

Federal Court



Cour fédérale

**Date: 20100721**

**Docket: IMM-5804-09**

**Citation: 2010 FC 768**

**Toronto, Ontario, July 21, 2010**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**CARLOS ALBERTO TALAVERA MORALES**

**Applicant**

**and**

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

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Immigration Division of the Immigration and Refugee Board concluded that Carlos Alberto Talavera Morales was inadmissible to Canada pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, on the grounds that he was a member of a criminal organization.

[2] Mr. Talavera seeks judicial review of the Immigration Division's decision, asserting that the Board erred in its interpretation of the evidence, in its assessment of his credibility, and in its

understanding of the concept of “membership” as it related to his involvement with the “Los Zetas” gang in Mexico.

[3] For the reasons that follow, I am satisfied that the Board did not err as alleged, and that its inadmissibility finding was one that was reasonably open to it on the record before it. As a consequence, the application for judicial review will be dismissed.

### **The Legislative Authority for the Decision**

[4] Before turning to examine the arguments advanced by Mr. Talavera, it is helpful to first review the legislative framework governing inadmissibility findings such as this.

[5] The inadmissibility finding in this case was made pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, which provides that:

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d’une organisation dont il y a des motifs raisonnables de croire qu’elle se livre ou s’est livrée à des activités faisant partie d’un plan d’activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d’une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada,

offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern ...	d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan ...
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[6] In making a finding under section 37(1)(a) of the Act, the Immigration Division is also guided by section 33 of the *IRPA*, which provides that:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
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### **Standard of Review**

[7] The Board's factual findings and credibility assessment are reviewable on the standard of reasonableness. I understand both parties to agree that the officer's finding in relation to the issue of membership is also reviewable on the reasonableness standard. Given that what is in issue in this regard is a question of mixed fact and law, I agree that reasonableness is the appropriate standard with respect to the question of membership: see *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] F.C.J. No. 381, 331 N.R. 129.

[8] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the

decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

### **Analysis**

[9] In order to conclude that Mr. Talavera was inadmissible to Canada under paragraph 37(1)(a) of *IRPA*, the Immigration Division had to find that he was, or had been, a member of an organization for which there are reasonable grounds to believe is or was engaged in organized criminality as defined in section 37 of the Act. There are thus three aspects involved in such an inadmissibility finding: the definition of “organized criminality”, the “reasonable grounds to believe” standard, and the concept of “membership”.

[10] In this case, Mr. Talavera concedes that the Los Zetas gang is engaged in organized criminality in Mexico.

[11] Insofar as the “reasonable grounds to believe” evidentiary standard is concerned, the Supreme Court of Canada stated in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, that this standard required “something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities”. The Supreme Court went on to hold that reasonable grounds will exist “where there is an objective basis for the belief which is based on compelling and credible information”: at para. 114.

[12] With respect to the test for membership, it is clear that actual or formal membership in an organization is not required – rather the term is to be broadly understood: see *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 at para. 57 (F.C.A.). Moreover, there will always be some factors that support a membership finding, and others that point away from membership: see *Poshteh*, above, at para. 36.

[13] It is clear from a review of the record in this case that there was considerable evidence supporting the Immigration Division’s conclusion that Mr. Talavera was a member of the Los Zetas gang, most of which came from Mr. Talavera himself.

[14] Mr. Talavera acknowledged having associated on a regular basis over a period of a couple of years with individuals he knew to be members of the Los Zetas, in particular, two men named Raul (who was also known as “el lobo” or “the wolf”) and Eric (also known as “el araña” or “the spider”). In his Personal Information Form (or “PIF”), Mr. Talavera described his relationship with Raul and Eric as “strong”, stating that he would go to parties with these individuals. They would give him marijuana and cocaine, and, in exchange, he would do favours for “them” such as stealing automotive materials, tools and spare parts from the company where he worked.

