Federal Court  Cour fédérale

Date: 20160825

Docket: IMM-5877-15

Citation: 2016 FC 956

Ottawa, Ontario, August 25, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

VIJAYARATNAM SEENIYAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Immigration Division of the Immigration and Refugee Board [ID], dated November 30, 2015, which after holding an admissibility hearing pursuant to subsection 44(2) of the IRPA, found Vijayaratnam Seeniyam [the Applicant] inadmissible to Canada pursuant to section 34(1)(f) of the IRPA.

II. Facts

[1] The Applicant is a Sri Lankan of Tamil origin. He spent some time in India between 2007 and 2010, during which time there was civil unrest in Sri Lanka. He returned to Sri Lanka in 2010 and from there he came to Canada in 2013 and made a claim for refugee protection. The Minister alleges that the Applicant was a member of the Liberation Tigers of Tamil Eelam (the LTTE was a violent terrorist group also known as either the Tamil Tigers of Eelam or the Tamil Tigers) by virtue of his affiliation with a political group headed by R. Sampanthan (Sampanthan), known as the Ilankai Tamil Arasu Kachchi (ITAK), and its affiliation with the Tamil National Alliance (TNA), both of which supported the LTTE.

[2] The Minister relied on both the objective evidence and that of the Applicant to meet the onus of establishing the case against the Applicant. The ID found the Applicant's evidence confusing in some respects. The Applicant takes medication for his psychological issues. This medication impacts his memory and concentration. The Applicant informed the ID that he was under medication at the outset of the hearing.

[3] That said, the record and the decision indicate the following:

- 1977 to 1979, Applicant joins ITAK, a longstanding political party and was active, recruiting members door to door. ITAK merges with other Tamil groups and becomes TULF (Tamil United Liberation Front), He states he has been a member since joining;

- 1979 to 1992: The Applicant states he was not active during this time;

- 1992 to 1995: Applicant is again active, recruiting members for TULF;

- 1995 to 2010: According to his testimony, the Applicant ceases activities both in Sri Lanka (1995 to 2007), and in India (2007 and 2010) during this time; the ID made no credibility finding against the Applicant at the hearing, despite noting that some objective evidence differed from his testimony;

- 2001: TULF and other Tamil groups form TNA, doing so with LTTE encouragement. Sampanthan is active with TULF at this time. At the hearing, the Applicant testified that Sampanthan was head of his party;

- 2004: Sri Lankan national elections are held. Sampanthan leaves TULF and resurrects ITAK (which had merged into TULF in 1977) in order to run ITAK candidates for Parliament. Sampanthan is head of ITAK and effectively controls both ITAK and TNA. TNA calls on Tamils to support both ITAK candidates and the LTTE in TNA's election manifesto;

- 1977 to 2010: Applicant does not renounce his membership in what has become the TNA, i.e., the party led by Sampanthan, and its parliamentary wing, the ITAK;

- 2009: LTTE is militarily defeated and dismantled;

- 2011 to 2012: Applicant organizes transportation from various cities for landowners whose land was taken by the government and participates in protests to recover said land (the Applicant's farm had been taken in the conflict and had not been returned);

- 2013: Applicant participates in ITAK / TAN election campaigns in the Northern Province.

[4] With this timeline in mind, the following amplification is provided.

[5] In 1977, the Applicant filled out a form and received a membership card. His evidence was that he was a member of Mr. Sampanthan's party (variously, TULF, ITAK and TNA) starting in 1977 and continuing thereafter.

[6] The Applicant was arrested and detained by the authorities in October 1979. The army beat the Applicant trying to get information about the LTTE rebel groups, of which the Applicant was not a part. A friend of the Applicant's secured his release.

[7] In 1983, racial violence broke out in Sri Lanka. The Applicant was again arrested by the authorities and was detained for a week, on suspicion that he was a supporter of the LTTE.

[8] In 1990, the Applicant lost his home and poultry farms, which were taken as a security zone, to the army. He did not get his property back. The Applicant and his family moved to a different village. The LTTE took control of Jaffna that year. As a result, the Applicant was

forced to work several times and pay money under duress and fear that failure to do so would result in death. In May 1996, the army captured the village. Many of the Applicant's neighbours were killed. The Applicant was detained twice but was released.

[9] In August 2007, the army arrested the Applicant on the suspicion that the Applicant had provided accommodation and food for LTTE, beating him with a baton and threatening to kill him. He was released after three days.

