**Date: 20080424**

**Docket: A-170-07**

**Citation: 2008 FCA 153**

**CORAM:** **DÉCARY J.A.**
**NADON J.A.**
**TRUDEL J.A.**

**BETWEEN:**

**PANCHALINGAM NAGALINGAM**

**Appellant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

Heard at Toronto, Ontario, on January 24, 2008.

Judgment delivered at Ottawa, Ontario, on April 24, 2008.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DÉCARY J.A.
NADON J.A.

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## REASONS FOR JUDGMENT

**TRUDEL J.A.**

[1] This is an appeal from a decision of Justice Kelen (cited as 2007 FC 229) sitting in judicial review, whereby he dismissed the application of Panchalingam Nagalingam (the appellant) to set aside the Opinion of the Minister of Citizenship and Immigration (the Minister) pursuant to paragraph 115(2)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

[2] In making his decision Justice Kelen found, and both parties agreed, that the application raised "questions of general importance with respect to the *refoulement*, or removal from Canada, of refugees who have been found to be persons inadmissible on grounds of organized criminality" (at paragraph 2 of the Reasons for Judgment). He therefore certified the following two questions:

1. If, in the preparation of an opinion under paragraph 115(2)(*b*) of the *Immigration and Refugee Protection Act*, the Minister finds that a refugee who is inadmissible on grounds of organized criminality does not face a risk of persecution, torture, cruel and unusual punishment or treatment upon return to his country of origin, does such a finding render unnecessary the Minister's consideration of the "nature and severity of acts committed" under paragraph 115(2)(*b*)?

2. If the lack of risk identified in question #1 is not determinative, is paragraph 115(2)(*b*) of the *Immigration and Refugee Protection Act* to be applied "on the basis of the nature and severity of acts committed" by the criminal organization of which the person is a member, or of acts committed by the person being considered for removal (including acts of the criminal organization in which the person was complicit)?

**Preliminary matter**

[3] The Minister of Public Safety and Emergency Preparedness is incorrectly named as the respondent in the style of cause. Upon the parties' consent, I hereby order that the style of cause be changed so as to replace the Minister of Public Safety and Emergency Preparedness with the Minister of Citizenship and Immigration as the proper respondent.

**Background**

[4] The appellant is a Sri Lankan Tamil who came to Canada in 1994. He was granted Convention refugee status in 1995 and permanent resident status in 1997.

[5] On August 24, 2001, the Minister issued a report under the former *Immigration Act*, R.S.C. 1985, c. I-2 (the former Act) alleging that the appellant was inadmissible to Canada on grounds of organized criminality. In issuing this report, a primary consideration of the Minister was the appellant's involvement with a Tamil gang known as the A.K. Kannan.

[6] In October 2001, the appellant was arrested and detained by immigration authorities on the basis that he represented a danger to the public and was unlikely to appear for his admissibility hearing or other immigration proceedings. Although the Immigration Division of the Immigration and Refugee Board (the Board) later ruled that the appellant should be released on certain terms and conditions, that Order was subsequently set aside by Justice O'Keefe on December 17, 2004 (cited as 2004 FC 1757).

[7] On May 28, 2003, having found the appellant inadmissible to Canada for organized criminality pursuant to paragraph 37(1)(*a*) of the Act, the Board ordered that he be deported. An application by the appellant for the judicial review of this decision was later dismissed by Justice Heneghan on October 12, 2004 (cited as 2004 FC 1397).

[8] On July 5, 2003, the appellant was notified that a determination would be made under paragraph 115(2)(*b*) of the Act as to whether he should not be allowed to remain in

Canada based on the “nature and severity of acts committed.” The appellant provided submissions and evidence under cover letters dated August 8, 2003 and November 11, 2003.

[9] On July 20, 2004, the respondent sent the appellant a “Request for Minister’s Opinion” dated July 13, 2004. Accordingly the appellant provided further submissions in regards to the material disclosed.

[10] On October 4, 2005, the Opinion of the Minister pursuant to paragraph 115(2)(*b*) was issued, subsequently being upheld by the Federal Court on February 28, 2007. Hence, the present appeal.

## Legislation

[11] The relevant provisions from the Act are as follows:

| | |
|---|---|
| Organized criminality | Activités de criminalité organisée |
| 37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for | 37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants : |
| (*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 offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or | (*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, d’une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d’un tel plan; |

Exclusion – Refugee Convention

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

Exclusion par application de la Convention sur les réfugiés

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

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 unusual treatment or punishment.

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 elle peut être renvoyée.

Exceptions

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

(*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

(*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.

Exclusion

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

(*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au 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.

Removal of refugee

(3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is

Renvoi de réfugié

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)*e*),

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.

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.

