Fuentes v. Canada (Minister of Citizenship and Immigration) (T.D.), 2003 FCT 379 (CanLII)

Date: 2003-03-31
Docket: IMM-1338-00
Parallel citations: [2003] 4 F.C. 249 • (2003), 231 F.T.R. 172
URL: http://www.canlii.org/en/ca/fct/doc/2003/2003fct379/2003fct379.html

IMM-1338-00

2003 FCT 379

Rogelio Cuevas Fuentes (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Fuentes v. Canada (Minister of Citizenship and Immigration) (T.D.)

Trial Division, Lemieux J.--Toronto, June 18, 2002; Ottawa, March 31, 2003.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Adjudicator finding applicant inadmissible under Immigration Act, s. 19(1)(f)(iii)(B) as member of organization engaged in terrorist activity -- Definition of"terrorism" by S.C.C. in Suresh v. Canada (Minister of Citizenship and Immigration) -- Evidentiary requirements -- Findings of fact by Adjudicator having no evidentiary basis, misapprehending evidence -- Both errors falling within ambit of Federal Court Act, s. 18.1(4)(d).

Administrative Law -- Judicial Review -- Certiorari -- Adjudicator finding applicant member of organization engaged in terrorism under Immigration Act, s. 19(1)(f)(iii)(B) -- No authoritative definition of"terrorism" in Act but S.C.C. providing such definition in Suresh case -- Inadequacy of evidence organization engaged in terrorism -- No credible evidence on record to believe act of terrorism committed on account of kidnappings -- Adjudicator failing to state why documentary evidence preferred over applicant's testimony.

This was an application of judicial review of an Adjudicator's decision finding the applicant to be an inadmissible person for permanent residence in Canada under clause 19(1)(*f*)(iii)(B) of the *Immigration Act*. The applicant is a citizen of Mexico who arrived in Canada in March of 1999 and made a refugee claim alleging torture by the Mexican Army. He admitted his participation, for about a year, as a combatant and second sergeant, in Ejercito Popular Revolucionario (EPR) commonly known as the Peoples' Revolutionary Army. Evidence of what EPR did during its operations came from two sources: the applicant and publicly available documentary evidence. The *Immigration Act* contains no definition of"terrorism", but the Supreme Court of Canada innovated in providing such definition when it rendered its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, on January 11, 2002. Shortly before that decision, Parliament enacted the *Anti-terrorism Act* in response to the tragic events of September 11, 2001. The definition of "terrorist activity" appears in section 83.01 of the *Criminal Code* which was enacted by section 4 of the *Anti-terrorism Act*. The only issue before the Adjudicator was whether EPR was an organization that "there are reasonable grounds to believe is or was engaged in terrorism". The Adjudicator

noted that part of the documentary evidence was deficient in many respects but nevertheless, concluded, from the totality of the evidence, that the EPR was an illegal armed guerrilla-type insurgent group attempting to achieve certain political and social aims which carried out surprise, hit-and-run armed attacks against various targets and that those attacks could be considered terrorist activity. She also concluded, on the basis of that same "deficient" evidence, and the applicant's testimony that there were kidnappings to raise funds for the organization.

Held, the application should be allowed.

In *Suresh*, the Supreme Court of Canada acknowledged that there was no authoritative definition of "terrorism", the *Immigration Act* did not define it and no single definition was accepted internationally. It noted that the absence of an authoritative definition meant "that at least at the margins" the term is open "to politicized manipulation, conjecture and polemical interpretation". Counsel for the Minister argued that the term "terrorism" must receive an unrestrictive interpretation. This submission could not be accepted because it ignored the fact that the Supreme Court of Canada did provide a definition of "terrorism" which, in its view, "catches the essence of what the world understands as terrorism", observing, however, that "particular cases on the fringes of terrorist activity will inevitably provoke disagreement". The definition of terrorism adopted by the Supreme Court of Canada focuses on the protection of civilians--a central element in international humanitarian law whose foundation rests in the four Geneva Conventions adopted on June 12, 1949, and its two additional Protocols, all of which have been incorporated into Canadian law. By choosing the definition of terrorism it did, the Supreme Court harmonized and gave space to each of the key concepts found in section 19 of the Act: subversion, terrorism, crimes against humanity, war crimes and ordinary crimes. Each of those concepts are distinct and have separate roles to play in law.

There are two major reasons why the Adjudicator's decision could not stand and must be aside: (1) the departure by the Adjudicator of the delineation by the Supreme Court of what terrorism constitutes, and (2) the inadequacy of the evidentiary foundation to support finding the EPR was engaged in acts of terrorism, given that the standard of proof is one, while falling short of the balance of probabilities, nonetheless connotes a *bona fide* belief in a serious possibility based on credible evidence. Despite the fact that the evidence relating to the EPR's actions was limited and so lacking in information and detail and the documentation was deficient and limited, the Adjudicator concluded that the EPR was engaged in terrorist activities rather than finding that the Minister had not discharged his burden of proof. The Federal Court of Appeal stressed the importance of providing findings of fact as to specific crimes against humanity which the refugee claimant is alleged to have committed. This need for specificity in the identification of acts of terrorism is illustrated in several judgments of this Court. Some findings of fact made by the Adjudicator must be set aside as either having no evidentiary basis or representing a misapprehension of the evidence, both errors falling within the ambit of paragraph 18.1(4)(*d*) of the *Federal Court Act*. The evidence relating to hostage taking was barren of details and circumstances such that there was no credible evidence on the record which could nourish, in the Adjudicator's mind, a serious reason to believe that an act of terrorism had been committed on account of the kidnappings. It is not known whether such hostage taking was fact or fiction, who was kidnapped (military or civilian), how many kidnappings occurred and whether these kidnappings were disapproved by the EPR. For this reason, the Adjudicator's finding could not stand. It is trite law that an adjudicator can prefer documentary evidence over the testimony of a claimant, but he or she is bound to state in clear and unmistakable terms why the documentary evidence should be preferred over the applicant's testimony. In this case, the Adjudicator failed to do so.

statutes and regulations judicially

considered

Anti-terrorism Act, S.C. 2001, c. 41, s. 4.

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, s. 4.

Criminal Code, R.S.C., 1985, c. C-46 , s. 83.01 (as enacted by S.C. 2001, c. 41, s. 4).

Federal Court Act, R.S.C., 1985, c. F-7 , s. 18.1 (as enacted by S.C. 1990, c. 8, s. 5).

Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, being Sch. III of the *Geneva Conventions Act*, R.S.C., 1985, c. G-3, Article 4.

Geneva Conventions Act, R.S.C., 1985, c. G-3, Sch. I, II, III, IV, V (as am. by S.C. 1990, c. 14, s. 6), VI (as am. *idem*).

Immigration Act, R.S.C., 1985, c. I-2 , ss. 9(1) (as am. by S.C. 1992, c. 49, s. 4), 19(1)(*c*.2) (as am. by S.C. 1996, c. 19, s. 83), (*e*) (as am. by S.C. 1992, c. 49, s. 11), (i) (as am. *idem*), (ii) (as am. *idem*), (iii) (as am. *idem*), (iv) (as am. *idem*), (A) (as am. *idem*), (B) (as am. *idem*), (C) (as am. *idem*), (*f*)(iii)(A) (as am. *idem*, s. 11), (B) (as am. *idem*), (*g*), (*j*) (as am. by S.C. 2000, c. 24, s. 55), 20 (as am. *idem*, s. 12), 32.1(3) (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 12; S.C. 1992, c. 49, s. 23), 46.01(1)(*e*) (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 36; 1995, c. 15, s. 9), 53(1)(*b*) (as am. by S.C. 1992, c. 49, s. 43).

International Convention Against the Taking of Hostages, adopted by the General Assembly on December 17, 1979, Art. 1.

International Convention for the Suppression of Terrorist Bombings, GA Res. 52/164, December 15, 1997, Arts. 1, 2.

International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, 9 December 1999, Art. 2.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), being Sch. V of the *Geneva Conventions Act*, R.S.C., 1985, c. G-3 (as am. by S.C. 1990, c. 14, s. 6), Article 50.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), being Sch. VI of the *Geneva Conventions Act*, R.S.C., 1985, c. G-3 (as am. by S.C. 1990, c. 14, s. 6), Articles 4, 13.

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998).

cases judicially considered

followed:

Suresh v. Canada (Minister of Citizenship and Immigration), 2000 CanLII 17101 (F.C.A.), [2000] 2 F.C. 592; (2000), 183 D.L.R. (4th) 629; 18 Admin. L.R. (3d) 159; 5 Imm. L.R. (3d) 1; 252 N.R. 1 (C.A.); revd 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 159; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1.

applied:

Chiau v. Canada (Minister of Citizenship and Immigration), 2000 CanLII 16793 (F.C.A.), [2001] 2 F.C. 297; (2000), 195 D.L.R. (4th) 422; 265 N.R. 121 (C.A.); *Sivakumar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 3012 (F.C.A.), [1994] 1 F.C. 433; (1993), 163 N.R. 197 (C.A.); *Moreno v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2993 (F.C.A.), [1994] 1 F.C. 298; (1993), 107 D.L.R. (4th) 424; 21 Imm. L.R. (2d) 221; 159 N.R. 210 (C.A.).

referred to:

Suresh, Re (1997), 140 F.T.R. 88; 40 Imm. L.R. (2d) 247 (F.C.T.D.); *Suresh v. Canada (Minister of Citizenship and Immigration)* (1999), 50 Imm. L.R. (2d) 183 (F.C.T.D.); *Baroud (Re)* (1995), 98 F.T.R. 99 (F.C.T.D.); *McAllister v. Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 4030 (F.C.), [1996] 2 F.C. 190; (1996), 108 F.T.R. 1 (T.D.); *Ikhlef (Re)* (2002), 223 F.T.R. 233 (F.C.T.D.); *Okyere-Akosah v. Canada (Minister of Employment and Immigration)* (1992), 157 N.R. 387 (F.C.A.).

authors cited

Chambers 20th Century Dictionary, edited by E. M. Kirkpatrick. Cambridge: Cambridge University Press, 1983.

Concise Oxford Dictionary of Current English, 8th ed. Oxford: Clarendon Press, 1990.

APPLICATION for judicial review of a decision by the Adjudicator finding the applicant to be inadmissible for

permanent residence in Canada under clause 19(1)(*f*)(iii)(B) of the *Immigration Act* because there were reasonable grounds to believe that he was a member of an organization engaged in terrorism. Application allowed.

appearances:

Jack Martin for applicant.

Amina Riaz and *David W. Tyndale* for respondent.

solicitors of record:

Jack Martin, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

Lemieux J.:

A. INTRODUCTION AND BACKGROUND

[1]Rogelio Cuevas Fuentes (the applicant), is a citizen of Mexico, who arrived in Canada in March of 1999, and immediately made a refugee claim alleging torture by the Mexican Army. He seeks to set aside the decision of Adjudicator Angela Martens, (the Adjudicator) dated February 29, 2000, who found him covered by clause 19(1)(*f*)(iii)(B) [as am. by S.C. 1992, c. 49, s. 11] of the *Immigration Act* [R.S.C., 1985, c. I-2] (the Act) which reads:

19. (1) No person shall be granted admission who is a member of any of the following classes:

. . .

(f) persons who there are reasonable grounds to believe

. . .

(iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in

(A) acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, or

(B) terrorism,

except persons who have satisfied the Minister that their admission would not be detrimental to the national interest; [Emphasis mine.]

[2]When she made her decision, the Adjudicator had the benefit of the Federal Court of Appeal's decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17101 (F.C.A.), [2000] 2 F.C. 592, at that time under leave to appeal to the Supreme Court of Canada [2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3]. The Act contains no definition of "terrorism" nor did the Federal Court of Appeal provide one taking the approach of identifying acts of terrorism. The Supreme Court of Canada innovated in providing such definition.

[3]As a result of the Adjudicator's decision, the applicant was inadmissible as an immigrant to Canada for permanent residence unless he satisfied the Minister that his admission would not be detrimental to the national interest. The second effect of that determination is to block under paragraph 46.01(1)(*e*) [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 36; 1995, c. 15, s. 9] of the Act his refugee claim if the Minister determines it would be contrary to the public interest to have his claim determined under the Act. There is no evidence before me that proceedings seeking either ministerial decisions have taken place.

[4]The Adjudicator's decision was made in the context of a section 20 [as am. by S.C. 1992, c. 49, s. 12] *Immigration Act* report, originally referring to a membership in an organization engaged in activities under clause 19(1)(*f*)(iii)(A) [as am. *idem*, s. 11], which was not pursued and instead, without amending the report, he was put on notice under clause 19(1)(*f*)(iii)(B).

