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Reasons and Decision – Motifs et décision

Between	The Minister of Public Safety Le ministre de la Sécurité publique	Entre
And		et
Person(s) Concerned	Malyvan KORASAK	Intéressé(e)(s)
Date(s) of Hearing	May 16, 2018	Date(s) de l'audience
Place of Hearing	Vancouver, B.C.	Lieu de l'audience
Date of Reasons	October 25, 2018	Date de la motifs
Panel	M. McPhalen	Tribunal
Counsel for the Minister	R. Friesen	Conseil du ministre
Counsel for the Person(s) Concerned	R. Kincaid, Barrister and Solicitor	Conseil(s) pour l'intéressé(e) / les intéressé(e)(s)

REASONS FOR DECISION

INTRODUCTION

[1] Immigration officials (the Minister) have alleged that Ms. Korasak is a permanent resident who is inadmissible to Canada for organized criminality under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act* (IRPA). That paragraph reads as follows:

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

BACKGROUND

[2] Ms. Korasak is a citizen of Laos and a permanent resident of Canada

[3] Counsel admits that Ms. Korasak's husband, Kham-song Phaysith (at times referred to as Brother Song, Song and Cam), ran a cocaine trafficking ring in Regina.

[4] It is apparent from the evidence that drugs were transported from Vancouver to Regina, the drugs were stored in stash houses in Regina and then the drugs were sold to street level dealers. Police in Regina learned about the operation of the gang through anonymous tips, surveillance and wire taps. Much of their information came from wiretaps of phones used by the person concerned and her husband. Police in Regina conducted Operation Faisan to investigate the gang. Operation Faisan resulted in Ms. Korasak, her husband and a number of other people being arrested and charged on September 12, 2002. Ultimately most of those arrested were not convicted; charges were stayed because of problems with the prosecution of the case. The charges against Ms. Korasak were stayed.

STANDARD OF PROOF

[5] According to section 33 of the IRPA the standard of proof with respect to this allegation is “reasonable grounds to believe”. This is a significantly lower standard than the criminal standard of “beyond a reasonable doubt” and even a lower standard than that in civil matters, the “balance of probabilities”.

[6] The “reasonable grounds to believe” standard has been confirmed by the Supreme Court of Canada¹ as requiring something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information. This standard applies to questions of fact.

ISSUE

[7] Counsel admits that Ms. Korasak’s husband ran a criminal organization. The only issue to be determined is whether Ms. Korasak was a member of the criminal organization.

THE MINISTER’S CASE

[8] The Minister entered hundreds of pages of wiretap evidence. Some of the most useful information into the workings of the gang came from wiretaps of phones belonging to Ms. Korasak and her husband. A woman using those phones had lengthy conversation with friends and relatives about her husband’s drug trafficking operation, about gang members being caught with drugs and about asking her husband to quit his life of crime. The person concerned claims that is not her talking on the phone, yet she admits the only females living in home were herself and her daughter and she says the female speaking in the wiretapped conversations was not her daughter. I am satisfied that the female person talking on the phone was the person concerned and I find that her explanation that it was not her, is not credible.

[9] Ms. Korasak was charged in relation to her husband’s drug trafficking operation.² It is important to note that the charges were eventually stayed.

¹ *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40

² Ex. C-1, p. 32

[10] The police seized \$62,000 from residence in Surrey where she lived with her husband.

[11] Ms. Korasak was listed as being among the targets of Operation Faisan.

[12] The Minister points to a translated phone conversation at Ex. C-3, p. 19. It appears to be conversation between the person concerned and her brother, Vilaysith Korasak. The person concerned is referred to as V and her brother is referred to as UM. She appears to be telling him what to do when he starts working for her husband:

V: Stay at the house when they come to get the stuff. You stay there and wait.

UM: Mm...

V: When Joy brings the money, he comes to get the stuff from the house. You don't sell to anybody else. Only Joy and Xieng come, then you give them the stuff, they give you the money, then you jot it down. Just stay there with Tou until they go home.

UM: Mm...

V: The sellers are ...

UM: I'm going up there tomorrow.

V: Hm?

I'm going up there tomorrow. He told me to go up there on Friday.

V: Is that right?

UM: Yeah.

[13] The Minister referred to another transcribed conversation purporting to be between the person concerned and Vilasith found at Ex. C-3, p. 21:

V: If you are going, tell Hath if people ask for you, to tell them that he's gone to Laos.

