Federal Court  Cour fédérale

Date: 20130402

Docket: IMM-4207-12

Citation: 2013 FC 327

Ottawa, Ontario, April 2, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

T.K.

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision dated 19 April 2012 (Decision) whereby a Member of the Immigration Division of the Immigration and Refugee Board of Canada (Member) deemed him inadmissible to Canada pursuant to paragraph 34(1)(*f*) of the Act.

BACKGROUND

[2] The Applicant is a citizen of Sri Lanka of Tamil ethnicity.

The Applicant's Background

[3] The Applicant is from Jaffna, in Northern Sri Lanka. The relevant events took place in 2005-2006. This was a time of peace in the civil war in Sri Lanka, but the Liberation Tigers of Tamil Eelam (LTTE) maintained a strong presence in the area where the Applicant lived.

[4] After the Applicant's arrival in Canada, he and his family members were interviewed many times, and he was referred for an admissibility hearing. The Applicant gave oral evidence, and he also called an expert witness, Kopalasingham Sritharan.

The Applicant's Testimony

[5] The Applicant explained that he was a member of a small union that was formed for the needs of auto car drivers and that was not very well organized. The union was run by the auto drivers and was not connected to the LTTE. The president of the union was not a member of the LTTE, nor were any of the members.

[6] In 2005, the Applicant and about 15 other members of the union were told by the LTTE to attend a 7-day training session, and that attendance was mandatory. There were 50-60 people at the camp in total. The training consisted of watching films about the LTTE, learning LTTE songs, and learning about people who had died for the LTTE's cause and hearing about the LTTE's progress. The Applicant did exercises such as marching and running. The Applicant was taught how to dig

trenches in the event of a shelling or bombing, and how to carry injured people. He was taught "self-defence," which consisted of learning how to make bunkers, first aid, and to lie down if there were bombings. This was not meant as combat training, but as training on how to protect members of the public if war broke out.

[7] On various memorial days LTTE members would organize meetings. The Applicant would hear through his union leader that he was to provide assistance at these meetings, and that it was mandatory to do so. Members of the union assisted by making and raising flags, setting up chairs and tents, and arranging and distributing food and drinks to the public. Other unions such as the barbers' union and the traders' union would also be called on to assist. The meetings would discuss the progress of the LTTE and the deeds of those who had died. The LTTE did not try and recruit at these meetings and the Applicant never spoke at them.

[8] The Applicant also assisted the LTTE a few times by driving his taxi around while another member of the union made announcements about upcoming LTTE events or played pre-recorded LTTE songs. The Applicant testified that he and the other members of the union did what the LTTE asked out of fear. The Applicant said that if he did not drive around making the announcements and playing the songs he would lose his auto and have no income, and so he had no choice in the matter.

[9] The Applicant said that he paid fees to the union, and the union would sometimes use these fees to buy supplies for the activities the LTTE requested of them. The Applicant never provided funds to the LTTE directly or in any other way.

[10] The Applicant testified at the hearing that he was scared of the LTTE, and that he undertook the activities out of compulsion. If people refused, the LTTE would take their autos away, or they

would be arrested and detained. He testified that the LTTE would threaten and beat people who did not do what they asked, and that he knew of someone whose auto was taken away for refusing to participate, and another person who was detained for a month. He also said he was aware of incidents of the LTTE killing people for refusing to participate. He said that many different types of unions were asked to provide assistance in different ways, and that "irrespective of the union we were in if the request comes in we have to do it, mandated."

[11] The Applicant testified that he never joined the LTTE, was never given a rank, and was never an employee of the LTTE. He was never given orders directly by the LTTE or associated with any of its members directly. He never received any confidential information from any members. He explained that, had he wished to join, he would have had to report at an LTTE camp and contact them directly.

[12] The Applicant stated that he could not seek protection from the authorities because, on the one hand, there was the risk that the LTTE would find out and he would face grave repercussions and, on the other hand, the authorities were suspicious of people from the Tamil community. If he had refused to go to the training camp, the LTTE would have searched for him and taken him by force. The Applicant said that he agrees with having a Tamil autonomous region, but that he does not support the goals of the LTTE and does not support the use of force. He testified that many people who were not members of the LTTE opposed the group, although some supported the cause.

The Applicant's Hearing and Expert Evidence

[13] At his admissibility hearing, the Applicant called Mr. Sritharan as a witness. Mr. Sritharan is an expert on the human rights situation in Sri Lanka. He testified that in times of ceasefire the LTTE

was still allowed to do political work, and would use this time to control the population and let people know they were watching. People who raised issues with the LTTE would be beaten, and because people did not want to take risks they would outwardly support the organization.

[14] Mr. Sritharan testified that the purpose of the LTTE in requiring people to participate in meetings was to "paint people in stripes." Once people participated, the LTTE would threaten them by saying that they would now be identified by the army as LTTE members. The intention was that once the war started, people would feel vulnerable and have no choice but to join the LTTE.

[15] If people did not attend meetings, intelligence members of the LTTE would watch them and they would run into problems. People were "paralyzed" by the terror, and the atmosphere was such that they would do what was asked in order to survive. It was a "totalitarian environment," and political killings were used to show people that anyone who challenged the LTTE faced death.

[16] All types of unions had to organize people from their villages. If they resisted, they would be targeted. People involved in small businesses or making small daily incomes could not continually resist as they were economically vulnerable. People would outwardly show their support to the LTTE, but do things to resist. For example, parents might send their children to volunteer for the "border police," but this was to avoid their recruitment to the LTTE military cadre.

[17] A strategy of control used by the LTTE was "drills training," such as the Applicant endured. It was expected that some people would end up joining the LTTE, but others would just go back to their daily lives after it was over. Drills training was done both to recruit people and to label them as LTTE supporters. Attendance did not make one a LTTE member. Drill training was different from

military training, which was serious military training in the jungle, and lasted six months to a year. A person who attended military training was a member of the LTTE.

[18] Mr. Sritharan said that it was very difficult not to attend drills training once someone became even slightly involved with the LTTE. Further, it was very difficult for someone not to be involved with the LTTE at all in the first place. As discussed above, if a member of a trade union continually resisted there would be problems.

DECISION UNDER REVIEW

[19] The Member found that the Applicant is a member of the LTTE, and that the LTTE is a terrorist organization. The Applicant was thus described by paragraph 34(1)(*f*) of the Act, and was therefore inadmissible to Canada.

[20] The Member stated that membership in the context of a terrorist organization must be given a "broad and unrestricted interpretation." He said that the Applicant asserted that his actions were coerced and made under duress, and thus he did not have the requisite *mens rea* to be considered a member of the LTTE.

