Suresh v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 8314 (F.C.); 65 C.R.R. (2d) 344; 173 F.T.R. 1

Date: 19990611

Docket: IMM-117-98

BETWEEN:

MANICKAVAGSAGAM SURESH

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

McKEOWN J.

[1] The applicant seeks judicial review of the decision of the Minister of Citizenship and Immigration, Lucienne Robillard ("Minister"), dated January 6, 1998, wherein the Minister determined, pursuant to s. 53(1)(b) of the *Immigration Act* , R.S.C. 1985, c. I-2, as amended ("the Act"), that the applicant is a danger to the security of Canada. The applicant had become the subject of a security certificate issued pursuant to s. 40.1 of the Act on September 11, 1995.

[2] A number of constitutional and administrative law issues were raised in this case. The issues include: the jurisdiction of the Federal Court on judicial review to determine the constitutionality of s. 53(1)(b) as well as s. 19(1)(e) and (f) of the Act; whether ss. 2 and 7 of the *Charter of Rights and Freedoms* ("the Charter") were violated; the standard of review to be applied; whether the Minister"s decision was procedurally fair; whether the applicant had been given notice of all the evidence to be considered by the Minister; the question of the admissibility of new evidence before this Court; and the role of treaties in Canada.

[3] There are four matters which the parties agree are not in issue: (1) the Minister has the statutory discretion to determine whether a Convention refugee is a danger to the security of Canada; (2) the Minister"s exercise of that discretion has to be rendered in accordance with the

Charter; (3) Mr. Justice Teitelbaum upheld the security certificate on all three s. 19 grounds; (4) the purpose of the legislation is the balancing of competing rights between the parties.

FACTS:

[4] The applicant is a Tamil from Sri Lanka. He came to Canada on October 5, 1990 and was found to be a Convention refugee on April 1, 1991. On September 11, 1995, the applicant became the subject of a security certificate issued, pursuant to s. 40.1 of the Act, on the grounds that he was inadmissible to Canada pursuant to ss. 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(iii)(B). These sections provide as follows:

1. s. 19(1)(e)(iv)(C): persons who there are reasonable grounds to believe are members of an organization that there are reasonable grounds to believe will engage in terrorism

2. s. 19(1)(f)(ii): persons who there are reasonable grounds to believe have engaged in terrorism

3. s. 19(1)(f)(iii)(B): persons who there are reasonable grounds to believe are or were members of an organization that there are reasonable grounds to believe is or was engaged in terrorism.

On August 29, 1997, pursuant to s. 40.1(7), Teitelbaum J. upheld the reasonableness of the security certificate, naming Mr. Suresh as inadmissible on these grounds. Specifically, Teitelbaum J. found that the *World Tamil Movement* (the "*WTM*"), of which Mr. Suresh was coordinator, "... can be reasonably concluded is part of the LTTE [Liberation Tigers of Tamil Eelam] organization or is, at the very least, an organization that strongly supports the activities of the LTTE." Further, he stated that he was "... satisfied that there are reasonable grounds to believe the LTTE to have committed "terrorist acts" no matter how one would define "terrorism" or "terrorist act"." In his decision of August 29, 1997, Teitelbaum J. indicated that he would issue reasons at a later date, and they were issued two and one half months later.

[5] There is no appeal or judicial review of Teitelbaum J."s decision. Section 40.1(7) of the Act provides

[w]here a certificate has been reviewed by the Federal Court pursuant to subsection (4) and has not been quashed pursuant to paragraph (4)(d),

(a) the certificate is conclusive proof that the person named in the certificate is a person described in subparagraph 19(1)(c.1)(ii), paragraph 19(1)(c.2)(d), (e), (f), (g), (j), (k) or (l) or subparagraph 19(2)(a.1)(ii); ...

Counsel for the applicant submitted before me that the LTTE is an organization promoting self-determination pursuant to the *International Covenant on Civil and Political Rights*, which forms part of the *International Bill of Rights*. She also submitted that the applicant was a community activist who engaged in community activities, including fundraising through a non-profit corporation operating a community centre in Toronto. However, given the binding nature of

Teitelbaum J."s decision, it is not open to me to revisit the question of the nature of the LTTE or of the applicant"s activities as coordinator of the *WTM* .

[6] An adjudicator ordered the applicant deported from Canada on September 17, 1997, pursuant to s. 32(6) of the Act, after finding him to be a person described in ss. 19(1)(e)(iv)(C) and 19(1)(f)(iii)(B) of the Act. The adjudicator did not find the applicant to be a person described in s. 19(1)(f) ii), and the Minister has appealed this aspect of the decision in another proceeding.

[7] On September 17, 1997, the applicant was given notice in writing (hereinafter "Notice of Intention") that the Minister would be considering the issuance of a s. 53(1)(b) opinion that the applicant is a danger to the security of Canada. The applicant was informed that an immigration adjudicator had found the applicant to be a person described in the above three cited subparagraphs of s. 19(1). In fact, as has been noted, the deportation order issued by the adjudicator did not include subparagraph 19(1)(f)(ii). According to the Memorandum to the Minister requesting the s. 53(1) decision, "the adjudicator presiding over his inquiry on September 17, 1997 did not agree with [Teitelbaum J.], as the Court had not published reasons for decision." Teitelbaum J."s full Reasons were released on November 14, 1997.

[8] The September 17, 1997 Notice of Intention to the applicant further informed him that before making a decision pursuant to s. 53(1)(b), the Minister would

... assess the risk that you represent for the Canadian public and the possible risks to which you will be exposed if you are returned to the country from which you came to Canada, your country of permanent residence, your country of nationality or your country of birth.

It further informed the applicant of the type of documentation that might be considered in this assessment:

Please note that CIC may consult documentation found in the Immigration and Refugee Board resource centres as well as the most recent and up-to-date information on the country. Among the documents that may be consulted are the human rights information files, the indexed press summary and the weekly press summary on the country or countries to which you might be removed. CIC may also use other documents published annually and made available to the public such as the Country Reports on Human Rights Practices of the U.S. State Department, the Critique of the Lawyers" Committee for Human Rights, Amnesty International Reports, the World Europa and the World Report of Human Rights Watch.

The Notice of Intention also informed him of his opportunity to "present written observations or arguments ... [and] ... submit any documentary evidence you deem relevant", stating "[y]ou may wish to relate your submission to the threat on your life or freedoms that could result in your removal from Canada". The deadline for submission was 15 days from the receipt of the Notice of Intention. The applicant would be informed of the Minister"s decision.

[9] Counsel for the applicant made submissions to the Minister on October 1, 1997 and made additional submissions on December 3rd, 1997, following the release of Teitelbaum J"s Reasons. The October 1, 1997 submissions consisted of 15 pages of counsel"s representations on the

standard of procedural fairness to be applied in the s. 53(1)(b) decision, the legality of the decision, and the risk faced by Mr. Suresh should he be returned to Sri Lanka. Counsel also submitted that "Mr. Suresh would not be safe and be subjected to torture and other forms of cruel, inhuman or degrading treatment in Sri Lanka. ... No place would provide safe haven for him in Sri Lanka." She further submitted, "I do not believe that the publicity about this case will provide Mr. Suresh with protection in Sri Lanka." Attached were over 100 pages of documentation on country conditions in Sri Lanka, specifically the human rights abuses against Tamils, including torture and killings.

