

Federal Court



Cour fédérale

Date: 20120419

Docket: IMM-2845-11

Citation: 2012 FC 459

Toronto, Ontario, April 19, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

MURUGAMOORTHY KANAPATHY

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Murugamoorthy Kanapathy seeks judicial review of the decision of an Immigration Officer who found him to be inadmissible to Canada on the basis that he was a member of an organization for which there are reasonable grounds to believe has engaged in acts of terrorism.

[2] Mr. Kanapathy asserts that the Officer erred in finding that his actions were sufficient to deem him to be a member of the Liberation Tigers of Tamil Eelam (LTTE). He contends that the

issue of his membership in the LTTE had already been decided by this Court in a related proceeding. Mr. Kanopathy also argues that he worked as a journalist in Sri Lanka, and that any journalistic contribution that he may have made to the LTTE should not be considered to exclude him under any law in Canada.

[3] For the reasons that follow, I am not persuaded that the Officer erred as alleged. As a result, the application for judicial review will be dismissed.

Background

[4] Mr. Kanopathy is a Tamil citizen of Sri Lanka. He arrived in Canada in 2005, and claimed refugee protection at the port of entry.

[5] Mr. Kanopathy claimed to fear persecution because of his perceived association with the LTTE. He had worked part-time for the *Murasoli* newspaper in Jaffna, first as a money collector and then as a reporter. Mr. Kanopathy acknowledges that the *Murasoli* was controlled by the LTTE, and that that the paper printed only stories favourable to it.

[6] A panel of the Immigration and Refugee Board initially rejected Mr. Kanopathy's refugee claim on the basis that Mr. Kanopathy was excluded from the refugee definition under Articles 1F(a) and 1F(c) of the Refugee Convention. That is, the Board found that there were serious reasons for considering that Mr. Kanopathy was complicit in the commission of a war crime, a crime against humanity, or an act contrary to the purposes and principles of the United Nations.

[7] This decision was set aside by Justice O'Reilly on judicial review: see *Kanapathy v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 985, 76 Imm. L.R. (3d) 48.

[8] Mr. Kanapathy's refugee claim was then referred back to the Board for reconsideration. The Minister did not participate in the second hearing, and Mr. Kanapathy's refugee claim was ultimately successful. Mr. Kanapathy then applied for permanent residence in Canada as a Convention refugee.

[9] An Immigration Officer subsequently informed Mr. Kanapathy that she had concerns regarding his admissibility to Canada. The Officer advised him that she had information indicating that Mr. Kanapathy was a member of the LTTE, and that the LTTE was an organization that has engaged in terrorism, as described in subsection 34(1) of *IRPA*. The Officer then interviewed Mr. Kanapathy in order to address these admissibility concerns.

[10] After the interview, Mr. Kanapathy received a fairness letter enclosing the documentation that the Officer would be relying upon in her admissibility decision. The Officer invited Mr. Kanapathy to provide submissions in relation to that material. Mr. Kanapathy declined to provide any further information to the Officer.

The Officer's Inadmissibility Decision

[11] The Immigration Officer found Mr. Kanapathy to be inadmissible to Canada. As a result, Mr. Kanapathy's application for permanent residency was refused.

[12] The Officer determined that the LTTE was an organization that has engaged in the use of terrorism to promote the establishment of a separate Tamil state. Mr. Kanapathy does not challenge this finding.

[13] The Officer noted that Mr. Kanapathy had opted to work for the *Murasoli* knowing that it was controlled by the LTTE. During his work there, Mr. Kanapathy participated in the publication and distribution of LTTE propaganda. He also willingly associated on a daily basis with key members of the LTTE. The Officer held that this demonstrated that Mr. Kanapathy was in a position of trust within the organization.

[14] The Officer further noted that Mr. Kanapathy's involvement with the LTTE was voluntary, and not a result of duress or threats, and that it was sufficient to amount to "membership" for the purposes of subsection 34(1) of the Act.

Is the Issue of Mr. Kanapathy's Membership in the LTTE *Res Judicata*?

[15] Although the issue does not appear to have been raised before the Immigration Officer, Mr. Kanapathy now argues that the issue of his membership in the LTTE had already been finally decided by Justice O'Reilly.

[16] The issue of Mr. Kanapathy's membership in the LTTE was not raised in the second RPD hearing, and Mr. Kanapathy submits that there was no new evidence before the Officer in this case that would distinguish Justice O'Reilly's decision on the membership issue.

[17] Finally, Mr. Kanapathy says that the test for establishing exclusion under articles 1F(a) and 1F(c) of the Refugee Convention is the same as the test for establishing inadmissibility under subsection 34(1) of the *IRPA*.

[18] There are several problems with this argument.

[19] Exclusion under Article 1F of the Refugee Convention is very different than inadmissibility on security grounds under section 34(1) of *IRPA*. The former requires a determination of whether there are serious reasons for considering that an applicant was complicit in the commission of a war crime, a crime against humanity, or an act contrary to the purposes and principles of the United Nations. The issue in a section 34(1) inadmissibility case is whether the individual is a member of an organization for which there are reasonable grounds to believe has engaged in acts of terrorism. These are different issues with different tests.

[20] Mr. Kanapathy's potential inadmissibility on security grounds had never been finally adjudicated by a competent authority prior to the Officer making her decision; thus, there is no commonality of issues here.

[21] Justice O'Reilly's examined Mr. Kanapathy's involvement with the *Murasoli* in order to determine whether the Board had erred in its finding that Mr. Kanapathy was complicit in the crimes against humanity carried out by the LTTE.

