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Docket: IMM-4064-06

Citation: 2007 FC 687

Ottawa, Ontario, June 28, 2007

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

JOTHIRAVI SITTAMPALAM

Applicant

and

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

Respondents

REASONS FOR ORDER AND ORDER

1. Introduction

[1] The Applicant, Mr. Jothiravi Sittampalam, seeks judicial review of the opinion of G.C. Alldridge, the Minister's Delegate (also referred to as the Delegate), dated July 6, 2006, in which the Delegate determined that the Applicant:

- constitutes a danger to the public in Canada, pursuant to s. 115(2)(a) of the *Immigration and*

Refugee Protection Act S.C. 2001, c. 27 (the *IRPA*); and

- should not be allowed to remain in Canada based on the nature and severity of acts committed, pursuant to s. 115(2)(b) of the *IRPA*.

[2] The effect of this opinion, if sustained on judicial review, is that the Applicant, despite a finding in 1990 that he was a Convention refugee, may be deported (or refouled) to Sri Lanka.

2. Issues

[3] The issues raised by this application are as follows:

1. In concluding that the Applicant presents a danger to the public, as contemplated by s. 115(2)(a) of the *IRPA*, did the Minister's Delegate ignore or otherwise misconstrue the evidence or err by placing weight on incidents that had not resulted in criminal convictions?

2. In concluding that the Applicant was inadmissible to Canada on grounds of organized criminality and should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed, as contemplated by s. 115(2)(b) of the *IRPA*, did the Minister's Delegate err by ignoring evidence, failing to make an explicit finding of complicity or otherwise misinterpreting s. 115(2)(b)?

3. Did the Minister's Delegate err in his conclusion that the Applicant would not be at risk if returned to Sri Lanka:

(a) by selectively relying on certain evidence and ignoring the finding in 1990 that the Applicant was a Convention refugee and, thus, presumed to be in need of protection; and

(b) by failing to have regard to submissions of the Applicant made in May 2006?

4. Did the Minister's Delegate err in concluding that there were insufficient humanitarian and compassionate (H & C) elements to warrant favourable consideration by failing to have regard to the best interests of the Applicant's Canadian-born children?

5. Did the Minister's Delegate, as a result of his errors on risk to the Applicant, improperly fail to balance the protection interests of the Applicant with the danger he presents to the public?

[4] In oral submissions before this Court, the Applicant did not pursue the issue regarding the best interests of his children. In my view, the opinion of the Minister's Delegate demonstrates that he was alert, alive and sensitive to the interests of the children affected. Accordingly, this issue will not be discussed further.

3. Background

[5] The Applicant, who is a citizen of Sri Lanka, has a lengthy history with immigration officials, the police and the Courts, including the Federal Courts. The most relevant portions of his background are as follows:

- The Applicant arrived in Canada in February 1990 and made a successful Convention refugee claim. He became a permanent resident on July 17, 1992.

- The Applicant has three criminal convictions: (1) Failing to Comply with a Recognizance, dated January 24, 1992; (2) Trafficking in a Narcotic, dated July 8, 1996; and (3) Obstructing a Peace Officer, dated February 1998.

- The Applicant has also been investigated, but never convicted, for gang-related occurrences for his role in numerous offences which include Attempted Murder, Assault with a Weapon, Aggravated Assault, Possession of a Weapon Dangerous to the Public, Pointing a Firearm and Using a Firearm to Commit an Offence, Threatening, Extortion, and Trafficking.

- The Applicant was identified by the Toronto Police as the leader of A.K. Kannan, one of two rival Tamil gangs operating in Toronto. The Applicant admitted his former involvement in the gang to police.

- The Applicant was reported under s. 27(1)(d) of the *Immigration Act*, R.S.C. 1985, c. I-2 [repealed] (the former Act), by virtue of his drug trafficking conviction.

- He was subsequently reported under s. 27(1)(a) and 19(1)(c.2) of the former Act as a person for whom there are reasonable grounds to believe is engaged in activity planned and organized by a number of persons acting together to commit criminal offences. The allegation was that the appellant "is or was a member of an organization known as the A.K.

Kannan gang".

- An inquiry under the former Act commenced in January 2002. When the IRPA came into force in June 2002, the inquiry continued under ss. 36 and 37 of the *IRPA*. The Applicant conceded that he was a person described in section 36 due to his drug trafficking conviction, but he disputed the allegations of organized criminality.

