Federal Court  Cour fédérale

Date: 20130125

Docket: IMM-1574-11
IMM-1575-11

Citation: 2013 FC 80

Ottawa, Ontario, January 25, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

IMM-1574-11

JEYAKUMARAN MUNEESWARAKUMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND

IMM-1575-11

JEYAKUMARAN MUNEESWARAKUMAR

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a decision of a Minister's Delegate under paragraph 115(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) that the applicant has committed acts the nature and severity of which are such that he should not be allowed to remain in Canada. The effect of this decision is that the applicant would be deported to Sri Lanka despite his status as a refugee in Canada.

[2] The applicant also seeks judicial review of a decision to deny his application under section 25 of the *IRPA* for permanent resident status on humanitarian and compassionate (H&C) grounds.

[3] For the reasons that follow the applications are dismissed.

Background

[4] The applicant is Tamil and a citizen of Sri Lanka. He arrived in Canada with his father in 1992 when he was 12 years old. He was granted refugee protection in 1993 and permanent resident status in 1995.

[5] In October of 2002, the applicant was found inadmissible to Canada on the basis of organized criminality under paragraph 37(1)(a) of the *IRPA*. The Immigration Division of the Immigration and Refugee Board found that the applicant was a member of an organization known as the Gilder Boys, which was in turn associated with another gang, the VVT. This Court dismissed an application for leave and judicial review of that decision.

[6] On September 26, 2006, a Minister's Delegate rendered an opinion under section 115 of the *IRPA*. The Delegate determined that the applicant should not be allowed to remain in Canada pursuant to paragraph 115(2)(b) of the *IRPA* because he had committed serious, violent crimes as part of a criminal organization.

[7] The applicant was scheduled to be removed from Canada on December 2, 2008. His request for a deferral was denied. He applied for leave and judicial review of that decision and sought a judicial stay of his removal. The applicant thereafter reached an agreement with Citizenship and Immigration Canada (CIC) and the Canadian Border Services Agency (CBSA) and discontinued the Federal Court applications.

[8] On January 29, 2008, the applicant requested that the Delegate's opinion be reconsidered in light of the changed country conditions and new evidence of his rehabilitation. He also made an H&C application for permanent residence. The Delegate considered both applications concurrently, and on February 2, 2011, issue one set of reasons denying each of them.

The Section 115 Opinion

[9] The Delegate noted that the prior section 115 opinion had been made without the benefit of the Federal Court of Appeal's decision in *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153. The Delegate reviewed the applicable law as set out in that decision, observing that the standard of proof was low and it was sufficient that there be reasonable grounds to believe that he had committed the acts in question. Additionally, the Delegate noted that the relevant actions are those the applicant committed personally or through complicity, as defined in

Canadian criminal law. Complicity includes aiding or abetting and other criminal conduct such as conspiracy.

[10] The Delegate gave the following reasons for her decision that the applicant's past acts were substantially grave:

(1) The applicant was convicted in 1999 for assault with a weapon, a metal rod. The attack was motivated by gang control over territory. The applicant and a co-accused stated that the altercation was over a woman. However, the Delegate gave greater weight to the police report because it included evidence given contemporaneously by a third party.

(2) In 2000, the applicant was convicted of breaking and entering.

(3) There were reasonable grounds to believe that the applicant was a member of the Gilder Boys and associated with the VVT gang. There were also reasonable grounds to believe that the applicant was close to the leader of the VVT gang, a man named Kailesh.

(4) VVT is a Tamil gang with links to the Liberation Tigers of Tamil Eelam (LTTE). Sub-gangs, such as Gilder Boys, are less focused on politics and more focussed on criminal enterprises.

(5) There were reasonable grounds to believe that the applicant was complicit in the commission of a homicide in 1997, having transported guns to the scene of the crime. This incident was "a concerted effort by a group of individuals to assassinate, in cold blood, a group of other individuals." One person died and two others sustained bullet wounds. During police interviews, one alleged participant stated

that the applicant transported the weapons to the scene of the crime after being instructed to do so by Kailesh. A polygraph examination indicated that the applicant was deceitful in his denial of this assertion. The applicant's explanation to the police also contradicted other evidence.

