Fight for Freedom? You're Inadmissible to Canada

By Matthew Behrens

The growing use of overly broad Canadian immigration inadmissibility provisions to deny status to refugees who have been associated with national liberation struggles finally saw some pushback with a Federal Court decision issued July 10.

The case involves José Figueroa, a survivor of the Salvadoran civil war (in which government forces murdered 75,000 people) who is faced with deportation for his prior association with the FMLN, the former resistance organization that is now the governing party in that country. Despite never having picked up a gun or engaging in any form of violence, he is falsely tarred with the terrorist brush by an immigration officer because of the FMLN association, even though the organization is listed nowhere on the planet as a terrorist entity and past and current members of the FMLN, including consular officials, attended the court hearing of his case.

Figueroa, currently living in sanctuary in a BC church, is caught in a bind faced by hundreds of individuals who have arrived in Canada from fresh or past conflict zones where simple survival often dictated having to interact with resistance forces who occupied large swaths of territory. It's all due to the Immigration and Refugee Protection Act (IRPA's) broad section 34, which prevents entry to individuals "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage" in acts of espionage, "engaging in or instigating the subversion by force of any government," or engaging in terrorism or the subversion of a democratic government.

But the interpretation of what it means to be a member is so broad that it can encompass someone who wrote for a party newspaper or provided catering services to a political meeting. Ottawa fails to consider, for example, whether someone joined a group before it took up arms or after it eschewed violence. It also fails to distinguish between membership in groups with a single brutal purpose – the employment of violence without regard to civilian casualties – and multi-faceted organizations that, while possessing a military wing, also act as de-facto governments that provide social services (such as the Palestine Liberation Organization).

In Figueroa's case, he admits to having been a member of the Farabundo Marti National Liberation Front (FMLN), the broad-based umbrella organization that resisted the military junta in El Salvador that tortured and slaughtered civilians throughout the 1980s.

Figueroa and his wife came to Canada in 1997 but in May 2000, they were denied refugee status because the Canadian government claimed El Salvador was a safe place and NOT because Figueroa, a teacher, admitted he was a member of the FMLN from 1986 to 1995. Indeed, the denial of their claim in fact recognized the FMLN as a legitimate political party and made no mention of alleged terrorism. In 2004, he and his wife were approved in principle for permanent residency following a positive humanitarian and compassionate application that was determined with full knowledge of his FMLN membership, good news for the family of five (including three Canadian-born children, one of whom has autism). Unfortunately, permanent residency was never finalized and, in 2010, Figueroa was declared inadmissible to Canada on security grounds.

The adjudicator who originally heard Figueroa's refugee claim conceded: "What the people [of the FMLN] appear to have been trying to do was to stop a regime that ran death squads. There's some legitimacy, I would say, in trying to arrange matters so that death squads can be eliminated."

In an effort to remain in Canada, Figueroa again applied for humanitarian and compassionate consideration, but was turned down by an immigration officer who introduced the terrorism association label. In May, the case underwent a judicial review before Judge Richard Mosley, the Federal Court's leading expert on national security legislation and functioning.

The no-nonsense Mosley was perturbed at that terrorism finding. During the hearing, he asked a government lawyer whether the terrorist brush should be applied to the 80-100,000 people who were members of the FMLN. The response was not unexpected: "Yes, my Lord. I mean... Well, as we stand today under section 34 [of the Immigration Act) all of those members, all of those people would be inadmissible as found by the immigration division in this case and as upheld by this Court."

Needless to say, the thousands of former FMLN members living in Canada, as well as current members (such as ambassadors and

diplomatic staff who were present at the hearing) have not faced the same conundrum as Figueroa.

"By extension, everyone who was a member of the ANC [Honourary Canadian Nelson Mandela's African National Congress] during the struggle against Apartheid in Africa, will also be caught? Yes?" Mosley asked.

The response was similarly banal and unsurprising: "The minister's delegate is applying the law and as the law stands, that's how it would be."

