Federal Court Cour fédérale

Date: 20210621

Docket: IMM-4132-21

Citation: 2021 FC 647

Ottawa, Ontario, June 21, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ROMAN TOLSTOV

Respondent

ORDER AND REASONS

[1] The Respondent, Roman Tolstov, is a citizen of Russia and Georgia, who arrived in Canada on a sailboat that he had sailed from Bermuda. He was arrested by Canada Border Services Agency officers on June 5, 2021, and has been in detention since that time.

[2] Several detention reviews have occurred before the Immigration Division of the Immigration and Refugee Board, as required under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The most recent detention review concluded on June 17, 2021, and the

Member issued an order releasing the Respondent on conditions, including an $8,000 bond to be provided by Dmitry Kiselev, and that a valid reservation be provided for a period of at least 30 days for a hotel or similar accommodation to be paid for by Mr. Kiselev, at which the Respondent was to reside.

[3] On June 18, 2021, the Applicant moved for an urgent stay of the order releasing the Respondent from detention and I heard the matter on only a few hours' notice. After hearing submissions from counsel for the Applicant and the Respondent, I granted an interim stay of release until today, June 21, 2021, and my Order was formalized and issued on June 19, 2021. In that Order, I provided that the parties could file further written submissions, and I re-convened the hearing on June 21, 2021.

[4] At the hearing today, the CBSA hearing officer who swore the affidavit in support of the original motion for a stay of release from detention gave evidence, and was cross-examined by counsel for the Respondent. One of the reasons for this is that the transcript of the detention review hearing that resulted in the order releasing the Respondent from detention was not available and there were no written reasons provided by the Member. The hearing officer's testimony provided further information regarding how the detention reviews had proceeded, as well as the evidence that had been before the Member.

[5] In summary, the key elements include the following facts, which are not in dispute. There have been several detention reviews. At the 48-hour review, the Applicant provided documents to the reviewing member regarding the Interpol Red Notice issued by Peru (Red Notice) in regard to the accusation that the Respondent was facing criminal charges for importing a quantity

of narcotics into Peru. The Red Notice requests other states to detain the Respondent so that he can be extradited to Peru to face charges of drug trafficking.

[6] Counsel for the Respondent first became involved and was able to participate in the 7-day detention review, at which he noted that these documents were not properly introduced into evidence because they were not accompanied by a valid certificate of translation. These documents end with a statement by one Jenny L. McLean saying "To the best of my knowledge and belief, the attached is an accurate translation of the three documents from Spanish to English." There is no indication that Ms. McLean is qualified as a translator, nor what her degree of fluency in either language is, nor does she explain the basis of her knowledge and belief. On this basis, counsel argued that these documents should not be admitted, and the Member agreed with that submission.

[7] In light of certain difficulties with the 7-day detention review hearing, including that counsel for the Respondent had not received the disclosure in advance, the hearing was quickly concluded. Given the difficulties, the Member did not order release at that stage and instead, accelerated the 30-day detention review, which was heard a few days later.

[8] At the outset of that 30-day detention review hearing, the Applicant had provided new, properly certified copies of the documents, and sought to rely on them to make submissions in support of the continued detention of the Respondent. The evidence of the hearings officer is that the Member refused to allow any reference to or reliance upon these documents, apparently because of some concern that doing so might somehow impede on the possible admissibility hearing for the Respondent. The reasons for this are not entirely clear, and without a transcript of

the hearing, it is not possible to review the reasons for the Member's refusal to consider these documents.

[9] Following this hearing, the Member issued the release order that has been described above. It is this order that the Applicant asks to be stayed, until such time as the transcript of the detention review can be obtained.

[10] With this background, we turn to the arguments on the stay. It is not disputed that the only issue is whether the Applicant has satisfied the test for a stay of release from detention. It is also not disputed that in assessing this, the Court is to apply the usual three-part test that applies to interlocutory injunctions and other similar relief.

[11] This test was recently summarized by the Supreme Court of Canada in *R v Canadian Broadcasting Corp*, 2018 SCC 5 at paragraph 12 [*CBC*]. The three parts of the test are cumulative, so that strength in one factor may overcome weakness on another (*Monsanto v Canada (Health)*, 2020 FC 1053 at para 50).

[12] It is important to recall that interlocutory orders such as stays of release from detention are equitable remedies and a degree of flexibility must be maintained in order to reflect the broad scope and richness of human experience. As the Supreme Court of Canada recently stated, in *Google Inc v Equustek Solutions Inc,* 2017 SCC 34 at para 1, "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case."

[13] The first element of the test considers the strength of the underlying case – here, the Applicant's challenge to the release decision. In many instances, this first step is easily met because the moving party must only demonstrate that their claim is not frivolous or vexatious.

