Federal Court of Appeal  Cour d'appel fédérale

Date: 20150407

Docket: A-265-14

Citation: 2015 FCA 86

CORAM: **DAWSON J.A.**
STRATAS J.A.
BOIVIN J.A.

BETWEEN:

MANICKAVASAGAR KANAGENDREN

Appellant

and

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

Respondents

Heard at Toronto, Ontario, on January 13, 2015.

Judgment delivered at Ottawa, Ontario, on April 7, 2015.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: STRATAS J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The Immigration Division of the Immigration and Refugee Board of Canada found the appellant to be inadmissible under paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). The Immigration Division found that the appellant was a member of

an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism. The Immigration Division reasoned that:

a. The appellant admitted to being a member of the Tamil National Alliance (TNA);

b. The appellant's membership in the TNA constituted membership in the Liberation Tigers of Tamil Eelam (LTTE); and

c. The appellant did not dispute that the LTTE had engaged in terrorism.

[2] A judge of the Federal Court dismissed an application for judicial review of the decision of the Immigration Division (2014 FC 384) that the appellant was inadmissible under paragraph 34(1)(*f*) of the Act. The Judge certified the following question:

> Does *Ezokola v. Canada (Minister of Citizenship and Immigration),* 2013 SCC 40, [2013] 2 S.C.R. 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*, S.C. 2001, c. 27?

[3] This is an appeal from the decision of the Federal Court.

I. The Issues

[4] In my view, the issues to be resolved on this appeal are:

a. What is the standard of review to be applied to the decision of the Immigration Division?

b. Did *Ezokola* modify the existing legal test for assessing membership in a terrorist organization?

c. Was the decision of the Immigration Division reasonable?

II. The Standard of Review

[5] The questions before this Court are: did the Federal Court select the appropriate standard of review and apply it correctly? To answer these questions this Court must "step into the shoes" of the Federal Court and focus on the administrative decision at issue (*Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45 and 46).

[6] The Federal Court did not expressly consider the standard of review. It framed the issue before it to be whether the decision of the Immigration Division was reasonable with respect to whether the appellant was a member of an organization that there are reasonable grounds to believe engaged in terrorism. The Federal Court noted that the outcome would turn on whether it was reasonable for the Immigration Division to find that membership in the TNA, a political party, was tantamount to membership in the LTTE (reasons, at paragraph 3).

[7] The parties disagree about the standard of review to be applied to the Immigration Division's interpretation of "member".

[8] The appellant argues that the definition of "member" is a legal question of general importance outside of the expertise of the Immigration Division. The word "member" therefore must be interpreted correctly. The appellant also relies upon the decision of this Court in *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113, 459 N.R. 367.

[9] The respondent submits that this Court has previously applied the reasonableness standard to the Immigration Division's interpretation of member: *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487.

[10] In my view, in this case nothing turns on the standard of review. On the basis of the required textual, contextual and purposive analysis conducted below, there is only a single reasonable interpretation of the word "member" *(McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paragraph 38; *Canada (Minister of Public Safety and Emergency Preparedness v. Huang*, 2014 FCA 228, 464 N.R. 112, at paragraph 39).

[11] That said, the substance of the decision of the Immigration Division is to be reviewed on the standard of reasonableness.

III. Did *Ezokola* modify the existing legal test for assessing membership in a terrorist organization?

[12] The appellant submits that the approach of the Supreme Court to complicity in *Ezokola* reflects broader concerns and articulates principles of interpretation of wider application. The appellant asserts that the Supreme Court's concern in *Ezokola* about excluding those who are guilty of no wrongdoing should also guide the interpretation of "membership" under paragraph 34(1)(*f*) of the Act. It follows, the appellant argues, that membership should not be extended to those who are not involved in terrorist activities or who are loosely linked to a terrorist organization or who are compelled to join a terrorist organization. The appellant further argues that in keeping with the parameters of what the Supreme Court found in *Ezokola* to be

blameworthy conduct, the principled nexus must be a significant contribution to the wrongful actions of the group by a true member who joined without coercion or compulsion.