S: Hm?

V: Tell him to tell them that you've gone to Laos.

S: Yeah?

V: Yeah, because we don't want them to know that you go there.

[14] According to the Minister this conversation appears to be the person concerned telling her brother that when he goes to Regina to work for her husband he should tell someone called Hath to tell people who ask for him that he has gone to Laos.

[15] There is a transcribed conversation between Ms. Korasak and an unknown person at Exhibit C-3 p. 8. Ms. Korasak is telling the other person that she wants her husband to quit selling drugs or she wants a divorce. She says that her husband does not want to quit, but he does not want to separate either. He wants to have someone called Seuth run the operation for him. Toward the bottom of the page Ms. Korasak says "If something happen.... it's not that I'm just afraid.... one of us is in jail and that other one is out here...."

[16] The Minister submits that Ms. Korasak was worried that she or her husband might go to jail. She knew how the operation was run, she told the other person that her husband does not have to do anything, he just waits until the money is collected and he brings it back. He hired someone else to take the stuff there in a separate car. According to the Minister, if Ms. Korasak was afraid that she might go to jail, it would be because she was involved in her husband's criminal organization.

[17] At Ex. C-3, p. 51 there is a transcript of conversation that is allegedly between Chay Chansy and Ms. Korasak. This is significant because Mr. Chansy has been found inadmissible for organized criminality by this Division for his role in Ms. Korasak's husband's criminal organization. Mr. Chansy says he is coming to see the boss. Ms. Korasak tells him not to come yet. In the conversation V is Ms. Korasak and J is Mr. Chansy:

J: Is the boss still sleeping?

V: No he's up. Want to talk to him?

J: No, I'm coming to see him.

V: Coming to see him where? He hasn't gone back there yet. We just came here.
Hah?

J: Where are you?

V: We just came here this morning.

J: I'm coming to see you there. (in bg Kham - unintel).

V: He's coming here, you know? (in bg K - Where?)

V: Over here. (In bg K - Don't come here yet.)

V: Don't come here yet. We are going back there soon.

J: (Unintel).

V: Hello. Hah? All the flowers are there. We're going soon. We came to pick Adam up. We'll call you when we get there, ok?

J: Yes.

[18] According to the Minister “flowers” is code for “cocaine”. The Minister submits that this conversation demonstrates that Ms. Korasak is able to order around members of her husband’s gang, such as Mr. Chansy.

[19] The Minister referred to yet another transcribed conversation found at Ex. C-4, p.3. This is a translated conversation between the person concerned and an unknown person, Noy, who police believe may be PC’s cousin. N is Noy and M is Ms. Korasak. Part of the conversation reads:

N: He can quit right?

M: Oy! Who’s going to... he’s into on his own, don’t belong to any gang... He’s boss to all of them right now.

N: Ooh...

M: His own money, he didn’t have any money, so he borrowed from the Vietnamese, 100 to 15... let me tell you. His brother borrowed for him too and gave him the car money. Right now he’s their big boss.

N: I’m just worry they might come kill you guys.

M: He’s not part of any gang, this is all our’s, we can quit whenever, no one will care.. just afraid of the police.

N: I want to do it too, just make enough money and quit.

M: Helping him package them I get paid too... like when he’s about to go back there, he would package them. I was going to get Somphone to help out, but worried that she might tell.

[20] The Minister submits that this conversation shows that the person concerned was packaging cocaine for her husband’s operation and that she had considered bringing another person into the organization to help out.

[21] Minister referred to other phone conversations involving the person concerned which showed that she knew on almost day to day basis what was going on with her husband’s gang.

[22] According to the Minister the above evidence shows Ms. Korasak knew all about the gang, she directed people in the gang as to what to do, for example her brother and Mr. Chansy, she packaged drugs for the gang and therefore she is a member of her husband’s criminal organization.

THE PERSON CONCERNED'S CASE

[23] Ms. Korasak's counsel submitted that although Ms. Korasak's husband ran a drug trafficking ring and she knew about the operation, that she was not member of the organization.

[24] Although she was a target of Project Faisan, police do not describe her as having role in the organization in their overview of the targets, a document describing what the various players do. In this summary document the police describe what role each person played in the organization, with the exception of the person concerned. All that the police say about her is that she was a target of Project Faisan, that she knew about her husband's drug dealing and that much has been learned about her husband's travels from her phone conversations.³

[25] Counsel notes that in many of wiretaps she talks of trying to get her husband to quit drug trafficking. He characterizes her as an outsider trying to get her husband to quit the criminal organization, rather than a member.

