Date: 20050630

Docket: IMM-6346-04

Citation: 2005 FC 923

Ottawa, Ontario, this 30th day of June, 2005

Present: THE HONOURABLE MR. JUSTICE SIMON NOËL

BETWEEN:

KARUNANEDHY KANENDRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision of the Immigration Division (the "panel") of the Immigration and Refugee Board (the "IRB") dated June 30, 2004, wherein the panel determined the Applicant was inadmissible to Canada by virtue of s. 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). The Applicant seeks to have this decision quashed and set aside, and the matter sent back for redetermination before a differently-constituted panel.

ISSUES

[2] Did the panel properly assess the notion of "membership" as it pertains to the inadmissibility provisions of s. 34(1)(f) of *IRPA*? If so, did it otherwise err in fact or law, base its conclusion on erroneous facts, or act in a manner contrary to law, in reaching its decision that the Applicant was inadmissible?

CONCLUSION

[3] For the reasons outlined below, the panel made no error in its assessment of the claim, and therefore this application for judicial review should be denied.

BACKGROUND

[4] The Applicant, Karunanedhy Kanendra (Mr. Kanendra, or the "Applicant"), is a citizen of Sri Lanka. In January 1994, a few weeks before his 14th birthday, he joined the Liberation Tigers of Tamil Eelam (the "LTTE"). He served as a member of the LTTE's communications unit until 2001, when he was detained by the LTTE after expressing his desire to leave the organization. In 2003, Mr. Kanendra managed to escape the LTTE's control. He fled first to India and shortly thereafter to Canada.

THE PANEL'S DECISION

[5] After an inadmissibility hearing held over a number of dates in the spring of 2004, the panel determined that Mr. Kanendra was a person described in s. 34(1)(f) of *IRPA* and therefore a person inadmissible to Canada. The pertinent parts of that decision are as follows :

Karunanedhy Kanendra testified at the hearing he is a citizen of Sri Lanka born February 4, 1980 in Sri Lanka. He is not a Canadian Citizen or a Permanent Resident of Canada. He is a citizen of no other country. His name in the movement (Tamil Tigers) was Koilmuran and he joined the Tamil Tigers in 1994. He received weapons training in Ak-47 and grenades.

Mr. Kanendra at the hearing testified that he was in a communications unit, he did not carry a weapon while in the battle area and he was never in a situation where he had to fire a weapon in battle.

[...]

On three different occasions Mr. Kanendra stated he was a member of the LTTE and received weapons training. On two of those occasions he said he fired his weapon in combat and on one occasion he testified that he never fired his weapon in combat. While that raises some concern as to his credibility the basic story remains the same and he was a member of the LTTE.

[...]

The next question is whether the LTTE is an organization that fits under Section 34(1)(a), (b) or (c) of *IRPA*.

[...]

In the present case Counsel submitted no evidence that the LTTE is not an organization which has engaged in or instigated the subversion by force of the Government of Sri Lanka and engaged in terrorism.

[...]

The documents submitted by the Minister in the present case to support that the LTTE is an organization that has committed acts falling within the purview of Section 34(1)(a), (b) or (c) are from four sources.

[...]

It appears that the four documents listed above come from diverse sources and have different points of view. Taken together it is fair to say that all class the LTTE as an organization which has engaged in recruitment of child soldiers, acts such as exploding a bomb in the financial center of Colombo in January 1996, killing 90 and injuring 1400, assassinations of military officials, suicide bombings and much more.

[...]

[T]he LTTE must be judged by their record, and whether or not the LTTE currently engages in subversive or terrorist activities, the time period I must consider is that from January 1994 until October 2001 when Mr. Kanendra, by his own admission, was a member of the LTTE.

I therefore find that there are more than merely reasonable grounds to believe that Mr. Karunanedhy Kanendra was a voluntary member of the LTTE from January 1994 until October 2001. There are reasonable grounds to believe that the LTTE is an organization which engaged in terrorism and active attempts to subvert the Government of Sri Lanka during the period January 1994 to October 2001. Mr. Kanendra is an individual that is described in Section 34(1)(f) [of] *IRPA*.