[21] The Member cited the decision in *Jalloh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 317 [*Jalloh*] at paragraphs 36-38 as relevant to this assessment:

> In my view, it is preferable to consider the evidence of membership along with the evidence of coercion in determining whether there are reasonable grounds to believe the person genuinely was a member of the group. One way of looking at this issue is to regard evidence of duress as defeating the *mens rea* of membership (*Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339). Accordingly, evidence relating to duress must be considered along with the evidence relating to membership in deciding whether the

> person really was a member of the group or, rather, was motivated by self-preservation.
>
> In sum, a person cannot be considered to be a member of a group when his or her involvement with it is based on duress. At a minimum, a member is someone who intentionally carries out acts in furtherance of the group's goals. A person who performs acts consistent with those goals while under duress cannot be said to be a genuine member.
>
> Therefore, the finding of membership should rest on indicia that the person's intentions were consonant with the group's objects, not survival. The evidence should be considered as a whole to determine whether the person was truly a member or whether his or her acts carried out in the group's name were coerced. It must be remembered, of course, that the issue to be decided under s 34(1)(f) is whether there are reasonable grounds to believe that the person was a member, not whether the evidence establishes such a connection on a balance of probabilities, or whether duress has been made out on any particular standard of proof. This, too, suggests that all of the relevant evidence should be considered together.

[22] The Member noted that at the time of the events in question, the Applicant was not a young boy, and was fully aware of the nature of his actions. He also noted that the Applicant's actions were not a one-time occurrence but were continuous. The Member said that the Applicant made financial contributions to the LTTE "through the guise of rickshaw union dues." The Applicant's actions ceased only in 2006 when the LTTE left the area where he resided.

[23] The Member pointed out that the Applicant was not a poor man by Sri Lankan standards. The Applicant was involved in other businesses besides driving his taxi. The Member thought that at any time the Applicant could have chosen not to pursue employment as a taxi operator.

[24] The Applicant said that he had 10-15 days notice that he would have to attend the drills training camp before it started. During this time he made no effort to detach himself from the taxi business, despite it being the reason he was forced to maintain links with the LTTE. He also made

no effort to flee, despite the fact that he had previously gone to Colombo for business purposes. The Applicant testified that if he tried to flee he would be stopped at checkpoints, but this was contrary to his earlier evidence where he said that he could lie at checkpoints and say that he was visiting relatives or going to a wedding.

[25] Based on the Applicant's oral testimony, the Member found that he appeared primarily concerned with the effect on his taxi business if he did not comply with LTTE demands, and not for his physical well-being. Further, the Applicant testified that his town had 4000-5000 people living in it, and that about 50-100 people would attend the meetings that he arranged. No one was forced to attend, and if people had other things to do they simply would not go. The Member thought this low public participation rate ran contrary to the Applicant's assertion that his town was living under constant LTTE fear and control.

[26] The Member concluded that the actions taken by the Applicant amounted to membership in the LTTE. He knowingly participated in LTTE activities, and his activities were numerous and ongoing. The Member found that the evidence did not support that these action were taken under duress, or that the Applicant was forced to complete them. The Applicant had some financial means available to him, and could have chosen to forego the taxi business if that was his only nexus to the LTTE. He also could have fled the area when asked to attend the drills training camp. The Applicant was thus deemed a member of the LTTE, a terrorist organization, and a deportation order was issued against him.

STATUTORY PROVISIONS

[27] The following provisions of the Act are applicable in these proceedings:

Security

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(*b*) engaging in or instigating the subversion by force of any government;

(*c*) engaging in terrorism;

(*d*) being a danger to the security of Canada;

(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(*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*).

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

Sécurité

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

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*).

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[…]

Decision

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

(*a*) recognize the right to enter Canada of a Canadian citizen within the meaning of the *Citizenship Act*, a person registered as an Indian under the *Indian Act* or a permanent resident;

(*b*) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;

(*c*) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or

(*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

[…]

Décision

45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

a) reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la *Loi sur la citoyenneté*, à la personne inscrite comme Indien au sens de la *Loi sur les Indiens* et au résident permanent;

b) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;

c) autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire;

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

ISSUES

[28] The Applicant raises the following issues in this application:

a. Did the Member err in law by conflating duress and coercion?

b. Did the Member err by failing to apply the correct criteria for a finding of membership?

c. Did the Member err by ignoring relevant evidence?

STANDARD OF REVIEW

[29] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[30] The difference between the concepts of duress and coercion is a legal issue (*Jalloh* at paragraph 36). Questions of law require "uniform and consistent answers," and are reviewable on a standard of correctness (*Dunsmuir* at paragraph 60). The first issue is reviewable on a standard of correctness.

[31] As stated in paragraphs 67-68 of *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957 [*Toronto Coalition to Stop the War*], "the interpretation of the term "member" in paragraph 34(1)(f) is a question of law," and is

reviewable on a correctness standard. See also *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 [*Poshteh*] at paragraph 21. The second issue will be evaluated on a standard of correctness.

[32] The Member's evaluation of evidence is a factual aspect of his subsection 34(1) analysis. The standard of review applicable to the Court's evaluation of a subsection 34(1) analysis is reasonableness (*Krishnamoorthy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1342 [*Krishnamoorthy*] at paragraph 12). The third issue is reviewable on a standard of reasonableness.

[33] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the 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."

ARGUMENTS

The Applicant

Did the Member err by conflating duress and coercion?

[34] The Applicant submits that the Member erred by conflating the legal defense of duress with the concept of coercion. The two are distinct concepts: duress is a defense that does not negate the

person's *mens rea* of being a member of the organization, whereas coercion negates the person's *mens rea* so that he or she does not possess the intent to be a member of the organization.

[35] When advancing the defense of duress, it is already established that the person intended to commit the act in question; however, it was done under duress (*Oberlander v Canada (Attorney General)*, 2009 FCA 330 at paragraphs 25-27 [*Oberlander*]). There are three things that must be established for duress: a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person; the person acted necessarily and reasonably to avoid this threat; the person did not intend to cause a greater harm than the one sought to be avoided (*Oberlander* at paragraph 26). An important consideration is whether the person fled the organization at the earliest opportunity (*Rutayisire v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1168 at paragraph 19).

[36] As regards coercion, the question is not whether the individual intended to commit the activities in question, but whether the person's intention in doing so was to contribute to the objectives of the relevant organization (*Toronto Coalition to Stop the War*, above). Membership can be inferred by a person's actions, but the person's intent in engaging in the activities must first be considered.

