

Federal Court



Cour fédérale

Date: 20110202

Docket: IMM-4345-09

Citation: 2011 FC 105

Ottawa, Ontario, February 2, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GUSTAVO ADOLFO PEREZ VILLEGAS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (the Act) for judicial review of a decision of an immigration officer (the officer), dated August 7, 2009, wherein the officer found the applicant to be inadmissible to Canada pursuant to paragraph 34(1)(f) of the Act.

[2] The applicant requests an order quashing the decision of the officer and remitting the matter back for reconsideration by a different officer.

Background

[3] Gustavo Adolfo Perez Villegas (the applicant) was born October 5, 1952 and is a citizen of Mexico.

[4] The applicant first learned about Ejercito Zapatista de Liberacion Nacional (EZLN), the Zapatista Army, after it stormed several government buildings in the state of Chiapas, Mexico in January 1994. His godfather, Bishop Samuel Ruiz, explained to him that EZLN was helping raise awareness about plight of indigenous people in Chiapas. From 1994 to 1997, the applicant states that he formed informal groups to collect money, medicine and food for indigenous peoples which he then gave to the EZLN because the Mexican Army had cut off normal access to Chiapas.

[5] The applicant was threatened for these activities. His brother disappeared and his home was ransacked. The applicant fled to Canada and claimed refugee status which he was granted in August 1998.

[6] In his Personal Information Form (PIF), the applicant indicated that he was a member of the EZLN, the Zapatista Army. In his applications for permanent residence, he indicated that he was a general coordinator and coordinator for the EZLN.

[7] The applicant was granted permanent residence status in principle, on December 16, 1998. Citizenship and Immigration Canada (CIC) requested a background check to determine the applicant's involvement with the EZLN. An interview with CIC took place on June 12, 2009.

[8] The applicant alleges in his affidavit that he was never a member, coordinator or organizer for the EZLN. He states that he told this to the CIC officer. Rather, he alleges that he was a coordinator for people who wanted to support the Zapatista movement.

Officer's Decision

[9] The officer ultimately found the applicant to be inadmissible to Canada pursuant to paragraph 34(1)(f) of the Act due to his membership in the EZLN which the officer determined that there were reasonable grounds to believe the applicant has engaged in terrorist activities.

[10] Regarding membership, the officer noted that there is no definition of membership in the Act, but that the definition is broad and unrestricted in the jurisprudence. He also took notice of the CIC Enforcement Manual definition of membership.

[11] The officer found that the applicant had listed belonging to the EZLN twice in his PIF and that in his applications for permanent residence, stated that he volunteered as a coordinator. The officer found that the applicant confirmed his involvement with the EZLN during his CIC admissibility interview.

[12] The officer acknowledged that the applicant stressed he was never a formal member of the EZLN. The officer found however, that the applicant coordinated activities in support of the EZLN in Mexico State. The officer acknowledged that the applicant worked with the EZLN because it was the only network which could deliver supplies to the poor in Chiapas.

[13] The officer found that the applicant did not agree that EZLN is a terrorist organization, but that he was aware of the violence attributed to the EZLN and that it had attacked the Mexican Army after the Army initiated attacks on the EZLN. The officer acknowledged that the applicant was never involved in acts of violence or terrorism.

[14] The officer found that the applicant remained involved with the EZLN after the government crackdown, but that he was discreet in his activities.

[15] The officer then concluded that there are reasonable grounds to believe that the applicant was a member of the EZLN.

[16] Regarding the organization, the officer provided the *Suresh* definition of terrorism (see *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at paragraph 98) and then stated that given his assessment of the EZLN, he was satisfied that it is an organization that there are reasonable grounds to believe engaged in acts of terrorism.

[17] In his assessment of EZLN, the officer found that the EZLN was created in 1983 by subcomandante Marcos to aid rural peasants and indigenous people of Chiapas. He found that

EZLN's first large military operation was in January 1994 where 1,000 EZLN guerrillas occupied six cities and towns in Chiapas. The officer described EZLN demands in the "war against the Mexican government." The officer found that there were between 6,000 and 14,000 Mayan Indian fighters in the January rebellion and he noted that in that fight, 30 soldiers and police, 24 EZLN members and three civilians were killed. He found that the total killed from January 1 to 12, 1994 was between 145 and 400 people and included police, soldiers, EZLN guerrillas and civilians.

