexible to operate.

5.2 Application of the Refugee Convention:

Regarding the application of the Refugee Convention, it mentioned in the sec 127 (2) of the Immigration Act 2009 that, the Refugee and protection officer when carrying out his/her function under this Act, he/she must act in a manner that is consistent with New Zealand’s obligations under the Refugee Convention.⁴⁸⁸. And the Immigration Act 2009 in the Schedule 1, set out the text of the Refugee Convention. Other major substantive provisions aimed at giving effect to the Refugee Convention are the sections 129 ,125 and 164(3) which already discuss in the previous subsection 5.5.1⁴⁸⁹.

5.3 Interpretation of the Convention definition of refugee and the approaches are taken by the New Zealand domestic court for interpretation

In New Zealand interpretation regarding the refugee definition and its elements is developed by the early decision from the New Zealand Court. This interpretation used as a guideline by their domestic judicial body to determine whether an applicant situation meets the requirements of the refugee definition. The Refugee Status Appeal Authority (RSAA) was played an important role in finding the authentic interpretation of the refugee definition before it ceased

(i) whether to recognize the person as a refugee on the ground set out in section 129.” See section 198 of the New Zealand: Immigration Act 2009 [New Zealand], 2009 No 51, 16 November 2009.

⁴⁸⁸ According to the sec127(2) of the Immigration Act 2009, “in carrying out his or her functions under this Act, a refugee and protection officer must act—(a) in accordance with this Act; and

(b) to the extent that a matter relating to a refugee or a person claiming recognition as a refugee is not dealt with in this Act, in a way that is consistent with New Zealand’s obligations under the Refugee Convention”. See section 127(2) of the New Zealand: Immigration Act 2009 [New Zealand], 2009 No 51, 16 November 2009.

⁴⁸⁹ See page

to exist in 2010 when the Immigration and Protection Tribunal (IPT) established under the Immigration Act 2009 and replaced the RSAA. The IPT also made their assessment based on the RASA's interpretation of refugee definition elements when determining the claim of the 'Tamil' applicant for the recognition of their refugee status in those selected cases for this thesis.

5.3.1 Elements of the Convention definition of Refugee

a) Well-founded fear

In New Zealand, the IPT adopts the Australian High Court approach in *Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379(HCA)*⁴⁹⁰ when determining the term, "well-founded fear" in the Art- 1A (2) of the Refugee Convention.⁴⁹¹ This approach mentioned by the RSAA as 'a correct approach to determine the well-founded fear' in the *Refugee Appeal No. 1/92 Re SA, New Zealand*⁴⁹² In *Chan v MIEA (1989) 169 CLR 379*, it was held that "a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring"⁴⁹³.

Regarding the test of the term 'well-founded fear' in the Refugee *Appeal No. 76044 [2008]*⁴⁹⁴ it was mentioned that "the well-founder fear standard is entirely objective."⁴⁹⁵ In this case the RSAA mentioned about this objective standard requirement when discussing the legal test for well-founded fear. And according to the RSAA,

⁴⁹⁰ Chan Yee Kin v. Minister for Immigration and Ethnic Affairs; Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs; Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs, Australia: High Court, 12 September 1989, available at: <http://www.refworld.org/docid/3ae6b70a4.html> [accessed 14 May 2016]

⁴⁹¹ *Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379(HCA)* cited in CK (Sri Lanka), [2015] NZIPT 800609, New Zealand: Immigration and Protection Tribunal, 28 May 2015 at para 64, CH (Sri Lanka), [2015] NZIPT 800704, New Zealand: Immigration and Protection Tribunal, 1 May 2015 at para 53, AF (Sri Lanka), [2011] NZIPT 800031, New Zealand: Immigration and Protection Tribunal, 30 March 2011 at para 55, this three cases are among six cases selected for the thesis for refugee status determination of Tamil in Sri Lanka.

⁴⁹² Refugee Status Appeal Authority mentioned this view in *Refugee Appeal No. 1/92 Re SA*, New Zealand: Refugee Status Appeals Authority, 30 April 1992, available at: <http://www.refworld.org/docid/3ae6b73d8.html> [accessed 13 May 2016]

⁴⁹³ Supra 376 and 377

⁴⁹⁴ Refugee Appeal No. 76044 [2008] NZAR 719 (NZRSAA), available at: <http://www.refworld.org/docid/48d8a5832.html> [accessed 13 May 2016]

⁴⁹⁵ Ibid at para 57 and *Refugee Appeal No. 76044 [2008]* cited in CK (Sri Lanka), [2015] NZIPT 800609, New Zealand: Immigration and Protection Tribunal, 28 May 2015 at para 64, CH (Sri Lanka), [2015] NZIPT 800704, New Zealand: Immigration and Protection Tribunal, 1 May 2015 at para 53, AF (Sri Lanka), [2011] NZIPT 800031, New Zealand: Immigration and Protection Tribunal, 30 March 2011 at para 55.

“In the Authority’s jurisprudence the well-founded standard has been understood as mandating the establishment of a real chance of being persecuted. See for example Refugee Appeal No. 72668/01 [2002] NZAR 649 at paras [111] to [154]. The standard is an entirely objective one. The trepidation of the refugee claimant, no matter how genuine or intense, does not alter or affect the legal standard and is irrelevant to the well-foundedness issue. Any subjective fear of harm, while relevant to the question whether the claimant is unable or unwilling to avail him or herself of the protection of the country of nationality, is of no relevance to whether the anticipation of being persecuted is well-founded. See Refugee Appeal No. 75692 [2007] NZAR 307 at paras [76] to [90] and the Michigan Guidelines on Well-Founded Fear (2005) 26 Mich. J. Int’l L. 491.”⁴⁹⁶

In the appeal *AH (Sri Lanka)*, [2011] NZIPT 800020-24⁴⁹⁷, the Immigration and Protection Tribunal adopted this view of the objective standers of well-founded fear and mentioned that, “an assessment of the “well-founded fear” element of the refugee definition has, at its core reference point, not the facts subjectively perceived by the claimant, but the objective facts as found by the decision-maker.⁴⁹⁸”

The New Zealand Immigration and Protection Tribunal to interpreting the term ‘well-founded fear’ adopts the ‘objective approach’ which is similar to the Hathaway’s objective approach mentioned in the “Law of the Refugee Status”. The Tribunal clearly mentioned that it adopts objective standers of well-founded fear and approach of the *Chan v MIEA (1989)*. In the *Chan v MIEA (1989)* the Tribunal itself adopted the objective approach to determining the tem ‘well-founded fear’.

b) Fear of being Persecuted

Regarding the interpretation of the term ‘being persecuted’ for refugee status determination, the Immigration and Protection Tribunal adopted the RSAA’s interpretation of the term “being persecuted in this regard”.⁴⁹⁹ The RSAA, “interpreted the term “being persecuted” in the “inclusion clause” (Article 1(2) of the Refugee Convention) as the sustained or systemic

⁴⁹⁶ Refugee Appeal No. 76044 [2008] NZAR 719 (NZRSAA) at para 57 and cited in *AH (Sri Lanka)*, [2011] NZIPT 800020-24, New Zealand: Immigration and Protection Tribunal, 16 August 2011 at para 48, available at: <http://www.refworld.org/docid/4f3cee022.html> [accessed 9 May 2016]

⁴⁹⁷ *AH (Sri Lanka)*, [2011] NZIPT 800020-24, New Zealand: Immigration and Protection Tribunal, 16 August 2011.

