Federal Court Cour fédérale

Date: 20111129

Docket: IMM-6916-10

Citation: 2011 FC 1379

Ottawa, Ontario, November 29, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KAMALA DEVI SELLAPPHA
NALINI SELLAPPHA
GEETHAVENGAYAN SELLAPPHA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Immigration Program Manager (IPM) at the Canadian High Commission in Colombo, Sri Lanka (Decision). The Refusal Letter is dated 15 June 2010, while the CAIPS notes indicate the IPM made up his mind on 11 June 2010. Both the Refusal Letter and the CAIPS notes are part of the Decision. The IPM refused the application for a permanent resident visa because the Applicants did not discharge the

onus under section 11 of the Act to show they were not inadmissible and because they were members of a terrorist organization under paragraph 34(1)(*f*) of the Act.

BACKGROUND

[2] The Principal Applicant, Kamala Devi Sellappha, is a citizen of Sri Lanka. The Minor Applicants are her daughter, Nalini Sellappha (Nalini), and her son, Geethavengayan Sellappha (Geethavengayan). The Applicants were sponsored in their application by Kavetha Sellappha (Kavetha), another daughter of the Principal Applicant, who is a permanent resident of Canada. Kavetha arrived in Canada in May 1999 and gained Refugee Status. She was granted permanent resident status in September 2000. Nalini and Geethavengayan were dependant children of the Principal Applicant at the time her application was filed.

[3] On 22 July 2003, the Respondent received the application for permanent residence. The application was paper screened on 11 August 2003 and again reviewed on 22 August 2003. Also on 22 August 2003, the Respondent requested the birth certificates of Nalini and Geethavengayan and the death certificate of the Principal Applicant's husband, Ponnampalam. The Respondent verified the two birth certificates on 7 October 2003.

[4] The Respondent received positive medical results for all the Applicants on 3 November 2003 and commenced validation of Ponnampalam's death certificate on 2 February 2004. The death certificate was validated genuine on 29 June 2004. An officer reviewed the file on 17 January 2005 in the wake of a tsunami which affected Sri Lanka. On 29 December 2005, the Applicants' legal counsel requested an update on the file and followed up with another letter on 12 January 2006.

Also, in January 2006, the Respondent requested updated contact information for the Applicants. On 21 February 2006, the Respondent sent out a request for further information related to whether the Applicants were affected by the tsunami.

[5] After corresponding with the Applicants' consultant, an officer, identified as PK in the CAIPS notes, determined that they were not members of a class who would be seriously and permanently affected by the tsunami and so would be processed as regular family class applicants.

[6] The Respondent convoked all three of the Applicants for an interview on 19 July 2007, in order to obtain information to determine if they were admissible to Canada. Having been advised that the Applicants would be unable to attend the scheduled interview, the Respondent re-scheduled the interview for 27 September 2007.

[7] The Principal Applicant and her son, Geethavengayan, attended the interview on 27 September 2007 (2007 Interview). The interview was conducted by Robert Stevenson, a visa officer in Colombo (Stevenson). Nalini did not attend and, as of the time of the refusal letter, had still not attended any interview. At the 2007 Interview, the Principal Applicant and Geethavengayan were asked questions about their connection with, and support for, the LTTE. Based on their answers to these questions, Stevenson determined that they may be potentially inadmissible. Because of concerns about the Applicants' inadmissibility, the Respondent requested secondary background checks on 27 December 2007. On 28 April 2008, the Respondent decided that it would be necessary to conduct a second interview with the Principal Applicant and Geethavengayan to determine their admissibility to Canada. This second interview was scheduled for 12 June 2008, though neither the Principal Applicant nor Geethavengayan attended. Another interview was scheduled for 23 April

2009 at the High Commission in Colombo. The Principal Applicant and Geethavengayan did not attend this interview either.

[8] On 28 January 2009, Geethavengayan was granted refugee status in France. The Applicants did not notify the Respondent of his change in status at this time.

[9] The Applicants' sponsor, Kavetha, wrote to the Respondent through her MP, the Hon. John McCallum, on 28 April 2009 asking that an interview with Geethavengayan be conducted in a European Union (EU) Country. She said her brother was in Denmark on a working visa at the time and could not attend an interview in Colombo. She did not inform the Respondent at this time that Geethavengayan had been granted refugee status in France.

[10] By 27 April 2009, Nalini had been interned in an Internally Displaced Persons camp at Vavuniya, Sri Lanka. On that day, Kavetha informed the Respondent of the address to which a letter could be sent which would allow Nalini to be released from the camp to participate in an interview. On 18 May 2009, hostilities between the LTTE and the Government of Sri Lanka ended with the military defeat of the LTTE.

[11] Having received communication from Kavetha's MP asking for an update on the file on 16 June 2009, the Respondent advised him that they would be willing to postpone the interview with Geethavengayan until October 2009. The Respondent also advised that, in order to facilitate Nalini's attendance at the interview, a letter could be provided to the camp at which she was being held, if Kavetha could provide an address to which such a letter could be forwarded.

[12] The application having been open for more than six years, on 30 September 2009 the Respondent wrote to Kavetha informing her that the application could not be kept open indefinitely. The Respondent further informed her that if the documents required to process the application, including police checks and copies of passport pages were not provided, a decision would be taken within sixty days. At this time, Kavetha was also informed that Geethavengayan would have to meet all statutory requirements and be examined, and that he could not be exempt from these requirements, because he was a dependant child on the application. Because the Respondent had received no response to the 30 September 2009 letter, on 1 December 2009 a copy of this letter was also sent to the Colombo address for the Principal Applicant that the Respondent had on file.

