A-473-05

2006 FCA 326

Jothiravi Sittampalam (*Appellant*)

v.

The Minister of Citizenship and Immigration; the Minister of Public Safety and Emergency Preparedness (*Respondents*)

INDEXED AS: SITTAMPALAM v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.A.)

Federal Court of Appeal, Linden, Nadon and Sexton JJ.A.—Toronto, September 25; Ottawa, October 12, 2006.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Removal of Permanent Residents — Appeal from Federal Court decision upholding Immigration and Refugee Board decision to issue deportation order on grounds of organized criminality under Immigration and Refugee Protection Act, s. 37(1)(a) — Appellant alleged member of criminal gang — Act, s. 33 permitting decision maker to consider past, present, future facts when making determination as to inadmissibility — Words "being a member of an organization" in Act, s. 37(1)(a) including person not member of criminal organization at time of inadmissibility report, but member before that time — Meaning of "organization" in s. 37(1)(a) — Factors considered by Board, Federal Court supporting conclusion gang to which appellant belonged "organization" — Appeal dismissed.

Construction of Statutes — Appellant found by Immigration and Refugee Board to be member of criminal organization within meaning of Immigration and Refugee Protection Act, s. 37(1)(a) — Act, s. 33 establishing "rule of interpretation" permitting decision maker to consider past, present, future facts when making determination as to inadmissibility — Unrestricted, broad interpretation to be given to word "organization" used in s. 37(1)(a) — Provision intended to prioritize security of Canadians, tackle organized crime — Flexible approach necessary in assessing whether attributes of particular group meet requirements of Act.

This was an appeal from a Federal Court decision upholding a decision of the Immigration and Refugee Board to issue a deportation order against the appellant on the grounds of organized criminality pursuant to paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act* (IRPA). The appellant, who is a citizen of Sri Lanka, arrived in Canada in February 1990 and became a permanent resident in July 1992. Following the allegation that the appellant "is or was a member of an organization known as the A.K. Kannan gang", an inquiry under the former *Immigration Act* was commenced in January 2002, and continued under sections 36 and 37 of the IRPA. Unless he was found not to be a person described in paragraph 37(1)(*a*) of the IRPA, the appellant would be deported to Sri Lanka without a right of appeal to the Immigration Appeal Division, having regard to subsection 64(1) of the IRPA. The Board found that the appellant was inadmissible for organized criminality pursuant to paragraph 37(1)(*a*) of the IRPA because he was a member of an organization, the A.K. Kannan gang, believed on reasonable grounds to be or have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable by indictment under an Act of Parliament. On judicial review, the Federal Court upheld the Board's determination regarding the appellant's inadmissibility to Canada. The following questions were certified: (1) whether the words "being a member of an organization" in paragraph 37(1)(*a*) of the IRPA include a person who was not a member at the time of reporting but was a member before that time; (2) what constitutes an "organization" within the meaning of paragraph 37(1)(*a*) of the IRPA, and does the A.K Kannan gang fit within that meaning? The appellant also raised the issue as to whether the Federal Court erred in determining that the Board was entitled to consider certain police reports of criminal activity unsbustantiated by conviction as evidence of involvement in criminal activity and testimony.

Held, the appeal should be dismissed.

(1) The Federal Court's finding that paragraph 37(1)(*a*) of the IRPA includes a person who was member of a criminal organization before the inadmissibility report is consistent with the wording of paragraph 19(1)(*c*.2) of the former *Immigration Act* which referred specifically to those who "are or were" members. Section 33 of the IRPA reduces the necessary repetition of the phrases denoting past, present and future membership in the former Act by establishing a "rule of interpretation" that permits a decision maker to consider past, present and future facts when making a determination as to inadmissibility. Section 33 is clear that the appellant's past membership in the A.K. Kannan gang, a factual determination, could be the basis for a legal inadmissibility finding in the present. This interpretation is consistent with the purpose of the inadmissibility provisions and the IRPA as a whole, and with the case law. However, the inadmissibility rule in paragraph 37(1)(*a*) may be overcome if the permanent resident can satisfy the Minister that his presence in Canada would not be detrimental to the national interest. The first certified question was answered in the affirmative.