[10] The submissions of December 3, 1997 consisted of representations as to the import of Teitelbaum J."s Reasons, arguing that despite his upholding of the s. 40.1 certificate, he had defined "membership" too broadly and that the conduct of Mr. Suresh in his capacity as coordinator of the *WTM* was not unlawful. Further, counsel submitted that Teitelbaum J."s decision, which indicated the applicant was on the "executive" of the LTTE and listed his activities in that capacity, compounded his risk should he be returned to Sri Lanka. Counsel pointed out that Teitelbaum J. had "indicated in his reasons that he would not name witnesses or review the evidence in his reasons because of a concern for the safety of others", but then did so with regard to Mr. Suresh. Specifically, Teitelbaum J."s Reasons indicated "that Tamils arrested by the Sri Lankan authorities are badly mistreated and in a number of cases [he] would consider the mistreatment as to border on torture." He continued that "... it could, I was told, be dangerous if it were known that certain specific persons gave evidence for or on behalf of the LTTE or the Tamil cause. ... "dangerous" for the witness or for his or her family still living in Sri Lanka." Based on these remarks, counsel for Mr. Suresh submitted to the Minister that the Court went much further than was necessary in detailing Mr. Suresh"s relationship with the LTTE, thereby compounding his risk in returning to Sri Lanka. Counsel"s submissions on behalf of Mr. Suresh were summarized in two briefs to the Minister, totalling one page. I note that counsel, in the submissions to Teitelbaum J., had requested him to issue two sets of reasons, one of which would cover in camera matters and other sensitive matters.

[11] On January 8, 1998, the Minister rendered a decision pursuant to s. 53(1)(b) of the Act that "Mr. Suresh, a Convention refugee, constitutes a danger to the security of Canada". The applicant was booked for removal on January 19, 1998 to Sri Lanka, and remains in Canada pursuant to an interim injunction issued by the Ontario Court General Division and upheld by the Ontario Court of Justice Divisional Court on January 8, 1999.

Jurisdiction of the Federal Court to Determine Constitutional Questions on Judicial Review:

[12] The applicant filed a Notice of Constitutional Question seeking to have this Court declare under s. 52 of the *Constitution Act*, that s. 19(1)(e) and (f) and s. 53 are of no force and effect. The respondent"s position was that on an application for judicial review, this Court has no jurisdiction to declare legislation of no force and effect. The respondent acknowledged that on judicial review, the Court has jurisdiction to examine whether the Minister"s conduct is contrary to the Charter, but that was the extent of this Court"s jurisdiction. If the applicant wished to proceed in the Federal Court of Canada to declare s. 19(1)(e) and (f) and s. 53 of no force and effect, this should be done by way of an action rather than an application for judicial review.

[13] During the preparation of my Reasons, the Federal Court of Appeal, in *Gwala v. M.C.I.*, Docket A-375-98, May 21, 1999, decided the jurisdictional question in the affirmative. The Court stated at p. 2:

> ... we are in general agreement with the reasons for judgment of Mr. Justice Muldoon in paragraphs 18 to 31 of his recent decision in *Raza v. Canada (Minister of Citizenship and Immigration* 1998 CanLII 9119 (F.C.), (1998), 157 F.T.R. 161, which is summarized as follows in paragraph 18:

With respect, however, it seems that *Gwala* was, as the learned judge herself seemed to suspect, incorrectly decided on the issue of whether this Court has jurisdiction to hear constitutional challenges in the circumstances at bar. There are two reasons: the expanded provisions of the *Federal Court Act* which were not in place when *Poirier* or *Tétreault-Gadoury* were decided (but referred to by Nadon, J. in *Mobarakizadeh*, above); and second, that a tribunal which bases its decision on a constitutionally invalid provision commits a jurisdictional error. Thus, by implication, in order to determine whether a decision-maker acted within its jurisdiction, the constitutionality of the conferring provision must be assessed.

[14] Regardless of my views on jurisdiction, both parties had urged me to consider the constitutionality of the sections in question before me. Before I proceed to consider the constitutionality of ss. 19 and 53 of the Act, I will review the administrative law issues in this case.

Standard of Review:

[15] Both parties made submissions with respect to the standard of review to be applied in this case. In my view, the result is the same, whichever standard of review I apply.

[16] I am reviewing a discretionary decision of the Minister under s. 53 of the Act. This decision was made following a Refugee Division determination that the applicant is a Convention refugee, the issuance of a security certificate pursuant to s. 40.1 of the Act, and a determination by a designated judge under s. 40.1 of the Act, about the reasonableness of a security certificate. Under s. 53 of the Act, the Minister then decided whether there was any reason to stop the applicant"s refoulement to Sri Lanka. This entailed balancing the risk of returning a Convention refugee to Sri Lanka against the danger that the applicant poses to Canadian security.

[17] In light of the discretionary nature of the Minister"s decision, I believe Iacobucci J."s comments in *Pezim v. British Columbia (Superintendent of Brokers)* , [1994] 2 S.C.R. 577 are applicable. At p. 607, he stated that s. 144 of the *British Columbia Securities Act*

> ... gives the Commission a broad discretion to make orders that it considers to be in the public interest. Thus, a reviewing court should not disturb a Commission"s order unless the Commission has made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner.

In the case before me, s. 53(1)(b) gives the Minister a similarly broad discretion. As will be shown, there are obvious differences between a decision of the Securities Commission and a decision by the Minister authorizing the refoulement of a refugee. However, the same principle of deference applies to the reviewing court in both instances.

[18] The Federal Court of Appeal, in *Williams v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 4972 (F.C.A.), [1997) 2 F.C. 646, addressed the Minister"s opinion under s. 70(5) of the Act that the applicant constituted a danger to the public. The Minister"s opinion had resulted in the applicant losing the right to appeal his removal order, normally provided pursuant to s. 70(1)(a). Strayer J.A., at p. 664, commented on the wording of the provision, noting specifically the phrase "where the Minister is of the opinion that the person constitutes a danger to the public in Canada..." He observed that Parliament had chosen to vest considerable discretion in the Minister, the determining factor being not objective proof but rather the Minister"s subjective "opinion." He continued:

... unless the overall scheme of the Act indicates otherwise through e.g. an unlimited right of appeal of such an opinion, such subjective decisions cannot be judicially reviewed except on grounds such as ... the decision maker acted in bad faith, or erred in law, or acted upon the basis of irrelevant considerations.

[19] Strayer J.A. further stated:

The Court is not ... asked to affirm the correctness of the Minister"s opinion but only to determine whether there is any lawful basis for ... review.

In my view, these comments are applicable to the case at bar. Section 53(1)(b) employs the same subjective language as s. 70(5), providing for an exception to the prohibition against the refoulement of refugees where "the Minister is of the opinion that the person constitutes a danger to the security of Canada.". Thus, as was stated by Strayer J.A. in *Williams, supra*, such a subjective decision can only be reviewed on grounds that "the decision maker acted in bad faith, or erred in law, or acted upon the basis of irrelevant considerations." Furthermore, the decision of the Minister that the applicant is a danger to the security of Canada is a question of fact over which the courts should be most reluctant to engage in a re-examination of the Minister"s conclusions.

[20] The applicant cites *Pushpanathan v. Canada (M.C.I.)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982 for the proposition that a higher standard of review should be applied given that refugee rights are in question. In my view, *Pushpanathan, supra*, is not of assistance to the applicant because the decision under review in that case was of a different nature than that which is before me. Specifically, *Pushpanathan, supra*, dealt with a decision of the Refugee Division of the Immigration and Refugee Board, which is quasi-judicial and as such attracts a greater degree of judicial scrutiny. In contrast, in the case before me, the Minister"s decision pursuant to s. 53(1)(b) is clearly discretionary and is therefore to be accorded considerable deference. Furthermore, three of the four factors set out in *Pushpanathan, supra* , favour greater deference on judicial review than the "correctness" standard sought by the applicant.

