

Federal Court



Cour fédérale

**Date: 20140428**

**Docket: IMM-7522-12**

**Citation: 2014 FC 384**

**Ottawa, Ontario, April 28, 2014**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**MANICKAVASAGAR KANAGENDRAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION AND THE MINISTER OF  
PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Immigration Division of the Immigration and Refugee Board of Canada [ID] found the Applicant inadmissible under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism, and also inadmissible under paragraph 35(1)(a) of IRPA for being complicit in the commission of crimes against humanity.

[2] The Minister concedes that the decision of the judicial review should be granted with respect to the ID's finding that the Applicant is inadmissible under paragraph 35(1)(a) of *IRPA* due to the failure to determine whether the Applicant made a voluntary, significant and knowing contribution to any crime or criminal purpose as is now required following the decision of the Supreme Court in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, [*Ezokola*].

[3] Therefore, the only issue is whether the ID's decision is reasonable with respect to whether the Applicant was a member of an organization for which there are reasonable grounds to believe, engaged in acts of terrorism. The outcome turns on whether or not it was reasonable for the ID to find that membership in the Tamil National Alliance [TNA], a political party, was tantamount to being a member of the Liberation Tigers of Tamil Eelam [LTTE].

[4] The Applicant is a citizen of Sri Lanka, born in 1932. He was and admits to having been a member of the TNA. He joined the TNA in 2002 and served as a TNA-appointed Member of Parliament from 2004-2007. Members of the TNA, including himself, occasionally attended meetings and lunches organized by the LTTE. LTTE members also attended rallies and meetings held by the TNA. The Applicant had met with LTTE leaders several times both before, and while he was with the TNA. He knew that the LTTE used violent means to achieve their goals, and does not dispute that the LTTE committed acts of terrorism and crimes against humanity.

[5] The Applicant says that during his time with the TNA, he was not sure whether the LTTE's actions could be considered crimes against humanity because he had reason to doubt the accuracy of reporting by the Government of Sri Lanka, and he also believed, based on international law, that an oppressed people could legitimately take up arms against their oppressors, although this was not a method he personally supported.

[6] The Applicant says that he has a history of advocacy through non-violent means. He joined the Ilankai Tamil Arasuk Kachchi [ITAK], whose leader believed in furtherance of Tamil rights by non-violent, political means. In 1979, he was detained for speaking out against the government. He was eventually released because the government determined it could not justify charging him based on his ardent belief in non-violent means.

[7] In 1980, he joined the Tamil Eelam Liberation Front [TELF] which was an open-operation movement devoted to non-violent political change. In 2000, he became involved with the TNA. In 2002, peace talks began between the LTTE and the Sri Lankan government.

[8] The Applicant came to Canada in early August 2009 and filed a claim for refugee protection claiming fear for his life due to the rise in murders of Tamil activists in Sri Lanka. The ID found that, by virtue of his membership with the TNA, the Applicant was in fact a member of the LTTE.

[9] The Federal Court and Federal Court of Appeal have consistently held that the concept of "membership" must be interpreted broadly: *Poshteh v Canada (Minister of Citizenship and*

*Immigration*), 2005 FCA 85 at paras 26-32; *Ismeal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 198 at para 20.

[10] After the release of *Ezokola*, Justice O'Reilly in *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1101, [2013] FCJ No 1171 (QL), stated at paras 14-15 that it was his view that "membership" should be read more narrowly in light of *Ezokola*. However, as the Respondent points out, Justice O'Reilly does not provide any reasons for this finding, and his statement is in obiter. Moreover, Justice Strickland in *Nassereddine v Canada (Minister of Citizenship and Immigration)*, 2014 FC 85, [2014] FCJ No 79 (QL) [*Nassereddine*] found his view to be contrary to prior jurisprudence. I agree with Justice Strickland that *Ezokola* does not change the test for admissibility pursuant to paragraph 34(1)(f) of *IRPA*.

[11] *Ezokola* dealt with section 98 of *IRPA*, which excludes refugee protection for those who fall under Articles 1E and 1F of the Refugee Convention. Neither article deals with membership in a terrorist organization:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[12] While section 98 of *IRPA* is concerned with international criminal culpability, paragraph 34(1)(f) of *IRPA* is concerned with national security, and in this respect, Parliament has seen fit to make membership in an organization that has engaged in acts of terrorism sufficient to render a person inadmissible to Canada.

[13] The Federal Court of Appeal has determined that it is not a requirement for inadmissibility under s. 34(1)(f) of *IRPA* that the dates of an individual's membership in the organization correspond with the dates on which that organization committed acts of terrorism or subversion by force: *Gebreab v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FCA 274, [2010] FCJ No 1312 (QL). The Applicant emphasizes that at the time that he was a member of parliament, the LTTE was engaged in peace talks with the Sri Lankan government. This is irrelevant because the LTTE at some point was engaged in terrorist activities; it does not matter that the Applicant may not have been a member when those activities were occurring. Regardless, evidence in the record indicates that during the elections in 2004 (at the time that the Applicant was a member of the TNA), the LTTE continued to use tactics such as intimidation and murder to forward their goals.

