Federal Court  Cour fédérale

Date: 20110317

Docket: IMM-1177-11

Citation: 2011 FC 331

Ottawa, Ontario, March 17, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B004

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration seeks a stay of the decision releasing the respondent from immigration detention made by Member Shaw-Dyck of the Immigration Division of the Immigration and Refugee Board on February 18, 2011. An interim stay was ordered on consent on February 22, 2011 pending a full hearing on the merits of the motion. These proceedings are subject to a confidentiality order respecting the identity of the respondent issued on December 9, 2010.

[2] The Minister also seeks an expedited decision on his application for leave and for judicial review of the Member's release decision. The respondent does not consent to leave being granted but in the interests of obtaining a decision on all matters, and of judicial economy, the respondent agrees that the motion for a stay and the merits of the application should be heard together.

[3] The record filed by the applicant contains, attached as an exhibit to an affidavit, a copy of all of the documents in the file maintained by the Immigration Division of the Board with respect to the respondent, including a transcript of the proceedings before Member Shaw- Dyck on February 18, 2011.

[4] I am satisfied that the Court should dispense with the need to perfect the application for leave and judicial review, grant the leave application and dispense with the need for the tribunal and the parties to file further materials in this proceeding. In arriving at this conclusion I have considered s. 72 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 ("IRPA"), Rule 55 of the *Federal Courts Rules* and Rule 21 (2) of the *Federal Court Immigration and Refugee Protection Rules*, the records filed by both parties and the oral submissions of counsel for the parties at a hearing conducted by videoconference on Wednesday, March 16, 2011. Accordingly, I will deal with the merits of the application for judicial review in these reasons for judgment and judgment.

BACKGROUND:

[5] The respondent is a 33-year-old citizen of Sri Lanka. He was a crew member of the *MV Sun Sea*, a ship that transported 492 men, women and children from the Gulf of Thailand to Canada. His role was to assist with the navigation of the ship and to keep watch while the ship was at sea. In return, he was compensated by being assigned a berth for himself and his wife in the crew's quarters. The respondent says that he was asked to assume this role when the original crew abandoned the ship and the captain called for volunteers. He says that he was given a one day course in navigation by the captain.

[6] In the proceedings before the Board, the respondent filed information about his employment with several foreign nongovernmental organizations in Sri Lanka, including in areas of the country formerly controlled by the Liberation Tigers of Tamil Elam ("LTTE"). He also served as a driver for a doctor at a hospital in that region who is being investigated by the Sri Lankan government for involvement with the LTTE. There is evidence that the respondent maintained a Facebook account with pro-LTTE videos and songs and information received from other migrants that his computer studies in Malaysia were supported by the LTTE, an allegation which the respondent denies.

[7] The respondent has been detained since his arrival in Canada on August 13, 2010. Initially, this was to establish his identity. That was confirmed without much difficulty as he had copies of his identity documents with him and the originals were forwarded by his family in Sri Lanka. His wife was released from detention on November 9, 2010 under conditions which require her to reside with the respondent's cousin in Toronto. The cousin has also offered to serve as a bonds person for the

respondent. Both the respondent and his wife owe substantial sums of money to the organizers of the Sun Sea voyage.

[8] In the hearing before Member Shaw-Dyck on February 18, 2011, the Minister submitted that the respondent was a danger to the public, and that he would be unlikely to appear for his admissibility hearing. This required the Member to consider the factors set out in s. 58 of the IRPA and prescribed by sections 245, 246 and 248 of the *Immigration and Refugee Protection Regulations* ("the IRP Regulations").

LEGISLATIVE FRAMEWORK:

[9] Subsection 58(1) of the IRPA states that permanent residents or foreign nationals who are detained shall be released unless certain of the below factors are established:

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	*c*) le ministre prend les mesures voulues pour enquêter sur les

reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or	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 establish their identity.	*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.

[10] Section 244 of the IRP Regulations says that:

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.

