

Federal Court



Cour fédérale

Date: 20140221

Docket: IMM-10703-12

Citation: 2014 FC 168

Ottawa, Ontario, February 21, 2014

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

P.S.

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant applies for judicial review of a decision of the Immigration Appeal Division (the IAD) dated September 24, 2012 (the Decision) which allowed an appeal by the Minister of Citizenship and Immigration and concluded that the Applicant is inadmissible to Canada as a member of the Sri Lankan Liberation Tigers of Tamil Eelam (the LTTE).

The Facts

[2] The initial decision of the Immigration Division of the Immigration and Refugee Board dated August 25, 2011 provided the following information:

[27] In this case the question of whether a civilian should be construed to be a member must be considered in the context of the LTTE in Sri Lanka. There was no dispute at this hearing that the LTTE had insinuated itself into all aspects of the community life in the Vanni area. The LTTE had set itself up as the *de facto* government and created a police force, a judiciary, a penal code, laws on banking, inland revenue, excise and road taxes and a highway code. The LTTE had health and education departments. For the civilian Tamil population daily life in this area included unavoidable contact or association with the LTTE in one form or another. [Exh. P2]

[...]

[30] [P.S.]’s descriptions of his workplace have been consistent throughout his numerous interviews. The store was in an area enclosed by a fence, there was also a kitchen, a well, the manager’s office and some other buildings inside the enclosed area. The name of the manager in charge of the complex was Oleinte Kannan and he was a member of the LTTE. There were about 50 employees and none of the employees were members of the LTTE. [P.S.] knew it was an LTTE-owned store because his uncle had told him it was.

[31] [P.S.]’s job involved receiving goods and keeping an account of all the items in the store. He said the type of goods in the store included flour, rice, sugar, paper, salt and similar foodstuffs. He said it was more or less a wholesale outlet for the LTTE and the main buyer was the LTTE. The food was brought by truck to the store and it was kept there until it was taken to the kitchen for cooking. The cooked food was packaged into shopping bags and then collected and taken elsewhere. [P.S.] believed the food went to LTTE camps because people who came to collect it were LTTE members.

[...]

[35] It is clear from his answer that [P.S.] believed the food was collected for LTTE members because of who collected the food, but there is no evidence it was going to the “front lines.”

During [P.S.] detention the Minister's representatives stated they would be investigating the food section of the LTTE and what role it played in respect to food distribution to LTTE members. Either the Minister did not complete that investigation or it was unsuccessful in obtaining any evidence about LTTE food distribution to its troops because no independent evidence was presented at this hearing.

[3] The IAD's Decision included the following additional facts. It said:

[7] The respondent was interviewed on a number of occasions in Canada and testified before the ID and at the IAD hearing. The respondent claimed that he was not a member of the Liberation Tigers of Tamil Ealam (The "LTTE"). The respondent testified he worked for the LTTE from April 2007 to May 2009 and received a monthly salary. He explained his duties involved receiving food products and arranging delivery of food prepared as required but he was not a member of the LTTE and he did not take a nickname.

[8] The respondent explained the circumstances that lead him to work at the LTTE compound. The respondent testified he was living with his family in a LTTE controlled area and after graduating high school in 2004, because he did not qualify to get into university, he began upgrading his education and worked part-time. The respondent testified that in August 2006 the LTTE came to his home and wanted him to join their movement because they required one member from every household to join but his father refused on the basis the respondent was his only son there as the respondent's elder brother was in India. The respondent explained that in October 2006 the LTTE began entering homes and taking individuals without consent. The respondent testified that he did not want to join the LTTE because he would have to fight and kill others, which he did not want to do, and he feared losing his life and he did not support what the LTTE was doing. The respondent explained that he could not leave the area without a pass because it was a controlled area and the LTTE would not issue passes to youths like him and although his uncle worked for the LTTE he could not obtain a pass for him. The respondent testified that his parents told him to go into the forest to hide and he remained in the forest for about 6 months. During that time, the respondent explained that his parents with food and the LTTE visited their home 6-7 times searching for him and had posted surveillance. The respondent testified that he told his father to find some alternative arrangements because it was difficult living in the forest and in April 2007, when the respondent's uncle visited his

home his parents agreed to the suggestion that the respondent could work in the LTTE compound where his uncle was working because he would be safe. He further testified his uncle was able to take him to work at the LTTE compound because the recruiting for fighting was done by a different group of the LTTE than those involved with the LTTE compound. The respondent testified that he worked at the LTTE compound from April 6, 2007 until May 13, 2009 when the LTTE was defeated by the government.

[...]

[10] The respondent explained the compound was run by Oriente Kannon. Although the respondent testified he never saw him in a uniform, he was the one responsible for the operation of the compound and who paid the respondent monthly and he had a vehicle with a specialized LTTE license plate. In earlier statements the respondent stated that Mr. Kannon was a LTTE member. The respondent further explained that the compound was fenced and entries and exits were controlled. At the hearing, the respondent testified he did not know who brought in the food trucks but he would take inventory of the food brought in and the food would be prepared by others in the kitchen and he would then arrange for what was requested and the food would be collected by people in uniforms or civilian dress but he did not know where the food was being distributed. In earlier statements the respondent stated he believed the food went to LTTE camps because the people who came to collect the food were LTTE members. The respondent testified that he lived on the compound and worked from 5 am to 5 pm. At the hearing the respondent testified that during the time he worked at the compound he only left the compound to visit family 4 times and his father only visited a few times and his mother one time. He explained he traveled with Mr. Kannon on his vehicle that had a special license plate so they would not be stopped by the LTTE and there was one time he was able to take Mr. Kannon's vehicle on his own. In earlier statements the respondent stated he never left the compound and his father had stated the respondent had visited the home 15 times.