[12] The relevant provisions of the *Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (the Convention) are as follows:

Article 1. - Definition of the term "refugee"

…

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

(*a*) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(*b*) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(*c*) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 1. - Définition du terme "réfugié"

[…]

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:

(*a*) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un rime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

(*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

(*c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

Article 33. - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 33. - Défense d'expulsion et de refoulement

1. Aucun des États contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

| | |
|---|---|
| 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. | 2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays. |

**The Opinion of the Minister's Delegate**

[13] On October 4, 2005, the Minister's Delegate, G.G. Alldridge (the Delegate), issued an opinion pursuant to paragraph 115(2)(*b*) of the Act that the appellant should not be allowed to remain in Canada based on the nature and severity of acts committed (AB 1, Tab 3, p. 001) (the Opinion).

[14] In deciding whether subsection 115(2) applied to the appellant, the Delegate analyzed the following:

a. the nature and severity of acts committed;
b. the risk to the appellant's life or of cruel and unusual punishment should he be returned to his country; and
c. whether there were sufficient humanitarian and compassionate reasons to warrant a favourable consideration.

*a. Nature and severity of the acts committed*

[15] In addressing the first point of analysis, the Delegate placed particular emphasis on evidence supporting the appellant's membership and involvement in the criminal activities of the A.K. Kannan. From a report prepared by the Toronto Police Street Violence Task

Force, the Delegate noted that this gang was responsible for a variety of criminal acts including “murders, attempted murders, serious assaults, extortions, kidnappings, frauds, drugs and weapons offences” (at paragraph 19 of the Opinion). The Delegate further concluded that two shooting incidents where the appellant and his family had been targeted were not random acts of violence, but rather retaliatory actions brought about by the appellant’s status as an enforcer within the A.K. Kannan (at paragraph 28 of the Opinion).

[16] The Delegate also addressed the criminal activity of the appellant specifically. To this end, the Delegate observed that the appellant had incurred relatively few criminal convictions with two of these convictions resulting in imprisonment for short periods of time between September 25, 2000 and January 25, 2001 (at paragraph 27 of the Opinion). Moreover, it was observed that between 1997 and 2000 the appellant had been criminally charged for possession and concealment of a weapon (a meat clever), threatening bodily harm and intimidation, fraud, assault with a weapon and breach of probation.

[17] Consequently, the Delegate concluded that:

> Following from the evidence noted above, including Mr. Nagalingam’s membership and involvement in the A.K. Kannan, in my view, the nature and the severity of the acts committed by the A.K. Kannan are serious and significant, and as such Mr. Nagalingam should not be allowed to remain in Canada (at paragraph 29 of the Opinion).
>
> [Emphasis added]

*b. Risk to the appellant’s life or of cruel and unusual punishment*

[18] The appellant claimed that if returned to Sri Lanka he would face a substantial risk of torture, or a risk to life or to cruel and unusual treatment or punishment. This claim was dismissed by the Delegate.

[19] While the Delegate acknowledged the appellant's status as a Convention refugee, he also noted that the conditions in Sri Lanka had undergone "a significant change in circumstances." As a result, the Delegate concluded that there was insufficient evidence to support a finding that it is more likely than not that the appellant would face a substantial risk of torture, or a risk to life or to cruel and unusual treatment or punishment upon his return to that country.

*c. Humanitarian and compassionate considerations*

[20] Despite the presence in Canada of the appellant's common law spouse, their Canadian born child, and other family members, the Delegate concluded that the appellant did not warrant favourable consideration on humanitarian and compassionate grounds. He writes:

> 51. …There is nothing in the material before me that would indicate that the child has suffered adversely from separation from his father while he's been incarcerated and in detention for the past four years (and I make the same observation with respect to Mr. Nagalingam's other family members – including his common law spouse ...)
>
> 53. …There is no indication in the material before me that there is a prohibition against Mr. Nagalingam's family from either living in or visiting him in Sri Lanka. While mindful that Mr. Nagalingam has a Canadian spouse and child who would be adversely affected by any enforced separation due to his removal from Canada as well as considering the period of adjustment that Mr. Nagalingam will face at having to start over in a strange country, which he left when he was 21 years of age, I find that Mr. Nagalingam's involvement in the organized crime milieu, leads me to conclude that this is not an appropriate case warranting favourable consideration on humanitarian and compassionate grounds.

[21] Proceeding on this basis, the Delegate opined that he "…need not undertake a balancing exercise whereby the risk, the nature and severity of acts committed, and the

humanitarian considerations are weighed against each other in accordance with the legal principles enunciated by the Supreme Court of Canada, as this simply does not arise in this case" (at paragraph 55 of the Opinion). Accordingly, the Delegate concluded that the appellant should not be allowed to remain in Canada.

**The Decision of the Federal Court**

[22] The appellant sought judicial review of the Delegate's decision on October 25, 2005. In doing so, the appellant filed applications for a stay of the execution of his removal order with the Federal Court and the Ontario Superior Court of Justice on November 16, 2005 and December 4, 2005 respectively. As each of these applications was dismissed in due course, the appellant was consequently removed from Canada in December 2005.