SUBMISSIONS OF THE PARTIES

The Applicant

[6] The Applicant argues three main issues:

< That the panel erred in finding that the LTTE was an organization described by ss. 34(1)(a), (b) or (c) of *IRPA*;

< That the panel erred in finding that Mr. Kanendra's association with the LTTE amounted to membership in the organization (and therefore, that he was a person described in s. 34(1)(f) of *IRPA*), since the panel did not properly assess whether his age at the time of joining the LTTE (13) played a factor;

< That the panel erred in failing to consider s. 34(2) - that is, the question of whether or not Mr. Kanendra's presence in Canada, despite his previous involvement with the LTTE, would be detrimental to the national interest.

[7] The Applicant also argues, in his Supplementary Memorandum, that the panel erred in its rejection of the Affidavit submitted with the Applicant's submissions after the close of the evidentiary portion of the hearing. According to the Applicant, the proper procedure would have been to grant an adjournment.

The Respondent

[8] The Respondent submits in response that the Applicant has failed to demonstrate that the panel refused to consider any evidence, ignored any evidence, or made an erroneous finding of fact. It further submits that there is no judicial authority suggesting that a restrictive interpretation of "membership" should be taken. The panel had adequate documentary evidence demonstrating that the LTTE was engaged in terrorist or subversive activities against the government of Sri Lanka. Furthermore, the Applicant provided no evidence to dispute this determination. Finally, there is no onus on the Minister or the IRB to consider whether an exemption to the inadmissibility determination should be made under s. 34(2) of *IRPA*; in fact, the wording of the provision suggests the opposite.

ANALYSIS

Standard of review

[9] The panel's finding that Mr. Kanendra was inadmissible was based on its determination that Mr. Kanendra was a member of the LTTE, a group which, at the time of his involvement, was engaged in or instigated the subversion of the government of Sri Lanka. This situation is quite similar to that faced by the Federal Court of Appeal in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 381 (C.A.) (*Poshteh*). The Applicant in *Poshteh*, an Iranian citizen, had joined an organization that there were reasonable grounds to believe engages, had engaged, or will engage in terrorism, at the age of 15. His involvement in this group was largely limited to the distribution of pamphlets. Two years later, he was arrested and detained for two weeks because of his involvement with the group. He thereafter fled to Canada and claimed refugee status.

[10] In order to determine the appropriate standard of review, Justice Rothstein undertook a pragmatic and functional analysis, at paragraphs 21-24:

[21] Paragraph 34(1)(f) forms part of the Immigration Division's constituent legislation. The question of membership in a terrorist organization is not something that is extraneous to its regular work. The expertise of the Immigration Division is in, among other things, determining whether criteria for inadmissibility have been established. These criteria include membership in a terrorist organization. Therefore, the interpretation of the term "member" in paragraph 34(1)(f) is, I think, a legal matter with respect to which the Immigration Division has some expertise.

[...]

[22] However, whether Mr. Poshteh's status as a minor is to be taken into account and if so, what considerations are relevant, is not a legal question that the Immigration Division would regularly encounter. There is no reference to age in paragraph 34(1)(f). On the other hand, the courts do encounter cases in which the application of a law to a minor is a relevant consideration. Whether age is to be taken into account and if so, in what manner are matters in which the expertise of the Court is greater than that of the Immigration Division, suggesting less deference on this issue.

[23] Having regard to the pragmatic and functional considerations to which I have adverted, I conclude:

(a) the question of the interpretation of the term "member" in paragraph 34(1)(f) is reviewable on a standard of reasonableness; and

(b) the question of whether age is to be considered under paragraph 34(1)(f) and if so, the manner of doing so is reviewable on a standard of correctness.

[24] Applying the relevant standards of review to the legal questions, should the Court find it necessary to intervene, the Court will either quash the Immigration Division's decision if it finds that Mr. Poshteh could not be a member of a terrorist organization or it will remit the matter to the Immigration Division for redetermination having regard to the proper legal tests. However, should the Court not find the Immigration Division's legal determinations with respect to the term "member" and Mr. Poshteh's minor status to be unreasonable or incorrect, respectively, the questions of mixed fact and law, namely the application of the law to the facts by the Immigration Division, should be reviewed on a reasonableness standard.