[5]After finding, based on his admission he came to Canada to reside, since he did not have an immigration visa as requested by subsection 9(1) [as am. *idem*, s. 4] of the Act, Adjudicator Martens made a conditional departure order pursuant to subsection 32.1(3) [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 12; S.C. 1992, c. 49, s. 23] of the Act. She then went on to explore the issues surrounding his clause 19(1)(*f*)(iii)(B) inadmissibility and, after so finding, issued a second conditional deportation order against him.

[6]The Supreme Court of Canada rendered its decision in *Suresh v. Canada (Minister of Citizenship and Immigration), supra*, on January 11, 2002, and set out the following non exhaustive definition of terrorism taken from the United Nations *International Convention for the Suppression of the Financing of Terrorism* [GA Res. 54/109, 9 December 1999] (the Convention) [at paragraph 98]:

. . . that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". [Emphasis mine.]

[7]Also, three weeks before the Supreme Court of Canada's decision in *Suresh, supra*, Parliament enacted the *Anti-terrorism Act*, S.C. 2001, c. 41 having had the previous year enacted the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

[8]The *Anti-terrorism Act*, enacted in response to the tragic events of September 11, 2001, contains a definition of "terrorist activity" in section 4 which enacts section 83.01 of the *Criminal Code*, R.S.C., 1985 c. C-46, which reads as follows:

83.01 (1) The following definitions apply in this Part.

. . .

"terrorist ac tivity" means

(*a*) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

(i) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,

(ii) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the *Convention on the Physical Protection of Nuclear Material*, done at Vienna and New York on March 3, 1980,

(vi) the offences referred to in subsection 7(2) that implement the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the safety of Maritime Navigation*, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(*b*) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(iii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. [Emphasis mine.]

[9]"Terrorist group" is defined in that subsection as follows:

83.01 (1) . . .

"terrorist group" means

(*a*) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(*b*) a listed entity,

and includes an association of such entities.

[10]The *Anti-terrorism Act* makes participation in a terrorist group or terrorist activities an indictable offence.

[11]The *Crimes Against Humanity and War Crimes Act* implements Canada's obligations under the *Rome Statute of the International Criminal Court* [U.N. Doc. A/Conf. 183/9 (1998)]. It contains the following definition of "crime against humanity" and "war crime [section 4]":

4. . . .

(3) The definitions in this subsection apply in this section.

"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

. . .

"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law o r conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

[12]It is to be noted that a crime against humanity is not tied to the existence of an armed conflict while a war crime is.

[13]The applicant admitted he had been, for about a year, a combatant and then a second sergeant in Ejercito Popular Revolucionario (EPR) commonly known as the Peoples' Revolutionary Army. EPR has also been described as the military wing of a political party known as Partido Democratico del Pueblo Revolucionario (PDPR).

[14]Having admitted past membership, the only issue before the Adjudicator was whether EPR was an organization that "there are reasonable grounds to believe is or was engaged in terrorism".

[15]Evidence of what EPR did when it carried on its operations came from two sources: (1) Mr. Fuentes, who was the only witness to testify (his testimony was very brief being examined only by the CPO [case presenting officer]. It covers only 10 pages of transcript, pages 463 to 473, (of the certified tribunal record) before the Adjudicator and the notes of the applicant's joint interview with officers from CSIS and Citizenship and Immigration Canada (CIC); (2) documentary evidence presented by the CPO and by the applicant's counsel consisting of:

(i) a human rights information package prepared from among publicly available sources by the Research Directorate of the Immigration and Refugee Board (Exhibit 2); and

(ii) various reports by human rights organizations on Mexico.

B. THE ADJUDICATOR'S DECISION

[16]The Adjudicator did not make any adverse findings of credibility against the applicant.

[17]The Adjudicator embarked on her consideration whether there are reasonable grounds to believe the EPR is or was engaged in terrorism by stating:

I believe that I have to consider and decide in this regard whether there is credible and trustworthy evidence before this inquiry which establishes that there are reasonable grounds to believe that the EPR has committed acts or engaged in activities which are terrorist in nature, or which constitute terrorism. [Emphasis mine.]

[18]She observed there was no definition of terrorism in the Act, that it was generally acknowledged there was no

standard or universally accepted definition of what constitutes terrorism and she knew of no decisions of higher courts "where a specific definition was attempted or which gave precise guidance as to what the boundaries of terrorist activities are".

[19]She referred to the Federal Court of Appeal's decision in *Suresh, supra*, and said the Court focussed on the activities of the LTTE and "specifically on violent actions perpetrated against civilian populations". She added:

In spite of this, however, I know of no law that would restrict an interpretation of terrorism to only actions against civilians. I believe that in this respect, it is the nature of the acts and activities that must be examined. [Emphasis mine.]

[20]The Adjudicator examined dictionary definitions and noted the *Chambers 20th Century Dictionary* defined "terrorism" as "[A]n organized system of intimidation" and the *Concise Oxford Dictionary* defined the word "terrorist" as a word referring to a person "who uses or favours violent and intimidating methods of coercing a government or community". She concluded on this point:

There are many dictionaries, and I believe there are many varying definitions of these terms containing many similarities and containing certain differences. I believe that, in general terms, a dictionary definition of terrorism is a limited one and defines terrorism as actions involving force and intimidation directed at governments or populations. I believe that definitions such as these are not conclusive or exhaustive of the matter. [Emphasis mine.]

[21]It was her view she had to focus on and consider the evidence "of the activities of this organization. . . . What I have to decide is whether the evidence provides reasonable grounds to believe that this organization did certain things, and if that is accepted, then to consider whether such activities constitute terrorism". [Emphasis mine.]

[22]She then reviewed the evidence and commented on the documentary evidence presented by counsel for the applicant which "left me at some loss as to understand why these materials were presented". She said these documents contained "very little information about the actual activities of the EPR" and that there was "some such information of a very limited nature, in general terms, to indicate that the EPR was an armed dissident group, using uniforms and weapons and military organisation" (emphasis mine). She stated these documents provided "no evidence to show that the human rights abuses extensively described were government policy" and that applicant's counsel "did not attempt to argue that justification was a factor". She noted the documents gave "considerable information about the activities of military and police in Mexico and about the extent to which these forces are seen by the general population as to be the same or similar".