[23] In dismissing the application which forms the basis of the appeal before this Court, Justice Kelen addressed four issues beginning with the question of whether the Delegate had erred in concluding that the appellant's removal to Sri Lanka would not expose him to a substantial risk of torture or a risk to life or to cruel treatment or punishment. On this point, Justice Kelen rejected the notion that the Delegate had failed to consider the appellant's status as a Convention refugee or any other relevant evidence in determining that he be removed from Canada. The Delegate's ruling on this issue was approved (at paragraph 39 of the Reasons for Judgement).

[24] The second issue required an answer to the following question:

> Having determined that the appellant, who is inadmissible on grounds of organized criminality, does not face a risk, was it necessary for the Delegate to consider the "nature and severity of acts committed" under paragraph 115(2)(*b*) of the Act?

In Justice Kelen's view, given that the Delegate had reasonably concluded that there was no risk of harm, the *non-refoulement* provisions under subsection 115(1) did not apply and as such there was no need to "balance" the competing interests under subsection 115(2). Justice Kelen decided that unless the Delegate's conclusions on risk were found to be patently unreasonable, there was no basis for the court to review the Delegate's assessment of the nature and severity of acts committed or to engage in a balancing of that assessment against the risk of harm upon the appellant's removal (*Ibid.* at paragraph 47).

[25] In light of this finding, Justice Kelen stated that it was no longer necessary to address the issue of complicity and whether one should consider the "nature and severity of the acts committed" by the criminal organization rather than the appellant personally. Moreover, it was equally unnecessary to consider whether the Delegate had erred in failing to account for the appellant's risk of persecution or the general constitutionality of the impugned provision. Nonetheless, recognizing that he could be wrong, Justice Kelen continued his analysis on these points (*Ibid.* at paragraph 52).

[26] On the issue of complicity and its relationship to the application of paragraph 115(2)(*b*), Justice Kelen concluded that the Delegate's assessment should rest on the nature and severity of the subject's personal acts rather than the acts of the group with which he or she is associated. In his view, the acts of the group would only gain relevance if it was demonstrated that the subject was a personal and knowing participant in such acts, i.e. complicit (*Ibid.* at paragraph 65). In the case at bar, Justice Kelen held that the Delegate had

erred by basing his opinion on the criminal acts committed by the A.K. Kannan without ever making an express finding that the appellant was actually "complicit" in those acts (*Ibid.* at paragraph 68). He went on to state that if it were not for his approval of the Delegate's earlier authoritative conclusion on risk, he would have no choice but to refer the matter back to another Delegate to determine if the appellant was complicit in the serious criminal acts of the gang for the purposes of paragraph 115(2)(*b*) of the Act (*Ibid.* at paragraph 68).

[27] Finally, Justice Kelen rejected the arguments that the Delegate had failed to consider the appellant's risk of persecution or the constitutionality of paragraph 115(2)(*b*). Specifically, Justice Kelen held that the Delegate had adequately canvassed the issue of persecution throughout his decision and that due to the absence of risk in that regard, the appellant's Charter rights under section 7 were not engaged (*Ibid.* at paragraph 74).

[28] Consequently, Justice Kelen dismissed the application for judicial review and certified the questions which are stated above at paragraph [2] and form the basis for our analysis, outlined as follows:

OUTLINE

**Analysis**

*A. Standard of Review*

[29] Pursuant to paragraph 74(*d*) of the Act, a decision of the Federal Court on an application for judicial review may be appealed to this Court only if a question is certified by the Federal Court judge. The certification of a "question of general importance" is the trigger by which an appeal is justified. However, the object of the appeal is still the judgment itself, not merely the certified question (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 25). Therefore, I propose to address all the issues raised by this appeal (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 12 [*Baker*]).

[30] As it arises from a decision of a judge sitting in judicial review, the principles outlined in *Housen v. Nikolaisen*, 2002 SCC 33 apply: the selection of the proper standard of review constitutes a question of law and is reviewable on a standard of correctness (*Dr Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paragraph 43 [*Dr Q*]). Ultimately, should this Court identify an error at this stage of the analysis, it will become necessary "to correct the error, substitute the appropriate standard of review, and assess or remit the [Delegate's] decision on that basis" (*Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paragraph 19; See also *Dr Q, supra* at paragraph 43).

[31] On March 7, 2008 the Supreme Court of Canada issued its long awaited decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 where it revisited the approach to be taken in the judicial review of decisions of administrative tribunals. Among the most salient features

was the Supreme Court's decision to reduce the available standards of review from three to two, collapsing the standard of reasonableness and patent unreasonableness into "a single form of 'reasonableness' review" (*Ibid.* at paragraph 45). In determining which of the remaining two standards would be appropriate in a given set of circumstances, the Supreme Court proposed a two-step process:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review (*Ibid.* at paragraph 62).