[13] The Applicants' legal counsel wrote to the Respondent on 19 April 2010 with the information that Geethavengayan would be unable to attend an interview in Colombo because he had been granted refugee status in France. Because Geethavengayan feared for his life in Sri Lanka, counsel requested that an interview be arranged at the Canadian Embassy in France if an interview was still required. However, he also advised that Kavetha wished to have Geethavengayan removed from the file. He further advised the Respondent that the Principal Applicant and Nalini had applied for Sri Lankan police certificates on 8 March 2010 and that they would be forwarded as soon as they became available.

[14] On 11 June 2010, IPM received and reviewed the file. Based on the information on file (the application forms filed as well as the CAIPS notes of the 2007 Interview with the Principal Applicant and Geethavengayan), the IPM decided that the family was inadmissible to Canada because they had failed to meet the onus under section 11 of the Act to establish that they were not inadmissible to Canada. The IPM also concluded that the Applicants were inadmissible under

paragraph 34(1)(*f*) of the Act as there were reasonable grounds to believe they were members of a group which engaged in unlawful activities. A refusal letter was drafted on 14 June 2010 and sent on 16 June 2010.

DECISION UNDER REVIEW

[15] The Decision under review in this case consists of both the IPM's letter rejecting the application and the CAIPS notes prepared by the Respondent's officers over the seven-year history of the application. In the letter to the Applicants, the IPM writes that he has carefully and thoroughly considered "all aspects of your application and the supporting information provided" and has decided the Applicants are ineligible for a permanent resident visa.

Section 11 Not Satisfied

[16] The letter indicates two bases for refusing the application. First, the IPM was not satisfied, as required under subsection 11(1) of the Act that the Applicants were not inadmissible to Canada. Based on what he found were contradictory answers given during the 2007 Interview with the Principal Applicant and Geethavengayan, the IPM indicates that he does "not know where the truth may lie." He also notes that, despite several requests for a second interview, Geethavengayan had not attended. As such, he concluded that he did not have a sufficient understanding of the Applicants' background and could not be satisfied they were not inadmissible.

[17] In the CAIPS notes relating to the 2007 Interview, Stevenson asked where the Principal Applicant lived before her marriage; she responded that she had been living in Chavakachcheri and

that, after her marriage, she had been living in Malavi from 1971 until the present. When asked if she had lived anywhere else during her marriage, she said no. Stevenson, according to the CAIPS notes, presented the Principal Applicant with information from her application form which indicated she had lived in Chavakachcheri from 2002 until 2003 while she was married to Ponnampalam. She responded by saying that they had been displaced for a few days. Stevenson notes the significant difference between a few days and a year.

[18] The CAIPS notes also record that, when asked why Nalini could not attend the interview, the Principal Applicant responded that Nalini could not get a pass from the LTTE to attend, though the Principal Applicant had managed to get herself a pass in exchange for her five acres of land. Later in the interview, the Principal Applicant said that Nalini was in hiding and that she had not seen her for nine months at the time of the interview. When asked to explain how she knew her daughter could not get a pass from the LTTE when she had not seen her for nine months, the Principal Applicant stated that a friend relayed messages between them.

Membership in a Section 34 Organization

[19] The IPM also rejected the Applicants' permanent resident visa because "there are reasonable grounds to believe that your family members are members of the inadmissible class of persons" set out in paragraph 34(1)(*f*) of the Act. Under paragraph 34(1)(*f*), foreign nationals are inadmissible to Canada if they are members of a group which engages in the activities listed in paragraphs 34(1)(*a*) through (*e*). The IPM noted that both the Principal Applicant and Geethavengayan made statements in the 2007 Interview which indicated they were involved with the LTTE. He noted that the Principal Applicant supported the LTTE cause, that Geethavengayan had participated in combat

training, and that Nalini had lived in an LTTE safehouse. The IPM wrote in the Refusal Letter that the Principal Applicant had said her sister was an active supporter of the LTTE. However, the CAIPS notes indicate that it was Kavetha, the Principal Applicant's daughter, who said she was a loyal supporter of the LTTE. Though he misread the CAIPS notes in part, based on the family's LTTE activities, the IPM concluded that there were reasonable grounds to believe that the Principal Applicant or her family members were inadmissible to Canada on security grounds under paragraph 34(1)(*f*) of the Act.

[20] The CAIPS notes of the 2007 Interview show that Stevenson asked the Principal Applicant which of her family members had actively supported the LTTE. She answered that her daughters, Sujeeva and Nalini, had worked for them doing clerical work and cooked for them for four to five hours per day for three days a week. When asked when they last worked for the LTTE, the Principal Applicant said 2005 and 2006, but she also said they had worked for a week in August 2007. The Principal Applicant then changed her answer and said that it was her daughters Sujeeva and Yasotha who had done work for the LTTE and that Nalini was in hiding from the LTTE. When asked if Nalini could not attend because she was at an LTTE camp, the Principal Applicant stated that she was at a house; Stevenson asked her if it was an LTTE house, and she said yes.

[21] The Principal Applicant also said at the 2007 Interview that her husband had a truck and had used it to carry things to the LTTE when he was still alive. She also said that he had been called "Tiger Kuncha Rasa" (Small Tiger King) by both their family and the LTTE. She confirmed that her husband had been appointed to the Mediation Committee of Thunukkai, a committee of the LTTE, because he was involved with the LTTE.