[21] The applicant further submits that a substantial interest is at stake in respect to the forcible refoulement of a Convention refugee, and that "Parliament should be held to significant procedural safeguards through the deportation scheme." Citing La Forest J. in *Lyons v. The Queen* 1987 CanLII 25 (S.C.C.), (1987), 32 C.R.R. 41 (S.C.C.), the applicant submits that the safeguards required depend on "...the functional nature of the proceedings and its potential impact on the liberty of the individual" (See also Wilson J. in *Singh v. Minister of Employment and Immigration* , 1985 CanLII 65 (S.C.C.), [1985] 1 S.C.R. 177).

[22] It is true that the refoulement of a Convention refugee has significant implications for the individual in question, as compared to the loss of a right of appeal in a non-refugee context, as was the case in *Williams*. However, there is also the important right of Canada to be free from danger to the security of Canada. The Minister, an elected official, is particularly well-suited to the task of overseeing the complex statutory scheme set out in the Act. Having regard to both the potential seriousness of this decision for the applicant, and the discretionary nature of a Ministerial opinion " particularly concerning issues of national security " I believe the appropriate standard of review of review is reasonableness.

[23] As will be shown, in my view, the Minister"s decision was reasonable, based on the evidence before her. The weight to be accorded that evidence is a matter for the Minister to decide and not the Court (see *Ngo v. Canada (M.C.I)* (F.C.T.D.), June 17, 1997, IMM-2257-96 and IMM-2258-96). Furthermore, in my opinion, the applicant did have notice of the materials before the Minister and had adequate opportunity to respond to the issues raised.

Procedural Fairness

(i) Did the applicant receive adequate disclosure of the material before the Minister?

[24] The applicant submitted that he was unaware of the material before the Minister and was not given adequate opportunity to make submissions with respect to paragraph 53(1)(b) of the Act. However, Mr. Suresh received a letter dated September 17, 1997, informing him that

... Citizenship and Immigration Canada (CIC) intends to request the opinion of the Minister of Citizenship and Immigration (the Minister), pursuant to paragraph 53(1)(b) of the *Immigration Act* (the Act) that you constitute a danger to the security of Canada. That opinion, if given, could have serious consequences for you.

The letter also referred to the fact that

... the Federal Court ... deemed reasonable a certificate issued by the Solicitor General of Canada and the Minister of Citizenship and Immigration to the effect that you are an inadmissible person described in sub paragraphs 19(1)(e)(iv)C, 19(1)(f)(ii) and19(1)(f)(iii)B of the Act".

The letter went on to provide:

However, before such a decision is made the Minister will assess the risk that you represent for the Canadian public and the possible risks to which you will be exposed if you returned to the

country from which you came to Canada, your country of permanent residence, your country of nationality or your country of birth.

It then offered Mr. Suresh the opportunity to present written observations or arguments and submit any documentary evidence that he deemed relevant. In particular, the letter stated, "[y]ou may wish to relate your submission to the threat on your life or freedoms that could result in your removal from Canada". It further indicated that CIC would consult certain documentation referred to in paragraph 8 above. The submissions of counsel for the applicant were put before the Minister and were also summarized in a Memorandum to the Minister by one of her officials.

[25] Although counsel for the applicant had requested a copy of the Memorandum to the Minister which was to be considered by her in reaching her s. 53(1) decision, counsel was not provided with same. In particular, the applicant has identified the following four "factual assertions unsupported by evidence" in the recommendations of the Minister"s officials to which the applicant"s counsel would have wanted to respond prior to the Minister"s decision:

(a) an assertion that the LTTE imposed an authoritarian military rule on those within its *de facto* jurisdiction, contrary to the evidence called by the applicant at the s. 40.1 proceeding;

(b) a listing of the LTTE"s violations, which implied they were in the same league as those of the Sri Lankan government;

(c) the Minister"s representatives indicated that Sri Lanka was a democracy with an independent judiciary, which ignores the fact that there is military rule in the Tamil areas and the judiciary itself has indicated that it cannot control or limit military and police abuses; further, it ignores the underlying basis of the armed conflict in Sri Lanka which arose because the Sri Lankan government oppressed the Tamil people, denying them equal rights and self-determination;

(d) the Minister"s representatives urged that the applicant not be allowed to remain in Canada to continue his activities because this runs counter to Canada"s international commitment to fight against terrorism; the applicant would have led evidence to the contrary, specifically that after the applicant was detained, the *World Tamil Movement* (the organization for which the applicant served as coordinator) changed its fundraising practices so as to raise funds only for humanitarian assistance to Tamil victims of the armed conflict in Sri Lanka.

There is evidence upon which it was open to the Minister"s officials to make these "factual" assertions. The applicant disagrees with the conclusions reached on the evidence. Some of this evidence is set out in paragraphs 31, 32, 33 and 34, *infra* .

[26] The Federal Court of Appeal in *Williams v. Canada, supra*, which dealt with a s. 70(5) "danger to the public" decision by the Minister regarding a non-refugee, found that the process was fair where the applicant did not receive the summary report to the Minister. However, the applicant submits that the decision-making process under s. 53(1)(b) requires a higher level of procedural fairness than that required under s. 70(5) since the former may result in the refoulement of a Convention refugee. In his submission, "the more serious the consequences [of

the decision], the greater the degree of compliance with the fairness principles and the greater degree of the care to be taken in assessing the evidence" (See *Singh, supra* ; *Bater and Bater*, 50 All E.R. 458 at p. 459). He further submits that it is open to the Court to go beyond the common law in adhering to "contemporary notions of administrative justice" in the context of s. 7 of the Charter (See Evans J. in *The Principles of Fundamental Justice: the Constitution and the Common Law* , 1991, 29 Osgoode Hall Law Journal 51 at 85-86).

[27] In my view, even if the implications of a decision under s. 53(1)(b) " that is, the refoulement of a Convention refugee " call for a higher standard of procedural fairness than that under s. 70(5), the procedure followed in the case before me was adequate. There is nothing in the official"s Memorandum to the Minister of which the applicant was unaware. In *Nguyen v. Canada (M.C.I.)* reflex, (1997), 133 F.T.R. 210, I addressed similar concerns regarding a summary report prepared by the Minister"s official for the purposes of a "danger to the public" decision pursuant to ss. 70(5) and 46.01(1)(e)(iv). I note that the s. 46.01(1)(e)(iv) decision precluded the applicant from having his refugee claim determined by the Refugee Division and therefore also had serious implications in terms of possible refoulement. The summary report contained information contrary to the applicant"s own submissions to the Minister. I held, at p. 214 that

... the Minister"s delegates are entitled to make contrary statements as long as the statements are either in the file or are based on information which is available to the applicant.

In the case at bar, I am satisfied that any information contained in the Memorandum to the Minister was known to the applicant at the time he made his submissions.

[28] The applicant suggested that there was no evidence known to him that the funds provided by him extended the civil war. In my view, if an organization engaged in terrorist activities received money, this money enabled the terrorist activities to continue and thus, extend the civil war. There was nothing to preclude the applicant from including in his written submissions to the Minister that he was not doing anything to further the conflict in Sri Lanka. I believe MacKay J."s holding in *Pratt v. Canada (M.C.I.)* 1997 CanLII 4981 (F.C.), (1997), 130 F.T.R. 137 at 146 applies to the case at bar:

... All matters underlying that recommendation were known to, and opportunity was provided for comment by, the applicant. The recommendation itself is simply a conclusion, the possibility of which was known to the applicant who had an opportunity to comment on the record on which that recommendation was based.