[11] Unlike as in the current proceeding before me, the question of whether the organization in question was a terrorist organization was not in dispute in *Poshteh*. The question of whether an organization is one described in ss. 34(1)(a), (b) or (c) has been dealt with previously by this Court according to the standard of reasonableness: see, *e.g., Hussain v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1430 (F.C.) at para. 12 *et seq.*; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1207 (F.C.) at paras. 35-40.

[12] Therefore, the question of whether the LTTE was properly determined to be a terrorist organization is reviewed on a reasonableness standard. The assessment of Mr. Kanendra's "membership" in the LTTE is also to be reviewed according to this standard. The impact Mr. Kanendra's age has on this determination will then be reviewed according to a standard of correctness. Finally, if necessary, the final decision of the panel in its entirety should be reviewed on a reasonableness standard.

Relevant legislative provisions

[13] Section 34 of *IRPA* reads as follows:

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 or an act of subversion against a democratic government, institution or process as they are understood in Canada;	a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(b) engaging in or instigating	b) être l'instigateur ou l'auteur d'actes visant au

the subversion by force of any government;	renversement d'un gouvernement par la force;
(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) 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) ou c).
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

Whether LTTE was an organization described by ss. 34(1)(a), (b) or (c) of *IRPA*

[14] The panel determined that there were reasonable grounds to believe that the LTTE engaged in terrorism and attempts to subvert the government of Sri Lanka between 1994 and 2001 (the time-period in question). This was on the basis of four pieces of documentary evidence filed by the Minister: a country report by the United States Department of State (the "US-DOS report"), a report by Human Rights Watch (a NGO), a report from the South Asia Terrorism Portal (a website operated by the Institute for Conflict Management in India), and materials from the Political Handbook of the World 1999.

[15] The Applicant claims the panel improperly assessed this evidence in coming to its conclusion that the LTTE was, for the purposes of the hearing, an organization described in ss. 34(1)(a), (b) or (c). First, the panel dismissed the US-DOS report as having a "strong political bias" (see page 7 of the decision). Then, in apparent disregard for this determination, the panel nonetheless took the US-DOS report into account when it decided that there were reasonable grounds to believe that the LTTE had engaged in terrorism or subversive activities against the government of Sri Lanka during the relevant time period.

[16] A review of the decision, however, contradicts the Applicant's argument. While the panel did acknowledge that the US-DOS report "likely has a strong political bias," it in no way dismissed the report. At most, the panel can be assumed to have given less weight to the US-DOS report because of its apparent bias.

[17] The Applicant cites a case from the United States, *Tian Yong-Chen v. United States Immigration and Naturalization Service* (Docket No. 00-4136) (*Chen*), in which a similar US-DOS Report was rejected. However, as the Respondent has rightly noted, in that case, the U.S. Court of Appeal merely stated that while the US-DOS reports are often useful and informative in establishing country conditions, they cannot be used to automatically discredit the evidence of an applicant. Unlike the *Chen* case, where the board failed to consider the applicant's evidence entirely, here the panel has weighed the US-DOS report along with the other documentary evidence, and done so in light of the Applicant's submissions as to the nature of the LTTE.

[18] The third submission the Applicant makes on this point is that the panel erred in putting the onus upon him to show that the LTTE was not a terrorist organization or one otherwise engaged in subversive activities. The panel does not seem to have done any such thing. The onus is clearly on the Minister to prove that either s. 34(1)(a), (b) or (c) has been met. However, it is always open to an applicant to enter contrary evidence. Here, the panel has simply noted: "Counsel submitted no evidence that the LTTE is not an organization which has engaged in or instigated the subversion by force of the Government of Sri Lanka and engaged in terrorism" (at page 6 of the decision). It then continued on to assess the documentary evidence provided by the Minister.

