Date: 20090706

Docket: IMM-4508-08

Citation: 2009 FC 700

Ottawa, Ontario, July 6, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SANDRA SIKIRATU IYILE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and background

[1] The Minister of Public Safety and Emergency Preparedness (the Minister) challenges, in this judicial review application, the September 19, 2008 decision of Marie-Louise Côté, a member of the Immigration Division of the Immigration and Refugee Board (the tribunal), who ordered the release from detention of Sandra Sikiratu Iyile (the respondent), subject to conditions. The respondent was required to report weekly to the Immigration Officer in Montreal. The tribunal said, however: "This condition will cease once an Immigration Officer is satisfied of your identity". She claims she was born in Benin, Nigeria in December 1983 which would make her 25 years of age. She claimed to have

left Nigeria on July 16, 2008 with the assistance of a smuggler, taking a flight from Lagos to Accra, the capital of Ghana where she spent a few hours in transit before she boarded a flight, accompanied by her smuggler, from Accra to Geneva, staying there about four days then flying to Munich transiting there before her flight to Montreal where she landed on July 22, 2008.

[2] Counsel for the Minister submits the tribunal erred in law in the following ways:

1) Relying on the Federal Court of Appeal's decision in the *Minister of Citizenship and Immigration v. Kaileshan Thanabalasingham*, [2004] 3 F.C.R. 572 (*Thanabalasingham*), the tribunal erred in not providing clear and convincing reasons for departing from previous decisions rendered by members of the Immigration Division who reviewed her detention and had not released her.

2) The tribunal exceeded its jurisdiction, by usurping the Minister's function under section 58(1)(d) of the *Immigration and Refugee Protection Act* (*IRPA*).

3) The tribunal erred in law in relying on paragraphs 178(1)(a) and (b) of the *Immigration and Refugee Protection Regulations* (*IRPR*).

4) The tribunal made capricious or perverse findings of fact or conclusions.

[3] She was detained on arrival at Pierre-Elliott-Trudeau Airport because her identity was in doubt. She had no passport on arrival in Montréal but, as was determined a few days later, she had travelled

from Germany on a Canadian passport bearing the name of Catherine Iyodele. When she deplaned, she had the following documents issued to her in either April or May 2008:

- a National Birth Certificate issued to Sandra Sikiratu Iyile dated April 21, 2008 on the application of Daniel Odiase. The certificate states Sandra Sikiratu Iyile was born on the 20th of December 1983 in Benin City, Edo State to Mr. Sam Iyile (father) and Mrs. Margret Iyile (mother) (Minister's Record, page 38);

- a Statutory Declaration of Age dated April 17, 2008 submitted by Daniel Odiase to the High Court of Justice in Nigeria in which he swears Ms. Iyile is his niece, indicates the date of her birth and who are her parents (Minister's Record, page 40);

- a Certificate of Identification/Origin dated May 26, 2008 with photo issued to Ms. Iyile by the Ikpoba Okha Local Government Council of Edo State Nigeria (Minister's Record, page 36); and,

- an Affidavit dated May 26, 2008 from Daniel Odiase to the Customary Courts Edo State of Nigeria entitled Affidavit of Local Government Area of Origin. In that affidavit, he says Miss Iyile is his niece (Minister's Record, page 42).

[4] These documents were sent for verification to determine if they were genuine. Her fingerprints were also taken and sent to the authorities who concluded she has no record in Canada or the United

States. She claimed refugee status upon arrival in Montréal and was issued a conditional departure order.

[5] Pursuant to the provisions of the *Immigration and Refugee Protection Act* (*IRPA*), the respondent had a number of detention reviews.

- On July 25, 2008, her first detention review was conducted, at which the respondent testified and her interview of July 22nd with an Immigration Officer at the airport was analysed. Commissioner Ladouceur concluded:

  > "I will maintain preventive detention for seven days and maybe shorter if immigration is satisfied of your identity. It's strictly a matter of identity at this point, and then afterwards when identity is established, normally you'll be released."

- On August 1, 2008, her second detention review where Commissioner Suzanne Bibeau determined the respondent would remain in detention because her collaboration to assist in proving her identity was not sufficient. The previous day, July 31, 2008, Canada Border Services Agency (CBSA) had received the expert analysis on the documents which the respondent had furnished to prove her identity. That same day, the respondent was interviewed by an Immigration Officer.

- Other reviews which will be mentioned later in these Reasons.

