

Federal Court



Cour fédérale

Date: 20131113

Docket: IMM-1414-13

Citation: 2013 FC 1146

Ottawa, Ontario, November 13, 2013

PRESENT: THE CHIEF JUSTICE

BETWEEN:

B074

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board. In its decision, the IAD found the Applicant to be inadmissible to Canada on security grounds for being a member of the Liberation Tigers of Tamil Eelam [LTTE], an organization that engages in terrorism, as contemplated by paragraphs 34(1)(c) and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant submits that, in reaching its decision, the IAD erred by:

- a. Adopting the wrong legal test for defining membership in a terrorist organization, or by failing to reasonably consider and weigh factors that it was required to assess;
- b. Failing to consider the defence of duress; and
- c. Reaching an unreasonable decision.

[3] Accordingly, the Applicant seeks an Order setting aside the IAD's decision and referring the matter back to a different member of the IAD for redetermination in accordance with such directions as may be considered appropriate by this Court.

[4] For the reasons that follow, I agree that the IAD committed the first of the errors alleged by the Applicant. This Application will therefore be granted.

I. Background

[5] The Applicant, B074, is a 27 year old Tamil citizen of Sri Lanka who arrived in Canada in August 2010 aboard the MV Sun Sea and immediately filed a refugee claim.

[6] In Sri Lanka, he lived with his family in an area controlled by the Sri Lankan government.

[7] In June 2006, he traveled from that area to the LTTE-controlled city of Kilinochchi to be with his uncle, who had suffered a stroke, had been paralyzed and needed help running his store.

[8] The Applicant was able to travel to Kilinochchi because of a cease-fire that existed at that time between the LTTE and the Sri Lankan government. When the cease-fire broke down, he claims that he was unable to return to his home.

[9] The Applicant helped in his uncle's store for approximately one year, at which time he obtained a job with an entity called Road Construction Private Company Ltd [Company]. It is common ground between the parties that the operations of the Company were controlled by the LTTE during the period of the Applicant's employment, namely, approximately July 2007 to August 2008. It is also common ground that the Applicant obtained that job through a person named Sinnappa Master, an acquaintance of his aunt, to avoid front-line service with the LTTE. It appears to be common ground that Mr. Master was a member of the LTTE who was responsible for the issuance of permits and passes to allow individuals to travel out of LTTE-controlled territory.

[10] In 2009, after his aunt and uncle were killed as a result of shelling, the Applicant left the conflict region and moved to a refugee camp. He then escaped to Malaysia, and from there, he traveled to Thailand, where he obtained passage on the MV Sun Sea.

[11] After he arrived in Canada, immigration officials alleged that he was inadmissible for being a member of a terrorist organization, namely, the LTTE. They therefore directed him to an admissibility hearing before the Immigration Division [ID] of the Immigration and Refugee Board.

[12] Before both the ID, it was common ground between the parties that the LTTE is an organization that there are reasonable grounds to believe is engaged, has engaged or will engage in

acts referred to in paragraphs 34(1)(a), (b) or (c) of the IRPA, including terrorism. The key issue was therefore whether the Applicant was a “member” of that organization.

[13] The ID found that there are reasonable grounds to believe that the Company was controlled by the LTTE at the relevant time. However, it rejected the suggestion that the mere fact of working for an LTTE-controlled company is sufficient to constitute membership in the LTTE, for the purposes of paragraph 34(1)(f) of the IRPA. After identifying and balancing factors that weighed in favour and against a conclusion that there are reasonable grounds to believe that the Applicant was a member of the LTTE, the ID concluded that he had not, in fact, been a member of that organization.

[14] The Minister appealed that decision to the IAD pursuant to subsection 63(5) of the IRPA.

II. The Decision Under Review

[15] The sole issue in dispute before the IAD was whether the Applicant was a member of the LTTE.

[16] In the course of addressing that issue, the IAD agreed with the Minister that, “if the road construction company was an LTTE operation and the employment was effectively in lieu of the respondent engaging in the front lines of battle, the employment amounts to informal membership in the LTTE.”

[17] Ultimately, after further analysis, the IAD concluded that the Company was in fact controlled or effectively operated by the LTTE during the relevant period, and that the Applicant's employment in the Company amounted to informal membership in the LTTE.