[18] The officer found that the EZLN had engaged in violence in other parts of Mexico including a shopping mall parking lot, military base and electrical tower in Mexico City and a government building in Acapulco. The officer noted that a report by the International Commission of Jurists could find no evidence that the EZLN committed human rights violations against civilians, whereas a Physicians for Human Rights/Human Rights Watch report stated that the EZLN violated the rules of war by killing non-combatants and taking hostages. The officer also found that EZLN held summary trials and executions and he also noted that a cache of weapons was found in an EZLN safehouse.

[19] The officer reviewed the history of the ceasefire and negotiations between the government and the EZLN.

[20] Given his conclusions about the applicant's membership and the nature of the EZLN as an organization which has engaged in terrorism, the officer found the applicant to be inadmissible under paragraph 34(1)(f) of the Act.

Issues

[21] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the officer fail to provide adequate reasons for his conclusion that the applicant was a member of the EZLN?
3. Did the officer err by finding that there are reasonable grounds to believe the EZLN is an organization that has engaged in terrorism?

Applicant's Written Submissions

[22] The applicant submits that the officer erred in concluding that the applicant was a member of the EZLN.

[23] The applicant submits that the officer failed to consider whether the applicant was sufficiently committed to the ideals and objectives of the organization and devoted sufficient time and energy to be considered a member.

[24] The applicant submits that the officer's reasons are inadequate. The reasons do not address the explanations or defences offered by the applicant. For example, the applicant stated that he never meant to say he was a member in his PIF or permanent residence forms. In addition, the reasons do not address the explanation that the applicant was only a political supporter of the EZLN who organized an informal civil society group that supported the organization.

[25] The applicant submits that a sympathizer or supporter of an organization is not necessarily a member.

[26] In addition, the applicant also submits that the officer was required to distinguish between activities performed under the political and military wings of the EZLN.

[27] The applicant also submits that the officer erred in concluding that there are reasonable grounds to believe that the EZLN engaged in terrorist acts.

[28] The applicant submits that the officer failed to properly apply the definition of terrorism to the EZLN. The officer was required to make findings of fact about specific acts committed by the EZLN and explain how the listed acts met the *Suresh* definition of terrorism above. In particular, the applicant submits that the officer was required to provide an analysis of how the listed acts were intended to harm civilians, since the *Suresh* definition is concerned with the protection of civilians.

[29] The applicant submits that the documentary evidence considered by the officer described EZLN as a military group engaged in conflict with Mexican security forces. There was no evidence before the officer that the EZLN encouraged, condoned or directed its members to target civilians. The officer described some violent incidents but failed to consider whether these incidents met the definition of terrorism.

[30] The applicant submits that departing from the *Suresh* definition of terrorism above, is a reviewable error and the decision of the officer should be quashed and remitted for reconsideration.

Respondent's Written Submissions

[31] The respondent submits that the officer reasonably found the applicant to be a member of the EZLN. The term member should be given a broad, unrestricted interpretation and membership does not require one to be an actual or formal member. In addition, the respondent submits that the applicant's labelling of himself as a supporter does not preclude a finding that he was a member, particularly since attending meetings and distributing pamphlets for an organization have been found to be membership.

[32] The respondent submits that the officer understood the applicant's explanations that he was a sympathizer who coordinated activities and distributed pamphlets and not a full member of the EZLN.

[33] The respondent submits that it is not always possible to draw a bright line between the legitimate business activities of a criminal organization and its criminal activities and that a person who participates in the legitimate activities of an organization knowing that it is controlled by a criminal organization may be considered a member of that criminal organization.

[34] While there may be factors which point to and away from membership, this is within the expertise of the Refugee Protection Division. As long as the officer's decision was reasonable, the Court should not interfere.

[35] The respondent submits that it was open to the officer to conclude that there were reasonable grounds to believe that the EZLN was a terrorist organization. The officer reviewed the *Suresh* definition of terrorism above, and the various military operations and rebellions of the EZLN. The respondent submits that there was evidence of activities before the officer which he weighed and determined that this fit into the *Suresh* definition of terrorism. This included reports that the EZLN had violated the rules of war, held summary trials and executions and had weapons and explosives. The respondent submits that the officer looked into the nature of the acts of violence in light of *Suresh* above, before coming to his conclusion.