- In a decision dated October 4, 2004, a panel of the Immigration and Refugee Board (the Board) determined that the Applicant was inadmissible to Canada on grounds of serious criminality (*IRPA*, s. 36(1)(a)) and organized criminality (*IRPA*, s. 37(1)(a)).

- On judicial review, the Federal Court upheld the Board's determination regarding the Applicant's inadmissibility to Canada (*Sittampalam v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, [2005] F.C.J. No. 1485 (F.C.) (QL) (referred to as *Sittampalam I*)), which in turn was upheld by the Federal Court of Appeal (*Sittampalam v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 1512 (F.C.A.) (QL) (referred to as *Sittampalam II*)).

[6] Following the inadmissibility findings of the Board (but before the Court decisions in *Sittampalam I* and *Sittampalam II*), officials of Canada Border Services Agency (CBSA) began a process which, if successful, would allow the refoulement of the Applicant to Sri Lanka. That is, CBSA sought to obtain what is commonly referred to as a "danger opinion" from the Minister of

Citizenship and Immigration (the Minister), pursuant to ss. 115(2)(a) and 115(2)(b) of the *IRPA*. A Notice, dated November 24, 2004, was served on the Applicant by CBSA, wherein CBSA advised the Applicant that it would be seeking an opinion of the Minister that the Applicant was both a danger to the public and/or a person who should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed. The letter described the evidentiary base upon which the Minister's opinion would be formed and invited the Applicant to make submissions.

[7] The Applicant made submissions in response to this Notice. The next step taken was the preparation of a formal "Request for Minister's Opinion – A115(2)(a) and A115(2)(b)". Once again, in a letter dated April 8, 2005, the Applicant was informed that he could make "such written representations or arguments as you deem necessary and submit any documentary evidence you believe relevant".

[8] In response to this letter, the Applicant, through his counsel, made submissions on May 1, 2005. Those submissions were clearly considered by the Minister's Delegate when he formed his opinion.

[9] After the initial submissions were made in May 2005, there was a gap in the procedure until the opinion was finally issued in July 2006. A second package of documents was forwarded to the Minister, under cover letter dated May 19, 2006. This second set of submissions was not contained in the Certified Tribunal Record. It appears to be accepted by the parties that, while this package was received at the Minister's offices, it was not received or considered by the Minister's Delegate.

4. Statutory Framework

[10] To understand the context of the Delegate's opinion, it is useful to have in mind an overview of the statutory framework that applies to the Applicant. To begin, a principle of refugee protection in Canada is that, once a person is found to be a Convention refugee, the IRPA provides protection to that individual and only allows refoulement to his country of origin in certain cases and only after following the procedures set out in the IRPA.

[11] One of the situations where refoulement is possible begins with a finding of inadmissibility. Of importance to the Applicant, s.36 of the *IRPA* applies to render a foreign national inadmissible on grounds of criminality and s. 37 applies in cases of organized criminality. The Applicant has been found inadmissible under both sections (see *Sittampalam I* and *Sittampalam II*, above).

[12] A determination that a foreign national, who is a protected person under IRPA (as is the Applicant), is inadmissible does not automatically lead to deportation. Indeed, s. 115(1) of the *IRPA* codifies what is referred to as the "principle of non-refoulement".

(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

[13] The exception to this principle is set out in s. 115(2) of the *IRPA*.

(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

The opinion of the Minister's Delegate was provided under this statutory provision.

[14] With this legislative context, I turn to the opinion of the Minister's Delegate.

5. Key Findings of the Minister's Delegate in the July 6, 2006 Opinion

[15] The Delegate's first task was to consider whether the Applicant constitutes a "danger to the public" as contemplated by s. 115(2)(a) of the *IRPA*. In doing so, he noted the three criminal convictions (described above) of the Applicant. Relying on *Thuraisingam v. Canada*, 2004 FC 607, the Delegate also placed weight on several incidents that did not result in criminal convictions. He also considered whether the Applicant had changed his "lifestyle" since his first conviction and concluded that he had not. The Delegate concluded that the criminal convictions "were not isolated

incidents" but were part of a "pattern". The Minister's Delegate determined that the Applicant "constitutes both a current and future danger to the public pursuant to paragraph 115(2)(a) of the *IRPA* and should not be allowed to remain in Canada on that basis".

