Federal Court  Cour fédérale

**Date: 20160419**

**Docket: IMM-1223-16**

**Citation: 2016 FC 423**

**Fredericton, New Brunswick, April 19, 2016**

**PRESENT: The Honourable Mr. Justice Bell**

**BETWEEN:**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Applicant**

**and**

**MAITHAM AZIZ ALZEHRANI**

**Respondent**

## ORDER AND REASONS

**(Delivered orally from the Bench on April 11, 2016)**

[1] This is a continuation of the hearing held in Vancouver, British Columbia, on March 31, 2016, in which the Minister seeks a stay of the Order of Member King of the Immigration Division in which he released the respondent from detention on March 22, 2016. On March 31, 2016, I granted an interim order for a stay until today's date or until further order of the Court.

[2] I have reviewed the materials submitted by the parties and I have carefully considered the conjunctive tripartite test set out in *RJR MacDonald Inc v Canada* [1994]1 SCR 311 [*RJR MacDonald*] and as further elaborated upon by the Federal Court of Appeal in *Toth v Canada (Minister of Employment & Immigration)* (1988) 86 NR 302 [*Toth*].

[3] I am fully cognizant of the fact that, on this application for a stay, it is not my responsibility to determine the outcome of the application for judicial review, but merely to assess the tripartite test in *RJR MacDonald* and *Toth*.

[4] Prior to addressing the fundamental elements of the tripartite test, I consider it appropriate to set out the context. Mr. Maitham Aziz Alzehrani, hereinafter referred to as Mr. Alzehrani, is a 44-year old citizen of Iraq who entered the United States in 1994. In 1997 he was convicted in the United States for domestic battery for which he was sentenced to two years' probation. According to police reports, this battery occurred while he was attempting to forcibly remove his girlfriend from their apartment. Less than a week later Mr. Alzehrani followed his girlfriend to work and forcibly pulled her out of her friend's vehicle and pulled her into his car.

[5] Later, while on probation for kidnapping, unlawful restraint, and domestic battery, Mr. Alzehrani committed a sexual assault. He was convicted in 1998 for this assault, which constituted forceful intercourse with his roommate after the victim's husband and the respondent's wife had left for work and while the victim's three young children were in the home.

[6] Upon being released from prison for that sexual assault, Mr. Alzehrani made his way to Canada, where on December 18, 2003, he was ordered deported from this country for serious criminality. Despite the deportation order, there is no evidence on the record that he voluntarily removed himself from Canada.

[7] Having chosen to remain in Canada after December 18, 2003, approximately one year later Mr. Alzehrani was charged with a sexual assault that occurred on Canadian soil. This charge and subsequent conviction was for forcing his girlfriend's friend to have sexual intercourse with him after having given her two ecstasy pills and following her to the bathroom of his residence. While not wishing to embark upon all the details, the record before me demonstrates that the respondent continued to force the victim to have sexual intercourse with him despite both the victim and Mr. Alzehrani's girlfriend telling him to stop and his girlfriend attempting to pull the respondent off the victim. He was found guilty of that offence on February 14, 2007, and sentenced to serve 78 months of imprisonment.

[8] Unfortunately for the Canadian public, while Mr. Alzehrani was on bail for the sexual assault, he chose to become involved in a human smuggling operation contrary to section 117 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[9] I note, to this point in my analysis, that Mr. Alzehrani committed a sexual assault in the United States while on probation and obviously under an order prohibiting him from committing any crimes. He failed to respect a deportation order from Canadian authorities, and he committed

the offence of human smuggling again while on bail for sexual assault and hence during a time period when he was ordered not to break the law, which should be understood in any event.

[10] While in prison, Mr. Alzehrani saw no necessity to seek treatment programs for sexual offenders. In fact, the record before me indicates that not only did he not see the necessity, he refused to participate in such programs. Because of his refusal to participate, he remained in prison until warrant expiry, which I understand to be on or about February 16, 2016.

[11] The Immigration Division held, as it is required to do, detention reviews on February 16, February 23 and March 22, 2016. The Immigration Division ordered Mr. Alzehrani to remain in detention as a result of the first two reviews. At the conclusion of the third review, Mr. Alzehrani was ordered released upon conditions, and I might add that they appear to be stringent conditions.

[12] One aspect of those conditions, however, bears mentioning. Because of Mr. Alzehrani's requirement to serve his sentence until warrant expiry, and the obvious inability of the authorities to reintegrate him gradually into the community with appropriate courses and therapies while in prison, the RCMP sought an order under Section 810.2 of the Criminal Code for continued supervision of Mr. Alzehrani. The possibility of this order figured significantly in the decision making of the Member or the Members at both the February 23, 2016, and the March 22, 2016 detention reviews.