[37] The distinction between the two concepts is recognized in the jurisprudence. In *Poshteh*, above, the Federal Court of Appeal kept the two concepts distinct – the terms were not used interchangeably (see paragraph 52). The Member relied on the *Jalloh* decision as setting out the relevant law on duress and coercion. In *Jalloh*, the applicant had submitted that his actions were carried out under duress. The Court pointed out the distinction between the two concepts at paragraph 33, stating that "[i]n determining whether Mr. Jalloh was a member, the Board did not

consider evidence relating to coercion, leaving it to be weighed separately in respect of the defence of duress." The Court went on at paragraph 38 to say that, "the finding of membership should rest on indicia that the person's intentions were consonant with the group's objects, not survival. The evidence should be considered as a whole to determine whether the person was truly a member or whether his or her acts carried out in the group's name were coerced."

[38] The Applicant did not rely on the defense of duress, but rather submitted before the Member that he was not a member of the LTTE because his actions were coerced. However, when assessing whether or not the Applicant was a member of the LTTE, the Member applied the test for the defense of duress. The key issue in the Applicant's admissibility hearing was not whether he committed acts of terrorism, but whether he demonstrated a commitment to the LTTE from which a finding of membership could be drawn. Therefore it was coercion, not duress, that was relevant.

[39] The Applicant submits that the Member applied the legal test for duress when he should have examined whether the Applicant's actions were coerced so as to negate the requisite intent to be found a member of the LTTE. This is evident in the factors the Member considered in his analysis, as well as the wording of the Decision. For example, the Member put significant emphasis on the fact that the Applicant did not attempt to flee the area to avoid the drills training camp; this is an important factor when it comes to duress, but not coercion.

[40] The Member also looked at the nature of the threat if the Applicant had refused to perform the activities in question. He found that the Applicant's actions were motivated mostly out of a concern for his business rather than for his physical well-being. The requirement that the actions be a result of a threat of imminent harm is a factor in the defense of duress. For the purposes of membership, the question is whether the person's "intentions were consonant with the group's

objects" (*Jalloh* at paragraph 38). Thus, if the person's actions were motivated by an economic concern as opposed to a desire to support the organization, this is sufficient to show the person's intentions were not consonant with the group's objects. When coercion is being considered, there is no requirement that the actions be a result of a threat to the person's life.

[41] It is evident from the Member's wording in the Decision that he was applying the test for duress. At the beginning of his analysis, the Member states "an assessment of [T.K.]'s activities as they relate to the LTTE is complicated by his assertions that he was coerced, that his actions were made out under duress." He then goes on to say that "the evidence does not support that these actions were taken under duress, that he was forced to complete them." The latter statement was based on the Member's finding that the Applicant could have foregone his business and fled the area when he was asked to attend drills training; this is an element of a duress analysis.

[42] The Applicant points out that the Member did not find that the Applicant's actions were carried out with the intent of supporting the LTTE's objectives. In fact, there was no analysis of the Applicant's intent, which is the critical issue when issues of coercion are raised in the context of membership. The Applicant distinguished between the concepts of duress and coercion in his submissions for his admissibility hearing. Despite this, however, the Member's reasons show that he incorrectly interpreted the Applicant's submissions as relying on the defense of duress, and that he erred by conflating the concepts of coercion and duress.

Did the Member err by failing to apply the correct criteria for membership?

[43] The Applicant submits that the Member erred by failing to apply the correct criteria for membership. The criteria that should be considered include: the person's involvement in the

organization; the length of time associated with the organization; and the person's degree of commitment to the organization and its objectives (*Villegas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 105 at paragraph 44 [*Villegas*]). Not every act of support for an organization constitutes membership (*Tharmavarathan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 985 at paragraph 28), and activities which are minimal or marginal are not enough to constitute membership under paragraph 34(1)(*f*) (*Poshteh* at paragraph 37; *Krishnamoorthy* at paragraph 28). The Applicant submits that the activities he participated in come under this minimal or marginal category, and thus are not enough to constitute membership in the LTTE.

[44] In *Villegas*, the Court quashed the decision because the Member did not analyse the applicant's involvement with the group in question, or perform any analysis of the applicant's commitment to the organization or its objectives. The Member in *Villegas* made findings about the applicant's reasons for participating, but did not analyse how the reasons affected the applicant's commitment to the organization. The Court said that a finding on inadmissibility must be carried out with the "utmost clarity," and that did not occur. The Applicant submits that this Decision contains a lack of clarity similar to that in *Villegas*.

[45] The decision in *Krishnamoorthy* was overturned for similar reasons. In that decision, the Member did not consider the criteria for membership established by the jurisprudence. Similarly, the Member who made the Applicant's Decision did not acknowledge these criteria, but simply said that membership must be given a "broad and unrestricted interpretation." Essentially, the Member's analysis ignored the membership criteria, and instead focused on whether the Applicant's actions were a result of duress.

[46] The Member's error in failing to consider the criteria for membership was critical, as there was evidence that the activities performed by the Applicant were also performed by a significant portion of the population living in the area at that time. The Member acknowledged that the Applicant provided evidence that he had no choice but to perform the duties, and that he did so primarily out of concern for his business. These things indicated that the Applicant did not intend to provide support for the LTTE's objectives and goals.

[47] The Member's lack of analysis is apparent in his finding pertaining to the Applicant's financial contributions to the LTTE. The Member found that the Applicant made financial contributions 7 to 8 times through union dues. The Member cited the Applicant's statements that he paid the money because "everyone had to give," yet despite this the Member did not provide any analysis of the intent behind these contributions. A financial contribution is not enough to constitute membership; the purpose of the contribution must be to enable the objectives of the organization (*Toronto Coalition to Stop the War* at paragraphs 110, 128). The Applicant submits it was an error for the Member not to provide an analysis of the intent behind these contributions.

[48] The Member found that the Applicant was involved in LTTE activities for about a year and a half, but did not provide any analysis of whether this amount of time should be considered minimal or significant. A failure to properly address this factor was considered an error in *Villegas*.

[49] The Applicant submits that findings of fact with regards to the Applicant's activities with the LTTE are not enough to sustain a finding of membership. The Member needed to apply the criteria set out in the jurisprudence, and provide an analysis of the different factors. For a finding of membership it needed to be determined that the Applicant's activities were carried out with the

intent of contributing to LTTE's objectives. The Member's failure to consider this important factor constitutes a reviewable error.

Did the Member err by ignoring relevant evidence?

[50] The Applicant points out that "the presumption that the decision-maker has considered all the evidence is a rebuttable one, and where the evidence in question is of significant probative value this Court can make a negative inference from the decision-maker's failure to mention it" (*Kaybaki v Canada (Solicitor General of Canada)*, 2004 FC 32 at paragraph 5). The more important the evidence that was not mentioned, the more the Court will be inclined to find that a finding a fact was made without regard to it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paragraphs 15, 17). If there was relevant evidence that goes against a finding on a central issue, the presumption will be rebutted if the decision-maker failed to mention it (*Provost v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1310).