[16] The Minister's Delegate turned next to a consideration of s. 115(2)(b) of the *IRPA*. Specifically, the Delegate addressed the questions of whether the Applicant was inadmissible to Canada on grounds of organized criminality and whether or not he should be allowed to remain in Canada on the basis of the nature and severity of the acts committed. He concluded that both elements of s. 115(2)(b) were satisfied. He relied on the October 4, 2004 decision of the Board and the decision of the Federal Court in *Sittampalam I* as support for a conclusion that the Applicant was inadmissible to Canada on grounds of serious criminality. In terms of the nature and severity of the acts, the Delegate focussed on the known activities of the A.K. Kannan gangs, commenting that "Tamil gangs, including the A.K. Kannan, pose a unique and pressing threat to Canadian society". He then reviewed the evidence supporting the Applicant's leadership role within the gang. The Delegate concluded that: (i) the Applicant was a member of the A.K.Kannan; (ii) the A.K. Kannan is an organized group; and (iii) the gang had a deleterious effect on the Sri Lankan community by committing crimes of violence.

[17] Informed by the Supreme Court of Canada decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 and the Federal Court of Appeal in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 and in *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1, 2005 FCA 1, at paras. 38-39, the Delegate then turned to consider whether the Applicant would be at "substantial risk of torture" or

"risk to life or to cruel and unusual treatment or punishment" if returned to Sri Lanka. Since Canada had accepted that the Applicant required refugee protection in 1990, the key question for the Delegate was whether the situation had changed since that time. The Delegate also considered whether, because of his activities in Canada, including gang membership, the Applicant would be targeted. After considering the documentary evidence and the evidence submitted by the Applicant (with the exception of the May 2006 package), the Delegate concluded that he was "not satisfied that Mr. Sittampalam's return under deportation to Sri Lanka would expose him to a substantial risk of torture, or to a risk to life or to cruel and unusual treatment or punishment".

[18] The next step in the analysis was whether, in spite of the findings, there existed H & C grounds for allowing the Applicant to remain in Canada. The Minister's Delegate concluded that "there are no sufficient humanitarian and compassionate elements in this case which would warrant favourable consideration."

[19] Finally, the Delegate addressed the question of whether he was required to undertake a "balancing exercise whereby the risk, the nature and severity of the acts committed and the humanitarian considerations are weighed against each other", as taught by *Suresh*, above. The Delegate concluded that he did not need to conduct the "balancing exercise". This was because: (1) the Applicant did not face a "substantial risk of torture, a risk to life or a risk of cruel and unusual treatment or punishment"; and (2) his H & C considerations "do not warrant favourable consideration". Quite simply, in the Delegate's opinion, there was nothing to weigh in this case.

6. Analysis

6.1 *What is the appropriate standard of review?*

[20] In *Suresh*, above, the Supreme Court of Canada noted that the discretionary determination of whether someone constitutes a danger to the security of Canada is one that calls for considerable deference:

> The court's task ... is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold her decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion. (at para. 38)

A danger opinion should only be set if it is patently unreasonable - that is, if it was arbitrary, if it was made in bad faith, if it was not supported by the evidence, or if the Minister's delegate failed to consider the appropriate factors (*Suresh*, above at para. 29).

[21] This standard of review has been consistently applied by this Court and was recently applied to an opinion under s. 115 of the *IRPA* by Justice Kelen in *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 229, at paras.18-19.

[22] A breach of procedural fairness may also constitute a reviewable error, without reference to any standard of review. Finally, the Applicant raises two legal issues (related to the s. 115(2)(b) finding) that are reviewable on a standard of correctness.

6.2 *Issue #1: Did the Minister err in his determination under s. 115(2)(a) of the IRPA?*

[23] With respect to s. 115(2)(a) of the *IRPA*, the Minister’s Delegate opined that:

> Mr. Sittampalam does in fact pose an unacceptable risk to the public of Canada and I find that he constitutes both a current and future danger to the public pursuant to paragraph 115(2)(a) of the *IRPA* and should not be allowed to remain in Canada on that basis.

[24] The Applicant raises a number of alleged errors in the Delegate's opinion, most of which are based on an argument that the Minister's Delegate ignored, or selectively relied upon the evidence.

[25] The Applicant relies upon *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (F.C.T.D.) for the proposition that an inference can be drawn by a Board failure to mention evidence in a decision that was favourable to the applicant, particularly when the reasons are detailed. Thus, the Applicant argues that it cannot always be presumed that the blanket statement that the Minister's Delegate considered all facts should be seen to apply. Allegedly, by failing to mention the evidence of Detective Fernandez on the Applicant's attempts to get out of the gang, his work as an independent trucker beginning in 1999 or the evidence of co-operation with the police, it must be inferred that the Delegate ignored that evidence. I do not agree.