[26] Counsel drew my attention to the reasons why the criminal charges against his client and her husband were stayed and pointed out that the some of the problems which affected the criminal prosecution are problematic in the admissibility hearing as well. He referred to Ex. C-, p. 131 which is a letter from an ad hoc prosecutor to a CBSA officer explaining why the charges were stayed "As mentioned to you, it was a difficult file for a number of reasons. There was extensive wiretap (over 28,000 calls in Laotian, including Laotian slang).

[27] Counsel also referred to the second page of the letter:

Based on many factors, including the complexity of the wiretap, the language and interpreter problems (my emphasis), the delay involved and just the strength of the case in general, it was determined that if the defendants would forfeit all proceeds seized, the Crown was prepared to direct a Stay of Proceedings on all charges.

[28] The taped conversations were in Laotian, they were translated into English and then transcribed. What was before me and what was provided to counsel were the English transcripts. Counsel and the person concerned wished to listen to tapes of conversations in Laotian to verify

³ Ex. C-1, p. 36, para. 11

whether the translations were accurate. Those tapes were not available. Counsel submits that this evidence not reliable.

Analysis

[29] I am satisfied that the Ms. Korasak's husband ran a criminal organization involving three or more people with defined roles working together to make money by selling cocaine. Ms. Korasak's brother "Sith" ran stash house where cocaine was "cooked" to produce crack cocaine. He was also involved in packaging the cocaine, providing it to gang members who sold it and he collected money from those sellers. Other members of gang transported cocaine to Regina and brought money back to Vancouver.

[30] The person concerned was charged with a number of criminal offences related to her husband's criminal operation, yet in describing roles of participants, RCMP Officer Gray says nothing about what the person concerned did in the operation. Officer Gray's description reads:

Kham song Phaysith makes regular trips to Regina from his home in Surrey, British Columbia. Phaysith's wife, Malyvanh Korasak, knows about his drug dealings and much has been learned from her conversations as to Kham song's travels. Phaysith appears to be the boss of the Regina operation and is supplied with cocaine by a yet unknown person in British Columbia. Phaysith has frequent conversations in Laotian with the other targets where he discusses aspects of his illegal activities.⁴

[31] This description does not suggest that Ms. Korasak played a role in the trafficking operation,.

[32] Out of thousands of intercepted conversations the ones pointed out by the Minister are the only ones that suggest the person concerned might have had a role in the operation. She was not hesitant to talk on phone about her husband's criminal operation. If she had a role in the operation, I would have expected to see more conversations about it.

[33] The Minister alleges that the conversation between Ms. Korasak and her brother, "Sith", in which he speaks of going to work for her husband, shows that she could tell Sith what to do within her husband's criminal organization.⁵ However seen in the context of a conversation

⁴ Ex. C-1, p. 36, para. 11

⁵ Ex. C-3, p. 19

between a brother and sister, the conversation may be no more than a sister warning her brother about how to act on first day of job at a business about which she knows a great deal. In the conversation V. is Ms. Korasak and UM is her brother. The first part of the conversation reads:

V: Did you call brother Song?

UM: Yes I did, I already asked him.

V: When did he tell you to go?

UM: He said Friday.

V: What do you thing (sic) you will do?

UM: Don't know. He told me to go, I go. I'd do whatever. He told me to go.

V: Maybe he wants you to take care of the house because that brother quit.

UM: Who?

V: Brother Seuth.

[34] Although Ms. Korasak knew a lot about the criminal organization, she did not know when her brother would be leaving to join the organization nor did she know what he would be doing. This does not fit with the Minister's theory that she has a role in the organization and can give people like her brother orders.

[35] The Minister points to a further conversation between Ms Korasak and her brother at Ex. C-3 p. 21 in which the Minister alleges that she is giving her brother orders about what to tell his roommate when he leaves for Regina. She tells him to tell his roommate to tell people that he has gone to Laos. Again this may be no more than a sister giving her brother advice about a situation. Later in the same conversation she says "That's why I told you to say you are going to Laos." Sith replies "Say go to Laos, who would believe that? I'd say I go somewhere else. Go to Toronto or somewhere else." To this V replies: "Mm wherever." It seems that Ms. Korasak's brother is not required to follow her suggestion. I do not conclude from this conversation that she can order her brother around or that she is part of her husband's operation.