[36] The respondent also noted that this Court has heard a number of judicial reviews where applicants have claimed refugee status on the basis that they fear persecution from the EZLN.

[37] Given the evidence, the Court should not intervene in this case, according to the respondent.

Analysis and Decision

[38] Issue 1

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 57).

[39] A review of a membership finding under paragraph 34(1)(f) of the Act, pre-*Dunsmuir* above, was undertaken on the reasonableness *simpliciter* standard (see *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487 at paragraph 23). This was due to the critical factual elements to be decided and the expertise of the officers in assessing applications of inadmissibility. This level of deference continues to be appropriate, thus, the standard of review is reasonableness (see *Uzbazghi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, [2009] 1 F.C.R. 454 at paragraph 36).

[40] Likewise, a certain level of deference is required in reviewing the determination of whether a particular organization is a terrorist group and as such, the standard of reasonableness continues to apply post-*Dunsmuir* above (see *Qureshi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 7, 78 Imm. L.R. (3d) 8 at paragraph 16).

[41] Since a finding of exclusion is particularly significant to an applicant, “[c]aution must be exercised to ensure such findings are properly made” (*Alemu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 997, 38 Imm. L.R. (3d) 250 at paragraph 41). This is particularly true when the applicant was already granted refugee status and would face persecution if returned to his country of nationality. Where the analysis and decision are reasonable, this Court will not interfere. However, findings of inadmissibility “should be carried out with prudence, and established with the utmost clarity” (see *Daud v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 701, 170 A.C.W.S. (3d) 148 at paragraph 8).

[42] Given the combination of section 33 and paragraph 34(1)(f) of the Act, the standard of proof used by the officer for both the question of whether the applicant was a member of the EZLN and whether the EZLN has engaged in terrorism was “reasonable grounds to believe.” The Supreme Court of Canada held in *Mugesera c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at paragraph 114, that this standard is more than suspicion and less than the balance of probabilities. It entails “a *bona fide* belief in a serious possibility based on credible evidence” (see *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, [2000] F.C.J. No. 2043 (QL) (FCA). The Federal Court is concerned, however, with whether it was reasonable for the immigration officer to conclude that there were reasonable grounds to believe that either EZLN was a terrorist group or that the applicant was a member of EZLN (see *Moiseev v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 88, 323 F.T.R. 164 (Eng.) at paragraph 17).

[43] **Issue 2**

Did the officer fail to provide adequate reasons for his conclusion that the applicant was a member of the EZLN?

There is no definition of member in the Act. This Court and the Federal Court of Appeal have held that the term member in paragraph 34(1)(f) must be given a broad and unrestricted interpretation since the type of organizations involved do not necessarily provide formal documentation of membership (see *Poshteh* above, at paragraphs 27 and 29). Because of this broad interpretation, formal or actual membership is not a prerequisite for finding that someone is a member (*Kanendra v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 923, 47 Imm.L.R. (3d) 265 at paragraphs 21 to 23). Mr. Justice Simon Noël held in *Kanendra* above, at

paragraph 22 that, “[t]o adopt such an interpretation would, I think, be contrary to the spirit of the legislation as well as to prior jurisprudence.” As such, membership may be found where the individual was an informal participant or supporter (see *Sepid v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 907 at paragraph 17).

[44] The factors a decision-maker should consider in assessing membership include, but are not limited to, the nature of the person’s involvement, the length of time involved and the degree of commitment to the organization and its objectives (see *Poshteh* above, at paragraph 37).

[45] The applicant submits that a distinction must be made when there is a separate and independent political and military wing. The applicant relies on *Cardenas v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 139 (C.A.). However, in that case, the political and military divisions were unique, distinct entities. There is no evidence that the applicant belonged to a distinct independent political wing of the EZLN, and as such, I do not find this case persuasive.

[46] Likewise, the respondent, relying on *Chiau* above, at paragraph 59, submits that a person who participates in the legitimate business activities of a criminal organization may be considered a member of that criminal organization. This case is not persuasive, however, since in the case at bar, the terrorist nature of EZLN was an issue to be determined by the officer, as well as membership.

