

Date: 20050203

Docket: IMM-3402-03

Citation: 2005 FC 172

BETWEEN:

KAILESHAN THANABALASINGHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

LEMIEUX J.:

INTRODUCTION

[1] The applicant is a citizen of Sri Lanka who became a permanent resident of Canada on August 31, 1992, after being recognized as a Convention refugee. In this judicial review application, he seeks to quash the decision of L. Hill, the Minister's delegate ("decision maker" or "delegate"), dated March 14, 2003, determining him to be a danger to the public under paragraph 115(2)(a) of the *Immigration and Refugee Protection Act* (the "Act") as well as her determination in respect of the risk of his return to Sri Lanka.

[2] Section 115 of the Act is entitled "Principle of non-refoulement" and reads:

Protection

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and

Principe

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel

unusual treatment or punishment.

elle peut être renvoyée.

115(2) Exceptions

115(2) Exclusion

(2) Subsection (1) does not apply in the case of a person

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire_:

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

115(3) Renvoi de réfugié

115(3) Removal of refugee

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)e), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.

(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection. [*emphasis mine*]

[3] In a document dated March 14, 2003, entitled "Minister's Opinion Considerations - A115(2)(a)" the Minister's delegate set out the reasons for considering the applicant a danger to the public in Canada.

[4] First, the decision-maker stated the applicant had a history of criminal convictions the most recent in 1998 for conspiracy to commit aggravated assault for which he was sentenced to imprisonment for five months and twenty-two days taking into account one month and ten days time served and probation for eighteen months. His earlier convictions were for failure to comply with his recognizance and possession in 1995 of a weapon (machete) for a dangerous purpose for which he was convicted in 1996 and received a suspended sentence, fined \$500 and prohibited from possessing firearms for five years.

[5] The Minister's delegate noted the applicant had no further charges since 1998 but added: (applicant's record, page 8) "While this is true, there is also the issue of Mr. Thanabalasingham's involvement in the Velvetiturai (VVT)" noting, however, that the applicant "denies being a member of the VVT and denies being a leader of this gang or any other".

[6] The Minister's delegate held:

The facts stated in the Request for Ministerial Opinion (RMO) and the Ministerial Opinion Report (MOR), along with all of the submissions included in these two reports differ from counsel's version of whether or not the client is a member of the VVT and thus a danger to the public. Having weighed the two versions, I place more weight on these two reports. In addition, evidence supplied at detention reviews and by the Toronto Police is convincing that Mr. Thanabalasingham is a member of the VVT. It is also credible that he plays a central role in the VVT. The actions of the VVT are violent as illustrated by the many pieces of documentary evidence provided by the CIC. The activities range from credit card fraud to car theft to unlawful use of weapons. Mr. Thanabalasingham's association with the VVT leads to the opinion that he will likely be involved in further criminal activity. Whether he actually commits the offences or plans and organizes these offences, the link is still there to the danger the client represents to the Canadian public. [emphasis mine]

[7] The Minister's delegate then refers to the applicant's claim that since he left Sri Lanka without a passport, he will be detained and will face a real and substantial risk of torture and she noted counsel for the applicant stated that, although the peace negotiations have moved along well, there was no certainty or even probability there will be a final agreement. It was further noted by the decision-maker that according to counsel for the applicant, there remained a risk of torture or other forms of cruel, inhumane treatment. The Minister's delegate concluded:

The RMO addresses these issues. Since Mr. Thanabalasingham was determined to be a Convention refugee in 1991, country conditions have changed considerably. The RMO speaks about steps to address human rights taken by the government of Sri Lanka. The documentary evidence outlined in the RMO is contrary to the client's opinion of current conditions in Sri Lanka. The documents included in the RMO sustain the belief that there has been significant enough change in country conditions to make the determination that there are substantial grounds to believe that the risk of torture or cruel and unusual punishment or treatment upon return to Mr. Thanabalasingham has been significantly reduced.

The evidence that I have weighed leads to the conclusion that any risk that Mr. Thanabalasingham might face is outweighed by the danger to the Canadian public. [emphasis mine]

BACKGROUND

[8] On February 14, 2002, the applicant was made the subject of a deportation order based on a report which alleged he was removable from Canada

because of the criminal conviction of conspiracy to commit assault, (the 1998 conviction).

[9] I mention the applicant had been the subject of a second section 27(1) report under the former *Immigration Act* (the "former Act"), alleging he was a member of a gang, *i.e.* an organization engaged in criminal activity. This allegation was not proceeded with by the Minister.

[10] On October 18, 2001, he was arrested in Ottawa; a number of individuals alleged to be members of Toronto area Tamil criminal gangs were also arrested at the same time.

[11] Several detention reviews were held in respect of his detention. He was initially ordered detained by Member Gratton of the Immigration Division who, after the first 30-day detention review, ordered in March 2002, his continued detention on the grounds he was both a danger to the public and a flight risk.

[12] The same result prevailed in a number of other detention reviews until those of Members Tumir and Iozzo who, on November 5, 2002, and March 18, 2003, respectively, found the applicant not to be a danger to the public on the basis the testimony of police witnesses was based on "notoriously and demonstrably unreliable gang sources" and thus insufficiently credible and trustworthy (Tumir, page 22) and "[T]he evidence presented to show that [the applicant] is the leader of the VVT and that he is still involved in the gang's activities, and has conspired to commit murder and has taken part in shootings is not credible or trustworthy" (Iozzo, paragraph 47 of [2003] I.D.D. No. 2).