[32] In this case, drawing on the Supreme Court's decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraph 41 [*Suresh*], Justice Kelen determined that the factual findings of the Delegate required a reviewable standard of patent unreasonableness (at paragraph 18 of the Reasons for Judgment). In light of *Suresh*, and more recently *Dunsmuir*, I agree with Justice Kelen that a high degree of deference is to be afforded to the Delegate's factual findings such that the appropriate standard of review is reasonableness.

[33] As for questions of law, Justice Kelen applied a standard of correctness (at paragraph 19 of the Reasons for Judgment). In *Dunsmuir*, the Supreme Court indicated that questions of law could at points attract either standard of review. To this end, Justice Bastarache and Justice Lebel, on behalf of the majority explained:

> 55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[34] In the case at bar, I note that there is no privative clause in the Act, rather the right to judicial review before the Federal Court is expressly provided so long as leave is granted (sections 72 to 75). Additionally, the questions of law in this appeal demand the interpretation and application of general common law and international law principles for which the Delegate does not have more expertise than the Court. As a result, I conclude that Justice Kelen applied the proper standard of review to the questions of law raised in this application for judicial review, i.e. correctness.

[35] Therefore, as no error was committed by Justice Kelen in the determination of the proper standards of review, I turn my attention to the first certified question.

*B. Certified Question #1*

[36] Both certified questions call for a proper understanding of the international legal principle of *non-refoulement*, found at Article 33(1) of the Convention and incorporated into Canadian law by subsection 115(1) of the Act. Subsection 115(1) prohibits the return of Convention refugees and protected persons to any 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 unusual treatment or punishment.

[37] While it is acknowledged that this rule forms the cornerstone of asylum in international refugee law, its protection is not absolute. Indeed, subsection 115(2), which in turn incorporates Article 33(2) of the Convention into Canadian law, expressly allows derogation from this principle where the subject is (a) found inadmissible on grounds of serious criminality and constitutes, in the opinion of the Minister, a danger to the public in Canada or (b) found 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.

[38] Applying this principle to the first question at issue, I agree with the parties that Justice Kelen erred when he held that an analysis of the nature and severity of acts committed by the appellant under subsection 115(2) of the Act became unnecessary in the absence of risk to the appellant upon his removal from Canada (at paragraph 40 of the Reasons for Judgment).

[39] In *Ragupathy v. Canada (Minister of Citizenship and Immigration),* 2006 FCA 151 [*Ragupathy*] this Court set out a logical sequence of analysis when discussing the elements of a ‘danger opinion’ issued under paragraph 115(2)(*a*). Specifically, this Court held that once the protected person has been found inadmissible on grounds of serious criminality,

the next logical step is to assess whether the individual poses a danger to the public (at paragraph 17). The Court continued:

> 18. If the delegate is of the opinion that the presence of the protected person does not present a danger to the public that is the end of the subsection 115(2) inquiry. He or she does not fall within the exception to the prohibition in subsection 115(1) against the refoulement of protected persons and may not be deported. If, on the other hand, the delegate is of the opinion that the person is a danger to the public, the delegate must then assess whether, and to what extent, the person would be at risk of persecution, torture or other inhuman punishment or treatment if he was removed. At this stage, the delegate must determine how much of a danger the person's continuing presence presents, in order to balance the risk and, apparently, other humanitarian and compassionate circumstances, against the magnitude of the danger to the public if he remains.

[40] While Justice Kelen correctly noted that the Delegate had first assessed the nature and severity of acts committed and second, determined that that the risk of harm upon removal was non-existent, he erred when declaring that pursuant to *Ragupathy*, the Delegate could reverse his order of analysis (at paragraph 46 of the Reasons for Judgment). In Justice Kelen's view, the need to assess the nature and severity of acts committed became inconsequential as there was no risk of harm upon the subject's return. That being the case, the principle of *non-refoulement* as outlined in subsection 115(1) of the Act was of no application in this instance (at paragraph 43 of the Reasons for Judgment).

[41] Respectfully, I find that Justice Kelen ignored the structure of section 115, as well as Canada's overall responsibilities with regards to the Convention, when finding that the absence of risk for the appellant, if returned to Sri Lanka, was determinative of his right to *non-refoulement.*

[42] The scope of section 115 is such that the principle of *non-refoulement* continually applies to a protected person or a Convention refugee until one of the two exceptions listed therein is engaged. Thus, to determine that the principle of *non-refoulement* no longer applies simply because the conditions in the protected person's or the Convention refugee's country of origin have improved is to short-circuit the process.

