Date: 20080815

Docket: IMM-2682-08

Citation: 2008 FC 949

Ottawa, Ontario, August 15, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

DONG ZHE LI and DONG HU LI

Respondents

REASONS FOR ORDER AND ORDER

[1] The Minister of Citizenship and Immigration (the applicant) contests the legality of two decisions of the Immigration Division of the Immigration and Refugee Board (the Board), specifically the decisions of Member Tessler, dated June 11, 2008, and Member Shaw Dyck, dated June 19, 2008, (together, the Release Orders) ordering the release from detention of Mr. Dong Hu Li and Mr. Dong Zhe Li (the respondents) on certain terms and conditions which include electronic monitoring.

I. PROCEEDINGS BEFORE THE COURT

[2] On June 13, 2008, the applicant filed two applications for leave and for judicial review of Member Tessler's Release Orders in Federal Court under Court File Nos. IMM-2682-08 and IMM-2683-08. The respondents were unable to perfect or meet the terms and conditions of Member Tessler's Release Orders prior to their next scheduled detention review hearing on June 19, 2008.

[3] On June 23, 2008, the applicant filed two other applications for leave and judicial review of Member Shaw Dyck's Release Orders in Federal Court under Court File Nos. IMM-2819-08 and IMM-2820-08. The applicant filed a motion seeking a stay of the execution of the former Release Orders pending the earlier of a final determination of the underlying judicial review applications or the next statutorily mandated detention review.

[4] On June 30, 2008, Justice Tremblay-Lamer allowed the applicant's motion and stayed Member Shaw Dyck's Release Orders until the respondents' next statutory required detention review hearing. In doing so, Justice Tremblay-Lamer held:

> Given the low threshold set by the Supreme Court for establishing a serious issue for the purpose of a stay application, I am satisfied that the member's failure to provide clear and compelling reasons for departing from previous rulings on detention review meets that threshold and constitutes a serious issue.
>
> I am also satisfied that being fugitives from justice who have consistently been found to be high flight risks, the Li brothers' release at this time constitutes irreparable harm.

> Finally, I am satisfied that the balance of convenience favours staying their release until their next statutorily mandated detention review.

[5] On July 9, 2008, Justice Tremblay-Lamer granted leave and ordered that the proceedings in Court File Nos. IMM-2682-08, IMM-2683-08, IMM-2819-08 and IMM-2820-08 be continued as a consolidated proceeding under IMM-2682-08. Moreover, directions were made that the matter could be heard expeditiously.

[6] On July 29, 2008, I heard this consolidated application.

[7] The parties agree that it would not be worthwhile for another detention review to take place pending disposition of this application. Counsel for the parties also agree that this case does not raise a question of general importance. However, counsel have asked the Court to provide guidance in these reasons for order, for the benefit of the Board members who may be called in the future to review the detention, if the Release Orders are set aside and quashed by the Court.

[8] For the following reasons, I have decided to allow the present application.

II. LEGISLATIVE AND REGULATORY FRAMEWORK

[9] Section 58 of the *Immigration and Refugee Protection Act,* S.C. 2001, c.27 (the Act) provides:

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that	58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :
(a) they are a danger to the public;	a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;
(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);	b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);
(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or	c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;
(d) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to	d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.

establish their identity.

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.	(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.
(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.	(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

[10] Pursuant to section 61, the regulations may include provisions respecting (a) grounds for and conditions and criteria with respect to the release of persons from detention; (b) factors to be considered by an officer or the Immigration Division; and (c) special considerations that may apply in relation to the detention of minor children.

[11] Sections 244, 245 and 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) state:

244. For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person

244. Pour l'application de la section 6 de la partie 1 de la Loi, les critères prévus à la présente partie doivent être pris en compte lors de l'appréciation :

(a) is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act;

a) du risque que l'intéressé se soustraie vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi;

(b) is a danger to the public; or

b) du danger que constitue l'intéressé pour la sécurité publique;

(c) is a foreign national whose identity has not been established.

c) de la question de savoir si l'intéressé est un étranger dont l'identité n'a pas été prouvée.

245. For the purposes of paragraph 244(a), the factors are the following:

245. Pour l'application de l'alinéa 244a), les critères sont les suivants :

(a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;

a) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;

(b) voluntary compliance with any previous departure order;

b) le fait de s'être conformé librement à une mesure d'interdiction de séjour;

(c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;

c) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;

(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

d) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;

(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

e) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

f) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244a) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;

(g) the existence of strong ties to a community in Canada.
[…]

g) l'appartenance réelle à une collectivité au Canada.
[…]

248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:

248. S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :

(a) the reason for detention;

a) le motif de la détention;

(b) the length of time in detention;

b) la durée de la détention;

(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;

c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;

(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(e) the existence of alternatives to detention.	e) l'existence de solutions de rechange à la détention.

