

Federal Court



Cour fédérale

Date: 20120120

Docket: IMM-2963-11

Citation: 2012 FC 84

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 20, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Applicant

and

SIU KWAN HONG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Preliminary

[1] The Board member refused to admit into evidence documents that clearly show that the guarantor had been convicted, as owner of a place, of knowingly permitting the place or any part thereof to be let or used for the purposes of a common bawdy-house (paragraph 210(2)(c) of the *Criminal Code*).

[2] According to the case law, an erroneous assessment of the ability and qualities of a proposed guarantor results in a fatal error.

M.P.S.E.P. and Sankar, 2009 FC 934, para 11,

M.P.S.E.P. and Al Achkar, 2010 FC 744, para 43 *et seq.*

Legal procedure

[3] Despite the fact that the respondent has returned to her country of origin, the case continued in Court for reasons of public interest and statutory interpretation (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342). This is an application for leave and judicial review filed by the Minister of Public Safety and Emergency Preparedness pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act* (Act) of a decision by Board Member Otto Nupponen of the Immigration Division of the Immigration and Refugee Board (panel or Immigration Division) dated May 4, 2011, ordering the release of the respondent.

Facts

[4] On March 6, 2007, the respondent tried to enter Canada as a visitor, but withdrew her application in view of the officer's doubts concerning her good faith. The respondent left on March 7, 2007.

[5] On June 13, 2010, the respondent again sought visitor's status, which was granted to her until June 24, 2010, on which date she was to leave Canada, but she did not do so.

[6] On April 19, 2011, the respondent was arrested by the Laval police in a massage parlour and was handed over to the Canada Border Services Agency (CBSA), pursuant to section 55 of the *Immigration and Refugee Protection Act* (Act), given that she did not have a legal status in Canada.

[7] On April 20, 2011, the applicant claimed refugee protection in Canada.

[8] On April 21, 2011, and April 28, 2011, the respondent benefited from an initial detention review and a further detention review, in accordance with subsections 57(1) and 57(2) of the Act, respectively.

Transcript of the hearing of April 21, 2011, Exhibit A of the affidavit of
Susan Bradley: Applicant's Record,
Order of Justice Shore, 2011 FC 532, para 6: Applicant's Record.

[9] Following the hearing, the Board member ordered the respondent's release on certain conditions.

[10] Counsel for the respondent advised the Immigration Division that Ms. Sin Fu would no longer be able to fulfil the conditions necessary for Ms. Hong's release.

[11] In his sworn testimony, Mr. Wong, a proposed guarantor, admitted that he had owned a massage parlour and had been convicted, as owner of a place, of knowingly permitting the place or any part thereof to be let or used for the purposes of a common bawdy-house (paragraph 210(2)(c) of the *Criminal Code*).

[12] Following Mr. Wong's testimony, the Minister's representative wanted to file the police report concerning the events that led to Mr. Wong's conviction.

[13] The Board member refused to accept filing of the police report on the ground that the report had not been translated into Mandarin, even though the requirement is, to the extent possible, to file documents in the language of the hearing, that is, in one of Canada's two official languages.

[14] The Minister objected to the respondent's release on the ground that Mr. Wong did not have the qualities sought in a guarantor.

[15] However, the Board member accepted the guarantor.

[16] Consequently, the Board member ordered the respondent's release, in return for payment by the guarantor, Mr. Wong, of the sum of \$1,500, payable in cash.

Issue

[17] Did the Board member err in fact and in law?

Analysis

[18] The Board member erred in fact and in law by refusing to accept filing of the police report. Examining the report would have enabled him to verify that Mr. Wong did not have the qualities required to be a guarantor and that he did not constitute a reasonable alternative to detention.

[19] Mandarin is not one of the two official languages. The Board member could, however, have required the interpreter present at the hearing to translate the document into Mandarin.

[20] In this regard, the *Immigration Division Rules* read as follows:

Language of documents	Langue des documents
25. (1) All documents used at a proceeding must be in English or French or, if in another language, be provided with an English or French translation and a translator's declaration.	25. (1) Tout document utilisé dans une procédure doit être rédigé en français ou en anglais ou, s'il est rédigé dans une autre langue, être accompagné d'une traduction française ou anglaise et de la déclaration du traducteur.
Language of Minister's documents	Documents transmis par le ministre
(2) If the Minister provides a document that is not in the language of the proceedings, the Minister must provide a translation and a translator's declaration.	(2) Si le ministre transmet un document qui n'est pas dans la langue des procédures, il l'accompagne d'une traduction dans cette langue et de la déclaration du traducteur.

[21] The Board member erred in law by refusing to admit into evidence a document drafted in the language of the proceedings before him.

Conclusion

[22] The panel made unreasonable errors of fact (erroneous finding of fact made in a perverse or capricious manner, paragraph 18.1(4)(d) of the *Federal Courts Act*) by refusing to admit into evidence the police report and the transcript of May 4, 2011, which showed that the guarantor had

been convicted, as owner of a place, of knowingly permitting the place or any part thereof to be let or used for the purposes of a common bawdy-house (paragraph 210(2)(c) of the *Criminal Code*).

[23] Despite clear and convincing evidence to the contrary of the Board member's observation, the Board member found the guarantor to be credible and made a decision in breach of the requirements of paragraph 47(2)(b) of the *Regulations*.

[24] According to the case law, an erroneous assessment of the ability and qualities of a proposed guarantor results in a fatal error.

[25] In view of the Board member's reasoning, his decision is set aside and the applicant's application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. There is no question of general importance to be certified.

“Michel M.J. Shore”

Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-2963-11

STYLE OF CAUSE: THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS and SIU KWAN
HONG

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 19, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: January 20, 2012

APPEARANCES:

Michèle Joubert

FOR THE APPLICANT

SOLICITORS OF RECORD:

Myles J. Kirvan
Deputy Attorney General of Canada
Montréal, Quebec

FOR THE APPLICANT