Date: 20081216

Docket: IMM-5405-08

Citation: 2008 FC 1372

Montréal, Quebec, December 16, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TIMOTHY IGBINOSA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
-and-
MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary comments

[1] Who is the person and where is the person from?

First, without going any further, these questions require clear, definite and specific answers. Without such answers, the objectives of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), would have no logic and the IRPA in itself would be meaningless.

OBJECTIVES AND APPLICATION	OBJET DE LA LOI
3. (1) **Objectives – immigration** - The objectives of this Act with respect to immigration are	**3**. (1) **Objet en matière d'immigration** - En matière d'immigration, la présente loi a pour objet:
…	[…]
(2) **Objectives – refugees** - (2) The objectives of this Act with respect to refugees are	(2) **Objet relatif aux réfugiés** - S'agissant des réfugiés, la présente loi a pour objet:
…	[…]
(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.	*h*) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

[2] Non-citizens do not have an unqualified right to enter or remain in Canada. In *Canada (Minister of Employment and Immigration) v. Chiarelli*, 1992 CanLII 87 (S.C.C.), [1992] 1 S.C.R. 711, at page 733, Justice John Sopinka stated that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country".

[3] Through the IRPA, Parliament has established an exhaustive review mechanism for immigration detention, which includes review by the Federal Court of the decisions of the Immigration and Refugee Board's Immigration Division (Immigration Division).

[4] The applicant's detention has always been reviewed as provided for in the IRPA, and he will be released once the conditions imposed by the IRPA have been met.

[5] In the absence of serious questions and irreparable harm, the balance of inconvenience favours the respondent Ministers, who have an interest in establishing the applicant's identity before he is released into Canadian society.

[6] There is ample evidence that the applicant did not cooperate by providing proof of his identity or helping the Canada Border Services Agency (CBSA) obtain such proof. He submitted suspicious documents and, on several occasions, provided unreliable and contradictory information about his identity and travel route to mislead the Canadian immigration authorities.

[7] The applicant has not established that the circumstances militate in favour of the exceptional order he is seeking from this Court.

[8] Without question, the public interest must prevail in this case.

II. Legal proceedings

[9] This is a motion by the applicant seeking:

(1) to have the Court declare [TRANSLATION] "that there were or appeared to be serious procedural errors in the review of the applicant's detention conducted by the Immigration Division in Montréal on 03-12-2008";

(2) [TRANSLATION] "an interlocutory injunction ordering the respondents . . . to release the applicant immediately and unconditionally until his application for review is heard on the merits".

[10] The motion accompanies an application for leave and for judicial review (ALJR) of the decision of the Immigration Division member dated December 3, 2008 refusing to release the applicant, who is currently being detained by the Canadian immigration authorities for identity purposes.

Preliminary remark – Style of cause

[11] On the procedural points, the respondents, the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness, submit that a tribunal whose decision is subject to an application for judicial review is not a proper responding party to that application (paragraph 303(1)(*a*) of the *Federal Courts Rules*, SOR/98-106 ; *Yeager v. Canada (Correctional Service)* (2000), 189 F.T.R. 196, 254 N.R. 38. (F.C.T.D.)).

[12] Accordingly, the style of cause is amended so that the Immigration and Refugee Board is no longer a respondent in this motion.

III. Facts

[13] The applicant is allegedly a citizen of Nigeria. On September 26, 2008, he arrived at Pierre Elliott Trudeau Airport on an unknown flight with an unknown document and with no identity documents, and he claimed refugee protection.

[14] Following an examination by the Canadian immigration authorities, his allegations were found to be contradictory, and he has been detained ever since for identity purposes.

[15] His detention was reviewed on September 29, October 6, November 5 and December 3, 2008.

[16] The next detention review is scheduled for December 18, 2008.

[17] In short, the CBSA is not satisfied of the applicant's identity but believes that his identity can be established and continues to make numerous efforts to do so.

[18] The applicant initially alleged that he had arrived in Canada directly from Nigeria.

