Federal Court Cour fédérale

Date: 20190411

Docket: IMM-2279-19

Citation: 2019 FC 452

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 11, 2019

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ALEXIS ISRAEL BERRIOS PEREZ

Respondent

ORDER AND REASONS

[1] Following an emergency interim stay order issued *ex parte* on the evening of April 8, 2019, the receipt of a copy of each party’s record, and a review of counsel’s oral submissions and the principles that apply, this is a determination of the appropriateness of staying the conditional release order made on April 8, 2019, by Cristian Jadue, Member, Immigration Division [ID], Immigration and Refugee Board [IRB].

[2] Under section 55 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], an immigration officer [officer] may arrest a foreign national or permanent resident who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, for an admissibility hearing or for removal from Canada [reasons for the detention]. Under section 56, the officer may release the person from detention if the officer is of the opinion that the reasons for the detention no longer exist. Otherwise, under section 57, the person taken into detention may have the reasons for the detention reviewed within 48 hours of being taken into detention, then within 7 days and then every 30 days.

[3] The respondent, Alexis Israël Barrios Perez, is a refugee protection claimant who was intercepted at the border by the Royal Canadian Mounted Police on March 23, 2019, for entering Canada illegally. He was taken into custody by the criminal investigations unit of the Canada Border Services Agency [CBSA], which laid charges of illegal entry into Canada, misrepresentation in the electronic travel authorization [eTA] application that the respondent had submitted in February 2019, and unauthorized return to Canada. Previously, in February 2016, the defendant had been declared inadmissible on grounds of misrepresentation because he had failed to declare his criminal record in his visa application. On February 23, 2016, a deportation order with no right of appeal had been made and, on March 8, 2016, the respondent had been removed from Canada.

[4] On March 25, 2019, at his first appearance at the Sherbrooke courthouse, the respondent said he wanted to see an immigration officer. On March 27, 2019, a report on inadmissibility for return to Canada without authorization was prepared; however, the respondent expressed a desire to claim refugee protection, and his refugee protection claim was referred to the Refugee

Protection Division of the IRB. On March 28, 2019, the criminal charges were stayed. Since then, the respondent has nevertheless remained in detention for examination, because the CBSA is awaiting confirmation that he is inadmissible on grounds of serious criminality under paragraph 36(1)(b) of the IRPA. The officer has not prepared a report on inadmissibility on grounds of serious criminality under subsection 44(1) of the IRPA, and the ID has not yet conducted an admissibility hearing under subsection 44(2) of the IRPA. However, since January 25, 2016, the respondent has apparently been under investigation as a result of a conviction in Chile for which he served a sentence of three years and one day. The Canadian authorities have requested the translation of the Chilean court documents.

[5] At the respondent’s first detention review hearing (48 hours), on April 1, 2019, the Minister of Public Safety and Emergency Preparedness [Minister] opposed the respondent’s release, citing two separate grounds for detention, namely danger to the public and high flight risk. Member Morin was unable to conclude that the factor of danger to the public was met. However, he was satisfied that the flight risk was significantly higher than that of typical refugee protection claimants. Since no alternative to the respondent’s own word had been proposed, Member Morin decided that the preventive detention of the respondent should continue. On April 8, 2019, at the conclusion of the second detention review hearing (7 days), Member Jadue was satisfied that the alternative proposed by the respondent offset the flight risk and consequently issued a conditional release order, which prompted the Minister to apply for leave and judicial review and, on the same day, for a stay, which was granted on an interim basis given the urgency of the matter.

[6] If this motion for a stay is granted by the Court, its practical effect will be to continue the detention of the respondent until a final decision is rendered on the application for leave and judicial review, or until the next mandatory detention review hearing, which should take place on May 6, 2019, according to the information that counsel for the respondent has provided to the Court. In this regard, counsel for the Minister concede that the serious issue test may be more demanding in this case (*Canada (Public Safety and Emergency Preparedness) v Mukenge*, 2016 FC 331 at para 8; *Canada (Public Safety and Emergency Preparedness) v Sun*, 2016 FC 1186 at paras 9–10, 16–17; *Canada (Public Safety and Emergency Preparedness) v Allen*, 2018 FC 1194 at para 15 [*Allen*]). Nevertheless, the Minister maintains that his application for a stay has a [TRANSLATION] "realistic chance of success" and he will [TRANSLATION] "likely succeed", whereas irreparable harm will result if the stay is not granted, and that the balance of convenience favours staying the release order, which the respondent disputes under each of the three tests that apply in such cases.