[15] Mr. Talavera insists that this was merely a social relationship - that he just spent his time hanging out with Raul and Eric and their friends doing drugs. However, he says that Eric and Raul eventually tried to recruit him to join the Zetas. When he refused to join the gang, attempts were made on his life, which led him to flee Mexico and come to Canada.

[16] The Immigration Division did not accept that Mr. Talavera's relationship with Raul and Eric was merely a social one between drug user and drug dealer. In this regard, the Board pointed to the fact that Mr. Talavera acknowledged having been provided with information regarding the gang's drug business. This included his having been introduced to three or four drug distributors, and his being provided with information regarding the gang's movements, contacts, and the points of purchase and sale for illegal drugs.

[17] Mr. Talavera argues that he was given all of this information as part of the gang's efforts to recruit him in order to prepare him for future work with the gang. The Board considered and rejected this explanation, finding that it was difficult to believe that a mere user of the drugs provided by the Zetas would be made aware of "delicate details" of the gang's drug business. This is an entirely reasonable finding, particularly in light of the documentary evidence detailing the gang's methods of operation.

[18] The Board also considered Mr. Talavera's statement in his PIF that he "*decided to leave that gang, that is, I cut them off for good and no longer hang out with Eric and did not go to parties anymore ...*" [emphasis added]. The Board noted and rejected Mr. Talavera's explanation that all he meant by this statement was that he stopped spending time with Raul and Eric and their friends.

[19] Mr. Talavera argues that the Board erred in taking his statement at face value, suggesting that his comment about him deciding to leave the gang resulted from the fact that he did not have legal assistance in preparing his PIF, and from problems with interpretation. However, as the Board

observed, Mr. Talavera filed an amended PIF after retaining counsel. Although numerous additions and deletions were made to the original document, the statement regarding his leaving the gang was left unchanged.

[20] Moreover, as Mr. Talavera himself conceded in cross-examination, you cannot leave a gang that you never joined.

[21] The Board also concluded that the evidence demonstrated a deeper involvement with the gang on the part of Mr. Talavera than mere social involvement or simply buying drugs from them. In this regard, the Board noted that for a period of approximately two years, Mr. Talavera knowingly associated with members of the Zetas gang. He attended their parties and received drugs from known gang members. In exchange, he provided support to Eric, who he knew to be a gang member, by stealing automotive parts for him. He was privy to details of the Zetas drug operations. In the Board's view, this gave rise to reasonable grounds to believe that Mr. Talavera was a "member" of the Los Zetas gang.

[22] Mr. Talavera takes issue with this finding, observing that there was no third-party information confirming his membership in the gang. As was noted earlier, what the jurisprudence requires is that there be an objective basis for the belief, based on compelling and credible information. The Board based its membership finding on Mr. Talavera's own statements, drawing what were, in my view, entirely reasonable inferences from those statements.

[23] Mr. Talavera has thus not persuaded me that the Board erred in finding that he was inadmissible to Canada. Consequently, the application for judicial review is dismissed.

### **Certification**

[24] Mr. Talavera proposes the following question for certification:

In order to prove membership in a criminal organization under section 37(1)(a) of the *Immigration and Refugee Protection Act*, is evidence of knowledge of some of the organization's activities sufficient?

[25] This is not an appropriate question for certification, given that the membership finding in this case was based on more than mere knowledge of some of the Zeta's criminal activities on the part of Mr. Talavera.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is dismissed; and
2. No serious question of general importance is certified.

“Anne Mactavish”

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Judge

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

**DOCKET:** IMM-5804-09

**STYLE OF CAUSE:** CARLOS ALBERTO TALAVERA MORALES v.  
THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** July 20, 2010

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

**DATED:** July 21, 2010

**APPEARANCES:**

Eugenia Cappellaro-Zavaleta FOR THE APPLICANT

Michael Butterfield FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

JACKMAN AND ASSOCIATES FOR THE APPLICANT  
Barristers and Solicitors  
Toronto, Ontario

MYLES J. KIRVAN FOR THE RESPONDENT  
Deputy Attorney General of Canada