Federal Court Cour fédérale

Date: 20161214

Docket: IMM-79-16

Citation: 2016 FC 1374

Ottawa, Ontario, December 14, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

GOWRIMUHUNTHAN SHANMUGARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a Tamil male from Sri Lanka. He arrived in Canada via the United States on August 18, 2014, and claimed refugee status on August 20, 2014. A Refugee Protection Division hearing was set for March 25, 2015. However, it was suspended at the request of the Minister of Public Safety and Emergency Preparedness [Minister] pending an inadmissibility

hearing to determine whether the Applicant was inadmissible on security grounds pursuant to paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph 34(1)(*c*) of the IRPA, namely engaging in terrorism. The Minister alleged that the Applicant was a member of the Tamil National Alliance [TNA], which served as a front or proxy for the Liberation Tigers of Tamil Eelam [LTTE].

[2] Following a hearing on July 16, 2015, the Immigration Division [ID] determined on December 15, 2015 that the Applicant was inadmissible "by virtue of the dispositions of subsection [sic] 34(1)(*f*) and (*c*) of the *Act*." On the basis of this finding, the ID issued a deportation order against the Applicant.

[3] The ID based its conclusion on three (3) elements. First, the ID found that there are reasonable grounds to believe that the LTTE is an organization that engages and has engaged in terrorism. Second, the ID also concluded that there was sufficient credible and trustworthy evidence demonstrating that the TNA was a front or proxy for the LTTE, and in particular, the 2004 TNA Election Manifesto and the "Political Handbook of the World: 2005-2006", *CQ Press*, which demonstrated that the TNA was a front or proxy for the LTTE. Third, the ID found that there are reasonable grounds to believe, based on credible and trustworthy evidence, that the Applicant was a member of the TNA.

[4] The Applicant seeks judicial review of the ID's decision.

II. Issue and Standard of Review

[5] Although framed differently by the parties, the application raises the issue of whether the ID erred in finding that the Applicant is a person inadmissible to Canada pursuant to paragraphs 34(1)(*f*) and 34(1)(*c*) of the IRPA.

[6] The issue of one's inadmissibility for security reasons is to be reviewed on the standard of review of reasonableness as it involves questions of fact or questions of mixed fact and law (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 11 [*Kanagendren*]; *Mirmahaleh v Canada (Citizenship and Immigration)*, 2015 FC 1085 at para 15; *Moussa v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 545 at para 24).

[7] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[8] Moreover, the evidentiary standard of "reasonable grounds to believe" stipulated in paragraph 34(1)(*f*) of the IRPA requires more than a mere suspicion, but less than the standard of proof of a balance of probabilities which is generally applicable in civil matters (*Kanapathy v Canada (Public Safety and Emergency Preparedness*), 2012 FC 459 at para 32 [*Kanapathy*]).

III. Analysis

[9] The Applicant submits that the ID's conclusions regarding the TNA being a proxy of the LTTE and the Applicant being a member of the TNA are flawed as the ID ignored evidence to the contrary. He does not dispute the ID's conclusion that the LTTE is an organization for which there are reasonable grounds to believe engages or has engaged in terrorism. He also submits that the ID erred by using "broad definitions" in interpreting membership under section 34 of the IRPA. Finally, the Applicant submits that the ID wrongly identified him to be inadmissible under paragraph 34(1)(*c*) of the IRPA for engaging in terrorism.

A. *The ID's finding that the TNA served as a front or proxy organization for the LTTE*

[10] The ID found that credible and trustworthy evidence demonstrated a sufficiently close relationship between the TNA and the LTTE to support a determination that the TNA acted as a front or as a proxy for the LTTE, particularly for the 2004 parliamentary elections. In support of its finding, the ID relied on an excerpt of the TNA's 2004 Election Manifesto and summarized its political message as follows:

1) The TNA accepts the leadership of the LTTE;
2) The LTTE is the sole and authentic representative of the Tamil people;
3) The Tamils, including the TNA, must devote full cooperation for the ideals of the Tigers' struggle;
4) The Tamils must work with the LTTE, under their leadership for the protection and autonomous life of the Tamil people;
5) It is inevitable that the Tamil homeland will be established.

[11] The ID also referred to the "Political Handbook of the World: 2005-2006" which indicates that the April 2004 election was the first time the TNA explicitly served as the proxy of the LTTE winning twenty-two (22) seats.

[12] The Applicant contends that the ID considered the TNA's 2004 Election Manifesto out of context and that it ignored evidence indicating that the TNA is not a proxy for the LTTE. In particular, he argues that the ID ignored the 2001 TNA Election Manifesto which does not defer to the LTTE, but merely encourages negotiations between the government and the LTTE, given that the LTTE controlled all of the North and that no peace could be achieved without negotiations and engagement with it. The Applicant also relies on a 2015 article reporting an interview with a TNA leader denying that the TNA is a proxy for the LTTE.