⁴⁹⁸ *Ibid* at para 48

⁴⁹⁹ *AH (Sri Lanka)*, [2011] NZIPT 800020-24, New Zealand: Immigration and Protection Tribunal, 16 August 2011 at para 47, available at: <http://www.refworld.org/docid/4f3cee022.html> [accessed 9 May 2016]

violation of basic or core human rights such as to be demonstrative of a failure of state protection”.⁵⁰⁰

This interpretation of the term “being persecuted” has been developed by the RSAA in a number of cases especially in the *Refugee Appeal No 74665/03* (7 July 2004) and *Refugee Appeal No. 2039/93* (12 February 1996).⁵⁰¹ Both of these cases [i.e. *Refugee Appeal No 74665/03* (7 July 2004) at para 36 to 90 and *Refugee Appeal No. 2039/93* (12 February 1996) at para 38] adopted Hathaway’s human rights based understanding of “being persecuted” mentioned by J C Hathaway in *“The Law of Refugee Status”* (Butterworths, Toronto, 1991) pp104-108 and that is ‘sustained or systemic violation of basic human rights demonstrative of a failure of state protection’⁵⁰².

In the *Refugee Appeal No 74665/03* (7 July 2004) it was mentioned,

“The Authority has adopted the formulation articulated by Professor Hathaway in his seminal text, The Law of Refugee Status (Butterworths, 1991) at 104 & 108, namely that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard. In other words, core norms of international human rights law are relied on to define forms of serious harm within the scope of “being persecuted”: *Refugee Appeal No. 71427/99 [2000] NZAR 545; [2000] INLR 608 at [51] and DG v Refugee Status Appeals Authority (High Court Wellington, CP213/00, 5 June 2001, Chisholm J) at [19] and [22].”*⁵⁰³

In the *Refugee Appeal No 71427*⁵⁰⁴ (16 August 2000) it was mentioned that “persecution can be seen as the infliction of serious harm, coupled with the absence of state protection”⁵⁰⁵ The

⁵⁰⁰ Ibid

⁵⁰¹ *Refugee Appeal No. 2039/93 Re MN*, New Zealand: Refugee Status Appeals Authority, 12 February 1996, available at <http://www.refworld.org/docid/3ae6b741c.html> [accessed 14 May 2016]

⁵⁰² *Refugee Appeal No 74665/03* (7 July 2004) cited in *CK (Sri Lanka)*, [2015] NZIPT 800609, New Zealand: Immigration and Protection Tribunal, 28 May 2015 at para 63, *CH (Sri Lanka)*, [2015] NZIPT 800704, New Zealand: Immigration and Protection Tribunal, 1 May 2015 at para 52 *AH (Sri Lanka)*, [2011] NZIPT 800020-24, New Zealand: Immigration and Protection Tribunal, 16 August 2011 at para 47 and *Refugee Appeal No. 2039/93* (12 February 1996) cited in *AF (Sri Lanka)*, [2011] NZIPT 800031, New Zealand: Immigration and Protection Tribunal, 30 March 2011 at para 54, *AI (Sri Lanka)*, [2011] NZIPT 800149, New Zealand: Immigration and Protection Tribunal, 15 September 2011 at para 47.

⁵⁰³ *Refugee Appeal No 74665/03* (7 July 2004) at para 58

⁵⁰⁴ *Refugee Appeal No. 71427/99, 71427/99*, New Zealand: Refugee Status Appeals Authority, 16 August 2000, available at <http://www.refworld.org/docid/3ae6b7400.html> [accessed 14 May 2016]

⁵⁰⁵ Ibid at para 67

Immigration and Protection Tribunal in *AI (Sri Lanka)*, [2011] NZIPT 800149, (15 September 2011)⁵⁰⁶ after considering all these above mentioned view commented that “the concept of persecution is a construct of two essential elements, namely, the risk of serious harm and a failure of state protection.”⁵⁰⁷

From the above mention discussion, there is a clear understanding of the New Zealand Immigration and protection Tribunal approach to interpreting the term “being persecuted”. The Tribunal adopts the Hathaway and Foster’s Human rights based approach which require the ‘sustained or systemic violation of basic human rights demonstrative of a failure of state protection. In the another way bifurcated understanding of the term ‘being persecuted’ which includes two elements- infliction of serious harm, coupled with the absence of state protection but the violation in a systematic and sustained way.

c) Causation/Nexus

Regarding the casual or nexus requirement the Authority in *Refugee Appeal No. 71427/99 [2000] NZAR 545; [2000] INLR 608*⁵⁰⁸ mentioned that,

*“Accepting as we do that Persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided either by the serious harm limb or the failure of State protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because “persecution” is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is “for reason of” a Convention ground, the summative construct is itself for reason of a Convention ground*⁵⁰⁹.

d) For the reasons of standers

⁵⁰⁶ *AI (Sri Lanka)*, [2011] NZIPT 800149, New Zealand: Immigration and Protection Tribunal, 15 September 2011, available at: <http://www.refworld.org/docid/4f423f8c2.html> [accessed 9 May 2016]

⁵⁰⁷ *Ibid* at para 48

⁵⁰⁸ *Refugee Appeal No. 71427/99 [2000] NZAR 545; [2000] INLR 608* at para 112

⁵⁰⁹ *Ibid*

In New Zealand, the Refugee Status Appeal Authority used the term ‘being persecuted’ rather than term ‘of persecution’ as an element of the refugee definition. In the *Refugee Appeal No 74665/03* (7 July 2004)⁵¹⁰ the Authority mentioned that, “While it is common in refugee discourse to refer to “the persecution element” of the refugee definition, the Authority prefers to use the language of the Convention itself, namely “being persecuted”. The inclusion clause has as its focus the predicament of the refugee claimant. The language draws attention to the fact of exposure to harm rather than to the act of inflicting harm”⁵¹¹ And in *Refugee Appeal No. 72635/01 (6 September 2002)*⁵¹² the Authority explained the reason of using the term ‘being persecuted’ clearly that-

*‘Looking first at the language of the Refugee Convention, the “for reasons of” clause relates not to the word “persecuted” but to the phrase “being persecuted”. The employment of the passive voice (“being persecuted”) establishes that the causal connection required is between a Convention ground and the predicament of the refugee claimant. The Convention defines refugee status not on the basis of a risk “of persecution” but rather “of being persecuted”. The language draws attention to the fact of exposure to harm, rather than to the act of inflicting harm. The focus is on the reasons for the claimant’s predicament rather than on the mindset of the persecutor, a point forcefully recognized in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [33] & [65] (HCA). At a practical level the state of mind of the persecutor may be beyond ascertainment even from the circumstantial evidence.’⁵¹³*

From the above mention discussion regarding the nexus requirement and ‘for reason of’ clause it can be said, the Authority adopted the “Predicament approach” mentioned by Hathaway and Foster for satisfying the nexus requirements. This approach requires that, the reason of the applicant exposed to the risk of being persecuted need to be explained by the Convention ground to establish causal connection between a Convention ground and the reason for the applicant’s well-founded fear of being persecuted⁵¹⁴. And the Authority adopted the language of the Convention as it used the phrase ‘being persecuted’ rather used the word ‘persecution’.