[22] The Principal Applicant also said in the 2007 Interview that she had cooked food for the LTTE and made them sweets. When asked if she supported their cause, she said yes. She also confirmed that she supported the LTTE's tactics of force for a Tamil homeland. The Principal Applicant was also asked about her son's involvement in the LTTE. She said that the LTTE had tried to recruit him, so she had sent him to India to study.

[23] At the 2007 Interview, Geethavengayan said that he lived in Chennai, India. When asked what he would do after the interview, he said that he could not go back to Vanni – the area in Sri Lanka where his family lived – because of LTTE problems. He also said that he did not like the ways of the LTTE, and in particular their recruiting and training by force. Geethavengayan said in the interview that he had received basic combat training from the LTTE, though this was only basic, and had involved crawling, running, and training with clubs. He also said that he had dug bunkers and graves, collected food, and done other odd jobs for the LTTE. When asked if his family supported the LTTE, Geethavengayan said they did, but it was an obligation.

[24] Stevenson suggested to Geethavengayan that his father had been a strong LTTE supporter, which Geethavengayan confirmed. Geethavengayan also said that his father served the LTTE rather than sending his children. He also said that he knew his father had helped the LTTE, but he did not remember a lot because he was fourteen when his father died. When asked about Nalini helping the LTTE, Geethavengayan said that he knew she would not do something like that. He also said that he could not confirm anything as he had just come from India.

[25] During the Interview, Stevenson told Geethavengayan that his "Sister in Canada states that she is a loyal supporter of LTTE and that father was a strong supporter of LTTE." Geethavengayan

said his father was forced to help, as was his sister. Stevenson told Geethavengayan that the statements made by Kavetha in her PIF, submitted in support of her refugee application to Canada, did not suggest that the family was forced to be supporters of the LTTE. Stevenson asked Geethavengayan why Nalini could not attend the interview; he said that she could not get a pass and that the family would have given money to allow her to come, but they did not have it.

ISSUES

[26] The Applicants raise the following issues:

a. Whether the IPM's finding that they had not discharged their onus under section 11 was unreasonable;

b. Whether the IPM's finding that they were inadmissible under paragraph 34(1)(*f*) of the Act was unreasonable; and

c. Whether the reasons given by the IPM were inadequate;

d. Whether the RPD fettered its discretion refusing to waive a second interview with Geethavengayan.

STATUTORY PROVISIONS

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

3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la résente loi a pour objet :
…	…
(*h*) to protect the health and	(*h*) de protéger la santé des

safety of Canadians and to maintain the security of Canadian society;

Canadiens et de garantir leur sécurité;

(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;

(*i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité

…

…

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

…

…

18. (1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.

18. (1) Quiconque cherche à entrer au Canada est tenu de se soumettre au contrôle visant à déterminer s'il a le droit d'y entrer ou s'il est autorisé, ou peut l'être, á y entrer et à y séjourner.

…

…

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 :

(*a*) engaging in an act of espionage or an act of

a) être l'auteur d'actes d'espionnage ou se livrer à la

subversion against a democratic government, institution or process as they are understood in Canada;	subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(*b*) engaging in or instigating the subversion by force of any government;	*b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
…	…
(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).	*f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*)j, *b*) ou *c*).

STANDARD OF REVIEW

[28] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, 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.

[29] In *Ghirmatsion v Canada (Minister of Citizenship and Immigration)* 2011 FC 519, Justice Judith Snider held that the standard of review for issues of procedural fairness is correctness. She quotes, at paragraph 50, from the decision of Justice Stephen T. Goudge of the Ontario Court of Appeal in *Clifford v Ontario Municipal Employees Retirement System* 2009 ONCA 670:

> Where an administrative tribunal has a legal obligation to give reasons for its decision as part of its duty of procedural fairness, the question on judicial review is whether that legal obligation has been complied with. The court cannot give deference to the choice of a tribunal whether to give reasons. The court must ensure that the tribunal complies with its legal obligation. It must review what the tribunal has done and decide if it has complied. In the parlance of judicial review, the standard of review used by the court is correctness.

[30] The standard of review on the third issue is correctness. In *Zaki v Canada (Minister of Citizenship and Immigration)* 2005 FC 1066, Justice Snider held at paragraph 14 that the fettering of discretion is an issue of procedural fairness. Justice Richard Mosley made a similar finding in *Benitez v Canada (Minister of Citizenship and Immigration)* 2006 FC 461 at paragraph 133. Finally, the Federal Court of Appeal held in *Thamotharem v Canada (Minister of Citizenship and Immigration)* 2007 FCA 198 at paragraph 33 that the standard of review with respect to fettering of discretion is correctness. The standard of review on the fourth issue is correctness.

[31] As the Supreme Court of Canada held in *Dunsmuir* (above, at paragraph 50),

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[32] In *Ugbazghi v Canada (Minister of Citizenship and Immigration)* 2008 FC 694, Justice Eleanor Dawson found that the standard of review on a subsection 34(1) determination was reasonableness. As the determination of membership in an organization involves an evaluation of the evidence and an application of the relevant legal test to the facts as determined by the tribunal,

this suggests a reasonableness standard. Further, the assessment of admissibility is within the expertise of immigration officers, so deference is called for. (*Ugbazghi* at paragraph 36). See also *Poshteh v Canada (Minister of Citizenship and Immigration*) 2005 FCA 85, at paragraph 21. The standard of review on the second issue is reasonableness.