[51] *Thind v Canada (Secretary of State)*, [1994] FCJ No 106 (TD) at paragraphs 2-3, provides as follows:

> It became very evident that the Board made no findings with reference to documentary evidence filed in support of the applicant and more particularly they chose to ignore almost totally the evidence provided by the witnesses at the hearing. The only reference throughout the entire decision to other documents or witnesses was the following:
>
> > . . . the claimant's testimony of fear of extremists who kill village leaders was supported by the other witnesses and the documentary evidence.
>
> The tribunal's assessment of one witness was "central" to the applicant's case. The tribunal erred in law by failing to appreciate it and chose to completely ignore the supportive evidence.

> The applicant had testified that he had been detained and questioned by police. This was corroborated, but the tribunal chose not to believe the applicant and made no mention of the independent corroborative evidence.

[52] In the case at bar, the Applicant called an expert witness who provided extensive relevant evidence. Mr. Sritharan's testimony was particularly relevant to the issue of coercion, and corroborated the Applicant's testimony that he felt compelled to perform the activities requested of him by the LTTE. The Member did not analyse this evidence at all, or provide any explanation why he preferred other evidence.

[53] The thrust of Mr. Sritharan's testimony was that many people did the same type of activities as the Applicant out of fear of the LTTE. Not only was the Member required to conduct a proper analysis of the Applicant's intention, he also needed to provide some analysis of this expert evidence.

[54] Mr. Sritharan also testified that many other professions besides auto drivers were controlled by the LTTE; this was directly on point to the Member's finding that the Applicant "made no effort to detach himself from the … business," yet there was no mention of it in the Decision.

[55] The Member also did not mention the expert evidence of the pervasive nature of the outward support that the population in Jaffna gave the LTTE in order to avoid being targeted. This was directly contrary to the Member's finding that the town was not living in fear. Mr. Sritharan's testimony corroborated the Applicant's assertion that the LTTE exerted tight control over the town, and that individuals participated in LTTE activities in order to avoid unwanted attention.

[56] The Member also ignored other documentary evidence presented by the Applicant. There was extensive evidence stating that a culture of fear existed in Jaffna, and that many people participated in LTTE activities because of it. These documentary materials were cited extensively in the Applicant's written submissions, but were paid no attention by the Member.

[57] One article submitted as part of the Applicant's documentary evidence specifically said that the dynamic of terror in Jaffna "became a risky, nuanced game of going through the motions and play acting for the benefit of each side." Another article said that the ceasefire arrangement allowed a "virtual takeover" of Jaffna by the LTTE using methods of extortion and coercion. Another said that the LTTE made "unquestioning obedience the only course open to the Tamils."

[58] A Human Rights Watch report that was submitted discusses the LTTE's use of planning meetings to maintain their presence and the use of the public to promote their meetings. It also specifically says that the LTTE organized public meetings and used taxis to promote these meetings. Another Human Rights Watch report discusses how the LTTE ruled through fear and by denying people their basic freedoms.

[59] The Applicant submits that the case of *Thind*, above, is right on point; the Member failed to analyse the Applicant's independent corroborating evidence and the expert's testimony. This evidence corroborates the Applicant's claim that he was compelled to participate in LTTE activities. This evidence also supports a finding that the Applicant's activities were pervasive, and thus minimal and marginal. This is directly relevant to the question of membership, and contradicts the Member's findings. This evidence was directly relied on by the Applicant in his submissions, yet the Member did not mention or analyze any of it. Given its relevance, the Applicant submits that this is a reviewable error.

The Respondent

Did the Member err by conflating duress and coercion?

[60] The Respondent submits that coercion and duress are interrelated concepts, and that the Applicant is attempting to import the criminal law concept of *mens rea* into an inadmissibility finding under the Act. The Applicant's reliance on the legal defence of duress and the burden of proving *mens rea* is misguided; these are criminal law concepts that are not engaged in this context.

[61] The Respondent submits that the Member considered the Applicant's contention that he was coerced, but reasonably rejected it. Neither the Applicant nor his family could identify any specific threats from the LTTE relating to the Applicant's activities. While the Applicant indicated he had a general fear of the LTTE, he also indicated that his real concern was the economic consequences of refusing to participate in LTTE-related activities. The evidence before the Member was that neither the Applicant nor his family members were physically threatened by the LTTE.

[62] Even if the Applicant can establish that he was coerced, his attempt to draw a "bright line" distinction between duress and coercion is not supported by the jurisprudence, which uses the terms interchangeably. The Federal Court of Appeal had the following to say on point at paragraph 40 of *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (FCA) [*Ramirez*]:

> The appellant did not argue the defence of superior orders, and his arguments as to duress and remorse are insufficient for exoneration. On duress, Hathaway, supra at 218, states, summarizing the draft Code of Offences Against the Peace and Security of Mankind, in process by the International Law Commission since 1947:
>
> > Second, it is possible to invoke [as a defence] coercion, state of necessity, or force majeure. Essentially, this exception recognizes the absence of intent where an individual is motivated to perpetrate

> the act in question only in order to avoid grave and imminent peril.…

[63] The Applicant relies on *Jalloh* for the proposition that the concepts of coercion and duress are distinct. However, a review of this decision does not support this conclusion. The Court's concern in *Jalloh* was not that the Immigration Division conflated coercion and duress, but that it artificially separated its analysis of "membership" from its analysis of "coercion." The inquiry into whether an individual was actually a member should include consideration of whether the membership was a product of coercion. The Court thought it would be artificial to find that an individual was a "voluntary" member, and then to consider whether membership was forced:

> 36 In my view, it is preferable to consider the evidence of membership along with the evidence of coercion in determining whether there are reasonable grounds to believe the person genuinely was a member of the group. One way of looking at this issue is to regard evidence of duress as defeating the *mens rea* of membership (*Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339). Accordingly, evidence relating to duress must be considered along with the evidence relating to membership in deciding whether the person really was a member of the group or, rather, was motivated by self-preservation.
>
> […]
>
> 38 Therefore, the finding of membership should rest on indicia that the person's intentions were consonant with the group's objects, not survival. The evidence should be considered as a whole to determine whether the person was truly a member or whether his or her acts carried out in the group's name were coerced. It must be remembered, of course, that the issue to be decided under s 34(1)(f) is whether there are reasonable grounds to believe that the person was a member, not whether the evidence establishes such a connection on a balance of probabilities, or whether duress has been made out on any particular standard of proof. This, too, suggests that all of the relevant evidence should be considered together.