[14] Further, it is irrelevant whether or not the Applicant was in any way involved with the LTTE's activities as paragraph 34(1)(f) of *IRPA* is not a determination as to complicity. If the ID's finding that the TNA is effectively the same organization as the LTTE is reasonable, it is

sufficient for the purposes of paragraph 34(1)(f) that the Applicant was a member of the TNA. I turn then to the nature of the TNA.

[15] The Applicant testified that in his view, the TNA was collaborating with the LTTE, but they were operating in parallel; the TNA was not a proxy for the LTTE. He also testified that at no time in his service as a member of parliament did he ever receive directives from the LTTE, nor did the TNA have any involvement in the activities of the LTTE.

[16] He testified that he personally believed in a non-violent struggle, but that the LTTE's (violent) actions were inevitable. While he supported the same end goal of the liberation of Tamils, he never considered himself a member of the LTTE. He never raised support, either financial or otherwise for the LTTE and never endorsed their use of violence to forward their agenda.

[17] The Applicant's own stance may have been a peaceful one; however one must consider, as the ID did, the documentary evidence in the record which indicates that:

- (i) The LTTE campaigned for the TNA in 2004;
- (ii) The LTTE worked to sabotage the 2004 elections in order to ensure that the TNA would secure seats in parliament by intimidating members of opposing parties;
- (iii) Members of the TNA were themselves involved in the violence and intimidation;
- (iv) Candidates from the TNA were screened and approved by the LTTE to help the LTTE achieve its own goals, or were active members of the LTTE;

- (v) Some members of the TNA were of the view that “the LTTE is ours and we are LTTE-ers” (CTR at p 490);
- (vi) Members of the TNA who were not avid supporters of the LTTE were sidelined and snubbed by LTTE leadership and kept in the dark regarding certain decisions;
- (vii) The TNA is subservient to the LTTE; and
- (viii) The TNA “explicitly served as the proxy of the LTTE.”

In my view, this constitutes evidence that reasonably grounds the ID’s conclusion that the TNA was subservient to, or equivalent to the LTTE.

[18] The Applicant submits that the ID erred:

1. In failing to give context to the TNA’s expressions of support for the LTTE: at the time, the TNA was advocating acceptance of the LTTE as the only legitimate representative of the Tamil people in the context of peace talks with the Sri Lankan government;
2. In not considering whether members of the TNA had any involvement in the LTTE activities;
3. By ignoring that claims that the TNA was created by the LTTE originated from opposing parties;
4. In failing to appreciate that references to the LTTE in the TNA’s 2004 Election Manifesto were made in the context of encouraging peace talks between the

LTTE and the government, and that the TNA called for the “immediate cessation of the war being currently waged in the northeast”; and

5. Failing to consider statements in the TNA’s 2004 Election Manifesto that specifically identified political solutions to the Tamil national problem.

[19] In my view, the Applicant has not identified any specific evidence that contradicts or brings into serious question the ID’s finding that the TNA was intimately related to the LTTE. That the TNA may have supported the LTTE in the context of encouraging peace talks, or had a peaceful political agenda, does not undermine the evidence that the LTTE supported the TNA through intimidation and murder during the 2004 elections. It also does not undermine the evidence that members of the TNA viewed themselves equally as members of the LTTE, that the LTTE vetted candidates of the TNA, and that some members of the TNA (albeit not the Applicant) were themselves engaged in violent acts against opposing parties.

[20] While it is true that the evidence relating to the LTTE’s involvement in the creation of the TNA came predominantly from members of opposing parties, there is independent evidence from the “Political Handbook of the World: 2005-2006” by CQ Press (A Division of Congressional Quarterly Inc.), that the TNA “explicitly served as the proxy of the LTTE.”

[21] The legitimate goals of an organization may be a factor to be considered in cases under section 98 or 35, where international criminal culpability through complicity is at issue, and the Supreme Court of Canada’s comments in *Ezokola* are instructive; however, that is not a factor to be considered under section 34. The statutory language is explicit: an applicant is inadmissible



for being a member of an organization that there are reasonable grounds to believe engages, or has engaged in acts of terrorism. That there may have been legitimate objectives or agendas is an irrelevant consideration.

[22] In this case, there was sufficient evidence to support the ID's conclusion that the LTTE was sufficiently connected with the TNA such that membership in the TNA was tantamount to membership in the LTTE. The decision is therefore reasonable.

[23] The Applicant proposed that a question be certified that is the same as or similar to that certified by Justice Strickland in *Nassereddine*. In that case, the Minister proposed the question. In this case, the Minister opposes the certification of any question. In my view, it is appropriate to certify the following question:

Does *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, change the existing legal test for assessing membership in terrorist organizations, for the purposes of assessing inadmissibility under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is allowed, in part;
2. The decision of the Immigration Division of the Immigration and Refugee Board of Canada finding that the Applicant is inadmissible under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 is quashed;
3. The decision of the Immigration Division of the Immigration and Refugee Board of Canada finding that the Applicant is inadmissible under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 is not set aside as it is found to be reasonable;
4. The following question is certified pursuant to paragraph 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

Does *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, change the existing legal test for assessing membership in terrorist organizations, for the purposes of assessing inadmissibility under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

“Russel W. Zinn”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-7522-12

**STYLE OF CAUSE:** MANICKAVASAGAR KANAGENDRAN  
v MCI ET AL

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 9, 2014

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

**DATED:** APRIL 28, 2014

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