[43] The approach of Justice Kelen essentially forces the Delegate to act beyond his jurisdiction, ruling on the appellant's status as a Convention refugee, rather than whether the nature and severity of the acts committed deprive him of the benefits associated with that status (i.e. not to be *refouled*). To this end, I agree with the respondent that the *Ragupathy* approach ensures that the Delegate maintains his jurisdiction as his role is not in any way to remove or alter the subject's status as Convention refugee (respondent's memorandum at paragraph 71). Proceeding in this manner guarantees that the Delegate's function will not usurp the role of the Refugee Protection Division on a cessation determination pursuant to subsection 108(2) of the Act.

[44] By way of summary then, the principles applicable to a delegate's decision under paragraph 115(2)(*b*) of the Act and the steps leading to that decision are as follows:

(1) A protected person or a Convention refugee benefits from the principle of *non-refoulement* recognized by subsection 115(1) of the Act, unless the exception provided by paragraph 115(2)(*b*) applies;

(2) For paragraph 115(2)(*b*) to apply, the individual must be inadmissible on grounds of security (section 34 of the Act), violating human or international rights (section 35 of the Act) or organized criminality (section 37 of the Act);

(3) If the individual is inadmissible on such grounds, the delegate must determine whether 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;

(4) Once such a determination is made, the delegate must proceed to a section 7 of the Charter analysis. To this end, the Delegate must assess whether the individual, if removed to his country of origin, will personally face a risk to life, security or liberty, on a balance of probabilities. This assessment must be made contemporaneously; the Convention refugee or protected person cannot rely on his or her status to trigger the application of section 7 of the Charter (*Suresh, supra* at paragraph 127).

(5) Continuing his analysis, the Delegate must balance the nature and severity of the acts committed or of the danger to the security of Canada against the degree of risk, as well as against any other humanitarian and compassionate considerations (*Suresh, supra* at paragraphs 76-79; *Ragupathy, supra* at paragraph 19).

[45] That being said, I propose to answer “no” to the first certified question as the Delegate failed to follow the steps suggested above in forming his opinion.

*C. Certified Question #2:*

[46] In addressing the second certified question, I propose to discuss the following:

(1) the standard of proof required to bring the appellant under the exception of paragraph 115(2)(*b*);

(2) the question of whether the acts to be considered under paragraph 115(2)(*b*) are the acts committed by the criminal organization of which the person is a member, or the acts committed in the context of organized criminality by the individual, either directly or through complicity;

(3) the appropriate threshold that must be met before an act is considered of such nature and severity that the perpetrator should no longer be allowed to stay in Canada.

(1) *Standard of proof under paragraph 115(2)(b) of the Act: reasonable grounds*

[47] The determination of the proper standard of proof required to bring the appellant under the exceptions of paragraph 115(2)(*b*) is important, as an error on the standard would undeniably permeate the interpretation of the law and the review of the evidence.

[48] As noted above, subsections 115(1) and (2) of the Act incorporate the principle of *non-refoulement* along with its exceptions into Canadian law.

[49] Although subsection 115(2) does not explicitly re-state the evidentiary threshold of "reasonable grounds" found at Article 33(2) of the Convention, it does confer to the Minister a discretionary power to decide "if, in (his) opinion, the person should not be

allowed to remain in Canada.” In my view, this discretionary power, examined within the structure of section 115 of the Act, is consistent with a standard of reasonable grounds. Discretionary decisions will generally be afforded considerable deference. However, I hasten to add “that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter” (*Baker, supra* at paragraph 56).

[50] I therefore conclude that the proper standard for a determination under subsection 115(2) of the Act is reasonable grounds. In doing so, I note that this standard has previously been articulated as being:

> …a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "a bona fide belief in a serious possibility based on credible evidence." See Attorney General of Canada v. Jolly, [1975] F.C. 216 (F.C.A.).

(2) *The acts committed by the appellant in the context of organized criminality: Complicity*

[51] I agree with Justice Kelen that the “acts committed” which are relevant under paragraph 115(2)(*b*) are those committed personally by the appellant. This proposition is supported by a basic reading of the French version of the provision and namely its use of the phrase “ses actes passés” (literally translated by “his past acts”). As Justice Kelen noted, this passage is plain, unambiguous and best reflects the intention of Parliament that the acts to be considered are those committed personally by the appellant (at paragraphs 59, 60 of Reasons for Judgment). That said, I further agree that such a finding does not negate the possibility of

relying on the acts committed by the criminal organization as a whole, so long as it is established that the appellant was complicit in the commission of those acts.

[52] However, I do not agree with Justice Kelen when he relies on *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), [*Ramirez*], to define complicity in the context of organized criminality. The definition he adopts, usually referred to as "complicity by association", has been recognized as a method of perpetrating an offence in respect of certain international crimes covered by Article 1F(*a*) of the Convention (crimes against peace, war crimes and crimes against humanity), and by analogy in the case of acts contrary to the international purposes and principles contemplated by Article 1F(*c*) of the Convention (*Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, at paragraph 137 by Décary J. (concurring)).