[7] First, with respect to the conditions of release, the Minister criticizes Member Jadue for stating in the release order that the respondent may be released if the Corporation d'aide Notre-Dame [Corporation] posts a $5,000 bond and if the respondent resides on the Corporation's premises and abides by its regulations. Under section 47 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], a guarantor is a natural person and not a legal entity. In addition, the member did not examine the ability of the Corporation and its president, Gilles Denis, who has been in trouble with the law, to ensure that the respondent will reside at all times at the Corporation and abide by its regulations. Lastly, the member ignored the hearings officer's request for an adjournment to continue the detention while clarifying the issue of the Corporation president's criminal convictions (apparently for trafficking).

[8] Counsel for the respondent submits that section 47 of the Regulations does not apply in this case. Indeed, the wording of this provision refers to a person who has posted a guarantee other than a sum of money. An example would be a guarantee posted by a natural person on a building they own. However, the release order refers to the payment of a $5,000 bond. Nothing legally prevents the Corporation from posting this bond. Moreover, the fact that it was the respondent's family that collected this sum of money—an aspect that was discussed at the hearing on April 8, 2019—is a positive factor. In addition, Member Jadue conducted an analysis of all relevant regulatory factors. He concluded that the Corporation had strict rules, was already dealing with the courts and seemed serious. He found that the monitoring aspect had been addressed, especially since the defendant had to report weekly to the CBSA.

[9] Second, the Minister criticizes Member Jadue for not explicitly addressing danger to the public and for focusing solely on flight risk. The Minister continued to oppose the respondent's release because the respondent was allegedly involved in a serious offence, namely armed robbery, which resulted in a sentence of three years and one day in prison in Chile.

[10] Although the Minister suggests that the respondent has no interest in appearing at an admissibility hearing, the respondent points out that no report on inadmissibility on grounds of serious criminality under subsection 44(1) of the IRPA has been referred to the ID, and the Minister does not even have a translation of the Spanish-language documents from Chile on information he has had since 2016. In any event, counsel for the respondent challenges the interpretation of counsel for the Minister of the conviction in question. In the respondent's view, it was more an [TRANSLATION] "attempted robbery with intimidation" than an [TRANSLATION] "armed robbery" (with a weapon), an important factual distinction in assessing a person's

dangerousness. Moreover, the ID has had information since 2016 regarding the respondent's criminal record, but nonetheless rejected the arguments put forward by the Minister regarding danger to the public. As the Minister has not provided any new evidence, the impugned decision is entirely reasonable and is supported by the evidence in the record.

[11] Issues relating to breaches of the principles of procedural fairness are reviewed on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 43), while the merits of the decision to order the respondent's conditional release are reviewed on a standard of reasonableness (*Canada (Public Safety and Emergency Preparedness) v Rooney*, 2016 FC 1097 at para 20).

[12] First, with respect to the alleged breaches of procedural fairness, it cannot be said that the affidavit of the hearings officer, Valery Naamo, referred to by the Minister, is truly conclusive. On the other hand, the affidavit of Guy Bernard, who listened to the recording of the hearing of April 8, 2019, an affidavit to which the respondent refers, leaves serious doubts about what really happened and about the arguments that can be drawn from it on either side. This is an issue that may be resolved only after the Court has listened carefully to the recording of the hearing. Unfortunately, counsel for the Minister have not submitted the CD of the recording and are currently unable to say when the transcript will be available.

[13] The reasonableness of the impugned decision is another issue that cannot be resolved without a careful analysis of the reasons given at the hearing by Member Jadue. Although the Court granted an interim stay so that the parties could serve and file complete records, it must be noted that, three days later, the Court remains uninformed about the relevant facts Member Jadue

accepted and the specific reasoning he followed. Of course, the onus is on the Minister to obtain reasons and the full transcript of the hearing. At this stage, the Court cannot simply rely on affidavits of the parties—which are silent on this issue—to determine whether the member failed to consider relevant evidence or failed to take into account prescribed factors, as the Minister contends. These issues cannot be determined simply by reading the order for the respondent's release. Therefore, I cannot now confidently conclude that the unreasonableness argument has a reasonable chance of success.