(2) The word "organization" is not defined in the IRPA. An unrestricted and broad interpretation should be given to the word "organization" as it is used in paragraph 37(1)(*a*). The IRPA signifies an intention to prioritize the security of Canadians, and paragraph 37(1)(*a*), in particular, is an attempt to tackle organized crime. This interpretation was supported by recent case law. In *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, the Federal Court took into account various factors, such as identity, leadership, a loose hierarchy and a basic organizational structure, in concluding that two Tamil gangs were "organizations" within the meaning of paragraph 37(1)(*a*) of the IRPA. These factors are helpful when making a determination under that provision, but no one is essential. It is necessary to adopt a rather flexible approach in assessing whether the attributes of a particular group meet the requirements of the IRPA given the varied, changing and clandestine character of criminal organizations. Such an interpretation of "organization" allows the Board some flexibility in determining whether a group may be properly characterized as such for the purposes of paragraph 37(1)(*a*). The Federal Court and the Board, correctly considered the legislation and applied the law as set out in *Thanaratnam* in the interpretation of the term "organization". Nor was there any palpable and overriding error in upholding the Board's finding that the A.K. Kannan gang is an "organization" within the meaning of paragraph 37(1)(*a*) of the IRPA.

In admissibility hearings, the Board is not bound by the strict rules of evidence. The evidence is admissible once the tribunal determines that it is credible and trustworthy. The Board considered the police source evidence credible and trustworthy in the circumstances of the case, and such a decision was entirely within its discretion. The Board is uniquely situated to assess credibility of evidence in an admissibility hearing. The appellant did not demonstrate that the Board's findings, or the Federal Court's acceptance of those facts, were perverse or capricious. The Federal Court correctly interpreted paragraph 37(1)(*a*) of the IRPA when reviewing the Board's findings.

statutes and regulations judicially considered

Criminal Code, R.S.C., 1985, c. C-46, s. 467.1(1) "criminal organization" (as enacted by S.C. 1997, c. 23, s. 11; 2001, c. 32, s. 27).

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18.1(4)(*d*) (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).

Immigration Act, R.S.C., 1985, c. I-2, ss. 19(1)(*c*.2) (as am. by S.C. 1996, c. 19, s. 83), (*f*) (as am. by S.C. 1992, c. 49, s. 11), 27(1)(*a*) (as am. *idem*, s. 16), (*d*) (as am. *idem* (F)).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(1), 33, 34, 35, 36, 37, 64(1), 173.

United Nations Convention against Transnational Organized Crime, November 2000, GA Res. 55/25.

cases judicially considered

applied:

Zündel (Re) (2005), 251 D.L.R. (4th) 511; 44 Imm. L.R. (3d) 279; 2005 FC 295; *Canada (Minister of Citizenship and Immigration) v. Singh* (1998), 151 F.T.R. 101; 44 Imm. L.R. (2d) 309 (F.C.T.D.); *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539; (2005), 258 D.L.R. (4th) 193; 339 N.R. 1; 2005 SCC 51; *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 301; (2004), 37 Imm. L.R. (3d) 96; 2004 FC 349; revd [2006] 1

F.C.R. 474; (2005), 45 Imm. L.R. (3d) 1; 333 N.R. 233; 2005 FCA 122.

considered:

Housen v. Nikolaisen, [2002] 2 S.C.R. 235; (2002), 211 D.L.R. (4th) 577; [2002] 7 W.W.R. 1; 219 Sask. R. 1; 10 C.C.L.T. (3d) 157; 30 M.P.L.R. (3d) 1; 286 N.R. 1; 2002 SCC 33; *Charkaoui (Re)*, [2005] 2 F.C.R. 299; (2004), 247 D.L.R. (4th) 405; 126 C.R.R. (2d) 298; 42 Imm. L.R. (3d) 165; 328 N.R. 201; 2004 FCA 421; revd (2007), 358 N.R. 1; 2007 SCC 9; *Hussenu v. Canada (Minister of Citizenship and Immigration)* (2004), 247 F.T.R. 137; 38 Imm. L.R. (3d) 197; 2004 FC 283.

referred to:

Veerasingam v. Canada (Minister of Citizenship and Immigration), 2004 FC 1661; *Thuraisingam v. Canada (Minister of Citizenship and Immigration)* (2004), 251 F.T.R. 282; 40 Imm. L.R. (3d) 145; 2004 FC 607.