[36] The Minister alleges that Ms. Korasak's conversation at Ex. C-3 p. 8 in which she worried that she or her husband might go to jail, shows that she is a member of his organization and that she was worrying that she might go to jail for being a member of a criminal organization. She was worrying that she or her husband might go to jail. She may have been worrying that she might go

to jail for reasons other than engaging in organized crime; she appeared to be supported by her husband's criminal activities. She was profiting from the proceeds of crime. The fact that she was worried about going to jail does not mean that she considered herself to be a member of the gang. She may have thought she might go to jail for possession of the proceeds of crime contrary to s. 354(1)(a) of the Criminal Code and in fact she was charged with that offence.

[37] I note that Ms. Korasek did not offer these possible explanations for the telephone calls. She simply denied making them at all. I find that she was not credible on this point, but I have to consider whether there are explanations for the telephone calls other than what the Minister has suggested.

[38] At Ex. C-3, p. 51 there is a transcript of a conversation that Ms. Korasak had with Mr. Chansy. Mr. Chansy's nick name is Joy and he was found by the Immigration Division to be a member of Ms. Korasak's husband's gang. In the conversation V is Ms. Korasak and J is Mr. Chansy. The conversation reads in part:

J: Is the boss still sleeping?

V: No, he's up. Want to talk to him?

J: No, I'm coming to see him.

V: Coming to see him where? He hasn't gone back there yet. We just came here. Hah?

J: Where are you?

V: We just came here his morning.

(in bg Kham – (unintel).

V: He's coming here, you know?

(In bg K – Where?)

V: Over here.

(in bg K – Don't come here yet.)

V: Don't come yet. We are going back there soon.

J: (Unitell)

V: Hello. Hah? All the flowers are there. We're going soon. We came to pick Adam up. We'll call you when we get there, ok?

J: Yes.

[39] According to the Minister this conversation demonstrates that Ms. Korasak can tell Mr. Chansy what to do, which suggests that she is a member of her husband's gang. Compare this with a similar scenario involving a non-criminal boss. Suppose someone working for that boss calls and the boss's wife answers the phone, the caller wants to meet the boss at a certain location, the wife says "Don't come yet, we are going back there soon, we'll call you when we get there". This would not necessarily mean that the wife is able to give orders to caller. The wife may simply be ensuring that the caller does not get to the meeting location before boss arrives. Furthermore the "in bg Kham) unintell (in bg K – where?)" may indicate Ms. Korasak's husband, Kham song, telling her what to say. The person in the background says "Don't come here yet" and immediately Ms. Korasak repeats that phrase.

[40] It is very clear from conversations such as the one beginning on p. 8 of Ex. C-3, p.8 that Ms. Korasak knew a lot about her husband's organization. She knew that he was the boss, that he wanted someone called Seuth to run the organization for him, that the person taking over the operation would have a house that they could live in for free with her husband paying all of the expenses such as water and hydro. She knew that her husband did not owe money to anyone for the drugs and that when he started his operation he borrowed money from the Vietnamese at fifteen per cent interest. Many wives of businessmen know a lot about their husband's work, that fact alone does not make them part of their husband's organization.

[41] The Minister referred to a quotation from *Amaya v. Canada (the PSEP)* 2007 FC 549, which could be interpreted as meaning that knowledge of the illegal operations of a gang is sufficient to amount to "membership". At paragraph 30 the Court writes: "In sum, even if the Applicant himself did not engage in the criminal activities, if he had knowledge of the activities, it would appear that he met the requirements of membership." But this must be taken in context, the Court goes on to write "Knowledge of the gang's activities would appear sufficient to satisfy any mens rea requirement." (my underlining)

[42] The first statement "if he had knowledge of the activities, it would appear that he met the requirements of membership" is not authority for the proposition that mere knowledge of a gang's illegal activities is enough to make a person a member of a gang. The statement has to be seen in the context of Mr. Amaya's case.

[43] Mr. Amaya admitted to being initiated into a clique of the MS -13 gang in 1992, he remained in the gang until 1996 or 1997. He attended gang meetings, he visited a gang member in jail, he tried to recruit members for the gang and actually did recruit one person. He knew about the gang's illegal activities, but said that he never participated in the illegal activities. He argued that he did not have the necessary mens rea to be a member of the gang. What the Court is saying is that where a person has participated in gang activities to the extent that Mr. Amaya did, then knowledge of the gang's illegal activities will satisfy any mens rea requirement that there may be in "membership". That is not the same as saying that merely knowing a lot about a gang without involving oneself in its activities amounts to membership. If that were so, a police officer who has expert knowledge of a criminal gang's activities, would be a member of the gang.