[6] On July 31, 2008, the expert analyst reported on the examination of the four documents submitted: Mr. Odiase's affidavit of May 26, 2008; the certificate of identification of origin dated May

26, 2008, the national birth certificate and the declaration of age. The examiner said these documents could not provide the basis for establishing Ms. Iyile's identification because: (1) all of them contained no security features enabling the analyst to verify their authenticity; (2) these documents did not provide any biometric information enabling a linkage to Ms. Iyile; (3) none revealed any trace of alteration; (4) there were no specimens to which the documents could be compared; and, (5) in the case of some (most) of the documents, they were based on information provided by a third party (Mr. Odiase).

[7] This expertise led to the submission by Minister's counsel before commissioner Bibeau CBSA did not have enough information to conclude on her identity. Minister's counsel then described the other steps CBSA was taking to verify her identity. Commissioner Bibeau, after hearing from Ms. Iyile and having considered the Minister's submissions which included his comments on the July 31, 2008 interview the respondent had with the Immigration Officer, ruled she should remain in detention for the following reasons:

> "So with respect to the efforts done by the Minister in the past week, I consider that they are reasonable given the facts of your claim, first of the results arrived on the 30th, so starting from then, they had to make more verifications because the conclusion is that they are not satisfied. With respect to your cooperation, I do find you quite limited. Some of your answers seem to be quite imprecise, if I can say that. I asked you with respect to the amount, what you purchased for that amount and your answers were very, very vague. I do have problems with the amount as stated previously and also you seem to not being able to provide much more information.
>
> So, therefore, on the basis of this, I find the efforts reasonable and I find your cooperation limited, so I do invite you to try to cooperate more, either by contacting a friend or thinking of more information that you could give in order to establish your identity." [My emphasis.]

[8] On August 14, 2008, counsel for the respondent sent to Citizenship and Immigration Canada (CIC) the following additional documents: 1) A document entitled State Primary Education Board; 2) New school register of attendance; and 3) Register of admission progress and withdrawal, all related to (Iyile) Sandra Sikiratu. These were apparently obtained and sent by Mr. Odiase. CIC sent these documents for analysis.

[9] On August 22, 2008, an expertise analysis was provided to CIC. The examiner confirmed these documents could not be the basis for the establishment of her identity for reasons previously expressed in relation to the four documents reported on July 31, 2008.

[10] On August 29, 2008, a third detention review was convened this time before Commissioner Côté. Ms. Iyile was not present because she had been hospitalized – she was about to give birth. The review was adjourned to September 5, 2008.

[11] On September 5, 2008, the hearing was convened before Commissioner Germain. Ms. Iyile was still absent as she was still in hospital. Commissioner Germain reviewed the efforts made by the Minister to verify the respondent's identity. Those efforts included: (1) word from the German authorities she was not known there; (2) the receipt of the expertise report on her additional documentation; (3) her August 26, 2008 interview with an immigration officer where she said she had travelled on a green passport from Nigeria to Switzerland but could not remember the name of the airline she travelled on and could not give the name of the person on the green passport, was unable to give the name of the person on the blue passport she travelled from Switzerland to Montreal; that she did not know where the father of her child is and how to contact him; (4) verification with the Swiss

authorities to determine whether she was known in that country; (5) verification with the Canadian passport office to determine whether and when any blue Canadian passport had been declared lost or stolen. On August 28, 2008, it was discovered that Catherine Iyodele had reported in August 2008 her blue passport had been missing since May 2008; and, (6) the respondent provided her uncle's telephone number in Nigeria, he was contacted and confirmed he was the respondent's uncle, gave her parents' names and was the person who obtained the birth certificate and sent the school documents. The commissioner concluded:

> "So, in the circumstances, due to the fact that Madam is not fully collaborating with the minister, and due to the fact that nothing that she has said, we cannot confirm or infirm the way she had travelled as we do not know how she did, on which airline, what is the name used, etc. So, that makes it more complicated for the Immigration to try to establish the identity.
>
> I do not know, it is not for me to decide if the information gathered will be enough to be satisfied of her identity. But for today, I believe the efforts to be reasonable in those circumstances. What I will do, as Madam is not here for the second time due to some medical problems with her pregnancy, the next hearing, due to her personal health, which should be taken into consideration by CBSA, and due to the fact that there is nothing else that Madam can provide pertaining to her identity, her next hearing will be held in two weeks." [My emphasis.]

