

Date: 20080904

Docket: IMM-3299-07

Citation: 2008 FC 985

Ottawa, Ontario, September 4, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

KANAPATHY MURUGAMOORTHY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 2007, a panel of the Immigration and Refugee Board found that Mr. Kanapathy Murugamoorthy was excluded from refugee protection in Canada because he had been an accomplice of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka. In the late 1980s, Mr. Kanapathy had worked part-time for a newspaper that often published press releases describing the LTTE's activities in a favourable light. The Board concluded that, because the LTTE had a "limited and brutal purpose" of committing crimes against humanity, and because Mr. Kanapathy's work at the newspaper furthered the LTTE's terrorist aims, Mr. Kanapathy should be considered complicit in the LTTE's crimes and excluded from refugee protection.

[2] The issue is whether the Board's conclusion regarding Mr. Kanapathy's alleged complicity with the LTTE was reasonable. I find that it was not. Accordingly, I must allow this application for judicial review and order a new hearing where the merits of Mr. Kanapathy's refugee claim can be heard.

I. Factual Background

[3] Mr. Kanapathy first worked as a sales collection agent and then as a reporter at a newspaper called "Murasoli". He worked part-time while studying to become a nurse.

[4] As a reporter, Mr. Kanapathy often attended LTTE press briefings where representatives of the LTTE distributed reports the newspaper was expected to publish. If it did not, the LTTE reprimanded the editors. Sometimes, Mr. Kanapathy wrote his own articles based on information he received at the briefings. He admitted that the newspaper did not publish unfavourable stories about the LTTE or any news items about the Sri Lankan Army. While Murasoli was privately owned, the LTTE controlled its contents.

[5] Mr. Kanapathy testified that he originally supported the LTTE because it protected people. Later, after he left the newspaper and began his career as a nurse, he realized that the LTTE was responsible for terrorist acts and he changed his view.

II. The Board's Decision

[6] The Board concluded that, during the time when Mr. Kanapathy worked for Murasoli, the LTTE was already involved in violent activities in an effort to achieve an independent homeland. It tortured and killed many civilians and enlisted child soldiers in its cause. Based on the LTTE's actions, the Board found that the LTTE had a "limited, brutal purpose" of committing crimes against humanity.

[7] The Board went on to find that Murasoli, as an organ of LTTE propaganda, assisted the LTTE by attempting to generate public support for its aims. As a journalist, Mr. Kanapathy must have been aware of the LTTE's crimes. Yet, he continued to help further the LTTE's objectives through his work at Murasoli.

[8] The Board relied on the definition of complicity set out in *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (QL). There, the Court concluded that persons who are members of a group that regularly engages in crimes against humanity are accomplices to those crimes if they lend their support to the group and neither try to prevent the crimes from happening (if they have the power to do so), nor withdraw from the group at the earliest opportunity (if they can do so safely). The Board concluded that Mr. Kanapathy's activities as a journalist at Murasoli brought him within that definition. Accordingly, it found that Mr. Kanapathy was complicit in the crimes against humanity carried out by the LTTE.

III. Was the Board's Conclusion Reasonable?

[9] Persons are excluded from refugee protection if there are serious reasons for considering that they have “committed a crime against peace, a war crime, or a crime against humanity”. (Article 1F(a) of the *Refugee Convention*). Canadian law recognizes that persons should be excluded if they knowingly and personally participated in the commission of these kinds of crimes: *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, 89 D.L.R. (4th) 173, 135 N.R. 390 (F.C.A.) (QL).

[10] There are two routes to a finding that a person should be excluded from refugee protection based on an allegation of involvement in crimes against humanity. First, where an organization exists for the singular purpose of committing crimes against humanity, a person may be excluded based solely on evidence of membership in that group. Second, a person may be excluded where there is evidence showing that he or she knowingly participated in a crime, either as a principal or as an accomplice. Generally speaking, an accomplice is a person who assists in the commission of a crime, whether by aiding or abetting it, or by counselling or inciting others to commit it.

[11] Here, having found that the LTTE was a group with a “limited, brutal purpose”, it would have been open to the Board to exclude Mr. Kanapathy based on evidence of membership in the LTTE. However, there was no such evidence.

[12] Nor was there evidence that Mr. Kanopathy was directly involved in any crimes. The only possible basis for exclusion was the suggestion that Mr. Kanopathy assisted the LTTE in its criminal activities and, as such, was an accomplice to its crimes.

[13] As I see it, there was no evidence before the Board that Mr. Kanopathy furthered any crimes committed by the LTTE. At most, there was evidence that Mr. Kanopathy's work at the newspaper might have helped improve public opinion about the LTTE which, in turn, might have assisted it in achieving its ultimate political objects. However, while Mr. Kanopathy conceded that he initially had some sympathy for the LTTE's aims, this is a long way from knowing and personal participation in actual crimes. In particular, there was no evidence that the press releases Mr. Kanopathy relayed from the LTTE to Murasoli counselled or incited anyone to do anything.

[14] Therefore, I find the Board's decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47.

IV. Conclusion

[15] As I have stated elsewhere, "accusing someone of crimes against humanity is a serious matter": *Safarov v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1009, [2004] F.C.J. No. 1246 (QL). To be excluded from refugee protection, there must either be evidence of

membership in an organization that is singularly devoted to crimes against humanity or evidence of knowing and personal participation in those crimes. Neither is present here.

[16] Accordingly, I must allow this application for judicial review. I order that a different panel of the Board proceed to a hearing of the merits of Mr. Kanapathy's refugee claim.

[17] No question of general importance arises.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review is allowed. The matter is referred back to the Board for a new hearing on the merits before a different panel;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

SOLICITORS OF RECORD

DOCKET: IMM-3299-07

STYLE OF CAUSE: KANAPATHY MURUGAMOORTHY v. MCI

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: March 20, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: September 4, 2008

APPEARANCES:

Kumar Sriskanda FOR THE APPLICANT

Deborah Drukarsh FOR THE RESPONDENT

SOLICITORS OF RECORD:

KUMAR SRISKANDA FOR THE APPLICANT
Scarborough, ON

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, ON