[13] The reason for these decisions on detention are relevant because the wording of section 58 of the new *Immigration Act* incorporates "danger to the public" criteria in the decision whether to detain a person or not.

[14] The Minister challenged the Tumir and Iozzo decisions. He was not successful. Justice Gauthier on October 21, 2003, dismissed the Minister's judicial review application from the Iozzo decision, 2003 FC 1225. Justice Gauthier was sustained on appeal by the Federal Court of Appeal, 2004 FCA 4.

[15] Justice Gauthier held it is the Minister who must establish, on a balance of probability, the applicant is a danger to the public if the Minister wanted the detention to continue. As noted, the Federal Court of Appeal agreed with her.

[16] Justice Gauthier also reviewed Member Iozzo's assessment of the evidence on the patently unreasonable standard. She rejected the Minister's submission it was patently unreasonable to reject the KGB's statement [the nickname given to those statements refers to the decision of the Supreme Court in *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (K.G.B.) dealing with hearsay evidence] and the evidence of the police officers as not credible or trustworthy, because at previous detention hearings, members of the Immigration Division actually held these KGB statements were trustworthy and Ms. Gratton found the evidence of Officer Furlong was compelling.

[17] Justice Gauthier ruled:

87 First, the Court notes that in fact Mr. Iozzo was confronted with contradictory findings with respect to the credibility or trustworthiness of the KGB statements.

¶ 88 Second, the three members who relied on the KGB statements expressed reservations about their trustworthiness and only accepted them as trustworthy with respect to the allegation that the respondent was a member and a leader of the VVT because they agreed with the common thread theory put forth by the applicant.

¶ 89 Also, the members who were satisfied that the respondent was the leader, or at least a member of the VVT, based their conclusions first and foremost on the KGB statements using the testimonies of the police officers as evidence confirming their views. [See Note 2 below]

[Note 2: Mr. Murrant said: "Added to this is the testimony of the police officers" (at p. 160 of T.R.).]

Ms. Gratton said: "That evidence [the KGB statements] coupled with what I view as the compelling testimony of officer Furlong" (at p. 592 T.R.).

Ms. Simmie said: "This information [the KGB statements] appears to also be consistent with the information otherwise obtained by the police as attested to by officers Gadeshan and Furlong" (at p. 1566 of T.R.).

¶ 90 With respect to the quality of the testimony of Mr. Furlong, Mrs. Gratton who heard his evidence said at page 592 T.R.:

That evidence coupled with what I view as the compelling testimony of officer Furlong, whose knowledge of the community and the organization was extensive has led me to find that it is not an unreasonable conclusion that Mr. Thanabalasingham is entrenched in the VVT organization. [My emphasis.]

¶ 91 Her actual finding certainly puts her comment about the compelling quality of this testimony in its proper context.

¶ 92 None of those members stated that their conclusion would have remained the same, had they not considered the KGB statements worthy of their trust.

¶ 93 Ms. Gratton did not have before her all of the evidence presented to Mr. Iozzo for much had been added in the subsequent reviews. She was told by officer Gadeshan that the police investigation was still under way.

¶ 94 With that background in mind, Mr. Iozzo reviewed all of the evidence before him knowing that he was now required to release Mr. Thanabalasingham unless he was satisfied by credible and trustworthy

evidence that he was a danger to the public. In that respect, he did not simply rely on Mr. Tumir's comments on the KGB statements or the police officers' testimonies, he made his own assessment of the evidence.

THE ISSUES

[18] Counsel for the applicant raised the following issues:

- (a) whether the delegate erred in law in providing reasons which were insufficient to meet the requirement to provide reasons;
- (b) whether the delegate erred in law in considering allegations of criminal wrongdoing which did not result in convictions nor even charges being laid against Mr. Thanabalasingham;
- (c) whether the delegate erred in law in placing weight on evidence provided by his officials over the sworn statements of the applicant and his family members and friends;
- (d) whether the delegate erred in law in ignoring evidence;
- (e) whether the delegate erred in law in concluding the danger Mr. Thanabalasingham represents outweighs any risk he may face in being returned to Sri Lanka.

A NEW DEVELOPMENT

[19] At the hearing before this Court, counsel for the Minister moved to admit as evidence in this proceeding, the applicant's testimony tendered in April/May 2004 before the Immigration Appeal Division ("IAD") on his appeal from the February 2002 deportation order.

[20] Counsel for the Minister states the applicant has admitted to the IAD he lied to Member Gratton on his detention review. As a result, he states that perjured evidence was before Justice Gauthier and the Federal Court of Appeal. It was also before the Minister's delegate when she rendered her decision the applicant is a danger to the Canadian public and consequently that evidence is before the Court in this proceeding.

[21] He submits the evidence from the IAD should be admitted into this proceeding and further the applicant's application should be dismissed on the basis of his conduct alone because to entertain his judicial review application undermines the authority and integrity of this Court. He further argued if this Court decided to entertain the applicant's application, the new evidence must be considered in determining whether the applicant's arguments have any merit. He argued the Court should not rely on any previous statements by the applicant that we now know is perjured and that the new evidence should be considered in determining whether any material fact relied on by the applicant should be given any weight.

[22] Counsel for the applicant did not disagree with counsel for the Minister that her client had lied. I reproduce the following extract from her supplementary memorandum of fact and law filed on June 15, 2004:

2. The Minister seeks to rely on Mr. Thanabalasingham's testimony given at his appeal before the Immigration Appeal Division in which he admitted that he had not been totally honest in giving his testimony at his detention review before Immigration adjudicator, Sylvana Gratton - he had minimized the circumstances surrounding his 1996 conviction for possession of a weapon on May 7, 1995 and his 1998 conviction for conspiracy to commit assault in May, 1997. In his testimony at the appeal he had been far more forthcoming about the details of his associations with persons in the VVT gang and while maintaining that he had stopped hanging around with other persons believed to be in a gang, he acknowledged that he had had some contacts with some of these people after his 1998 conviction.