[10] The Applicant fled to India in 2007. He trained to become a pastor while at the refugee camp. During his stay in India, he was questioned and detained by the Indian authorities twice in relation to an alleged connection to the LTTE. He was released both times.

[11] The LTTE was defeated and dismantled in 2009 after its unsuccessful military campaign against the Sri Lankan government. With encouragement from the Indian authorities and given the prospects of peace, the Applicant returned home in 2010. Upon his return, he worked as a pastor. He also organized peaceful protests in response to the land takings.

[12] In 2012, the Applicant was arrested and detained by the army again. The army accused him of helping LTTE members while in India. The army subsequently released the Applicant.

[13] At all times during these proceedings, the Applicant denied helping the LTTE.

[14] The Applicant arrived in Canada in 2013 on visitor visa to visit his sister. When the situation in Sri Lanka did not appear to be getting better, he applied for refugee status.

[15] The Applicant says he did not support LTTE, but did support the promotion of Tamil rights and the return of land that had, like his, been taken by the army.

III. Decision

[16] The ID found the Minister had discharged the burden to establish reasonable grounds to believe that the Applicant was or is a member of the LTTE by proxy through his membership in the TNA and, in effect, his support of the party lead by Sampanthan (namely, ITAK). This finding renders the Applicant inadmissible to Canada for being a member of an organization that had engaged in subversion by force of a government and terrorism.

[17] In particular, the ID determined that the Applicant had "signed up about 45-50 new members, canvassing door-to-door, working with a Member of Parliament, Sivajilingam. This recruitment took place prior to his departure for India." The ID also suggested that the Federal Court of Appeal has decided that "…membership in the TNA was tantamount to membership in the LTTE."

IV. Issues

[18] In my view, the matter raises the following issues:

1. What is the standard of review?

2. Did the ID reasonably find ITAK was de facto the TNA and therefore under the LTTE umbrella as relates to the Applicant?

3. Was it reasonable for the ID to find the Applicant was a member of the TNA?

V. Analysis

[19] In my view, the application for judicial review must be dismissed for the following reasons.

A. *Standard of Review*

[20] As to the standard of review, in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The ID's determination of membership is generally reviewed on a reasonableness standard of review: *Ismeal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 198 at para 15 [*Ismael*]; *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at para 23 [*B074*].

[21] In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] I must also consider that the Supreme Court of Canada instructs that judicial review is not a line-by-line treasure hunt for errors, but rather that the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. At issue is whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; See also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

B. *Legislative and Legal Framework*

[23] I begin with the scheme of the legislation established by Parliament. First, section 33 of the IRPA sets out the rules of interpretation. Then, subsection 34(1) of the IRPA sets out various individuals who are inadmissible:

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou

occurring or may occur.	peuvent survenir.
Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants :
…	…
(c) engaging in terrorism;	c) se livrer au terrorisme;
…	…
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c). (2) [Repealed, 2013, c. 16, s. 13]	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), b.1) ou c). (2) [Abrogé, 2013, ch. 16, art. 13] 2001, ch. 27, art. 34; 2013, ch. 16, art. 13.
[emphasis added]	[soulignement ajouté]

[24] Paragraph 34(1)(c) covers those engaged in terrorism, while paragraph 34(1)(f) captures those who are members of an organizations that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism. I emphasize the use not only of the present but also of the past and future tenses of the verb 'engage' in paragraph 34(1)(f). Further, there is no need to establish an Applicant engages in terrorism to be found a member under paragraph 34(1)(f); if this was a requirement, paragraph 34(1)(f) would be redundant since that situation is already covered by paragraph 34(1)(c): *Kanagendren v Canada (Citizenship and Immigration),* 2015 FCA 86 [*Kanagendren*]. Paragraph 34(1)(f) focusses on a finding of membership.

[25] I also note that Parliament has enacted a special and additional provision permitting a ministerial waiver for those found inadmissible by virtue of paragraph 34(1)(f):

Exception - Application to Minister	**Exception - demande au minister**
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

[26] Therefore, where a person is found to be inadmissible for either engaging in terrorism or, importantly for these purposes, being a member of a terrorist organization, he or she may apply to the Minister and, where qualified, obtain a waiver under subsection 42.1(1) of the IRPA.

[27] The ID applied the well-established definition of terrorism together with the statutory burden of proof as settled by the jurisprudence; therefore these topics are not discussed in these reasons.