[18] In addition, the IAD briefly addressed and rejected the Applicant's position that he joined the company under duress.

III. Relevant Legislation

[19] Pursuant to paragraph 34(1)(f) of the IRPA, a foreign national is inadmissible to Canada on security grounds if he or she is a member of an organization that there are reasonable grounds to believe engages in, has engaged in, or will engage in terrorism or certain other conduct.

[20] Pursuant to section 33 of the IRPA, the facts that constitute inadmissibility under sections 34 to 37 of the IRPA include, among other things, facts for which there are reasonable grounds to believe they have occurred, are occurring or may occur. This includes the fact of membership in an organization.

[21] The full text of sections 33 and 34 are reproduced in Appendix 1 to these reasons.

IV. Issues

[22] The Applicant has raised the following three issues:

- i. Did the IAD err by adopting the wrong legal test for defining membership in a terrorist organization, or by failing to reasonably consider and weigh factors that it was required to assess?
- ii. Did the IAD err by failing to consider the defence of duress?
- iii. Did the IAD reach an unreasonable decision?

V. Standard of Review

[23] The first issue raised by the Applicant has two components. The meaning of the term “member” in paragraph 34(1)(f) is a question of statutory interpretation that is reviewable on a standard of reasonableness. This is because the IRPA is the IAD’s “home statute” and the question of interpretation does not fall into any of the categories of questions to which the correctness standard continues to apply (*Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 SCR 654, at para 30 [*Alberta Teachers*]; *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, at para 23 [*Poshteh*]; *Kanapathy v Canada (Minister of Public Safety and Emergency Preparedness and Minister of Citizenship and Immigration)*, 2012 FC 459, at para 29 [*Kanapathy*]; *Basaki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 397, at para 17 [*Basaki*]; *Motehaver v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 141, at para 11 [*Motehaver*]; *Sepid v Canada (Minister of Citizenship and Immigration)*, 2008 FC 907, at para 13 [*Sepid*]; *Ugbazghi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, at para 36 [*Ugbazghi*]). Whether the IAD erred by failing to reasonably consider and weigh factors that it was required to assess is a question of mixed fact and law that is also reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*,

2008 SCC 9, at paras 51-53 [*Dunsmuir*]; *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness, Minister of Citizenship and Immigration)*, 2010 FC 957, at para 66 [*Toronto Coalition*]).

[24] The second issue raised by the Applicant, concerning the defence of duress, also has two components, namely, the test for the defence of duress and whether the facts in this case were appropriately applied to that test. In my view, to the extent that the test for the defence of duress has been settled in the jurisprudence (*Oberlander v Canada (Attorney General)*, 2009 FCA 330, at para 25), it is not open to the IAD to apply a different test. Accordingly, the issue of whether the IAD applied the proper test for the defence of duress is reviewable on a standard of correctness (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004, at para 22). However, the IAD's application of that test to the facts of this case is reviewable on a standard of reasonableness (*Dunsmuir*, above).

[25] The third issue raised by the Applicant, concerning the reasonableness of the IAD's decision, is reviewable on a standard of reasonableness.

VI. Analysis

A. Did the IAD err by adopting an incorrect test for membership in a terrorist organization or by failing to reasonably consider and weigh factors that it was required to assess?

[26] The Applicant submits that the IAD erred in concluding that the mere fact of working for a company that is controlled by the LTTE is a sufficient basis upon which to conclude that the person in question is or was a member of the LTTE. The Applicant also asserts that the IAD erred by

failing to reasonably consider and balance factors that it was required to assess. I agree that the IAD appears to have committed both of these errors. In any event, it is clear that it committed the latter one.

[27] It is settled law that the term “member,” as it is used in section 34 of the IRPA, must be given a broad meaning (*Poshteh*, above, at paras 27-29; *Kanapathy*, above, at para 33; *Jalloh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 317, at paras 10, 34; *Kanendra v Canada (Minister of Citizenship and Immigration)*, 2005 FC 923, at para 23 [*Kanendra*]).