(6) The Delegate was satisfied on reasonable grounds that the applicant aided in the commission of the homicide by transporting weapons to the shooters.

(7) The applicant's past acts as a member of the VVT and Guilder Boys gangs, in particular his participation in the homicide, were of substantial gravity.

[11] The applicant submitted that new conditions put him at risk of persecution by the Sri Lankan government; in particular he cited his status as a young Tamil male with no identification card and as a criminal deportee from Canada with alleged links to the LTTE. However, the Delegate determined that the applicant was not at risk if returned to Sri Lanka, for the following reasons:

(1) The applicant had been granted refugee status because the LTTE were conscripting Tamil children into the civil war. Given the passage of time and change in country conditions, this risk no longer existed.

(2) The documentary evidence did not indicate that lack of an identification card or being a Tamil from the North were, at present, risk factors.

(3) The evidence indicated that being suspected of having links to the LTTE is a risk factor, and the applicant pointed to the examples of Tamil men who claim they were mistreated by Sri Lankan authorities after being removed from Canada. The Delegate determined that the applicant's circumstances were substantially different. He did not have a prominent position in the VVT and his case did not receive media attention.

(4) It was speculative to argue that CBSA would inform Sri Lankan authorities of the applicant's criminality. Furthermore, there was no direct link between the applicant himself and the LTTE. Even if there was a link, the documentary evidence showed that many who were affiliated with the LTTE had been released from custody and that low-level supporters were not generally of interest to authorities.

The H&C Decision

[12] The Delegate determined that the nature and severity of the applicant's acts outweighed the H&C considerations. The Delegate provided the following reasons for refusing the applicant's H&C application:

(1) The applicant had lived in Canada since he was 12. He did not complete secondary school and has a varied employment history.

(2) The applicant claimed to be a breadwinner for his immediate and extended family. However, there was no evidence as to his employment situation since 2008 when he stopped working as a mortgage agent because of pending fraud charges.

(3) His sources of income were suspect, given his relatively low annual salary when compared to his stated financial obligations and lifestyle. He did not provide tax returns.

(4) Though he was never convicted of fraud, evidence of criminal charges "cast[s] a shadow" on whether all of his income has been lawful.

(5) It was not clear how successful his business endeavours had been.

(6) Several factors weighed in his favour: his volunteer activities, a wide network of supportive friends and the length of time he has spent in Canada. The applicant had

family in Canada and the interests of his two children also weighed in his favour. Separation from his family would cause hardship and emotional upset.

(7) However, the applicant and his wife married after he had been issued a deportation order. Additionally, the couple had had numerous disputes involving the police, including allegations of assault and infidelity.

(8) While the applicant would have a period of adjustment in Sri Lanka, the country situation had improved.

Issues

[13] The standard of review is reasonableness for both the Delegate's section 115 opinion and the H&C decision. Procedural fairness is reviewed on a standard of correctness: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; *Dunsmuir v New Brunswick*, 2008 SCC 9; *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153.

Analysis

Procedural Fairness

[14] The applicant states that he was not given adequate notice that the Delegate would rely on evidence of his participation in the homicide and double shooting. CBSA did not specifically reference that allegation in its submissions to the Minister.

[15] On March 19, 2009, CBSA disclosed 1548 pages of documents to the applicant, inviting his response. Contained within this disclosure package was the documentation relating to the homicide, including the police reports. The disclosure package also listed the Minister's decision of

September 26, 2006. The 2006 Ministerial opinion is founded, in part, on the applicant's participation in the homicide and double shooting.

[16] This disclosure satisfies the requirements of procedural fairness. It is axiomatic that any information on which the decision maker relies must be provided to the applicant: *Suresh*. There is no authority for the proposition that disclosure also requires that the specific conduct, which the Delegate might find particularly pertinent or compelling, be distilled or that crucial facts be identified or emphasized. Procedural fairness requires disclosure; it does not require that the disclosure be triaged to identify evidence which may be of particular relevance to the decision maker. In the circumstances of this case, I find that the applicant did have adequate notice of the evidence against him and the case he had to meet.