⁵¹⁰ *Refugee Appeal No. 74665*, No. 74665, New Zealand: Refugee Status Appeals Authority, 7 July 2004, available at: <http://www.refworld.org/docid/42234ca54.html> [accessed 14 May 2016]

⁵¹¹ *Ibid* at para 36

⁵¹² *Refugee Appeal No. 72635/01 (6 September 2002)*; [2003] INLR 629 at para 168

⁵¹³ *Ibid*

⁵¹⁴ See chapter 3, subsection 3.2

Regarding the issue Hathaway mentioned, “this use of the passive voice (signals the need to demonstrate a predicament of risk that calls for surrogate international protection.”⁵¹⁵

e) *The Convention Grounds*

In the Refugee Appeal No. 76044 [2008] NZAR 719 (NZRSAA)⁵¹⁶ the Authority mentioned that “A well-founded fear of being persecuted on its own is insufficient to establish refugee status. Protection under the Refugee Convention requires the risk of harm to be “for reasons of” one of the five Convention grounds, namely race, religion, nationality, membership of a particular social group or political opinion”

The Authority confirmed that the well-founded fear of persecution needs to be based on the five Conventional grounds mentioned in the Refugee definition.

5.4 Credibility Assessment

New Zealand developed its understanding on the credibility assessment from the judgement of the previous case law of their domestic Court. Rodger Haines former member of the New Zealand Refugee Status Appeals Authority, in a paper regarding “Country Information and Evidence Assessment in New Zealand”⁵¹⁷ made some observation regarding the credibility assessment in New Zealand. His observation based on the previous case law of the New Zealand Refugee Status Appeals Authority. Some of his observation mentioned below-

- “Credibility cannot, however, be pursued as an end in itself. The decision-maker cannot allow the pursuit of credibility issues to divert him or her from those considerations which are primarily relevant to the claim to refugee or protection status. Even if the decision-maker concludes that nothing which the claimant has said is true other evidence may establish that the person is a refugee or protected person”⁵¹⁸.
- “The fact that a claimant has lied when giving evidence does not of itself mean that the whole of his or her evidence is untruthful. The decision-maker is required to ask

⁵¹⁵ *ibid*

⁵¹⁶ Refugee Appeal No. 76044 [2008] NZAR 719 (NZRSAA), available at

http://www.refugee.org.nz/Casesearch/Fulltext/76044.html#THE_REASONS_FOR_THE_RISK_OF_HARM

⁵¹⁷ Rodger Haines, Country Information and Evidence Assessment in New Zealand, 13-15 April 2011, Budapest, available at <http://www.refugee.org.nz/Reference/Budapest.html#1>

⁵¹⁸ Rodger Haines, Country Information and Evidence Assessment in New Zealand, 2011 at pp 21

whether a person, having all of the characteristics of the claimant, is at risk of being persecuted, tortured or subjected to CIDT on return.”⁵¹⁹

- “All refugee and protection claims require a narrative of the claimant’s personal circumstances and although past harm is not a requirement it is common to find that past harm or past encounters with the agent of persecution are central to the claimant’s narrative. The credibility of this narrative is then subjected to close examination from different perspectives including coherency, internal consistency, plausibility and consistency of telling. Obviously, there are also other factors which potentially affect the credibility assessment. But the last factor (consistency of telling) is particularly relevant to appellate tribunals which conduct the refugee or protection enquiry on a de novo basis”⁵²⁰
- “Decision-maker cannot engage in the simplistic exercise of comparing the claimant’s account with whatever COI the decision-maker happens to have available and then proceeding to a determination of “the truth” by treating the COI as the touchstone. Credibility assessment cannot be reduced to such a formulaic exercise. Nor can credibility assessment be assumed to be an exercise undertaken with scientific precision”. ⁵²¹

From the above mention observation, it can be assumable that in New Zealand for credibility assessment, the UNHCR mentioned indicator such as coherency, internal consistency, plausibility and consistency of statement was also used by the Authority. But the New Zealand Authority did not clearly indicate that they are following the UNHCR approach for the assessment of credibility.

The next section discussed how the Immigration and refugee Tribunal determined the appeal regarding the recognition of refugee status of Tamil in New Zealand.

5.5 Determination of refugee status of Tamil by the Immigration and Protection Tribunal, New Zealand

In New Zealand Tamil people from Sri Lanka seeking asylum who are fleeing from persecution based on their Tamil ethnicity and imputed political opinion as already discussed in chapter 2 and chapter 3.

⁵¹⁹ Ibid

⁵²⁰ Ibid at pp 72

⁵²¹ Rodger Haines, Country Information and Evidence Assessment in New Zealand, 2011 at pp 74

This subsection discussed the six cases, where the New Zealand Immigration and Protection Tribunal (IPT) heard the appeal against the refusal decisions made by the Immigration and protection officer to recognize the claim of the Tamil applicants as refugee. Discussion of this subsection based how the Tribunal reached to the decision and how the Tribunal applied the interpretation of the elements of refugee definition which discussed in the previous subsection. Among the six cases only in one case, the IPT allowed the appeal against the decision of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellant, a citizen of Sri Lanka. Other five appeal was dismissed by the IPT against the decision of a Refugee and Protection officer, declining to grant the refugee status and/or protected person status to the appellant.

5.5.1 Cases where appeal dismissed by the Immigration and Protection Tribunal:

In this section discussion based on the five cases where the appeal dismissed by the IPT against a decision of a Refugee and Protection officer, declining to grant the refugee status and/or protected person status to the appellant. The Immigration and Protection Tribunal, in the three appeal cases⁵²² similarly made an assessment of the appeal because the claim of the applicants was almost similar and based on their Tamil ethnicity and imputed political opinion.

- ***Facts of the case***

In the first case *CK (Sri Lanka), [2015] NZIPT 800609*,⁵²³ the appellant was Tamil Christian from Sri Lanka. He kidnapped twice in Sri Lanka, once by the Pillayan faction of the Tamil Makkal Viduthalai Puligal⁵²⁴ (TMVP) they tried and persuade him to join their cause and he was also beaten when he refused to join each time. And, in another occasion, by the Criminal Investigation Department (CID) of the Sri Lankan police.⁵²⁵ The applicant claimed that “he is

⁵²² *CK (Sri Lanka), [2015] NZIPT 800609* New Zealand: Immigration and Protection Tribunal, 28 May 2015; *CH (Sri Lanka), [2015] NZIPT 800704* New Zealand: Immigration and Protection Tribunal, 1 May 2015 and *AI (Sri Lanka), [2011] NZIPT 800149*, New Zealand: Immigration and Protection Tribunal, 15 September 2011.

⁵²³ *CK (Sri Lanka), [2015] NZIPT 800609*, New Zealand: Immigration and Protection Tribunal, 28 May 2015, available at: <http://www.refworld.org/docid/55b0b2874.html> [accessed 9 May 2016]

⁵²⁴ “The TMVP is a Tamil group that sided with the Sri Lankan government during the war. In February 2009 the Karuna faction of the TMVP joined the mainstream Sri Lankan Freedom Party; the remaining members of the TMVP became known as the ‘Pillayan’ group.” See *Ibid* at para 11

⁵²⁵ *CK (Sri Lanka), [2015] NZIPT 800609* at para 2

at risk from government forces because he has witnessed war crimes. The public and media were not allowed in the Vavuniya camp, which the appellant visited. Further, he was accused by a student named BB of being a member of the LTTE. The CID knows who he is and knows he is in New Zealand. They will detain him as soon as he arrives back in Sri Lanka. He will return to a life of fear and death.”⁵²⁶

In the second case *CH (Sri Lanka)*, [2015] NZIPT 800704⁵²⁷ the appellant was a Hindu Tamil from Sri Lanka. The appellant participated in the two demonstrations in the United Kingdom in 2009 and 2012 against the Government of Sri Lanka, and participated in a referendum for Tamil independence. After that when he returned to Sri Lanka in November 2012, he was detained and mistreated by the Criminal Investigation Department (CID). The applicant claimed that “the CID have photographs of him protesting in London and will cause him serious harm upon return to Sri Lanka”⁵²⁸ as the “Sri Lankan Government assumed that Tamils who lived in London or abroad were all anti-government. Even though there had been recent elections and a new president elected, the attitude of CID officers to Tamils had not changed”⁵²⁹.