[19] However, the evidence showed that he had arrived from Italy, which he had entered in 2001. When confronted, he began changing his story.

[20] The only documents provided by the applicant to establish his identity are as follows: (1) a Nigerian driver's licence, the expert appraisal of which indicates that it is *apocryphal*, which means that it is probably not genuine because it has characteristics associated with forgery; and (2) a birth certificate, the expert appraisal of which found no signs of significant alteration, but those results are not conclusive because the certificate has no security features and the parents' names differ from those given by the applicant.

[21] This along with other contradictions in the evidence and the applicant's statements, as well as the applicant's limited cooperation with the CBSA, have complicated efforts to establish the applicant's identity, since the CBSA is working with three possible identities.

[22] Having reviewed all the evidence before it during the last detention review on December 3, 2008, the Immigration Division concluded as follows:

> . . . since the efforts of the CBSA have been reasonable, since I find that your collaboration is lacking to a certain extent, I can't say that it's totally negative, but it is lacking to a certain extent, and since CBSA still has certain avenues which they will follow up on to try to establish your identity in a satisfactory manner, I am deciding to maintain you in detention. Your case will be reviewed within a period of thirty days. If CBSA is satisfied of your identity before that, you can come back here at an earlier date or request to come back here at an earlier date and your case will be reviewed. (Emphasis added.) (Applicant's record, at page 60.)

IV. Issue

[23] Has the applicant met the test for an interlocutory injunction as defined in *R.J.R. - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311: does the leave application underlying this motion raise a serious question; could the applicant's detention cause irreparable harm; and does the balance of inconvenience favour his release without his identity being established to the satisfaction of the Canadian immigration authorities?

[24] This is a **conjunctive** test.

V. Analysis

A. Serious questions

[25] The applicant's representations do not show that the Immigration Division, which is an expert tribunal when it comes to detention review, so erred in fact and in law as to warrant this Court's intervention.

[26] We understand from the applicant's written representations that he is arguing that the serious questions to be tried are as follows:

a. the Minister's unsworn representative has no personal knowledge of the facts he presents to the Immigration Division and therefore cannot validly tell the tribunal about the CBSA's efforts to establish the applicant's identity;
b. the Immigration Division refused to issue the summonses applied for by the applicant;

c. the Immigration Division [TRANSLATION] "*denied counsel for the applicant the right to complete his representations*";

d. the Immigration Division examined the applicant in the absence of his counsel, who left the room in the middle of the hearing to show his frustration;

e. the Immigration Division proceeded without a Beninese language interpreter;

f. each detention review is *de novo*.

(a) Role of the Minister's counsel

[27] The guidelines set out in Chapter ENF 3 of the Immigration Manual, "Admissibility Hearings and Detention Review Proceedings", section 6.7, are very clear about the role of the Minister's counsel (Exhibit A of Hélène Exantus' affidavit):

- The Minister's counsel is a hearings officer who represents the Minister of Public Safety and Emergency Preparedness (PSEP) in admissibility hearing proceedings and detention reviews before a member of the Immigration Division.
- The hearings officer's main role is to present the PSEP Minister's position to the member of the Immigration Division. The hearings officer is a firm advocate of the PSEP Minister's position, and is subject to the direction of the PSEP Minister. . . .
- At an admissibility hearing and/or a detention review, Minister's counsels have an obligation to set all the relevant evidence fairly before the member of the Immigration Division. . . .

[28] Thus, it is clear that the hearings officer speaks and acts on the Minister's behalf. The officer's role is to inform the tribunal of the outcome of any efforts made by the Minister to establish a detained person's identity.

[29] In any event, the Immigration Division can be very flexible about the evidence it considers. It is not bound by any legal or technical rules of evidence, and it may rely and base a decision on any evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances (IRPA paragraphs 173(*c*) and (*d*); *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 349, [2004] 3 F.C. 301, at paragraph 7).