[23]She drew upon the applicant's testimony. It was to the effect "that the EPR engaged in military activity with a political goal . . . that the organisation engaged in armed attacks against army and police . . . that persons were, on occasion, killed on both sides of the conflict." (Emphasis mine.) She noted his testimony EPR was illegal and they possessed weapons which were also illegal.

[24]She then reviewed the notes prepared by the immigration officer in the joint interview by officers of CSIS and CIC where the applicant indicated EPR:

. . . watched the comings and goings of the military, that they observed the movements of the military, that they did this to watch and wait for an opportunity to attack the military. He also testified about the types of weapons, and he also stated that certain threats were made against government or public officials. He said that this was not done directly, but was done in newspapers--through newspapers. [Emphasis mine.]

[25]The Adjudicator then turned to Exhibit 2, the human rights package introduced by the CPO, which she found gave the most information about the activities of the EPR and summarized it in the following terms:

This document states again that the EPR was or is a well armed group, that it carried out attacks against various targets, that it used violent tactics, more violent than certain other groups with similar aims or goals. The document states that the EPR carried out so-called hit-and-run strategy of armed attacks against police stations, military installations and government buildings. This report refers to casualties numbering 96 on one occasion, numbers of attacks, numbers of persons killed or injured, on one occasion referring to a week-long series of attacks against

military and police targets during which at least six policemen were killed. [Emphasis mine.]

[26]The Adjudicator was also critical of Exhibit 2 which she said:

. . . is a document which certainly is deficient in many respects. Counsel, in his arguments, pointed out the limits--how limited the information is which is provided in it. I cannot disagree about that. Nevertheless, in its substance, I accept it as credible and trustworthy evidence within its limits, and limited though it may be, concerning the activities of this organisation. [Emphasis mine.]

[27]She concluded:

The totality of the evidence indicates that the EPR was, perhaps still is, an illegal armed guerrilla-type insurgent group attempting to achieve certain political and social aims which carried out surprise, hit-and-run armed attacks against various targets, military, police, and government targets. [Emphasis mine.]

[28]The Adjudicator did not accept the applicant's argument a civil war or a state of war existed and EPR's activities should be examined in that context, i.e. "that what was taking place were acts of war, that they were military confrontations". She did so for the following reason:

My conclusion is that the type of surprise armed attacks which have been described in the evidence at this Inquiry are not the same as simple military confrontations, and I believe that they can be considered terrorist activity and should be so described in the present case. [Emphasis mine.]

[29]Adjudicator Martens then reviewed some evidence which she found "indicate that the activities of the EPR were more extensive than the confrontations or the attacks just referred to".

[30]She mentioned again "media threats or threats in the newspapers against government officials".

[31]She noted evidence showed "attacks not only on military installations, but against the police forces" commenting "no matter how much the police forces in Mexico may now be associated with the military, I don't believe that it should be concluded that they are one and the same force entirely in all respects. I don't think they can be considered soldiers on the field for all purposes".

[32]She noted there was reference to attacks on government buildings but cautioned:

The evidence being so lacking in information and detail, we don't know what more may have been involved. [Emphasis mine.]

[33]Finally, she turned again to Exhibit 2 for evidence the EPR carried out kidnappings to finance its operations. She indicated the applicant denied this was true and testified his superior officers had told him this was not true. She referred to his further testimony that he himself had not been involved in fundraising and he did not, in fact, know how funds were raised for this organization. She concluded without more:

On the basis of Exhibit 2 and having considered Mr. Cuevas' [*sic*] testimony, I believe there are reasonable grounds to believe that there were kidnappings to raise funds for the organisation.

D. ANALYSIS

(1) The Supreme Court of Canada teaching in *Suresh*

[34]The Supreme Court of Canada's discussion of terrorism is contained in paragraphs 93 to 99 of its decision. The Court made it clear in paragraph 93 it did not seek to define terrorism exhaustively "a notoriously difficult endeavour" holding the term provided sufficient basis for adjudication and was not inherently ambiguous "even if the full meaning . . . must be determined on an incremental basis" adopting the words of Justice Robertson who wrote the Federal Court of Appeal's reasons in the *Suresh* case.

[35]The Court at paragraph 94 acknowledged there was no authoritative definition of "terrorism", the Act did not

define it and no single definition is accepted internationally. It noted the absence of an authoritative definition meant "that at least at the margins" the term is open "to politicized manipulation, conjecture and polemical interpretation". It quoted an author as viewing the term "terrorism" as somewhat "Humpty Dumpty--anything we choose it to be" and another author (at paragraph 95) stating "that one state considers terrorism, another may consider as a valid exercise of resistance".

[36]The Court turned to the Convention and noted it approached the problem of what terrorism is in two ways: a functional definition and a stipulative definition. The functional approach consists of defining terrorism by reference [at paragraph 97] "to specific acts of violence (e.g. `hijacking, hostage taking and terrorist bombing')" spelled out in the Convention's annexed list of treaties which the Supreme Court said [at paragraph 96] "that are commonly viewed as relating to terrorist acts". Those treaties are listed in paragraph 83.01(1)(*a*) of the *Anti-terrorism Act* which now makes Convention offences, offences under Canadian law.

[37]One of the annexed treaties is the *International Convention for the Suppression of Terrorist Bombings* adopted by the General Assembly of the United Nations on December 15, 1997. Its Article 2 reads:

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(*a*) With the intent to cause death or serious bodily injury; or

(*b*) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

[38]In that Convention [Article 1], "place of public use" is defined to mean "those parts of any building, land, street, waterway or other location that are accessible or open to members of the public, whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place that is so accessible or open to the public".

[39]Another annexed Treaty is the *International Convention Against the Taking of Hostages* adopted by the General Assembly on December 17, 1979, and in force on June 3, 1983. Its Article 1 reads:

Article 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

[40]The Supreme Court of Canada expressed, as previously noted, the stipulative definition of terrorism by reference to Article 2 of the Convention which defines terrorism as:

Article 2

. . .

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from

doing any act.

[41]The Court analysed the advantages and disadvantages of each approach noting the functional approach referencing specific acts of violence had received strong support but it expressed the view at paragraph 97:

While we are not unaware of the danger that the term "terrorism" may be manipulated, we are not persuaded that it is necessary or advisable to altogether eschew a stipulative definition of the term in favour of a list that may change over time and that may in the end necessitate distinguishing some (proscribed) acts from other (non-prescribed) acts by reliance on a term like "terrorism". [Emphasis mine.]