[26] Most of the submissions of the Applicant are no more than a disagreement with the weight given to the evidence by the Minister's Delegate. I consider first the numerous assertions that the Delegate ignored evidence. Given that there were 14 large volumes of evidence before the Delegate, it is understandable that not every document received a specific reference in the opinion. On the facts before the Delegate, it was not an error to omit specific reference to evidence of Detective Fernandez, the trucking business established in 1999 or the evidence of co-operation with the police. Omission of these details does not mean that the Delegate did not consider and appreciate

the evidence on these matters. I am satisfied that the Minister's Delegate had considered all of the evidence on these points when he concluded:

> There is little evidence in the material before me that would support an inference that Mr. Sittampalam is serious about changing the pattern of behaviour resulting in his criminal convictions. Likewise, there is little evidence in support of a finding that he is taking active substantive steps to rehabilitate himself and become a productive member of society.

[27] As is apparent from reading the opinion as a whole, the Minister's Delegate was simply not persuaded that the seriousness of the convictions and the incidents in which the Applicant was involved were outweighed by the "little evidence" that he had reformed his life.

[28] Secondly, the Applicant submits that the Delegate's conclusion that there was "a pattern of participation in criminal activities that occurred over a period of a number of years" was perverse, given that there was only one gang-related conviction. I can see no error. In light of, not only the conviction, but the many other gang-related incidents involving the Applicant, this conclusion is not unreasonable. The finding does not state that the Applicant was convicted of gang-related offences. Rather, the Delegate found a "pattern" on the basis of the lengthy history of police involvement with gang incidents that included the Applicant as a party. Even if this history was not sufficient for the laying of criminal charges or to obtain criminal convictions, it was evidence upon which the Delegate could base his finding of a "pattern".

[29] Another error alleged by the Applicant relates to the Delegate's references to his drug addiction. In the opinion, the Delegate states as follows:

> I do acknowledge that Mr. Sittampalam participated in a drug addiction program while in detention; however, there is nothing in the material before me indicating that he continued to participate in this type of program once released from detention. In like manner, there is nothing in the material before me indicating that he has recently participated in such a program. I also acknowledge that Mr. Sittampalam has indicated that he is no longer addicted to illegal substances.

[30] The Applicant argues that the Delegate relied on irrelevant considerations by referring to the past drug issues when, as the Delegate stated, there is no evidence that he is now addicted to illegal substances. I do not agree. As I read the opinion, the Delegate was not finding that the Applicant was or was not addicted to drugs at the time of writing the opinion. Rather, he was using the evidence that the Applicant had not pursued treatment, except in one prison program. It is not an unreasonable inference that a person addicted to illegal substances, who is truly intent on rehabilitation, would pursue treatment on his own initiative. It follows that his failure to do so was further evidence to support a conclusion that the Applicant had not taken "substantive steps to rehabilitate himself".

[31] Next, contrary to the assertion of the Applicant, this is not a case where the passage of time necessarily weighs in his favour. Admittedly, the Applicant has not had a criminal conviction or a gang-related incident since 2001. However, it is certainly not unreasonable to conclude that the Applicant's detention, rather than rehabilitation, was the main reason for the lack of criminal or gang-related activity. I see no error.

[32] In response to the arguments related to the Applicant's claim that he is no longer a member of the A.K. Kannan, the Federal Court of Appeal has provided a full response in *Sittampalam II*, at para. 23, where the Court states:

> Such an interpretation would also mean that a former member of the Nazi party in Germany could not be found inadmissible because the Nazi party no longer exists, so that he is no longer a member. It would mean that a member of an international terrorist organization could renounce his or her membership immediately prior to making a refugee claim, and would not be inadmissible because he is not a current member of a terrorist organization. It would also mean that a person who spends ten years as a member of an organization engaged in criminal activities within Canada could withdraw from the organization before being reported under the IRPA and avoid a finding of inadmissibility.

[33] The most serious argument of the Applicant appears to be that the Delegate erred by taking into account the various incidents that did not result in criminal conviction. The Applicant argues that the Minister's Delegate relied on *Thuraisingam*, above, to consider charges not resulting in convictions. The Applicant argues that these reports cannot constitute "evidence" underlying the charges as contemplated in *Thuraisingam.*

[34] I first observe that a reading of the Danger Opinion as a whole does not show that the Delegate placed an inappropriate amount of weight on the failed convictions. Rather, they are seen as part of the larger picture – a pattern of behavior – that continued up until 2001 when the Applicant was allegedly found with instruments of forgery.