[53] He states in his reasons:

> [64] This test for complicity under the Act has been settled by the Court with respect to crimes against humanity. Such crimes are also part of paragraph 115(2)(b), and this is a reasonable one for the purposes of establishing complicity under paragraph 115(2)(b). See my decision in *Catal v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1875 at paragraphs 8 and 9.

[54] "Complicity by association" has been applied in Canadian immigration law in the context of section 98 (subsection 2(1) of the former *Immigration Act*) as well as section 35 of the Act (*Ramirez, supra*; *Sivakumar v. Canada (Minister of Citizenship and Immigration)*, [1994] 1 F.C. 433 (C.A.); *Zazai v. Canada (Minister of Citizenship and*

*Immigration)*, 2005 FCA 303; *Lennikov v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 43).

[55] In *Ramirez, supra*, the most controversial legal issue dealt with the extent to which accomplices as well as principal actors in international crimes should be excluded from Convention refugee status. To this end, Justice MacGuigan writes:

> 12. The Convention provision [1F(a)] refers to "the international instruments drawn up to make provisions in respect of such crimes." One of these instruments is the London Charter of the International Military Tribunal, Article 6 of which provides in part (reproduced by Grahl-Madsen, at page 274):
>
> > Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
>
> I believe this evidence is decisive of the inclusion of accomplices as well as principal actors, but leaves to be answered the very large question as to the extent of participation required for inclusion as an "accomplice".
>
> 13. It was common ground to both parties during argument that it is not open to this Court to interpret the "liability" of accomplices under this Convention exclusively in the light of section 21 of the Canadian Criminal Code [R.S.C., 1985, c. C-46], which deals with parties to an offence, since that provision stems from the traditional common law approach to "aiding" and "abetting."[4] An international convention cannot be read in the light of only one of the world's legal systems.

[56] Article 1F(*a*) of the Convention refers to international instruments and section 98 of the Act incorporates Article 1F into Canadian law. It is in that context that the traditional common law approach to complicity was excluded.

[57] While I concede that the approach taken by Justice Kelen would apply to a determination under paragraph 115(2)(*b*) where a person has been found inadmissible under section 35 (human or international rights violation), I do not think that the same can be said for a person declared inadmissible pursuant to section 37 (organized criminality). In terms of the later provision, Parliament has chosen to define 'organized criminality' by referring to "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" (Emphasis added).

[58] I would suggest that this wording constitutes a clear invitation to apply our domestic laws to determine whether a person is complicit in the commission of certain acts within organized criminality. Unlike in *Ramirez,* I can find no reason in the case of organized criminality to conclude otherwise.

[59] Section 21 of the *Criminal Code*, R.S.C. 1985, c. C-46 (Criminal Code or Cr.C.) sets out the liability of principals and parties to an offence. It will most often apply when dealing with complicity. It reads as follows:

| | |
|---|---|
| 21. (1) Every one is a party to an offence who<br>(*a*) actually commits it;<br>(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or<br>(*c*) abets any person in committing it. | 21. (1) Participent à une infraction :<br>*a*) quiconque la commet réellement;<br>*b*) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;<br>*c*) quiconque encourage quelqu'un à la commettre. |
| (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out | (2) Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en |

| | |
|---|---|
| the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence. | réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpétration de l'infraction, participe à cette infraction. |

[60] Paragraph 21(1)(*a*) holds an accused liable for the role as principal if he or she committed that offence.

[61] Paragraph 21(1)(*b*) makes an accused liable as a party for acts or omissions which are done for the purpose of *aiding* a principal to commit an offence while paragraph 21(1)(*c*) makes the accused similarly liable if he or she *abetted* the principal.

[62] Although the terms *aiding* and *abetting* are commonly associated, the two concepts are not the same. To aid under paragraph 21(1)(*b*) means to assist or help the perpetrator while to abet, within the meaning of paragraph 21(1)(*c*), includes encouraging, instigating, promoting or procuring the crime to be committed: *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at paragraph 26; also cited in: R. *v. Smith*, 2007 NSCA 19 at paragraph 148; *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 at paragraph 166 by Décary J. (concurring).

[63] In elucidating the meaning of aiding and abetting, Justice Dickson in *R. v. Dunlop*, [1979] 2 S.C.R. 881, at pages 891, 896, writes:

> Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch or enticing the

> victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.
> …
> [However] presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement.

[64] Complicity in Canadian law is however not limited to this concept of aiding and abetting. For example, subsection 21(2) of the Cr.C. extends the liability of the principal and parties beyond the wrongful act originally intended. In the absence of aiding and abetting, a person may even become a party to an offence committed by another which he knew or ought to have known was a probable consequence of carrying out the unlawful purpose: *R. v. Simpson*, [1988] 1 S.C.R. 3 at paragraph 14.

[65] Our Criminal Code also contains provisions relating to (a) other forms of liability such as sections 23 and 463, accessory after the fact; section 465, conspiracy; and (b) liability of a secondary party such as section 146, assisting escape and section 240, accessory after the fact to murder, to name a few that appear more relevant in the context of organized criminality.