APPEAL from a Federal Court decision ((2005), 258 D.L.R. (4th) 303; 50 Imm.L.R. (3d) 289; 279 F.T.R. 211; 2005 FC 1211) upholding a decision of the Immigration and Refugee Board to issue a deportation order against the appellant on the grounds of organized criminality pursuant to paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*. Appeal dismissed.

appearances:

Barbara L. Jackman and *Leigh S. Salsberg* for appellant.

Meilka Visnic and *Alison Engel-Yan* for respondents.

solicitors of record:

Jackman & Associates, Toronto, for appellant.

Deputy Attorney General of Canada for respondents.

The following are the reasons for judgment rendered in English by

[1] LINDEN J.A.: The issue in this appeal is whether the appellant is a member of a criminal organization so as to deny him the right of appeal to the Immigration Appeal Division (the IAD) on the question of whether he is inadmissible pursuant to paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] This is an appeal against the decision of the Federal Court, dated September 6, 2005, reported as (2005), 258 D.L.R. (4th) 303, which upheld the decision of the Immigration Division of the Immigration and Refugee Board (the Board), wherein it issued a deportation order against the appellant on the grounds of organized criminality pursuant to paragraph 37(1)(*a*) of the IRPA.

[3] The following questions were certified by the Judge:

(a) Do the words “being a member of an organization” in paragraph 37(1)(*a*) of the IRPA include a person who was not a member at the time of reporting but was a member before that time?

(b) What constitutes an “organization” within the meaning of paragraph 37(1)(*a*) of the IRPA, and does the A.K. Kannan gang fit within that meaning?

[4] The appellant raised an additional issue as to whether the Judge erred in determining that the Board was entitled to consider certain police officers’ reports and testimony, in particular evidence about alleged criminal activity that was not followed by charges or convictions.

FACTS

[5] The facts may be briefly summarized. The appellant is a 35-year-old citizen of Sri Lanka. He arrived in Canada in February 1990 and made a successful claim to be a Convention refugee. He became a permanent resident on July 17, 1992.

[6] The appellant has three criminal convictions: (1) failing to comply with a recognizance, dated January 24, 1992; (2) trafficking in a narcotic, dated July 8, 1996; and (3) obstructing a peace officer, dated February 1998. The appellant has also been investigated but never charged for gang-related occurrences for his role in numerous offences which included attempted murder, assault with a weapon, aggravated assault, possession of a weapon dangerous to the public, pointing a firearm and using a firearm to commit an offence, threatening, extortion, and trafficking.

[7] The appellant was identified by the Toronto police as the leader of A.K. Kannan, one of two rival Tamil gangs operating in Toronto. The appellant admitted his former involvement in the gang to police. He also admitted, in a statement to police on April 9, 2001, that his nickname is “A.K. Kannan”, the same name of the group of which he is alleged to be a member.

[8] The appellant was reported under paragraph 27(1)(*d*) [as am. by S.C. 1992, c. 49, s. 16(F)] of the *Immigration Act*, R.S.C., 1985, c. I-2 (repealed) (the former Act), by virtue of his drug trafficking conviction. He was subsequently reported under paragraph 27(1)(*a*) [as am. *idem*] and 19(1)(*c*.2) [as am. by S.C. 1996, c. 19, s. 83] of the former Act as a person for whom there are reasonable grounds to believe is engaged in activity planned and organized by a number of persons acting together to commit criminal offences. The allegation was that the appellant “is or was a member of an organization known as the A.K. Kannan gang”.

[9] An inquiry under the former Act commenced in January 2002. When the IRPA came into force in June 2002, the inquiry continued under sections 36 and 37 of the IRPA. The appellant conceded that he was a person described in section 36 due to his drug trafficking conviction, but he disputed the organized criminality allegation.

[10] The importance of the inquiry to the appellant was that, unless he was found not to be a person described in paragraph 37(1)(*a*) of the IRPA, the appellant would be deported to Sri Lanka without a right of an appeal to the IAD, having regard to subsection 64(1) of the IRPA.

[11] The Board made a finding on October 4, 2004 that the appellant is inadmissible for organized criminality pursuant to paragraph 37(1)(*a*) of the IRPA because he was a member of an organization, the A.K. Kannan gang, believed on reasonable grounds to be or have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable by indictment under an Act of Parliament. Being unable to appeal to the IAD, the appellant applied for judicial review to the Federal Court.