However, in other cases, a higher standard is applied, which involves a more extensive review of the merits of the decision. The Applicant argues that the lower threshold applies here, while the Respondent submits that the higher standard applies because granting the stay amounts to giving the Applicant what they seek in the underlying application – namely, his continued detention.

[14] The case-law in this Court appears to be divided on this question: see *Canada (Public Safety and Emergency Preparedness) v Thomas*, 2021 FC 456; *Canada (Public Safety and Emergency Preparedness) v Smith,* 2019 FC 1454 [*Smith*]; *Canada (MPSEP) v Asante*, 2019 FC 905; *Canada (Public Safety and Emergency Preparedness) v Allen*, 2018 FC 1194. A review of these cases underlines two things: (i) the particular circumstances of each case are vital to understanding the reasoning and the result; and (ii) even where the lower threshold is applied, the Court has stated that this must be done with particular care and sensitivity to the fact that the individual's liberty interests are at stake (*Smith* at para 51).

[15] In my view, it is imperative to remember that while the three elements of the test must be considered, they do not constitute some sort of calculus or formula to be rigidly applied because their application is so highly contextual and dependent on the particular facts of each case (see *Awashish v Conseil des Atikamekw d'Opitciwan*, 2019 FC 1131 at para 11, citing Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, loose-leaf ed.), ch 2 at 600).

[16] The apparent divergence in the jurisprudence does not need to be resolved on the facts of this case because I find that applying either test the Applicant has met the standard.

[17] The Applicant's main argument is that the Member failed to consider the statutory elements that are mandatory considerations in a detention review, as set out in subsection 58(1) of *IRPA*. The Applicant contends that the Member's refusal to consider the properly translated documents as well as the inadequacies of the assessment of the reliability of the bondsperson raises serious issues regarding the reasonableness of the Member's order.

[18] I agree.

[19] First, it is not at all clear why the Member refused to consider the properly translated documents when they were provided by the Applicant. I agree with the Respondent that the Member had good reason to refuse to consider the original version, given the absence of any proper certification of the translation. However, that problem was fixed, and in light of the nature of ongoing detention reviews, and the fact that this hearing continued over several days, it was incumbent on the Member to consider any relevant and admissible evidence that was probative in regard to any of the factors set out in subsection 58(1). The Red Notice was relevant to the Respondent's flight risk, which is particularly evident given how he arrived in Canada and his lack of any ties to this country. It is also relevant to any risk to security, and to the basis for which the Minister seeks the Respondent's continued detention while the Minister takes steps to inquire whether he was inadmissible (see paragraph 58(1)(c) of *IRPA*).

[20] I am not persuaded by the Respondent's submission that this difficulty is overcome by the fact that the Notice of Arrest was before the Member. It is true that this document refers to the Red Notice and the fact that the Respondent was wanted in Peru and had previously been detained in Spain. However, without a transcript, it is not possible to assess whether the Member took this information or document into account in any meaningful way in fashioning the terms of

release. Further, the fact that the Member refused to allow the hearing officer to present the evidence of the Red Notice does not support a conclusion that the statutory requirements were properly assessed.

[21] In addition, I find that serious questions have been raised concerning the member's assessment of the suitability of the bondsperson, Mr. Kiselev. Again, without a transcript it is not possible to assess the Member's reasoning in any detail. The evidence is that Mr. Kiselev denied that he faced any criminal charges in any foreign country when he was asked about this in the context of the detention review. There is a debate about what, exactly, the CBSA hearing officer asked. Mr. Kiselev's affidavit states that he did not fully understand the question, but in any event he did not think that he faced any criminal charges in any other country. He states that he told the truth in response to the question he was asked.

[22] However, there is no dispute that the hearing officer asked Mr. Kiselev about prior criminal matters, and that he had previously testified about exactly such matters at his refugee hearing before the Refugee Protection Division (RPD). It is also clear that Mr. Kiselev's character was very much in issue because he put himself forward as a bondsperson in support of the Respondent's release from custody.

[23] The Applicant points to the decision of the RPD that accepted Mr. Kiselev's refugee claim, noting that this decision states that he had "testified that the Ministry of Defence, Federal Security Service of Russia has commenced a criminal action against him with fabricated allegations" (Applicant's Motion Record, Reasons of the RPD at para 8). The Applicant argues that Mr. Kiselev's character was being assessed as a potential bondsperson at the detention review, and he was not honest when he answered the question about facing any criminal charges.

The Applicant submits that this is sufficient to call into question the reasonableness of the Member's determination that Mr. Kiselev was a trustworthy bondsperson who could vouch for the Respondent.

[24] I agree. At a minimum, Mr. Kiselev was economical with the truth, and regardless of what he understood about the specifics of the question, he failed to disclose the same information that had been relied upon previously by the RPD when it granted him refugee status. It is not possible to know whether or how the Member assessed this in the release order or conditions that were imposed.