III. STANDARD OF REVIEW

[12] In this proceeding, the applicant contends that Members Tessler and Shaw Dyck erred by failing to give clear and compelling reasons to depart from prior Board decisions which had ordered the continued detention of the respondents.

[13] The functional and pragmatic approach to a judicial review in the context of detention on the grounds of constituting a danger to the public or a flight risk was very carefully analyzed by Justice Gauthier in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 523, 2003 FC 1225 (*Thanabalasingham*) at paras. 38-52. On appeal, Justice Gauthier was found to have applied the proper standards of review to the findings of the Board: [2004] 3 F.C.R. 572 (*Thanabalasingham FCA*) at para. 24. To summarize Justice Gauthier's conclusion in this regard, findings of fact were to be reviewed on patently unreasonable standard and mixed issues of fact and law on a reasonableness standard. Holdings in law are entitled to no deference: the correctness standard applies.

[14] In *Canada (Minister of Citizenship and Immigration) v. Lai*, 2007 FC 1252, [2007] F.C.J. No. 1603 (QL) (*Lai*) at para. 17, Justice Harrington determined that the issue as to whether a member erred by failing to provide clear and compelling reasons for departing from all previous decisions was a question of mixed fact and law. Accordingly, the member was found to be entitled to deference on a reasonableness standard of review.

[15] In light of the analysis in *Lai*, as well as the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), I find that the applicable standard of review for the issues raised in this judicial review is reasonableness.

[16] This means that I can only intervene if I am of the view that the impugned decisions are unreasonable, in the sense that they fall outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at para. 47. This is the case as explained in the analysis below.

IV. ANALYSIS

[17] Judicial clarification of the legality of the impugned decisions is warranted in this case despite the fact that a statutory review of the reasons for continued detention must take place every thirty days.

[18] The Federal Court of Appeal in *Thanabalasingham FCA*, at para. 6 noted that detention review hearings are not precisely *de novo*. To the contrary, all existing factors relating to custody must be taken into consideration, including the reasons for previous detention orders being made.

[19] At paragraphs 10-13 of the *Thanabalasingham FCA* decision, mentioned above, the Federal Court of Appeal sets out a number of principles that apply when a member of the Board conducts a detention review hearing:

> Detention review decisions are the kind of essentially fact-based decision to which deference is usually shown. While, as discussed above, prior decisions are not binding on a Member, I agree with the Minister that if a Member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out. There are good reasons for requiring such clear and compelling reasons.
>
> Credibility of the individual concerned and of witnesses is often an issue. Where a prior decision maker had the opportunity to hear from witnesses, observe their demeanour and assess their credibility, the subsequent decision maker must give a clear explanation of why the prior decision maker's assessment of the evidence does not justify continued detention. For example, the admission of relevant new evidence would be a valid basis for departing from a prior decision to detain. Alternatively, a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision.
>
> The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current Member disagrees.
>
> However, even if the Member does not explicitly state why he or she has come to a different conclusion than the previous Member, his or her reasons for doing so may be implicit in the subsequent decision. What would be unacceptable would be a cursory decision which

> does not advert to the prior reasons for detention in any meaningful way.
>
> [Emphasis added]

[20] The principles elucidated by the Court in *Thanabalasingham FCA*, were summarized by Justice Dawson in *Sittampalam v. Canada (Solicitor General)*, 2005 FC 1352, [2005] F.C.J. No. 1734 (QL) as follows:

> First, a detention review is not, strictly speaking, a de novo hearing. The record before the Board continues to be built at each hearing and the Board is expected to take into consideration the reasons for previous detention orders. Second, the Board must decide afresh at each hearing whether continued detention is warranted. Third, where a member chooses to depart from prior decisions of the Board, clear and compelling reasons for doing so must be set out. Fourth, the onus is always on the Minister to demonstrate that there are reasons which warrant detention or continued detention. However, once the Minister has made out a *prima facie* case for continued detention, the individual must provide some evidence or risk his or her continued detention.

[21] In this instance, I am of the view that the impugned decisions are unreasonable. Succinctly, Members Tessler and Shaw Dyck failed to provide clear and compelling reasons to depart from the previous decisions of the Board with respect to the issues of long term detention and alternatives to detention, including electronic monitoring.

[22] Given the complex nature of the case before me, it is worthwhile to emphasize, in some detail, the facts which led to the earlier decisions of the Board and other immigration instances, as well as the key findings made on these occasions.