[44] Possibly most damaging telephone call referred to by the Minister is a conversation between Ms. Korasak and someone called Noy. The conversation is found at Ex. C-4, p. 3; M is Ms. Korasak and N is Noy:

M: He's not part of any gang, this is all our's, we can quit whenever, no one will care...just afraid of the police.

N: I want to do it too. Just make enough money and quit.

M: Helping him parckage (sic) them I get paid too ... like when he's about to go back there he would package them. I was going to get Somphone to help out, but worried she might tell.

[45] It may be that Ms. Korasak is telling Noy that she packages cocaine for the gang and that she considered recruiting another person to help out. If that is established as a fact it tends to show that Ms. Korasak is member of the gang.

[46] None of the police descriptions of the workings of the trafficking operation say that Ms. Korasak packaged cocaine for the gang. The police do mention that Sith and Tho packaged cocaine for the gang, so clearly the police consider the packaging of cocaine to be worth mentioning.⁶ If the police believed that Ms. Korasak packaged cocaine, I would have expected them to say so. With over 28,000 phone calls intercepted, I would also have expected that if Ms. Korasak packaged cocaine for the gang, there would have been more than one phone call in which Ms. Korasak spoke

⁶ Ex. C-1, p. 36, paras 13 and 14.

of packaging cocaine. She was not at all hesitant to speak about her husband's criminal organization on the phone. If she was packaging cocaine, I would have expected more conversations on that subject.

[47] The conversation between Ms. Korasak and Noy was translated from Laotian to English. The Minister's case is primarily based on transcripts. Telephone calls in Laotian were intercepted and recorded, the recordings were translated into English and then transcribed. The Minister was not able to make original tapes available to Ms. Korasak and her counsel so that they could check the accuracy of the interpretation and the English transcripts. Because she requested but was not given the tapes of the phone conversations, the person concerned was unable to check whether the original phone calls were translated accurately or whether the translations were accurately transcribed. In addition to the tapes being unavailable to the person so she could check accuracy of interpretation, there were issues with translation. The letter from the ad hoc prosecutor to CBSA starting p. 131 of C-1 explaining why the Crown directed stay of criminal proceedings against alleged gang members in exchange for the defendants forfeiting all proceeds seized, mentions "there was extensive wiretap (over 28,000 calls in Laotian, including Laotian slang)" and goes on to say that based on many factors including the complexity of the wiretap and the language and interpreter problems there was a Stay of Proceeding on all charges.

[48] The Minister has to put before me credible or trustworthy evidence to prove his case. In the circumstances of this case, I cannot simply assume that the transcripts were accurate. In a case involving wiretaps of over 28,000 calls in Laotian, including Laotian slang, where the Prosecution admits that there were language and interpreter problems and where the person concerned had no meaningful opportunity to challenge the evidence because the original tapes of the wiretaps were not provided to her, I cannot conclude that the Minister's evidence is credible or trustworthy. I conclude that in these circumstances it would be unfair to rely on the evidence of a phone call allegedly discussing packaging cocaine.

CONCLUSION

[49] When I consider all of the evidence; that the police do not indicate what role, if any, Ms. Korasak played in the drug trafficking operation, that the conversations that she had with her brother Sith may be no more than her giving sisterly advice as he begins work in her husband's

business, rather than conversations between gang members, that out of all of the Minister's evidence there is only one line that suggests that Ms. Korasak may have packaged cocaine, that the police do not say that she packaged cocaine, that the Minister's evidence consists almost entirely of wiretap evidence in which the original Laotian was interpreted into English and then transcribed and the original tapes are not available, that the wiretap evidence is unreliable because the Prosecutor has admitted that there were interpreter and language problems, I conclude that the Minister has not established that Ms. Korasak was a member of her husband's criminal organization.

[50] The Minister has not established that Ms. Korasak is inadmissible under paragraph 37(1)(a) of the IRPA. A Favourable Decision is attached to these reasons.

“Michael McPhalen”

Michael McPhalen

25 October 2018

Appeal Rights – Under section 63(5) of the *Immigration and Refugee Protection Act*, the Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.