C. *Discussion*

[28] Essentially, because of the ministerial discretion created by section 42.1(1), the Respondent argues, and I agree, that the Federal Court of Appeal has interpreted s. 34(1)(i) and "membership" broadly:

> [29] Based on the rationale in *Singh* and, in particular, on the availability of an exemption from the operation of paragraph 34(1)(f) in appropriate cases, I am satisfied that the term "member" under the Act should continue to be interpreted broadly.
>
> *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 [*Poshteh*]

[29] In *Poshteh*, Justice Rothstein spoke for the FCA saying:

> [32] The Immigration Division adopted a broad approach to the interpretation of the term "member." It was not unreasonable for it to have done so.
>
> (…)
>
> [36] In any given case, it will always be possible to say that although a number of factors support a membership finding, a number point away from membership. An assessment of these facts is within the expertise of the Immigration Division.

[30] Before leaving these passages, I wish to emphasize that the Federal Court of Appeal in *Poshteh* also instructs that the assessment of membership is within the expertise of the ID and therefore, deference to the ID is required on judicial review. In *B074*, Chief Justice Crampton identified three criteria to assist a tribunal in resolving a membership issue:

> [29] In determining whether a foreign national is a member of an organization described in paragraph 34(1)(f), some assessment of that person's participation in the organization in question must be undertaken (*Toronto Coalition*, above, at para 118; *Kanendra*, above, at para 24). In this regard, three criteria that should be considered include the nature of the person's involvement in the organization, the length of time involved, and the degree of the person's commitment to the organization's goals and objectives (*TK v Canada (Minister of Public Safety and Emergency Preparedness*, 2013 FC 327, at para 105 [*TK*]; *Toronto Coalition*, above, at para 130; *Basaki*, above at para 18; *Sepid*, above, at para 14; *Ugbazghi*, above, at paras 44-45). Where there are some factors which suggest that the foreign national was in fact a member and others which suggest the contrary, those factors must

> be reasonably considered and weighed (*Toronto Coalition*, above, at para 118; *Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339, at para 20 [*Thiyagarajah]*).
>
> [emphasis added]

[31] The Applicant relied on *B074* and called for its application in this case. The Respondent did not see compliance with the analytical framework set out in *B074* as essential, but agreed *B074* had not been over-ruled. In my view, it is desirable that the ID follow the framework set out in *B074*, but failure to follow that framework does not render the decision unreasonable if the decision may otherwise be supported on judicial review, as is the case here.

[32] I am also guided by Justice Dawson in *Kanagendren*, who said great caution is required when finding that a person is a member of a terrorist organization by proxy because he or she is a member of another organization:

> [30] That said, great caution must be exercised when finding membership in one organization to be a proxy for membership in another. Particularly in the context of nationalist or liberation movements, the mere sharing of goals and coordination of political activities may well not justify this type of analysis.

[33] This caution is appropriate in this case because the core issue is whether the Applicant's support of Sampanthan's party and the Applicant's membership in ITAK, TULF and then ITAK and/or TNA again, are proxies for membership in TNA and thereby for membership in LTTE. As noted, the Applicant testified his leader was Sampanthan, an individual who participated in a range of political entities including TULF, ITAK and TNA, and who, as leader of ITAK and effective leader of TNA, supported the LTTE before and during the 2004 elections. The

Applicant was a member both before and after the 2004 general elections, and more generally, both before and after the LTTE was actively engaged in terrorism in Sri Lanka.

[34] I also note that the ID did not make credibility findings as to the Applicant's testimony. Absent evidence to the contrary, the Applicant's testimony is to be believed: *Maldonado v Canada (Minister of Employment and Immigration)*, 1980 2 F.C. 302 (FCA), *Maldonado v Canada (Minister of Employment and Immigration)*, 1979 FCJ 248 (CA). However, the ID acted reasonably in noting the objective evidence differed from the Applicant's oral testimony, which as it stated (reasonably, in my view) was confused. The ID was well within its jurisdiction to give greater weight to the objective evidence in this case.

[35] I am not asked on this judicial review to assess whether the ID's decision is correct. My task is to assess if the ID's decision is reasonable, as outlined in *Dunsmuir*. In my respectful view, the ID's decision is reasonable. While the Applicant gave evidence that pointed away from membership, he also gave evidence that supported membership; this is always possible. *Ismeal* at para 22. This type of situation occurs here because the Applicant's evidence of membership in ITAK is countered by his evidence of disagreement with the goals of ITAK elsewhere in his narrative.