[29] On the issue of adequate notice, the applicant submitted that the Minister was required, in the Notice of Intention, to apprise him of the grounds on which she believed he was not at risk, or not sufficiently at risk to outweigh the danger he represented to the security of Canada. In my view, it would be contrary to the Minister"s duty for her to draw any conclusions on the risk to the applicant until the applicant was given an opportunity to address what he believes the risks would be. Furthermore, because the applicant is a Convention refugee, the issue of risk is before the Minister. The Minister knows that seven years ago, the applicant had a well founded fear of persecution, and it is only the applicant who can inform the Minister of what the risk is to him at

present. The Minister made it clear in paragraph 6 of the Notice of Intention that she was going to look at the risk to the applicant if he returns to Sri Lanka. The Minister informed the applicant of the documentation before her, which I have set out in paragraph 8 above.

[30] The applicant submitted that since he did not have full disclosure of all materials before the Minister, he should not be limited in this judicial review to the record which was before the Minister, but rather, should be allowed to produce new materials. I am satisfied that the Minister made full disclosure of the material upon which she was to make her decision, except for the Memorandum to the Minister, and this was based on material that the applicant knew about and was publicly available to him. She followed the requirements of procedural fairness. Accordingly, I place no reliance on the new evidence filed by the applicant or the respondent in my review of the evidence before me. This Court on judicial review is not the forum to engage in risk assessment, which is what I would have to do if I accepted the new evidence of either the applicant or the respondent. The September 1997 Notice of Intention provided the applicant with an opportunity to show why he would be at risk if he returned to Sri Lanka. In my view, the Minister wanted to be able to assess the risk to the applicant if he was returned to Sri Lanka and balance that risk against the danger to the security of Canada posed by the applicant.

(ii)Was the Minister"s decision reasonably open to her based on the evidence before her?

[31] The applicant submits that the Minister acted perversely or capriciously and made findings with no factual basis whatsoever. The applicant made submissions before the Minister and before Teitelbaum J. that the LTTE is a movement fighting for self-determination. However, the documentary evidence submitted by the applicant himself suggested otherwise. It referred to the LTTE being involved in the biggest bomb attack in Colombo in 1996, in which explosives were driven into the Central Bank, killing "some 100 persons" and injuring over 1,200.[1]

[32] In the U.S. Department of State "Sri Lanka Country Report on Human Rights Practices for 1996" [hereinafter "U.S. D.O.S. Report"], submitted by the applicant, there is reference to the LTTE killing 14 Sinhalese villagers in the Puttalam district and murdering 11 Sinhalese travellers in an ambush on a bus in the Ampara district. The materials submitted by the applicant also stated that the LTTE was "reported to have conducted executions of suspected government informers, and have engaged in massacres and retaliatory killings of Sinhalese and Muslim villagers, torture and mistreatment of prisoners, forced conscription of children, and kidnapping"[2]. The LTTE engages in intimidation by way of lamppost killings.

[33] The LTTE denies the people under its authority the right to change their government. It does not tolerate freedom of expression. It does not respect academic freedom. Tamils who do not support the LTTE are subjected to human rights abuses.

[34] There was also evidence before the Minister that Sri Lanka is a long-standing democratic republic, that the government generally remained committed to the human rights of its citizens and was making progress in handling some unresolved, high-profile cases of extra-judicial killings and disappearances.[3] According to the U.S. D.O.S. Report, "[l]egislation was passed establishing a permanent human rights commission to monitor any abuses", although the commission was not yet operational at year"s end. Also, Sri Lanka has entered into the

International Covenant on Civil and Political Rights, which prohibits torture. Sri Lanka has charged individual soldiers with offences. It arrested and convicted 14 soldiers on 101 counts of murder in 1996. The International Committee of the Red Cross has unhindered access to detention centres, police stations and army camps.

[35] The evidence submitted by the applicant to the Minister also detailed human rights violations committed by the government-controlled security forces. The U.S. D.O.S. Report stated that "[m]embers of the security forces continued to torture and mistreat detainees and other prisoners, both male and female, particularly during interrogation". It identified most torture victims as "Tamils suspected of being LTTE insurgents or collaborators."[4] The evidence also referred to at least 17 extrajudicial killings in the Eastern Province by the police in 1995, "some as reprisals against Tamil civilians for LTTE attacks in which members of the security forces were killed or injured." In some cases, the perpetrators had not been arrested.[5]

[36] With regard to Jaffna, there was reference to a large rise in the number of Tamil arrests following the LTTE suicide bomb attack of July 4, 1996. The "UNHCR Background Paper" also reported "an institutionalization of torture to a point where Sri Lankans see it as a retaliation against Tamil civilians rather than as isolated misdemeanours.[6] Also included in the applicant"s submissions to the Minister was a July 1997 report entitled "Human Rights Violations in the Batticaloa District in East Sri Lanka", by Joseph Pararajasingham, a Tamil member of parliament for the Tamil United Liberation Front (TULF), a moderate Tamil party which participates in elections in Sri Lanka and is not involved in fighting against the Sri Lankan government. The applicant comes from the Batticaloa district. The report states that "[t]he Sri Lankan security forces continued to torture and mistreat detainees, both male and female, during interrogation and at the time of arrest."[7]

[37] While the evidence before the Minister was mixed, it was reasonably open to her, based on these materials, to conclude that the danger the applicant represented to the security of the Canadian public outweighed the risk to him upon his return to Sri Lanka. The applicant"s arguments go to the weight of the evidence, which is clearly a matter for the Minister to decide. The applicant took the view that the newspaper articles published in Sri Lanka by the Sri Lankan ambassador gave him a high profile. Although the applicant believes that this would cause problems for himself, it was certainly open to the Minister to draw the conclusion that the publicity would assist in protecting him. As I have stated above, the Minister"s decision need only be reasonable, not correct. Furthermore, while the applicant has made submissions before both the Minister and myself regarding the nature of the LTTE"s activities, arguing that they do not constitute terrorism, that issue is not properly before this Court. Teitelbaum J."s decision under s. 40.1(7) of the *Act* rendered the Minster"s security certificate "conclusive proof" that the applicant was a person described in ss. 19(1)(e)(iv)(C), 19(1)(f) (ii) and 19(1)(iii)(B). Thus, it is not open to me to revisit the question of the nature of the LTTE"s activities.

[38] The applicant also submitted that fundamental justice required an oral hearing by an independent arbitrator. The Federal Court of Appeal decisions in *Nguyen, supra*, in *Williams, supra* and in the Trial Division"s decision in *McAllister v. Canada* , 1996 CanLII 4030 (F.C.), [1996] 2 F.C. 190 (T.D.), indicate that written submissions are sufficient. Although in *Nguyen*, the Federal Court of Appeal stated that written submissions would be sufficient, Marceau J.A.

stated *in obiter* that the application of the Charter would be different where "forcing the individual concerned back to a country where, on the evidence, torture and possibly death will be inflicted ... would be ... at the very least, an outrage to public standards of decency, in violation of the principles of fundamental justice under s. 3 of the *Charter*". I also note that in *Kindler v. Canada (Minister of Justice)* , 1991 CanLII 78 (S.C.C.), [1991] 2 S.C.R. 779, the appellant asked the Minister of Justice for a personal interview and for an opportunity to bring witnesses, and the Supreme Court of Canada was unanimous that written submissions were sufficient to satisfy the requirements of fundamental justice. The question of an independent person is also dealt with in *Williams, supra*, and it was noted that Parliament wanted the opinion of a minister, not of a judge. A subjective opinion may be reviewed in terms of fundamental justice, as to whether the Minister acted in bad faith, erred in law, or acted on irrelevant considerations. Furthermore, the Federal Court of Appeal in *Nguyen, supra*, found that the Minister"s opinion was as good as the Court"s opinion. The Act does not require an independent, impartial decision maker. There has been an independent judicial arbitrator in the person of Mr. Justice Teitelbaum, who upheld the reasonableness of the security certificate under s. 40.1. The subjective opinion still complies with the principles of fundamental justice. In my view, fundamental justice does not require an oral hearing by an independent arbitrator.