[33] As with a subsection 34(1) decision, an admissibility decision under section 11 is subject to deference and should be evaluated on a standard of reasonableness. See *Kumarasekaram v Canada (Minister of Citizenship and Immigration)* 2010 FC 1311, at paragraph 8. The evaluation of whether an officer is satisfied as to an applicant's admissibility is a decision which allows for a range of possible outcomes based on the evidence presented to the officer. The standard of review on the first issue is reasonableness.

[34] 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 Applicants

The Section 11 Finding of Inadmissibility Was Unreasonable

[35] The Applicants argue that the IPM's Decision that they were inadmissible under section 11 was unreasonably based on the fact that Geethavengayan did not attend the second interview required by the Respondent. Because Geethavengayan's non-attendance at the interview was a collateral matter to the Decision before the IPM, basing his Decision on this fact was unreasonable. The Applicants are not concerned with the information (or lack thereof) which could have been gleaned from a second interview. Rather, they argue that the Decision was based on Geethavengayan's non-attendance *per se*.

[36] In support of the argument that the IPM based his Decision on Geethavengayan's non-attendance at the interview, the Applicants quote from the Decision letter:

> Similarly, despite clear and consistent messaging that the son must be examined, we have received also a clear messaging [*sic*] that he does not wish to attend the required interview and that he be removed from the application. I conclude that I do not have a complete understanding of your background and I am not satisfied that you are not inadmissible in accordance with a11(1)

This quotation demonstrates that the principal concern of the IPM was Geethavengayan's non-attendance, rather than the substance of the application.

[37] The Applicants also rely on the 26 May 2009 CAIPS notes entry to support their position that the IPM unreasonably based his Decision on Geethavengayan's failure to attend the interview. That day's entry reads as follows:

> SPR's [sponsor] indicates in his letter (no date specified) that his BRO [brother] is in Denmark on a working visa and he is not willing to forgo that and come to INT [interview] in Colombo. Wants the INT to be done in any EU country otherwise SPR will remove BRO from the sponsorship.
>
> 1st there are serious security concerns on this case. INT cannot be waived. Secondly PA applied from SL [Sri Lanka], and program integrity is best served for processing of case in SL which includes the background review.
>
> Son in Denmark had gone to work there its [*sic*] not because of any other reason like he fears for his life to prevent him from complying with our requirements.
>
> SPR can choose whether BRO is accompanying or not, but as he is a DEP [dependent] child of PA he has to be examined.

The Applicants argue that this passage shows that the IPM was focussed on Geethavengayan's non-attendance at the interview when making his determination under section 11.

[38] The Applicants also argue that the Respondent's insistence on a second interview with Geethavengayan was unreasonable and did not take into account his refugee status in France or his fear of return to Sri Lanka. In addition, the Applicants argue that the IPM fettered his discretion in refusing to waive the second interview and in failing to appreciate that he had the discretion to waive the second interview.

[39] The Applicants note that the Respondent was made aware of Geethavengayan's refugee status in France on three occasions: 8 April 2010, 11 June 2010, and 14 June 2010. The Applicants

assert that the CAIPS notes do not indicate that any consideration was given to Geethavengayan's refugee status in France or his alleged fear of return to Sri Lanka. The Respondent was made aware of Geethavengayan's refugee status almost two years after he was convoked for a second interview on 28 April 2008. However, the Applicants argue that it was unreasonable for the IPM not to consider waiving the second interview based on Geethavengayan's refugee status, because he received that information before the Decision was finalized on 15 June 2010.

[40] The Applicants further argue that the section 11 Decision was unreasonable because the IPM did not appreciate that he had the discretion to waive the second interview and so fettered his discretion. The Applicants rely on Justice Eleanor Dawson's examination of the standard of review applicable to a decision to require an interview in *Qazi v Canada (Minister of Citizenship and Immigration)* 2006 FC 1177. They say that *Qazi* stands for the proposition that the IPM had the discretion to waive the interview. Paragraph 16 of *Qazi* reads as follows:

> *Su* was a decision rendered in respect of the legislative provisions contained in the former Act and Regulations. However, the current legislative regime continues to vest a discretion in an officer to require attendance at an interview. In determining the standard of review to be applied to the exercise of that discretion, it is necessary to consider the four factors that comprise the pragmatic and functional analysis (the existence of a privative cause, relative expertise, the purpose of the provision and the Act, and the nature of the question). Having regard to those factors:
>
> > …
> >
> > (4) The decision whether to require interview is highly discretionary and fact-based. However, subsection 16(1) of the Act requires an applicant to produce "all relevant evidence and documents that [an] officer reasonably requires". This means that the decision to require information is not completely open-ended. It suggests an intent that there be some review of an officer's decision.

[41] Though the decision had already been taken on 28 April 2008 to require a second interview, the IPM had the discretion to waive the required interview once the Respondent was notified in 2010 of Geethavengayan's refugee status. By failing to appreciate he had this discretion, the IPM unlawfully fettered his discretion.

[42] In support of this line of argument, the Applicants quote from the letter provided to The Hon. John McCallum, MP in response to his inquiry on the file:

> In regard to processing of this case of dependant son Mr. Geethavengayan, as earlier indicated whether accompanying or not, dependant son Geethavengayan will also have to meet all statutory requirement and be examined with the Principal Applicant and her daughter. The dependant son cannot be exempt from this examination.

Because the Respondent said that the son could not be exempt from the requirement of the interview, this shows that the discretion to waive the interview was fettered.