[42]The Court, *per curiam*, concluded at paragraph 98 as follows:

. . .that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. [Emphasis mine.]

[43]In his reasons for the Federal Court of Appeal's decision, Justice Robertson in *Suresh, supra*, referred to Justice Teitelbaum's decision *Suresh, Re* (1997), 140 F.T.R. 88 (F.C.T.D.), upholding the reasonableness of a certificate issued by the Minister of Citizenship and Immigration that Mr. Suresh was a person described in three of the inadmissible classes found within section 19 of the *Immigration Act*. Justice Robertson [at paragraph 38] extracted the following from Justice Teitelbaum's reasons [paragraphs 30-32]:

I do not intend to list the incidents the LTTE is said to have committed. One need only refer to Appendix "B" where some 140 incidents are mentioned starting with the alleged LTTE's assassination of Alfred Duraippah, the pro-governme nt mayor of Jaffna on July 27, 1975 to the incident on September 10, 1995 when the LTTE is alleged to have killed seven soldiers who, it is alleged, were part of a road clearing patrol.

Witnesses called by Suresh denied most of these incidents as being "t errorist" in nature as, it is alleged, the LTTE can be considered freedom fighters, and therefore have the "right" to shoot at soldiers or persons who do not support the LTTE and their aims.

With respect, I disagree. Even if it were so, the LTTE's assassi nation of the mayor of Jaffna on July 27, 1975 solely on the basis of his pro-government leaning is to me an act that one may consider "terrorist" in nature. The execution of a police constable on February 14, 1977 gives rise to a reasonable conclusion tha t a "terrorist act" has taken place. The shooting of a member of Parliament, who later died, is a "terrorist act". The blowing up of a civilian aircraft is a "terrorist act". Attacks on civilians are as I have said "terrorist acts" whether the attack is on a fishing village or on farms. The May 16, 1985 LTTE attack and massacre where 138 to 146 civilians at Anuradhapura in Sri Lanka were killed can be considered a "terrorist act".

[44]Justice Robertson then, at paragraph 39 of his reasons for judgment, quotes an extract from Justice McKeown's reasons for judgment as evidence which qualifies as evidence of terrorist acts committed by the LTTE. Justice McKeown, in his judgment at (1999), 50 Imm. L.R. (2d) 183, dismissed Mr. Suresh's application for judicial review challenging the Minister of Citizenship and Immigration's opinion under paragraph 53(1)(*b*) [as am. by S.C. 1992, c. 49, s. 43] of the *Immigration Act*:

McKeown J. in his reasons for judgment [at paragraphs 31-33, pages 198-199] also refers to evidence which qualifies as evidence of terrorist acts committed by the LTTE:

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.

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". The LTTE engages in intimidation by way of lamppost killings.

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.

[45]Justice Robertson concluded at paragraph 40 as follows:

In short, there is sufficient and conclusive evidence that the LTTE engages in indiscriminate killing and torture of innocent civilians amounting to what are classified under international law as "crimes against humanity". I hasten to add that this was firmly established by this Court as early as 1994 in *Sivakumar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 3012 (F.C.A.), [1994] 1 F.C. 433 (C.A.). [Emphasis mine.]

[46]The Supreme Court of Canada had no difficulty in finding the LTTE a terrorist organization because it had engaged in terrorist activities (see paragraph 109).

(2) What the evidence shows here

[47]I reviewed the transcript and the documentary evidence contained in the Tribunal's certified record. The applicant, in his memorandum, conveniently summarized that evidence in a manner which I believe accurately reflects that evidence. I quote from the applicant's memorandum:

7. After his arrival, the claimant was interviewed jointly by CSIS and Canada Immigration. The evidence concerning the applicant's activities on behalf of EPR come from that interview and from his examination by the CPO at the inquiry.

8. The applicant said that he had been a member of the PDPR (Por la republica democratic popular) and its armed wing, the EPR (Ejercito Popular Revolucionario) for a year before he was abducted and imprisoned by Mexican military intelligence and detained by them in Acapulco and Mexico City for one year, two months and 23 days. While in the EPR, he started as a combatant, and later was a second sergeant. During his captivity, he was beaten and tortured. While he was imprisoned he could hear other members being interrogated and tortured. He was released on August 27, 1998. After his release, he did not maintain his contacts with the group.

9. He said that the EPR was involved in military activities, but with a political goal. He described the objectives of the PDPR and EPR as being to take over the government and establish a democratic country.

10. He was asked if the PDPR ever made any threats against government representatives. He said not against anyone in particular and not directly; they would print things in the newspapers. He was asked was sort of military activities the EPR was involved in. He said it was to respond by self-defence to acts of repression and torture and disappearances perpetrated by the Mexican army. He said that in certain zones, when there was excessive repression, the party would send communiques to the media to put a stop to the repression to begin by trying to obtain goals by peaceful means. If the repression did not stop, then the organization would respond by armed attacks on the "companies" which he said meant the army and the p olice.

11. He said that the EPR would get orders from the PDPR, and that those would include military strategies: watching the comings and goings of the military. He said that there are different areas in small towns where aboriginal peoples were harassed by the military. The EPR, therefore, would watch and wait for an opportunity to attack the military zone so that they would stop bothering the people. He said that during his membership he knew of about 10 such attacks, but that there were other confrontations. Of the 10, he participated as a driver on two occasions. He said that he did not personally participate in those attacks. His task was to take his comrades to the zone where there was activity and the [*sic*] to pick them up. He said that the incidents he was involved in took

place in Cuacalco in the State of Mexico and at Naucalpan. He said that during the two attacks, one person was killed, in an attack which took place to stop the repression.

12. He said that the EPR was also involved in activities in solidarity with the people, including providing clothing, teachers and doctors for the people.

13. He said that to his knowledge the organization was not involved in kidnappings. He said that he did not know where the organization got its money, but that the organization had a very wide social base from which it got funds, but he did not know the particulars.

14. He was asked if he ever kept material in his home. He said that he had kept weapons, including reflex weapons, AK47s, pistols and grenades in this home as well as EPR leaflets. He said he had stored illegal weapons on 4 or 5 occasions.

15. In the documentary evidence, the EPR was described as an armed opposition group, a guerilla movement and an armed dissident group. The Report from the Inter-American Commission on human rights referred to conflict zones, in a section of the report which also spoke of the torture of alleged EPR members. It is submitted there was low-intensity armed conflict taking place in Mexico.