[19] Finally, in regard to assessing the actual evidence before it, it was reasonable for the panel to determine that there were reasonable grounds to believe that the LTTE was an organization as described in ss. 34(1)(a), (b) or (c) of *IRPA*. In addition to four reports, each of which had a certain amount of credibility and authority, including, I must note, the UNHCR Report from 2000 which clearly describes the circumstances according to which the LTTE is a terrorist organization, the panel drew on the definition of "terrorism" as provided by the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, decided under the old *Immigration Act*, at para. 98:

In our view, it may safely be concluded, following the International Convention for the Suppression of the Financing of Terrorism, that "terrorism" in s. 19 of the Act includes 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". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the Immigration Act is sufficiently certain to be workable, fair and constitutional. We believe that it is.

[20] After applying this definition to the descriptions of the LTTE's activities as provided by the four reports, it was reasonable for the panel to determine that the LTTE was an organization described in ss. 34(1)(a), (b) or (c) of *IRPA*.

Whether Mr. Kanendra was a member of the LTTE

[21] The Applicant submits that the interpretation of "member" in s. 34(1)(f) must be read strictly, so as not to include in its ambit persons who may associate and sympathize with an organization described in s. 34(1)(a), (b) or (c), but who are not themselves a threat to Canada. The Applicant further submits that "member" should be interpreted to mean current and actual or formal membership, including only those who are subject to party discipline and not entitled to act in accordance with independent belief and action.

[22] To adopt such an interpretation would, I think, be contrary to the spirit of the legislation as well as to prior jurisprudence. In *Suresh v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 247 (F.C.T.D.) at 259 (para. 22), rev'd in part (on different grounds), 47 Imm. L.R. (2d) 1 (F.C.A.), Justice Teitelbaum stated that, "Membership cannot and should not be narrowly interpreted when it involves the issue of Canada's national security. Membership also does not only refer to persons who have engaged or who might engage in terrorist activities." See also *Canada (Minister of Citizenship and Immigration) v. Singh*, (1998) 44 Imm. L.R. (2d) 309 at para. 51 *et seq.* (F.C.T.D.); *Canada (Minister of Citizenship and Immigration) v. Owens*, (2000) 9 Imm. L.R. (3d) 101 at paras. 16-18 (F.C.T.D.); *Poshteh, supra*, at para. 29.

[23] Therefore, the term "member" as it is used in s. 34(1)(f) of *IRPA* should be given a broad interpretation. The Applicant is concerned that those who are not a threat to the security of Canada, despite their former membership in a s. 34(1)(a), (b) or (c) organization, should not be included in the ambit of s. 34(1)(f) and therefore excluded. However, I note that s. 34(2) effectively exempts them from exclusion. This section provides that those who would otherwise be deemed inadmissible because of certain associations or activities not be so deemed where they can satisfy the Minister that they are not a danger to the security of Canada. This interpretation of the statute was also found to be the case in *Suresh* (S.C.C.), *supra*. Though that case was determined under s. 19 of the old *Immigration Act*, the principle remains the same.

[24] In order, then, to determine whether an applicant was or is a member of an organization described in ss. 34(1)(a), (b) or (c), an assessment of their participation in the organization must be undertaken. It is important to note that this analysis should be conducted without regard to the age of the individual at the time of their purported membership. As Justice Rothstein stated in *Poshteh, supra*, at para. 26:

If an adult would not be considered a member on the facts applicable to Mr. Poshteh, it will be unnecessary to address the question of age. Only if his activities would have resulted in him being found to be a member if he were an adult at the relevant time, will it be necessary to consider whether his status as a minor at that time requires a different conclusion.

[25] In the present case, the evidence shows that while Mr. Kanendra initially joined the LTTE at a young age, he remained a member of the LTTE for close to seven years. At the time of his attempted departure in October 2001, he was close to 21 years old, and had had ample time to assess his situation. Therefore, the facts in this case are not limited to the actions of a child; a good part deals with time spent by Mr. Kanendra as an adult. Furthermore, the file indicates that Applicant has continuously been represented by counsel and had the opportunity to submit arguments in line with the fact that he was a child for a portion of his LTTE service. He did not, at any time, make any such arguments. The IRB can therefore not be blamed for not having dealt specifically with this issue.