FURTHER CONTEXT

[23] At this point, it is useful to summarize the submissions which led to the Minister's delegate's finding the applicant was a danger to the public in Canada.

[24] It was on October 31, 2002, the applicant was informed by Citizenship and Immigration Canada ("CIC") it possessed evidence suggesting he was a person in Canada who is a danger to the public and CIC would be seeking the Minister's opinion to this effect.

[25] He was advised (applicant's record page 13):

The Minister will consider whether it can be reasonably concluded that you are a danger to the public. This will require an assessment of the threat you pose to the public in Canada and the possibility of risk to you which could be precipitated by returning you to the country from which you came to Canada, ...

[26] CIC's letter included a list of the material CIC would provide the Minister for consideration. That material included:

(1) A reference to the 1996 conviction for possession of a dangerous weapon for a dangerous purpose and the applicant's guilty plea. CIC felt the conviction list did not capture the "true brutality of the offence". It attached the police occurrence report showing they were aware of the ongoing rivalry between two Sri Lankan gangs. According to the police, the applicant participated on May 7, 1995, in a gang related attack against a rival gang member in which he used a machete.

(2) CIC's material mentions the victim of the May 7, 1995 attack was savagely attacked two days later. The victim identified the applicant as his assailant. The applicant was charged. The victim stated then he was not sure the applicant was there. The charges against the applicant were dropped. The victim was charged with public mischief.

(3) CIC mentions that in April 1997, the applicant was investigated as part of the Paper Tiger police investigation that authorized the interception of communications. The applicant was heard conspiring with the acknowledged leader of the VVT gang at the time about providing a 22-caliber firearm to other gang members and planning an assault. As a result of the wiretapping, on May 9, 1997, he was charged along with the VVT leader and another known VVT enforcer of conspiracy to commit an indictable offence of aggravated assault. He was convicted.

[27] CIC's intention to seek a ministerial opinion then discussed the applicant's potential for rehabilitation. CIC states the applicant has been identified by Toronto police as a gang member, a purveyor of guns and ammunition and a leader of the VVT, a Sri Lankan gang involved in serious criminal activity as well as an ongoing violent turf war with another rival gang in Metro Toronto. The gang activity ranged from car theft, credit card and official document fraud to assault with weapons, possession and use of unregistered firearm, coercion, aggravated assault, attempted murder and murder.

[28] As proof, CIC referred to police statements and evidence, taped transcripts of interviews with other gang members who identified the applicant as a VVT member and leader. CIC stated (applicant's record, page 19) "[T]he preponderance of evidence against him was sufficient to convince several presiding adjudicators during his detention reviews that [the applicant] was and is a member of the VVT, a planner of violent, even deadly, armed attacks and a purveyor of firearms who assumed the VVT leadership after the arrest of the then leader [Sri Ranjan Rasa] and, therefore poses an ongoing danger to the public".

[29] CIC then goes on to describe a taped interview in February of 2001 between the police and a VVT gang member who reported the applicant was in the process of buying firearms in the United States. That person implicated the applicant in a number of other criminal occurrences from providing and disposing firearms to being in the process of planning an attack on a rival gang member on his release from the Mimico Detention Centre. The attack took place in March 2001. Several gunshots were fired; the target was hit five times but survived.

[30] CIC's material also refers to Homicide #61/97 Investigative Report in conjunction with police audio and/or videotaped interviews from different dates which were referred to throughout the detention reviews as KGB statements.

[31] Specifically, there is a reference to a December 27, 1997, incident at a donut shop on Finch Avenue in Toronto where the rival gang to the VVT hung out. There was one fatality. The KGB statements implicated the applicant as the planner of the attack and the new leader of the VVT.

[32] CIC's material referred to parts of Member Gratton's decision on her detention review and her finding that, despite the information provided, the inconsistencies, lies and prevarications, she saw a common thread despite the lack of credibility in the KGB statements - the common binding thread placing the applicant clearly in the role of leader or interim leader of the VVT. According to CIC, Member Gratton found this evidence and the compelling testimony of Officer Furlong led her

to conclude it was not unreasonable to find the applicant was entrenched in the VVT organization. Moreover, she found the applicant non credible.

[33] CIC's material also referred to other detention reviews and the findings that despite the deficiencies in the KGB statements, there existed substantial evidence for the assertion the applicant was a member of the VVT and its current leader including the finding of Adjudicator Murrant who believed there were reasonable grounds for him to come to the conclusion the applicant was a danger to the public.

[34] Counsel for the applicant responded to CIC's intention to request the Minister's danger opinion by letter dated December 16, 2002, making lengthy submissions and providing additional documentation. Counsel for the applicant had represented the applicant throughout several detention reviews, his admissibility hearing and represented him before the IAD.

[35] Counsel for the applicant specifically pointed out the following.

[36] First, CIC's documentation was selective. Mr. Tumir's detention review decision finding the applicant not to be a danger to the public had not been part of CIC's proposed information to the Minister.

[37] Second, several of the deponents of the KGB statements recanted their statements and their affidavits had been left out.