[11] The respondent testified he had learned about the Martyr's Day events when in school and had participated in such events in school. He testified he was aware of the LTTE and its terrorist activities against the government, including: bombings; use of combat; targeting civilians; and suicide bombers such as the Black Tigers. The respondent testified he understood the LTTE were waging war for land for the Tamil people but in his opinion it was not feasible or good for the people.

Legislation

[4] The relevant legislation is paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, [the IRPA]:

<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 ya 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>
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The Standard of Review

[5] There is no issue that the standard of review for decisions under s.34(1) of the IRPA is reasonableness and that the standard of reasonableness is described in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 47-48.

Membership

[6] The IRPA does not define the term “member” but it is to be interpreted in an unrestricted and broad manner because issues of national security and public safety are engaged – see *Poshteh v Canada (Citizenship and Immigration Canada)* [2005] F.C.J. No. 381 at paras 27 – 29.

[7] However, as Mr. Justice Mosley observed in *Toronto Coalition to Stop the War* at para 118:

[118] But an unrestricted and broad definition is not a license to classify anyone who has had any dealings with a terrorist organization as a member of the group. Consideration has to be given to the facts of each case including any evidence pointing away from a finding of membership: *Poshteh*, at para. 38.

[8] As well he cautioned in *Jeyadumar Krishnamoorthy v Canada (Citizenship and Immigration Canada)*, 2011 FC 1342 at para 23 that “Not every act of support for a group that there are reasonable grounds to believe is involved in terrorist activities will constitute membership.

[9] A review of the case law canvassed by Mr. Justice Mosley in his decision in *Krishnamoorthy*, above, reveals that the following factors are among those that may be considered in deciding whether an applicant’s participation in activities associated with a terrorist organization constitute membership in the organization:

- The participant’s knowledge of the organization’s methods and goals;
- The voluntariness of the participation;
- The degree to which the participation furthers the organization’s objectives
- The degree to which participation is combative/military;
- The participant’s intentions – disclosed by statements and actions;
- The duration of the participation; and
- The participant’s membership in related supportive groups.

[10] In my view, the environment or context in which the participation occurred is also a factor which should be considered.

The Issues

[11] The Applicant agreed that the LTTE is a terrorist organization and that he is neither a Canadian citizen nor a permanent resident. The issues are:

1. Whether the IAD made material errors of fact when it considered whether the Applicant was a member of the LTTE?
2. Whether the IAD failed to consider relevant evidence on the issue of membership?

Issue 1

[12] The Applicant says that the IAD erred in concluding first that the Applicant – “had been successfully hiding in the jungle for several months” and second that he “was aware of other Sri Lankans evading recruitment and having escaped the LTTE controlled area”. These findings are crucial because they underpin the IADs conclusion that the Applicant “chose” to work for the LTTE when he had other options such as hiding or escaping.

[13] The Applicant hid in the jungle for six months from October 2006 to April 2007. During that time he was kept alive by food packages his parents left him once a week. There was a shortage of water and he testified that eventually he could not sustain himself and had to return home notwithstanding the risk of forced recruitment. In my view, it was not reasonable to conclude on this evidence that his hiding in the jungle was “successful”.

[14] The Applicant also testified that, by the time he hid in the jungle, the LTTE had seriously restricted passes and was killing those who tried to leave the area. His understanding was corroborated by the documentary evidence which showed that passes were restricted as of August

2006. In view of this evidence it was unreasonable for the IAD to conclude that escape was an option when it involved a serious likelihood of being killed.

Issue 2

[15] I am also persuaded that the IAD failed to have regard for all the evidence when it said in paragraph 34 of the Decision, “The factors that support a finding of membership outweigh the factors that point away from a finding of membership”. However, the following evidence which points away from membership was not mentioned in the Decision:

- The evidence that the Applicant did not support the LTTE and thought that its activities hurt the people. It is noteworthy that the IAD took no issue with the credibility of this evidence.
- The evidence that the “compound” was not a military or even quasi military facility and was not located near such facilities. It was a food service facility and like every other undertaking in Vanni it was operated by a LTTE manager. The Applicant stocked shelves and dispensed cooked food to both civilians and people in uniform. The Applicant’s evidence – which was not questioned – was that he did not know where the food was served.
- The evidence that the facility was fenced but not guarded – there was no military presence and workers and their families and friends were free to come and go as they wished. There was no evidence that workers were required to live at the facility. The only evidence was that those who did so were poor.
- The evidence that the Applicant lived in a coercive environment. His actions – hiding in the jungle – and his statements made it clear he was not an LTTE supporter yet he faced

the constant risk of recruitment and the risk was greater if he lived at home with his parents. The risk was demonstrated when the LTTE kidnapped the Applicant's mother in an effort to lure him home. He was safest when he lived at the food service facility.

[16] In my view the IAD's failure to address this evidence was unreasonable.

Conclusion

[17] Because the IAD made two serious factual errors and failed to consider crucial evidence, the application will be allowed.

Certification for appeal

[18] No question of general importance was posed for certification pursuant to section 79 of the IRPA.

ORDER

THIS COURT ORDERS that:

The application is allowed. The IADs Decision dated September 24, 2012 and the related deportation order are set aside and the matter is referred back for reconsideration by a different panel of the IAD.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: P.S. v THE MINISTER OF CITIZENSHIP AND
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