[23] The respondents are brothers and Chinese citizens who came to Canada on December 31, 2004. They entered the country on Temporary Residents Visas. Instead of leaving the country when their visas expired, the respondents remained in Canada illegally and took concerted steps to avoid Canadian authorities.

[24] Based on information provided by the Chinese authorities, the respondents fled the People's Republic of China (China) a few weeks before they were both charged with conspiring to commit fraud involving over $136 million CDN through the transfer of funds from bank accounts of victim companies into the bank accounts of companies controlled by either of the respondents. The Chinese authorities identified 24 suspects: seven suspects fled and six have been convicted.

[25] On January 24, 2005, the Chinese authorities issued warrants for the respondents' arrest. The warrants were issued by the People's Protectorate of Harbin City, Heilongjiang Province, China, under article 194 of the Criminal Law of China. If committed in Canada, this offence would be equivalent to paragraph 380(1)(*a*) of the *Canadian Criminal Code*, R.S.C. 1985, c. C-46, fraud over $5,000.00, an indictable offence punishable by a maximum term of imprisonment of fourteen years.

[26] Before going further into the admissibility and detention decisions in this case it is useful, at this point, to refer to subsection 55(1) of the Act, which enables an immigration officer to issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has

reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

[27] Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention and then again within seven (7) days after the 48-hour review and every 30-day period thereafter (subsections 57(1) and (2) of the Act).

[28] On November 12, 2006, Immigration Enforcement Officer, Cheryl Shapka (Officer Shapka) issued a report that, in her opinion, Dong Zhe Li is inadmissible pursuant to paragraph 36(1)(*c*) of the Act for serious crimes committed outside Canada. A few days later, she issued a report that, in her opinion, Dong Hu Li is also inadmissible pursuant to the same paragraph of the Act.

[29] On November 16, 2006, Officer Shapka issued an inadmissibility report under subsection 44(1) of the Act. On that same day, she issued warrants for the respondents' arrest in Canada.

[30] Officer Shapka subsequently issued additional reports indicating that, in her opinion, the respondents are also inadmissible to Canada pursuant to subsections 41(*a*) and 29(2) of the Act for remaining in Canada after the period authorized to remain in Canada on a temporary basis.

[31] The respondents went underground and succeeded in eluding the Canadian authorities for some time. During the time the respondents were fugitives, one of their associates, Gao Shan and his wife, Li Xue, were arrested in Canada.

[32] In February 2007, Officers of the Vancouver Police Department discovered the respondents were staying at the Sheraton Wall Centre Hotel in downtown Vancouver. The Officers knocked on their hotel room door on February 23, 2007; however, the respondents refused to open the door to the police. Resorting to the use of a Special Entry Warrant, the Officers entered the respondents' hotel suite. When the respondents were arrested, the Officers found several pieces of torn up paper inside the tank of their toilet. The ripped up documents included a passport, driver's license and a driver's record card all in the name of Zhou Hua. In early 2005, the respondents had used false Chinese identity documents in the names of Zhou Hua and Guo Feng.

[33] The respondents were taken into custody immediately. They were detained at the North Vancouver RCMP detachment where they were read their rights. In addition, Officer Shapka interviewed each respondent separately and informed them that they had been arrested for inadmissibility to Canada as a result of the serious fraud charges against them in China, in accordance with paragraph 36(1)(*c*) of the Act. She also informed them that they were arrested and detained pursuant to section 55 of the Act because of their refusal to leave Canada or apply for an extension when their Temporary Residents Visas expired.

[34] The respondents were afforded an opportunity to contact a lawyer, Mr. Stanley Foo. Mr. Foo retained Mr. Kompa, a criminal lawyer with experience in immigration law, to appear as his agent and represent the respondents at their admissibility and detention review hearings which were both scheduled to occur one after another on February 26, 2007.

[35] At the admissibility hearing, the respondents were interviewed by the applicant's delegate who was satisfied that the allegations contained in the reports, relating to the overstay of their temporary residence authorization, were valid. The next day the applicant's delegate issued Exclusion Orders against the respondents.

[36] As a consequence of the Exclusion Orders, the respondents were not eligible to make a claim for refugee protection pursuant to subsection 99(3) of the Act.

[37] The respondents filed applications for leave and judicial review in the Federal Court with regard to the Exclusion Orders. These applications delayed the processing of the respondents' Pre-removal Risk Assessment (PRRA) application, as explained below.

[38] The respondents' detention hearing was dealt with by the Immigration Division on the same day as the admissibility hearing. At the request of counsel for the respondents, Member Shaw Dyck adjourned the hearing to continue on March 2, 2007.

[39] In the meantime, on February 27, 2007, the respondents were given notice of their eligibility to apply for a PRRA.