[22] It was in this context that Justice O'Reilly observed that "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": at para. 11. It is not clear whether Justice O'Reilly was referring to formal membership in the LTTE for the purposes of his complicity analysis, or to membership by association.

[23] What is clear is that Justice O'Reilly went on to state at paragraph 13 of his decision that:

As I see it, there was no evidence before the Board that Mr. Kanapathy furthered any crimes committed by the LTTE. At most, *there was evidence that Mr. Kanapathy'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.* [my emphasis]

[24] There is no suggestion that the Officer in this case found that Mr. Kanapathy furthered any crimes committed by the LTTE. The Officer based her inadmissibility decision on her finding that Mr. Kanapathy's work at the *Murasoli* might have helped improve public opinion about the LTTE which, in turn, might have assisted it in achieving its ultimate political objects.

[25] There was thus nothing inconsistent between Justice O'Reilly's findings and those of the Immigration Officer. Moreover, the Officer made her inadmissibility finding on a different record than the one that was before Justice O'Reilly, as the Officer had the benefit of having interviewed Mr. Kanapathy.

[26] As a result, I am not persuaded that the issue of Mr. Kanapathy's membership in the LTTE for the purposes of an inadmissibility finding under subsection 34(1) of *IRPA* was *res judicata*. The next question is whether that finding was reasonable.

Was the Officer's Inadmissibility Finding Reasonable?

[27] The inadmissibility finding in this case was made under the provisions of paragraph 34(1)(f) of *IRPA*, the relevant portions of which provide that:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
...	...
(c) engaging in terrorism;	c) se livrer au terrorisme;
...	...
(f) 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 (a), (b) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

[28] In making a finding under subsection 34(1) of the Act, an immigration officer is also guided by section 33 of *IRPA*, which provides that:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils
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reasonable grounds to believe that they have occurred, are occurring or may occur.	sont survenus, surviennent ou peuvent survenir.
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[29] I understand the parties to agree that the Officer's finding in relation to the issue of membership is reviewable on the standard of reasonableness. Given that the issue is one of mixed fact and law, I agree that reasonableness is the appropriate standard: see *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487.

[30] 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: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R.190 at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

[31] As was noted earlier, Mr. Kanapathy does not take issue with the Officer's finding that the LTTE is an organization for which there are reasonable grounds to believe engages, has engaged or will engage in terrorism.

[32] In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at para. 114, the Supreme Court of Canada described the "reasonable grounds to believe" evidentiary standard as requiring "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities". The Supreme

Court went on to hold that reasonable grounds to believe will exist “where there is an objective basis for the belief which is based on compelling and credible information”: at para. 114.

[33] Insofar as the test for membership is concerned, it is clear that actual or formal membership in an organization is not required: rather, the term is to be broadly understood: see *Chiau v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 642, [1998] F.C.J. No. 131 (QL).

[34] Informal participation or support for a group may suffice: *Kanendra v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 923, 47 Imm.L.R. (3d) 265 at paras. 21-23; *Sepid v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 907, 170 A.C.W.S. (3d) 599 at para. 17.

[35] The requirements for establishing inadmissibility on security grounds are thus less stringent than the requirements for exclusion on grounds of violating international human rights. The latter requires complicity or knowing participation in the commission of a specific international crime, while the former does not require any complicity or knowing participation in an act of terrorism. Mr. Kanapathy fails to appreciate these distinctions when he argues that the Officer erred by failing to show that he actually incited a terrorist act during his employment with *Murasoli*.

[36] Given the low threshold that must be met to support a membership finding under subsection 34(1) of *IRPA*, the Officer’s conclusion that Mr. Kanapathy’s work for the *Murasoli*

supported the LTTE was reasonable. Mr. Kanapathy has acknowledged that the *Murasoli* supported and was controlled by the LTTE. Moreover, the documentary evidence affirms the links between the *Murasoli* and the LTTE and discusses the importance of media propaganda to the LTTE's activities.

[37] The Officer quite reasonably relied on Mr. Kanapathy's knowing participation in LTTE propaganda campaigns and his association with key members of the LTTE over a three-year period to find that there were reasonable grounds to believe that Mr. Kanapathy was a member in the LTTE for the purposes of paragraph 34(1)(f) of *IRPA*.

[38] As noted earlier, this Court has acknowledged that informal participation in, or support for an organization may establish membership for the purposes of subsection 34(1): *Kanendra*, above at paras. 21-23; *Sepid*, above at para. 17. The Officer's conclusions were supported by information in the record and were thus reasonable.

[39] I acknowledge Mr. Kanapathy's argument that a certain amount of interaction with the LTTE may have been inevitable in LTTE-controlled areas of northern Sri Lanka during the period in question. However, it seems to me that those submissions may be better advanced in the context of an application for a Ministerial exemption under subsection 34(2) of *Immigration and Refugee Protection Act*.

Mr. Kanopathy's Role as a Journalist

[40] Mr. Kanopathy argues that any contribution that he may have made to the LTTE through his work as a journalist should not exclude him under any law in Canada. I do not accept this submission.

[41] Mr. Kanopathy offers no authority for this assertion, and I note that it seems somewhat inconsistent with his contention that he did not exercise any independent judgment in his reporting for the *Murasoli* and that all he did was to bring articles from the LTTE to the paper for publication.

Conclusion

[42] For these reasons, the application for judicial review is dismissed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. This application for judicial review is dismissed; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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MINISTER OF PUBLIC SAFETY AND EMERGENCY
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