[38] Third, there were many documents which were either inadmissible, irrelevant or not properly proven as evidence even in an administrative proceeding such as the one engaged. The first document she referred to was the Homicide Report concerning a shooting of three persons resulting in the murder of one. She pointed out the applicant had not been charged with involvement in the incident nor had the police even questioned him. She stated the report was based on four KGB statements implicating the applicant in the shooting. She asserts the report is deceptive and misleading as three of those persons made other statements either on or off the record in which their accounts differ from those summarized. She pointed out the failure to lay charges was significant because that evidence was not sufficiently credible or trustworthy to be given weight in the context of laying charges and could not be credible for the purposes of a danger certification request. She added that inherently incredible and untrustworthy evidence did not become credible or trustworthy because it was being used in a different proceeding. She observed that the test for laying of criminal charges is reasonable grounds and the test for the evidence in this proceeding was balance of probabilities and that balance of probabilities is a higher standard than reasonable grounds.

[39] In her submissions, counsel for the applicant:

- (1) returned to the fact the recantations of the KGB providers had been left out;
- (2) commented on Mr. Tumir's decision which analysed differently the evidence than other adjudicators had and suggested no reliance should be placed on the electronic surveillance request affidavit of March 1997 because it was not sworn; there was no evidence it was ever presented to a Court and there was no evidence a

judge of the Superior Court of Justice ever issued an authorization to intercept private communications.

[40] Counsel for the applicant also addressed the risk of the applicant's return to Sri Lanka.

[41] She commented on the peace of process and mentioned there continued to be breaches of the cessation of hostilities.

[42] However, she added another point concerning public assertions by the Toronto police and Canadian immigration officials that the VVT was working for the LTTE, was a front for the LTTE or the LTTE itself and the applicant was a member and the leader of the VVT. She said this "clearly puts his life at risk in Sri Lanka not only because the VVT is said to have supported the LTTE but it was actively committing crimes to obtain money for the LTTE".

[43] Finally, counsel for the applicant, in her response to CIC's intention to request for a ministerial opinion appended a copy of her 33-page brief to Member Tumir.

[44] On January 8, 2003, CIC disclosed to the applicant a copy of the Ministerial Opinion Report ("MOR") and the Request for the Minister's Opinion ("RMO") as well as documentation related to Sri Lanka. The applicant was advised that before the documents were presented to the Minister, the applicant could make final representations, arguments or submit evidence.

[45] I need not summarize, *in extenso*, CIC's RMO. Although organized differently than in the previous disclosure in respect of its intention to do so, the RMO identified key documents such as: information from the RCMP on the June 8, 1998, conspiracy conviction; the police report on the 1996 assault conviction and its gang related features; the application by the Toronto police for wiretap authorization and the linkage between the VVT and the LTTE; Mr. Murrant's detention decision; the comment in Mr. Tumir's decision about the applicant's credibility; extracts from applicant's counsel's submissions dated December 16, 2002, including the risk of his return to Sri Lanka; information on the applicant's immigration status and country condition reports on the risk of return to Sri Lanka.

[46] The case review officer in the RMO concludes that since the applicant was determined to be a Convention refugee and considering the changes in the country conditions with the cease-fire and the peace process that is currently taking place, there is no serious possibility that as a young Tamil he is still a person who will be subjected to persecution. There is also a further finding there are no substantive grounds to believe he will face torture and it is unlikely he will be subject to other cruel, inhumane and degrading treatment or punishment should he be removed to Sri Lanka.

[47] The reviewing officer's comments in the RMO simply state this at page 270 of the applicant's record:

As indicated by the IRB member R. Murrant in his detention review conclusion, [the applicant] represents a present and future danger to the public in Canada. Further, although he was released from detention on November 5, 2002, it is evident from the member's comments that concerns still remain with respect to credibility.

[48] The case reviewing officer concludes by stating he has reviewed the notification letter plus all attachments to that letter, the Ministerial Opinion Report ("MOR") prepared by the CIC as well as the submissions forwarded by the client or counsel.

[49] The MOR is dated November 25, 2002. Under Part B entitled "Criminality and Danger Information", the 1998 and 1996 convictions are listed.

[50] In terms of the danger rationale, it reads:

Mr. Thanabalasingham was identified through police wiretaps, evidence and other gang members statements as the leader of the V.V.T., a Sri Lankan gang involved in serious criminal activity as well as an ongoing turf war with another rival gang in the Metropolitan Toronto area. Gang activity ranges from car theft, credit card and official document fraud to assault with weapons, possession of unregistered firearms, coercion, kidnapping, aggravated assault, attempt murder and murder. Mr. Thanabalasingham is the alleged provider and disposer of firearms as well as the planner of criminal activity and armed attacks that have led to at least one murder of an innocent bystander as well as the shooting of two others who survived their wounds. Sufficient compelling evidence was provided that Members presiding at Mr. Thanabalasingham's detention reviews and inquiry (admissibility hearing) were of the opinion that he was and is a member and leader of the V.V.T. and a danger to the public.

[51] Counsel for the applicant responded to the MOR by way of a written submission dated January 29, 2003, which made the following points.

[52] First, on the 1996 and 1998 convictions, counsel said while they were serious ones, they were dated and mentioned the applicant was not detained by immigration officials until October 2001.

[53] Second, as to the gangs, the RMO relies on an application from the Metro Toronto Police Services for an intercept authorization. She assumed the purported affidavit was the one which was not sworn, nor dated, and said the application should be given no weight at all. She notes the paragraph referring to the VVT leaves out the statement that Mr. Rasa is the leader of the VVT which contradicts the position taken by immigration officials that the applicant is the leader of the VVT. It noted that on the applicant's sentencing for the 1998 conviction, the Court only characterized him as an associate and not a member. She points out the LTTE is not listed as a terrorist organization in Canada.