Constitutional and Treaty Analysis:

[39] Section 7 of the Charter provides

[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Since, in the case before me, the parties are in agreement that s. 7 of the Charter is engaged by the Minister"s decision under s. 53(1)(b), it remains for me to consider whether that decision violated the principles of fundamental justice. This approach was taken by the Supreme Court of Canada in *Chiarelli v. Canada (M.E.I.)* , 1992 CanLII 87 (S.C.C.), [1992] 1 S.C.R. 711, *Dehgani v. Canada (M.E.I.)*, 1993 CanLII 128 (S.C.C.), [1993] 1 S.C.R. 1053, and in *Kindler, supra,* where La Forest stated at p. 831,

[t]here can be no doubt that the appellant"s right to liberty and security of the person is very seriously affected because he may face the death penalty following his return. The real question is whether surrender under these conditions violates the principles of fundamental justice.

La Forest J. then considered whether the decision in question was in accordance with the principles of fundamental justice, both procedurally and substantively. As I have already considered the procedural aspects of the principles of fundamental justice, it now remains for me to consider the substantive aspects.

[40] Many of the constitutional arguments raised in this case were addressed in Rothstein J."s decision in *Said v. M.C.I.* , (F.C.T.D) February 11, 1999, IMM-169-98 and IMM-170-98. While the issue in that case was the validity of paragraph 53(1)(d) of the Act, the reasoning is equally applicable to paragraph 53(1)(b) of the Act. In considering whether s. 53(1)(d) violated the principles of fundamental justice under s. 7, Rothstein J. noted the following at paragraph 15:

> The balancing between an individual"s liberty interest and the protection of society is well established in the application of principles of "fundamental justice" in section 7 of the *Charter* . In *Rodriguez v. British Columbia (Attorney General et al.*, 1993 CanLII 75 (S.C.C.), [1993] 3 S.C.R. 519, Sopinka J. stated at p. 593:
>
> > This concept of balancing was confirmed in a very recent judgment of this Court, in *Cunningham v. Canada*, [1993] 2 S.C.R. 43... McLachlin J. concluded that the appellant had been deprived of a liberty interest protected by s. 6. She then considered whether that deprivation was in accordance with the principles of fundamental justice (at pp. 151-152):
>
> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally ... (emphasis in original)

[41] Rothstein J."s comments, at para. 11, on the role of s. 53 as incorporating Article 33 of the *Convention Relating to the Status of Refugees* and on the rationale for balancing under s. 53, are pertinent:

Article 33(1) provides that a refugee may not be returned to the place where his life or freedom would be threatened on account of a Convention ground. However Article 33(2) states that the benefit of Article 33(1) may not be claimed by a refugee where there are reasonable grounds for regarding him or her as a danger to the security of the country in which he or she claims refugee or where, having been convicted, by a final judgment, of a particularly serious crime, he or she constitutes a danger to the community of that country.

[42] The Supreme Court commented specifically on the function of s. 53 in *Pushpanathan, supra*. Although the case concerned Article 1F of the Act, Bastarache J., speaking for the majority, also considered s. 53. He described at paragraph 73, p. 1034, the rationale behind the balancing undertaken pursuant to s. 53:

... Article 33(2) as implemented in the Act by ss. 53 and 19 provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon *refoulement*. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of states to sanction criminal activity on the other.

In my view, in light of the Supreme Court of Canada decisions in *Rodriguez, supra* and *Cunningham, supra*, referred to by Rothstein J. in *Said, supra*, as well as Bastarache J."s reasons in *Pushpanathan, supra* , the balancing undertaken by the Minister under s. 53(1)(b) satisfies the requirements of fundamental justice as articulated by the Supreme Court.

The *Convention Against Torture*

[43] The applicant before me takes the position that the balancing approach under s. 53 is not applicable where a Convention refugee may be subject to torture. He relies on Article 3.1 of the *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* [1987] Can. T.S. No. 36, which provides

No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The *Convention Against Torture* has not been enacted as part of the domestic law of Canada, but has been ratified by Canada.

[44] Strayer J.A. in *Baker v. M.C.I.*, 1996 CanLII 3884 (F.C.A.), [1997] 2 F.C. 127 (F.C.A.), considered Canada"s obligations under the *Convention on the Rights of the Child* , which has also not been adopted by either federal or provincial legislation in Canada. He stated at p. 140

... It is clear that a treaty made by the executive branch of government does not have legal effect over rights and obligations within Canada unless implemented by statute. This Convention has never been adopted by either federal or provincial legislation in Canada. It is clear that legislation implementing a treaty should be interpreted by reference to the treaty even in the absence of real ambiguity in the legislation, but it has in no way been demonstrated that the *Immigration Act* is legislation implementing the *Convention on the Rights of the Child*. While there is a general principal that courts should interpret all other legislation so as to avoid, if possible, interpretations which would put Canada in breach of its international obligations, this general principle in my view cannot be applied to bring about unconstitutional results.

[45] Noël J., commenting specifically on the *Convention Against Torture* in *M.C.I. v. Sinnathurai*, F.C.T.D., March 11, 1998, IMM-1111-97, stated at page 2,

... even though Canada has ratified the Convention Against Torture, it has not been incorporated into the *Immigration Act* with the result that it is difficult to conceive how its principles could govern the scope and application of that *Act*.

Unlike the *Convention Relating to the Status of Refugees*, which has been implemented into the *Immigration Act*, the *Convention Against Torture* is not binding under Canadian law. However, as was noted in *Baker, supra,* Canadian legislation should be interpreted so as to avoid a breach of Canada"s international obligations. In *Slaight Communications Inc. v. Davidson* , 1989 CanLII 92 (S.C.C.), [1989] 1 S.C.R. 1038, at pages 1056 and 1057, Dickson C.J. commented on the role of Canada"s treaty obligations with regard to Charter interpretation:

Given the dual function of s. 1 identified in *Oakes*, Canada"s international human rights obligations should inform not only the interpretation of the contents of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.

While the *Convention Against Torture* does not have the effect of law in Canada, it informs the interpretation of Charter rights. It is in this context that I must consider whether the balancing

undertaken by the Minister pursuant to s. 53(1)(b) violates Article 3 of the *Convention Against Torture* and thereby violates s. 7 of the Charter, notwithstanding my view that this balancing complies with the principles of fundamental justice.

[46] With regard to Article 3 of the *Convention Against Torture*, the applicant cites *Chahal v. The United Kingdom*, E.Ct.H.R., File: 70/1995/576/662, November 15, 1996. In that case, the European Court of Human Rights held that the deportation to India of a Sikh separatist for national security reasons violated Article 3. The majority, 12 of 19 judges, noted that Article 3 "makes no provision for exceptions and no derogation from it is permissible". It found this prohibition to be equally absolute in expulsion cases, concluding that

[w]henever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.

It continued, "[i]n these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration." Based on the evidence before it, the majority found there were "substantial grounds" for believing the applicant would be at risk of torture contrary to Article 3.

[47] In my view, the case before me is distinguishable from *Chahal, supra* because the applicant has not met the high burden of proof required to establish a violation of Article 3, that is, he has not established that there are "substantial grounds" for believing he would be tortured. The standard of proof required under the *Convention Against Torture* was discussed in the *General Comment by the Committee against Torture on the Implementation of Article 3 in the context of Article 22 of the Convention against Torture*, November 21, 1997. The Committee stated that the burden is on the applicant and that there has to be a factual basis. It elaborated,

[b]earing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

In addition, the applicant would have to "establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present." The Committee noted, however, that "... the risk does not have to meet the test of being highly probable."

