

Federal Court



Cour fédérale

Date: 20100910

Docket: IMM-2114-09

Citation: 2010 FC 900

Ottawa, Ontario, September 10, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

NAGULESWARAN SHANMUGASUNDARAM

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] An immigration officer concluded that Naguleswaran Shanmugasundaram was inadmissible to Canada as there were reasonable grounds for believing that he was a member of the Tamil Eelam Liberation Army (or “TELA”), an organization for which there were reasonable grounds to believe had engaged in terrorist activities.

[2] Mr. Shanmugasundaram seeks judicial review of the officer’s decision, asserting that the officer erred in his analysis of the membership issue by failing to consider explanations offered by Mr. Shanmugasundaram for apparent inconsistencies in his evidence, and by drawing unreasonable

inferences from the facts surrounding Mr. Shanmugasundaram's involvement with various Tamil organizations within Sri Lanka.

[3] For the reasons that follow, I have concluded that the immigration officer did indeed err in his analysis of the membership issue, with the result that the application for judicial review will be allowed. In the circumstances it is not necessary to address Mr. Shanmugasundaram's arguments as to whether TELA can properly be considered to have been an organization which had engaged in terrorism.

A Preliminary Observation

[4] The officer's reasons contain numerous references to a number of different Tamil organizations which were active in Sri Lanka at various times in that country's recent history. In addition to TELA, these organizations include the Liberation Tigers of Tamil Eelam (the "LTTE"), the People's Liberation Organization of Tamil Eelam (or "PLOTE"), the Hill Country People's Front, and the Up Country Tamil Front.

[5] The documentary evidence describes TELA as being a splinter group of the Tamil Eelam Liberation Organization (or "TELO"). It appears that TELA did not exist for very long. It was created in 1982, and following events occurring in 1983, TELA was absorbed by PLOTE.

[6] It is important to note that although these various organizations are mentioned in the officer's reasons, the inadmissibility finding was based entirely upon Mr. Shanmugasundaram's

membership in TELA. No membership finding was made with respect to any of these other organizations.

[7] It is clear from the jurisprudence that in making an inadmissibility finding under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, an immigration officer must identify the terrorist organization in question with specificity: see *Ali v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1416 at paras. 66-68.

[8] In these circumstances, I will confine my analysis to the reasonableness of the officer's findings with respect to Mr. Shanmugasundaram's membership in TELA.

The Section 87 Proceedings

[9] After the commencement of this application for judicial review, the Minister brought a motion for non-disclosure of certain limited portions of the Certified Tribunal Record, in accordance with the provisions of section 87 of the *Immigration and Refugee Protection Act*. The Minister claimed that the disclosure of the redacted information would be injurious to national security or to the safety of any person.

[10] I carefully reviewed the redacted portions of the Certified Tribunal Record, as well as a secret affidavit filed in support of the motion. I also heard *viva voce* testimony from the deponent of the affidavit and oral submissions from counsel for the Minister in an *ex parte, in camera* hearing. As a result of concerns expressed by me in the course of that hearing, additional information with

respect to the claimed redactions was subsequently provided to the Court by the Minister. At the end of the day, I was satisfied that the disclosure of the redacted portions of the Certified Tribunal Record would be injurious to national security or would endanger the safety of any person. Consequently, the Minister's motion for non-disclosure was granted.

Standard of Review

[11] Mr. Shanmugasundaram argues that the officer erred in finding that he was a member of TELA. I understand both parties to agree that the officer's membership finding is reviewable on the standard of reasonableness. Given that what is in issue are questions of mixed fact and law, I agree that reasonableness is the appropriate standard: see *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] F.C.J. No. 381 at para. 24.

[12] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R.190 at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

The Legislative Authority for the Decision

[13] Before turning to examine the arguments advanced by Mr. Shanmugasundaram, it is helpful to review the legislative framework governing inadmissibility findings such as this.

[14] The inadmissibility finding in this case was made under the provisions of section 34(1)(f) of the *Immigration and Refugee Protection Act*, the relevant portions of which provide that:

<p>34. (1) A permanent resident or a foreign national is inadmissible on security grounds for</p> <p>...</p> <p>(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).</p>	<p>34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :</p> <p>...</p> <p>f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).</p>
--	---

Paragraph 34(1)(c) refers to organizations engaging in terrorism.

[15] In making a finding under section 34(1) of the Act, an immigration officer is also guided by section 33 of *IRPA*, which provides that:

<p>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 or occurring or may occur.</p>	<p>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.</p>
--	---

The Legal Tests to be Applied in Assessing Admissibility under s. 34(1)(f) of *IRPA*

[16] In order to conclude that Mr. Shanmugasundaram was inadmissible to Canada, the immigration officer had to find that he was, or had been, a member of an organization for which there are reasonable grounds to believe engages, has engaged or will engage in terrorism. There are

three aspects involved in such a finding that require comment, namely the “reasonable grounds to believe” standard, the concept of “membership”, and the definition of “terrorism”.

[17] The Supreme Court of Canada described the “reasonable grounds to believe” evidentiary standard in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, as requiring “something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities”. The Supreme Court went on to hold that reasonable grounds will exist “where there is an objective basis for the belief which is based on compelling and credible information”: at para. 114.