[11] Section 245 applies to the determination of flight risk and reads as follows:

245. For the purposes of paragraph 244(*a*), the factors are the following	245. Pour l'application de l'alinéa 244*a*), 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

[12] Section 246 of the IRP Regulations sets out a number of factors that a Member at a detention review hearing must consider when determining whether the individual in question is a danger to the public. The portions relevant to this review are as follows:

246. For the purposes of paragraph 244(*b*), the factors are the following:	246. Pour l'application de l'alinéa 244*b*), les critères sont les suivants :
[…]	[…]
(*b*) association with a criminal organization within the meaning of subsection 121(2) of the Act;	*b*) l'association à une organisation criminelle au sens du paragraphe 121(2) de la Loi;
(*c*) engagement in people smuggling or trafficking in persons;	*c*) le fait de s'être livré au passage de clandestins ou le trafic de personnes;
[…]	[…]

[13] Section 248 outlines additional factors that are to be considered before a decision is rendered on detention or release:

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.

DECISION UNDER REVIEW:

[14] The Board Member found that, "by the narrowest of margins, the balance of probabilities that you will not appear for your admissibility hearing, does exist" but that he did not pose any present or future danger to the public. She found that a $5000 bond to be posted by the respondent's cousin coupled with terms including reporting, non-association and residence conditions were valid alternatives to detention.

ISSUES:

[15] As a preliminary matter, the respondent objected to a number of documents in Volume 2 of the applicant's Motion Record as not properly being before the Court. These documents had not been placed before the Immigration Division and, as such, could not be considered on the application for judicial review: *Noor v. Canada (Human Resources Development)* [2000] F.C.J. No. 574 (F.C.A.) (QL) at para. 6. At the hearing, counsel for the applicant stated that they were included

for the purpose of the stay motion and would not be relied upon in the application for judicial review.

[16] The substantive issues which remain are:

a. Did the Member make an error in law with respect to the legal threshold for continued detention on the basis of danger to the public?
b. Did the Member misconstrue the factors under subparagraphs 246 (b) and 246 (c) of the IRP Regulations in coming to her conclusion that the respondent was not a danger to the public?
c. Did the member give a complete analysis of the respondent's flight risk?
d. Did the member err in her conclusion on alternatives to detention?

ANALYSIS:

[17] The applicant submits that, in so far as the Member may have misconstrued or ignored the IRP Regulations, the standard of review should be one of correctness. That only applies when the Member fails to consider the appropriate factors altogether as in *Canada (Minister of Citizenship and Immigration) v. Gill*, 2003 FC 1398, 242 F.T.R. 126 at paragraph 26.

[18] Detention reviews are primarily fact based decisions. As stated by Justice Michael Phelan in *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 1095 at paragraph 18 , and repeated by Chief Justice Allan Lutfy in *Canada (Minister of Citizenship and Immigration) v. B386* 2011 FC 140, at paragraph 9, detention hearings are often "rough and ready" proceedings. But, they

are conducted by members of the Immigration Division who have considerable expertise in such matters as my colleague Justice Johanne Gauthier noted in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2003 FC 1225 at paragraph 42, upheld at 2004 FCA 4:

> As career civil servants, they are in a position to acquire significant expertise over the years. In fact, with respect to detention reviews, previous adjudicators, which have now become members of the Immigration Division have potentially acquired numerous years of dealing with similar problems… This is especially so when one considers that with respect to some criteria set out in the regulations (such as the likely length of time the person will be detained), members of the Immigration Division have definitely better knowledge and expertise than this Court.

[19] Thus, they are owed significant deference: *Walker v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 392, 89 Imm. L.R. (3d) 151 at paras. 25-26. This Court is only to intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47. As such, the standard of review is that of reasonableness: *Canada (Minister of Public Safety and Emergency Preparedness) v. Karimi-Arshad*, 2010 FC 964, 92 Imm. L.R. (3d) 32 at para. 16.

[20] Where an individual's liberty interests are at stake, detention and release decisions must also be reviewed with a view to the detained person's s.7 *Charter* rights: *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (QL) at paras. 25-27; *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham* (FCA), above at para. 14.

[21] The burden of establishing that the respondent presented a danger to the public lay with the Minister on a balance of probabilities. I agree with the respondent that the Member did not err in law or in fact when she concluded that the Minister had not met that burden. This is not a case similar to that recently heard by my colleague Justice De Montigny, *Canada (Minister of*

Citizenship and Immigration) v. B157, 2010 FC 1314, in which there was considerable evidence of the respondent's support for, and involvement with, the LTTE.