And in the third case *AI (Sri Lanka)*, [2011] NZIPT 800149⁵³⁰ the appellant was also a Sri Lankan Tamil. He claimed that “he fears the police, security forces, army, and paramilitary groups in Sri Lanka. He believes the Sri Lankan authorities will subject him to serious harm or kill him because they suspect him of supporting the Liberation Tigers of Tamil Eelam (LTTE) from abroad. He also fears he will be kidnapped by the authorities and paramilitary groups for extortion upon return to Sri Lanka”.⁵³¹

- *Issue before the Tribunal*

⁵²⁶ Ibid at para 35

⁵²⁷ *CH (Sri Lanka)*, [2015] NZIPT 800704, New Zealand: Immigration and Protection Tribunal, 1 May 2015, available at: <http://www.refworld.org/docid/55b0b1b84.html> [accessed 9 May 2016]

⁵²⁸ Ibid at para 2

⁵²⁹ Ibid at para 24

⁵³⁰ *AI (Sri Lanka)*, [2011] NZIPT 800149, New Zealand: Immigration and Protection Tribunal, 15 September 2011, available at: <http://www.refworld.org/docid/4f423f8c2.html> [accessed 9 May 2016]

⁵³¹ Ibid at para 3

In all this three cases, the issue before the Tribunal was, “whether the appellant’s claim is credible, and whether, on the facts as found, the applicant holds a well-founded fear of being mistreated on return to Sri Lanka⁵³².”

- ***Procedures-***

The Tribunal started the proceedings in all this individual case by considering the claim of the applicant. Then the Tribunal discussed the appellant’s case or facts of the case and after that considered the materials and submission received by the Tribunal. This includes decision file of the Refugee Status Branch (RSB), the appellant’s statement, other evidence, related country information submitted by the counsel in support of the appeal. Then the Tribunal described the relevant law under which the appeal has to be considered and determined. That is under the sec 194 of the Immigration Act, the applicant has right to appeal in relation to the decisions concerning refugee status and under the sec 198 of the Act, that appeal has to be determined. Also, the sec 129 of the Immigration Act recognized a refugee under the 1951 Convention Relating to the Status of Refugees.

After that, the Tribunal made the credibility assessment of the applicant and made the assessment of claim to the refugee status. This includes how New Zealand interpreted the elements of the refugee definition (I.e. who is refugee, well-founded fear, persecution) which already discuss in previous subsection 5.3, assessment of the risk based on the Convention reasons of Tamil ethnicity and imputed political opinion, other ground relevant to the specific case and assessment of risk as a failed asylum seeker. After that the Tribunal discussed the findings whether the applicant had fulfilled the criteria for the refugee status or for the complementary protection. Finally, the Tribunal reached to the decision to the appeal.

- ***Assessment of the Credibility***

In the first case *CK (Sri Lanka)*, [2015] NZIPT 800609, the Tribunal accepted some of the claims but cumulatively rejected that the applicant was kidnapped and person of interest for the CID in Sri Lanka. According to the Tribunal, “Taking the above concerns as to credibility cumulatively, the Tribunal rejects the appellant’s evidence that he has been kidnapped twice in Sri Lanka and his claim that he has been of interest, or is of continuing interest, to the TMVP or the CID in Sri Lanka. It follows that the Tribunal does not accept the evidence that the

⁵³² *CK (Sri Lanka)*, [2015] NZIPT 800609 at para 3; *CH (Sri Lanka)*, [2015] NZIPT 80070 at para 3 and *AI (Sri Lanka)*, [2011] NZIPT 800149, at para 3.

TMVP or CID suspect him of receiving money from, or working for, the LTTE. Nor is it accepted that there have been any difficulties for his family since he left Sri Lanka.”⁵³³

In the second case *CH (Sri Lanka)*, [2015] NZIPT 80070, the Tribunal findings on credibility was, “The Tribunal accepts that the appellant attended two protests against the Sri Lankan government in 2009 and 2012 in the United Kingdom, and was photographed at the first protest. However, considered cumulatively, the inconsistent, mobile and implausible characteristics of the appellant’s evidence lead the Tribunal to reject the core of his claim that the CID have detained and ill-treated him and sought him at his home. The appellant has presented a false account of being arrested, detained by CID, and of their continued interest in him”⁵³⁴.

And in the third case *AI (Sri Lanka)*, [2011] NZIPT 800149, the Tribunal mentioned that, “based upon the combined effect of the above vague, inconsistent and contradictory evidence, the Tribunal does not accept the appellant’s account that the police inquired about him or made allegations that he was an LTTE supporter and providing financial support to the LTTE. The Tribunal does, however, accept that his brother, AA, was arrested and mistreated by the authorities as a suspected LTTE member or supporter, and has since been released, with all charges being dropped”⁵³⁵.

- ***Risk assessments***

The Immigration and Protection Tribunal in all these appeal cases, made assessment based on two principle issues “in terms of *Refugee Appeal No 70074 (17 September 1996)* and the principal issues are: (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality? (b) If the answer is yes, is there a Convention reason for that persecution?”⁵³⁶

The Tribunal considered the relevant country of origin information (COI) especially the United States Department of State notes in its Country Reports on Human Rights Practices 2013: Sri Lanka (27 February 2014), the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka 2012, report of the United Kingdom Upper Tribunal (Immigration and Asylum Chamber) in GJ and ors (post-civil war: returnees)

⁵³³ *CK (Sri Lanka)*, [2015] NZIPT 800609 at para 57

⁵³⁴ *CH (Sri Lanka)*, [2015] NZIPT 80070 at para 46

⁵³⁵ *AI (Sri Lanka)*, [2011] NZIPT 800149 at para 43

⁵³⁶ *CK (Sri Lanka)*, [2015] NZIPT 800609 at para 62; *CH (Sri Lanka)*, [2015] NZIPT 80070 at para 51 and *AI (Sri Lanka)*, [2011] NZIPT 800149 at para 46

Sri Lanka CG [2013] UKUT 00319 , The Human Rights Watch report's on the instances of returning Tamils being tortured in Sri Lanka etc. for the assessment of the risk of the well-founded fear of persecution .