[12] On judicial review, the Federal Court Judge upheld the Board’s determination regarding the appellant’s inadmissibility to Canada. That decision is the subject of this appeal.

STATUTORY SCHEME

[13] The provisions in the IRPA most relevant to this appeal are as follows.

3. (1) The objectives of this Act with respect to immigration are

. . .

(*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;

(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

. . .

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

. . .

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for:

(*a*) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

(2) The following provisions govern subsection (1):

(*a*) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and

(*b*) paragraph (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

ANALYSIS

Issue No. 1: “being” a member of an organization

[14] The first certified question concerns whether the words in paragraph 37(1)(*a*) “being a member” include a person who was not a member of a criminal organization at the time of the inadmissibility report, but was a member before that time.

[15] This requires the Court to assess the proper interpretation of the language in paragraph 37(1)(*a*) of the IRPA. The interpretation of statutes is generally considered to be a question of law; therefore, the standard of review to be applied on this appeal of the case is correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paragraph 8.

[16] The Federal Court Judge held that paragraph 37(1)(*a*) includes a person who was a member of a criminal organization before the inadmissibility report. For the following reasons, I agree.

[17] First, this meaning is consistent with the wording of the former Act. Paragraph 19(1)(*c*.2) of the former Act specifically referred to those who “are or were members”. It read:

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;

[18] One of Parliament's objectives when enacting the IRPA was to simplify the former Act. Section 33 does just that: it reduces the necessary repetition of the phrases denoting past, present and future membership in the former Act by establishing a "rule of interpretation" that permits a decision maker to consider past, present and future facts when making a determination as to inadmissibility.

[19] If one were to interpret paragraph 37(1)(*a*) as including only present membership in an organization, it would, in effect, render section 33 redundant. The Board said (at page 49), and I concur, that consideration of evidence of a person's history and future plans would be relevant to the question of whether a person is currently a member of an organization described in section 37, even without codification to such effect in legislation.

[20] In my view, Parliament must have intended section 33 to have some meaning. The language of section 33 is clear that a present finding of inadmissi-bility, which is a legal determination, may be based on a conclusion of fact as to an individual's past membership in an organization. In other words, the appellant's past membership in the A.K. Kannan gang, a factual determination, can be the basis for a legal inadmissibility finding in the present.

[21] Second, this interpretation is consistent with the purpose of the inadmissibly provisions and the IRPA as a whole. The inadmissibility provisions have, as one of their objectives, the protection of the safety of Canadian society. They facilitate the removal of permanent residents who constitute a risk to Canadian society on the basis of their conduct, whether it be criminality, organized criminality, human or international rights violations, or terrorism. If one were to interpret "being a member" as including only present membership in an organization described in paragraph 37(1)(*a*), this would have a contrary effect, by narrowing the scope of persons who are declared inadmissible, thereby increasing the potential risk to Canadian safety.

[22] Third, if the Court were to interpret "being a member" as including only current members, it would lead to absurd results that could not have be intended by Parliament. This would mean that sections 34 (terrorism/security), 35 (crimes against humanity), and 37 (organized criminality) of the IRPA, all of which use the wording "being a member" or "being a prescribed senior official," would only refer to <u>current</u> circumstances.

[23] Such an interpretation would also mean that a former member of the Nazi party in Germany could not be found inadmissible because the Nazi party no longer exists, so that he is no longer a member. It would mean that a member of an international terrorist organization could renounce his or her membership immediately prior to making a refugee claim, and would not be inadmissible because he is not a current member of a terrorist organization. It would also mean that a person who spends 10 years as a member of an organization engaged in criminal activities within Canada could withdraw from the organization before being reported under the IRPA and avoid a finding of inadmissibility.

[24] Fourth, the jurisprudence supports this interpretation. In *Zündel (Re)* (2005), 251 D.L.R. (4th) 511 (F.C.), the Federal Court addressed whether past wrongdoing can constitute the basis for inadmissibility under section 34 of the IRPA. Pursuant to paragraph 34(1)(*f*), a person can be found to be inadmissible for "<u>being a member</u> of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*) [espionage], (*b*) [subversion by force of any govern-ment] or (*c*) [terrorism]." Blais J. held (at paragraph 18) that an admissibility determination under section 34 cannot be restricted to present circumstances. Pursuant to section 33, "the [Minister] can provide evidence or information of past, present or anticipated future circumstances of . . . inadmissibility on security grounds."