[25] In light of this, I find that the Applicant has demonstrated a strong *prima facie* case that the release order is unreasonable.

[26] The second step of the interlocutory injunction analysis considers irreparable harm. I am satisfied that, in the particular circumstances of this case, the Applicant has met this test as well.

[27] The release of the Respondent from detention would have the likely effect of frustrating the Applicant's efforts to assess his admissibility and could pose a risk to security in Canada, as well as possibly reducing confidence in the administration of the immigration system because he poses a flight risk. These are all relevant considerations for the Applicant under *IRPA* and the statute indicates that they are each valid reasons to interfere with an individual's liberty interest (under sections 55-58 of *IRPA*).

[28] I am persuaded that the Applicant has demonstrated irreparable harm that would flow from the denial of the stay, to a sufficiently convincing degree of particularity (see *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31; *Gateway City Church*

v Canada (National Revenue), 2013 FCA 126 at paras 15-16; *Newbould v Canada (Attorney General)*, 2017 FCA 106 at paras 28-29).

[29] Turning to the third element, the question is which party will suffer greater harm from the granting or refusal of the interlocutory relief, pending a decision on the merits (*CBC* at para 12). In this case, there are important considerations on both sides. The Applicant says it is giving effect to the public interest as reflected in the terms of *IRPA*; in particular, the security of Canada is a very significant factor. The Respondent points out that his liberty interest is at stake, and that the expert body authorized by Parliament to make detention determinations has found that whatever risks he may pose can be managed through the conditions attached to his release.

[30] In the circumstances of this case, and considering all of the evidence, I find that the balance of convenience favours the Applicant. The evidence is that the admissibility proceedings are underway, that the Minister will give them priority, and the Respondent's next detention review may be held in conjunction with the admissibility hearing, which could occur within a matter of weeks. This is the process prescribed by the statute, and in light of the question of whether the Member gave proper consideration to the risks the Respondent poses, or to the suitability of Mr. Kiselev as the bondsperson whose promise is said to reduce the risks to an acceptable level, I find that the balance of convenience weighs in favour of the Minister.

[31] Stepping back from the three elements, I am satisfied that it is just and equitable to grant the stay of the Respondent's release from detention. I find that the most significant considerations in assessing the equities of the situation are the following factors:

- unlike many other prior decisions, it is not clear that any decision-maker has assessed the risks posed by the Respondent's release; it is not at all clear that the Member who ordered

his release considered the details regarding the fact that the Respondent is currently wanted in Peru for allegations of drug trafficking;

- the suitability of the bondsperson, Mr. Kiselev, who was accepted as reliable by the Member is cast into doubt by his failure to provide a fulsome answer regarding his criminal history;
- the flight risk and security risk posed by the Respondent is heightened by the circumstances of his arrival in Canada (on a sailboat he sailed from Bermuda as its captain), his lack of any other ties to Canada, and his reasons to seek to evade authorities in light of the Red Notice; and
- the fact that the Respondent’s total detention may be quite short; he has been in detention for just over two weeks, and it appears that his admissibility hearing and next detention review may occur in a matter of weeks.

[32] In view of all of these elements, and considering the circumstances as a whole, I am satisfied that it is just and equitable to grant a short stay of the Respondent’s release from detention.

[33] Turning to the terms of the Order, I have noted several times that in the absence of a transcript of the detention review, it is difficult if not impossible to properly review the Member’s reasoning process. The Applicant seeks a stay of release from detention until these transcripts can be produced, but no party is in a position to state with any degree of certainty when that might occur.

[34] In the circumstances, I am therefore granting a stay of release of the Respondent from detention, on the following terms.

[35] The release of the Respondent from detention is stayed for a period of up to seven (7) days, that is, the stay will be in effect until 5:00 p.m. (ET) on June 28, 2021. If the transcript of the detention review is released before that date, the Applicant will immediately file and serve a copy of the transcript. The parties will each then have up to 24 hours to file further written submissions (which may be in letter form). The Court will then convene a further hearing as soon as possible after any submissions are filed.

[36] If either party has any questions about the terms of this Order, they may contact the Registry and a call can be arranged to discuss them.

ORDER in IMM-4132-21

THIS COURT'S Order is that:

1. The release of the Respondent from detention is hereby stayed, for a period of up to seven (7) days, that is, until Monday, June 28, 2021 at 5:00 p.m. (ET).

2. If the transcript of the detention review is released before that date, the Applicant will immediately file and serve a copy of the transcript. The parties will each then have up to 24 hours to file further written submissions (which may be in letter form).
3. The Court will then convene a further hearing as soon as possible after any submissions are filed.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4132-21
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS V ROMAN TOLSTOV
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DATED:	JUNE 21, 2021

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