A Section 115 Opinion – Basic Principles

[17] Subsection 115(1) of the *IRPA* reflects the principle of international law of *non-refoulement*, and is derived from Article 33 of the *United Nations Convention Relating to the Status of Refugees*. Simply put, Convention refugees may not be removed from Canada to a country where they would be at risk of persecution, torture or cruel and unusual treatment or punishment. Paragraphs 115(2) (a) and (b) contain an exception to this general rule. A refugee may be removed to their country of origin if they are inadmissible to Canada on the basis of serious organized criminality or if, in the Minister's opinion, the person should not be allowed to remain in Canada because of the nature and severity of their acts. They read:

115. (2) Subsection (1) does not apply in the case of a person	115. (2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of	a) pour grande criminalité qui, selon le

serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	ministre, constitue un danger pour le public au Canada;
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

[18] The "acts committed" which are relevant for a section 115 opinion are those that the applicant has committed personally, including complicity in acts committed by criminal organizations and others. The decision maker must apply Canadian criminal law when considering if an individual was complicit in criminal acts. This involves consideration of the law of aiding and abetting under section 21 of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*). However, the standard of proof is that of reasonable grounds to believe, lower than the criminal standard of proof beyond a reasonable doubt.

[19] Section 7 of the *Canadian Charter of Rights and Freedoms* is integral to the formulation of an opinion under section 115. It imposes an over-arching obligation on the Minister to assess, on a balance of probabilities, whether the individual will face a risk to his life, liberty or security, on refoulement. The Minister must balance that risk against the nature and severity of the acts: *Nagalingam v Minister of Citizenship and Immigration*, 2008 FCA 153.

Permissible Evidence

[20] There is no merit to the applicant's assertion that the Delegate could not consider evidence in support of unproven criminal allegations. In making her decision, the Delegate was entitled to consider any evidence reasonably considered reliable and trustworthy. This Court has consistently held that evidence in support of an unproven criminal charge can be used to form a section 115 opinion: *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 176; *Alkhalil v Canada (Minister of Citizenship and Immigration)*, 2011 FC 976; *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2007 FC 687.

[21] While the Delegate could not rely on the mere fact of a criminal charge, there is no error in relying on the underlying evidence surrounding a charge. Justice Anne Mactavish explained this distinction in *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 at paragraph 35:

> In my view, a distinction must be drawn between reliance on the *fact* that someone has been charged with a criminal offense, and reliance on the *evidence* that underlies the charges in question. The fact that someone has been charged with an offense proves nothing: it is simply an allegation. In contrast, the evidence underlying the charge may indeed be sufficient to provide the foundation for a good-faith opinion that an individual poses a present or future danger to others in Canada.
>
> [Emphasis in original]

[22] This explanation was endorsed by the Federal Court of Appeal in *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at paragraph 50. The law on this point is thus firmly settled. If the Delegate was limited to considering only allegations which resulted in a criminal conviction, the standard of proof would be elevated to that of beyond a reasonable doubt.

Evidence that is insufficient to prove the applicant's guilt on a criminal standard may still be sufficient to meet the lower threshold of reasonable grounds to believe.

[23] In this case, there was sufficient evidence in the police reports for the Delegate to conclude that the applicant was complicit in the commission of a homicide. In particular, the Delegate relied on the police homicide investigation report and the interviews of witnesses contained therein.

[24] The Delegate was also permitted to consider polygraph evidence: *Maire v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1185. She found that the polygraph results supported the other evidence in the police reports, in particular the various interviews.

[25] Polygraph results are inadmissible in a criminal trial, but this is not, as the applicant submits, because of concerns as to the reliability of the results; rather polygraph evidence has been rejected as it would run counter to long established evidentiary rules on oath-helping, prior inconsistent statements, character evidence and expert evidence. Most significantly, polygraph results could usurp the role of the trier of fact in weighing the credibility of a witness: *R v Béland*, [1987] 2 SCR 398.