[13] It is trite law that a tribunal's decision and reasons must be evaluated on the basis of the entire record. A tribunal is presumed to have taken all the evidence into consideration and is not required to refer to each constituent element of the evidence (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board*), 2011 SCC 62 at paras 15-16; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). It is also not the role of this Court to reweigh the evidence that was before the ID and come to a different conclusion (*Khosa* at para 61).

[14] It is clear upon review of the record that the ID considered all of the evidence in coming to its conclusion and reasonably concluded that the TNA was a proxy for the LTTE, particularly for the 2004 parliamentary elections.

[15] The ID explicitly indicated that it had reviewed "the documentation produced by the parties and in particular all the extracts specifically mentioned by counsels" before coming to its conclusion. There is ample objective and independent evidence in the ID's record demonstrating not only the relationship between the LTTE and the TNA during the 2004 parliamentary elections, but also the influence of the LTTE over TNA members both before and after the 2004 parliamentary elections. In fact, the Applicant concedes in his written submissions that the Minister submitted articles which specifically affirm that the TNA is a proxy for the LTTE.

[16] Even if, as contends the Applicant, the relationship between the TNA and LTTE may have changed over the years, given that an organization must only have at one point engaged in acts of terrorism and that there is clear evidence linking the TNA to the LTTE, even if only in 2004, the ID's conclusion that the TNA was a front or a proxy for the LTTE was reasonable as it falls within the range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Dunsmuir* at para 47).

[17] While each case must be decided on its own facts and merit, I also note that the Federal Court of Appeal determined in *Kanagendren* that it was reasonable for the ID to find that membership in the TNA equated membership in the LTTE (*Kanagendren* at para 29). As in the present case, the evidence upon which the ID relied upon in *Kanagendren* also included the "Political Handbook of the World 2005-2006" and the 2004 Election Manifesto (*Kanagendren* at 10-11).

B. *The ID's finding that the Applicant was a member of the TNA*

[18] The ID concluded that the Applicant was a member of the TNA given the length of time he was involved with the TNA and the active participation he had during those years. The ID noted that for a period of ten (10) years, between 2001 and 2011, the Applicant was intimately politically involved with the TNA. The ID found that while the Applicant may not have been a registered card carrying member, he was a representative of the TNA and a voice for a party that had close links with the LTTE, particularly during the 2001 and 2004 parliamentary elections. The ID also found that no evidence was presented which would allow the determination that the Applicant himself committed any terrorist acts or that he was a member of the LTTE or complicit in the terrorist acts it committed.

[19] The Applicant submits that he was not a member of the TNA since he has not filled out the requisite forms nor paid the fees required by the TNA to be a member. He alleges that he was only an appointee who was nominated to run the election under the TNA's banner.

[20] The Federal Court of Appeal confirmed that membership in paragraph 34(1)(*f*) of the IRPA should be interpreted broadly (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 29, 32).

[21] Membership, as expounded by this Court and the Federal Court of Appeal, can include both formal and informal membership (*Kanapathy* at para 33). As explained in *Canada (Minister of Citizenship and Immigration) v Singh*, (1998), 151 FTR 101 (FTD) at paragraph 52:

> [52] … It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable.

[22] In order to determine membership, the ID must examine criteria such as the nature of the person's involvement in the organization, the length of time of such involvement and the degree of the person's commitment to the goals and objective of the organization. Where some factors suggest that the individual was a member and others suggest the contrary, those factors must be reasonably considered and weighed by the ID (*B074 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1146 at para 29).

[23] I am satisfied that the ID reasonably concluded that the Applicant was a member of the TNA. The ID considered a number of factors including: 1) the TNA was created on October 18, 2001 by four (4) Tamil political parties, including the Tamil United Liberation Front [TULF] party; 2) before the 2001 parliamentary election, the Applicant was approached and became a representative of the TULF party; 3) the Applicant was appointed as a TNA candidate in the 2001, 2004 and 2010 national parliamentary elections; 4) in 2006, the leader of the TNA personally nominated the Applicant as a candidate for election of the Chairman of the Trincomalee Urban Council, which he ultimately won; and 5) during his campaigning he participated in various party and public meetings, at some of which he was a speaker.

[24] The record also demonstrates that in completing his Basis of Claim [BOC] narrative, the Applicant first wrote that he was a member of the TNA and then crossed out the word "member" and replaced it with the word "appointee". The notion of membership reappears further down in the same paragraph when the Applicant wrote that he was falsely accused of supporting the

LTTE "since [he] was a member of the TNA". He subsequently crossed out the word "since" so that the sentence would read that he was accused of supporting the LTTE "and that ~~since~~ he was a member of the TNA".

[25] Moreover, during his testimony before the ID, the Applicant also explicitly stated at page 19 of the transcript that he was a representative of the TULF and a member of the TNA before revising his answer to state that he was not a member. Admitting that he was linked to the party, he then explained that he had corrected his BOC narrative to reconfirm that he was "not really a member of that party", explaining that he had first written that he was a member because people would refer to him as such.