[47] The facts of the applicant’s case are very similar to that of *Uzbazghi* above. In that case, the applicant stated in her PIF that she had been a member of the Eritrean Liberation Front (ELF) but in

her statutory declaration stated she was not a member but rather a part of an ELF support group. The Court found that there was no reviewable error because the officer did not rely on the applicant's prior admission of membership (at paragraph 39). The Court noted that the officer considered the applicant's "activities (meetings, donations, distribution of ELF materials which encouraged others to join the armed struggle and or to give donations)], amount to membership [. . .] as they furthered the goals of the organization" (at paragraph 39). Consequently, the Court held that the officer's finding that the applicant was a member of the ELF was reasonable (at paragraph 45).

[48] In the case at bar, the officer's determination on membership under paragraph 34(1)(f) of the Act lacks transparency. He did not explain how his findings amount to membership based on the jurisprudence or the CIC enforcement manual definition of membership. Unlike *Uzbazghi* above, the officer did not engage in any analysis of whether the applicant's activities in support of the EZLN amounted to membership. The officer relied on the applicant's prior admission of membership, noting that he wrote member and coordinator in his PIF and permanent residence applications. The officer did not address the applicant's explanations for describing himself as a member.

[49] The officer did not analyze the applicant's involvement with the EZLN, he simply noted that the "applicant did confirm that he coordinated activities in support of the EZLN." While the officer noted that the applicant became involved in the EZLN in January 1994, he did not address whether this is a positive or negative factor in his analysis of membership.

[50] The officer found that the applicant “worked with the EZLN because it was the only network that could distribute food . . .”. He also found that the applicant continued his activities after the crackdown by the Mexican government, “because he was aware of the situation in Chiapas and of the exploitation of the people there. Furthermore, he believed that ultimately the EZLN made everyone aware of living conditions in Chiapas”. The officer did not provide any analysis of how these factors affected the applicant’s degree of commitment to the organization or its objectives.

[51] Ultimately, the officer did not provide an intelligible and reasoned decision for finding that the applicant was a member of the EZLN. As stated above, any finding of inadmissibility “should be carried out with prudence, and established with the utmost clarity” (see *Daud* above, at paragraph 8). The finding that the applicant was a member of the EZLN forms part of the officer’s decision on inadmissibility and it does not meet the reasonableness standard set out in *Dunsmuir* above.

[52] **Issue 3**

Did the officer err by finding that there are reasonable grounds to believe the EZLN is an organization that has engaged in terrorism?

There is no definition of “terrorism” in the Act. The Supreme Court held in *Suresh* above, at paragraph 98 that terrorism 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.

[53] In *Daud* above, at paragraph 11, Madam Justice Danièle Tremblay-Lamer outlined the two-step analysis, that an officer must undertake in applying the *Suresh* above, definition of terrorism:

The first step involves a factual determination of whether there are reasonable grounds to believe that the organization in question committed the acts of violence attributed to it. At the second step of the analysis, a determination is made as to whether those acts constitute acts of terrorism. The officer must provide the definition of terrorism relied upon and explain how the listed acts meet that definition (*Jalil v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 246 (F.C.), at para. 32).

[54] First, the decision-maker must show the evidentiary foundation to support a finding that an organization was engaged in acts of terrorism (see *Fuentes v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 379, [2003] 4 F.C. 249). The decision-maker must make specific findings of fact about what acts the organization engaged in that are contained in either paragraphs 34(1)(a), (b) or (c) (see *Alemu* above, at paragraphs 32, 33 and 41).

[55] Then, the decision maker must provide analysis of the acts the organization has committed and explain how they meet the definition of terrorism. This requires showing the link between the acts and the definition of terrorism provided (see *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1735, 78 Imm.L.R. (3d) 23). Significantly, the decision-maker must explain how the acts were intended to harm civilians – as the definition of terrorism focuses on the protection of civilians. Mr. Justice François Lemieux in *Fuentes* above, at paragraph 77, highlights the importance of analyzing the listed acts:

I readily acknowledge that a bomb or other armed attack on a government building filled with government workers would, with the required purpose, be easily construed as an act of terrorism within the *Suresh* meaning or within the meaning of terrorist activity under the

Anti-terrorist Act. The problem here is that we do not know any surrounding circumstance of what was involved in such attacks.