[26] These concerns are not applicable in an administrative law process. Provided the reasoning satisfied the criteria of transparency, intelligibility and justification, the Delegate was not bound by the technical rules of evidence. Importantly, in the specific context of this case, she did not use the polygraph evidence to determine the applicant's credibility but rather as an additional piece of

evidence to be weighed. The questions posed on the polygraph were undoubtedly pertinent, as they were directed to whether the applicant transported the guns to the scene of the crime.

Section 21 of the Criminal Code

[27] The applicant submits that the Delegate erred in the application of the criminal law in order to establish whether he was a party to or complicit in a criminal act of such a nature as to warrant removal. The Delegate found the applicant was complicit in murder, concluding:

> … [he] was complicit in a shooting resulting in a homicide orchestrated by Kailesh in that he transported guns hidden in a speaker of his car to the scene of the crime.

[28] The applicant contends that this finding is insufficient. The Delegate had to render a determination that there were reasonable grounds to believe that the elements of section 21 of the *Criminal Code* and the offence of aiding and abetting had been established in the evidence. The applicant contends that intention is required to establish aiding and abetting, and that in order to do so in the context of a homicide, the accused must know of the principle's intention to kill. It is not sufficient that the acts had the effect of aiding in the commission of the offence. The purpose must be proven. The Delegate needed to expressly find that the applicant had knowledge of an intention to kill.

[29] Section 21 of the *Criminal Code* provides:

21. (1) Every one is a party to an offence who	21. (1) Participent à une infraction :
(a) actually commits it;	a) quiconque la commet réellement;
(b) does or omits to do anything for the purpose of aiding any person to	b) quiconque accomplit ou omet d'accomplir quelque chose en vue

commit it; or	d'aider quelqu'un à la commettre;
(c) abets any person in committing it.	c) quiconque encourage quelqu'un à la commettre.
(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.	(2) Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpétration de l'infraction, participe à cette infraction.

[30] The Court of Appeal considered section 21 in *Nagalingam*, paras 60-61:

> Paragraph 21(1)(*a*) holds an accused liable for the role as principal if he or she committed that offence.
>
> Paragraph 21(1)(*b*) makes an accused liable as a party for acts or omissions which are done for the purpose of aiding a principal to commit an offence while paragraph 21(1)(*c*) makes the accused similarly liable if he or she abetted the principal.
>
> [Emphasis in original]

[31] The Delegate concluded that the applicant "was complicit in a homicide". There is no offence of complicity, rather it is a label applied to section 21 which addresses parties to an offence. A party to the offence of homicide can be established either through aiding under paragraph 21(1)(b) (in this case transportation of guns to the scene of the crime) or under subsection 21(2) where it is sufficient that there is a common intention to carry out an unlawful purpose and that the applicant knew, or ought to have known, that the commission of the offence would be a probable consequence of the conduct.

[32] The offence of culpable homicide is defined as:

221. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.	221. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, par négligence criminelle, cause des lésions corporelles à autrui.
222. …	222. …
(5) A person commits culpable homicide when he causes the death of a human being,	(5) Une personne commet un homicide coupable lorsqu'elle cause la mort d'un être humain :
(a) by means of an unlawful act;	a) soit au moyen d'un acte illégal;
(b) by criminal negligence;	b) soit par négligence criminelle;
(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or	c) soit en portant cet être humain, par des menaces ou la crainte de quelque violence, ou par la supercherie, à faire quelque chose qui cause sa mort;
(d) by wilfully frightening that human being, in the case of a child or sick person.	d) soit en effrayant volontairement cet être humain, dans le cas d'un enfant ou d'une personne malade.

[33] The offence of homicide engages a range of unlawful acts causing death, including criminal negligence causing death (section 220); murder (section 229), either in the first or second degree (section 231); murder reduced to manslaughter (section 232); and manslaughter (section 236).

[34] In the case of murder, the person aiding must intend that death ensue or intend that the perpetrator cause harm that is likely to result in death, or be reckless as to whether death ensues: *R v Kirkness*, [1990] 3 SCR 74.

[35] The applicant's position, insofar as murder is concerned, is well-founded: *R. v McIntyre*, 2012 ONCA 356; *R. v Kirkness*, [1990] 3 SCR 74. Here, however, the Delegate did not predicate the finding on the narrow classification of the offence of first degree murder. The finding, or classification, of the act of substantial gravity, was that of homicide, which as the definition explains, encompasses "causing death by an unlawful act".