[54] Third, as to the reliance placed on the factual finding by Mr. Murrant, those statements appear to differ from material provided for the wiretap authorization, the Minister chose not to proceed on the allegation the applicant was a member of a gang although a section 27 report had been prepared.

[55] Fourth, she stated CIC's continued insistence the applicant is the leader of the VVT and the VVT are a bunch of trained LTTE terrorists acting as the LTTE in Canada and committing crimes is not true and only puts the applicant at increased risks if removed from Canada and returned to Colombo and into the hands of the Sri Lankan authorities.

[56] Fifth, she took issue with the change of circumstance in Sri Lanka through the visa process.

[57] Sixth, as to the danger rationale, she once again pointed out that other gang members' statements that the applicant is the leader of the VVT, is contained in statements of alleged co-conspirators and police constables who relied on the alleged co-conspirators. She pointed out once again some of them retracted their statements and it appears from the statements they were made to the police by persons who wanted to implicate the applicant.

[58] Finally, she asserted she did not know on what evidence CIC relied on for the assertion the applicant is the supplier and disposer of firearms.

ANALYSIS

(a) The standard of review

[59] The decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, is determinative. In that case, the Court was dealing with a Minister's decision a refugee constituted a danger to the security of Canada. I see no distinction between the nature of that kind of decision and the one at hand where the Minister's decision is in respect of whether a refugee constitutes a danger to the public in Canada. The Court's answer is found at paragraph 29 of its decision:

¶ 29 The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada. We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere [page24] merely because it would have come to a different conclusion. [emphasis mine]

[60] The Court went on to decide a second question concerning the standard of review of the Minister's decision on whether the refugee faced a substantial risk of torture upon deportation. The Supreme Court held whether there is a substantial risk of torture if Suresh is deported is a threshold question which, in large part, is a fact driven inquiry which requires consideration of the human rights records of the home state, the personal risk faced by the claimant, any assurances the claimant will not be tortured and their worth, and, in that respect, the ability of the home state to control its own security forces and more. The Court said the threshold finding of whether Suresh faced a substantial risk of torture is an aspect of the larger danger opinion attracting

deference from the reviewing court. It was of the view the Court may not re-weigh the factors considered by the Minister but may intervene if the decision is not supported by the evidence or fails to consider the appropriate factors.

(b) Conclusions

(i) Risk analysis

[61] In *Suresh, supra*, the Supreme Court of Canada had to decide whether deportation to face torture was contrary to section 7 of the Charter and contrary to international law precepts.

[62] The Court concluded at paragraph 58, that "Canadian jurisprudence does not suggest Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil [...] the appropriate approach is essentially one of balancing" but "[T]his said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere".

[63] The Court then considered what the international perspective taught Canada. At paragraph 75, the Court concluded "the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the Charter".

[64] At paragraphs 77 and 78, the Supreme Court of Canada reiterated that again the balance struck by the Minister must conform to the principles of fundamental justice and it followed that insofar as the *Immigration Act* "leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture".

[65] At paragraph 78, the Court said "[W]e do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1. This is an issue which is to be decided on a case by case basis". The Court added "[W]e may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture".

[66] In this context, I have come to the conclusion there is a fatal flaw in the risk analysis made by the Minister's delegate. The conclusion I reach is identical to that reached by my colleague, Justice MacTavish, in *Thuraisingam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 607.

[67] The defect in the risk analysis relates to the fact the Minister's delegate did not consider the specific circumstances of the applicant's own situation and to his particular risk arising from the fact he was alleged to be the leader of a Tamil gang in Toronto, which gang is said to provide support to the LTTE and that this has been communicated to the Sri Lankan authorities as a result of media coverage.

[68] This circumstance was the precise circumstance which Justice MacTavish faced in *Thuraisingam, supra*. This is what she concluded at paragraphs 49 and 50 of her decision:

¶ 49 Mr. Thuraisingam asserts that he would be specifically targeted by Sri Lankan authorities because of his alleged gang activities in Canada. He has produced media reports from Sri Lanka which specifically identify Mr. Thuraisingam as the leader of a VVT gang. These reports also state that the RCMP have connected senior VVT members in Canada with the LTTE in Sri Lanka. In my view, this raises a *prima facie* risk to Mr. Thuraisingam from the Sri Lankan authorities.

¶ 50 In assessing the risk to Mr. Thuraisingam if he were returned to Sri Lanka, the Minister's Delegate examined the general situation facing returning Tamil refugees, finding that the situation was much improved, and that work was being done to smooth the way for returning deportees. No consideration was given to the specific circumstances of Mr. Thuraisingam's own situation, or to the particular risk that he might face from Sri Lankan authorities.

[69] The Minister's counsel asks me to bring into the evidence in this proceeding the applicant's lies to the IAD about his activities in Canada and, once that evidence is admitted, to reject his judicial review application because of that conduct.

[70] I am prepared to bring into evidence a summary of what he told the IAD. I attach as Appendix "A" to these reasons, a summary of the relevant admissions to the IAD and how they differed from his testimony on detention review. I do so on the basis that the admission of such evidence is in the interest of justice (see paragraph 4 of Justice Sharlow's decision in *Humanist Association of Toronto v. Canada*, 2002 FCA 322).

[71] However, I am not prepared to reject his judicial review application just because he lied. He may have established a *prima facie* risk of torture because of the publicity related to his leadership in the VVT in Toronto. If anything, his admissions may go some length to strengthen the Minister's case in respect of his danger to Canada but I make no determination on this point, the matter before me being in the nature of judicial review.