[35] However, even more responsive to this argument, are the opinions of the Federal Court and the Federal Court of Appeal in *Sittampalam I* and *Sittampalam II*. I turn to the comments of Justice Hughes in *Sittampalam I*, at para. 35 where he stated:

> I do not read the Member's Report at pages 53 and following under the heading "Criminality" as giving improper weight to charges laid or contemplated to be laid but which never went forward. These circumstances are mentioned in the Report but only in the context of a detailed consideration as to the circumstances themselves that were behind the charges or contemplated charges. It was these circumstances

> and not the charges or contemplated charges that supported the Member's findings that there were reasonable grounds for finding that section 37(1)(a) of IRPA applied.

[36] The Court of Appeal confirmed this point in *Sittampalam II*, at paragraphs 50-51 where that Court stated as follows:

> The jurisprudence of this Court indicates that evidence surrounding withdrawn or dismissed charges can be taken into consideration at an immigration hearing. However, such charges cannot be used, in and of themselves, as evidence of an individual's criminality: see, for example, *Veerasingam v. Canada (M.C.I.)* (2004), [2004] F.C.J. No. 2014, 135 A.C.W.S. (3d) 456 (F.C.T.D.) at para.11; *Thuraisingam v. Canada (M.C.I.)* (2004), 251 F.T.R. 282 (T.D.) at para. 35.
>
> In this regard, I agree with the Judge that the Board did not rely on the police source evidence as evidence of the appellant's wrongdoing. Rather, he considered the circumstances underlying the charges and contemplated charges -- including the frequency of the appellant's interactions with the police and the fact that others involved were often gang members -- to establish that there are "reasonable grounds to believe", a standard that is lower than the civil standard, that the A.K. Kannan gang engages in the type of activity set out in paragraph 37(1)(a).”

[37] In my view, in the present application, we have exactly the same evidence of the police incidents being put to substantially the same use as was done by the Board in reaching the conclusion on inadmissibility. If reliance in that manner by the Board, in the context of the inadmissibility determination, was acceptable to the Courts in *Sittampalam I* and *Sittampalam II*, it is certainly acceptable in the context before me.

[38] In conclusion on this issue, having considered all of the submissions of the Applicant, I am not persuaded that the Minister’s Delegate was patently unreasonable in his opinion that the Applicant presents a danger to Canada as contemplated by s. 115(2(a)).

6.3 *Issue #2: Did the Minister err in his determination under s. 115(2)(b) of the IRPA?*

[39] In forming his opinion on whether the Applicant should not be allowed to remain in Canada on the basis of the nature and severity of acts committed (s. 115(2)(b)), the Minister's Delegate entered into a lengthy analysis of the evidence related to the direct actions of the Applicant, the activities of the A.K. Kannan and the role of the Applicant within that organization. In short, he concluded that:

> In terms of the nature and severity of the acts committed, the evidence shows the existence of facts supporting Mr. Sittampalam's membership in and participation in the criminal activities of the A.K. Kannan, that Tamil gangs, including the A.K. Kannan, pose a unique and pressing threat to Canadian society, and the fact that the A.K. Kannan has been involved in a significant and serious criminal activity against civilians and a rival gang (i.e. the VVT) including violence.

[40] Further, the Delegate was satisfied that the Applicant was a member of the gang. Indeed, his involvement reached far beyond mere membership; as noted by the Delegate, "the evidence shows the existence of facts supporting Mr. Sittampalam's membership in the leadership in and involvement in the criminal activities of the A.K. Kannan." In his analysis, the Delegate also referred to *Sittampalam I*, where Justice Hughes upheld the decision of the Board that there were reasonable grounds to believe that the A.K. Kannan met the definition of "organized criminality" set out in s. 37(1)(a) the *IRPA* and that the Applicant was a member of that organization. It is important to note that the Delegate did not simply adopt the findings of the Board or the Court. Since this was a determination under s. 115(2)(b) of the *IRPA*, the Delegate recognized his responsibility to carry out his own analysis of the evidence. I am satisfied that he did so.