[36] If the intent of the aiding party is insufficient to support a conviction for murder, then the party may still be convicted of manslaughter, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken: *Kirkness*; *R v Q.V.T.M.L.*, 2003 BCCA 48 at para 49.

[37] To require the Delegate to specify the precise nature of the unlawful act as murder or manslaughter would convert the administrative law hearing into a pseudo-criminal trial process. Such a process would, by definition, be unsatisfactory. The Delegate does not have the mechanisms to establish, for example, that Kailesh intended to murder the victim at the time the applicant provided the weapons, as would be required if the act of substantial gravity was particularized as complicity in first degree murder.

[38] The Delegate's findings fall within the scope of what is required to establish, on a lesser standard of proof, complicity in homicide. Cory J, in *Kirkness*, p 88:

> In the case of an accused who aids or abets in the killing of another, the requisite intent that the aider or abettor must have in order to warrant a conviction for murder must be the same as that required of the person who actually does the killing. That is to say, the person aiding or abetting the crime must intend that death ensue or intend

> that he or the perpetrator cause bodily harm of a kind likely to result in death and be reckless whether death ensues or not. If the intent of the aiding party is insufficient to support a conviction for murder, then that party might still be convicted of manslaughter if the unlawful act which was aided or abetted is one he or she knows is likely to cause some harm short of death.

[39] Therefore, the case law does not require an intention to kill and knowledge of the principle's intention to kill. Intention to cause harm or recklessness as to the consequences will suffice. Even if the aiding party does not have the same intention as the accused, to commit murder, it is sufficient if the party knows that some sort of harm short of death is likely to ensure.

[40] The Delegate considered the applicant's knowledge and intention. She reviewed police evidence which showed that the homicide had been orchestrated by Kailesh, the VVT leader. The Delegate concluded:

> Finally, and most significantly the evidence contained in the ID's reasons provide reasonably grounds to believe that Mr. M was complicit in a shooting resulting in a homicide orchestrated by Kailesh in that he transported guns hidden in his car to the scene of the crime.

[41] After extracting relevant portions from the police report, including a synopsis of a police interview with a participant confirming that he heard Kailesh's direction to the applicant to bring the guns, the Delegate concluded "[this was] a concerted effort by a group of individuals to assassinate, in cold blood, a group of other individuals."

[42] This conclusion and the preceding reasons demonstrate that the Delegate considered the applicant to have been a knowing participant in the homicide.

[43] This conclusion reached by the Delegate was reasonably open to her on the evidence.

[44] The applicant's intention to commit any particular crime is a necessary but subordinate element of the real question at issue, whether he committed or was complicit in the commission of acts of substantial gravity. Here, the act was homicide, which is defined as death by an unlawful act. The unlawful act may require a party to have knowledge of an intention to kill, but not necessarily. If this is not established, the unlawful act may be manslaughter. Indeed, in *Nagalingam* at paragraphs 77 and 79, the Federal Court of Appeal stated that the Delegate is not required to make a specific finding on complicity. It follows that a Delegate need not parse the underlying criminal offence beyond that of homicide.

[45] The applicant's argument imports into an administrative law procedure, namely the formulation of an opinion under section 115, the substantive element of criminal law necessary to sustain a specific criminal conviction. While the Federal Court of Appeal in *Nagalingam* provided that criminal law is applicable to the formulation of a section 115 opinion, it also cautioned that the law must be applied with "circumspection and caution" in the immigration context. Criminal law principles inform, but do not control, the Delegate's analysis of whether the nature and severity of "the acts committed" warrant the opinion.

[46] While the Delegate does not expressly find intention and did not use the language of "known or ought to have known" she did conclude that it was "a concerted effort to assassinate" a group of other individuals. This is, in my view, a sufficient finding of intent insofar as it incorporates the intention of the applicant and other parties to the offence, namely Kailesh. The

dictionary definition of "concerted" demonstrates that the requisite knowledge and intention is imbedded in the use of the word "concerted". The Merriam-Webster Dictionary (online) defines "concerted" as "mutually contrived or agreed on". Similarly, the Canadian Oxford Dictionary (2nd ed. 2004) includes the definition "combined together; jointly arranged or planned".