[26] Given the factors considered by the ID and the evidence on the record, I find the ID's conclusion that the Applicant was a member of the TNA to be reasonable as it falls within the range of possible outcomes.

C. *Membership as per paragraph 34(1)(*f*) of the IRPA*

[27] Relying on the recent decisions of the Supreme Court of Canada in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 [*B010*] and *R v Appulonappa*, 2015 SCC 59 [*Appulonappa*], the Applicant submits that the ID erred in using overly broad definitions in interpreting paragraph 34(1)(*f*) of the IRPA. Knowing that the Applicant had never been involved in any terrorist acts, the ID should have interpreted "member" in a restrictive way so as to avoid including him as a member of a terrorist organization. According to the Applicant, the ID's broad interpretation of membership and the association between the TNA and the LTTE has

the unintended consequence of including him in a category of people inadmissible in Canada and is equivalent to finding him responsible for terrorists' acts by complicity. Relying on *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at paragraph 84 [*Ezokola*], wherein the Supreme Court of Canada found that refugee claimants may only be excluded if they "voluntary made a significant and knowing contribution to the organization's crime or criminal purpose", the Applicant contends that he should not have been found inadmissible as the ID explicitly acknowledged that he was not complicit in the LTTE's acts of terrorism.

[28] Neither *Appulonappa* nor *B010* deal with the issue of membership in an organization for which there are reasonable grounds to believe engages in terrorism. In *Appulonappa*, the Supreme Court of Canada examined section 117 of the IRPA, which makes it an offence to "organize, induce, aid or abet the coming into Canada" of people in contravention of the IRPA. The Court found the provision overly broad insofar as it permitted the unintended consequence of including people who assist family members in coming to Canada or who provide humanitarian aid to an asylum-seeker entering Canada. Similarly, in *B010* which dealt with inadmissibility on grounds of organized criminality for engaging in people smuggling under paragraph 37(1)(*b*) of the IRPA, the Supreme Court of Canada found that the provision only applies to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. In both cases, the provisions involve situations where an individual proactively organizes, aides or engages in certain identified activities.

[29] As for the application of *Ezokola*, I note that the Federal Court of Appeal answered a certified question in *Kanagendren* as to whether the Supreme Court of Canada's decision changed the legal test used to assess membership under paragraph 34(1)(*f*) of the IRPA. It concluded that it did not (*Kanagendren* at paras 28, 38).

D. *Application of paragraph 34(1)(*c*) of the IRPA*

[30] Both the decision and the deportation order issued by the ID indicates that the Applicant is inadmissible under paragraphs 34(1)(*f*) and 34(1)(*c*) of the IRPA. Paragraph 34(1)(*c*) provides that a person is inadmissible if there are reasonable grounds to believe that a person has, is or will engage in terrorism.

[31] The Minister did not seek the issuance of a deportation order under paragraph 34(1)(*c*) of the IRPA and the ID explicitly concluded that no evidence was presented that would allow the determination that the Applicant committed terrorists acts.

[32] The Applicant submits that the ID erred in referring to paragraph 34(1)(*c*) of the IRPA.

[33] The Minister submits that any error made by the ID in referring to paragraph 34(1)(*c*) of the IRPA is inconsequential as the Applicant is still subject to a deportation order as a person inadmissible under paragraph 34(1)(*f*) of the IRPA.

[34] Given my finding that the ID's conclusion regarding the inadmissibility of the Applicant under paragraph 34(1)(*f*) is reasonable and the absence of a live issue with respect to the

Applicant being inadmissible under paragraph 34(1)(*c*) of the IRPA, to the extent that the ID erred in referring to paragraph 34(1)(*c*), this error would not be determinative.

IV. Conclusion

[35] For all of the above reasons, the application for judicial review shall be dismissed.

V. Certified question

[36] The Applicant proposes that the following question be certified for consideration by the Federal Court of Appeal under subsection 74(d) of the IRPA:

> In light of the Supreme Court cases of Appulonappa and B010, is inadmissibility under section 34(1)(f), is membership in terrorist organisation changed, in the context of avoiding having a large definition of membership and catching unintended people in the net of the IRPA? [sic]

[37] The Minister opposes the Applicant's request to certify a question and submits that the decision of the Federal Court of Appeal in *Kanagendren* has settled the issue of the scope of "membership" under paragraph 34(1)(*f*) of the IRPA.

[38] The test for certification is whether there is a serious question of general importance and of broad significance which would be dispositive of the appeal and which transcends the interests of the parties to the litigation (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9; *Varela v Canada (Citizenship and Immigration),* 2009 FCA 145 at paras 28-29; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11).

[39] As noted earlier, the issue of membership in an organization for which there are reasonable grounds to believe engages in terrorism is well-settled in law. The Federal Court of Appeal's decision in *Kanagendren* effectively disposes of the issue. Moreover, it is also noteworthy to mention that the Supreme Court of Canada denied the application for leave to appeal in *Kanagendren* eight (8) days prior to rendering its decisions in *Appulonappa* and *B010*.

[40] For these reasons, I decline to certify the proposed question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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