[72] Given the drastic consequences which might befall the applicant should he be forcibly removed to Sri Lanka and given the holding of the Supreme Court of Canada that generally deportation to face torture is not in accordance with Canadian law, and balancing those two factors with the factor of his recent admission, leads me to conclude I cannot subscribe to the Minister's request to simply shut down the applicant's judicial review application.

[73] Although strictly not necessary to do so, I now explain why I have concluded the Minister's delegate's reasons were inadequate in respect of the finding the applicant was a danger to the public in Canada.

[74] The Minister's delegate derived the factual foundation to the critical finding the applicant is a member of the VVT and thus a danger to the public in

Canada by holding the facts (without specifying which facts) stated in the RMO and in the MOR "differ from counsel's version of whether or not the client is a member of the VVT...". She then states her conclusion, without more, "[H]aving weighed the two versions, I place more weight on these two reports". The delegate does not tell us why this evidence is convincing.

[75] The Minister's delegate then adds, without any explanation, the evidence supplied at the detention reviews (without stating which ones) and by the Toronto police is convincing the applicant is a member of the VVT. The delegate does not tell us why this evidence is convincing in contrast to other evidence.

[76] As part of the material before the Minister's delegate is the Tumir decision which found the applicant not to be a danger to the public because of the lack of credible and trustworthy evidence before him. The Tumir decision is opposite that of other adjudicators. The Minister's delegate does not analyse the infirmities in the evidence which Immigration Division adjudicators acknowledged as problems. The Minister's delegate does not refer to any points brought forward by applicant's counsel.

[77] In my view, the Minister's delegate's reasons fall short of the required standard particularly in the context of the question to be decided by the Minister's delegate and the consequences of such finding. In view of the conflicting and contradictory evidence the decision maker had an obligation to sort out the evidence through appropriate analysis so that the basis of her decision could be understood. This is particularly so because the evidence must show, on a balance of probabilities, the applicant is a danger to the public in Canada. It appears some adjudicators in the detention review may have applied a different lower standard of "reason to believe".

[78] This is why the Supreme Court of Canada in *Suresh, supra*, imposed upon the Minister the obligation to provide written reasons for decision. This is what the Supreme Court of Canada said at paragraph 126 in *Suresh, supra*:

¶ 126 The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual who is the subject of a s. 53(1)(b) declaration will be subjected [page67] to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act. In addition, the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion, such as the memorandum of Mr. Gautier. Mr. Gautier's report, explaining to the Minister the position of Citizenship and Immigration Canada, is more like a prosecutor's brief than a statement of reasons for a decision.

[79] Inadequate reasons does not mean there was no evidence in the record to support the delegate's ultimate view; it means that there were conflicting evidentiary

submissions, conflicting evidentiary findings in detention reviews and deficiencies in the evidence that required analysis and explanation which were absent.

[80] The circumstances in which courts will find reasons inadequate are well known and I need cite only a few of them.

[81] This is the way Justice Hugessen, then a member of the Federal Court of Appeal, expressed himself in *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.A. No. 545:

Subsection 69.1(11) of the Immigration Act [R.S.C. 1985, c. 1-2.] requires that the Refugee Division "give written reasons" for any decision against the claimant. If this obligation is to be met, the reasons must be sufficiently clear, precise and intelligible that the claimant may know why his claim has failed and decide whether to seek leave to appeal, where necessary.

We are all of the opinion that the reasons given by the Refugee Division in this case do not meet these criteria. Stating that the claimant "did not prove the existence of the reasonable fear of persecution", without saying any more, may mean that the panel did not believe the claimant, or that it believed him but that the reasons for the alleged persecution do not fall within the reasons listed in the Act, or that the reasonable fear which existed in the past is no longer reasonable because of changed circumstances in the country of origin. There are several other possibilities, inter alia that the Refugee Division interpreted the Act itself badly.

[82] I cite Justice Layden-Stevenson's decision in *Liang v. Canada (Minister of Citizenship and Immigration)*, 2003 CF 1501 at paragraph 42:

¶ 42 It is important not to lose sight of the purpose of reasons. In *Li v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 413 (T.D.), Mr. Justice Teitelbaum, citing *Syed v. Canada (Minister of Employment and Immigration)* (1994), 83 F.T.R. 283 (T.D.), stated:

The function of written reasons is to allow an individual adversely affected by an administrative tribunal's decision to know the underlying rationale for the decision. To that end, the reasons must be proper, adequate and intelligible and must give consideration to the substantial points of argument raised by the parties ... The Refugee Division is obligated, at the very least, to comment on the evidence adduced by the applicant at the hearing. If that evidence is accepted or rejected, the applicant should be advised of the reasons why.

At the same time, the reasons are not to be read microscopically and held to a standard of perfection. They must be read as a whole: *Medina v. Canada (Minister of Employment and Immigration)* (1990), 120 N.R. 385 (F.C.A.); *Ahmed v. Canada (Minister of Employment and Immigration)* (1993), 156 N.R. 221 (F.C.A.).