[13] I disagree that the decision of the Supreme Court in *Ezokola* requires modification of the legal test for membership in a terrorist organization. I reach this conclusion for the following reasons.

[14] I begin by discussing the scheme of the Act and the nature of the issue before the Supreme Court in *Ezokola*.

[15] Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (Refugee Convention) excludes individuals from the definition of "refugee" if there are "serious reasons for considering that [they have] committed a crime against peace, a war crime, or a crime against humanity". Article 1F(*a*) is set out in the appendix to these reasons, together with all sections of the Act cited in these reasons.

[16] Article 1F(*a*) is incorporated into Canadian law by section 98 of the Act.

[17] As a matter of law, criminal liability is not confined to the direct perpetrators of a crime. As the Supreme Court noted in *Ezokola*, a murder conviction can attach equally to one who pulls the trigger as well as to one who provides the gun (*Ezokola*, at paragraph 1).

[18] At issue in *Ezokola* was the line between mere association and culpable complicity (*Ezokola*, at paragraph 4). The Court found that complicity arises by contribution; Article 1F(*a*) requires serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose (*Ezokola*, at paragraph 8).

[19] Paragraph 35(1)(*a*) of the Act is the domestic inadmissibility provision that parallels Article 1F(*a*). In material part, paragraph 35(1)(*a*) of the Act provides:

35. (1) Human or international rights violation – A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(*a*) committing an act that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*; [Emphasis added.]	*a*) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*; [Le souligné est de moi.]

[20] The present appeal implicates subsection 34(1) of the Act:

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 :
[…]	[. . .]
(*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 paragraphs (*a*), (*b*), (*b.1*) or (*c*). [Emphasis added.]	*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*). [Le souligné est de moi.]

[21] Read together, clear differences exist between subsections 34(1) and 35(1). Under subsection 34(1) an inadmissibility finding flows from engaging in terrorism or membership in an organization that engages in terrorism; under subsection 35(1) an inadmissibility finding flows from the commission of an offence. Because criminal liability attaches to both the direct perpetrators and their accomplices, complicity is relevant to the subsection 35(1) analysis.

[22] In contrast, nothing in paragraph 34(1)(*f*) requires or contemplates a complicity analysis in the context of membership. Nor does the text of this provision require a "member" to be a "true" member who contributed significantly to the wrongful actions of the group. These concepts cannot be read into the language used by Parliament.

[23] This textual analysis of paragraph 34(1)(*f*) is informed by contextual and purposive considerations.

[24] The first contextual factor is paragraph 34(1)(*c*) of the Act which renders a person inadmissible for "engaging in terrorism". Thus, paragraph 34(1)(*c*) of the Act contemplates actual participation in acts of terrorism, while paragraph 34(1)(*f*) is only concerned with membership in a terrorist organization. On the appellant's interpretation of "membership", paragraph 34(1)(*c*) would be redundant.

[25] Moreover, as noted by the Federal Court in *Nassereddine v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 85, 22 Imm. L.R. (4th) 297, at paragraph 74, while paragraph 34(1)(*c*) could possibly engage a consideration of complicity, this provision is not

relevant to the finding under review that the appellant is inadmissible as a result of his membership in the TNA.

[26] The second contextual factor is section 42.1 of the Act which permits the Minister to find a person not to be inadmissible pursuant to section 34 if the Minister is satisfied that such a finding is not contrary to the national interest. Because of the very broad range of conduct that gives rise to inadmissibility under paragraph 34(1)(*f*), the Minister is given discretion to grant relief against inadmissibility. There is no similar relieving provision applicable to a finding of inadmissibility under paragraph 35(1)(*a*). A relieving provision is not required where inadmissibility flows from the commission of an offence whether as perpetrator or accomplice.

[27] Finally, I note that the purposes underlying subsection 34(1) and paragraph 35(1)(*a*) are very different. Paragraph 34(1)(*f*) is animated by security concerns. This purpose is served by a wide definition of membership. In contrast, paragraph 35(1)(*a*) guards against abuse of the Refugee Convention by those who create refugees: those who create refugees are not refugees themselves (*Ezokola*, at paragraph 34).