- ***Real chance of being persecuted if returned to Sri Lanka and the Convention reason of persecution***

In the first case *CK (Sri Lanka), [2015] NZIPT 800609* the Tribunal after considering the United States Department of State notes in its *Country Reports on Human Rights Practices 2013: Sri Lanka (27 February 2014)*,⁵³⁷ acknowledged that “Sri Lanka remains a country with issues of ethnic-based civil and political conflict and a record of significant human rights violations against some groups within society.”⁵³⁸

The Tribunal mentioned that “the Tribunal must look at the particular risk profiles for individual Sri Lankans considered likely to be in need of refugee protection”⁵³⁹. The Tribunal after considering the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka 2010* (revised on 21 December 2012)⁵⁴⁰ (revised on 21 December 2012) which identifies risk profiles for Sri Lankan returnees mentioned, “It is clear that individuals with real or perceived links to the LTTE are potentially at risk upon return to Sri Lanka” from the UNHCR Guidelines⁵⁴¹. But the Tribunal did not find any risk profile of the appellant as mentioned in the UNHCR Guidelines and the Tribunal found that any of the “historic activities do not put him at risk of harm. They did not put him at risk of harm in the past, and there is no reason, now that more time has passed, they would cause him any difficulty in the future”⁵⁴² and “the evidence does not disclose that the appellant is at any risk of serious harm if he returns there.”⁵⁴³

The Tribunal was considered “whether a person having all the characteristics of the appellant, facing the particular circumstances that he will experience on return to Sri Lanka, would face

⁵³⁷ See Chapter 2 for the report United States Department of State notes in its *Country Reports on Human Rights Practices 2013: Sri Lanka (27 February 2014)*

⁵³⁸ *CK (Sri Lanka), [2015] NZIPT 800609 at para 66*

⁵³⁹ *Ibid* 67

⁵⁴⁰ For risk profile mentioned in UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka see Chapter 2

⁵⁴¹ *CK (Sri Lanka), [2015] NZIPT 800609 at para 68*

⁵⁴² *Ibid*

⁵⁴³ *CK (Sri Lanka), [2015] NZIPT 800609 at para 72*

a real chance of being persecuted there. For the reasons given, the Tribunal concludes that the answer is “no”. The appellant does not therefore have a well-founded fear of being persecuted in Sri Lanka”⁵⁴⁴. Regarding the issue of Convention reason of persecution, in this case, the Tribunal mentioned that “the foregoing issue being answered in the negative, no question of a Convention reason arises for the appellant”⁵⁴⁵.

In the second case *CH (Sri Lanka), [2015] NZIPT 80070*, the Tribunal after considering relevant country information from credible source and the UNHCR Eligibility Guidelines for risk profile of Tamil returnees in Sri Lanka mentioned that, “the appellant has no background as an LTTE supporter, or any role in fundraising or propaganda. There is no evidence of him having any ongoing profile of interest to the Sri Lankan authorities.”⁵⁴⁶ “The Tribunal considers it speculative that there is any risk of the authorities demonstrating any interest in him. Any risk to him of serious harm at the hands of the authorities is remote and does not reach the real chance threshold.”⁵⁴⁷

And the Tribunal’s view in this particular case regarding persecution based on the Conventional reason of race (Tamil ethnicity) and imputed political opinion was that, “the Tribunal finds that the appellant does not hold any well-founded fear of being persecuted upon return to Sri Lanka on account of the risk of his being perceived by authorities as an LTTE supporter or for any other reason”⁵⁴⁸.

The Tribunal in the third case *AI (Sri Lanka), [2011] NZIPT 800149* after consideration of credible country report mentioned that, “the fact that the appellant has travelled abroad to India, Singapore, and most recently to New Zealand, does not, in itself, give rise to a real chance the authorities will suspect him of providing financial support, or other means of support, to the LTTE”⁵⁴⁹. Further “There is no reason why the authorities should consider the appellant to be a supporter of the LTTE and his travel to other countries has been for legitimate reasons, which he can demonstrate.”⁵⁵⁰

⁵⁴⁴ Ibid at Para 73

⁵⁴⁵ Ibid at para 74

⁵⁴⁶ *CH (Sri Lanka), [2015] NZIPT 80070 at para 74*

⁵⁴⁷ Ibid at para 77

⁵⁴⁸ Ibid at para 78

⁵⁴⁹ *AI (Sri Lanka), [2011] NZIPT 800149 at para 54*

⁵⁵⁰ Ibid at para 55

Regarding the appellant claim that he was at risk of being kidnapped by paramilitaries and authorities in Sri Lanka who wanted to extort money from him the Tribunal mentioned, “this assertion is not supported by any evidence. The claim that the appellant would suffer this fate is simply conjecture. Given that conjecture and surmise have no part to play in assessing whether a risk of harm is well-founded, any risk of harm to the appellant for this reason is no more than speculative and falls well short of amounting to a real chance”⁵⁵¹.

The Tribunal found that, there is no well-founded fear of the appellant being persecuted upon return to Sri Lanka⁵⁵² and regarding the question is there a Convention reason for persecution the Tribunal mentioned “The first framed issue being answered in the negative, the second issue does not fall for consideration.”⁵⁵³

- ***Decisions***

The Tribunal found in these three individual cases that “the appellant is not a refugee within the meaning of Article 1A (2) of the Refugee Convention”⁵⁵⁴. The appellant’s refugee status was declined and also the appellants were not eligible for other protection in New Zealand. And finally, appeal dismissed by the Immigration and Protection Tribunal.

Other two cases:

Another two cases *AH (Sri Lanka), [2011] NZIPT 800020-24*⁵⁵⁵ and *AL (Sri Lanka), [2011] NZIPT 800164*⁵⁵⁶ were related to the appellants third (subsequent) refugee appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB), declining to the grant refugee status and/or protected person status to the appellants, nationals of Sri Lanka. In the both case appellant first and second appeal was declined by the Authority because they were not credible to their claim.

- ***Facts of the cases***

In the *first case AH (Sri Lanka), [2011] NZIPT 800020-24*, the appellant was the husband is a Tamil Muslim of Sri Lankan nationality. “At the core of these appeals made by him and his

⁵⁵¹ *AI (Sri Lanka), [2011] NZIPT 800149* at para 60

⁵⁵² *Ibid* at para 61

⁵⁵³ *Ibid* at para 62

⁵⁵⁴ *CK (Sri Lanka), [2015] NZIPT 800609* at para 75; *CH (Sri Lanka), [2015] NZIPT 80070* at para 78 and *AI (Sri Lanka), [2011] NZIPT 800149* at para 63

⁵⁵⁵ *AH (Sri Lanka), [2011] NZIPT 800020-24*, New Zealand: Immigration and Protection Tribunal, 16 August 2011, available at: <http://www.refworld.org/docid/4f3cee022.html> [accessed 9 May 2016]

⁵⁵⁶ *AL (Sri Lanka), [2011] NZIPT 800164*, New Zealand: Immigration and Protection Tribunal, 28 November 2011, available at: <http://www.refworld.org/docid/4f424b5c2.html> [accessed 9 May 2016]

family, is whether the prospective actions by a tenant of a commercial building, partly owned by the husband, present a real chance of the husband and his family being seriously maltreated if they return to Sri Lanka at this time. In these appeals the Tribunal finds the appellants' evidence substantively lacks credibility and risks to them remote or speculative"⁵⁵⁷. Accordingly, the appeals of all appellants fail". The appellant third appeal was in relation to the refugee claims by the appellants and the protected persons' and claims were based on the same factual matrix which the Tribunal dealt with together⁵⁵⁸.