[83] I add as another reference Justice Martineau's decision in *Canada (Minister of Citizenship and Immigration) v. Koriagin*, 2003 FC 1210 at paragraphs 5 and 6:

¶ 5 To fulfil the obligation under paragraph 69.1(11)(b) of the Act, the reasons must be sufficiently clear, precise and intelligible to allow the Minister or the person making the claim to understand the grounds on which the decision is based and, where applicable should the decision be appealed, to allow the Court to satisfy itself that the Refugee Division exercised its jurisdiction in accordance with the Act.. See inter alia: *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.) (QL); *Minister of Citizenship and Immigration v. Roitman*, [2001] F.C.J. No. 718 (F.C.T.D.) (QL); *Zannat v. Minister of Citizenship and Immigration* (2000), 188 F.T.R. 148; *Zoga v. Minister of Citizenship and Immigration*, [1999] F.C.J. No. 1253 (F.C.T.D.) (QL); *Khan v. Minister of Citizenship and Immigration*, [1998] F.C.J. No. 1187 (F.C.T.D.) (QL).

¶ 6 A determination that there is a reasonable fear of persecution based on one of the grounds listed in the Convention raises a question of mixed fact and law. In *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 187 N.R. 321, the Supreme Court of Canada reaffirmed that a refugee claimant has the burden of proof in establishing a well-founded fear of persecution. Clearly, this determination calls for a careful analysis of the claimant's testimony and of the documentary evidence concerning the conditions in the country. When written reasons are required, it is not sufficient to state that the determination in the affirmative is based on the evidence without further explanation.

[84] I conclude by reference to Justice Binnie's decision in *R. v. Sheppard*, 2002 SCC 26, at paragraph 46 and in doing so, I appreciate the penal context is not the same as the immigration context but, in my view, at the level of principles, the underlying rationale for providing written reasons is apt:

¶ 46 These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the [page893] circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict properly scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons

may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function.

[85] Counsel for the applicant raised a number of other issues which, given my findings, I need not resolve.

[86] For all of these reasons, this judicial review application is allowed, the Minister's delegate's decision of March 14, 2003, is set aside, and the matter referred back to the Minister for redetermination by a different delegate. I grant each party five working days from the date of this order to propose one or more questions of general importance for certification. Each party will have a further five working days to comment on any question proposed from the opposite party.

"François Lemieux"

J U D G E

OTTAWA, ONTARIO

FEBRUARY 3, 2005

APPENDIX "A"

[Paragraph 9 of the respondent's supplementary memorandum]

a) The Applicant said that he lied to Member Gratton because he had heard she was biased; because he wanted to minimize his involvement with gang members and guns; and because he wanted to be released from detention. He said that he knew that it was not good to lie under oath, and that now he was going to be upfront and honest, and just tell what happened. (April 6, at 31, 35-36, 98; April 13, at 188-192)

b) The Applicant agreed that he did not correct his misrepresentations at later detention reviews because he still hoped to get out of detention on perjured testimony. (April 13, at 190)

c) The Applicant continued to deny membership and leadership in the VVT. He said that he was not a gang member because they did not tell him secret information that was between the members, such as, serious criminal matters. As well, Rasa and Fabian never worked, and Suresh Kanagalingam ("Suresh" or "Koli") rarely worked. Most of their time was spent on gang activities, and they made money that way. The Applicant stated that he associated with them part-time and was enjoying hanging around with them. (April 13, at 144, 147, 156; April 14, at 23-24)

d) The Applicant lied about the May 7, 1995 machete attack on Sabesan Rajah and his subsequent conviction. His previous testimony was that, upon arriving at the restaurant to pick up a friend, he saw a fight and simply drove away without getting out of his car. He had said that his conviction for possession of a weapon was because he told the police that he had an army knife in the trunk of his car. (Tribunal Record, at 502-507, 555)

At the IAD, he testified that he had bought a machete a year earlier at a flea market. He bought and kept it in the trunk of his car for protection, as he and his friends usually got into trouble at bars (bar fights). He said that he was prepared to use the machete, but he could not remember if he had ever pulled it out at a club, as that was a long time ago.

On May 7, 1995, his friend asked him to pick him up at a restaurant. When he arrived, there was an argument going on between his friend's group of friends and another group, altogether between 10-15 Tamils. He walked up to his friend and was told that there were problems between the two groups and that there was going to be a fight. He told his friend that he had a machete in his car, and he was asked to get it. Other people had baseball bats and sticks. He retrieved the machete from his car. Two people from the opposing group were coming towards his friend, and the Applicant used the machete to protect himself and his friend. The Applicant stated that he cut Sabesan Rajah on the hand with the machete. The police came, and he threw the machete in a bush. Two or three days later, the police came to his house, and because he wanted to be upfront with them, he told them that he had a machete. He said that the fight was not a gang fight; rather, it was just a fight between two groups of people who had been drinking. (April 6, at 22-27, 191; April 13, at 74-81, 87-95, 99-103)

He said he knew three guys from the other side, one of whom he hit with his machete (Sebesan Rajah), and that later they became members of the AKK. (April 6, at 49; April 13, at 93; April 14, at 89-91)

e) He lied about his 1998 conviction for conspiracy to commit assault. Before Member Gratton, he said that he had asked Rasa to threaten a former Ottawa roommate of his who was in Toronto spreading rumours about him. (Tribunal Record, at 495-499)

At the IAD, the Applicant said that the above-noted incident occurred, but that it was a different incident. He admitted that his conviction was the result of him requesting Rasa's permission to give a gun to members of the Guilder Boys who were having trouble with AKK gang members.

