IMMIGRATION AND REFUGEE BOARD
(APPEAL DIVISION)

LA COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ
(SECTION D'APPEL)

REASONS FOR DECISION AND ORDER

MA1-12567

APPELLANT(S)/APPLICANT(S)	APPELANT(S)/REQUÉRANT(S)
MOHAMOUD SHEIKH MURSAL	
RESPONDENT	INTIMÉ
MINISTER OF CITIZENSHIP AND IMMIGRATION	
DATE(S) OF HEARING	DATE(S) DE L'AUDIENCE
June 14, 2002	
PLACE OF HEARING	LIEU DE L'AUDIENCE
Ottawa, Ontario	
DATE OF DECISION	DATE DE LA DÉCISION
June 21, 2002	
CORAM	CORAM
Egya Sangmuah	
FOR THE APPELLANT(S)/APPLICANT(S)	POUR L'APPELANT(S)/REQUÉRANT(S)
Michael Bossin Laila Demirdache	
FOR THE RESPONDENT	POUR L'INTIMÉ
Lynn Marchildon	

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The appellant, Mohamoud Sheikh MURSAL, appeals from a deportation order, dated December 4, 2001, issued against him by adjudicator Pierre Turmel pursuant to paragraph 19(1)(L) of the Immigration Act (the Act).[1] The appeal is based on section 70 of the Act.

The appellant challenges the legal validity of the deportation order on a number of grounds. He argues that paragraphs 19(1)(L) and 19(1.1.) of the Act violate sections 2, 7 and 15 of the Canadian Charter of Rights and Freedoms and cannot be saved by section 1 of the Charter. He seeks an order quashing the removal order made against him. The respondent asks that the appeal be dismissed.

I. FACTUAL BACKGROUND

The appellant is a citizen of Somalia, where he worked as a civil servant for 23 years. The highest positions he held were as Deputy Minister of Minister of Post[s] and Telecommunications (from February 1980 to June 1984) and Deputy Minister of Mining and Water Resources (from June 1984 to March 1988). The appellant was also a member of the Somali National Assembly from February 1980 until October 1990.

He entered Canada with his wife in August 1991. They both claimed Convention refugee status and were found to be Convention refugees on November 19, 1993. The appellant and his wife subsequently applied for permanent residence status in Canada. The application process was halted in February 1995, after an immigration officer issued a report under paragraph 20(1) of the Immigration Act. The Report alleged that the appellant is a member of an inadmissible class of persons

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[1] Record.

described in paragraph 19(1)(L) of the Act, namely, that he was a senior member of a government that, in the opinion of the Minister, was engaged in systematic or gross human rights violations. After an inquiry held on March 27, 1996 the appellant was ordered deported pursuant to paragraph 19(1)(L). The appellant appealed to the Immigration Appeal Division, which allowed the appeal in law on January 30, 1997 on the ground that the presumption in 19(1.1) of the Act is rebuttable.[2] The Appeal Division ordered that the appellant be examined as a person seeking admission at a port of entry (ss. 74(1)(b) of the Immigration Act). The appellant subsequently made submissions to the Minister of Citizenship and Immigration seeking an exemption from the application of paragraph 19(1)(L) on the ground that his admission to Canada would not be detrimental to the national interest. Paragraph 19(1)(L) does not apply to persons described in that paragraph who satisfy the Minister that their admission would not be detrimental to the national interest. The evidence submitted by the appellant in connection with his request for an exemption including affidavits from Dr. Ken Menkhaus, a recognized authority on Somalia, and Dwight Fulford, a former Canadian Ambassador to Somalia. The affidavits state the opinion that it is highly unlikely that the appellant had any involvement in human rights abuses and that he held politically peripheral posts.

On March 29, 2000, the Minister declined to exempt the appellant from the application of paragraph 19(1)(L). The appellant sought leave from the Federal Court to commence an application for judicial review of the Minister's decision, but the leave was denied. A second inquiry was convened on December

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[2] Mursal, Mohamoud Sheikh v. M.C.I. (IAD M96-08958), Ramsay, January 30, 1997.

4, 2001. For the second time an adjudicator found the appellant to be a person described in paragraph 19(1)(L) and issued a deportation order against him. The appellant appeals from this order. Section 70(4) of the Act limits his right of appeal to an appeal on a question of law or fact or mixed law and fact.