[28] The jurisprudence has not yet established a precise and exhaustive definition of the term “member” (*Poshteh*, above; *Toronto Coalition*, above, at para 118; *Ugbazghi*, above, at para 37). However, it is clear that actual or formal membership in the organization in question is not required; informal participation or support for a group may suffice (*Kanapathy*, above, at paras 33-34; *Sepid*, above, at para 17), depending on the nature of that participation or support.

[29] In determining whether a foreign national is a member of an organization described in paragraph 34(1)(f), some assessment of that person’s participation in the organization in question must be undertaken (*Toronto Coalition*, above, at para 118; *Kanendra*, above, at para 24). In this regard, three criteria that should be considered include the nature of the person’s involvement in the organization, the length of time involved, and the degree of the person’s commitment to the organization’s goals and objectives (*TK v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 327, at para 105 [TK]; *Toronto Coalition*, above, at para 130; *Basaki*, above

at para 18; *Sepid*, above, at para 14; *Ugbazghi*, above, at paras 44-45). Where there are some factors which suggest that the foreign national was in fact a member and others which suggest the contrary, those factors must be reasonably considered and weighed (*Toronto Coalition*, above, at para 118; *Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339, at para 20 [*Thiyagarajah*]).

[30] The standard of proof applicable in determining whether a foreign national is or was a member of an organization that there are reasonable grounds to believe engages in, has engaged in, or will engage in terrorism, as contemplated by paragraphs 34(1)(c) and (f) of the IRPA, is low. In general, the evidence must establish “more than mere suspicion, but less than [what is required by] the standard applicable in civil matters of proof on the balance of probabilities” (*Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, at para 114 [*Mugesera*]). This test will be met where there is an objective basis, based on compelling and credible information, for the belief that (i) the person is or was in fact a member of the organization, and (ii) that the organization does, did or will engage in terrorism (*Mugesera*, above; *Kanapathy*, above, at para 32; *Motehaver*, above, at paras 14-16; *Basaki*, above, at para 18).

[31] It is common ground between the parties that the LTTE is an organization that there are reasonable grounds to believe engages in, has engaged in, or will engage in terrorism. It also appears to have been common ground that the Applicant was not a formal member of the LTTE, in part because he did not receive military training or engage in the front lines of battle. Accordingly, the only question addressed by the IAD was whether the Applicant was an informal “member” of the LTTE.

[32] In its decision, the IAD noted that the Applicant provided inconsistent evidence regarding whether the Company was controlled by the LTTE. In his letter to the United Nations High Commissioner for Refugees [UNHCR], the Applicant unambiguously stated that he worked for the LTTE (Applicant's Record, p 52). The IAD acknowledged that the contents of that letter were based on advice that he received about what to say. Nevertheless, the IAD found that this evidence was consistent with the Applicant's responses to several questions posed during his initial interview with the Canada Border Services Agency [CBSA] on August 29, 2010, when he characterized his employment as having been for "an administration section [of the LTTE] who were involved in the road construction" (Applicant's Record, p 63). In reaching this finding, the IAD acknowledged that the information provided by the Applicant during that interview was not entirely clear in places. However, it found that there was no material lack of clarity upon reading the Applicant's responses as a whole.

[33] The IAD proceeded to determine that this evidence was more reliable than the testimony given by the Applicant during proceedings before the ID and the IAD, when he took the position that the Company was controlled by the government. In this regard, the IAD stated that it was more likely than not that the allegation of inadmissibility to Canada based on the Applicant's association and employment with the LTTE had influenced his later testimony. In any event, the IAD found that the available evidence regarding the LTTE's control of the region in which the Applicant lived and worked substantially excluded the possibility that the Company was controlled by the government and that the government would have deducted funds from employees' salaries for the LTTE, as the Applicant alleged.

[34] In my view, these findings were not unreasonable. They were well “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law,” and were appropriately transparent, intelligible and justified (*Dunsmuir*, above, at para 47). As an aside, I note that the ID also concluded that there are reasonable grounds to believe that the Company was controlled by the LTTE. In addition, during the hearing of this Application, and solely for the purposes of this Application, the Applicant conceded that the Company was controlled by the LTTE.

[35] However, to the extent that the IAD appears to have concluded, that the Applicant was an informal member of the LTTE, largely based on the mere fact that he worked for the LTTE to avoid serving on the front lines of battle, it erred.