16. The only group which referred to the EPR as a terrorist group was the Mexican state itself, which based its characterization on its attacking military installations, and wounding and even killing members of the armed forces.

17. Documentary evidence noted the militarization of police commands, and the rising militarization in Mexico, particularly in indigenous areas, along with combined actions by the army and police. There was evidence of EPR attacks on security forces personnel. There was evidence of torture with impunity by the armed forces.

(3) The standard of proof

[48]The Federal Court of Appeal in *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (F.C.A.), [2001] 2 F.C. 297, examined the meaning of the words "reasonable grounds to believe" in section 19 of the Act and held these words provided [at paragraph 60] "as 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'."

(4) Discussion

[49]The Adjudicator determined the applicant to be a person whom there are reasonable grounds to believe is or was a member of an organization that there are reasonable grounds to believe is or was engaged in terrorism.

[50]This provision is part of section 19 found in Part III of the Act entitled "Exclusion and Removal". Persons covered by section 19, subject to the exercise of positive ministerial discretion, cannot be admitted to Canada for entry or landing. In order to situate the context of paragraph 19(1)(*f*) of the Act, it is useful to set out the provisions of paragraphs 19(1)(*c*.2), 19(1)(*e*), 19(1)(*g*) and 19(1)(*j*):

19. (1) No person shall be granted admission who is a member of any of the following classes:

. . .

(*c*.2) 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 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 any offence under the *Criminal Code* or *Controlled Drugs and Substances Act* that may be punishable by way of indictment or in the commission outside Canada of an act or omission that, if committed in Canada, would constitute such an offence, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;

. . .

(*e*) persons who there are reasonable grounds to believe

(i) will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(ii) will, while in Canada, engage in or instigate the subversion by force of any government,

(iii) will engage in terrorism, or

(iv) are members of an organization that there are reasonable grounds to believe will

(A) engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(B) engage in or instigate the subversion by force of any government, or

(C) engage in terrorism;

. . .

(*g*) persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence;

. . .

(*j*) persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*; [Emphasis mine.]

[51]These provisions engage issues of national security in respect of persons who are not Canadian citizens nor permanent residents but seek to enter Canada as visitors or for landing. Nevertheless, important individual interests are at stake particularly if refugee status is blocked and the person involved has a well-founded fear of persecution.

[52]The Adjudicator, in her reasons, referred to the following activities carried out by the EPR:

(1) armed attacks against the military during which deaths or casualties occurred;

(2) armed attacks against the police during which persons on both sides were killed or were injured;

(3) threats made against government and public officials;

(4) attacks against government buildings; and

(5) kidnappings in order to finance the organization's activities.

[53]Counsel for the Minister made an overarching argument that the term "terrorism" must receive an unrestrictive interpretation citing previous jurisprudence of the Federal Court Trial Division, namely Justice Denault's decision in *Baroud (Re)* (1995), 98 F.T.R. 99 (F.C.T.D.); Justice Teitelbaum's decision in *Re Suresh, supra*, and Justice MacKay's decision in *McAllister v. Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 4030 (F.C.), [1996] 2 F.C. 190 (T.D.).

[54]This submission by the Minister is anchored on statements made by the Supreme Court of Canada in *Suresh, supra*, that it did not seek to define terrorism exhaustively--a notoriously difficult endeavour, but contented itself with a finding that the term provided a sufficient basis for adjudication; its approval of Justice Robertson's statement the full meaning of terrorism must be determined on an incremental basis, its view there is no authoritative definition of terrorism and no single definition is accepted internationally.

[55]The Minister's submission cannot be accepted because it ignores the fact the Supreme Court of Canada did provide a definition of "terrorism" which, in its view "catches the essence of what the world understands as terrorism" observing, however, that "particular cases on the fringes of terrorist activitywill inevitably provoke disagreement" (Emphasis mine).

[56]The definition of terrorism adopted by the Supreme Court of Canada focuses on the protection of civilians--a central element in international humanitarian law whose foundation rests in the four Geneva Conventions adopted on June 12, 1949, and its two additional Protocols, all of which have been incorporated into and made part of Canadian law (see, *Geneva Conventions Act*, R.S.C., 1985, c. G-3, Sch. I, II, III, IV, V (as am. by S.C. 1990, c. 14, s. 6), VI (as am. *idem*) subject, in one case, to stipulated reservations.

[57]Here, I echo what Justice Robertson said in *Suresh, supra* [at paragraph 36]:

No one questions the right to use force in seeking political independence so long as the struggle is between two combatants. Nor does any one question the fact that the LTTE claims to represent the Tamil minority and is pursuing the right of self-determination and an independent homeland in the northern part of Sri Lanka. Finally, no one is disputing that the struggle for Tamil independence is being waged by a minority against the Sinhalese majority, represented by the governing party. What is questioned is the means by which the political ends are being sought. Clearly, there are various avenues by which citizens can oppose their presiding government and, certainly, not all governments are equally receptive to criticism. However, a line separating acceptable means of protest from unacceptable means must be drawn somewhere. In my view terrorism is an unacceptable means of attempting to effect political change. Nowhere in the jurisprudence is there support for the proposition that one has an inherent right to engage in terrorism in the pursuit of self-determination. For this reason alone the appellant's argument must fail. [Emphasis mine.]

[58]Justice Robertson's view of the primacy of civilian protection in international humantarian law is confirmed by an examination of the 1949 Geneva Conventions and their two Protocols.

[59]Article 50 of Protocol I [*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, being Sch. V of the *Geneva Conventions Act*, R.S.C., 1985, c. G-3 (as am. by S.C. 1990, c. 14, s. 6)] defines a civilian as basically anyone not taking up arms in an armed conflict which excludes members of armed forces, militia and volunteer groups taking up arms, members of a resistance group and inhabitants of a non-occupied territory who, on the approach of an enemy, spontaneously take up arms to resist the invading forces (see Article 4 of the 3rd Geneva Convention of 1949 [*Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, being Sch. III of the *Geneva Convention Act*, R.S.C., 1985, c. G-3]).