[64] In *Jalloh*, the Court does not distinguish duress and coercion, but uses the terms interchangeably. The Respondent says that this decision supports the proposition that evidence

relating to possible coercion or duress should be considered as part of the determination of membership.

[65] The Respondent also says that the Applicant's reliance on *Poshteh* is misguided. The Federal Court of Appeal specifically noted at paragraph 52 of *Poshteh* that the issue of coercion did not arise on the facts of that case and, contrary to the Applicant's suggestion, did not distinguish between duress and coercion in its reasons. In fact, as in *Ramirez*, the Federal Court of Appeal also used the terms interchangeably, saying "For example, issues of duress or coercion may be relevant. However, these issues do not arise in this case."

[66] The Respondent submits that the distinction the Applicant seeks to draw is unsupported by the jurisprudence and the evidentiary record in this case. As found by the Member, the Applicant's actions were inconsistent with unwilling participation: he was concerned about economic harm rather than physical risk; no specific threats were made against him; and he had opportunities to leave the area or change jobs.

Did the Member err by failing to apply the correct criteria for membership?

[67] The Respondent states that the test for membership requires "reasonable grounds," which is a low evidentiary threshold; the standard of evidence to be applied to this threshold test is higher than a mere suspicion but lower than proof on the civil balance of probabilities standard (*Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paragraph 25). The Respondent submits that this low threshold was met in this case. The Member found that the "facts of this case lead to a conclusion that [T.K.] had a knowing participation in LTTE activities."

[68] As noted in *Ugbazghi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 694 at paragraph 47, "subsection 34(1) was intended to cast a wide net in order to capture a broad range of conduct that is inimical to Canada's interests." The Court in *Ugbazghi* considered the activities of the applicant which furthered the goal of the organization such as attending meetings where they discussed the need to support the organization and distributing pamphlets. On that basis, Justice Eleanor Dawson upheld the finding of membership. The Respondent submits that these are precisely the types of activities the Applicant in this case was involved in, and therefore the same result should apply here.

[69] The Applicant attended LTTE meetings, put up flags, notices and pictures, provided funds indirectly to the LTTE through his union, and attended at least one LTTE training camp. On the "broad and unrestricted interpretation" of membership, the Member was entitled to find these activities sufficient. The case law has settled that informal participation in or support for the LTTE may be sufficient to establish membership (*Kanapathy v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 459 at paragraph 34).

[70] The Member noted that the Applicant's activities with the LTTE were ongoing, and that he chose not to leave the area despite opportunities to do so. The Applicant was an adult when he became involved with the LTTE, and he participated on a monthly basis, and made financial contributions 7 or 8 times. His involvement only ceased in 2006 "when the LTTE left the area in which he resided."

[71] The Member acknowledged the Applicant's argument that he felt threatened and that he participated on that basis, but noted that he had alternatives. However, as stated in the Decision, he "made no effort to detach himself from the [taxi] business, despite its being the primary link

between him at the LTTE." Even after being told to attend training, he had 10 to 15 days to leave the area if he wished to.

[72] The Respondent also points out that when the Applicant's sister was interviewed by CBSA she said that she remembered the Applicant leaving for training, and that he went on his own rather than by force. She also indicated that he had told her he was trained by the LTTE in standing guard and in how to handle weapons. She indicated that no one from her family was threatened by the LTTE (pages 39-45 of the Applicant's Record). The Applicant denied that he ever received any weapons training at the camp.

[73] The Applicant's mother was also interviewed. She said that the Applicant had gone for LTTE training once, then "2 or 3 times," then clarified that it had in fact just been once. She also indicated that no one in her family had been threatened by the LTTE, but said that she was afraid of conditions in Sri Lanka generally at that time (pages 256-269 of the Applicant's Record).

[74] The Respondent submits that, in short, the Member was simply not satisfied that the Applicant's course of conduct established real reluctance to participate in LTTE activities. Given the wide range of options available to the Applicant, it was open to the Member to find that his actions were not the product of coercion. In *Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339 [*Thiyagarajah*], a similar case involving whether coercion by the LTTE amounted to duress, Justice Donald Rennie had the following to say on point at paragraph 17:

> In this context the Board examined the pressure and coercion the applicant felt and assessed it against the harm done by his continued active participation and support of the LTTE. This assessment is one which could reasonably give rise to different interpretation. The existence of another view on the evidence however, does not mean that the interpretation reached by the Board on these facts, is unreasonable. There is no reviewable error.

The Respondent submits the same logic is applicable to the case at bar.

Did the Member err by ignoring relevant evidence?

[75] The Respondent points out that the Member took no issue with the qualifications of the Applicant's expert witness, and noted that the documentary evidence was replete with acts undertaken by the LTTE that fell squarely within the definition of terrorism. To that extent, the witness' opinion was uncontroversial. The first section of the Reasons involves a detailed review of terrorist acts performed by the LTTE as described by the documentary evidence. Contrary to the Applicant's submission, the Member explicitly considered an article from Human Rights Watch and the "Parallel Governments: Living Between Terror and Counter Terror" document.

[76] The Respondent submits that, taken at its highest, the opinion of the witness indicated that some individuals were coerced by the LTTE, but the reasons indicate that the Member was well aware of the LTTE's activities. However, the Member found that the Applicant himself was not a victim of threats sufficient to meet the test for coercion.

[77] There is no requirement that the Member specifically remark on passages of the evidence before it, including the expert's testimony. In *Thiyagarajah*, at paragraphs 19-20, the Court directed as follows:

> As noted earlier, the reasons of the Board indicate that it was fully aware of the oppressive and brutal methodology of the LTTE and how it may have resulted in coerced participation. The fact that the specific passages cited by counsel before me were not expressly referenced in the section dealing with duress does not support the inference that the Board ignored their import or effect on the

> question of the voluntariness of the applicant's participation in the LTTE. Indeed, as noted, they were not.
>
> The jurisprudence is clear that the Board need not make express reference to all the materials before it. ….

[78] Further, the Respondent submits that the Member was entitled to give limited weight to the witness' opinion where it was unsupported by objective facts. The expert's evidence on the means used by the LTTE does not address the key issue in this case, which is the absence of evidence establishing that the Applicant's LTTE activities were coerced. The Member found the Applicant's claim inconsistent with the idea of the entire population "living in fear" or being under the tight control of the LTTE. The weight the Member gave the evidence is not a basis for judicial review.