[43] The Applicants also argue that the Respondent failed to appreciate that there was discretion to waive the interview requirement for non-accompanying family members. They point to the Immigration Manual, section OP2 (*Processing Members of the Family Class*) in support of this discretion to waive:

> **Section 5.11**
>
> All family members, whether accompanying the Principal Applicant or not, are required to be examined unless an officer decides otherwise. Normally, an inadmissible family member, whether accompanying or not, would render the Principal Applicant inadmissible. There are, however, two exceptions to this rule described in R23. The first is the separated spouse of the Applicant and the second is where a child of the Applicant who is in the legal custody of someone other than the Applicant or an

accompanying family member of the Applicant, or where someone other than the Applicant or accompanying family member of the Applicant is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law.

[…]

If these family members are genuinely unavailable or unwilling to be examined, the consequences of not having them examined should be clearly explained to the Applicant and reflected in the CAIPS notes. Officers may wish to have Applicants sign a statutory declaration indicating they understand the consequences of failing to have the family member examined.

Section 5.12

Under both the previous legislation and under IRPA, both the Applicant and the Applicant's family members, whether accompanying or not, must meet the requirements of the legislation. There are no exceptions to the requirement that all family members must be declared. With few exceptions, this also means that all family members must be examined as part of the process for achieving permanent residence.

Officers should be open to the possibility that a client may not be able to make a family member available for examination. If an Applicant has done everything in their power to have their family member examined but has failed to do so, and the officer is satisfied that they are aware of the consequences of this (i.e., no future sponsorship possible), then a refusal of their application for non-compliance would not be appropriate.

Officers must decide on a case-by-case basis using common sense and good judgment whether to proceed with an application even if all family members have not been examined. Some scenarios where this may likely occur include where an ex-spouse refuses to allow a child to be examined or an overage dependant refuses to be examined. Proceeding in this way should be a last resort and only after the officer is convinced that the Applicant cannot make the family member available for examination**.** The Applicant themselves cannot choose not to have a family member examined.

[44] These sections demonstrate the Immigration Section had the discretion to waive the interview. Since the Respondent continued to insist on a second interview throughout the application process, he must have fettered his discretion.

Paragraph 34(1)(*f*) Decision Was Unreasonable

[45] The Applicants argue that the IPM's finding that the family was inadmissible under paragraph 34(1)(*f*) was unreasonable because he did not consider whether the Applicants had been coerced into doing things in support of the LTTE. In the CAIPS notes on the 2007 Interview with the Principal Applicant, Stevenson noted that the Principal Applicant said she supported the LTTE goals of a homeland and their tactics of force. He also noted that she said she had cooked and made sweets for the LTTE members. He did not make any notes about coercion in these activities. The CAIPS notes also show that, during the interview, Geethavengayan said he had dug graves and bunkers and had done odd jobs for the LTTE. When asked if his family supported the LTTE, Geethavengayan said that they did but "it was an obligation."

[46] The Applicants also note that, in support of the application for judicial review, the Principal Applicant submitted a document purporting to have been written (though not sworn) sometime in 2011. In this document, submitted as an exhibit to the affidavit of the translator, the Principal Applicant states that in the 2007 Interview she told Stevenson that all the help her family had given the LTTE was coerced because they lived in an LTTE controlled area. Geethavengayan has also provided the Court with an affidavit in which he swears that at the 2007 Interview he told Stevenson

that his family's participation in LTTE activities was forced and that they had no option because they lived in an LTTE controlled area.

[47] Based on these affidavits and the CAIPS notes, the Applicants argue that the IPM ignored evidence that they had been coerced into participating in the activities of the LTTE when he decided that the Applicants were inadmissible under paragraph 34(1)(*f*). At the time they filed their Memorandum of Argument, there was no supporting affidavit from Stevenson (though an affidavit from him has now been filed) so the Applicants argue that their affidavit evidence should be preferred to the CAIPS notes to prove what occurred during the 2007 Interview. Since there was evidence before the IPM that their participation in LTTE activities was forced, it was unreasonable for him not to consider coercion in making the determination under paragraph 34(1)(*f*).

The Reasons Given Were Inadequate

[48] The Applicants also argue that, because the Decision does not disclose an individualized assessment or the required institutional link to a group that engages in the activities listed in paragraph 34(1)(*a*) through (*c*), the reasons are inadequate. The Applicants say that the IPM did not find that they were actual members of the LTTE, but rather imputed membership to them based on the statements they made at the 2007 Interview. This imputed membership was also based on the PIF Kavetha filed with her refugee application in 1999. In her PIF, Kavetha wrote that:

> My father was a strong LTTE supporter. He used his Lorry to transport goods for Tigers. He is well known as "*Tiger Kuncha Rasa"* (Small Tiger King). He was appointed as the head of the Mediation Committee of *Thunukkai* by Tigers. My father died on July 4, 1998. While was fighting for his life he refused to be transferred from *Malavi* Hospital to *Anuratha Pura* Hospital because his involvement with Tigers is well known. [italics in original]

[49] The Applicants say that, where an officer imputes membership in an organization but does not find actual membership in an organization, there must be evidence of some kind of institutional link. They rely on *Sinnaiah v Canada (Minister of Citizenship and Immigration)* 2004 FC 1576, where Justice James O'Reilly said at paragraphs 4-6:

> A person is inadmissible to Canada if there are reasonable grounds to believe he or she is a member of a terrorist group (ss. 33, 34, *Immigration and Refugee Protection Act*, S.C. 2001, c. 27). Both parties in this case accept that the LTTE is a terrorist group.
>
> The requirement for "reasonable grounds" represents a low, yet meaningful, evidentiary threshold. Some evidence of actual membership must exist, although it need not satisfy the civil standard of a balance of probabilities: *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.); *Thanaratnam v. Canada (Minister of Citizenship and Immigration)* 2004 FC 349, [2004] F.C.J. No. 395 (FC)(QL);
>
> To establish "membership" in an organization, there must at least be evidence of an "institutional link" with, or "knowing participation" in, the group's activities: *Chiau*, above; *Thanaratnam*, above.