The Tribunal's decision on release from detention

[12] As noted, on September 19, 2008 after hearing from Ms. Iyile, her counsel and the Minister's counsel, particularly on the substance of an interview which the respondent had with an Immigration Officer on September 16, 2008, the tribunal based on the factors set out in section 247 of the *Immigration and Refugee Protection Regulations*, decided she would not continue the respondent's detention on the ground of identity. She said she must look at her collaboration and then look at the efforts which have been made by the Immigration Department to verify her identity. She noted the

respondent was a refugee claimant who had used the services of a smuggler, used false documents to get to Canada and was pregnant at the time of her arrival.

[13] Commissioner Côté noted “there has been a great emphasis placed on the factor dealing with the itinerary” and expressed the view Ms. Iyile gave information which was vague or contradictory including:

- contradictory information on whether she used a smuggler to travel to Montréal: once saying travelled alone and another time she had travelled with a smuggler;

- contradictory information on whether she destroyed Ms. Iyodele’s blue Canadian passport or handed it back to the smuggler;

- implausible information on having travelled by plane from Accra in Ghana to Geneva when there were no flights between these two points;

- her inability to give the names of the persons to whom the passports had been issued, nor the names of the airlines she travelled on, nor the seats she occupied but noted in her testimony that day she said she could not read;

- her denial not knowing Catherine Iyodele yet the immigration officer who compared their photos discerned similar facial characteristics between leading to the possibility they were family members, a suspicion heightened by the fact Ms. Iyodele only declared in August 2008 her passport missing since May 4, 2008; and,

- she concluded on this point by stating: "Much of the concerns deal with the way in which you travelled. Your itinerary".

[14] She then wrote:

> "It seems in my opinion that there are other elements that deal with your collaboration and that play in your favour. I note the fact that you have been able to present several identity documents. I refer to the four documents that you had when you came to Canada – the Birth Certificate, the Statutory Declaration of Age, the Certificate of Identity in the affidavit of your uncle. There was also another school document that was added later on. It was called the State Primary Indication Board. This document was added on the 19th of August 2008.
>
> I am familiar with the results of the expertise of the first four documents that I mentioned. This was received as Exhibit C-1 at a previous detention review. I have considered the analysis and I noted that there are no traces of alteration on any of these documents. This I believe is an element that is positive.
>
> I note the fact you have systematically repeated that there are no other documents that you can present. You actually alluded to the fact that you are unable to contact your family and that this is a factor which prevents you in getting any other ID documents. At any rate there would be no other ID documents available. You never had a passport for example. You didn't have a Driver's License.
>
> I also note, in terms of assessing your collaboration, that you did give the phone number of your uncle. Your uncle was contacted by an immigration officer. It seems that your uncle was able to confirm that you are his niece and that he actually gave your parents' names. He was also the one who provided some of the identity documents that were presented at the Immigration Department.
>
> It seems that the information that refers to your identity as such is not contradictory. It appears to me that this is an important element. I refer specifically to subsection 247(1)(e) which refers to documents that contradict information provided by the foreign national with respect to their identity. There are documents presented and they do not contradict the information you give.
>
> I would like to also refer to the sections in the *Immigration and Refugee Protection Act* that deal with the documentation that is accepted for refugee claimants. I refer to Section 178(1) who indicates which documents a refugee claimant can present when this person does not hold a passport, and make specifically reference to 178(1)(a) and

(b). Among those documents that are accepted are documents that have been delivered before you came to Canada, and there are also sworn statements from a person who knows you such as a family member. In this instance, there is an affidavit of your uncle, which was actually supported by his answers to an immigration officer.

Somehow these elements that I have pointed out seem to have been cast aside and great emphasis has been placed on the issue of your itinerary and the other points that I stated before. The fact that you cannot read can, in my opinion, explain the fact that you may not have been able to read the names of the airlines companies. The fact that you were fleeing persecution, as you will try to establish in your refugee claim, and combined with the fact that you were pregnant at the time, can explain that you did not note the number of the seat in which you were seating. It can also be explained that perhaps you were not in Switzerland given that you were told by the agent that you were in that country. But the information you give me about your stay there brings doubts that you were actually in Switzerland.

I want to stress the fact that this particular point was raised before at a previous detention review when it was held before my colleague on August 1st, 2008. You specifically said that day that you travelled from Nigeria to the place the agent said was Switzerland but you did not know. This could perhaps explain why the department is not able to find a flight that goes from Accra to Geneva for example.

For the reasons that I gave, I make the finding that for someone in your particular situation, you are collaborating although there are contradictions pertaining to, for example, the fact that you would have destroyed a passport on the plane instead of giving it to someone else."