[40] On March 13, 2007, the respondents submitted their PRRA application. However, they requested a deferral of the PRRA determination until their judicial review applications with respect to their challenge of the Exclusion Orders and refugee claim eligibility were determined by the Federal Court. In a decision dated September 21, 2007, my colleague Justice Noël dismissed the applications for judicial review: *Li v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 941, [2007] F.C.J. No. 1215 (QL).

[41] The resumption of the detention review hearing before Member Shaw Dyck took place on March 2, 2007. The applicant sought the continued detention of the respondents pursuant to subsection 245(*a*) of the Regulations on the ground that they were "unlikely to appear for removal from Canada." Counsel for the respondents confirmed that the respondents were not seeking their release; rather, they consented to remain in detention.

[42] Member Shaw Dyck determined that the respondents were "fugitives from justice" and concluded they were "unlikely to appear for removal from Canada." These conclusions were never challenged by the respondents in subsequent detention review hearings. Member Shaw Dyck ordered their continued detention.

[43] The next detention review hearing took place seven days later on March 9, 2007. As the position of the parties remained the same, Member Shaw Dyck ordered continued detention until the next statutorily mandated detention review hearing.

[44] On April 5, 2007, in light of the fact that the parties' positions remained the same, Member Shaw Dyck again ordered the respondents' continued detention. Moreover, at subsequent detention review hearings held on April 23, 2007 and May 16, 2007, the Member ordered their continued detention on the ground that the respondents were "unlikely to appear for removal from Canada."

[45] Detention hearings were held before Member King on June 28, 2007, July 3, 2007, and on July 4, 2007. The respondents requested on that occasion that they be released from detention with a proposed bond in the amount of $200,000 CDN to be posted by a friend working for the Royal Winnipeg Ballet. The applicant filed documents from the Chinese authorities relating to the fraud allegations and witness statements. The respondents both testified orally in the proceedings.

[46] In a decision rendered on July 6, 2007, Member King rejected the respondents' proposal for release and ordered their continued detention. The respondents were found not to be credible. Again, I wish to point out that credibility findings made on this occasion have not been seriously questioned by the respondents at the subsequent review hearings.

[47] That being said, Member King acknowledged that the respondents faced long detention: "it will probably take a long time for their legal matters to be resolved in Canada. Nevertheless, that

factor alone does not overcome the other relevant considerations in their case." Member King held that the respondents' conduct demonstrated they were a high flight risk and reaffirmed that they are unlikely to appear for removal from Canada if released.

[48] Member King ordered their continued detention and found as follows:

1. The respondents are highly motivated to avoid returning to China and thus, pose a significant flight risk;
2. The respondents and their wives began divesting themselves of all assets and property in their names shortly after arriving here to avoid detection in Canada. In this regard, Dong Zhe Li was not credible in his testimony;
3. The respondents were trying to avoid arrest by Canadian authorities and are willing to make a significant effort to do so. On this issue their testimony was self contradictory and implausible; and,
4. The bond proposed by the respondents would not provide them with the necessary incentive to appear for removal from Canada.

[49] At the next detention review hearing, approximately one month later, Member Nupponen agreed with all aspects of Member King's decision and dismissed the propositions made by the respondents who were seeking the installation of a bonds person. He determined that the respondents are unlikely to report for removal and ordered the continuation of their detention. Member Nupponen further emphasized that the respondents face potentially long detention.

Nevertheless, the Member stated: “I do not consider that to be an indeterminate period. It is simply a long period that will be required for the procedures to be worked through. In view of the high unlikelihood of appearing that potential length of continued detention, in my view, is not excessive.”

[50] Additional detention review hearings were held on September 6, 2007, October 4, 2007, October 30, 2007, and on November 27, 2007. Finding that there was no reason to depart from previous decisions, the respondents were ordered to remain in detention on the grounds that they are unlikely to appear for their removal from Canada.

[51] In particular, on November 27, 2007, Member Nupponen stated:

> Myself and other Members have concluded that the brothers Li would have sufficient funds available to themselves to make themselves -- be in a position where they would not need to report to Immigration officials if they were called upon to do so.
>
> Alternatives to detention have been posed in the past and those alternatives have been disposed of. Myself included, have concluded that the alternatives would not be appropriate in addressing the substantial risk of not appearing.

[52] The next detention review hearings were held on December 19 and 20, 2007. At the hearing, the respondents asserted that the “PRRA process will be lengthy, will likely involve a judicial review application regardless of the outcome and, therefore, it will likely be many years until their immigration applications are concluded.”