[25] More recently, in *Charkaoui (Re)*, [2005] 2 F.C.R. 299 (F.C.A.), appeal to the Supreme Court of Canada [reversed on (2007), 358 N.R. 1, 2007 SCC 9] granted, this Court was concerned with whether there were reasonable grounds to believe that Charkaoui was inadmissible pursuant to section 34 on account of being a member of a terrorist organization. Décary and Létourneau JJ.A. stated (at paragraph105): "inadmissi-bility must be based, under section 33 of the IRPA, on the Minister's reasonable grounds to believe that the acts or omissions referred to in sections 34 to 37 have occurred, are occurring or, if preventive considerations are involved, may occur."

[26] This issue was also addressed by Russell J. in the decision of *Hussenu v. Canada (Minister of Citizenship*

and Immigration) (2004), 247 F.T.R. 137 (F.C.). There, Hussenu argued that he was not inadmissible under paragraph 34(1)(*f*) of the IRPA because he had ceased to be a member of the Eritrean Liberation Front immediately prior to making a refugee claim. The Court denied the appeal, stating (at paragraph 39):

Section 34(1)(*f*) of IRPA does use the words "being a Member of an organization . . .," but s. 33 specifically provides that " . . . facts that constitute inadmissibility under ss. 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts from which there are reasonable grounds to believe that they have occurred, are occurring or may occur." [emphasis added]. If the Applicant's argument concerning s. 34(1)(*f*) were correct on this issue, then s. 34 would not apply to a terrorist who resigns his or her membership in a terrorist organization immediately prior to making a refugee claim. It could not have been Parliament's intent to exclude such an applicant from the purview of s. 34(1)(*f*) and s. 33 makes this position clear.

[27] The appellant submits that an interpretation of paragraph 37(1)(*a*) as including past members would not permit absolution for persons who were associated with criminal organizations in the past, realized that it is not what they wanted to do with their life, and genuinely withdrew without having engaged in criminal activity.

[28] This argument is not persuasive. Subsection 37(2) of the IRPA is intended to alleviate the harshness of the inadmissibility rule where, as the appellant suggests, there is evidence of a person's genuine withdrawal from membership. Provided the permanent resident can satisfy the Minister that his or her presence in Canada would not be detrimental to the national interest, the inadmissibility rule in paragraph 37(1)(*a*) could be overcome.

[29] Based on all of the above, I answer the first certified question in the affirmative.

Issue No. 2: The meaning of "organization"

[30] The second certified question in this appeal requires the Court to determine what constitutes an "organization" within the meaning of paragraph 37(1)(*a*), and in particular, does the A.K. Kannan gang fit within that meaning?

[31] The answer to the first part of the question, the proper meaning of the word "organization" in view of paragraph 37(1)(*a*), is a legal determination and is to be reviewed on a correctness standard: *Housen*, at paragraph 8.

[32] The answer to the second part of the question, whether the A.K. Kannan gang falls within the meaning of "organization" for the purposes of paragraph 37(1)(*a*), is a mixed question of fact and law; it involves applying the legal standard to the facts and evidence in each particular case. In *Housen*, at paragraph 36, the Supreme Court said:

Matters of mixed fact law lie along a spectrum. Where, for instance, an error. . .can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. . . . Where the legal principle is not readily extractible, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[33] Unless this Court finds that the Judge incorrectly characterized the law as regards paragraph 37(1)(*a*), the Judge's decision that the A.K. Kannan gang falls within the meaning of "organization" will not be reviewed in the absence of a palpable and overriding error: *Housen*, at paragraph 10.

(a) The legal question: meaning of "organization"

[34] The word "organization" is not defined in the IRPA. The appellant submits that the lack of a statutory definition creates a danger of courts over-reaching to cover the broadest range of criminal action that may appear to be taken in association with others. According to the appellant, a precise definition is required given the serious consequences of inadmissibility and the fact that membership alone constitutes inadmissibility. In reliance on international law and criminal jurisprudence, the appellant argues that for the purpose of paragraph 37(1)(*a*), an "organization" must, at minimum, have a common criminal purpose and a sufficient structure to allow the benefits

of its illegal conduct to be shared.