[50] The Applicants further rely on *Villegas v Canada (Minister of Citizenship and Immigration)* 2011 FC 105 which, they argue, stands for the proposition that a tribunal must engage in an analysis of the quality of membership when imputing membership. The Applicants say that neither the refusal letter or the CAIPS notes show how the IPM analysed their membership in the LTTE. They quote the CAIPS notes at length:

> Further, there is strong evidence on file, as a matter of direct statements from family members, that the mother, the son, and the daughter have made active contributions to the LTTE, a listed terrorist organization. They have made statements that they support the cause, participated in combat training, and, in the case of the daughter, been provided protection in an LTTE safe house. There is no need to conduct further procedural fairness on these issues, the information results from direct statements made by the Applicants. Though the Applicants may not have a card that says they are LTTE members, their actions demonstrate active support both

> behaviourally and spiritually. In accordance with A34(f) [*sic*] they are inadmissible to Canada.

[51] The Applicants say that the quoted passage demonstrates that the reasons of the IPM do not disclose how he assessed each Applicant's individual membership in the LTTE. They say that the reasons do not show how the IPM considered all the factors relevant to determine a person's membership in an organization.

[52] As an example of this failure to disclose reasons, the Applicants assert that it is unclear how the IPM came to the conclusion that Nalini was an LTTE member from the fact that she stayed at an LTTE safe house. Further, they argue that the reasons disclose insufficient analysis as to how the Principal Applicant's actions of making food and sweets, as well as her statements that she supported the cause of the LTTE make her a member of the LTTE. Because the reasons do not show a consideration of the quality of each Applicant's membership in the LTTE, they are inadequate.

[53] In making the arguments regarding the adequacy of reasons, the Applicants also raise an argument about the reasonableness of the IPM's conclusions. They assert that the IPM's Decision was based on the statements of the sponsor in her PIF and the actions of the Principal Applicant's deceased husband. Basing the Decision that they were members of an organization under paragraph 34(1)(*f*) on the actions of these people who were not parties to the application was unreasonable.

The Respondent

Section 11 Determination Was Reasonable

[54] The Respondent argues that it was reasonable for the IPM to conclude, based on all the evidence that was before him, that the Applicants had not met their burden of satisfying him that they were not inadmissible to Canada. The Respondent notes that the Applicants had more than sufficient time to satisfy the onus on them as the application was in process for nearly eight years.

[55] The Respondent also notes that, at the time of the 2007 Interview, the Respondent was willing to move the date of the initial interview with all three Applicants from July to September 2007. In addition, Stevenson was willing to proceed with the interview of the Principal Applicant and Geethavengayan, in spite of the fact that Nalini could not attend. Having heard what the Principal Applicant and Geethavengayan had to say, Stevenson determined that there were security concerns with the Applicants and scheduled a second interview for 12 June 2008. On 31 July 2009, the Respondent requested a copy Geethavengayan's passport and visa from Denmark so that the application could be processed. These documents were not produced.

[56] It was not unreasonable for the IPM to refuse the request to waive the interview. The Applicants had not been forthcoming with the information requested of them, having not provided any information within the sixty-day deadline set in the letter to the sponsor of 30 September 2009. Further, the Respondent notes, the Applicants did not make him aware of Geethavengayan's refugee status in France until 16 months after it had been granted. Having not made him aware of Geethavengayan's refugee status in a timely manner, it was not reasonable for the Applicants to expect a last-minute accommodation for the second interview.

[57] The Respondent argues that the OP2 guidelines do not assist the Applicants' position because they apply to the situation where an included dependent is not available for examination

because of circumstances beyond the applicant's control. This is not such a situation. In this case, it was entirely within the Applicants control to make Geethavengayan available for an interview, yet they did not do so. Thus, the ordinary requirement that all family members be examined for the application remained.

Subsection 34(1) Determination Was Reasonable

[58] The Respondent says that, based on all the evidence and the law before him, the IPM's determination that the Applicants were members in an organization within the meaning of subsection 34(1) was reasonable. As noted above, the Principal Applicant and Geethavengayan made several statements during the 2007 Interview about the things that they did for and with the LTTE. Further, the Principal Applicant said that her husband had helped the LTTE, and that he had been a member of one of the LTTE committees. Both the Principal Applicant and Geethavengayan said that their family supported the LTTE. Based on this evidence, as well as the statements in Kavetha's PIF, it was open to the IPM to conclude that the Applicants were members of the LTTE, an organization which engaged in the activities listed in paragraphs 34(1)(*a*) through (*e*) of the Act.

[59] In response to the Applicants' contention that the CAIPS notes do not accurately reflect the conduct and contents of the 2007 Interview, the Respondent argues that the CAIPS notes should be preferred. He notes that the Applicants' affidavits were produced after the application for judicial review was commenced. He also notes that the affidavits were produced nearly four years after the interview in question was conducted, while the CAIPS notes were recorded contemporaneously with the interview in question. The Respondent asserts that the affidavits were not prepared based

on contemporaneous notes. The Respondent also points out that the document submitted by the Principal Applicant as an exhibit to the affidavit of the translator was not commissioned or dated.

[60] Because the CAIPS notes ought to be preferred to the affidavits of the Applicants, the Respondent argues that there was no evidence before the IPM with respect to coercion. It was therefore reasonable for the IPM not to consider whether the Applicants' LTTE activities were coerced.