In the second case *AL (Sri Lanka)*, [2011] NZIPT 800164 the appellant was also a Muslim minority from a district in the central province of Sri Lanka. His first and second refugee claim was related to his relation with the LTTE. The basis of the appellant's third refugee claim was that "since his second appeal was determined, his wife has obtained a divorce without his knowledge and consent, and has remarried. She refuses to communicate with the appellant and his parents have been told that if he tries to disturb her, her new husband will "torture him". His former parents-in-law also refuse to talk to him. The appellant fears he will be targeted by his wife's parents and her new husband as his father-in-law is a powerful man and is angry that his son is missing and he wants to take revenge"⁵⁵⁹. The appellant also feared that "he will be questioned by the Sri Lankan authorities on arrival in Colombo as they will see that he has been overseas on an expired passport for many years. His poor mental health will cause him to panic and lose concentration thereby causing suspicion "⁵⁶⁰

- ***Procedures:***

In both of this cases, the Tribunal started the appeal with the discussion of the issue of the jurisdiction of the Tribunal that whether the Tribunal has jurisdiction to hear the subsequent appeal under the Immigration Act 2009. The Tribunal made an assessment on the jurisdictional question by considering, the question that "has there been a change in circumstances material to the claim?"⁵⁶¹

In the case *AH (Sri Lanka)*, [2011] NZIPT 800020-24, the Tribunal found from the analysis of the three claims that "the third claim, as presented, is based on a significant change in circumstances from the first and second claims. Those changes post-date the decision in the

⁵⁵⁷ *AH (Sri Lanka)*, [2011] NZIPT 800020-24, at para 1

⁵⁵⁸ *Ibid* at para 8

⁵⁵⁹ *AL (Sri Lanka)*, [2011] NZIPT 800164 at para 19

⁵⁶⁰ *Ibid* at para 20

⁵⁶¹ *Supra* note 557 & *supra* note 559

second appeal. There is no suggestion that any of the appellants acted in bad faith and for the purpose for creating grounds for recognition as refugees or protected persons”⁵⁶². And the Tribunal accepted to hear the Appellants third claim/appeal and it has jurisdiction under sec 198(1) ⁵⁶³ of the Immigration Act 2009 to hear the appeal.⁵⁶⁴

In the second case *AL (Sri Lanka), [2011] NZIPT 800164*, the Tribunal found, ‘that since the determination of the appellant’s last appeal in March 2010, circumstances in Sri Lanka have not changed to such an extent that his subsequent claim is based on significantly different grounds to his previous refugee claim. Accordingly, there is no jurisdiction for the Tribunal to consider the appeal’⁵⁶⁵. So the Tribunal did not hear the third refugee appeal of the applicant and dismiss the appeal.

in the first case *AH (Sri Lanka), [2011] NZIPT 800020-24*, after assessment of the jurisdiction the Tribunal considered the claim and evidence of the applicant and his family. The Tribunal then mention about the relevant law of the Immigration Act and made credibility assessment of the applicant and his family.

- ***Assessment of the credibility***

The Tribunal in the *AH (Sri Lanka), [2011] NZIPT 800020-24*, mentioned that “the Tribunal is satisfied that the core of all the appellants’ claims are based on unreliable evidence and highly speculative, uncorroborated conjecture on their part”⁵⁶⁶. “The Tribunal thus does not accept it is plausible that the husband and his family would fail to carry out the most basic checks, in relation to their expensive property, before taking direct and confrontational steps with the tenant himself. For this reason alone, which is essential to the substance of the whole of the current claim, the Tribunal does not accept the appellants’ claim is credible”⁵⁶⁷. And based on all evidence and reasoning, “the Tribunal is satisfied that the appellants’ subsequent claim lacks credibility to such an extent that the whole story is rejected”⁵⁶⁸.

- ***Assessment of the Refugee claim***

⁵⁶² *AH (Sri Lanka), [2011] NZIPT 800020-24* at para 18

⁵⁶³ Supra note 373

⁵⁶⁴ *AH (Sri Lanka), [2011] NZIPT 800020-24* at para 19

⁵⁶⁵ *AL (Sri Lanka), [2011] NZIPT 800164* at para

⁵⁶⁶ *AH (Sri Lanka), [2011] NZIPT 800020-24* at para 51

⁵⁶⁷ Ibid at para 56

⁵⁶⁸ Ibid at para 63

The Tribunal made an assessment of the refugee claim on the two principle issues like the previous cases already mentioned in the subsection and the issues are: (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality? (b) If the answer is yes, is there a Convention reason for that persecution?⁵⁶⁹

And in answer to the first question the Tribunal mentioned, “As the husband’s and wife’s credibility is not accepted in respect of this subsequent claim, and indeed it was substantially rejected in all of their previous claims, the Tribunal does not accept that the husband, his wife and his two elder children have a well-founded fear of being persecuted in Sri Lanka based on their subsequent claim.”⁵⁷⁰ And Tribunal mentioned the applicant and his family have no well-founded fear of being persecuted upon their return to Sri Lanka.

Regarding the second question the Tribunal mentioned that, “the first principal issue is therefore answered in the negative. There is no need to consider the second issues as it does not arise.”⁵⁷¹

- ***Decision***

The Tribunal based on the above -mentioned reasons the appellants are not refugees within the meaning of the Refugee Convention and also not eligible for other protection in New Zealand. And finally dismissed the appeal⁵⁷².

- ***Concluding Remarks-***

From above discussion of all these cases, it is clear that the Tribunal made credibility assessment of the appellant in the same way by taking consideration of the facts and evidence before it. For credibility assessment, it used indicators like plausibility, consist of statements, and none of the applicants were found credible to their central claim that they were a victim of the human rights violation, kidnapped or tortured, ill-treated or detained because of their relation with LTTE or because of their ethnicity.

Regarding the issue of risk assessment of the individual applicant in all these cases it is understandable that the Tribunal made assessment on the basis of current country information and the UNHCR Eligibility Guidelines and also, other reports to sought out risk profile categories of Tamil who has real chance of persecution upon to return Sri Lanka because of

⁵⁶⁹AH (Sri Lanka), [2011] NZIPT 800020-24 at para 68

⁵⁷⁰ Ibid at para 69

⁵⁷¹ Ibid at para 71

⁵⁷² Ibid at paras 79-80

their specific profile. In these cases, the tribunal found individual applicant does not fall into the category of the risk profile and thus there was not a real chance of being persecuted if they return to the country. The tribunal made assessment of the two principle issue as already mentioned. In all these cases the answer was negative for the first question that is there was no real chance of being persecuted for the applicant to return to their country of origin so the Tribunal did not consider the second question for further assessment that whether the appellants persecuted for their Tamil ethnicity or imputed political opinion.

5.5.2 Discussion of the cases where protection granted

In the case, *AF (Sri Lanka), [2011] NZIPT 800031*⁵⁷³ the Tribunal accepted the appeal against the decision of a Refugee Status officer of the Refugee Status Branch (RSB), declining to recognize him as a refugee.

In this case the appellant was a citizen of Sri Lanka of Tamil ethnicity. The appeal left the country because the appellant had a risk arisen from a paramilitary group in Batticaloa, and he was unable to access meaningful protection elsewhere in Sri Lanka⁵⁷⁴.