[41] Many of the arguments by the Applicant with respect to the factual findings under s. 115(2)(b) are the same as those made for the s. 115(2)(a) finding. The Applicant submits that the

Delegate ignored evidence on the Applicant's membership status in the gang, his efforts to leave the gang and the co-operation with police. As I have already determined that the Board did not ignore this evidence, I conclude that the Delegate did not err.

[42] The more serious argument advanced by the Applicant is that the Delegate erred by focusing on the acts of the A.K. Kannan rather than those of the Applicant. In doing so, the Applicant asserts that there are two errors. The first is that the Delegate was required to make an explicit finding that the Applicant was complicit in the crimes and violent acts of the A.K. Kannan (*Nagalingam*, above). Secondly, the Applicant argues that s. 115(2)(b) can only apply to the acts of the individual and not of the gang to which he may have belonged.

[43] In my view, the complicity argument is not well-founded on these facts. Although there is not a specific sentence in the opinion that states that the Applicant was complicit in the acts and crimes of the A.K. Kannan, the opinion certainly establishes the Applicant's role, as the founder, leader and active participant in a number of the specific initiatives and crimes of the A.K. Kannan. In my view, this is sufficient to establish that the Delegate turned his mind to the relationship of the Applicant to the acts of the gang. In fact, there was evidence to show that the Applicant was, at certain times of the gang's violent history, a directing mind of the organization. In my view, the Minister's Delegate had before him sufficient evidence to conclude that the Applicant "was a personal and knowing participant in the criminal activities of the organization" (*Nagalingam*, above, at para. 63). Thus, even though the Delegate did not use of the word "complicit", his analysis demonstrates that he recognized that, for s. 115(2)(b), he was required to find a close link between

the Applicant and the A.K. Kannan. Because of that close link, the acts of the A.K. Kannan, in effect, become the acts of the Applicant.

[44] The other issue is whether the Delegate was limited to a consideration of the nature and severity of the acts committed by the Applicant, and could not consider the acts of the criminal organization. The Applicant points to the words used in the French version of s. 115(2)(b) which, in part, read “en raison soit de la nature et de la gravité de ses actes passés”. In the English version, the provision refers to the “nature and severity of acts committed”, with no modifier of the word “acts”. Thus, submits the Applicant, Parliament must have intended the provision to apply only to the acts of the Applicant. This interpretation of s. 115(2)(b) was accepted, albeit in *obiter*, by Justice Kelen in *Nagalingam*, above, at paras. 52-61.

[45] I do not agree that the Delegate erred, even if the Applicant’s interpretation of s. 115(2)(b) is correct (which determination I do not need to make on these facts). The problem with the argument is that, in my view, the Applicant mischaracterizes this section of the opinion. When the s. 115(2)(b) analysis is read as a whole, it is clear that the Delegate was not examining the acts of the A.K. Kannan on its own.

[46] I observe that the Delegate could not ignore the nature of the A.K. Kanaan. Absent a finding that the group is involved in “organized criminality”, s. 115(2)(b) is inapplicable to the Applicant. Thus, it would be nonsensical for the Delegate to ignore the acts of the gang for the purpose of establishing that the A.K. Kanaan met the definition of “organized criminality”.

[47] However, the Delegate did not assess only the activities of the gang. An essential step in the Delegate's analysis was an examination of personal criminal activities of the Applicant and his leadership role in the organization. In other words, the "acts committed" were both the Applicant's own criminal "acts" and his "acts" of founding, leading and belonging to the A.K. Kanaan, an organized gang with a violent and dangerous purpose. Accordingly, the Delegate, in my view, demonstrates that his finding related to the "la nature et la gravité de ses actes passés". There was no error.

6.4 *Issue #3(a): Did the Minister's Delegate err in his risk opinion?*

[48] As noted, the Delegate found that "there is insufficient evidence to support a finding that it is more likely that not that Mr. Sittampalam would face a substantial risk of torture, or a risk to life or to cruel and unusual treatment or punishment." The Applicant takes issue with this conclusion on two grounds:

- the Delegate selectively relied on certain evidence and ignored the 1990 finding that the Applicant was a Convention refugee, and thus, presumed to be in need of protection; and

- the Delegate failed to have regard to the documents submitted in May 2006.

I will deal with each of these arguments separately.

[49] On the first alleged error, the Applicant seems to be asking for a re-weighing of the findings as they related to Sri Lankan country conditions.