[66] However, it is not necessary nor is it appropriate for this appeal to address all the provisions that might apply to a particular situation. Suffice to say that, in the context of paragraph 115(2)(*b*) of the Act, when a person has been found inadmissible for organized criminality, one has to refer to Canadian law and not international law, in order to establish if the person was a party to an act of such nature and severity as to warrant his or her

removal. One must also note that section 37 of the Act contains its own definition of organised criminality distinct from that of subsection 467.1(1) of the Criminal Code (on subsection 467.1(1) of the Cr.C., see *R. v. Terezakis*, 2007 BCCA 384, leave to appeal to the S.C.C. dismissed: [2007] S.C.C.A. No. 487).

[67] Before concluding on that issue, I make two further comments. First, while it is understood that the provisions of the Criminal Code will play an important role in a determination of complicity in the context cited above, (especially when we consider subsection 34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21), it is not excluded that other Acts of Parliament may apply to a particular situation on a finding of complicity (see subsection 4(4) of the Cr.C). Second, reference to criminal law in the context of immigration matters has to be made with circumspection and with the required adaptations, especially since the proper standard of proof applicable to subsection 115(2) of the Act is reasonable grounds and not beyond reasonable doubt.

[68] That being said, I have reached the view that when applying paragraph 115(2)(*b*) in relation to an individual found inadmissible for reasons of organized criminality (section 37 of the Act), there must be reasonable grounds to believe that the person committed, himself or through complicity, as defined in our criminal legal system, acts of organized criminality.

(3) *Nature and severity of the acts: a high threshold*

[69] In addressing my final point of analysis on the second certified question, I accept the appellant's argument that the "fundamental character of the prohibition of *refoulement* and

the humanitarian essence of the … Convention more generally, must be taken as establishing a high threshold for the operation of exceptions" (Lauterpacht, sir E. and D. Bethlehem, "The scope and content of the principle of non-refoulement" in *Refugee Protection in International Law* (Cambridge: E. Feller, V. Turk and F. Nicholson, 2003) at paragraph 169).

[70] This idea of a "high threshold for the operation of exceptions" is supported by the wording of the Act itself and the choices made by Parliament. Specifically, I note that paragraph 115(2)(*a*) applies where the person has been found inadmissible for serious criminality, as defined by subsection 36(1) of the Act, that is, for convictions relating to "an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed." Conversely, inadmissibility for criminality pursuant to subsection 36(2) does not fall within the exceptions of paragraph 115(2)(*a*) or (*b*), thereby indicating that minor offences were not contemplated as meeting this particular threshold. This is even more so when we consider that, for paragraph 115(2)(*a*) to apply, the individual has to be found, in the opinion of the Minister, to be "a danger to the public in Canada".

[71] Indeed, as Lauterpacht and Bethlehem note:

> 186. The text of Article 33(2) makes it clear that it is only convictions for crimes of a particularly serious nature that will come within the purview of the exception. This double qualification-*particularly* and *serious*- is consistent with the restrictive scope of the exception and emphasizes that *refoulement* may be contemplated pursuant to this provision only in the most exceptional of circumstances. Commentators have

> suggested that the kinds of crimes that will come within the purview of the exception will include crimes such as murder, rape, armed robbery, arson, etc.
>
> [References omitted]

[72] This same restrictive approach applies to paragraph 115(2)(*b*). I note that, under this paragraph, inadmissibility on grounds of organised criminality is treated with the same importance as inadmissibility on security grounds (section 34) or inadmissibility for violating human or international rights (section 35). Under those two sections, a person is inadmissible for, among other things:

- Engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada (34(1)(*a*));
- Engaging in terrorism (34(1)(*c*));
- Committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes against Humanity and War Crimes Act* (35(1)(*a*)).

[73] Despite the critical nature of these infractions, Parliament has nonetheless given the Minister the discretion to assess the nature and severity of the acts before determining if the subject should be *refouled* under paragraph 115(2)(*b*). This, to me, suggests that paragraph 115(2)(*b*) will only be triggered where the acts committed are of substantial gravity.

[74] Consequently, I endorse the ruling of Justice Kelen that "the logical reason to examine the nature and gravity of the personal acts committed by the refugee is that the refugee should not be *refouled* only because he is a member of a criminal organization unless the acts in which he was involved warrant removal"(Emphasis added) (at paragraph

61 of Reasons for Judgment). The high threshold lies in the nature and severity of the acts committed.

[75] Therefore, I propose to answer the second certified question as follows:

> The exception of paragraph 115(2)(*b*) regarding organized criminality will apply to a Convention refugee or a protected person if, in the opinion of the Minister, that person should not be allowed to remain in Canada on the basis of the nature and substantial gravity of acts committed (in the context of organized criminality) personally or through complicity, as defined by our domestic laws, but established on a standard of reasonable grounds.