[30] Thus, the Immigration Division is not bound by the best evidence rule and may, in particular, accept and consider hearsay evidence (ENF 3 – Section 6.4).

(b) Summonses

[31] As an independent tribunal that controls its own procedure, the Immigration Division can always issue a summons to ensure that a witness comes to a hearing to be examined. In exercising this discretion, the Immigration Division must consider any relevant factors. Rule 33(2) of the *Immigration Division Rules*, SOR/2002-229, states the following:

33(2) In deciding whether to issue a summons, the Division must consider any relevant factors, including	33(2) Pour décider si elle délivre une citation à comparaître, la Section prend en considération tout élément pertinent. Elle examine notamment:
(*a*) the necessity of the	*a*) la nécessité du

testimony to a full and proper hearing; and	témoignage pour l'instruction approfondie de l'affaire;
(*b*) the ability of the person to give that testimony.	*b*) la capacité de la personne de présenter ce témoignage.

[32] In this case, on July 21, 2005, the Immigration Division refused to allow the applicant's application to summon the immigration officer who had expertly appraised his identity documents and the immigration officer in charge of his file because the tribunal found that [TRANSLATION] "the reasons for the appearance of the witnesses are not sufficient to warrant issuing summonses" (applicant's record, at pages 49 and 50).

[33] It must be acknowledged that the applicant did not show the necessity of the testimony of the two persons in question. He provided no tangible explanation in support of his application for summonses.

[34] There is no allegation that the two officers' reports are inaccurate, and the applicant is not making any such argument.

[35] There is no evidence before this Court that the applicant was unable to exercise his right to a fair hearing or that he had no opportunity to adduce evidence and intervene in the proceedings to present his views and correct any inaccuracies in his evidence.

[36] The sole fact that the request was denied by the Immigration Division is not in itself sufficient grounds to determine that there was a breach of natural justice or procedural fairness *(Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 669, 160 A.C.W.S. (3d) 851, at paragraph 13).

(c) Refusal to allow counsel for the applicant to complete his representations

[37] In his memorandum of argument and at paragraphs 56 to 64 of his affidavit, the applicant alleges that [TRANSLATION] "the member categorically refused to allow counsel for the applicant to complete his representations". At paragraph 63 of his affidavit, he suggests that he had [TRANSLATION] "additional arguments he now wanted to address".

[38] It should be noted that the applicant provides no details on the alleged "additional arguments" he wanted to address.

[39] With respect, the evidence before the Court shows that things did not happen as the applicant claims.

[40] First, paragraphs 58 and 59 of the applicant's affidavit contradict the allegation that he had no opportunity to adduce evidence and intervene in the proceedings to present his views and correct any inaccuracies in his evidence.

[41] In other respects, the Immigration Division's decision speaks for itself:

> So, essentially, counsel wanted to make at the end of the hearing some further arguments or submissions on procedures on how detention reviews are handled. Seeing as these issues or points were already addressed throughout this hearing and last hearing, I indicated to your counsel that we do not need to hear that at this point, and that the main elements being the reasonable efforts and collaboration. Those were the key issues that needed to be addressed at this point, and that I do not have the authority to change how detention reviews are handled in general. I only have the authority to handle how each detention review that I preside over is handled, and **I believe that I did address the issues as they came up during the hearing**. (Emphasis added.)

(Applicant's record, at page 59.)

(d) The Immigration Division examined the applicant in the absence of his counsel, who left the room in the middle of the hearing to show his frustration

[42] The relevance of this argument is not at all clear from the applicant's representations.

[43] He does not specify the type of questions he was allegedly asked, the answers he allegedly gave or the relevance of all this to the Immigration Division's decision.

[44] According to paragraph 67 of his affidavit, it would seem that the questions were quite [TRANSLATION] "innocuous".

[45] According to paragraphs 64, 58 and 59 of his affidavit, his counsel left the room just before the decision was delivered, that is, after the parties had completed their evidence and representations.

[46] Failure to observe the rules of natural justice or procedural fairness cannot be presumed (*Singh*, above, at paragraph 14).