II. STATUTORY PROVISIONS

Inadmissible Classes

> Inadmissible persons
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> 19. (1) No person shall be granted admission who is a member of any of the following classes:
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> (l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the Criminal Code, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.
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> Meaning of "senior members of or senior officials in the service of a government"
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> (1.1) For the purposes of paragraph (1)(l), "senior members of or senior officials in the service of a government" means persons who, by virtue of the position they hold or have held, are or were able to exert a significant influence on the exercise of government power and, without limiting its generality, includes
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> (a) heads of state or government;
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> (b) members of the cabinet or governing council;
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> (c) senior advisors to persons described in paragraph (a) or (b);
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> (d) senior members of the public service;
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> (e) senior members of the military and of the intelligence and internal security apparatus;
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> (f) ambassadors and senior diplomatic officials; and
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> (g) members of the judiciary.

> 53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless
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> (b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;

III. ANALYSIS

Section 7 of the Charter: the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice.

The appellant submits that as a Convention refugee his right to liberty and security of the person is engaged by the deportation order pursuant to paragraph 19(1)(L). His deportation would deprive him of his section 7 rights, therefore, his removal from Canada must be done in accordance with the principles of fundamental justice. The appellant argues that paragraph 19(1)(L) is not consistent with the principles of fundamental justice, because persons described in the paragraph do not have the opportunity to rebut the presumption that they are or were able to exert significant influence on the exercise of government power. The panel finds that there has been no deprivation of the appellant's section 7 rights and that paragraph 19(1)(L) is consistent with the principles of fundamental justice. The panel relies on the reasoning of the Appeal Division panel in Shirdon[3]. The

[3] Shirdon, Aden Farah v. M.C.I. (IAD T97-06059), D'Ignazio, Sangmuah, Hoare, September 6, 2000, pp. 5-15.

appellant in Shirdon was a Convention refugee found to be a person described in paragraph 19(1)(L). He was an ambassador in the government of Siad Barre. Here, as in Shirdon, the Minister is obliged by section 53(1) of the Immigration Act not to remove the appellant to a country where his life and freedom would be threatened. No action has been taken by the Minister against the appellant with respect to paragraph 53(1) of the Act. In Suresh,[4] the Supreme Court provided guidelines as to procedures that it considers constitutionally acceptable when the Minster exercises his powers under paragraph 53(1) of the Act. The Minister is obliged to act accordingly. Thus, it is premature to say that the appellant's section 7 rights have been infringed.

The panel notes that the Supreme Court held in Suresh that paragraph 19(1)(f), which is drafted in a similar manner as paragraph 19(1)(L) (particularly with respect to the availability of a Ministerial exemption), does not infringe section 7 of the Charter. The appellant argues that paragraph 19(1)(L) is fatally flawed, because he is not allowed to rebut the presumption of significant influence at inquiry. In Suresh, however, the Supreme Court took the view that the availability of a Ministerial exemption is sufficient to address the concern that innocent persons may be caught by paragraph 19(1)(f) of the Immigration Act:

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[4] Suresh v. Canada (Minister of Citizenship and Immigration), [2002] S.C.J. No. 3, 2002 SCC 1, paras. 113-128.

> [para 110] We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.[5]

The appellant was permitted to show that his continued residence in Canada will not be detrimental to Canada and that he was not involved in or responsible for gross human rights abuses. The appellant contends that the manner in which the Minister exercised her discretion in his case was procedurally unfair. The Appeal Division does not have jurisdiction to review the Minister's exercise of her discretion.[6] The appellant sought leave from the Federal Court to commence an application for judicial review of the Minister's decision, but leave was denied. In so far as section 7 of the Charter is engaged, it is sufficient that the Minister has the power to exempt persons whose admission to Canada would not be detrimental to the national interest.

Section 2(d) of the Charter: Freedom of Association

The appellant argues that his freedom of association has been infringed because he was found inadmissible by virtue of

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[5] Suresh, supra, footnote 4, para. 110.