[28] Having concluded that *Ezokola* does not compel any change to the legal test used to establish membership, I next consider the reasonableness of the decision of the Immigration Division.

IV. Was the decision of the Immigration Division reasonable?

[29] As explained above, the Immigration Division found that the appellant's membership in the TNA constituted membership in the LTTE. I conclude on the basis of the evidentiary record before the Immigration Division that its decision was reasonable.

[30] That said, great caution must be exercised when finding membership in one organization to be a proxy for membership in another. Particularly in the context of nationalist or liberation movements, the mere sharing of goals and coordination of political activities may well not justify this type of analysis.

[31] With respect to consideration of the reasonableness of the decision of the Immigration Division in this case, there were three distinct categories of evidence before it: third-party country condition reports, the appellant's own statements and the appellant's contacts with senior LTTE leadership.

[32] As noted by the Immigration Division at paragraphs 28 to 42 of its reasons, the third-party country condition documentation included the following information about the LTTE's influence over the TNA:

- The International Crisis Group's report "Sri Lanka: The Failure of the Peace Process" described the LTTE's creation of the TNA, stated that the TNA campaigned on the basis of the LTTE being the sole representative of Tamils and "maintained a slavishly pro-LTTE line" (Appeal Book, Volume 4, Tab 13, at page 1131).

- A Jane's World Insurgency and Terrorism Report noted the LTTE's instruction to Tamil leaders to join the TNA and that the LTTE head-office selected the TNA's nominees in the 2004 election. The LTTE was said to have then launched a massive campaign in favour of TNA candidates. The campaign included the killing of several anti-TNA candidates and their supporters (Appeal Book, Volume 2, Tab 8, at pages 514-515).

- A UNHCR "Background Paper on Refugees and Asylum-Seekers from Sri Lanka" reported the LTTE announced support for the TNA and further reported that candidates from rival parties were killed, allegedly by the LTTE (Appeal Book, Volume 4, Tab 13, at page 1017).

- A chapter in "The Political Handbook of the World: 2005-2006" described the 2004 elections as "the first time the TNA explicitly served as the proxy of the LTTE, winning 22 seats in the north and east" (Appeal Book, Volume 2, Tab 7, at page 439).

- An Amnesty International report covering Sri Lanka for 2005 reported that "[t]he LTTE-affiliated Tamil National Alliance (TNA) took the majority of seats in the north-east, where elections were marred by vote rigging, intimidation and violence" including the killing of rival candidates (Appeal Book, Volume 4, Tab 13, at page 1077).

- A BBC News report quoted the appellant as saying: "To us the LTTE is the only movement that counts and [Tigers' chief Velupillai] Prabhakaran is the only leader who counts"; the election was more a referendum on the armed struggle; and "[t]he world is saying, alright you fought and did some wonders but what guarantee is there that you

have the backing of the people, […] this election will prove 70% to 80% of the Tamil people back the rebels" (Appeal Book, Volume 2, Tab 7, at pages 380-381).

- The 2001 TNA election manifesto stated that in 50 years no just solution was found to the Tamil national question:

> Consequently, it was inevitable, that the armed struggle gained in strength, and the Liberation Tigers of Tamil Eelam came to occupy a paramount position, and play a pivotal role in the struggle of the Tamil nationality to win their rights. It would be futile not to recognize this reality.
>
> (Appeal Book, Volume 2, Tab 7, at page 294)

- The 2004 election manifesto of the TNA advised:

> Accepting LTTE's leadership as the national leadership of the Tamil Eelam Tamils and the Liberation Tigers as the sole and authentic representatives of the Tamil people, let us devote our full cooperation for the ideals of the Liberation Tigers' struggle with honesty and steadfastness. Let us endeavour determinedly, collectively as one group, one nation, one country, transcending race and religious differences, under the leadership of the LTTE for a life of liberty, honour and justice for the Tamil people. Let us work side by side with the LTTE, who are fighting for the protection and autonomous life of the Tamil speaking people, for the political initiatives under their leadership. [Emphasis added.]
>
> (Appeal Book, Volume 2, Tab 7, at page 292)

- The International Crisis Group reported in 2008 that the TNA's platform was "pro-LTTE" and the TNA members of parliament chose "not to risk taking political positions independent from the LTTE" (Appeal Book, Volume 4, Tab 13, at page 1233).