[50] I note the decision of Justice Mactavish in *Fabian v. Minister of Citizenship and Immigration*, 2006 FC 851, which, in my opinion, is exactly on point. That case involved a VVT Tamil Gang leader in Toronto (found to be a danger to the public) who argued that, because of his notoriety, he would be harmed upon returning to Sri Lanka. Justice Mactavish stated at para. 58:

> It is clear from a review of the Minister's Delegate's decision that he specifically turned his mind to the treatment afforded returning Sri Lankan nationals, including those with a profile such as that of Mr. Fabian, finding that the prevailing conditions were such that Mr. Fabian would not be at any greater risk than any other returning Sri Lankan national.

[51] In my opinion, a similar situation exists in the instant case. There was a large volume of material available for the Minister's Delegate, and he is presumed to have considered it all. There is no reviewable error.

[52] The Applicant submits that, absent a vacation of the refugee determination in 1990, as provided for in s. 109(1) of the *IRPA*, he is still a person in need of protection. This argument has no merit. First, s. 109 only applies if the Board determines that the refugee protection was obtained "as a result of directly or indirectly misrepresenting or withholding material facts". This provision is inapplicable as no one is alleging that, in 1990, the Applicant became a protected person through misrepresentation. The issue before the Delegate was whether, in 2006, he still requires protection. Paraphrasing Justice Yvon Pinard in *Camara v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 221 at para. 58, the fact that the Applicant had been considered at risk by the Board in 1990 does not establish that he was still at risk in 2006. There is no need, in this situation, to formally vacate the refugee determination.

[53] To this point, I can see no reviewable error in the risk assessment conducted on the Delegate's review of the material before him. Of course, this view is subject to the issue of whether the Delegate erred by failing to have regard to the materials submitted in May 2006. That issue is discussed below.

6.5 *Issue #3(b): Did the Delegate err by failing to have regard to submissions of the Applicant made in May 2006?*

[54] It is undisputed that the Applicant forwarded a package of supplemental documentation to the attention of the Minister's Delegate under cover letter dated May 19, 2006. There is evidence that the documents were received. However, there is not a single reference to the materials in the opinion and they are not contained in the Certified Tribunal Record. Accordingly, I find that the Delegate failed to consider these materials.

[55] Failure to have regard to the materials is a breach of procedural fairness and a ground upon which the decision of the Minister's Delegate may be overturned.

[56] A breach of natural justice or procedural fairness will, in general, render the decision invalid (*Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at page 661; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202). The Respondent argues that this case presents a set of exceptional facts where the decision of the Minister's Delegate should stand. In effect, the Respondent argues that any breach of fairness was *de minimus* and that it would not

have affected the outcome of the danger opinion. To some extent, I agree with the Respondent. However, there is one aspect of the decision that may be affected in a significant way.

[57] Having reviewed the materials in question, I begin by considering what parts of the Delegate's opinion would (or would not) be impacted by the May 2006 materials. First, the May 2006 information would not change the analysis of the Minister's Delegate with respect to the danger to the public in Canada or the nature and severity of the acts committed by the Applicant. None of the May 2006 information relates to these issues.

[58] Second, I also do not believe the information would alter the risk assessment with respect to the Applicant not having proper documentation upon returning to Sri Lanka, as the Minister's Delegate was clear that no such risk existed, and, in my opinion, the May 2006 information does not serve to rebut this finding.

[59] Third, I do not believe it can be said that the Minister's Delegate was unaware of the inherent risks present to young Tamil males in northern Sri Lanka. The May 2006 documents do not disclose any new evidence on this point that was not already before the Minister's Delegate.

[60] However, in my opinion, the main issue would be with respect to the changing country conditions documented in the May 2006 information package. In the Delegate's opinion, at page 18, he specifically finds:

> [i]n my view, conditions in Sri Lanka are vastly different than when Mr. Sittampalam left that country for Canada, and when he was found to be in need of protection.

[61] Further, at page 21 of his Danger Opinion the Minister's Delegate specifically finds:

> …while things are far from ideal in Sri Lanka, a comparison of two documents does not reveal any substantial increase in ceasefire violations which may suggest that the peace accord between the warring parties is becoming an accepted fact.

[62] My concern with these statements is that, if the Minister's Delegate is going to make such a risk finding, it must be based on all the material. Given that the May 2006 information contains – or at least purports to contain – information regarding deteriorating country conditions, it was a reviewable error for the Delegate to fail to take this information into consideration. In my view, it is necessary for the Minister's Delegate re-examine this aspect of the case with the benefit of the full information in front of him. I will return to the extent of any reconsideration below.