[22] In this case, the evidence relating to danger was found by another member of the Immigration Division to be "very thin". Virtually all of the Minister's submissions before Member Shaw-Dyck and indeed, before this Court on the question of danger to the public, related to the respondent's work on the ship. There is little to point to the respondent's involvement with the LTTE in Sri Lanka and there is evidence from some of those for whom he worked there, including a Canadian NGO official, stating that such involvement was unlikely.

[23] The applicant submits that the Member did not evaluate the evidence in light of the test set out by the Federal Court of Appeal in *Williams v. Canada (Minister of Citizenship and Immigration)* [1997] 2 F.C.J. No. 393 (QL), leave to appeal dismissed, [1997] S.C.C.A. No. 332 (QL), that is whether an individual represents an "unacceptable risk to the public." Member Shaw-Dyck described the test she applied in the following terms:

> … I am unable to conclude simply from your activities on board the ship that at this particular moment you represent any kind of danger to the public of Canada, either presently or in the future.

[24] I agree with the respondent that this test is broader than that required by *Williams.* A person who does not represent "any kind of danger to the public" does not meet the threshold of "unacceptable risk to the public".

[25] There is no doubt that those who arranged to transport several hundred migrants in a vessel of dubious seaworthiness and without a properly qualified and trained crew put the lives of all on

the boat in jeopardy, as counsel for the applicant repeatedly asserted. To the extent that the respondent assisted by acting as a navigator or watchmen aboard the boat in return for more comfortable accommodations for he and his wife, he undoubtedly aided and abetted those who arranged this voyage. But there is no evidence on the record that was before the Member, as far as I can see, that the respondent was part of the organization that made those arrangements. Moreover, no evidence was led to establish that the organizers and crew constituted a criminal organization as defined in subsection 121 (2) of the IRPA.

[26] A finding that the respondent was a member of the crew that brought the vessel to Canada's shores does not lead inexorably to the conclusion that his release would constitute a danger to the public of Canada as the Minister appears to assert. I agree with Member Shaw-Dyck that the basis for detention on this ground has to be "something more than theory." There has to be some evidence that the respondent is a present and future danger to the public of Canada.

[27] It is clear from the transcript of the Member's reasons that she did consider IRP Regulation 246 (c) in determining whether the respondent was a danger to the public. While she did not make a specific finding as to the respondent’s engagement in people smuggling, she concluded that the facts of the case did not establish that the respondent’s involvement was sufficient to pose a danger. This was a finding that was reasonably open to her on the evidence.

[28] With respect to the risk that the respondent would not appear for proceedings with respect to his admissibility to Canada, the Minister raised two arguments before the Member: that the respondent had an outstanding debt to the smugglers and that the respondent’s relationship with his

cousin in Toronto was not close. The Member considered both of these questions. She addressed the alleged inconsistencies in the respondent's descriptions of the debt owed by both himself and his wife and the fact that the respondent faced an inadmissibility hearing with potential adverse consequences. Based on these factors, she did find that the respondent was a flight risk. Her analysis in that regard was sufficient.

[29] Having reached the conclusion that there was a flight risk, the Member was required conduct the *Charter*-based analysis under s. 248 of the IRP Regulations. She considered the length of time respondent had been in detention, the length of time that detention was likely to continue if he were not released and existence of alternatives to detention. She noted that the proposed bonds person was the respondent's first cousin and had been cross-examined by Minister's counsel at the hearing. The cousin was a Canadian citizen and steadily employed. The amount of the bond was a substantial amount in relation to his income. He was prepared to provide the respondent with the residence and willing to supervise and take responsibility for the respondent. On that evidence, it was open to the Member to find that there was a reasonable alternative to detention.

[30] In the result, there are no grounds on which this Court could or should interfere with the Member's decision. The parties were given an opportunity to propose questions for certification and none were received.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. The applicant's application for leave for judicial review is hereby granted;
2. The application for judicial review of the decision releasing the respondent from immigration detention made by the Immigration Division of the Immigration and Refugee Board on February 18, 2011 is dismissed;
3. The interim stay of the release order is vacated;
4. There are no questions for certification.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1177-11
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APPEARANCES:

Helen Park	FOR THE APPLICANT
Laura Best	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MYLES J. KIRVAN Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
LAURA BEST Barristers & Solicitors Vancouver, British Columbia	FOR THE RESPONDENT