[47] The Delegate applied the correct legal tests in concluding that there were reasonable grounds to believe that the applicant aided in the commission of a homicide and reasonably concluded that this action, among others, demonstrated that the applicant had committed acts of "substantial gravity." There is no reviewable error.

Risk in Sri Lanka

[48] Having reached this conclusion, the Delegate was required to consider what risk the applicant might face if removed to Sri Lanka.

[49] The applicant submits that the Delegate erroneously concluded that the circumstances in Sri Lanka had changed such that only high profile members of the LTTE were presently at risk. The applicant emphasizes evidence which indicates that anyone suspected of links to the LTTE is in danger. Similarly, the applicant submits that the Delegate erroneously concluded that he was not a high profile LTTE member.

[50] The Delegate explained that, though the applicant was associated with organizations with LTTE ties, he himself had no direct connection. There was no evidence before the Delegate that the applicant ever fundraised for or otherwise supported the LTTE. As such, her conclusions were

rooted in the evidence. In effect, the applicant is challenging the weight the Delegate assigned to various pieces of evidence. This is not the function of judicial review.

[51] Nor is there merit to the argument that the Delegate ignored evidence. The Delegate specifically referred to the expert reports provided by Professor Anthony Good. The Delegate also reviewed the cases of other Tamil men removed from Canada and explained why she determined that their circumstances were substantially different. The Delegate explained that, as country conditions had evolved substantially, evidence from 2008 and 2009 was out of date.

[52] Finally, the applicant argues that the Delegate failed to consider whether the changes in Sri Lanka were effective and durable. The language of an effective and durable change is not essential to the analysis: *Yusuf v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 35; *Fabian v Canada (Minister of Citizenship and Immigration*), 2006 FC 851. The issue to be decided is whether the applicant is personally at risk, on a balance of probabilities, on the basis of the existing evidence. This includes an analysis of the nature of the changes. Put otherwise, effectiveness and durability is embedded in the risk analysis. To require the Delegate to foresee how far the changes will prevail in the future would entail an inappropriately speculative soothsaying exercise. The risk must be assessed in real time, based on known facts. Here, the Delegate considered the evidence relating to risk and came to a reasonable conclusion as to the prospective risk.

The H&C Decision

[53] The applicant applied for an H&C exemption from the finding that he was inadmissible on the basis of his criminality. For this application to succeed, the applicant was required to demonstrate that the hardship of his removal would be undue, undeserved or disproportionate.

[54] This does not involve reconsideration of the applicant's right to life, liberty and security of the person, as provided for in *Suresh*. The Delegate had already given careful consideration to the issue of risk in the section 115 opinion. Rather, the H&C application was an opportunity for the Delegate to consider additional factors such as the applicant's establishment in Canada and the best interests of his children.

[55] The applicant submits that the Delegate exceeded her jurisdiction in deciding his H&C application. He argues that an H&C decision is a two step process. First, a front line officer reviews the application and decides whether it should be approved in principle. Second, the Delegate can decide whether there should be an exemption from the inadmissibility finding under paragraph 37(1)(a).

[56] The CIC Manual sets out that the local office should forward the case to the Director of Case Review at the National Headquarters of CIC if H&C factors might justify an exemption. If the Director determines that there are insufficient H&C grounds to justify an exemption, the Director may render a negative decision.

[57] That is precisely what happened in this case. The applicant's file was processed at the CIC office in Scarborough, Ontario. It was then forwarded to the National Headquarters where the Delegate, also the Director of Case Review, decided that an exemption from the inadmissibility finding was not justified. No divergence from the CIC Policy manual has been established. In any event, internal administration processing decisions do not give rise, in the absence of proof of a legitimate expectation or lost opportunity to be heard, to procedural fairness concerns.

[58] The Delegate explicitly considered that the applicant arrived in Canada as a refugee, a circumstance that was beyond his control. She found that the length of time that the applicant lived in Canada weighed in favour of accepting his application.