[61] The Respondent also argues that the definition of "member" in paragraph 34(1)(*f*) is broad enough to capture the activities of the Applicants and make them inadmissible under this section. The Respondent relies on *Poshteh*, above, in which Justice Marshall Rothstein held at paragraph 29 that "'member' under the Act should continue to be interpreted broadly." Justice Rothstein further noted that "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." The Respondent further relies on *Kanendra v Canada (Minister of Citizenship and Immigration)* 2005 FC 923 for the proposition that membership need not be limited to actual or formal members. Since the definition of membership is broad, it was large enough to capture the activities of the Applicants; the IPM's finding that they were members of the LTTE was reasonable.

The Reasons Provided Were Adequate

[62] The Respondent says that the reasons given by the IPM are adequate when they are examined with the purposes for providing reasons in mind. Relying on *Ragupathy v Canada*

(Minister of Citizenship and Immigration) 2006 FCA 151, the Respondent argues that reasons ought to be examined in light of their purposes. Reasons allow the court to ensure that decision-makers have focussed on the factors they must consider and enable the parties to exercise the right to judicial review. Further, reasons should be read with a view to understanding, rather than examined clause-by-clause looking for errors (*Ragupathy*, at paragraph 15).

[63] Relying on *Farkhondehfall v Canada (Minister of Citizenship and Immigration)* 2010 FC 471, the Respondent also says that the reviewing court can consult the evidence referred to by a tribunal to flesh out the reasons given. Because the CAIPS notes disclose the evidence that the IPM relied on, and that evidence supported his conclusions, the Respondent argues that, taken together, the letter and the CAIPS notes do provide adequate reasons.

ANALYSIS

[64] Even if I were to agree with the Applicants that the Decision contains reviewable errors with regard to section 11 of the Act, it still seems to me that this application cannot succeed. The IPM goes on to make a further finding under paragraph 34(1)(*f*) of the Act that the Applicants are inadmissible. This finding is set out and explained in a summary fashion in the refusal letter of 15 June 2010, but it is given significant elaboration in the CAIPS notes that are also part of the Decision. See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 44, *Mehrabani v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 345 at paragraph 5, and *Kindie v Canada (Minister of Citizenship and Immigration)* 2011 FC 850 at paragraph 5.

[65] The CAIPS notes contain details of the interviews conducted with the Principal Applicant and Geethavengayan in 2007. The Principal Applicant's daughter, Nalini, was never interviewed because she could not get a pass to attend.

[66] In any event, after a significant period of time and lengthy correspondence aimed at arranging further interviews with the Principal Applicant and Geethavengayan, the IPM concluded that a decision on admissibility could be made from the evidence on file. This is how he summarized the situation in the CAIPS notes:

> Further, there is strong evidence on file, as a matter of direct statements from family members, that the mother, the son, and the daughter had made active contributions to the LTTE, a listed terrorist organization. They have made statements they support the cause, participated in combat training, and, in the case of the daughter, been provided protection in a LTTE safe house. There is no need to conduct further procedural fairness on these issues, information results from direct statements made by the Applicants. Though the Applicants may not have a card that says they are LTTE members, their actions demonstrate active support both behaviourally and spiritually. In accordance with A34(f), they are inadmissible to Canada.

[67] It is possible, in my view, to take issue with what the evidence reveals concerning the contributions that Nalini and Geethavengayan have made to the LTTE. However, the Principal Applicant openly acknowledged her contributions when she was interviewed. She said that:

a. She had lived for a long period in an area controlled by the LTTE;

b. She and other family members had worked for the LTTE (although the participation of Nalini and Geethavengayan is not entirely clear);

c. Her daughters did clerical work and cooking for the LTTE. They did this for four or five hours per day for three days per week on and off;

d. Ponnampalam used to help the LTTE. He would bring things for them and use his lorry to help them. He also provided monetary help;

e. Ponnampalam was an LTTE supporter and was called “Tiger Kuncha Rasa” which means “Small Tiger King”;

f. The LTTE had appointed Ponnampalam as head of the Mediation Committee of Thunukkai because of his involvement with the LTTE;

g. She cooked for the LTTE and she gave them food and sweets;

h. She, her deceased husband, and “her kids” are supporters of the LTTE;

i. Following Ponnampalam’s example, she and her children have continued to support the LTTE;

j. She supports the LTTE struggle for a homeland;

k. She supports the LTTE’s acts of force and combat for a homeland.

[68] It seems to me that this evidentiary base provides clear support for a conclusion that the Principal Applicant, at least, is a voluntary supporter of the LTTE, just as her husband was, and that she has provided active support to the LTTE struggle for a homeland and approves of the LTTE’s use of force in combat to achieve this goal.

[69] The Applicants seek to discredit this rather obvious conclusion in several ways. First of all, the Principal Applicant has filed an affidavit with this application in which she says, *inter alia*, that

> I also told [Stevenson] at my interview that all the help we were providing to the LTTE was because we had no other options. It was not voluntary service on any of our part, but rather forced, because we lived in an LTTE controlled area.

[70] For some reason that is unexplained, this affidavit is unsworn. In any event, the affidavit was prepared some three years after the interview and there is no evidence that it was prepared based on notes made contemporaneously with the interview or immediately after. The CAIPS notes were made at the time of the interview by an officer who has no personal interest in the outcome of this litigation. That officer has also filed an affidavit attesting to the contents of the CAIPS notes.