[56] The officer in the case at bar provided the *Suresh* definition of terrorism above. He then indicated that he had “considered the information in the previous section *Assessment of the Ejercito Zapatista de Liberacion Nacional (EZLN)*” and stated that he was satisfied that the EZLN is an organization that there are reasonable grounds to believe has engaged in acts of terrorism. This analysis cannot meet the requirements set down by the jurisprudence.

[57] Even if this Court reviews the officer’s assessment of the EZLN from the previous section, which was not part of his terrorism analysis, the officer does not indicate which evidence he is relying on to conclude that terrorist acts occurred. Moreover, there is no discussion at any point about how any acts of the EZLN were “. . . 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 . . .” (see *Suresh* above, at paragraph 98). In fact, the officer mentions civilians only twice in the assessment of the EZLN, both times to note that civilians were killed. He does not analyze how these civilians were killed, by whom, or whether the EZLN condoned or encouraged the killing. The officer mentions one report that said the EZLN had killed non-combatants but, again, the officer did not assess whether they were targeted or intentionally killed. As in *Fuentes* above, while the officer described some violent acts in the section entitled assessment of the EZLN, he does not show how these acts fit within the *Suresh* above, definition of terrorism.

[58] As such, the officer’s finding that there were reasonable grounds to believe that the EZLN has engaged in acts of terrorism is unreasonable.

[59] As a result, the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

[60] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[61] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, 2001, c. 27*

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.

34.(1) A permanent resident or a foreign national is inadmissible on security grounds for

...

(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).

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

34.(1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

...

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).

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

CIC Enforcement Manual 2

4.5. Interpretation

The meaning of “member –

4.5. Interprétation

Les termes «

membership” includes anyone who is knowingly linked to an organized crime group and benefits from this association; this may include:

- persons who devote themselves full time or almost full time to the organization;
- persons who are associated with members of the organization, especially over the course of a lengthy period of time;
- persons who do not personally commit acts, provided that they are connected to the criminal organization;
- persons who are directly, indirectly, or peripherally involved with the organization;
- persons who are not involved in the management of the organization but derive an economic benefit from their association with the organization;
- persons working for a legitimate company while knowing it is controlled by organized crime; and
- persons who do not have formal membership as long as they belong (or belonged) to the criminal organization. Belonging to an organization is assumed where persons

membre/appartenance » visent quiconque est sciemment lié à un groupe criminel organisé et tire profit de cette association, ce qui peut comprendre :

- les personnes qui consacrent tout leur temps ou presque à l’organisation;
- les personnes associées à des membres de l’organisation, particulièrement sur une longue période de temps;
- les personnes qui ne commettent pas personnellement des actes mais qui sont liées à l’organisation criminelle;
- les personnes qui, directement, indirectement ou accessoirement, sont impliquées dans l’organisation;
- les personnes qui ne participent pas à la gestion de l’organisation mais tirent un avantage économique de leur association à celle-ci;
- les personnes qui travaillent pour une entreprise légitime tout en sachant qu’elle est contrôlée par le crime organisé;
- les personnes qui ne sont pas membres officiels, mais qui appartiennent ou ont appartenu à l’organisation criminelle. L’appartenance à une organisation criminelle s’entend

join voluntarily and remain in the group for the common purpose of actively adding their personal efforts to the group's cause.

d'une personne qui se joint volontairement au groupe et y demeure pour le but commun d'apporter ses efforts personnels à la cause du groupe.

Membership does not include persons who had no knowledge of the criminal purpose or acts of the organization.

L'appartenance au groupe ne comprend pas les personnes qui n'avaient aucune connaissance de la fin criminelle ou des actes de l'organisation.

However, the structure of A37(1)(a) makes it clear that "membership" of a gang and engaging in gang-related activities are discrete, but overlapping grounds on which a person may be inadmissible for "organized criminality." The "engaging in gang-related activities" ground of "organized criminality" was added by IRPA.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4345-09

STYLE OF CAUSE: GUSTAVO ADOLFO PEREZ VILLEGAS
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 21, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: February 2, 2011

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