



File No./Dossier: A7-00299

REASONS AND DECISION – MOTIFS ET DÉCISION

Between/Entre:

**The Minister of Citizenship and Immigration
Le Ministre de la Citoyenneté et de l'Immigration**

And/Et

XXXXXX XXXXX XXXXX

**Date
of Hearing**

22 MAY 2007

**Date de
l'audience**

Place of Hearing

VANCOUVER, BRITISH COLUMBIA

Lieu de l'audience

Date of Decision

31 MAY 2007

Date de la Décision

Member

M. TESSLER

Commissaire

For the Person Concerned

D. KING

Pour L'intéressé

Minister's Counsel

S. TERAN

Conseil de L'intimé

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1 --- PROCEEDINGS RESUMED

2

3 MEMBER TESSLER: This is a resumption of an admissibility hearing at Vancouver on
4 the 31st of May, 2007, concerning XXXXX XXXXX XXXXX XXXXX. My name is
5 Marc Tessler. Our interpreter is Alejandro Azcona.

6

7 Mr. XXXXX, do you understand the interpreter when he speaks to you in Spanish?

8

9 PERSON CONCERNED: Yes.

10

11 --- (INTERPRETER AFFIRMED)

12

13 MEMBER TESSLER: Counsel for the person concerned is Douglas King. Minister's
14 counsel is Sandra Teran. This matter was adjourned on the 22nd of May for a decision.

15

16 DECISION AND REASONS BY MEMBER TESSLER:

17

18 MEMBER TESSLER: The Canada Border Services Agency has alleged that Mr. XXXXX
19 is a foreign national who is inadmissible to Canada under paragraph 37(1)(a) on the
20 grounds of organized criminality for being a member of an organization that is believed on
21 reasonable grounds to be or to have been engaged in activity that is part of a pattern of
22 criminal activity planned and organized by a number of persons acting in concert, in
23 furtherance of the commission of an offence punishable under an Act of Parliament by way
24 of indictment or in furtherance of the commission of an offence outside Canada that, if
25 committed in Canada, would constitute such an offence or engaging in activity that is part
26 of such a pattern.

27

28 In other words, the allegation is that Mr. XXXXX was a member of a gang, specifically
29 that he was a member of Mara 18 in his home country of Honduras from the ages of 13 and
30 a half to 15. Mr. XXXXX is currently 24 years old.

31

32 I have considered all of the evidence and all of the submissions. There are three main
33 issues. Was Mara 18 a criminal organization as it is understood in 37(1)(a)? Was Mr.
34 XXXXX a member of this organization? And finally, does his age at the time of his
35 membership mitigate his role?

36

37 The first issue is the nature of Mara 18. In order to be considered a criminal organization,
38 it must have a criminal purpose. It must have an identity. It must have leadership and
39 therefore, some form of hierarchy through which criminal activity is planned by leaders
40 and carried out by members. Mara 18 has all of these characteristics.

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1 Officer XXXXX (phonetic) of the Honduran Preventative Police described the gang. It has
2 its origins in Honduras in 1993 with deportees from the United States who established
3 themselves in poor areas of Honduran cities, bringing with them 18th Street gang
4 affiliation. The 18th Street gang is a Los Angeles-based gang. By 1998 there were only
5 two gangs remaining in Honduras, the Mara Salvatrucha and the Mara 18, as the two gangs
6 that managed to eliminate the traditional gangs.

7
8 Gang activity was originally petty but was replaced by ever-increasing serious crime
9 including drug trafficking, extortion, car theft, kidnapping and homicide. The single
10 purpose of the gang was to obtain money and assets through criminal activity.

11
12 Membership in the gang was enticed by the display of material possessions. Young men
13 would be hooked by the chance to rise above their desperate circumstances. The structure
14 of the gang was as follows:

15
16 Recruitment began with boys 12 to 14 years old. They were identified as sympathizers
17 living in a community that has gang members and that they know these gang members.

18
19 Among sympathizers were identified those who aspire to join the gang. Those chosen to
20 join are baptized into the gang or jumped in, a ritual that requires that they endure being
21 beaten for 18 seconds. Once jumped in, the gang member becomes a novice and is entitled
22 to be tattooed. Novices are given the role of watcher or look-out. They watch for
23 authorities.

24
25 At the very top of the leadership are the master homies. These persons are difficult for the
26 police to identify. They are men in their thirties who appear as regular community
27 members operating small businesses. They maintain a distance from the actual criminal
28 activities by passing orders to regional leaders.