- In a speech delivered in South Africa, the appellant stated "And we the Eelam Tamils have decided to fight. We shall fight, but we want your help. We shall fight in the sea; we shall fight in the air: we shall fight in the land and when we fight it out and we have

nothing but blood, toil and tears to give to our country" (Appeal Book, Volume 6, Tab 17, at pages 1644-1645).

[33] In an interview conducted by an Inland Enforcement Officer, the appellant stated that the LTTE leader, Prabhakaran, had not initiated the TNA but "would have given his blessings" because "they are both fighting for the same cause" and he "knew that the TNA is being formed for Tamil cause" (Appeal Book, Volume 1, Tab 6, at pages 172-173). The appellant agreed "that TNA members were aligned with LTTE in Tamil cause" (Appeal Book, Volume 1, Tab 6, at page 182). Before the Immigration Division the appellant testified that while the LTTE's violence was not ideal, "mass confrontation of the government was something unavoidable though unpalatable" (Appeal Book, Volume 6, Tab 18, at page 1678).

[34] The appellant admitted to attending a number of meetings with senior members of the LTTE and his shared goals with the LTTE. He stated his view of the inevitability of the LTTE's armed struggle. Specifically:

- The appellant met personally with "all the" LTTE leaders, including Prabhakaran and Tamilselvan, meeting with Prabhakaran twice and Tamilselvan every few months commencing at the time he became a TNA member in 2002 (Appeal Book, Volume 1, Tab 6, at pages 169, 170 and 209).

- The appellant quoted Prabhakaran as stating "we had to join the work as a team" with "[the LTTE] agitating the armed struggle and [the TNA] agitating Parliament struggle only, we call it the over ground movement" (Appeal Book, Volume 1, Tab 6, at page 177).

- While denying that he received "directions" from Prabhakaran, the appellant considered the TNA parliamentary agitation "running parallel" with and sharing the "goal" of the LTTE (Appeal Book, Volume 1, Tab 6, at page 184).

- While his own role was limited to parliamentary activism, the appellant considered armed struggle to be "part of any freedom struggle" and considered the LTTE's armed struggle "unavoidable" (Appeal Book, Volume 1, Tab 6, at page 199).

[35] The appellant argues that the Immigration Division ignored evidence that was favourable to the appellant.

[36] However, it is settled law that an adjudicator is not required to refer to every piece of evidence. More importantly, the evidence before the Immigration Division was conflicting. The reasons of the Immigration Division demonstrate that the member sifted through the record and was alive to the appellant's challenge to the credibility of certain documents. The Immigration Division's findings were amply supported on the record before the Immigration Division.

[37] Section 33 of the Act requires only "reasonable grounds to believe" that facts giving rise to inadmissibility are present. In my view, the Immigration Division's conclusion that there were "reasonable grounds to believe" in this case was within the range of outcomes acceptable and defensible on the facts and the law. The decision was therefore reasonable.

V. Conclusion

[38] For these reasons, I would dismiss the appeal. I would answer the certified question as follows:

> *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678 does not change the existing legal test for assessing membership in terrorist organizations under paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

"Eleanor R. Dawson"

J.A.

"I agree.
David Stratas J.A."

"I agree.
Richard Boivin J.A."

Appendix

Sections 33, subsections 34(1)(*a*) to (*f*), subsection 35(1)(*a*) and section 42.1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 read as follows:

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.	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.
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 that is against Canada or that is contrary to Canada's interests;	*a*) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du 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;
(*b.1*) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	*b.1*) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
(*d*) being a danger to the security of Canada;	*d*) constituer un danger pour la sécurité du Canada;
(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	*e*) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(*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*).	*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*).

[…]	[. . .]
35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;	*a*) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;
[…]	[. . .]
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(*b*) and (*c*) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)*b*) ou *c*) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees,* Can. T.S. 1969 No. 6 reads as follows:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(*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;	*a*) qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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