[48] The Committee provided a non-exhaustive checklist of pertinent information, including whether the State concerned is "one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights"and whether there has been any change in this situation; whether the applicant has been "tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past"; whether the applicant has "engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being

placed in danger of torture" in that State; and whether there is any evidence regarding the applicant"s credibility, such as inconsistencies in his/her claim.

[49] In *Farhadi v. Canada* (M.C.I.) 1998 CanLII 9056 (F.C.), (1998), 144 F.T.R. 76, Gibson J. commented on the standard of proof required to establish a violation of Article 3, noting that there is a "high evidentiary threshold". He further cited *MacKay et al. v. Manitoba* , 1989 CanLII 26 (S.C.C.), [1989] 2 S.C.R. 357 in which the Supreme Court held that there had to be a sufficient factual foundation to support a Charter claim. In *MacKay, supra,* the Court noted that "[t]he presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues..."

[50] In the case before me, the applicant did not submit to the Minister any personal statement outlining why he believes he is at risk. Counsel for the applicant filed submissions on the subject to the Minister and enclosed a number of documents. Given the high evidentiary burden attaching to Article 3, and the need for a clear factual foundation in the context of Charter claims, I do not believe the applicant has established such a violation. As I have noted above (see para.34), there is evidence pointing to the improvement of human rights conditions in Sri Lanka since the applicant left in 1990. The applicant submits that the publicity generated in the proceedings against him by the Canadian government make him particularly vulnerable to ill-treatment in Sri Lanka. However, it is equally possible that the resulting international scrutiny will protect the applicant. I note that the minority in *Chahal* made a similar finding with regard to the publicity surrounding Mr. Chahal"s case, stating at p. 46, "[i]t is, however, arguable with equal, if not greater, force that his high profile would afford him additional protection."

[51] Accordingly, in my opinion, the applicant has failed to meet the high evidentiary threshold required to establish a violation of Article 3 of the *Convention Against Torture*. Since there has been no such violation, the balancing undertaken by the Minister pursuant to s. 53(1)(b) was in keeping with the principles of fundamental justice and there has been no violation of s. 7 of the Charter.

[52] I also adopt the minority"s distinction in *Chahal, supra,* at p. 45, between cases in which a Contracting State directly violates Article 3, and cases such as this one, in which

... only the extra-territorial (or indirect) application of the Article is at stake. There, a Contracting State which is contemplating the removal of someone from its jurisdiction ... may legitimately strike a fair balance between, on the one hand, the nature of the threat ... if the person were to remain and, on the other, the extent of the potential risk of ill-treatment...

[53] Furthermore, in my view, Canada should follow its obligations under the *Convention Relating to the Status of Refugees*, which has been implemented into the Act, in preference to its obligations under the *Convention Against Torture*, which is not binding under Canadian law. However, I note that the question of which of the international conventions, that appear to be contradictory with respect to the question of whether balancing is permissible, is to be preferred, was not argued.

[54] The applicant cites *Kindler, supra,* in which La Forest J. determined that the decision to extradite an individual facing the death penalty in the United States did not violate the substantive principles of fundamental justice. The applicant relies specifically on La Forest J."s statement at p. 832, that

[t]here are, of course, situations where the punishment imposed following surrender " torture, for example " would be so outrageous to the values of the Canadian community that the surrender would be unacceptable. But I do not think the surrender of fugitives who may ultimately face the death penalty abroad would in all cases shock the conscience of Canadians.

In my view, the case before me is distinguishable from that contemplated by La Forest J. In *Kindler, supra,* there was no concern with regard to the security of Canada, and therefore no need to balance this danger against the rights of the individual. In any event, as I have noted, the burden is on the applicant to provide a factual basis upon which one could find there are substantial grounds for believing he would be in danger of being tortured if he is returned. As he has not, in my opinion, met the burden of proof under the *Convention Against Torture,* this is not a case which would shock the conscience of Canadians.

[55] In view of my findings, I will not review the submissions as they pertain to s. 1 of the Charter.

Freedom of Expression and Association: Section 2 of the Charter

[56] The applicant also submitted that in his capacity as coordinator for the *WTM*, he was engaged in freedoms protected under s. 2 of the Charter, namely, freedom of expression under s. 2(b) and freedom of association under s. 2(d). Thus, in his submission, ss. 19(1)(e) and (f), and 53(1)(b) of the *Act* violate his rights under section 2 of the Charter.

[57] In *Irwin Toy v. Quebec (A.G.)*, 1989 CanLII 87 (S.C.C.), [1989] 1 S.C.R. 927, the Supreme Court of Canada set out a two-stage process for determining whether there has been a violation of s. 2(b). Firstly, it must be determined if the activity in question is expression, and secondly, it must be determined if the purpose or effect of the impugned governmental action or legislation is to restrict freedom of expression. If the purpose of the impugned action or legislation is to restrict freedom of expression, paragraph 2(b) is engaged and the onus then shifts to the respondent government to justify the restriction under section 1 of the Charter. Where it is not the purpose but rather the effect of the government action or legislation to restrict expression, the individual must demonstrate that the expression in question is related to the values underlying s. 2(b). The Supreme Court summarized these values as follows in *Irwin Toy, supra* at p. 976:

(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

[58] The applicant submits that his activities as coordinator of the *WTM* fall within the "classic concept of expression" and as such merit protection under s. 2(b). He relies on the Supreme Court"s broad definition of expression under s. 2(b), as first elucidated in *Irwin Toy, supra* and reiterated in *R. v. Keegstra*, 1990 CanLII 24 (S.C.C.), [1990] 3 S.C.R. 697 at page 729: "Activity is expressive if it attempts to convey meaning. That meaning is the content." The Supreme Court went on to state in *Keegstra, supra* ,

[a]part from the rare cases where expression is communicated in a physically violent form, the Court does view the fundamental nature of freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.

[59] The applicant acknowledges that the purpose of ss. 19(1) (e) and (f) and 53(1)(b) is to ensure that Canada"s security is protected. However, he submits that the effect of the legislation is to infringe the exercise of expressive and associational freedoms. He further submits that his activities as coordinator of the *WTM* " which he characterizes as the promotion of self-determination " are political and human-rights promoting, and as such are at the core of the values underlying s. 2(b). In this regard, he points out that the Minister has conceded that he "is not known to have personally committed any acts of violence either in Canada or Sri Lanka..." Further, with regard to the nature of his activities, he underlines that he has not engaged in any criminal activity, and submits that the Minister has failed to establish a nexus between his activities promoting Tamil self-determination and the commission of specific violent acts in Sri Lanka.

[60] Based on the foregoing, the applicant submits that his ss. 2(b) and (d) rights have been violated and that the Minister bears the onus of justifying this infringement under s. 1 of the Charter.

[61] The respondent cites the recent decision of *Iqbal Singh v. Canada (M.C.I.)* F.C.T.D., May 6, 1998, IMM-1647-98, in which Rothstein J. held that ss. 19(1)(e) and (f) of the Act do not violate ss. 2(b) and (d) of the Charter. The facts in that case were similar to those of the case before me. The Minister had certified that she was of the opinion Mr. Singh is a person described in ss. 19(1)(e)(ii), 19(1)(e)(iv)(B) and (c), and 19(1)(f)(iii) (B) of the Act. He applied to the Court for interim relief pending the determination by this Court as to the reasonableness of the Minister"s certificate pursuant to s. 40.1(4)(d) of the Act. He did so on the basis that there was a serious issue to be tried as to whether ss. 19(1)(e) and (f), or the Minister"s interpretation of these provisions, violated his ss. 2(b) and (d) rights under the Charter. His alleged activities were in relation to the Babbar Khalsa International ("B.K.I."), "an organization that the Ministers are of the opinion, based on security intelligence reports, there are reasonable grounds to believe will engage, has engaged, or is engaging in terrorism, or the subversion by force of the Government of India."