29
30 Above the master homey is loyalty to the leaders of the 18th Street gang in the United
31 States. The gang is organized into cliques who operate in defined neighbourhoods or
32 *barrios*. I note that Mr. XXXXX described in his interview --

33
34 INTERPRETER: I'm sorry?

35
36 MEMBER TESSLER: I note that Mr. XXXXX described in his interview with Officer
37 XXXXX a four-block turf in his *barrios* of XXXXX, in the city of XXXXX.

38
39 Each clique has a clique leader who knows and communicates with other clique leaders,
40 who in turn report to a regional clique co-ordinator, above whom are department leaders.

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1 There are two department leaders. There is one for Tegucigalpa.

2

3 INTERPRETER: Galpa?

4

5 MEMBER TESSLER: Tegucigalpa.

6

7 INTERPRETER: Sorry.

8

9 MEMBER TESSLER: And one for San Pedro Sula. These are the only two who are in
10 communication with the master homey and know his identity. Meetings are called from
11 the top down. Mr. XXXXX described meetings every two weeks on the hill outside of the
12 town of XXXXX.

13

14 Tattooing of the number 18 or the roman numeral XVIII was a common gang identifier.
15 Graffiti consistent with tattoos was painted to mark turf and to compete with a rival gang.

16

17 Members of the gang are identified by monikers or nicknames that describe or represent a
18 characteristic of the person. Mr. XXXXX was known as XXXXX for his wild hair. He
19 seems to keep it better under control today. He used several monikers to describe other
20 gang members. He admitted to wearing red clothing, including baggy red pants, to identify
21 his gang affiliation.

22

23 With respect to the criminal activities of the gang, they were described both by Mr.
24 XXXXX and Officer XXXXX -- or the activities that both of them described, all of them
25 would have equivalences in indictable offences in Canada. And I'll cite two examples:
26 trafficking in cocaine in Canada is an indictable offence under the *Controlled Drugs and*
27 *Substances Act*; and homicide is, of course, indictable under the *Criminal Code*.

28

29 Now, the second issue is whether Mr. XXXXX was a member of the Mara 18.
30 Membership for the purposes of the immigration legislation is to be interpreted broadly.
31 Membership need not be formal or even involve active participation in unlawful acts.
32 Membership is a question of fact or an accumulation of facts.

33

34 Did his role with the gang rise above merely a supporter or sympathizer? Mr. XXXXX has
35 argued that membership should be evaluated not on the cumulative indicia or facts of
36 membership, but on the degree of participation in gang activities.

37

38 That argument sounds very much like a test that the Federal Court specifically rejected in
39 the *Poshte* (phonetic) decision, which I'll be discussing. The Court called it the significant
40 integration test. In any case, I don't think that that type of analysis would assist Mr.

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1 XXXXX. He has admitted membership in the Mara 18 while downplaying his actual
2 participation.

3

4 So I note to begin with that he made an admission or an acknowledgement of membership
5 in his interview with Officer XXXXX. He began to hang out with gang members at age
6 13. He knew that the gang was involved in drug trafficking and extortion under threat of
7 violence before he was formally joined to the gang.

8

9 His formal membership began when he was jumped in, and on the same day tattooed with
10 the roman numeral XVIII and a mermaid. He began to cut his hair very short, almost
11 shaved. He was assigned a moniker and he wore red clothing to exhibit his gang
12 affiliation. He attended the occasional meeting. He sprayed graffiti. All of these qualities
13 are consistent with Officer XXXXX's description of gang membership, practices or ritual.

14

15 Mr. XXXXX was asked by Officer XXXXX what he thought he would be doing once he
16 joined the gang. He answered:

17

18 Ask for rent, fight with others, maybe selling drugs.

19

20 MEMBER TESSLER: Now, I interpret asking for rent as extortion.

21

22 After his initial baptism into the gang, he supported it as a look-out. He watched fights, he
23 watched drug deals, and as he said, hundreds of drug deals. He carried a bat but never a
24 real gun while noting that those with more seniority carried actual guns and homemade
25 weapons. Again, this is consistent with Officer XXXXX's description of the role of
26 novices, that before they're given greater responsibility they are watchers or look-outs.

27

28 Once Mr. XXXXX learned that to move up the ranks of the gang he would have to commit
29 a violent act such as an assault or a murder, that's when he decided that he had to leave the
30 gang.