[53] The respondents proposed their release subject to electronic monitoring, an alternative to detention that had not been previously considered. In support of their proposal, the respondents submitted Board decisions in the case of *USA v. Welch and Romero* (September 26, 2006), Vancouver B.C., 23960 (B.C. Supreme Court) (*Welch and Romero*). Both of these individuals were found by the Board to be a high flight risk and that substantial bonds would not reduce the risk. However, after they had been in detention for several months, the Board determined that their release, subject to electronic monitoring, would be appropriate. The release order was never given effect, however, because within a short period of time extradition proceedings were commenced.

[54] In this instance, the applicant vehemently opposed electronic monitoring as an appropriate alternative to detention and provided rationale and arguments of fact in this case which distinguished the *Welch and Romero* decisions and other cases upon which the respondents had been relying on to request their release on conditions. The applicant's reasoning was entirely endorsed by Member King who refused to order the release of the respondents on the conditions then proposed which were all found to be unacceptable.

[55] In a decision rendered on January 10, 2008, Member King reasserted that the respondents pose a significant flight risk if they are released from detention.

[56] With respect to the length of time the respondents had been detained, Member King concluded:

> [T]he length of time the Li's have been in detention does not operate in their favour when weighed against the other factors of their case. They have been in immigration detention for 10 months. Although it is true that their PRAA process may be lengthy, it is also equally possible that it may be concluded relatively quickly if leave to judicially review the PRAA decision is dismissed.

[57] With respect to the respondents' proposal that electronic monitoring can sufficiently reduce the risk in the circumstances of the case, Member King provided ample reasons to dismiss this particular alternative. Notably, Member King distinguished the *Welch and Romero* case:

> Welch and Romero were not accused in their home country of financial crimes. They never at any time prior to their arrest in Canada had access to wealth on a scale comparable to the Li's. Welch and Romero never had or used false identity documents, they had never used aliases in Canada, and they had not made elaborate plans to hide their presence in Canada. They were discovered by a RCMP officer within days of being in this country and they cooperated completely with that officer on first contact. Most significantly, Welch and Romero had never been found by a Member of this tribunal to lack credibility.

[58] Member King also reviewed relevant case law and Board decisions regarding electronic monitoring and found that electronic monitoring does not ensure the attendance of a person. To the contrary, all it does is alert the company (in this case Trace Canada) and the relevant authorities to the possibility that the subject has fled or otherwise disappeared. It does not assist in locating the subject, nor does it reveal her or his plans.

[59] Acknowledging that terms and conditions of release under the Act are not required to provide the applicant with a perfect substitute for detention, Member King was nevertheless of the view that continued detention was required since electronic monitoring does not physically restrict the movement of the person wearing it and it does not assist in locating a person who has managed to remove or disable the device.

[60] At the next three detention reviews, held on February 6, 2008, March 5, 2008, and on April 2, 2008, given the fact that there was no new evidence that would allow the Members to depart from the previous decisions taken, the Board ordered continued detention.

[61] On May 1, 2008, Member Tessler adjourned the detention review hearing until May 7, 2008, enabling the respondents to attend the hearing. On May 7, 2008 and May 22, 2008 at a detention review hearing before Member Tessler, counsel for the respondents advised that, in their opinion, there was “a significant change in circumstances of the case”.

[62] In essence, the respondents alleged that a new development in the processing of the PRRA application suggested that detention would be substantially longer. Counsel argued that a PRRA Officer had rendered an opinion that the respondents would be subject to risk upon return to China, and that the PRRA application would now have to undergo a lengthy review and determination process in Ottawa (commonly referred to as the “balancing exercise”) before a final PRRA decision could be rendered.

[63] In support of this position, the respondents adduced two affidavits of Lorne Waldman, a barrister and solicitor practicing exclusively in the area of immigration law and counsel for the respondents' co-accused Gao Shan. According to Mr. Waldman's testimony:

> In cases where a positive risk assessment has been referred to the Minister by the PRRA officer pursuant to 112(3) [of the Act] for a balancing, my experience indicates that the process is extremely time-consuming and runs into the years. […]
>
> Based on all of my experience in all of these cases, it is my firm belief that, despite any assurances that a case will be given a high priority, it is unlikely that there will be a decision for a year and it is very likely that the decision will take longer.

[64] On the contrary, the applicant submitted that there was no significant change of circumstances to warrant Member Tessler to depart from previous decisions of the Board in this case. Moreover, the letter sent by the PRRA Officer to the respondents, in which it was stated that she or he had completed the work on the file, had been sent in error as attested in subsequent correspondence addressed to respondents' counsel. Indeed, the applicant tendered a letter from the PRRA coordinator informing the respondents that "the completed pre-removal risk assessment has not yet been concluded."