[18] Insofar as the test for membership is concerned, it is clear that actual or formal membership in an organization is not required – rather the term is to be broadly understood: see *Chiau v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 642 at para. 34. Moreover, there will always be some factors that support a membership finding, and others that point away from membership: see *Poshteh* at para. 36.

[19] As to the definition of terrorism, the officer adopted the definition from *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 96, where the Supreme Court of Canada described terrorism as:

Any ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel

a government or an international organization to do or to abstain from doing any act.

[20] With this understanding of the legal tests to be applied in assessing admissibility under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, I turn now to consider whether the immigration officer's finding that Mr. Shanmugasundaram was inadmissible under paragraph 34(1)(f) of *IRPA* was reasonable.

Did the Officer Err in Concluding that Mr. Shanmugasundaram was a Member of TELA?

[21] A review of the immigration officer's reasons discloses that the finding that there were reasonable grounds to believe that Mr. Shanmugasundaram was a member of TELA was based to a large extent on inconsistencies in his description of his involvement with that organization. Mr. Shanmugasundaram was always consistent in asserting that his involvement with TELA was limited to a period of a couple of months in July and/or August of 1983. However, his description of the circumstances surrounding his involvement with TELA, and the nature of the activities that he carried out on behalf of the organization varied over time.

[22] That is, in an interview with the Canadian Security Intelligence Service, Mr. Shanmugasundaram stated that on a couple of occasions during the summer of 1983 he helped a friend distribute flyers on behalf of TELA, and that this was the full extent of his involvement with the organization. In describing his involvement with TELA in his Personal Information Form, Mr. Shanmugasundaram makes no mention of his activities having been carried out under any form of duress or compulsion.

[23] In contrast, in an interview with immigration authorities, Mr. Shanmugasundaram stated that on three or four occasions in the summer of 1983 he was forced to give a TELA member a ride on his bicycle to collect food from houses. It appears that Mr. Shanmugasundaram never provided a satisfactory explanation for this inconsistency, beyond suggesting that there could have been problems with the interpretation of his answers.

[24] The inconsistency in Mr. Shanmugasundaram's evidence in this regard could certainly give rise to concerns as to the truthfulness of his evidence with respect to his involvement with TELA, but would not, by itself, provide a sufficient basis for a finding of membership.

[25] In a similar vein, Mr. Shanmugasundaram's evidence that TELA was a social service organization could also have potentially raised concerns with respect to his truthfulness, but was not, in and of itself, an indicator of membership in that organization.

[26] The immigration officer's membership finding was also based upon the fact that a senior member of PLOTE was involved in negotiating Mr. Shanmugasundaram's release from detention in October of 1993, and again in 1994. Mr. Shanmugasundaram had been detained because he was suspected by Sri Lankan authorities of having been an intelligence agent for the LTTE.

[27] Mr. Shanmugasundaram explained that while he was in detention, he had spent two years sharing a cell with a representative of the Up Country Tamil Front. This individual was said to be a

friend of the leader of PLOTE. It was because of these relationships that the leader of PLOTE intervened on Mr. Shanmugasundaram's behalf to secure his release from detention, going so far as to stand as a surety on his behalf.

[28] The immigration officer found that the personal intervention of the leader of PLOTE in securing Mr. Shanmugasundaram's release from detention suggested that Mr. Shanmugasundaram's involvement in PLOTE was more than minimal. This was a reasonable inference, insofar as it related to Mr. Shanmugasundaram's involvement with PLOTE in 1993. However, it must be recalled that the officer never found that Mr. Shanmugasundaram had ever been a member of PLOTE.

[29] The officer also found that the intervention of the PLOTE leader also suggested that Mr. Shanmugasundaram's involvement in TELA was more than minimal. This latter inference was not reasonable.

[30] It appears that TELA was a short-lived and relatively obscure Tamil organization, which ceased to exist as an independent entity sometime around 1983, when it was absorbed by PLOTE. In my view, it was unreasonable for the officer to find that Mr. Shanmugasundaram's involvement with TELA in 1983 was sufficient to make him a "member" of that organization, based upon a series of events occurring some 10 years after the fact, involving a representative of a successor organization.

Conclusion

[31] As was noted earlier, although the officer's reasons make reference to several different Tamil organizations, the membership finding related only to TELA. For the reasons cited above, based upon the reasons given by the immigration officer, I am of the view that the officer's finding in this regard was unreasonable. Consequently, the application for judicial review is allowed.

Certification

[32] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different immigration officer for re-determination in accordance with these reasons;
and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2114-09

STYLE OF CAUSE: NAGULESWARAN SHANMUGASUNDARAM v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 1, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mactavish J.

DATED: September 10, 2010

APPEARANCES:

Lorne Waldman

FOR THE APPLICANT

Jamie Todd
Hillary Stephenson

FOR THE RESPONDENT

SOLICITORS OF RECORD:

WALDMAN & ASSOCIATES
Barristers and Solicitors
Toronto, Ontario

FOR THE APPLICANT

MYLES J. KIRVAN
Deputy Attorney General of Canada

FOR THE RESPONDENT