[47] Neither the applicant nor his counsel objected to this alleged situation during the hearing.

[48] As for the allegation that the applicant was interviewed several times by the immigration officer in charge of his file without his counsel present, it must be recalled that the principles of fundamental justice do not include a right to counsel in circumstances of routine information gathering.

[49] In *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, the Supreme Court of Canada confirmed (1) that there is no right for non-citizens to enter or remain in Canada, (2) that examination of a person for purposes of entry must be analysed differently from the questioning of a person within Canada, (3) that this is a routine administrative process, (4) that the right to counsel does not extend beyond those circumstances of arrest or detention described in paragraph 10(*b*) of the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, and (5) that the principles of fundamental justice do not include a right to counsel in circumstances of routine information gathering.

[50] Here, it is clear from the evidence before the Court that the applicant was aware of his right to counsel and freely chose to collaborate with the immigration officer. The applicant cannot validly

claim that this right was violated, since he ended the interview by invoking his right to counsel, which the immigration officer respected (applicant's record, at page 44, paragraph 4).

(e) The Immigration Division proceeded without a Beninese language interpreter

[51] A party or witness has the right to an interpreter for any proceeding before the Immigration Division if the party or witness does not understand or speak the language in which the proceeding is conducted (rule 17 of the *Immigration Division Rules*).

[52] Once again, the Immigration Division's decision in this case speaks for itself:

> Before rendering my decision on the matter, sir, there were some points that were raised during the hearing, as you are well aware. Your counsel made some objections. Firstly, I'll deal with those. Throughout the hearing there were some procedural issues that were raised by your counsel. The first issue being that of an interpreter. Now, as I stated during the hearing, **we have proceeded in the past without the benefit of a Benin interpreter because there was none available**. **There have been efforts made by the Interpreter's Unit to try to find someone who speaks that language who is an accredited interpreter**. It can't just be anybody obviously. Unfortunately, they were not able to find anyone. So, **since you have proceeded in the past with immigration authorities and in front of this tribunal in English, we decided to proceed in English today, and <u>I explained to you that you could at any point in time raise the fact that there was maybe something you didn't understand and it would be repeated for you to ensure that you did understand everything that occurred</u>**. (Emphasis added.)

(Applicant's record, at page 59.)

[53] First of all, it is important to note that, apart from the allegation that there was no Beninese language interpreter during the detention review on December 3, 2008, no arguments have been made to show how this affected the applicant or was a breach of natural justice in his case.

[54] It is also important to note that this case does not involve a hearing into a claim for refugee protection, which could have been adjourned until an interpreter had been found. This case is one in which a detention review is required by law and by the personal interests of the detained applicant.

[55] Here, despite the absence of an interpreter, there is no specific allegation other than the fact that the applicant's detention reviews took place in English.

[56] The Immigration Division made it very clear to the applicant that he should tell it at any point if he did not understand something. There is no evidence that the applicant expressed this or did not understand something.

[57] It should be noted that the applicant was also duly represented by counsel during the detention reviews.

[58] It is very surprising to see that the applicant's affidavit was translated from French to English for him.

[59] If the applicant has trouble understanding English, how can it be that his affidavit was validly translated from French to English for him to serve as evidence in this Court (applicant's record, at page 5)?

***(f) Each detention review is* de novo**

[60] Not surprisingly, this argument by the applicant has no legal basis. The applicant presented no authorities or case law in support of his argument.