6.6 *Issue #5: Did the Delegate improperly fail to balance the protection interests of the Applicant with the danger he presents to the public?*

[63] As established by *Suresh*, above, and recognized by the Minister's Delegate, a balancing exercise is sometimes necessary in the context of a danger opinion. Specifically, where a Delegate concludes that a person, otherwise found to be a person described in s. 115(2)(a) or 115(2)(b), would face a substantial risk if returned, the Delegate must weigh that risk in light of all the other factors. In this case, the Delegate concluded that the Applicant would not face a substantial risk and that H & C considerations did not warrant favourable consideration. Accordingly, he determined that:

> I do not need to undertake a balancing exercise whereby the risk, the nature and severity of acts committed, and the humanitarian considerations are weighed against

> each other in accordance with the legal principles enunciated by the Supreme Court in Suresh, as this simply does not arise on the facts of this case.

[64] This conclusion is plain common sense. If there is no risk found, there is nothing to balance under s. 115(2) of *IRPA*. This was confirmed by Justice Kelen in *Nagalingam*, at para. 43. However, if the Minister's Delegate erred and ultimately a risk is found, a balancing would be required (*Nagalingam*, above, at para. 47). Because I have found that there is one reviewable error, absent a further assessment of risk by the Delegate, I cannot provide any definitive answer to this issue.

6.7 *What is the appropriate remedy in this case?*

[65] Having reviewed the submissions and arguments of the parties, I am persuaded that, although the Minister's Delegate did not err in a number of areas, there was one error that warrants judicial intervention. The Applicant requests that the opinion be quashed and the matter be returned for reconsideration by a different Delegate.

[66] However, in my opinion, that would be an inappropriate remedy in this case. I note that, on an application for judicial review, s. 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides this Court with a range of options. Specifically, the Court may:

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement

determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[67] In *Turanskaya v. Canada (Minister of Citizenship and Immigration)* 145 D.L.R. (4th) 259 the Federal Court of Appeal held, when considering the scope of 18.1(3)(b) of *the Federal Courts Act*:

> The "directions" which the Trial Division is authorized to give under paragraph 18.1(3)(b) will vary with the circumstances of a particular case. If, for example, issues of fact remain to be resolved it would be appropriate for the Trial Division to refer a matter back for a new hearing before the same or differently constituted panel depending on the circumstances.

The assessment of risk and any change in country conditions in Sri Lanka constitute factual issues as contemplated in *Turanskaya* and can therefore be returned to the original decision maker.

[68] Further, in my view, there is no need for the Minister's Delegate to redo everything that he has done in the opinion. Given my reasons, the Delegate's findings that the Applicant has been involved in serious criminality and poses a danger to the public in Canada and that he should not be allowed to remain in Canada on the basis of the nature and severity of acts committed in Canada should not be disturbed. The only error is that the Minister's Delegate erred in his assessment of risk to the Applicant if returned to Sri Lanka by failing to have regard to all of evidence before him. Thus, the matter will be remitted to the original Minister's Delegate for a new risk assessment. This is consistent with the decision of Justice Mactavish in *Thuraisingam v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 746, where she was faced with a similar error with respect to the risk assessment portion of the opinion.

[69] In the event that, after this review, the Delegate concludes that the Applicant would be at substantial risk, I would further direct the Delegate to undertake a balancing exercise as contemplated by *Suresh*, above. Otherwise there will be no need for a final balancing.

7. Conclusion

[70] For the above reasons, this application for judicial review will be allowed with the matter remitted to the same Minister's Delegate for reconsideration in accordance with the directions of this Court, as outlined above and set out in the Order.

[71] Both parties suggested that, if I dismissed the application, I should certify the same questions as those certified by Justice Kelen in *Nagalingam*, above. Since I have allowed the judicial review, these questions are not dispositive of this matter. Accordingly, I will not certify any questions.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is allowed with respect to the Delegate's finding that the Applicant's return to Sri Lanka would not expose him to a substantial risk of torture or to a risk to life or cruel and unusual treatment;

2. The opinion of the Minister's Delegate is set aside and the matter is remitted to the same Minister's Delegate for the sole purpose of re-assessing the risk to the Applicant if he were returned to Sri Lanka;

3. In the event that the Delegate concludes that the Applicant would be at substantial risk, the Delegate is to carry out a balancing exercise, as contemplated by *Suresh*; and

4. No question is certified.

"Judith A. Snider"

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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