Six weeks after the hearing, Mosley granted Figueroa's request that the matter be reconsidered because the original decision failed to be "intelligible, transparent, justified and within the range of acceptable outcomes defensible on the facts and the law."

Significantly, Mosley also found it "unreasonable as it failed to take into account the nature of the conflict and Mr. Figueroa's personal role as a non-combatant political advocate." By insisting on the importance of context, something which the immigration bureaucracy almost universally fails to consider, Mosley said he was surprised that the government failed to consider, despite a recognition of "Canada's commitment to international justice," anything that related to the specific "history of the conflict in El Salvador and, in particular, the political violence inflicted on the population by the military and security forces over many years."

In addition, Mosley notes "none of the other immigration officers who considered [Figueroa's] case over the years that it was pending found that he was a risk to Canada's security or to the security of any person." Indeed, he says concern about the FMLN "arrived slowly and late…five years after his application for permanent residence received preliminary approval." He also finds that immigration officer "unreasonably referred to the FLMN as a 'terrorist organization.'…The FMLN was never a group for which political terror was a primary tactic. It had broad popular support and has now formed the government through democratic means. The organization attracted 80-100,000 members in a country of 5 million population. It was a broad based legitimate resistance group. The armed elements of the FMLN were primarily military forces engaged in a civil war against an oppressive regime much like the African National Congress in South Africa's struggle against apartheid."

While this was a step forward for Figueroa and, perhaps, for others facing similarly unreasonable inadmissibility decisions, the father of three remains in sanctuary as he awaits a new decision on his application for landed status and pursues other legal and political strategies.

Meanwhile, the issue of inadmissibility was recently considered by the Supreme Court of Canada in the October, 2012 case of Muhsen Ahemed Ramadan Agraira, a Libyan national who left his country in 1996 and eventually claimed refugee status in Canada due to membership in the Libyan National Salvation Front (the "LNSF"), a secular group formed in 1981. Notably, the LNSF was a paramilitary group that received the support of Middle Eastern and Western agencies, including the CIA, in efforts to destabilize the Gadhafi regime. The group ended armed operations in 1995.

Agraira's claim was rejected, but he married a Canadian in 1999, and she submitted an application to sponsor her husband, which was accepted in principle. Agraira proceeded to apply for permanent residence. In interviews with CSIS (Canada's spy agency) and immigration officials, he said that he had only been involved minimally with the LNSF, that he supported their goal of democracy, and that he had exaggerated his original involvement in the group to strengthen his refugee claim. He also said he had no knowledge that the group advocated violence and would not have been involved if he had known it to be true. Declared inadmissible, in 2002, he sought out the faint-hope clause of ministerial relief under which he could apply for landing under humanitarian and compassionate consideration. In 2006, the Canadian Border Services Agency – not known for friendliness towards refugees – nonetheless recommended that he be granted relief when it concluded his presence in Canada would not be detrimental to the national interest. In 2009, the Minister of Public Safety disagreed and turned him down, even though Agraira had by then lived nine years of normal Canadian life, was a productive member of society earning over $100,000 a year, and had no criminal record.

Ottawa's Orwellian stubborn insistence on labeling organizations that the Canadian government itself has supported as subversive has become so perverse, Agraira's lawyers argued, that "individuals can be rendered inadmissible to Canada on the basis of activities that are legal and in accordance with Canadian values. For example, subversion has been defined as having two essential elements—a clandestine or deceptive element and an element of undermining from within. Under this broad interpretation of 'subversion', individuals who worked with

Canadian Forces or the United Nations against dictatorial governments that have committed mass human rights violations could be found to have engaged in 'subversion by force'".

Indeed, the Canadian government, in helping overthrow the Gadhafi regime, worked alongside of the LNSF among many other groups.