31

32 So either way, by participation or by appearance, Mr. XXXXX was a member of the gang.
33 He was more than a mere sympathizer or supporter. He acknowledged membership and
34 bore the indicia of a gang member --

35

36 INTERPRETER: The words?

37

38 MEMBER TESSLER: He displayed the markings of a gang member.

39

40 INTERPRETER: Thank you.

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1 MEMBER TESSLER: He provided material support for gang activities by providing
2 surveillance during criminal activity. I'm satisfied that he was a member as it's understood
3 in 37(1)(a) of the Act.

4

5 The final issue is whether Mr. XXXXX's age at the time of his membership in the gang
6 mitigates his membership, or in other words, is a defence to membership. Mr. XXXXX
7 argued that his age when he joined the gang is an overriding fact in consideration, that his
8 participation was involuntary or coerced by reason of his youthful vulnerability and lack of
9 legal capacity.

10

11 Because it seemed to be on point, I brought the Federal Court of Appeal decision in *Poshte*
12 to the attention of the parties. That case concerned an allegation of inadmissibility for
13 membership in an organization that engages in terrorism.

14

15 I believe the assessment of whether someone is a member in a criminal organization or is a
16 member in a terrorist organization is a similar exercise. The issue is membership. The
17 Federal Court of Appeal was required in the *Poshte* decision to consider an issue that was
18 similarly argued here: whether Mr. Poshte's status as a minor was a relevant consideration
19 in determining membership and if so, what considerations are to be taken into account in
20 determining or valuating membership by a minor.

21

22 In my opinion, the reasoning in *Poshte* about the influence of age on membership is
23 equally relevant in this case. The Court found that age is a relevant consideration,
24 specifically whether the minor had the knowledge or mental capacity to understand the
25 nature and effect of his actions. The Court suggested that in the case of a minor under the
26 age of 12, for example, it would be highly unusual for there to be a finding of membership.
27 According to the Court, there is a continuum that the closer the minor is to age 18, the
28 greater the presumption of understanding of his actions.

29

30 There was no evidence that Mr. XXXXX joined Mara 18 under actual duress, for which I
31 differentiate between -- I differentiate from constructed duress based on his circumstances
32 as a youth with few opportunities or prospects. In other words, he was not forced by any
33 person to join the gang.

34

35 He knew more or less what the gang was about before joining. He may not have known
36 that membership was a lifelong obligation, and he may not have appreciated the extent of
37 the gang's lawlessness, but he knew that the gang was involved in extortion under the
38 threat of violence and drug trafficking, both serious criminal offences. Even at this young
39 age he could identify the difference between good and bad, and he knew that the activities
40 of the gang were bad. It is also significant that he had joined against the wishes of his

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1 father.

2

3 In summary, he knew before he joined that the gang was involved in violent and illicit
 4 activities and that these activities were wrong. He joined voluntarily and he joined against
 5 the advice of adults.

6

7 In my opinion, these findings support my determination that even at age 14, Mr. XXXXX
 8 had the knowledge and mental capacity to understand that he was joining the gang and that
 9 there were obligations and consequences that would flow. Obviously, the extent of those
 10 obligations and consequences were not fully known to him.

11

12 I also want to acknowledge that Mr. XXXXX was, in reality, a mere boy when he joined
 13 the gang, that he came from an impoverished neighbourhood, that membership was likely
 14 enticing to him because it offered him, theoretically, material possessions, a community,
 15 status and protection. These are potentially important considerations, not in the assessment
 16 of membership but perhaps in an application under paragraph 37(2) for a Ministerial
 17 exemption and potentially under -- or in a risk assessment.

18

19 I'm satisfied that Mr. XXXXX is not a Canadian citizen and not a permanent resident, that
 20 he is a foreign national who is inadmissible under section 37(1)(a) of the Act. I am
 21 required to make a deportation order against him, which I hereby do. He may wish to
 22 apply under section 72 of the Act to the Federal Court for leave for judicial review of this
 23 decision.

24

25 This matter is concluded. Thank you.

26

27 --- PROCEEDINGS CONCLUDED

28

29

30 I, the undersigned, hereby certify that the preceding
 31 constitutes a transcript of proceedings, transcribed from
 32 taped proceedings, to the best of my skill and ability, of an
 33 Immigration Division hearing held at Vancouver, British
 34 Columbia.

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Shelagh Kuse

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- 1 IMMIGRATION DIVISION - INADMISSIBLE CLASSES - CRIMINAL ORGANIZATION -
- 2 MINORS