[61] In *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C. 572, the Federal Court of Appeal pointed out that, strictly speaking, a detention review is not *de novo*. On the contrary, all existing factors relating to custody must be taken into consideration, including the reasons for previous detention orders:

> [6] I think it is important to first clarify the use of the term *de novo*. Strictly speaking, a *de novo* review is a review in which an entirely fresh record is developed and no regard at all is had to a prior decision (see *Bayside Drive-in Ltd. v. M.N.R.* (1997), 218 N.R. 150 at 156 (F.C.A.); *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145 at 166 (C.A.)). This is not what occurs in a detention review. In *Canada (Minister of Citizenship and Immigration) v. Lai*, [2001] 3 F.C. 326 at 334 (T.D.), Campbell J. held that in a detention review, "all existing factors relating to custody must be taken into consideration, including the reasons for previous detention orders being made." Although Campbell J. was dealing with the former Act, there is no reason why this ruling should not apply to the new Act. Therefore, *de novo* review is not a precisely accurate way of describing the kind of review hearing held under sections 57 and 58 of the new Act.

[62] In *Sittampalam v. Canada (Solicitor General)*, 2005 FC 1352, 143 A.C.W.S. (3d) 332, Justice Eleanor Dawson summarized the principles laid down by the Federal Court of Appeal in *Thanabalasingham* as follows:

> [19] . . . 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. (Emphasis added.)

[63] Here, it is manifestly clear that the Immigration Division examined all the evidence provided to it, including the evidence on the CBSA's efforts to establish the applicant's identity and the applicant's collaboration with those efforts, and therefore assessed all relevant factors.

[64] In short, the Immigration Division found that the Minister is making valid efforts to establish the applicant's identity and that those efforts are being complicated and taking longer because of the applicant's inadequate collaboration and lack of credibility.

[65] The Immigration Division could reasonably make its findings in light of the evidence before it.

[66] The applicant may not agree with the outcome of the decision on his detention review, but it is clear that it is within the range of acceptable possible outcomes that are justifiable in light of the evidence before the Immigration Division.

[67] Moreover, the applicant's arguments against that decision relate not to the merits of the issues debated before the Immigration Division but rather to alleged breaches of procedural fairness during the hearing, which, as shown above, are completely unfounded.

[68] The applicant has not shown through his representations that the Immigration Division's decision was unreasonable. Therefore, there is no serious question to be tried in relation to the application for judicial review of that decision.

[69] Accordingly, the motion should be dismissed **for this reason alone**.

B. Irreparable harm

[70] The applicant does not argue and has not shown that he has suffered irreparable harm as a result of his detention by the Canadian immigration authorities.

[71] Accordingly, the motion should be dismissed **for this reason alone**.

[72] The applicant's detention is not unlawful. It results from the operation of law, since Canada is entitled to control the entry and know the identity of all foreign nationals on its territory (section 55 of the IRPA). **There is no allegation that his conditions of detention are problematic.**

[73] Non-citizens do not have an unqualified right to enter or remain in Canada. In *Chiarelli*, above, Justice Sopinka stated that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country".

[74] Through the IRPA, Parliament has established an exhaustive review mechanism for immigration detention, which includes review of the Immigration Division's decisions by the Federal Court.

[75] The applicant's detention has always been reviewed as provided for in the IRPA, and he will be released once the conditions imposed by the IRPA have been met.

C. Balance of inconvenience

[76] The applicant has made no argument and has not shown that the balance of inconvenience favours his immediate and unconditional release.

[77] Accordingly, the motion should be dismissed **for this reason alone**.

[78] In light of the representations set out above, the respondent Ministers submit that the balance of inconvenience is clearly in their favour.

[79] In the absence of serious questions and irreparable harm, the balance of inconvenience favours the respondent Ministers, who have an interest in establishing the applicant's identity before he is released into Canadian society.

[80] There is ample evidence that the applicant did not cooperate by providing proof of his identity or helping the CBSA obtain such proof. He submitted suspicious documents and, on several

occasions, provided unreliable and contradictory information about his identity and travel route to mislead the Canadian immigration authorities.

[81] The applicant has not established that the circumstances militate in favour of the exceptional order he is seeking from this Court.

[82] Without question, the public interest must prevail in this case.

VI. Conclusion

[83] Taking all of the above into account, the applicant does not meet the tests established by the courts for allowing his motion.

JUDGMENT

THIS COURT ORDERS that

1. The applicant's motion be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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