[59] As explained above, it was permissible for the Delegate to consider evidence underlying criminal allegations that did not result in convictions.

[60] In one instance, the Delegate considered the mere fact that the applicant had faced criminal charges for fraud involving false mortgage applications. For this allegation, the Delegate did not consider the underlying evidence, only the charge, in and of itself. This was improper. However, I am not convinced that this error had any impact on the decision. The fraud allegations were relatively minor in light of the other criminal conduct at issue.

[61] The Delegate was concerned about whether the applicant's stated income could actually support his lifestyle and financial obligations. The applicant did not submit evidence of his

employment since 2008 and did not submit any tax returns. Though the Delegate considered the fraud allegations, she also emphasized other evidence which called his income into question.

[62] The Delegate found that family unity and the best interests of the applicant's children weighed in favour of an H&C exemption. The Delegate found that the distance between Canada and Sri Lanka would cause hardship. It was open to the Delegate to also consider that a two parent household is desirable, but not essential and that with modern communication methods the applicant could stay in contact with his children. The Delegate carefully reviewed the best interests of the applicant's children. Her findings are reasonable and supported by the evidence.

[63] Furthermore, family conflict is a relevant consideration. It was undisputed that the police had been called to the applicant's home because of conflict between the applicant and his wife. There was no error in considering this fact. The Delegate did not rely on this evidence as proof of criminality, but as evidence to be put on to the scales in assessing the applicant's claim that removal would cause undue hardship to his wife and children.

[64] In sum, given the broad discretion accorded to H&C decisions, the decision reached was reasonably open to the Delegate on the evidence before her. No reviewable error has been identified in the methodology, the identification of relevant criteria, or in the assessment of the evidence.

Certified Questions

[65] The applicant proposes three questions for certification:

(1) Does the Minister's Delegate breach principles of procedural fairness or natural justice by relying on evidence in the decision which was not put forward by CBSA as part of the case the applicant had to meet, without first notifying the applicant of the issue?

(2) Does the Minister's Delegate err in law in relying on evidence of criminal conduct which did not lead to a conviction for the alleged conduct to determine reasonable grounds to believe that the applicant had committed a criminal offence or been complicit in a criminal offence?

(3) In applying section 21 of the *Criminal Code* to a finding of reasonable grounds to believe complicity in murder, is the Minister's Delegate required to determine all requisite elements of the offence, including intention?

[66] I note that these proposed questions relate to the judicial review of the section 115 opinion only, not the H&C application.

[67] The test for certification is whether there is a serious question of general importance which would be dispositive of an appeal: *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at para 11. The three proposed questions do not satisfy that test.

[68] The first proposed question does not transcend the interests of the immediate parties. Whether an applicant has been given adequate disclosure is highly specific to the facts of each case. As the Federal Court of Appeal explained in *Kunkul v Canada (Minister of Citizenship and*

Immigration, 2009 FCA 347 at paragraph 11, "What is fair and reasonable in one instance may not be in another." In any event, on the evidence and the facts as found, there was disclosure of the documents.

[69] The second proposed question is not a serious question of general importance because the law on that issue is settled. There is no real debate as to whether evidence underlying a criminal charge as opposed to the charge itself can be considered in these circumstances: *Thuraisingam*.

[70] With respect to the third question, *Nagalingam* informs that when applying paragraph 115(2)(b) there must be reasonable grounds to believe that the person committed, personally, the act, or was complicit in its commission and hence became a party to the offence. One of the requirements of section 21 of the *Criminal Code* is intention, although the object of *mens rea* varies with the crime. As noted, the offence of homicide spans between a specific deliberate intention to kill to the reduced *mens rea* requirements for manslaughter. No real question arises from the facts of this case as the Delegate made the requisite findings of fact, including intent, under section 21 to reach the conclusion that the applicant was complicit in a homicide.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed.

There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1574-11
STYLE OF CAUSE:	**JEYAKUMARAN MUNEESWARAKUMAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
DOCKET:	IMM-1575-11
STYLE OF CAUSE:	**JEYAKUMARAN MUNEESWARAKUMAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION and MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	September 5, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	January 25, 2013

APPEARANCES:

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