[26] Counsel for the applicant submitted at the hearing before me that Mr. Kanendra had advised the LTTE "continuously" that he wanted to leave. I note that this was not raised at the hearing before the panel. Further, I note that this issue is only raised in the port of entry notes (page 136 of the Tribunal Record) as follows:

Why did you leave them [the LTTE] in October 2001?

Since I was with them for seven years, I wanted to go back home to may [*sic*] family. I told them I was quitting and going home.

Were you being paid by them?

No [*sic*]

Did they allow you to go?

They refused to let me go. I was continuously saying I need to go home. They confined me in their jail, told me they would let me go only after five years.

This evidence is clearly insufficient to indicate that Mr. Kanendra tried to leave the LTTE but was unable, or that he was otherwise forced to remain an LTTE member at any time prior to October 2001. The Applicant has failed to show that the panel's decision in this regard was unreasonable.

<u>Whether s. 34(2) should have been considered</u>

[27] For the sake of convenience, I reproduce s. 34(2) of *IRPA* here:

34. (2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	34. (2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[28] The Applicant claims that the panel should have either made a finding as to the applicability of this section or adjourned the hearing until such time these arguments could be heard. However, I note that this is contrary to what this Court has previously found: see, *e.g., Hussenu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 283 (CanLII), 2004 FC 283, at paras. 25-26 where Russell J. decided that there is no duty on the part of the Minister or the IRB panel to advise an applicant of his right to apply for an exemption under s. 34(2) of *IRPA*:

[25] In my opinion, the Applicant is correct in asserting that a high standard of natural justice applies in cases where the Minister takes an adversarial position in relation to a refugee claimant, but this does not impose an obligation on the Minister, in a case such as the present, to notify and advise the Applicant concerning a specific exemption that might be available to him under IRPA. The relevant provision appears in the Act and is there for everyone to see. The Applicant was represented by legal counsel at all material times. He had a right to raise all material issues. [...]

[26] Provided the Applicant had full access to his rights under IRPA, and was not prevented from raising the s. 34(2) exemption, there could be no breach of procedural fairness. If the Applicant's counsel failed to raise this issue, that omission cannot be laid at the feet of the Minister by invoking a duty to provide notice of an exemption that is perfectly apparent on the face of the statute.

[29] Mr. Kanendra has been represented by legal counsel at all times, and the exemption provided in s. 34(2) is clearly available to any person who faces an inadmissibility hearing. The onus is on the Applicant to make such a request. No evidence exists that such a request has been made, or that an adjournment was requested so that one might be made; accordingly, no breach of natural justice has occurred.

CONCLUSION

[30] The Applicant has failed in his onus to show that the panel committed an error regarding this decision. Therefore, this application for judicial review is denied.

QUESTIONS FOR CERTIFICATION

[31] Counsel for the Applicant submitted two questions for the purpose of certification:

(1) Is an immigration member under a duty to clarify ambiguous relevant evidence relating to an issue raised by the person concerned and required to be determined before her?

(2) In light of the reasoning of the Supreme Court of Canada in *Suresh v. M.C.I.*, [2002] S.C.J. No. 39 at para. 109-110, is an immigration member obligated to provide a person alleged to be described in s. 34(1) of the *IRPA* notice that an exemption may be sought under s. 34(2) of the Act, and adjourn the hearing to enable the person to seek an exemption?

[32] I do not believe that either of these questions are appropriate for certification. Both are based upon the facts of this case, and are not of general relevance. In response to the first question, the Applicant was represented by counsel at all points during his refugee claim, and there was a duty on him and his counsel to clarify and/or raise any issues that remained ambiguous or unclear. As for the second question, it has already been explained in these reasons that there is no onus on the Minister or panel of the IRB to advise a person concerned of the existence of the exemption provision or to adjourn the proceedings to allow for an exemption request to go forward. It is an applicant's responsibility to ensure his best case is brought forward. Neither question will be certified.

ORDER

THIS COURT ORDERS THAT :

This application for judicial review be denied without costs, and no question will be certified.

"Simon Noël"

Judge