The Applicant's Reply

[79] The Applicant submits that the recent jurisprudence of this Court makes it clear that there is a distinction between duress and coercion. Duress is relevant to issues related to exclusion because it is a defense to the commission of war crimes and crimes against humanity (and, as the Respondent points out, any criminal offence). As such it requires a high level of compulsion and balancing. Coercion is not raised as a defense but rather is relevant to the assessment of membership. Membership is determined by assessing conduct and determining whether it is sufficient to warrant a finding that the Applicant is sufficiently committed to the goals of the organization. It is not a defense, but is a relevant factor when assessing the commitment of an individual to an organization. The Applicant says that the Respondent is trying to argue that the two concepts are interchangeable, but they are not.

[80] In response to the Respondent's submissions, the Applicant points out that in order to establish duress the evidence must disclose evidence of imminent harm proportional to the harm caused by the actions. Coercion is distinct; it goes to the question of the person's commitment to the organization. Coercion can occur even if the threat is less severe if it is established that the Applicant did not choose to participate of his own free will but rather was forced to do so. Thus, the fact that no gun was pointed at the Applicant and he was not beaten is not dispositive. The Applicant submits that the key evidence before the Member was the evidence of the expert witness who testified that in LTTE-controlled areas people had no choice but to assist the LTTE. This is relevant to the question of membership (*Jalloh*; *Krishnamoorthy*; *Toronto Coalition to Stop the War*).

[81] The Respondent cites at paragraph 2 of its Memorandum of Argument an excerpt from the Applicant's testimony where he says that if there were a country for Tamil people they would not have to leave Sri Lanka, and they would not have problems with the Army. The Applicant submits that this does not refute the question of coercion, and that it was not relied on by the Member in his reasons. There was also compelling expert evidence on this point which the Member chose to ignore. The Respondent has also ignored the expert evidence in regards to his submissions about the Applicant's LTTE-related activities and the provision of funds to the union.

[82] In response to the Respondent's reliance on the Applicant's sister's statements, the Applicant denied that he received weapons training. The Member did not disbelieve the Applicant on this point; thus the Respondent cannot now rely on that fact in support of the Decision by the Member. Similarly, the Member believed that the Applicant only went to one training session. The

Respondent cannot now question this evidence. Furthermore, the Applicant's mother's evidence of the general coercive atmosphere is consistent with the expert's evidence.

[83] In response to the Respondent's assertion that the Applicant is relying on criminal law concepts, the Applicant submits that this is misguided. In *Jalloh*, the Court clearly uses the term *mens rea* to explain the requirement to consider the Applicant's intention. Thus, the jurisprudence supports the requirement for consideration of the mental element in assessing membership. The term *mens rea* refers to intent, and the jurisprudence makes clear that intent must be considered when assessing membership.

[84] The Court in *Jalloh* clearly distinguishes between duress and coercion, stating at paragraph 33 that "in determining whether Mr. Jalloh was a member, the Board did not consider evidence relating to coercion, leaving it to be weighed separately in respect of the defence of duress." The Court goes on to state at paragraph 38 that "the finding of membership should rest of indicia that the person's intentions were consonant with the group's objects, not survival. The evidence should be considered as a whole to determine whether the person was truly a member or whether his or her acts carried out in the group's name were coerced." Thus, the Applicant does not err in arguing that his intent must be considered when assessing membership because this is clearly stated by the jurisprudence.

[85] The Respondent also ignores the fact that the Applicant made it clear he would lose his ability to work if he did not cooperate with the LTTE. This is consistent with the expert's evidence on the general atmosphere of coercion in areas under LTTE control. Further, as mentioned, coercion is distinct from duress and it is not necessary to prove a threat to one's life.

[86] The Applicant also submits that the Respondent's reliance on *Ramirez* is ill-founded. In that case, the Federal Court of Appeal was referring to the defense of coercion and duress as it is understood in international law. The subsequent jurisprudence draws a clear distinction between the defense of duress which requires evidence of imminent threats and the relevance of coercion in regards to a consideration of membership. The Respondent is conflating issues by relying on jurisprudence for exclusion when dealing with questions of membership.

[87] Further, the Respondent is misstating the finding in *Jalloh*. The Applicant agrees with the Respondent that the inquiry into whether a person is a member is a unified process and requires an assessment of whether the conduct was a product of coercion. However, the Applicant points out that the Member applied the much stricter test for duress instead of assessing whether there was coercion which negated the intention to carry out the activities.

[88] Furthermore, the Court states in *Jalloh* that the question of membership requires an assessment of intention. A person should not be considered a member if he acted under either coercion or duress when engaging in activities. Thus, the Member must consider both coercion and duress in this context. There is nothing in the section from *Jalloh* quoted by the Respondent that undermines the Applicant's arguments that coercion and duress are two distinct concepts. Indeed, the fact that the Court used both terms indicates that they are distinct. Indeed, when the Court refers to duress it is within the context of negating *mens rea*.

[89] As regards *Poshteh*, the Applicant notes that the Court of Appeal clearly says that duress and coercion are two distinct questions. By stating that "issues of duress or coercion may be relevant," the Court has clearly recognized that they are two distinct issues. The Respondent has not

provided any reasonable explanation for the use of the two terms. Furthermore, the Respondent's repeated reliance on *Ramirez* is ill-founded because *Ramirez* is an exclusion case.

[90] In response to the Respondent's submissions on the low evidentiary threshold required for membership, the Applicant submits that this is only relevant to the assessment of facts. Thus, the Member need not establish the facts on a balance of probabilities but only to the reasonable grounds standard. Once the facts have been determined the issue that arises is the application of those facts to the legal definition of membership and it is here that the Member erred.

[91] The Respondent's reliance on the Member's statement that the Applicant knowingly participated in the LTTE is a clear example of the Member conflating the questions of exclusion and membership. Knowing and active participation is the test for complicity; it is not the proper test for membership which requires an assessment of the evidence to determine whether the person was sufficiently committed to the goals and objectives of the organization to properly be considered a member.

[92] The Respondent's reliance on *Ugbazghi* is also ill-founded. The Court has repeatedly said that the determination of membership is a fact-specific exercise in which the Applicant's conduct must be assessed. This requires an assessment of both the Applicant's activities and his intentions. In *Ugbazghi*, there was no issue of coercion because the applicant in that case made it clear that she voluntarily engaged in the activities in question.

[93] The Applicant does not dispute that he engaged in the LTTE activities cited by the Respondent in paragraphs 23-25 of its Memorandum, but reiterates his argument that the Member must assess the activities within the context of the atmosphere of coercion that existed for the

Applicant at that time. The Respondent's submission that the Applicant had alternatives fails to meet the issue at hand. The issue is not, as it might be in the case of exclusion, whether the Applicant had alternatives or left at the first opportunity, but whether or not the Applicant's activities were voluntary. If the activities were not voluntary then they cannot be considered indicia of membership.