[60]Protocol II [*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II)*, being Sch. VI of the *Geneva Conventions Act*, R.S.C., 1985, c. G-3 (as am. by S.C. 1990, c. 14, s. 6)] to the 1949 Geneva Conventions applies to non-international armed conflicts, that is, conflicts between the armed forces of a state and dissident armed forces or other organized armed groups, under responsible command and in control over a part of the State's territory. Protocol II proscribes either side committing acts of terrorism (see subparagraph 2(*d*) of Article 4). Also prohibited are "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population" (see paragraph 2 of Article 13). There are other key elements in the definition of terrorism adopted by the Supreme Court of Canada, namely:

(1) civilians or other persons must not be taking an active part in hostilities in situation of armed conflict which again brings into play concepts known in international public law; and

(2) the purpose of the act intending to cause death or serious bodily harm (which are crimes known in domestic law and in international law (war crimes or crimes against humanity)) which gives that act its quality of terror, must be, by its nature or context, to intimidate a population or to compel a government or international organization to do or to abstain from doing any act.

[61]Furthermore, the Supreme Court of Canada, was quite conscious that the concept of terrorism can and is the

subject of political manipulation and this is why it wished to circumscribe its scope by identifying precise elements of what terrorism is while at the same time, at the margins or on the fringe, not closing the class to terrorist activity which allows for some flexibility and some means of adaptation.

[62]In addition, as I see it, by choosing the definition of terrorism it did, the Supreme Court harmonized and gave space to each of the key concepts we find in section 19 of the Act: subversion, terrorism, crimes against humanity, war crimes and ordinary crimes. Each of those concepts are distinct and have separate roles to play in law.

[63]There are two major reasons why the Adjudicator's decision cannot stand and must be set aside:

(1) the departure by the Adjudicator of the delineation by the Supreme Court of Canada of what terrorism constitutes, a point which the Adjudicator did not have the advantage of having that thinking; and

(2) the inadequacy of the evidentiary foundation to support finding the EPR was engaged in acts of terrorism, appreciating that the standard of proof is one, while falling short of the balance of probabilities, nonetheless connotes a *bona fide* belief in a serious possibility based on credible evidence.

[64]On this second point, the Adjudicator realized the Minister's case was weak, a fact recognized by the CPO in his argument before the Adjudicator (certified record, pages 419-420, lines 40 to 10. He pinned his hopes of terrorist activity on the report of kidnappings), the evidence of what the EPR was engaged in was limited and was "so lacking in information and detail" and the documentation, particularly exhibit 2 was deficient and limited. Yet, despite these findings, she concluded it was sufficient for her to make a determination the EPR was engaged in terrorist activities rather than finding the Minister had not discharged his burden of proof.

[65]It is clear from the Adjudicator's reasons she was of the view terrorism could not be restricted "to only actions against civilians" and connoted a much wider meaning which included as a target of terrorism the Armed Forces of a State combatting an armed insurgent group--a situation of armed conflict. Humanitarian international law generally makes a distinction between combatants whose activities are governed by the rules of war where a breach may constitute a war crime and civilians who enjoy protected status under the 1949 Geneva Conventions and its two Protocols. *Suresh*, *supra*, adopted that delineation.

[66]An examination of the evidence tendered by the Minister in support of his allegation EPR was a terrorist organization was, as I said, weak. That evidence is focussed on exhibit 2 but more specifically on a document which is unidentified and located between pages 56 to 63 of the certified Tribunal record. It is incomplete because it contains only pages 16 to 23 of that document.

[67]What was reproduced is only section 4, which deals with the EPR and the statements contained in that document appear to have mainly as their sources in various newspapers, which are secondary sources.

[68]I quote the following examples:

(1) "The EPR claims its funding source and social base are the people in general who may or may not be organized. The movement has carried out kidnappings to help finance its activities and has indicated that it may impose a war tax" (AFP 3 Feb 1997; EIU Fourth Quarter 1996, 13);

(2) "The EPR . . . opted for a "hit and run" strategy of armed attacks against police stations, military installations and government buildings" citing *Latinamerica Press*, 15 August 1996; AFP 3 Feb 1997, *Proceso* 1 September 1996 and *Le Monde diplomatique*, January 1997, 12;

(3) "The EPR claims to have inflicted at least 96 casualties on Security Forces Personnel between its first appearance on 28 June 1996 and early February 1997" (AFP 3 Feb 1997);

(4) "On 28 August 1996 the EPR launched 18 attacks against the government, police and army targets in seven States, killing at least 12 people and injuring 23", giving as a source Country Reports 1996-97, and others including the *Houston Chronicle*, 8 September 1996;

(5) "The day after the cease-fire expired, it launched a week-long series of attacks against military and police targets in the states of Guerrero and Mexico including near Mexico City" citing the *Dallas Morning News*, *Reforma* and the *Washington Post*. "At least 6 policemen were killed in the attacks" citing the *Dallas Morning News*, 2 Nov 1996.

[69]These citations from the unknown document support the Adjudicator's observation about the deficiencies in the evidence and its inadequacy. That evidence lacks the specificity of who, what, when and where and in what circumstances which is necessary to meet the test of sufficiency in assessing the Minister's burden of proof gauged in relation to its appropriate standard.

[70]The Federal Court of Appeal in *Sivakumar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 3012 (F.C.A.), [1994] 1 F.C. 433, stressed the importance of providing findings of fact as to specific crimes against humanity which the refugee claimant is alleged to have committed. Justice Linden at page 449 stated as follows:

For example, the Amnesty International Report of 1989 indicates that the Sri Lankan government is responsible for arbitrary arrest and detention without charge or trial, "disappearances", torture, death in custody, and extrajudicial killi ngs. Given the seriousness of the possible consequences of the denial of the appellant's claim on the basis of section F(a) of Article 1 of the Convention to the appellant and the relatively low standard of proof required of the Minister, it is crucial tha t the Refugee Division set out in its reasons those crimes against humanity for which there are serious reasons to consider that a claimant has committed them. In failing to make the required findings of fact, I believe that the Refugee Division can be said to have made an error of law.

[71]Justice Robertson echoed the same underlying thought in *Moreno v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2993 (F.C.A.), [1994] 1 F.C. 298 (C.A.), at page 314 after discussing what questions of law and questions of fact were; in his view, it was a question of law whether the act of killing civilians by military personnel could be classified as a crime against humanity. He wrote this:

It seems clear that questions of law do not lend themselves to adjudication by reference to legal concepts embedded in probability theory. Yet there are other reasons for immunizing questions of law from the application of a standard of proof. It is true that the "less-than-civil-law" standard established in *Ramirez* reinforces the view that it was the intent of the Convention signatories to exclude persons undeserving of protection. But it is difficult to credit the intention of establishing a threshold standard of proof which virtually guarantees exclusion once the Minister demonstrates that there are "serious reasons for considering" that a claimant's acts or omissions could be classified as a crime against humanity.