[35] In contrast with this submission, in the case of *Canada (Minister of Citizenship and Immigration) v. Singh* (1998), 151 F.T.R. 101 (F.C.T.D.), Rothstein J., as he then was, held that the term "member" (of an organization), found in subparagraph 19(1)(*f*)(iii) [as am. by S.C. 1992, c. 49, s. 11] of the former Act, dealing with terrorism and espionage threats to Canadian security, was to be given an unrestricted and broad interpretation. He said, at paragraph 52:

The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not easily identifiable. . . . I think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation. I find no support for the view that a person is not a member as contemplated by the provision if he or she became a member after the organization stopped engaging in terrorism.

[36] In my view, the same "unrestricted and broad" interpretation should be given to the word "organization" as it is used in paragraph 37(1)(*a*). The IRPA signifies an intention, above all, to prioritize the security of Canadians. This was confirmed by the Supreme Court of Canada in the decision of *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, at paragraph 10:

The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. . . . the objectives of the *IRPA* and its provisions concerning permanent resident, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

[37] Paragraph 37(1)(*a*) appears to be an attempt to tackle organized crime, in recognition of the fact that non-citizen members of criminal organizations are as grave a threat as individuals who are convicted of serious criminal offences. It enables deportation of members of criminal organizations who avoid convictions as individuals but may nevertheless be dangerous.

[38] Recent jurisprudence supports this interpretation. In *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 301 (F.C.), reversed on other grounds, [2006] 1 F.C.R. 474 (F.C.A.), O'Reilly J. took into account various factors when he concluded that two Tamil gangs (one of which was the A.K. Kannan gang at issue here) were "organizations" within the meaning of paragraph 37(1)(*a*) of the IRPA. In his opinion, the two Tamil groups had "some characteristics of an organization", namely "identity, leadership, a loose hierarchy and a basic organizational structure" (at paragraph 31). The factors listed in *Thanaratnam*, as well as other factors, such as an occupied territory or regular meeting locations, both factors considered by the Board, are helpful when making a determination under paragraph 37(1)(*a*), but no one of them is essential.

[39] These criminal organizations do not usually have formal structures like corporations or associations that have charters, by-laws or constitutions. They are usually rather loosely and informally structured, which structures vary dramatically. Looseness and informality in the structure of a group should not thwart the purpose of the IRPA. It is, therefore, necessary to adopt a rather flexible approach in assessing whether the attributes of a particular group meet the requirements of the IRPA given their varied, changing and clandestine character. It is, therefore, important to evaluate the various factors applied by O'Reilly J. and other similar factors that may assist to determine whether the essential attributes of an organization are present in the circumstances. Such an interpretation of "organization" allows the Board some flexibility in determining whether, in light of the evidence and facts before it, a group may be properly characterized as such for the purposes of paragraph 37(1)(*a*).

[40] With respect to the appellant's argument that criminal jurisprudence and international instruments should inform the meaning of a criminal "organization", I disagree. Although these materials can be helpful as interpretive aides, they are not directly applicable in the immigration context. Parliament deliberately chose not to adopt the definition of "criminal organization" as it appears in subsection 467.1(1) [as enacted by S.C. 1997, c. 23, s. 11;

2001, s. 32, s. 27] of the *Criminal Code*, R.S.C., 1985, c. C-46. Nor did it adopt the definition of "organized criminal group" in the *United Nations Convention against Transnational Organized Crime* [November 2000, GA Res. 55/25] (the Convention). The wording in paragraph 37(1)(*a*) is different, because its purpose is different.

[41] In this case, the Judge, as did the Board, correctly considered the legislation and applied the law as set out in *Thanaratnam*, in the interpretation of the term "organization." Accordingly, I find no error of law relating to the first part of the certified question.

(b) The factual question: on the facts of this case, is the A.K. Kannan gang an "organization"?

[42] With respect to the second part of the certified question, the appellant argues that the Judge committed a palpable and overriding error when he upheld the Board's decision that the A.K. Kannan gang is an organization within the meaning of paragraph 37(1)(*a*). I disagree.

[43] The Board considered the evidence before it and found that there were six relevant *indicia* of "organization" for the A.K. Kannan gang in this case: leadership, an elementary form of hierarchy, the giving of instructions from a leader, a specific and identifying name, an occupied territory, and chosen locations for meeting within their specified territory in Ontario. The Board concluded that all of the evidence taken together was sufficient to conclude that A.K. Kannan was an organization, and the Judge, considering the evidence related to most of the same factors, upheld this decision.