[76] Therefore, the Delegate had to reasonably link the appellant to the acts of the organization in which he was a member, taking into consideration, if applicable, his role and responsibilities within the criminal organization. In doing so, the Delegate had to caution himself that it is only in exceptional cases that a Convention refugee or a protected person will lose the benefit of subsection 115(1). Thus, only acts which are of substantial gravity will meet this high threshold.

*D. Application to the Delegate's findings*

[77] Justice Kelen found that the Delegate failed to "make an express finding that the applicant was complicit in the serious and significant criminal acts of the gang." (at paragraph 68 of the Reasons for Judgment). I agree in part. The Delegate failed to conduct

an adequate analysis leading to a finding of complicity. However, an express finding is not required (*Sittampalam v. Canada (M.C.I. and M.P.S.E.P.)*, 2007 FC 687 at paragraph 43).

[78] In this case, the Delegate found that the A.K. Kannan was a criminal organization generally involved in severe criminal acts, and that the appellant was an active member in that group. This is not sufficient to meet the threshold of paragraph 115(2)(*b*) of the Act. On this point, I note that the specific rank of the appellant within the A.K. Kannan criminal organization is unclear. In the Request for Minister's Opinion, *supra*, the appellant is said to be a "leader" by a source "confirmed [to be] reliable" (at paragraph 24), whereas in the Delegate's Opinion, he is referred to as an "enforcer" on the basis of a witness' statement who later disowned his prior declaration to that effect.

[79] While this general approach used by the Delegate would be consistent with a determination under paragraph 37(1)(*a*) of the Act, it falls short of meeting the personalized fact-driven inquiry dictated by paragraph 115(2)(*b*) of the same Act. Ultimately, not having to make an express finding of complicity does not mean that the Delegate was not required to conclude, on reasonable grounds, that the evidence pointed to the appellant as being complicit in the acts of organized criminality committed by the organization, acts that were of such nature and severity as to warrant his removal. The Delegate failed to do so.

[80] To that effect, I propose to remit the matter back to the Minister for reconsideration in accordance with the law. Considering that conclusion, it is therefore not appropriate to address the issue of risk assessment.

*E. Remedies Sought*

[81] The appellant requests, among other remedies, that this Court compels the respondent to assist him to return to Canada on an urgent basis so that he may remain in Canada while his case is being reconsidered (appellant's memorandum at paragraph 76).

[82] The record indicates no special circumstances for this Court to compel the Minister to act in a particular fashion. Despite the legal errors committed by the Delegate during the examination of the appellant's file, his rights to a fair process were never breached. Indeed such an issue was never raised in argument. Furthermore, the Minister is acutely aware of his obligations under the Act and this Court has no reason to intervene, or to presume that these obligations will not be met.

**Conclusions**

[83] In light of the foregoing, I would allow the appeal without costs, set aside the decision of the Federal Court, allow the application for judicial review and remit the matter back to the Delegate for re-determination in accordance with the present reasons.

[84] I propose, as well, to answer the certified questions as follows:

Question 1

If, in the preparation of an opinion under paragraph 115(2)(*b*) of the *Immigration and Refugee Protection Act* , the Minister finds that a refugee who is inadmissible on grounds of organized criminality does not face a risk of persecution, torture, cruel and unusual punishment or treatment upon return to his country of origin, does such

a finding render unnecessary the Minister's consideration of the "nature and severity of acts committed" under paragraph 115(2)(*b*)?

Answer: No

Question 2

If the lack of risk identified in question #1 is not determinative, is paragraph 115(2)(*b*) of the *Immigration and Refugee Protection Act* to be applied "on the basis of the nature and severity of acts committed" by the criminal organization of which the person is a member, or of acts committed by the person being considered for removal (including acts of the criminal organization in which the person was complicit)?

Answer: The exception of paragraph 115(2)(*b*) regarding organized criminality will apply to a Convention refugee or a protected person if, in the opinion of the Minister, that person should not be allowed to remain in Canada on the basis of the nature and substantial gravity of acts committed (in the context of organized criminality) personally or through complicity, as defined by our domestic laws, but established on a standard of reasonable grounds.

"Johanne Trudel"
J.A.

"I agree
Robert Décary J.A."

"I agree
M. Nadon J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-170-07 |
| **(APPEAL FROM A JUDGMENT OF JUSTICE KELEN, 2007 FC 229, File IMM-6447-05)** | |
| **STYLE OF CAUSE:** | Panchalingam Nagalingam<br>Appellant<br>The Minister of Citizenship and Immigration<br>Respondent |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | January 24, 2008 |
| **REASONS FOR JUDGMENT BY:** | Trudel JA |
| **CONCURRED IN BY:** | Décary JA<br>Nadon JA |
| **DATED:** | April 24, 2008 |

**APPEARANCES:**

| | |
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