[71] Given the acknowledgement recorded in the CAIPS notes that the Principal Applicant is a continuing supporter of the LTTE and approved of their use of force to achieve a homeland, in order to accept the Principal Applicant's affidavit evidence on this point, I would have to accept that Stevenson deliberately concocted the CAIPS notes because they so clearly speak to non-coercive support for, and contribution to, the LTTE by the Principal Applicant. Needless to say, I accept the CAIPS notes as an accurate account of what transpired at the interview and reject the Principal Applicant's belated attempts to change her story and discredit the interview process. See *Khela v Canada (Minister of Citizenship and Immigration)* 2010 FC 134 at paragraph 18; *Sehgal v Canada (Minister of Citizenship and Immigration)* 2001 FCT 212 at paragraph 7, and *Paracha v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1786 at paragraphs 6 and 7. The Principal Applicant is now aware of the significance of what she acknowledged at the interview and wishes to avoid the obvious conclusion the IPM drew. She gives no explanation other than that the CAIPS notes fail to record that her support and contributions were coerced. This suggests to me that the Principal Applicant is fully aware of why the visa was refused in her case and the reasons are adequate in creating that awareness.

[72] The Principal Applicant also argued at the hearing of this application that the failure to examine Geethavengayan a second time renders the conclusions regarding subsection 34(1)

problematic, so that the matter needs to be returned for reconsideration. Even if I were to accept that the failure to re-examine Geethavengayan impacts the IPM's conclusions about him and his sister, the direct evidence from the Principal Applicant concerning her own support for the LTTE is absolutely clear and, in my view, did not require a further examination of Geethavengayan for a final decision on the inadmissibility of the Principal Applicant.

[73] Finally, the Applicants say that the IPM failed to consider coercion, and this includes coercion of the Principal Applicant. This is alleged by Geethavengayan in the affidavit he has filed for this judicial review application and he also raised it when he was interviewed.

[74] On this point, the CAIPS notes of the interview of Geethavengayan reveal the following:

a. He refused to concede that his father had been a very willing supporter of the LTTE and said that his father would go to the LTTE "instead of sending his children." This is a contradiction of the Principal Applicant's account of the father's role, and that she and the children followed on and provided active support for the LTTE. When Stevenson pressed him further on the father's support, Geethavengayan immediately backed off and changed his response: "I know he helped them, but don't remember a lot – I was 14 when he died." Geethavengayan concedes he is no authority on what his father did for the LTTE even though he was initially adamant that his father was not a willing supporter;

b. Geethavengayan was then confronted with what Stevenson said the Principal Applicant had said about Nalini. He again said that Nalini did not want to join the LTTE and had not actively participated in support of the LTTE, but he also

conceded he had been away in India and that he had not talked to Nalini since January;

c. Stevenson also confronted him with evidence from his sister in Canada that she is a loyal supporter of the LTTE and that the father was a strong supporter. Again Geethavengayan says that his father was forced to help as well as his sister. Stevenson then points out that Kavetha's evidence in her PIF did not suggest that she and her father were forced supporters.

[75] None of this really casts doubt upon the clear evidence of the Principal Applicant concerning her own uncoerced support for the LTTE and that organization's tactics. The later revisionist affidavits filed with this application do not help. None of them explain why the Principal Applicant would have said what she did say at the interview if she had been coerced by the LTTE.

[76] When the IPM came to review the file and make the Decision, he accurately characterized the Principal Applicant's evidence on point: "Tells us her husband was an active LTTE supporter and she is an active supporter and believes their cause." The IPM reasonably concluded that the evidence shows the Principal Applicant has made an active contribution to the LTTE – a listed terrorist group – and her actions demonstrate active support, both behaviourally and spiritually. The Principal Applicant's own direct evidence makes it clear that her support and contribution to the LTTE was not coerced. There was no need for the IPM to go further.

[77] The Court cannot say that the IPM was unreasonable with regard to his paragraph 34(1)(*f*) conclusions about the Principal Applicant, or that he failed to provide adequate reasons on this point. After reviewing the refusal letter and CAIPS notes, I find that the Principal Applicant was

individually assessed on her level of involvement. The evidence justifies the findings that she was a member of the LTTE in accordance with the extended meaning of that term recognized in the jurisprudence. See *Sinnaiah*, above; *Villegas*, above; and *Poshteh*, above. Her more recent affidavit makes it clear that she is fully aware of why a negative decision was made in her case, because she now wants to claim that her approval of LTTE aims and methods was coerced. Coercion occurs when a person does not approve of a cause but is compelled to contribute notwithstanding that disapproval. The whole tenor of the Applicant's account was that she was a willing supporter, just as her husband had been. As a willing supporter, she was not coerced. That being the case, it seems to me that there is no point in proceeding with an analysis of other points raised by the Applicants, or in sending the matter back for reconsideration because the reasonable finding by the IPM that the Principal Applicant supported the LTTE means that the sponsorship application must fail.

[78] Both counsel agree that there is no question for certification and the Court concurs.

<u>JUDGMENT</u>

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-6916-10
STYLE OF CAUSE:	KAMALA DEVI SELLAPPHA NALINI SELLAPPHA GEETHAVENGAYAN SELLAPPHA - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 8, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 29, 2011

APPEARANCES:

Lorne Waldman	**APPLICANTS**
Tamrat Gebeyehu	**RESPONDENT**

SOLICITORS OF RECORD:

LORNE WALDMAN Barrister and Solicitor Waldman and Associates Toronto, Ontario	**APPLICANTS**
Myles J. Kirvan, Q.C. Deputy Attorney General of Canada	**RESPONDENT**