[44] The appellant submits that the Board ignored his testimony that there was no organization and ignored a report prepared for the Canadian Tamil Youth Development Centre (the CTYDC report), which characterizes Tamil gangs as loose associations with no organizational structure.

[45] The Board concluded that the appellant was not a credible witness, and gave detailed reasons for its conclusion. Further, the Board considered the CTYDC report and discussed it within its reasons. The Board was entitled to weigh the report and give it little effect in the context of the conflicting evidence. The appellant has failed to show that the Board's decision was perverse or irrational.

[46] Accordingly, the Judge did not commit any palpable and overriding error in upholding the Board's finding that the A.K. Kannan gang is an "organization" within the meaning of paragraph 37(1)(*a*) of the IRPA.

Issue 3: Evidence of Organized Criminal Activity

[47] Paragraph 37(1)(*a*) of the IRPA applies where an organization of which one is a member is believed on reasonable grounds to be or have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment.

[48] The appellant argues that the Judge erred when he held that the Board was entitled to give weight to the police reports of criminal activity, unsubstantiated by conviction, as evidence of his, or the organization's, involvement in criminal activity.

[49] In admissibility hearings the Board is not bound by the strict rules of evidence. Once the tribunal determines that the evidence is credible and trustwor-thy then it is admissible, and the question of how the evidence was obtained becomes relevant merely as to the weight attached to the evidence: section 173 of the IRPA.

[50] The jurisprudence of this Court indicates that evidence surrounding withdrawn or dismissed charges can be taken into consideration at an immigration hearing. However, such charges cannot be used, in and of themselves, as evidence of an individual's criminality: see, for example, *Veerasingam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1661, at paragraph 11; *Thuraisingam v. Canada (Minister of Citizenship and Immigration)* (2004), 251 F.T.R. 282 (F.C.), at paragraph 35.

[51] In this regard, I agree with the Judge that the Board did not rely on the police source evidence as evidence of

the appellant's wrongdoing. Rather, it considered the circumstances underlying the charges and contemplated charges—including the frequency of the appellant's interactions with the police and the fact that others involved were often gang members—to establish that there are "reasonable grounds to believe," a standard that is lower than the civil standard, that the A.K. Kannan gang engages in the type of activity set out in paragraph 37(1)(*a*).

[52] The appellant also submits that the police source evidence in this case is not credible and reliable evidence. Many of the police reports were made before a proper investigation, and were not supported by the testimony of the police officers and witnesses that were involved. Further, the appellant argues that the evidence hinted that the police lacked objectivity; that their view of the appellant was biased.

[53] In this regard, I find that the Board considered the police source evidence credible and trustworthy in the circumstances of the case, and such a decision is entirely within its discretion. The Board is uniquely situated to assess credibility of evidence in an inadmissibility hearing; credibility determinations are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence: *Federal Courts Act*, R.S.C., 1985, c. F-7 [section 1 (as am. by S.C. 2002, c. 8, s. 14)], paragraph 18.1(4)(*d*) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27].

[54] The appellant has not demonstrated that the Board's findings, or the Judge's acceptance of those facts, were perverse or capricious. Therefore, I find no reviewable error in respect of this issue.

[55] I am satisfied that the Judge correctly interpreted paragraph 37(1)(*a*) of the IRPA when reviewing the Board's findings. I would answer the certified questions as follows:

(a) The phrase "being a member of an organization" in paragraph 37(1)(*a*) of the IRPA includes a person who was not a member at the time of the reporting, but was a member before that time.

(b) The word "organization", as it is used in paragraph 37(1)(*a*) of the IRPA, is to be given a broad and unrestricted interpretation. While no precise definition can be established here, the factors listed by O'Reilly J. in *Thanaratnam*, by the Board member, and possibly others, are helpful when making a determination, but no one of them is an essential element. The structure of criminal organizations is varied, and the Board must be given flexibility to evaluate all of the evidence in the light of the legislative purpose of the IRPA to prioritize security in deciding whether a group is an organization for the purpose of paragraph 37(1)(*a*). The A.K. Kannan gang, as found by the Board and the Judge, fits within this meaning.

[56] For these reasons, I would dismiss the appeal.

NADON J.A.: I agree.

SEXTON J.A.: I agree.