[36] It is not disputed that the Applicant joined ITAK in 1977. It is also not disputed that the Applicant retained his membership until very recently. Through the various Tamil party iterations, the Applicant was an admitted follower of Sampanthan, whom the Applicant referred to as his leader. ITAK - under Sampanthan's leadership - supported the LTTE and indeed, was

what I would call the TNA and LTTE's parliamentary wing in the 2004 elections. In the 2004 elections, those who ran under the ITAK banner were praised and actively supported and promoted by TNA. TNA called on Tamils to support ITAK because ITAK supported LTTE. I note that Sampanthan left TULF to run TNA and ITAK because he was unhappy with TULF's refusal to more actively support the LTTE. The Applicant was a follower of Sampanthan. In my view, the Applicant, having been an active member of ITAK from 1977 until recently, including the period after 2010, was a person who the ID could, acting reasonably, find as a member of a organization that had engaged in terrorism in that ITAK supported the LTTE before during and after the general election of 2004.

[37] I note the Applicant's criticism of the passage in the Federal Court's decision in *Kanagendran v Canada (Citizenship and Immigration)*, 2014 FC 384 at para 22, aff'd 2015 FCA 86, (the decision is the subject of appeal in *Kanagendren*) to the effect that "…membership in the TNA was tantamount to membership in the LTTE." However, that passage was not overturned on subsequent appeal and in any event was based on the evidence. I agree the ID was required to independently assess the case before it, but I also note that the objective evidence in this case clearly linked TNA, ITAK and LTTE at all relevant times.

[38] The Applicant also referred to the following statement by the ID:

> The evidence supports that Mr. Seeniyan was involved with the ITAK/TNA for over 30 years. He was involved in recruiting new members, he assisted in organizing participants to pro TNA protests, and he worked for TNA MPs from the 1970s up until the September 2013 provincial election. His activities rose above those of simple supporter or sympathizer. [The ID is] satisfied that Mr. Seeniyan was a member of the TNA.

[39] I will look at each component of this statement separately as part of the reasonableness analysis:

- The evidence supports that Mr. Seeniyan was involved with the ITAK/TNA for over 30 years. [Court comment: this is reasonable because he held a membership card in ITAK for at least 30 years, even during times when he said he was not involved in specific activities];

- He was involved in recruiting new members [Court comment: this is reasonable, because the Applicant admitted to recruiting members between 1977 and 1979 and between 1992 to 1995];

- He assisted in organizing participants to pro-TNA protests [Court comment: this is correct in terms of activities post-2012, but should it be considered unreasonable because the LTTE had been dismantled by then? In my view, the comment is reasonable because active party membership post-2012 involved support of an organization that had engaged in terrorism prior to that time]; and,

- He worked for TNA MPs from the 1970s up until the September 2013 provincial election [Court comment: this is reasonable because the Applicant concedes he worked for a Member of Parliament, called Sivajilingam, both before and after he went to India, and concedes he worked for two candidates who were elected as TNA members to the Northern Provincial Council in September 2013. The objection is that by 2013 the LTTE had been dismantled. In my view, the comment is reasonable because active party membership both before 1995 and after 2009 (when LTTE was dismantled) still involved support of organizations led by Sampanthan (ITAK and TNA) that later engaged in

> terrorism through support of LTTE both before and after the general election of 2004.TheApplicant's admitted support of TNA MPs in 2013 essentially involved the support of TNA, which had been engaged in terrorism through its support of LTTE prior to 2009.]

[40] The Applicant emphasizes repeatedly that he did not support the goals of the LTTE. However, that is not determinative. This issue is membership in an organization that was engaged in terrorism. There is no doubt that the LTTE was such an organization, a point conceded below and with which, on the record, I agree. It was also reasonable for the ID to find it had reasonable grounds to believe the Applicant, through his membership in ITAK (which supported the LTTE) and his following of Sampanthan (who led ITAK, effectively led TNA and who actively supported LTTE), was a member in an organization that was engaged in terrorism as contemplated by paragraph 34(1)(f).

[41] In summary, given the deference owed to the ID and its expertise, given that it applied the definition of terrorism and the statutory burden of proof as settled by jurisprudence, keeping in mind the broad definition the courts have given to membership, and recalling that the ID only needs to satisfy itself on a "reasonable grounds to believe" basis, it is my view that the decision, viewed as a whole in the context of the record, falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law per Dunsmuir. Therefore, I am obliged to dismiss this application for judicial review.

D. *Certified question*

[42] Neither party proposed a question of general importance to certify, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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