[36] At paragraph 17 of its decision, the IAD stated: “I agree with the [Respondent] that, if the [Company] was an LTTE operation and the employment was effectively in lieu of the [Applicant] engaging in the front lines of battle, the employment amounts to informal membership in the LTTE.” Later in its decision, at paragraph 19, the IAD gave the following reasons for concluding that the Applicant was an informal member of the LTTE:

- i. The Applicant obtained his employment in the Company through a prominent member of the LTTE (Mr. Master);
- ii. He was paid by the LTTE and left that employment together with other employees of the Company when the Sri Lankan army advanced into the region;

- iii. He told the CBSA shortly after arriving in Canada that the Company was an LTTE organization and that he worked there in lieu of having to serve on the front lines of battle;
- iv. In his letter to the UNHCR, he identified the Company as an LTTE institution and stated that he worked there instead of engaging at the front lines.

[37] The foregoing reasons, taken alone, did not provide a sufficient basis upon which to reasonably conclude that the Applicant was a member of the LTTE. In brief, those reasons failed to take account of the nature of the Applicant's involvement in the Company or the degree of his commitment to the LTTE's goals and objectives, as required by the jurisprudence mentioned at paragraphs 28 and 29 above, which I endorse.

[38] Later in its decision, the IAD briefly mentioned some of the additional evidence that was relevant to the issue of his membership in the LTTE. It did this in the context of explaining the basis for its conclusion that the Applicant's statements to the UNHCR and the CBSA were more reliable than his testimony to the ID and the IAD concerning the issue of whether the Company was controlled by the LTTE or the government. In this regard, the IAD noted the following:

- i. He was hired by Mr. Master to work for the Company in 2007, "when recruitment was forced," as a caretaker of a house for engineers and other officer grade people in the Company; and

- ii. He was able to give part of his salary of 6,000 rupees per month to the LTTE to avoid having to dig bunkers for the LTTE – that money was used by the LTTE to hire someone else to perform that task.

[39] After noting the foregoing facts, together with the reasons why it found the Applicant's statements to the UNHCR and the CBSA to be more reliable than his statements to the ID and the IAD on the issue of whether the Company was controlled by the LTTE or the government, the IAD again stated its conclusions that (i) the Company was an LTTE organization, and (ii) there are reasonable grounds to believe that the Applicant's employment in that Company amounts to informal membership in the LTTE.

[40] I have serious doubts that these additional reasons given by the IAD met the legal requirement to consider the issues of the nature of the Applicant's involvement in the Company and the degree of his commitment to the LTTE's goals and objectives. However, even if it could be said that those reasons met that requirement, the IAD still failed to reasonably engage with those factors and to weigh them against the factors that supported its conclusion that the Applicant was a member of the LTTE.

[41] Some evidence bearing on those factors (the nature of the Applicant's involvement in the Company and the degree of his commitment to the LTTE's goals and objectives) was assessed in the earlier decision by the ID (at paragraph 47), when the ID concluded that the Applicant was not a member of the LTTE. In this regard, the ID noted the following:

- i. The Applicant worked for the Company not to further the terrorist objectives of the LTTE, but to avoid forced recruitment.
- ii. The work he did was not clearly supportive of the LTTE's terrorist objectives.
- iii. There is no evidence that he had any involvement with the LTTE after his job with them ended.
- iv. He did not refer to himself as a member or express a desire to become a member of the LTTE.

[42] The Applicant provided important evidence on these points that should have been meaningfully addressed by the IAD. This included the following:

- i. He hid from the LTTE's recruiters for much of the period that he worked at his uncle's store (CTR, at pp1214, 1247);
- ii. When he was finally forced to encounter those recruiters, he was able to successfully resist them approximately five or six times by telling them that he was the only relative who could help his uncle at the store (CTR, at pp 1212, 1238);
- iii. He was scared to join the LTTE and he did not want to fight for them (CTR, at p 1274);
- iv. He ultimately decided to accede to the recruiters demands after he was told that "this is the last warning that we [are] giving you. So the next time you have to join us" (CTR, at p 1239);

- v. He gave up part of his salary to avoid digging bunkers, because he was scared and “didn’t want to go and get killed by helping the Liberation Tigers. I didn’t need to do that for them” (CTR, at pp 1274, 1254, 1212); and
- vi. He did not support or even wish to help the LTTE, and he perceived that the LTTE had not done anything to benefit the people (CTR, pp 90, 108, 205).