[65] In contrast to the timeline suggested by Mr. Waldman, counsel for the applicant stated that the applicant had obtained a time estimate from a credible and trustworthy source, the Director-General of the Case Management Branch at Citizenship and Immigration Canada, suggesting that the balancing under section 113 of the Act would normally take "between three to five months to render a decision."

[66] Further, the applicant challenged the affidavits of Mr. Waldman as lacking impartiality since he is counsel to Gao Shan who is alleged by Chinese authorities to have conspired with the respondents.

[67] By reasons and decision dated June 11, 2008, Member Tessler ordered the release of the respondents on terms and conditions including electronic monitoring.

[68] Under the section marked "Change in circumstances," Member Tessler noted:

> I am satisfied from the evidence that the Li brothers have been determined by a PRRA officer to be at risk if returned to China. In fact the Minister conceded this at the third sitting of this detention review. The PRRA has now entered a potentially lengthy phase in its processing. This represents a significant change in circumstances.

[69] In a section of the decision entitled "Legal principles on long term detention", Member Tessler reviewed the factors for consideration in assessing long term detention and whether it amounts to a breach of the right to liberty enshrined in section 7 of the *Canadian Charter of Rights and Freedoms* as stated in *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214, [1994] F.C.J. No. 1534 (QL) and codified in section 248 of the Regulations.

[70] Member Tessler first found that the respondents had been detained as unlikely to appear for their removals.

[71] Member Tessler then noted that they have been in detention for 15 months.

[72] With respect to the third factor, that is whether there are any elements that can assist in determining the length of time that detention is likely to continue, and if so, that length of time, Member Tessler stated that it was apparent the respondents had been determined by a PRRA Officer to be at risk if returned to China. Accordingly, before the results of the risk assessment are communicated to the respondents, the applicant will need to balance the risk to the individuals against the risk to society.

[73] The Member rejected the applicant's argument that Mr. Waldman was not impartial, finding instead that he was merely providing empirical information on processing times where no other information had been tendered. Member Tessler was satisfied that Mr. Waldman had "no personal or professional interest in the outcome of this hearing."

[74] The Member then estimated that if the respondents were "to remain in detention and all processes were to be expedited then the applicant would be unable to remove them for an additional 3 or 4 years." As there were a number of possible steps that may be taken by either side and the times to take each step are mostly unknown, the Member concluded that the detention is approaching indefinite and may offend the rights to liberty: "In this case where there is a likelihood of indefinite detention and no risk to the health, safety and security of Canadians, the liberty interest of the Li brothers outweighs the public interest."

[75] With respect to whether or not there were unexplained delays, the Member concluded that the pursuit of legal remedies does not amount to unexplained delay by the respondents. Nor was there any delay or lack of diligence attributable to the applicant.

[76] Finally, turning to alternatives to detention, Member Tessler agreed with the findings of previous Members that the respondents are a high flight risk. However, as the "news of a positive risk assessment of the Minister seeking a restriction assessment are important new facts in respect of the potential length of detention", the Member was of the view that the circumstances have substantially changed and the length of time detention is likely to continue which "tips the balance in favour of release."

[77] Member Tessler remained of the view that a bond would have little influence on the respondents' future behaviour: "If they are desperate enough a bond is not going to prevent their flight." As such, Member Tessler then considered whether electronic monitoring would limit their flight impulses.

[78] The Member noted first that the respondents would be responsible for paying for the service which is "very flexible and allows for varying degrees of restrictions on the movements of the monitored persons. Notifications of the location of the Li brothers and of any breaches would be

communicated by the U.S. [monitoring system] to the [Canadian Border Services Agency] by telephone, fax or email."

[79] The Member then acknowledged the applicant's strenuous objections to electronic monitoring as articulated in written submissions presented to Member King in December 2007. Member Tessler was of the view that one of the main objections to electronic monitoring is that CBSA does not have the resources to receive the monitoring reports or to respond to breaches. Nevertheless, he stated: "It occurs to me that the cost of detention is considerably higher than the costs involved in receiving monitoring reports and responding to breaches when appropriate. Where there is a will, there is a way."

[80] Although electronic monitoring is merely a different form of periodic reporting that does not guarantee appearance for removal, since the balance had tipped in favour of release, the Member anticipated that "CBSA will embrace the electronic monitoring system […]". In conclusion, given the degree of the flight risk and the potential for indefinite detention, Member Tessler issued the Release Orders with restrictive conditions including electronic monitoring.

[81] On June 19, 2008, a detention review hearing was held before Member Shaw Dyck since the respondents had not yet been able to perfect or meet the terms and conditions of Member Tessler's Release Orders. At this hearing, the respondents requested changes to the terms and conditions imposed by Member Tessler. Applicant's counsel argued for continued detention based on important errors made by Member Tessler in his Release Orders.