- ***Issue before the Tribunal***

The Tribunal like the previously discussed cases mentioned here that the principle issues of the case in terms of the *Refugee Appeal No 70074/96* (17 September 1996) were : (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality? (b) If the answer is yes, is there a Convention reason for that persecution?⁵⁷⁵

And also on the facts of the present case, the Tribunal addressed the question (c) Can the appellant access meaningful state protection elsewhere in Sri Lanka?⁵⁷⁶

- ***Procedure***

The Tribunal first outlined the legislative basis upon which it comes to determine the appeal. Then the Tribunal summarize the appellant's account before assessing its credibility. The

⁵⁷³ *AF (Sri Lanka), [2011] NZIPT 800031*, New Zealand: Immigration and Protection Tribunal, 30 March 2011, available at: <http://www.refworld.org/docid/4e0451542.html> [accessed 9 May 2016]

⁵⁷⁴ *AF (Sri Lanka), [2011] NZIPT 800031* at para 1

⁵⁷⁵ *Ibid* at paras 43

⁵⁷⁶ *Ibid* at para 44

Tribunal then discussed the issues under the Refugee Convention where it mentioned how New Zealand determined the refugee definition elements (i.e. well-founded fear, persecution) already discussed in subsection 5.3. Then the Tribunal made an assessment of the risk of real chance of being persecuted based on the applicant claim as a return asylum seeker and the Convention reason. The Tribunal made an assessment on the question whether relocation is possible for the appellant and can appellant access meaningful state protection elsewhere in Sri Lanka. And finally based on the assessment made a decision under the Immigration Act 2009.

- *Assessment of credibility*

The Tribunal for the assessment of credibility considered the appellant statements, evidence and relevant COI. Regarding the findings on credibility, in this case the Tribunal mentioned that “his evidence was broadly consistent with the account outlined in his original written statement and with the evidence he gave before the Refugee Status Branch. It was also consistent with country information.”⁵⁷⁷ And the Tribunal accepted the appellant core account was credible⁵⁷⁸.

- *Assessment of risk*

The Tribunal made an assessment of the risk on the basis of the relevant country of origin information like the Human Rights Watch report, the UNHCR Eligibility Guidelines as already discussed in subsection 5.4.1 against which the risk to this appellant is to be assessed.

- *Real chance of being persecuted as returned asylum seeker*

The Tribunal considered the UNHCR Eligibility Guidelines and mentioned that the Tribunal did not find the applicant has such risk profile as an LTTE sympathizer. In the view of the Tribunal, “the fact that others were detained, and he was released without harm on that occasion is a strong indication that he was not a person of specific interest to the Sri Lankan Army.”⁵⁷⁹ But after the assessment, the Tribunal found that “in all of the circumstances, the Tribunal finds that there is a real chance that the appellant would again be a target of the Karuna Group if he were to return to Batticaloa.”⁵⁸⁰

The Tribunal found.” Karuna is aligned with the Sri Lankan government and the group is clearly powerful in the appellant’s locality. It appears to be able to act with impunity and the

⁵⁷⁷ AF (Sri Lanka), [2011] NZIPT 800031 at para 46

⁵⁷⁸ Ibid at para 48

⁵⁷⁹ Ibid at para 60

⁵⁸⁰ AF (Sri Lanka), [2011] NZIPT 800031 at para 68

appellant has no realistic prospect of seeking protection from the Sri Lankan state against that harm”⁵⁸¹.

For these reasons the Tribunal found that ‘the appellant has a well-founded fear of being persecuted if he were to return to Batticaloa’⁵⁸².

- ***Convention Reason***

The Tribunal found that ‘the context in which the Karuna Group has obtained and seeks to maintain its influence in the east makes it clear that the appellant’s predicament is due, at least in part, to an imputed political opinion.’⁵⁸³. So there was a Convention reason for being persecuted if he returned to his country of origin.

- ***Internal Protection Alternative or meaningful state protection elsewhere in Sri Lanka***

After considering the country report the Tribunal reached in a decision that the” appellant to have a well-founded fear of being persecuted in part of his country of origin. Under the Refugee Convention he is a person in need of protection. The Tribunal is not satisfied that there is available in Sri Lanka a site of internal protection in which the appellant would face no new risks of being persecuted or of being exposed to other forms of serious harm or of refoulement to his home in Batticaloa, where he is at risk of being persecuted. The appellant is presently unable to genuinely access meaningful protection elsewhere in Sri Lanka”⁵⁸⁴

- ***Decision***

The Tribunal reached in a decision that the appellant is a refugee within the meaning of the Refugee Convention. And accordingly allowed the appeal.

- ***Concluding Remarks***

The Immigration and Protection Tribunal for the assessment of the refugee claim in this appeal followed that the same approach of credibility assessment. The Tribunal considered the statement of the applicant and evidence before it and made an objective risk assessment based on the relevant country of origin information to the extent relevant to the asylum claim of the applicant. And the Tribunal mentioned that the applicant was credible to his claim and the Tribunal found he has a well-founded fear of being persecuted as a return asylum seeker. The

⁵⁸¹ Ibid at para 69

⁵⁸² Ibid at para 70

⁵⁸³ Ibid at para 71

⁵⁸⁴ AF (Sri Lanka), [2011] NZIPT 800031 at para 46

Tribunal did not find that he has risk profile as a LTTE sympathizer but found it is not possible for him to assess meaning full protection elsewhere in Sri Lanka. In this case the Tribunal recognize him as a refugee under the Immigration Act because he was credible that he would be persecuted as return asylum seeker though he has no risk profile.

5.6 Does the interpretation matters for the determination of the refugee status of Tamil in New Zealand

In all these appeal cases like the Australia cases there was no situation aroused for the Tribunal to rethink about the interpretation of the elements of refugee definition. The situation may be whether the applicant personal circumstance gives enough ground to consider it persecution or whether the treatment of failed asylum seeker constitute persecution under the Act or the other grounds except the race and political opinion like wealthy Tamil from Sri Lanka also need to consider to determined asylum claim of Tamil , or whether the applicant has fear of being persecuted to satisfy the nexus requirement etc .In all these cases the Tribunal adopted the similar approach of interpretation of the refugee definition . For the term ‘well-founded fear’ the Tribunal used the objective risk assessment test and the term ‘fear of persecution’ was interpreted on the basis of the Human Right based approach. But for the issue of interpretation nor the asylum claim rejected neither granted, it was the applicant credibility for which the status granted or rejected by the Tribunal.

The Tribunal assessment was based on the issue of the applicant truthfulness to his claim of suffered harm and future chance of being persecuted based on his statement and evidence. The Tribunal assessed his situation with consideration of the general country information to verify the applicant claim and made findings to consider of his claim upon he consistency of his oral and written statement and evidence. None of these cases, refugee status of the applicant was recognized where the applicant was not credible but the actual risk of was harm exists because of the other situation. But the refugee status refused where the person found credible but there was not a real chance of harm for the applicant.

So the assessment of the credibility was the important part for the assessment of the refugee claim of the Tamil applicant in these appealed cases in New Zealand. The issues of the interpretation of the refugee definition was not in central to grant or refused the protection visa in New Zealand.

Chapter-6 Conclusion

At the beginning of this paper it was mentioned that there is no uniform practice among the States Parties to the Refugee Convention regarding the application and interpretation of the Convention. Because there is no body established under the Convention to deal with the matter of the interpretation and application of the Refugee Convention. Only the UNHCR has played the supervisory role under the UNHCR Statute and the Convention, regarding the application and interpretation of the Convention. But the States Parties are not bound by the UNHCR guidelines of interpretation. States Parties by incorporating the provisions of the Refugee Convention in their domestic law established their own refugee status determination procedure and interpreted the definition of the Refugee Convention by adopting their preferable approach or following their own approach.

The ultimate aim of this paper is to test, if different approach of the interpretation practiced by the States Parties to the Convention than for a 'one group' how two different States interpret the definition of the Refugee Convention? And when determining the refugee status of that group what are the approaches that are taken to interpret the refugee definition and its element by the two State? Are they similar or different? Finally, what is the outcome if the interpretation is different or similar in the two States?