[43] This evidence suggested that the Applicant was not committed to the LTTE’s goals and objectives. The IAD erred by failing to meaningfully engage with it.

[44] The same is true with respect to the nature of the Applicant’s role and participation within the Company. Although the IAD recognized that he was employed as a caretaker, it did not appear to give any weight to the fact that this was obviously a minimal or marginal role within the organization (*Poshteh*, above, at para 37).

[45] Contrary to the Respondent’s submissions, these errors did not simply involve the weight given to the evidence by the IAD. They involved a failure to address, come to grips with and weigh important factors that suggested that the Applicant was not a member of the LTTE within the meaning of section 34 of the IRPA and as required by the jurisprudence (*Toronto Coalition*, above, at para 118; *Thiyagarajah*, above). The decision in *TK*, above, is distinguished. In contrast to the decision under review in that case, the IAD’s treatment of the established criteria for assessing whether the Applicant was a member of the LTTE did not “analyze the core issues” (*TK*, above, at para 108).

[46] Given the IAD's failure to meaningfully engage with and weigh important factors that weighed against a finding that the Applicant was a member of the LTTE, this Application will be granted. In brief, the IAD's decision did not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and was not appropriately justified, having regard to the evidence on the record (*Dunsmuir*, above).

[47] It is therefore unnecessary to address the other issues that have been raised by the Applicant.

VII. Conclusion

[48] To the extent that the IAD appears to have concluded, that the Applicant was an informal member of the LTTE, based largely on the mere fact that he worked for the LTTE to avoid serving on the front lines of battle, it erred.

[49] The IAD accepted the available evidence that the LTTE not only had *de facto* control of government operations in the region in which the Applicant lived, but that it also controlled that region and imposed severe restrictions on movement by civilians. In addition, it accepted the documentary evidence that reported on the LTTE's heightened campaign of forced conscription and the pressure it brought to bear on households to provide young men and women for its operations or to work in entities that were under its control.

[50] In this context, people within that region who could not find a way to work in a family or other business that was not controlled by the LTTE may have had little realistic alternative but to

either join the LTTE or work for an entity that it controlled, particularly if they needed to work to support themselves or their families. It is not reasonable to suggest, as the Respondent did in its submissions to the IAD (CTR, at p 1284), that simply being employed by an LTTE-controlled entity in such a context was sufficient to render a person a “member” of the LTTE for the purposes of section 34 of the IRPA. A more nuanced analysis that addressed the factors that have been identified in the jurisprudence discussed at paragraph 29 above was required.

[51] The Respondent appears to suggest that, when the IAD’s decision is read as a whole, it becomes apparent that the IAD met the legal requirement to engage with the issues of the nature of the Applicant’s involvement in the Company and the degree of his commitment to the LTTE’s goals and objectives. However, even if the IAD is given the benefit of the significant doubt that I have on this issue, the IAD still failed to meaningfully address factors that it was required to consider, including by weighing those factors against the factors that mitigated in favour of its conclusion that the Applicant was a member of the LTTE.

[52] Accordingly, the IAD’s decision will be set aside and remitted to a differently constituted panel for redetermination in accordance with these reasons.

[53] The parties declined to propose a question for certification and I agree that no serious question of general importance arises on the facts of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This Application is granted.
2. The IAD's decision dated January 17, 2013 is set aside and remitted to a differently constituted panel of the IAD for redetermination in accordance with these reasons.

"Paul S. Crampton"

Chief Justice

Appendix 1

Rules of interpretation

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

Security

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

(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

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

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(c) engaging in terrorism;

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

Interprétation

33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

Sécurité

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

a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;

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

b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du

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

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

(2) [Repealed, 2013, c. 16, s. 13]

Canada;

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

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

(2) [Abrogé, 2013, ch. 16, art. 13]

FEDERAL COURT
SOLICITORS OF RECORD

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AND JUDGMENT:** CRAMPTON

C.J.

DATED: NOVEMBER 13, 2013

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