[82] On this occasion, the applicant filed a letter dated June 19, 2008 from the Director-General of the Case Management Branch at Citizenship and Immigration Canada, providing the following time estimate for a decision on the respondents' PRRA application:

> CIC will complete working on a "Restriction Assessment" (case summary) based on the danger profile within approximately four weeks after the reception of the risk assessment and danger package. Both assessments (risk and danger assessment) will then be returned to Canada Border Services Agency (CBSA) for disclosure to the client. For instance, if we were to receive both packages by June 25, 2008 and working on the assumption that all the necessary material has been provided to us by CBSA, we should be able to disclose both the assessment (risk and danger) to the clients by July 30, 2008. If we give the clients the required 15 days for a submission, presuming that the client do not require an extension, we should receive the submissions back by August 29, 2008 which includes the time for transfer of the assessments from CIC to CBSA and the transfer of the submission from CBSA to CIC. We anticipate that the Minister's Delegate will render a decision by the middle of October, 2008 with the caveat that we have received the assurances from China regarding the death penalty.

[83] Moreover, the applicant continued to assert that the respondents remain a high flight risk which could not be managed by electronic monitoring. The applicant called as a witness an RCMP Officer who testified that he was leader of a surveillance team investigating the respondents. During the investigation, the RCMP determined that Mr. Dong Hu Li had traveled to Toronto in January 2007 to obtain fraudulent Canadian identity documents; including a Canadian passport and birth certificate, an Ontario driver's license, and Ontario health insurance documents.

[84] By oral decision rendered at the hearing, Member Shaw Dyck stated: "I do not have any compelling reason or any good reason whatsoever to depart from the decision rendered by Member Tessler on the 11th of June 2008. So I adopt his decision in its entirety […]." Finding that

“[e]lectronic monitoring is better than nothing”, the Member ordered the release of the respondents on terms and conditions amended from those previously imposed by Member Tessler.

[85] Having carefully read the certified Tribunal Record in its entirety and considered the arguments made by the parties, I conclude that clear and compelling reasons for departing from previous decisions have not been articulated in the impugned decisions which are otherwise unreasonable.

[86] Indeed, previous decisions of the Board had expressly considered the potential length of detention and ultimately rejected this factor in favour of the respondents’ release due to the nature of their flight risk.

[87] Neither can I find any clear rationale in the impugned decisions reasonably supporting the conclusion at this point in time, that the detention of the respondents can be qualified today as being “indefinite” or “indeterminate”. If there has been indeed a “change of circumstances”, at best, the evidence is contradictory. In determining the length of time that detention is likely to continue and Members Tessler and Shaw Dyck should have given cogent reasons to discard direct and relevant evidence submitted by the applicant in this regard.

[88] Moreover, alternatives to detention, including electronic monitoring, were all rejected by the Board in the past for very articulated and convincing reasons, which appear to still be valid today.

Same appears to have been ignored or arbitrarily discarded by Members Tessler and Shaw Dyck in the impugned decisions in an arbitrary and capricious manner.

[89] Approximately one year before the Release Orders were rendered, the respondents first raised the length of detention issue arguing that their legal proceedings may take several years to resolve. As such, they proposed a release on the posting of a bond as an alternative to detention. As discussed above, this line of argumentation was expressly rejected by Member King in a decision dated July 6, 2007.

[90] The issue of length of detention resurfaced at the next detention review hearing, this time before Member Nupponen. Again, as described above, the Member did not consider that the prospect of a long detention pending the PRRA would amount to an indeterminate period of detention, nor was the detention to be seen as excessive in the circumstances.

[91] Further, at a detention review held in late 2007/early 2008, the respondents again argued that their PRRA process will be lengthy, will likely involve a judicial review application regardless of the outcome and that it will likely be many years before their immigration applications are concluded. Nevertheless, Member King reaffirmed previous Board decisions. In particular, he found that although the respondents have been in immigration detention for ten (10) months and that their PRRA process may be lengthy, it is also equally possible that it may be concluded relatively quickly if leave to judicially review the PRRA decision is dismissed.

[92] Members Tessler and Shaw Dyck rendered the Release Orders based, to a great extent, on the finding that there was a change in circumstances with respect to the PRRA process. Member Tessler was of the view that the respondents' positive risk assessment would lead to a potentially lengthy processing. Such a finding was supported by the general opinion contained in the Waldman affidavit which, I note, was in direct contrast to the information submitted by the applicant to the effect that the PRRA process would normally take between three (3) to five (5) months for a decision to be rendered with respect to an application for protection under section 112(3) of the Act.