[72]He continued in the following terms:

In my opinion, that is a question of law which must be decided in accordance with legal principles rather than by reference to a standard of proof. (Those legal principles will be applied to a series of facts established pursuant to the "less-than-civil-law" standard of p roof, ...

[73]Justice Robertson's comment is brought home in this case where, only once, does the Adjudicator make a finding of a terrorist activity by the EPR which she identified as "the type of surprise armed attack which have been described in the evidence at this inquiry as not being the same as simple military confrontations".

[74]This need for specificity in the identification of acts of terrorism is illustrated in several judgments of justices in the Trial Division in addition to those mentioned by Justice Robertson. I have in mind Justice Denault's reasons in *Baroud, supra*, Justice Mackay's judgment in *McAllister, supra* and Justice Blais' recent decision in *Iklhef (Re)* (2002), 223 F.T.R. 233 (F.C.T.D.).

[75]I briefly touch upon some findings of fact made by the Adjudicator which must be set aside as either having no evidentiary basis or representing a misapprehension of the evidence, both errors falling within the ambit of paragraph 18.14(*d*) of the *Federal Court Act* [R.S.C., 1985, c. F-7 (as enacted by S.C. 1990, c. 8, s. 5)].

[76]First, the Adjudicator, referring to the unidentified document stated "this report refers to casualties numbering 96 on one occasion". It is clear from the document (certified record, page 59) these casualties were security forces and not civilians.

[77]Second, the Adjudicator's finding that the EPR attacked government buildings as evidence of an act of terrorism is not sufficiently and reasonably supported. I readily acknowledge that a bomb or other armed attack on a government building filled with government workers would, with the required purpose, be easily construed as an act of terrorism within the *Suresh* meaning or within the meaning of terrorist activity under the *Anti-terrorism Act*. The problem here is that we do not know any surrounding circumstance of what was involved in such attacks. The Adjudicator specifically recognized that fact when she said "the evidence being so lacking in information and detail, we do not know what more may have been involved".

[78]Third, the evidence introduced by counsel for the applicant demonstrates the police were acting in consort with the Mexican Armed Forces against the EPR as well as the militarization of the police in conflict zones (certified transcript, pages 171, 284, 302, 332 and 335) which seemed to be acknowledged by the Adjudicator who found "no matter how much the police forces in Mexico may now be associated with the military" she went on to say that "I don't believe that it should be concluded that they are one and the same force entirely in all respects. I don't think they can be considered soldiers on the field for all purposes". The Adjudicator cites no evidence in support of this conclusion which seems to be an inference without any evidentiary foundation. Again, I could see terrorist activity, assuming the required purpose, in an attack on a policeman in the discharge of normal non-military municipal duties but that is not what the totality of the evidence indicates, namely a militarized police carrying on joint operations with the Armed Forces. There is no evidence in the certified record of what I would call a "normal" policeman being killed or wounded for terrorist purposes. If a policeman in Mexico was hurt in an EPR attack, his perpetrators could be prosecuted under Mexican criminal law either under its criminal code or other statute law but this is no basis to apply against that person without more a terrorist label for the purposes of the application of section 19 of the Act.

[79]Fourth, the Adjudicator referred to media threats or threats in the newspapers against government officials. That finding must be infirmed because the Adjudicator did not consider the entire evidence. During the hearing, the applicant explained what the notes of the joint CSIS CIC interview report. At page 466, he explained the DPPR (the political party) directing the EPR, would send out in zones of excessive repression a communique to all the media "and, in the communique, they would ask to, they would ask them to please stop their acts of repression against our people. Otherwise, there was no other way to respond to such aggression, in order to try to put a stop [*sic*] such aggression".

[80]Finally, I deal with the issue of kidnapping to finance the EPR's activities. As noted, the evidence which the Adjudicator relied upon is contained in the unidentified document in exhibit 2. The entire exhibit, as I have already noted, is contained in the following sentence:

The movement has carried out kidnappings to help finance its operations, and has indicated that it may impose a war tax (AFP, 3 Feb 1997; EIU, 4th Quarter, 1996, 13).

[81]I agree with counsel for the applicant's submission that kidnapping without more cannot be automatically equated to an act of terrorism. Having said that, I recognize that the international community through its Convention against the taking of hostages has proscribed hostage taking and characterized it in the circumstances set out in that Convention as an act of terrorism.

[82]The problem with the evidence on this point is that it is barren of details and circumstances such that there is no credible evidence on the record which could nourish, in the Adjudicator's mind, a serious reason to believe an act of terrorism had been committed on account of the kidnappings. We do not know whether such hostage taking is fact or fiction, who was kidnapped (military or civilian), how many kidnappings occurred and whether these kidnappings, if they did occur, were disapproved by the EPR. For this reason, the Adjudicator's finding cannot stand.

[83]The issue of the kidnappings was raised at the applicant's hearing and is transcribed at pages 470 to 473 of the certified record. The CPO asked the applicant a series of questions on the subject. The applicant answered he did not know how the organization got its money but denied the EPR engaged in kidnappings and said the EPR had a

very wide social base through which it got its funds but did not know any particulars about how such funds were gathered. On clarification, at page 472 of the certified record, the applicant again stated the organization did not do any kidnappings and he knew that because the commander and high ranking officials said that.

[84]It is trite law the Adjudicator can prefer documentary evidence over the testimony of a claimant but, the Adjudicator was bound to state in clear and unmistakable terms why it preferred the documentary evidence over the applicant's testimony (see *Okyere-Akosah v. Canada (Minister of Employment and Immigration)* (1992), 157 N.R. 387 (F.C.A.)). This the Adjudicator did not do.

[85]For all of these reasons, this judicial review application is allowed, the Adjudicator's decision dated February 29, 2000, is set aside and the matter is remitted to a different Adjudicator.

[86]In terms of one or more certified questions, I am aware the parties have written to me on the issue. However, other certified questions may be proposed arising out of these reasons. If either party wishes to propose the formulation of one or more certified questions, it must do so by the end of the day Tuesday, April 8, 2003, with the right of the other party commenting on any proposed certified question to be received by the Court Registry at the end of business on Tuesday, April 15, 2003.