[62] In *Iqbal Singh, supra,* the applicant submitted that

because the basis for the certificate [was] only his involvement in fundraising, recruiting, and organizing for the B.K.I., there [was] no nexus between his expression and any specific actions of the B.K.I. that could be considered to be terrorism.

Rothstein J. noted that the premise of this argument was that "even if the B.K.I. engaged in terrorism, the applicant"s activities are benign and are entitled to *Charter* protection." As the applicant before me takes a similar position, Rothstein J."s analysis of the engagement of s. 2(b) in this context is applicable:

I have great difficulty with the applicant"s suggestion that his activities, although themselves non-violent, are "expression" within the meaning of paragraph 2(b) of the Charter when he carries them out on behalf of an organization that there are reasonable grounds to believe is engaged in terrorism or subversion of a state by force. For [the] purpose of this argument, the applicant seems to want his activities in Canada to be considered in isolation without regard to the nature of the organization of which he is alleged to be a member.

Rothstein J. continued,

For the Court to turn a blind eye to the nature of the organization and treat the applicant as if he is fundraising, recruiting and organizing for a socially benign organization, would be artificial. Fundraising, recruiting and organizing may be constitutionally protected forms of expression when undertaken in support of many or most non-violent organizations. However, the same cannot be said when such activities are undertaken in support and furtherance of terrorism, which I find is not a constitutionally protected form of expression.

He went on to conclude that "[t]errorists cannot invoke freedom of expression as justification for the violent activities in which they are involved; nor may individuals who aid and abet organizations engaged in terrorism in the way the applicant is alleged to assist the B.K.I.".

[63] In my view, this analysis applies to the case at bar. I note that in the case before me, the security certificate has been found to be reasonable by Teitelbaum J. pursuant to s. 40.1, and thus, is conclusive proof, as provided in s. 40.1(7)(a), that Mr. Suresh"s activities fall under ss. 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(iii)(B). Specifically, Teitelbaum J. found that the *WTM* "can be reasonably concluded is part of the LTTE organization, or is a the very least an organization that strongly supports the activities of the LTTE". Further, he was "satisfied that there are reasonable grounds to believe the LTTE to have committed "terrorist acts", no matter how one would define "terrorism" or a "terrorist act"." Given the conclusive nature of the s. 40.1(1) certificate, it is not open to me to find that there is insufficient nexus between Mr. Suresh"s activities on behalf of the *WTM* and the LTTE"s acts of violence against civilians in Sri Lanka. Accordingly, I agree with Rothstein J. that it would be artificial to view the applicant"s activities as benign and therefore protected expression merely because such activities are not *prima facie* violent in and of themselves. Thus, the applicant has not engaged in any activity which qualifies as expression under s. 2(b).

[64] If I am wrong and the applicant"s activities as coordinator of the *WTM* do constitute expression protected under s. 2(b), it remains for me to consider whether ss. 19(1) (e) and (f) and

53(1)(b) have the purpose, or merely the effect of infringing his freedom. As I noted above, the applicant acknowledges that the challenged provisions" purpose is to protect Canada"s security and takes the position that they have the effect of infringing his freedom of expression. He further submits that the expression in question relates to the values underlying s. 2(b) of the Charter, arguing that the Minister has failed to establish a nexus between this activity and the LTTE"s specific violent acts. He characterizes his fundraising for the *WTM* as legitimate non-violent expression, forwarding the values of truth, equality, democracy, and self-fulfilment as embodied in the right of his people to self-determination. Therefore, in his submission, the onus is on Minister to justify the s. 2(b) infringement pursuant to s. 1.

[65] In my view, given Teitelbaum J."s upholding of the certificate pursuant to s. 40.1(7), the Minister has established sufficient nexus between the terrorist acts of the LTTE and the applicant"s activities as coordinator of the *WTM* . Given that the expression in question, particularly the fundraising, was in the service of violent activity, I find that it was not related to the values underlying s. 2(b). Thus, the applicant has not established a violation of his s. 2(b) rights.

[66] The applicant submits that a Canadian citizen could have done what the applicant here did without any punishment. Without necessarily agreeing with that statement, the Supreme Court has clearly permitted conditions to be placed on non-citizens. In *Chiarelli*, *supra*, Sopinka J. stated at p. 733,

[t]he distinction between citizens and non-citizens is recognized in the *Charter*...only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1). Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act* ...The qualified nature of the rights of non-citizens to enter and remain in Canada is made clear by s. 4 of the Act [which]...provides that permanent residents have a right to remain in Canada except where they fall within one of the classes in s. 27(1).

I note that paragraph 19(1) (f) is an inadmissible class listed in s. 27(1). Sopinka J. went on to discuss specifically s. 27(1)(d), but his comments are, in my view, applicable generally to the conditions imposed pursuant to s. 27(1), and therefore are relevant in the context of the differential treatment of non-citizens under paragraph s. 19(1)(f):

This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country... there is one element common to all persons who fall within the class of permanent residents described in s. 27(1) (d) (ii). They have all deliberately violated an essential condition which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada... There is nothing inherently unjust about [issuing a deportation order where there is] ... a deliberate violation

[67] The applicant also submitted that his rights under s. 2(d) of the Charter, guaranteeing freedom of association, had been violated. I am in agreement with Rothstein J. in *Iqbal Singh*, *supra*, where at page 17, paragraphs 25 and 26, he stated:

Similarly, I doubt that the applicant has raised a serious issue with respect to freedom of association, under paragraph 2(d) of the Charter. *Irwin Toy (supra)* states that violent forms of expression such as murder do not fall within the sphere of constitutionally protected expression under paragraph 2(b). I cannot see how there would be any greater protection afforded under paragraph 2(d) to an association that exists to commit acts of violence.

While I accept the proposition that with paragraph 2(d), the Court should not generally look to the nature of the organization to determine whether the association is constitutionally protected, ... I think the same exception that exists under paragraph 2(b), *i.e.* that violence does not warrant constitutional protection as a form of expression, must also apply to persons associating in the commission of violent activities such as murder or terrorism. Indeed, in my view, the contrary position would be tantamount to saying that, although murder is not constitutionally protected expression, a conspiracy to commit murder would be constitutionally protected association. Such a proposition is untenable.

[68] It is true that there are no allegations of criminal misconduct or criminal activity against the applicant, or that he engaged in terrorism in Sri Lanka; nor are there allegations of any known procurement by him of ammunition, arms, weapons or materials, nor any allegations he was involved in shipping materials from Canada. However, he was engaged in fundraising in Canada in support of a terrorist organization. I note that the applicant relied on MacKay J."s decision in *Yamani v. Canada (Solicitor General)* , 1995 CanLII 3553 (F.C.), [1996] 1 F.C. 174 (T.D.), but I agree with MacKay J."s own distinguishing of the *Yamani* case in *McAllister, supra*, where he was dealing with one of the provisions in the case at bar, sub-paragraph 19(1)(f)(iii)(B). He stated at p. 210, "[i]n this case the organization is defined in the Act with more particularity than was the case with the words I found unsatisfactory in *Yamani.*" I note that in the case before me, as in *McAllister, supra,* it is not the constitutionality of s. 19(1)(g) being challenged. Rather, the applicant challenges the constitutionality of ss.19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(f)(iii)(B), the latter of which was found constitutional in *McAllister, supra.* In *McAllister,* MacKay J. went on to state at p. 210,

[i]n the circumstances here the applicant has acknowledged his membership in an organization, proscribed in Northern Ireland, which it is understood he acknowledges, and which news articles provided at his inquiry indicate, was engaged in terrorism.