Longtime refugee lawyer and outspoken advocate Barbara Jackman, representing the Canadian Arab Federation and the Canadian Tamil Congress, argued at the Supreme Court last fall that the growing list of those caught in this frustrating net include a Sri Lankan woman who cooked meals for and acted as a secretary to her husband, a member of a legal political party who was assassinated. But because that party worked with the Tamil Tigers to negotiate an end to that nation's civil war, however, she was judged inadmissible by Canada for being associated with a group that allegedly engages in terrorism.

In another instance, Jackman pointed to a young woman from Namibia who attended a few meetings of a secessionist organization with her boyfriend. She had no knowledge of the group's aims and activities, but was nonetheless found inadmissible because the government of Canada said the group was engaged in subversion.

Jackman noted many members of Canada's Arab and Middle Eastern diaspora have faced such a conundrum, as many have been involved in national liberation struggles that have sought to throw off the yoke of colonial occupation or brutal dictatorship.

In her trademark style, Jackman helped personalize this dilemma for the Supreme Court when she explained, "You can be a kid growing up in Gaza and you want to go to university. The only way to get a scholarship? You join Hamas, in order to get out, and then, you can't get landed [in Canada] because you joined Hamas to get the scholarship." It's those kinds of situations, she notes, that have plagued dozens of her clients and continue to cause the kinds of psychological stress and emotional upset that leave them separated from loved ones abroad, unable to get on with their lives, having to apply every year for a work permit or health coverage, essentially stateless.

It's this narrow thinking that lawyer John Norris, representing the Canadian Council of Refugees, argues is not only counter-productive, but operating in a kind of vacuum that ignores the lessons learned from the criminal court process in Canada.

"The [criminal courts] don't resort to labels that effectively become a catch-22 where because you're a member you have to go looking to the minister for relief, but you don't get relief because you're [considered] a member because of that very label," he explained at the time.

Unfortunately, the Supreme Court denied Agraira's appeal in June, 2013, stating deference should be shown to the minister of public safety and that the decision to deny Agraira status was reasonable. The same day, Bill C-43, which completely closed ministerial relief for individuals found inadmissible for security reasons, was given Royal Assent.

Meanwhile, Figueroa continues his protracted legal struggle from his BC sanctuary. While immigration considers anew his humanitarian application, he launched a challenge to the Public Safety Minister after his request for a certificate stating that he is not a listed terrorist entity- required to be issued by the Public Safety Minister within 15 days of a request- had been denied for well over a year. He was hoping that by forcing the issue, it would clarify what the government really thinks of him in terms of national security.

A letter written by his lawyer noted Figueroa "is seeking a certificate that he is not a listed entity in order to clarify that, notwithstanding the finding against him – and against the FMLN – under the IRPA, Canadian officials know full well that he is not a terrorist and has not been involved in a terrorist organization. He wants to have this to ensure that he does not face further difficulties in his life because of the IRPA determination."

The government of Canada argued such certificates are only issued in cases of mistaken identity, and declared that since Figueroa's name was not on the list of named entities, there was no reason to issue him a certificate (failing to understand the deleterious effects of having been named a national security threat by an immigration officer).

Judge Luc Martineau rejected the application, stating he doubted it would have any effect on Figueroa's case, and because "the applicant is not on the list of listed entities, nor is he claiming to be a member of a listed entity, and the FMLN is not a listed entity, nor was it ever placed on the list established by the Governor in Council under section 83.05 of the Code."

Hence, Figueroa remained trapped in an Alice in Wonderland world:

while an official of the public safety ministry advised accepting him as a permanent resident in 2010, the public safety minister has rejected that advice on the conclusion of an immigration officer concluding he was associated with terrorism because of membership in the FMLN, even though neither Figueroa nor the FMLN are listed terrorist entities.

Multiply this case by the hundreds (Tamils, Libyans, Palestinians, Tamils, ANC members, among many others), and it remains obvious why so many continue to face an uphill battle to gain entry to or remain in Canada. Mosley's July decision criticizing the loose use of the terrorist brush was a faint glimmer of hope; whether it will be enough to embolden weaker-kneed members of the bench and also keep in line zealous immigration bureaucrats remains to be seen.