[6] Crawford v. Canada (M.E.I.) (1987), 3Imm.L.R. (2d) 12; Elmi, Rama Ahmed v. M.C.I. (IAD TA0-01989), Sangmuah, August 27, 2001.

his association with the government of Siad Barre, as opposed to the actual influence he exerted on the exercise of government power or his participation in the crimes listed in paragraph 19(1)(L). He cites Al-Yamani,[7] for the proposition that where one is associated with an organization that serves a variety of purposes, only some which are unlawful, mere association with such an organization should not attract the sanctions imposed by paragraph 19(1)(L) and 19(1)(g). In this respect, the appellant argues the panel in Shirdon erred in concluding the paragraph 19(1)(L) does not infringe section 2(d) of the Charter because:

> Section 2(d) does not protect association for unlawful purposes or pursuing lawful objectives by unlawful means. [note Reference re: Public Service Employee Relations Act (Alberta) (1987), 38 D.L.R. (4th) 161 at 224 (S.C.C.); Alex Couture Inc. v. A.G. of Canada (1991), 83 D.L.R. (4th) 577 at 625-626 (Que. C.A.)]. Systematic or gross human rights abuses cannot be described as lawful objects.[8]

The appellant concedes that section 2(d) does not protect association for unlawful objects, but contends that the government of Siad Barre was engaged in numerous activities that were lawful, including telephone and mail services. He further argues that there is no evidence that, as Deputy Minister of Post and Telecommunications or of Mining and Water, he engaged in any unlawful activities.

The respondent contends that the approach taken in Shirdon with respect to freedom of association is correct, as associations which pursue unlawful objects are not protected by section 2(d) of the Charter. The respondent further argues that paragraph 19(1)(L) does not make membership in an organization

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[7] Al Yamani v. M.C.I.(F.C.T.D. IMM-4557-93, IMM-2197-94) November 7, 1995.

[8] Shirdon, supra, footnote 3, p. 17.

unlawful in Canada. It only provides for certain consequences in an immigration context, therefore, section 2(d) of the Charter does not apply. The latter argument is rather problematic. Paragraph 19(1)(L) was enacted by Parliament and is enforced by the government of Canada. The Charter applies to both institutions. Having regard to the jurisprudence on the application of the Charter to extradition matters,[9] it would appear that imposing sanctions on Convention refugees or permanent residents in Canada for past association with organizations outside Canada would constitute Canadian action that would attract scrutiny under section 2(d) of the Charter. It is, however, unnecessary for this panel to pronounce on this issue, because in Suresh the Supreme Court took the view the section 2(d) of the Charter does not protect unlawful conduct, such as that associated with violent activity. In so doing, the Court rejected the part lawful/part unlawful distinction that the appellant argues makes it acceptable for someone to associate with a government responsible for gross human rights abuses.

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[9] Schreiber v. Canada (Attorney General), [1998] 1 S.C.R. 841; R. v. Cook, [1998] 2 S.C.R. 597.

[para 100] Suresh argues that the Minister's issuance of the certificate under s. 40.1 of the Immigration Act and the order declaring him a danger to the security of Canada under s. 53(1)(b) on the ground that he was a member of the LTTE violate his Charter rights of free expression and free association and cannot be justified. He points out that he has not been involved in actual terrorist activity in Canada, but merely in fund-raising and support activities thatmay, in some part, contribute to the civil war efforts of Tamils in Sri Lanka. He also points out that it is not a criminal offence to belong to such an organization and that the government seeks to deport him for something that Canadian citizens may lawfully do without sanction. He suggests that inclusion of mere membership in an organization that has been or will be involved in acts of terrorism unjustifiably limits the freedom of Convention refugees to express their views on dissident movements outside the country, as well as their freedom to associate with other people in Canada who come from similar backgrounds. He points out that the alleged terrorist organizations he was found to have been a member of are engaged in many positive endeavours to improve the lives of people in Canada and are not involved in violence here.

…

[para 101] The government, for its part, argues that support of organizations that have engaged in or may assist terrorism is not constitutionally protected expression or association. It argues that constitutional rights cannot be extended to inflict harm on others. This is so, in the government's submission, even though many of the activities of the organization may be laudable. Accordingly, it says, ss. 2(b) and 2(d) of the Charter do not apply. [para104] At this point, an ambiguity in the combination of ss. 53 and 19 arises. Is the class of persons designated by the reference to s. 19 those persons who at entry were or had been associated with terrorist acts or members of terrorist organizations? Or was Parliament's intention to include those who after entry committed terrorist acts or were members of terrorist organizations? The Minister interprets s. 19, as incorporated into s. 53, as including conduct of refugees after entry.