[14] Without expressing a final opinion in this regard, I am also inclined to accept the respondent's argument that section 47 of the Regulations does not apply, while the alternative that the respondent proposed to the ID does not seem devoid of any rational basis, especially since the evidence presented to me today shows that the CBSA has started the nationwide rollout of its Alternatives to Detention Program, which involves organizations and third-party providers that specialize in the continuous monitoring of individuals in the community. In the absence of a clear finding in the determination that the respondent poses no danger to the public and as long as the flight risk is not offset by an acceptable alternative, counsel for the Minister argue that it is the Minister's responsibility to protect the health of Canadians and maintain their safety; therefore, the allegations of irreparable harm are well founded in this case. Moreover, apart from the fact that the application for judicial review will be rendered moot if the respondent is released, counsel for the Minister reiterate that the flight risk is high, and there is no basis for concluding that the Corporation and its president are in fact able to monitor the respondent. Previously, the respondent failed to observe the period authorized for his stay, returned to Canada without authorization and misrepresented himself to the immigration authorities. At the same time, if the motion for a stay is granted, counsel for the Minister remind the Court that the

respondent will be entitled to a new detention review hearing no later than May 6, 2019; consequently, although he will be deprived of his liberty during that time, given that the public interest is at stake, the balance of convenience favours staying the release order.

[15] I am not satisfied that the Minister will suffer irreparable harm and that the balance of convenience favours continuing the detention of the respondent.

[16] The onus is on the Minister to satisfy the Court, through clear and compelling evidence, that irreparable harm will result if the respondent is released; simple allegations or assumptions will not suffice (*Allen* at para 17; *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31). Moreover, the prospect of a moot application for judicial review will not always result in a finding of irreparable harm to the applicant if a stay is not granted (*Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 18 at para 13; *Allen* at para 18), especially since the Court may nevertheless exercise its discretion to determine the merits of the application for judicial review (*Canada (Public Safety and Emergency Preparedness) v Ramirez*, 2013 FC 387).

[17] In this case, the fragmented and incomplete evidence filed on this issue does not support a finding that the factors for danger to the public set out in section 246 of the Regulations have been met. As well, as Member Morin indicated, the ID rejected the Minister's submissions for lack of evidence, which distinguishes this case from the case law brought to the attention of the Court by counsel for the Minister (*Canada (Public Safety and Emergency Preparedness) v Sankar*, 2009 FC 934 at paras 6, 8, 12, 16–17; *Canada (Public Safety and Emergency Preparedness) v Castillo*, 2009 FC 1022 at paras 8–11, 19–20, 23; *Canada (Public Safety and*

Emergency Preparedness) v Zaw Zaw, 2011 FC 1177 at paras 1–2, 4, 7, 26–29). In addition, I have no reason to believe today that the respondent will fail to comply with the conditions of release imposed by the ID or that the Corporation will fail to enforce its regulations and will be unable to adequately monitor the respondent.

[18] Moreover, any deprivation of liberty is to be the exception, as explicitly recognized in subsection 58(1) of the IRPA. It is also important not to minimize or trivialize the consequences of several weeks of continuous detention before the ID conducts a new detention review hearing if the Court stays the release order. In addition, the defendant is a refugee protection claimant. He has not yet been found inadmissible on grounds of serious criminality. The Minister's allegations that the respondent would be well advised to avoid immigration authorities appear to me at this stage to be premature or speculative.

[19] For all of these reasons, this motion for a stay is dismissed.

ORDER in IMM-2279-19

THIS COURT ORDERS that the motion for a stay is dismissed.

"Luc Martineau"
Judge

Certified true translation
This 26th day of April, 2019.

Vincent Mar, C Tran

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2279-19
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v ALEXIS ISRAEL BERRIOS PEREZ

MOTION CONSIDERED BY CONFERENCE CALL ON APRIL 11, 2019, BETWEEN OTTAWA, ONTARIO, AND MONTRÉAL

ORDER AND REASONS:	MARTINEAU J.
DATED:	April 11, 2019

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