[13] The prospect of the Section 810.2 Order constituted part of the reasons why the Immigration Division concluded on March 22, 2016, that Mr. Alzehrani should be released. In fact, Mr. Alzehrani, through his counsel, told the Member of the Immigration Division on March 22, 2016, and I quote:

> Mr. Alzehrani just mentioned that he's going back to court on the 31st of March. His plan on that day, as I understand it, is to consent to the 810 application and to continue putting himself subject to the very strict conditions that my friend mentioned in her submissions.

[14] As is evident, that Section 810 hearing was scheduled to be held on March 31, 2016. There can be no doubt that that Section 810.2 hearing was considered by the Member in reaching her decision.

[15] For one reason or another, Mr. Alzehrani did not appear at the March 31, 2016 hearing. That hearing was then scheduled for April 7, 2016. On April 7, the Section 810.2 matter was adjourned to another date in April. Mr. Alzehrani did not consent to the Section 810 application as he had undertaken to do before the Immigration Division Member on March 22, 2016.

[16] In her decision, Member King of the Immigration Division framed the issue in the following terms:

> The reference has been made to you as being an untreated sex offender, but the point of detention under the Immigration and Refugee Protection Act is not to detain you for past offences as punishment but rather to determine whether you're likely to pose a present or future danger to the public if released […]

[17] That was the question. Her answer then is as follows:

> […] and with the degree of supervision that's going to be in place in your case I really can't see that there is much risk of that occurring. Your freedom will be quite seriously restricted under these conditions.

[18] And on the previous page to that quote the Member said as follows:

> The alternative here is really very stringent. I'm looking at Exhibit C-2. You will have the 810 Provincial Coordinator monitoring you, monitoring your place of residence.
>
> […] There are no-contact orders in place with respect to any of the victims of your offences.
>
> […]
>
> You are to immediately advise your bail supervisor of all close or intimate relationships.
>
> […]
>
> You're on strict abstinence conditions with respect to alcohol or controlled substances.

[19] I now turn to the tripartite test and consider: (1) whether the Minister has made out a serious issue to be tried; (2) whether there is irreparable harm; and (3) whether the balance of convenience favours the granting of the order sought.

[20] In my respectful view, the Minister has made out a case for a serious issue. Member King diverges from the two previous members with respect to the issue of Mr. Alzehrani's release without, in my view, providing sufficient reasons.

[21] More importantly, however, I am of the view the Minister has established a serious issue to be tried solely on the basis of the conclusion that the danger to the public has been mitigated to the extent she claims. I say that for the following reasons.

[22] First, her conclusion presumes Mr. Alzehrani has respected his undertaking to consent to the Section 810.2 Order on March 31, 2016. Not only did he not consent to that Order on March 31-he did not do it on April 7, 2016, and we do not know when, if ever, he is going to consent.

[23] Second, much of Member King's decision is based upon undertakings by Mr. Alzehrani. Those undertakings include such things as no-contact orders, notifying bail supervisors if he has an intimate relationship with someone, abstaining from alcohol and controlled substances, and others. The fact these personal undertakings by Mr. Alzehrani figure in her analysis without any assessment of the failure by Mr. Alzehrani to respect his undertakings to the Court and to respect Canadian laws as they relate to committing sexual assaults while on probation, committing human smuggling while on bail, and failing to respect a deportation order from Canadian authorities, causes me to conclude that the Minister raises a serious issue to be tried with respect to the danger this man poses and the failure by Member King to put in the balance Mr. Alzehrani's failure to respect the laws when she concludes that "there is not much risk" of him not respecting the terms of release.

[24] I therefore conclude that the Minister has established a serious issue to be tried.

[25] With respect to the issue of irreparable harm, my view is that the Minister has established there is a serious risk to the Canadian public should Mr. Alzehrani be released. There is also a serious risk to the credibility of the Canadian Immigration system should Mr. Alzehrani be released pending the conclusion of the judicial review application or until further order of the Court. The Minister has the responsibility to remove Mr. Alzehrani, just as Mr. Alzehrani had a responsibility to leave the country in 2003 but yet he remains here. This is one of those cases where the issue of irreparable harm clearly follows the serious issue to be determined.

[26] Given Mr. Alzehrani's demonstrated lack of respect for the law, and given Member King's failure to put in the balance his failure to respect terms of previous releases, it is evident that the balance of convenience favours the continued detention of Mr. Alzehrani.

## ORDER

**THIS COURT ORDERS that** the interim stay order on March 31, 2016, be continued until the application for judicial review is finally disposed of or until further order of the Court.

"B. Richard Bell"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1223-16 |
| **STYLE OF CAUSE:** | THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v MAITHAM AZIZ ALZEHRANI |
| **PLACE OF HEARING:** | QUÉBEC, QUEBEC |
| **DATE OF HEARING:** | APRIL 11, 2016 |
| **ORDER AND REASONS:** | BELL J. |
| **DATED:** | APRIL 19, 2016 |

**APPEARANCES:**

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| Robin D. Bajer | FOR THE RESPONDENT |

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