[para 105] We do not find it necessary to resolve this ambiguity, as in our opinion on either interpretation, s. 19 as incorporated into s. 53 does not breach the rights of free expression and association guaranteed by ss. 2(b) and (d) of the Charter. If s. 19, as used in s. 53, is interpreted as referring only to conduct prior to the point of entry, no constitutional problem arises. On the other hand, if it is interpreted as referring to post-entry conduct, we are satisfied that the conduct caught by the section, interpreted properly by the Minister, fails to attract constitutional protection because it would be conduct associated with violent activity.

Applying the reasoning above, paragraph 19(1)(L) does not engage or offend section 2(d) of the Charter.

Section 15 of the Charter: Equal treatment under the law.

The appellant argues that paragraphs 19(1)(L) and 19(1.1) of the Immigration Act draw a formal distinction between senior officials of governments that have been designated by the Minister and senior officials of non-designated governments. Many non-designated governments, such as the regime of Mengistu Haile Mariam of Ethiopia (1977-1978), are also responsible for gross and systematic human rights violation but have not been designated by the Minister. Thus, the appellant contends, he is treated differently from a Deputy Minister who served the Mengistu government and that the differential treatment is based on his nationality, an enumerated ground under section 15 of the Charter. The appellant submits that it would be a rare care where differential treatment on an enumerated or analogous ground would not be discriminatory, and this is not one of those rare cases.

In Law,[10] the Supreme Court of Canada provided the following guidance with respect to analyzing claims of discrimination under section 15 of the Charter:

> [a] court that is called upon to determine a discrimination claim under section 15(1) should make the following three broad inquiries:
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> > A. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

[10] Law v. Canada (M.E.I.) (1999), 170 D.L.R (4th) 1 (S.C.C.), p.19.

> B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? and
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> C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration? The second and third enquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

It may very well be that the Minister can designate some governments other than those on the current designated list as governments described in paragraph 19(1)(L). However, paragraph 19(1)(L) does not draw a distinction on the basis of nationality. It only catches senior officials in the service of a government that is or was engaged in terrorism, systematic and gross human rights, or crimes against humanity, irrespective of their nationality. Senior officials of governments currently designated may be Afghani, Bosnian Serb, Iranian, Haitian, Rwandan, for example.[11] Designating a government under paragraph 19(1)(L) requires in depth research of the human rights record of proposed nations and consultations within the Canadian government.[12] The process necessarily takes time. There is no evidence that the regime of Siad Barre was not properly designated as government responsible for systematic and gross human rights abuses or that the designation process is arbitrary. That other regimes can also fit that description

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[11] Exhibit A-2, Citizenship and Immigration Canada, Operations Memorandum, “War Crimes and Crimes Against Humanity: Designated regimes under Section 19(1)(L) of the Immigration Act,” April 10, 2001, p. 2, Exhibit A referred to in the affidavit of Laila Demirdache.

[12] Ibid.

does not transform the distinctions drawn in paragraph 19(1)(L) into one based on nationality.

Furthermore, the purpose of section 15(1) of the Charter is to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping or prejudice. With its focus on senior officials in the service of particular kinds of governments, paragraph 19(1)(L) does not impose stereotypes on Somalis or suggest that they are less worthy of recognition.

For the reasons above the panel finds that paragraph 19(1)(L) does not offend section 15 of the Charter. Having found no breach of the appellant's Charter rights it is unnecessary to discuss section 1 of the Charter.

The appellant did not dispute that he was a senior member of the public service [paragraph 19(1.1)(d)] of the government of Siad Barre, a designated regime. Thus, the panel finds the deportation order valid in law.

Accordingly, the appeal pursuant to section 70(3)(a) of the Act is dismissed.

ORDER

The Immigration Appeal Division orders that the appeal be dismissed. The removal order made the 4th day of December, 2001, is in accordance with the law.

"Egya Sangmuah"
Egya Sangmuah

DATED at Toronto this 21st day of June, 2002.

You have the right under ss. 82.1(1) of the *Immigration Act* to apply for a judicial review of this decision, with leave of a judge of the Federal Court - Trial Division. You may wish to consult with counsel immediately as your time for applying for leave is limited under that section.