He said that he had returned from Ottawa for summer vacation. Members of the Guilder Boys (including Bobby) were having problems with AKK gang members, and the former knew that he knew Rasa, the leader of the VVT. They asked him if he could get a gun for them. Subsequently, he sought Rasa's permission to give a 22 - calibre handgun to the Guilder Boys. He did not think of any alternative courses of action, as it would have appeared that he was afraid, and he wanted to demonstrate that he was an influential and prominent person. He said that he would not have been in breach of his probation order restricting him from carrying firearms because he did not intend to carry the gun himself and would have had someone else carry it. He said that, in the end, the gun was not given to the Guilder Boys. He said that he was not involved in defending the Guilder Boys and was simply doing them a favour. He said that, at the time, he was willing to see the person that the Guilder Boys were having a conflict with seriously injured or killed. He said that Rasa had control over guns and wasn't willing to hand them out to just anybody (April 6, at 34-37, 205; April 13, at 153-154, 166-174, 179-184, 217-225; April 14, at 5-7, 47, 113-114; May 11, at 33-34)

f) The Applicant lied about his knowledge of the gangs and his relationship with gang members. In his earlier testimony, the Applicant maintained that he had very limited knowledge of the gangs, and that most of that knowledge was gained from the media. (Tribunal Record, at 488-489, 498, 507, 515, 523, 544)

At the IAD, the Applicant admitted that he knew "far, far more about the gangs and gang structure." He knew first hand that Rasa, Suresh, and Fabian were gang members and leaders of the VVT. The first two were close friends, but the latter was not his friend. He started to hang out with Rasa, who was getting into trouble, shortly before he, the Applicant, went to Ottawa in September 1994. He wanted to associate himself with Rasa because his thinking was stupid, he wanted his name in the community, he did not listen to his family, and he thought it would be cool to be a tough guy. He said that people in the community identified Rasa as the leader of the VVT and were afraid of him, which was one of the reasons he wanted to get close to him. The Applicant testified that Rasa had admitted that he was the leader of the VVT and that Rasa counted him as a good friend. The Applicant said that he used to think that fighting was fun and that eventually he too came to be feared in the community. (April 6, at 40, 49-50, 53, 55, 57-58, 60-62, 81, 133, 137; April 7, at 196; April 13, at 27-32, 175, 200; April 14, at 4-5, 8-22, 34-38, 50-54, 57-60, 108-109, 128, 167-170; May 11, at 30-34, 93-96)

In answer to why he wanted to associate with violence in order to become a prominent person, he answered as follows:

"At that time, I'm thinking that's the only way to become prominent in short time but I didn't think about this as in a bad way, killing other people but now I realize after I have my convictions charges that there are so many ways you can bring up yourself in the community, show you that your attendance and your work for the community in the (inaudible)." (*sic*) (May 11, at 124)

He said that some members of the VVT were involved in fraud, car thefts, counterfeiting, and fraudulent passports. He also said that he knew that the gangs were involved in violent activities. He said that he heard about all of this from gang members, gossip, and the media. He said that the gangs would discuss violent activities where people were not killed (e.g. stabbings and shootings) some time after the occurrences, but they would not discuss killings because of ongoing police investigations. (April 7, at 8-9, 30-33; April 13, at 34-42, 74, 124, 133, 143-144, 242-243; April 14, at 59, 67-69)

He said that he realized that his thinking was wrong after being charged for conspiracy to commit assault in 1997. He realized that he was hurting people, directly and indirectly, including his family. He said that the gangs were giving the Tamil community a bad name and that he wanted to become a good citizen. He said that he wanted to build a good future and go to the United States to establish his life there. (April 6, at 99; April 7, at 213-214; April 13, at 163; April 14, at 55)

g) The Applicant lied about the last time he had contact with gang members. His previous testimony was that after his 1997 charge for conspiracy, he stopped associating with gang members and that he did not have any "connection with anybody." (Tribunal Record, at 515-516)

At the IAD, he said that he saw Rasa 2-3 times between 1999 and 2001. He said that he last saw Rasa at Millbrook Detention Centre in or about August 2001. He said that Rasa did not have family and that he had heard that he was having problems. He visited Rasa in the detention centre and gave him canteen money. He said that he had given Rasa canteen money on one or two occasions. (April 6, at 108-112)

He said that he had also visited three other VVT members in prison in the period after his 1997 charge for conspiracy to commit assault. One member he visited two or three times in late 2000/early 2001. when the member was facing charges for possession of two guns. The Applicant said, however, that he never discussed the guns with the gang member. In the year 2000, he visited Suresh, who was facing attempted murder charges for running over a high-ranking member of the AKK with his car. On March 20, 2001, the Applicant attended one of Suresh's Court hearings in relation to the said charge. (April 6, at 114-119; April 7, at 102-107; April 13, at 66-68)

Suresh, who was a good friend of his, attended his cultural wedding in September 2001, as did Mr. Ariyaratam (a.k.a. "Reuben"), Mr. Thuraisingam (a.k.a. "Seelapu", leader of the Seelapu gang, see *Thuraisingam v. M.C.I.*, 2004 FC 607), and another known gang member. (April 6, at 117; May 11, at 18-19)

h) Before Member Gratton, the Applicant said that he had never seen or been with any gang members with guns. (Tribunal Record, at 501-502)

At the IAD, the Applicant admitted that that was a lie and that on one or two occasions he had been in the presence of "alleged" VVT gang members who had possession of guns. (April 7, at 36-37; April 13, at 98; April 14, at 110)

i) The Applicant also testified that his wife, sister and mother knew before they testified at his 7-day detention review that he had associated with gang members and had been convicted in 1998 for agreeing to get a gun for other gang members. (April 13, at 164-165; April 14, at 50-53, 197-198; May 11, at 9-16) This is inconsistent with their oral testimony provided at his 7-day detention review before Member Gratton. (Tribunal Record, at 423-484)

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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