[94] The Applicant submits that the Respondent's reliance on *Thiyagarajah* is also ill founded. At the outset of that decision, Justice Rennie made clear that the issue was solely duress. He said at paragraph 5:

> There is a single issue in this judicial review; whether the Board erred in its finding that the defence of duress was not established. There is no question that the Board applied the correct legal principles to its assessment of the evidence of duress; rather the precise error alleged is that the Board, in its decision, made no reference to certain country condition reports for Sri Lanka, and in particular, those passages which described the extent to which the LTTE resorted to threatened and actual violence to coerce Tamils into supporting their cause. Before this Court counsel for the applicant conducted a comprehensive and detailed review of the documentary evidence before the Board which described the LTTE tactics.

[95] The Applicant never argued that he could raise the defense of duress; his argument was that the issue of coercion is relevant to the assessment of membership. This was not raised or decided in *Thiyagarajah* where the Court noted as follows at paragraphs 16-18:

> The application of a legal standard (the defence of duress) against a given set of facts is a question of mixed fact and law, and as such, is assessed on a standard of reasonableness: *Poshteh* above. 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 outcomes that are defensible in light of the facts and law.

> In this context the Board examined the pressure and coercion the applicant felt and assessed it against the harm done by his continued active participation and support of the LTTE. This assessment is one which could reasonably give rise to different interpretation. The existence of another view on the evidence however, does not mean that the interpretation reached by the Board on these facts, is unreasonable. There is no reviewable error.
>
> As noted, no issue is taken with the legal framework applied by the Board to assess the question of membership or duress. Rather, the applicant contends that the factual conclusions would have been different had reference been made to the specific country condition reports. This argument, in effect, asks the Court to re-weigh the evidence and re-determine the facts as previously found. The applicant does not point to any particular findings of fact which he says would have been determined differently. Nor does the applicant point to any particular aspect of the country condition reports, which if expressly referenced, would have produced a different finding, nor to any gaps in the analysis or reasoning in respect of the facts as found; rather the applicant argues for a different conclusion.

[96] As evident from the above excerpt, the issue in *Thiyagarajah* was solely duress. Here, the Applicant argues that, based on two subsequently decided cases (*Jalloh*; *Krishnamoorthy*), that coercion is a separate issue that goes to the question of membership.

[97] In response to the Respondent's submissions on the Applicant's expert witness, the Applicant reiterates that this evidence was completely ignored by the Member. It went to a central issue that was before the Member, and the Applicant submits that this alone is enough to set aside the Decision.

ANALYSIS

[98] As Justice Anne Mactavish makes clear in her analysis in *Kanapathy*, above, at paragraphs 22 and 34, membership in a terrorist organization or a terrorist group for the purposes of section 34 of IRPA can be either formal or "membership by association" or "informal participation." It is clear

that informal participation in, or support for, an organization may establish membership for the purposes of subsection 34(1). See *Kanapathy* at paragraph 38 and *Kanendra v Canada (Minister of Citizenship and Immigration)*, 2005 FC 923, at paragraphs 21-23.

[99] In the present case, there was no dispute that the LTTE was a terrorist organization, but there is no finding that the Applicant was a formal member. The issue before the RPD was whether the Applicant was an LTTE member by informal participation.

The Test for Membership

[100] The Applicant makes much of the legal distinction between duress and coercion and asserts that the RPD erred by "conflating the legal defense of duress and the concept of coercion."

[101] A reading of the Decision as a whole reveals that no such conflation occurs. The member simply uses "coercion," "duress" and "compulsion" interchangeably. After reciting the activities undertaken by Applicant that were of assistance to the LTTE, the member simply — as directed by the case law — analyzes whether the Applicant did these acts voluntarily in support of the LTTE, or whether he was forced or compelled to do them in a way that reveals he was not supporting the goals of the LTTE.

[102] Before going about this analysis, the RPD states the test that it is using. Referring to *Ahani*, the member correctly points out that the "current jurisprudence seems to indicate that, with respect to section 34, a more broad net should be cast with respect to what constitutes membership."

[103] The RPD then sets out the approach to be taken by referring to the guidance provided by Justice James O'Reilly in *Jalloh*, above. In that case, Justice O'Reilly makes it clear that "at a

minimum, a member is someone who intentionally carries out acts in furtherance of the groups goals" (paragraph 37). Paragraph 38 of *Jalloh* is quoted by the RPD and is of particular importance for the approach taken by the member in this case:

> Therefore, the finding of membership should rest on indicia that the person's intentions were consonant with the group's objects, not survival. The evidence should be considered as a whole to determine whether the person was truly a member or whether his or her acts carried out in the group's name were coerced. It must be remembered, of course, that the issue to be decided under s 34(1)(*f*) is whether there are reasonable grounds to believe that the person was a member, not whether the evidence establishes such a connection on a balance of probabilities, or whether duress has been made out on any particular standard of proof. This, too, suggests that all of the relevant evidence should be considered together.

[104] In this paragraph, we see Justice O'Reilly using "coerced" and "duress" in a way that I do not think is intended to draw out or apply any legal distinction between the two concepts. Membership rests upon "indicia that the person's intentions were consonant with the group's objects…" and the "evidence should be considered as a whole, to determine whether the person was truly a member or whether his or her acts carried out in the group's name were coerced." In other words, did the person intend to support the group or was he or she coerced in a way that negates such an intent? I do not think there is any necessity to introduce complex legal distinctions into this exercise and, in quoting Justice O'Reilly's words, the RPD is obviously telling us the test it intends to apply. As the Applicant argues, the key question is the Applicant's commitment to the LTTE at the material time, and the intention behind the acts from which the finding of informal membership is drawn. I see the RPD's analysis as its way of getting at the important concept of "intent" and, in the process, deciding whether the Applicant intended by his acts to support the LTTE, or whether he was compelled or coerced into doing the things he did in a way that reveals he did not support the LTTE. I can find no reviewable error on this issue.

Failure to Apply the Correct Criteria for Membership

[105] On this issue, I agree with the Applicant that the jurisprudence has set out criteria that should be considered when determining whether a person is a member of an organization. The criteria include: the person's involvement in the organization, the length of time associated with the organization, and the person's degree of commitment to the organization and its objectives. See *Krishnamoorthy*, above, at paragraph 23 and *Villegas*, above, at paragraph 44.

[106] The Applicant says that, in the case at bar, as in *Krishnamoorthy*, the Member did not properly consider the criteria for membership established in the jurisprudence. He says the Member does not acknowledge these criteria in his analysis. The Member sets out that the meaning of membership must be given a "broad and unrestricted interpretation," but the Applicant says that the Member does not set out the criteria that must be assessed when determining whether an individual constitutes a member, nor does he apply the criteria. The Member's analysis focuses on whether the Applicant's actions were a result of duress.