After the study on Australia and New Zealand on the basis of the above mentioned cases regarding the refugee status determination of 'Tamil' from Sri Lanka it can be said both the countries adopted the almost similar approach to interpreting the definition of refugee and its elements.

But the point which seeks the attention is, it was not issue of the similar approach of the interpretation which results similar outcome in the cases of Tamil. Among ten cases regarding refugee status determination of Tamil in Australia,⁵⁸⁵ in only two cases the applicant granted protection in Australia and among six cases⁵⁸⁶ in New Zealand in only one case the applicant's appeal was granted.

In those cases, interpretation of the element of the refugee definition does not actually played a central role or does not seem important matter to those specific cases of 'Tamil'. Because on the basis of the interpretation of the element of refugee definition neither the recognition of the refugee status or the protection granted nor refused or dismissed in the both States. Credibility

⁵⁸⁵ See chapter 3 and 4 for case law discussion regarding refugee claim of Tamil in Australia.

⁵⁸⁶ See chapter 4 for case law discussion regarding refugee claim of Tamil in New Zealand.

Assessment played a central role in the cases of Tamil on the basis of which refugee status provided or refused to provide by the responsible authorities of the two States.

Now this paragraph summarized the points of the Australian and New Zealand refugee determination processes and approaches to interpretation.

In Australia Migration Act 1958 and the New Zealand Immigration 2009 deals with the matter related to the refugee claim of the applicant. "Australian and New Zealand refugee determination processes look very similar in the first glance'. In both countries, an officer of a government department officer initially determines the status of refugees, In Australia, this is the Department of Immigration and Border protection and in New Zealand it is the Refugee Status Branch (RSB) of the New Zealand Immigration Service If the claim is declined, he or she has a right of appeal, de novo, to an independent tribunal. In Australia, this is the Refugee Review Tribunal (RRT) and in New Zealand it is the Immigration and protection Tribunal."⁵⁸⁷

In New Zealand, the Immigration and Refugee Tribunal has the power to examine the legal issues including interpretation issue of the refugee definition but in Australian Refugee and review Tribunal do not have the power to deal with the interpretation⁵⁸⁸.

In both Australian and New Zealand Migration law, the definition of the 'refugee' is similar to the 1951 Convention definition of the refugee. Australian Migration Act defines the elements of refugee definition, but The New Zealand Immigration Act does not define any element of refugee definition.

In New Zealand, interpretation regarding the refugee definition and its elements developed by the early decision from the New Zealand Court. And these used as guidelines by the domestic judicial body to determine whether an applicant situation meets the requirements of the refugee definition. In Australia, domestic judiciary adopts the guidelines from the interpretation of the Australian High Court regarding elements of refugee definition.

The Australia Migration Act mentioned that well- founded also includes the real chance of future persecution if the person returns to the receiving country for the one or more Conventional reasons or all area of a receiving country. And the persecution includes the 'serious harm' and need to involve the systematic and discriminatory conduct.⁵⁸⁹

⁵⁸⁷ Jeanne Donald "We Don't Know. How Lucky We Are, Mate: Australian and New Zealand Refugee Law - A Comparison" (12 April 2002). Available at <http://www.refugee.org.nz/lucky.html#1>.

⁵⁸⁸ Osamu Arakaki, *Refugee Law and Practice in Japan*, Ashgate Publishing, Ltd., 1 Jan 2008, p 74

⁵⁸⁹ See chapter -4 for discussion.

In Australia, the RRT adopted for the objective approach to interpret the term “well-founded fear. “New Zealand also adopted this approach to define the term well-founded fear when determining refugee statuses of Tamil. Both Country took the Human Rights based approach to interpretation of the term ‘being persecuted which requires 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.⁵⁹⁰

In Australia, the RRT for the ‘test of causation’ or for the interpretation of the phrase ‘for reason of’ adopted different approaches which includes ‘motivation approach’, ‘Contributing clause approach’. In New Zealand, the Tribunal adopts the ‘Predicament approach’ suggested by Hathaway and Foster.

For the determination of the refugee statuses of Tamil in Australia, the RRT dealt with the issue of applicant credibility. And made assessment on the issue in every individual cases, whether the applicants fulfill the criteria for protection based on his claim that the applicant will be persecuted because of his Tamil ethnicity and imputed political opinion and also being a returned asylum seeker. In New Zealand the IPT in every individual case dealt with the following issues a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality? (b) If the answer is yes, is there a Convention reason for that persecution?

In Australia the RRT and in New Zealand the ITP made the credibility assessment of the Tamil applicants on the basis of the applicant statement, evidence and relevant country information(COI). Both of countries almost used the similar reports as COI like The United States Department reports on ‘Human Rights Practices 2013’: Sri Lanka, the Immigration and Refugee Board of Canada Information on the treatment of Tamil returnees to Sri Lank 2011, Human Rights Watch Country report on SriLanka including the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka 2012. None of the countries adopted fully the UNHCR guideline on Credibility assessment. In Australia, for the credibility assessment the RRT followed their own domestic guidelines and in New Zealand, the IPT follow the guidelines develop by the early case law from RSAA.

After the assessment of the credibility in Australia, among ten cases in seven cases the applicant found not credible to their claim and in other three cases the applicant was found credible. And all those seven cases the court found, the applicant has no risk profile. Also found there is not a real chance of harm for the applicant for being persecuted on the basis of Tamil ethnicity,

⁵⁹⁰See Chapter 3

imputed political opinion and as a return asylum seeker and accordingly rejected the applicant claim for refugee status. In the other three cases, only two cases the applicants were successful for the refugee protection. The applicant in those cases were found credible and the Tribunal found they have a risk profile mentioned in the UNHCR Eligibility Guidelines. And for the risk profile the Tribunal found the applicants have real chance of being persecuted based on the Convention reasons and as a returned asylum seeker. In the remaining one case, the applicant was credible and The Tribunal found he has also the real chance of being persecuted for the Conventional reasons but the Tribunal found relocation was the possible option for him.

In New Zealand among the six cases, one was related to the third appeal of the applicant so Tribunal found it has no jurisdiction to hear the appeal. In another five cases, only in one case the appeal was granted to recognize the refugee status of Tamil applicant. In that case the applicant was found credible to his claim and the Tribunal found the applicant has well-founded fear of being persecuted as a return asylum seeker. The Tribunal did not find he has risk profile as an LTTE sympathizer but found it is not possible for him to assess the meaningful protection elsewhere in Sri Lanka. In another four cases, the applicant was found not credible to their claim. Also found there was no real chance of being persecuted for the applicants to return to their country of origin. So the Tribunal did not consider the second question for the further assessment that whether the appellants persecuted for their Tamil ethnicity or imputed political opinion.

In none of the cases in Australia and New Zealand issue related to the interpretation of the element of the refuge definition played a central role in the rejection as mentioned above. Credibility assessment was the important matter for the refugee status determination of the Tamil asylum seeker in Sri Lanka.

If the RRT in Australia adopted the New Zealand approach to interpreting the refugee definition and its elements and vice versa then also the outcome may be same. Because for the refugee status determination of the Tamil asylum seeker, their actual situation in a post-war situation matters to the Tribunal. It is well established by the different reports that Tamil's human rights are violated everyday but not all of them are victim of persecution. Only those who has the risk profile as the LTTE member or sympathize. So the question assessed by the Tribunal is the Credibility of the applicant to find out the actual link profile for which they are persecuted.

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