[69] While the applicant before me is not known to be a member of the LTTE, he acknowledges his association with that organization, which has been found conclusively to be a terrorist organization. This is corroborated by news articles which were before the Minister. In my view, the provisions under challenge, understood in the context of the documentation before the Minister, are defined with sufficient particularity to avoid an infringement of legitimate associative rights pursuant to s. 2(d) of the Charter.

Section 12 of the Charter

[70] The applicant requested the Minister to consider the *Convention Relating to the Status of Refugees* and made submissions with respect to its impact on domestic law and the Minister"s conduct vis-à-vis the Charter, but withdrew her challenge on the basis of section 12 of the Charter. However, the section 12 cases demonstrate further why the Minister"s conduct is not contrary to the Charter and that there is another approach to society"s standards of decency than that suggested by the applicant. The Supreme Court of Canada made it very clear in *Kindler, supra* and in *Reference Re. Ng Extradition (Canada)*, 1991 CanLII 79 (S.C.C.), [1991] 2 S.C.R. 858, that s. 12 of the Charter is not used in these types of cases and that s. 7 governs. In order to come within the protection of s. 12, the applicant must demonstrate two things: (1) that he was subjected to treatment or punishment at the hands of the State; and (2) that such treatment is cruel or unusual. The *Chiarelli, supra* case has decided that deportation is not punishment, and the Supreme Court found it unnecessary to address treatment, since it concluded that deportation authorized by the Act is not cruel and unusual. A second part of the test is to determine whether what is happening is so excessive as to outrage standards of decency. Sopinka J."s comments in *Chiarelli, supra* , in my view, are applicable to the present case, if one substitutes refugee for permanent resident and a danger to the security of Canada for committing a criminal offence punishable by an imprisonment of five years or more. He stated at p. 736,

The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency. On the contrary, it would tend to outrage such standards if individuals were permitted, without consequence, to violate those conditions deliberately.

[71] I would also agree with Tremblay-Lamer J. in *Gwala v. Canada (M.C.I.)*1998 CanLII 9069 (F.C.), (1998), 147 F.T.R. 246, at paragraph 33:

... To allow refugee claimants who misrepresent themselves or who attempt to fraudulently obtain the protection of the Canadian state, would, in my opinion, outrage much more society"s standards of decency.

In the present case, if the applicant was allowed to remain here and violate the conditions under s. 19 of the Act, that would violate and outrage standards of decency.

Vagueness

[72] The applicant submitted that the expression "danger to the security of Canada" is too vague. In *R v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606 at 639, Gonthier J. stated that "a law will be unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate". In my view, paragraph 53(1)(b) is sufficiently clear. It is comparable to the phrase "danger to the public" in s. 70(5), which was found to be sufficiently clear in *Williams, supra* by the Federal Court of Appeal. Strayer J.A., speaking for the Court, articulated the question in the context of judicial review of the Minister"s decision as "does this phraseology give sufficient direction to the Minister so that both she and the Court can determine whether she is exercising the power for the purposes intended by Parliament?" In my view, the statutory context in which the phrase "danger to the security of

Canada" is presented provides sufficient guidance to the Minister in this regard. Specifically, s. 53(1) (b) refers to the terrorist-related inadmissibility provisions of 19(1)(e) and (f) and thereby focuses and contextualizes the analysis of both the Minister and the Court.

[73] In *Williams, supra,* Strayer J.A. noted that the Minister"s decision pursuant to s. 70(5) "can involve political considerations not inappropriate for a minister." In my view, this is even more so in the present case, where a decision is made in the context of high level national and international security concerns. Strayer J.A. cited, at 669, the following statement by Gonthier J. in *Nova Scotia Pharmaceutical Society, supra* , at p. 642, which is also relevant to the case at bar:

One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights...

[74] I note further that the Supreme Court of Canada stated in *Pushpanathan, supra,* at paragraph 75 that "Article 33 and its counterparts in the Act [s. 53, which refers to ss. 19 and 27] are designed to deal with the expulsion of individuals who present a threat to Canadian society, and the grounds for such a determination are wider and more clearly articulated [than those contained in Article 1F(c) of the *Convention Relating to the Status of Refugees*]." Therefore, to paraphrase *Williams, supra,* at p. 668,

the subsection adequately focusses the Minister"s mind on ...whether, given what she knows about the individual and what the individual has had to say in his own behalf, she can form an opinion in good faith that he is a possible re-offender whose presence in Canada creates an unacceptable risk to the country"s [security].

[75] I am also satisfied that the fact that terrorism is not defined in s. 19 does not make it unconstitutionally vague. I note that in *McAllister, supra,* MacKay J. considered this issue and stated at p. 211,

[i]n an era when much attention on the international level, and within many countries, has been and continues to be given to containing, restricting and punishing acts of terrorism, I am not persuaded that the word can be considered so vague as to be devoid of sufficient certainty of meaning, or that application of the provision would present uncertainty.

I agree with this comment and further note that in *Pushpanathan, supra,* the Supreme Court of Canada discussed the ambit of the phrase "acts contrary to the purposes and principles of the United Nations" and included terrorism within its scope.[8]

[76] Given this backdrop of Canadian jurisprudence, international instruments to prevent terrorism, and reports such as the recent *Report of the Special Senate Committee on Security and Intelligence*[9], I find that the term "terrorism" is sufficiently clear as to provide notice of the factors to be considered. While, as the Senate Committee Report details, terrorism is an evolving concept, reflective of changes in the world economy and technological advances, it is understood most essentially to encompass acts of violence. As the circumstances of this case, evidenced in

the documentary materials before the Minister, implicate the LTTE in this most basic understanding of terrorism, I find that ss. 19 and 53 are not unconstitutionally vague.

[77] The applicant made no specific submissions with respect to the constitutionality of sections 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(f)(iii), except in relation to subsections 2(b) and (d) of the Charter. Sections 53(1)(b), 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(f)(iii) of the *Immigration Act* are not unconstitutional. There is no breach of fairness nor is there breach of the substantive and procedural aspects of fundamental justice. The application for judicial review is dismissed.

[78] Within 15 days of the issue of these Reasons, either or both counsel may submit a draft of any questions to be certified. The Court will then reserve the right to endorse any such questions and incorporate it or them into a formal Order.

William P. McKeown

JUDGE

OTTAWA, Ontario

June 11, 1999.

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[1]United Nations High Commission for Refugees, Background paper on Refugees and Asylum Seekers from Sri Lanka, UNHCR Centre for Documentation and Research, Generva, March 1997, at p. 7, citing INFORM, January 1996, 3 [hereinafter *UNHCR Background Paper*].

[2]*Ibid* at 8.

[3]U.S. Department of State: Sri Lanka Country Report on Human Rights Practices for 1996, Released by the Bureau of Democracy, Human Rights, and Labour, January 30, 1997. p. 1.

[4]*Ibid.*, at 5.

[5] *UNHCR Background Paper*, at 13.

[6]*Ibid.*, at 18, citing The University Teachers for Human Rigths-Jaffna, August 1996, 28.

[7]"Human Rights Violations in the Batticaloa District in East Sri Lanka, Joseph Pararajasingham, July 31, 1997.

[8]At paras. 61 and 66.

[9]January 1999.