[107] The Applicant says that findings of fact pertaining to the Applicant's activities with the LTTE, without any accompanying analysis, cannot sustain a finding of membership.

[108] I think the Applicant is demanding a level of sophistication that is not required for a meaningful analysis. A reading of the Decision as a whole reveals that the Member's analysis goes well beyond a mere recitation of the facts and that we see the Member attempting to ascertain the Applicant's "intent" by examining the ways in which he interacted with the LTTE. The Member may have done a poor job of laying out the applicable legal test for a finding of membership, but he does analyze the core issues. The Member examines the Applicant's involvement, the length of time

he was associated with the LTTE, and the degree of the Applicant's commitment to the LTTE and its objectives. It is possible to take issue with some of the Member's assessment and conclusions, but I do not think it can be said that the Member merely recites the facts and does not address the criteria for membership or attempt to ascertain the Applicant's "intent" in doing what he did. I can find no reviewable error on this issue.

Ignoring Relevant Evidence

[109] In my view, this is where the Decision becomes unreasonable. The Applicant presented expert and other evidence to the effect that the LTTE created a climate of fear and intimidation in the area where he lived which meant that many people were dragooned into acting in ways that, ostensibly at least, look like support. The evidence points out that they really had no choice but to participate; failure to act as supporter could have dire consequences.

[110] This evidence is directly relevant to what the RPD had to decide about the Applicant. It is central to the whole notion of why the Applicant did what he did. When viewed against this evidence, what the Applicant did looks very much like what a lot of other people felt compelled to do in order to avoid the consequences of resisting an authoritarian, terrorist regime. The Member needed to address this contradictory, highly relevant evidence. See *Cepeda-Gutierrez*, above, at paragraphs 15 and 17, and *Provost*, above, at paragraphs 30-31.

[111] I agree with the Applicant that, in addition to ignoring the evidence of Mr. Sritharan, the Member also ignored corroborative documentary evidence which was relied upon by the Applicant. Extensive documentary evidence was provided to show the culture of fear that existed at the time in question in Jaffna. The evidence showed the extent of control that the LTTE had over the

population. The evidence also showed that the activities performed by the Applicant for the LTTE were pervasive and that many members of the public were forced to perform these activities. This did not necessarily make them members by association. The evidence was cited extensively by the Applicant in his written submissions.

Ministerial Relief

[112] The Respondent argues that coercion itself does not negate membership and that, if the result seems harsh, subsection 34(2) can be called into play. The rationale for this position is that subsection 34(1) is intended to cast a very broad net to capture conduct that is inimical to Canada's interests. See *Stables v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1319 at paragraph 35. The Respondent appears to be suggesting that the Decision should not be set aside in this instance, because there was little evidence of coercion, and because the Applicant can apply for Ministerial relief under subsection 34(2).

[113] The Respondent refers the court to the Federal Court of Appeal decision in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103, at paragraphs 63-65 and, in particular, the Court's guidance in paragraph 64 that

> There may be other cases in which persons who would otherwise be caught by subsection 34(1) of the IRPA may justify their conduct in such a way as to escape the consequences of inadmissibility. For example, those who could persuade the Minister that their participation in a terrorist organization was coerced might well benefit from ministerial relief.

[114] As the jurisprudence on subsection 34(1) makes clear, the existence of subsection 34(2) does not remove the need for the RPD to consider coercion, duress, or any form of compulsion when assessing membership under subsection 34(1). Apart from formal membership, the whole

point of examining the conduct of someone in the Applicant's position is to ascertain whether the conduct in question was carried out with a view to contributing to the objectives of the LTTE. The existence of subsection 34(2) cannot dispense with the need for such an assessment. Subsection 34(2) will obviously be very important in a formal membership situation, and it could also come into play where the Member's assessment of informal membership is reasonable. However, in my view, the availability of ministerial discretion under subsection 34(2) does not relieve the Member from assessing membership under subsection 34(1) in the light of whatever form of compulsion an applicant raises to justify his or her acts or omissions, and it does not relieve the Court on judicial review of the obligation to review whether a reasonable assessment has been carried out by the Member. In my view, on the facts of this case, and for reasons given above, I do not think that a reasonable assessment of membership has occurred. I do not see why the Applicant should be left to rely upon ministerial discretion under subsection 34(2) when his rights under subsection 34(1) have yet to be accorded him.

[115] In paragraph 39 of *Kanapathy*, above, Justice Mactavish commented as follows:

> 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*.

[116] On the facts of *Kanapathy*, subsection 34(2) may well have been the most appropriate provision to use. However, as the jurisprudence on subsection 34(1) makes clear, informal association requires that an Applicant's intentions and commitment to an organization must be addressed appropriately. As Justice Richard Mosley pointed out in *Krishnamoorthy* at paragraph 19:

> I find that the officer erred in concluding that the applicant was a member of the LTTE by failing to consider the relevant criteria set out in the jurisprudence for determining "membership" as required by paragraph 34(1)(f). The officer did not consider the applicant's intentions, his degree of involvement and his commitment towards the LTTE.

[117] Parliament intended that the term "member" should have an "unrestricted and broad interpretation" (see *Poshteh*, above, at paragraph 52) but it must have some meaning and restriction, otherwise subsection 34(1) would be incomprehensible. The jurisprudence around subsection 34(1) has made it clear that the RPD must consider various criteria and attempt to ascertain whether the acts in question constitute membership. This point was made by Justice Mosley in *Toronto Coalition to Stop the War*, above, at paragraph 118:

> The phrase "member of an organization" is not defined in the statute. The courts have not given it a precise and exhaustive definition. It is well-established in the jurisprudence that the term is to be given an unrestricted and broad definition: *Poshteh* above at para. 27; *Canada (Minister of Citizenship and Immigration) v. Singh*, (1998), 151 F.T.R. 101, 44 Imm. L.R. (2d) 309 at para. 52. But an unrestricted and broad definition is not a license to classify anyone who has had any dealings with a terrorist organization as a member of the group. Consideration has to be given to the facts of each case including any evidence pointing away from a finding of membership: *Poshteh*, at para. 38. I see no indication in the preliminary assessment that the authors gave any weight to factors other than the financial and other material assistance which Galloway delivered to Hamas.

Certification

[118] The Applicant has submitted questions for certification but, as the review is allowed on the basis outlined above, there is no need to discuss them.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different Member of the Immigration Division.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4207-12
STYLE OF CAUSE:	**T.K.**
	- and -
	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	February 6, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	April 2, 2013

APPEARANCES:

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Angela Marinos Nicole Rahaman	**RESPONDENT**

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