[93] However, in issuing the Release Orders, neither Member Tessler nor Member Shaw Dyck made any reference to the fact that the potential long-term detention had already been considered and rejected by previous Board Members. Indeed, neither Member provided clear and compelling reasons to depart from previous Board decisions which concluded that the length of detention did not weigh in favour of release when all other relevant factors are considered. This is a revisable error that justifies the intervention of the Court.

[94] Despite my finding that the impugned decisions were unreasonable in the sense that they failed to provide clear and compelling reasons to depart from the previous decisions of the Board with respect to the issue of long-term detention, I am also of the view that the issue of indefinite or indeterminate detention may have been brought prematurely before the Board. As this issue is not determinative in this application for judicial review, I have not considered it in detail. Suffice it to note, there is evidence on the record which clearly indicates that the Minister's Delegate should

render a decision by mid-October 2008 (with the caveat that assurances from China regarding the death penalty have been received). Unless the evidence in question is found to be unreliable or not credible, it would be unreasonable for the Board, at this point in time, to outright dismiss such direct and relevant evidence emanating from the applicant.

[95] Additionally, I am of the opinion that the impugned decisions were unreasonable as they failed to provide clear and compelling reasons to depart from the previous decisions of the Board with respect to electronic monitoring.

[96] In the Decision and Reasons dated January 10, 2008, Member King specifically considered release on electronic monitoring (as proposed by the respondents) as an alternative to detention. Based on the evidence on record, Member King determined that electronic monitoring was inappropriate in the circumstances.

[97] I reiterate, at this point, that the respondents are accused of financial crimes. They have been found to have access to an enormous amount of wealth, to have used false identity documents, to have aliases in Canada, to have made plans to hide their presence in Canada and to lack credibility. The respondents were and continue to be a high flight risk. The Board clearly decided in past decisions that the proposed alternatives to detention were not satisfactory and provided clear and compelling reasons in support of their conclusion. In particular, Member King clearly rejected electronic monitoring as an appropriate alternative to detention. The evidence upon which these past findings have been made has not been challenged by the respondents.

[98] Despite Member King's clear finding that electronic monitoring was not a viable alternative to detention, Member Tessler nevertheless ordered the respondents' release on precisely the same proposed alternative that was expressly rejected by Member King. Although Member Tessler states in the Release Order: "I am not choosing to differ from my colleague's finding on the appropriateness of proposed terms and conditions; I am simply reassessing the alternative in light of a significant change of circumstance," he fails to provide a clear and compelling reason why electronic monitoring is now appropriate. He further fails to describe how electronic monitoring would serve to mitigate the flight risks which had been identified in every previous Board decision.

[99] Member Shaw Dyck erred in the same regard. In her reasons, the Member states that electronic monitoring is better than nothing. However, yet again she fails to provide a clear and compelling reason why electronic monitoring is now appropriate and how electronic monitoring could reduce the flight risks previously identified by all Members of the Board.

V. CONCLUSION

[100] In conclusion, Members Tessler and Shaw Dyck erred by failing to provide clear and compelling reasons to depart from the previous decisions of the Board with respect to the issue of long term detention. This reviewable error was compounded by a failure to provide clear and compelling reasons to depart from the previous decisions of the Board with respect to the issue of electronic monitoring.

[101] For these reasons, this consolidated application for judicial review shall be allowed. The Release Orders will be set aside and quashed accordingly. At the next detention review, the Board shall consider the reasons contained in the present decision of the Court together with prior decisions of the Board in respect of same, and with the evidence and the submissions on record, including all new evidence or additional submissions of the parties, and accordingly determine whether clear and compelling reasons to depart from the previous decisions exist, and whether having considered and weighed all relevant factors, the respondents should be released on conditions.

ORDER

THIS COURT ORDERS that this consolidated application for judicial review is allowed. The Release Orders of Members Tessler and Shaw Dyck, dated June 11, 2008 and June 19, 2008 respectively, are set aside and quashed accordingly. At the next detention review, the Board shall consider the reasons contained in the present decision of the Court together with prior decisions of the Board in respect of same, and with the evidence and the submissions on record, including all new evidence or additional submissions of the parties, and accordingly determine whether clear and compelling reasons to depart from the previous decisions exist, and whether having considered and weighed all relevant factors, the respondents should be released on conditions.

"Luc Martineau "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2682-08
STYLE OF CAUSE:	MCI v. DONG ZHE LI and DONG HU LI
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	July 29, 2008
REASONS FOR ORDER AND ORDER:	MARTINEAU J.
DATED:	August 15, 2008

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