[15] The tribunal next embarked on her analysis of CIC's efforts at verifying the respondent's identity writing:

"I have to look at the efforts that have been made by the Immigration Department to see if they are reasonable. I note that at the interview that was held, on the 16th of September 2008, several points had already been established before. The fact that you had no other identity document for example. That you had no passport, no other school documents to give. The fact that you left Nigeria on the 16th of July. The fact that you travelled with a smuggler Paul. The fact that you could not give the airline company's name. The fact that you stayed four days in a country that you think is Switzerland.

These are elements that had already been established before. They are not new. There were elements, however, during this interview that are relevant to the issue of your identity. And in that respect, the interview is an effort that has to be looked at." [My emphasis.]

[16] She noted there were "several efforts regarding the flight from Accra to Geneva, including the verification on the Internet, the Immigration Officer's phone call to Geneva Airport and the request for information from Lufthansa for the purpose of determining whether the respondent had actually travelled from Accra to Geneva and how that could be". The Commissioner then wrote:

> This effort has to be looked at in view of the fact that there is in this case a possible doubt that you were in Switzerland. I believe it is important to take your previous statement into account that perhaps it was Switzerland and perhaps not. [My emphasis.]

[17] The Commissioner then discussed the efforts at verifying whether she had any status in Switzerland (a visitor's visa/a claim for refugee status). She opined she could not see in this effort any reasonableness given that it had not given any fruit. Neither did she see any relevance of making enquiries in the Netherlands "given that there was no information that you actually travelled there".

[18] The tribunal next examined Citizenship and Immigration Canada's (CIC) efforts to see if there was any family link between the respondent and Catherine Iyodele noting that photographs were compared and "apparently there were similar characteristics noted". The Commissioner referred to the respondent's claim "that you have no family members in Canada and you say you do not know who she is." She concluded:

> "I am not convinced that this effort is called for in respect to establishing your identity. At any rate, it becomes so much less important when compared to the other elements that I made reference to in terms of your collaboration. I refer to the documents you presented, to the fact that your uncle confirmed that you are his niece. In this context, comparing the photographs, perhaps noting similar characteristics with Catherine Iyodele, is not in my opinion as relevant as it should be." [My emphasis.]

[19] The Commissioner then commented on CIC's enquiries whether she travelled to France as a result of Ms. Iyodele's declaration when she took on a flight from Paris to Montreal she lost her blue passport on which the respondent travelled from Munich to Montreal. She wrote: "I question the relevancy of this effort actually in establishing your identity."

[20] Finally, the Commissioner noted CIC's request to the detention centre to see the list of visitors who had come to see the respondent. Concerning this request, the tribunal wrote that it: "is not in my opinion relevant to establishing your identity", adding: "It seems much more relevant to consider the fact that you did come forth with the name and the phone number of your uncle and he has confirmed your identity. This, in my opinion, is much more relevant."

[21] She expressed her overall conclusion in these terms:

> I see that the department is making efforts, but it seems to me that some of these efforts are not relevant, and they are of much less importance than the collaboration that you have made up until today. Consequently, I have come to the finding that your detention not justified given the collaboration that you give. Again I stress the fact that this collaboration has been looked at in view of the factors in section 247 of the *Regulations*. [My emphasis.]

[22] She also offered the opinion she believed CIC "is in a position to continue with its investigations even if you are released", adding:

> "There must be, in my opinion, a way to impose conditions that will help the department keep close contact with you, ask you any questions that they may find relevant on the issue of your identity. I am aware that the Minister's delegate does not think your identity has been established. I find that the continued detention is not justified, as I have applied the factors in Section 247. At any rate, I also am concerned with the fact that there does not seem to be [*sic*] any other documents that you can present. There does not seem to be any end in sight. So, for these reasons, I will not continue the detention on the ground of identity."

[23] It is then the tribunal imposed the condition that: "You must report to the Immigration Office once a week until your identity is established. This condition will cease once an Immigration Officer is satisfied of your identity."

The Legislative and Regulatory Scheme

[24] Division 6 of *IRPA* deals with Detention and Release with section 54 providing the Immigration Division is the competent Division of the Immigration and Refugee Board with respect to the review of the reasons for detention under the Division.

[25] Section 58 of *IRPA* provides for release from detention with paragraph 58(1)(d) reading:

Release – Immigration Division	**Mise en liberté par la Section de l'immigration**
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 :
…	…
(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. [My emphasis.]	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. [Je souligne.]

[26] The prescribed factors are located in Part 14 of the *Immigration and Refugee Protection Regulations* (*IRPR*), also headed "Detention and Release". Section 244 of the *IRPR* provides for the purposes of Division 6 of Part 1 of *IRPA*, "the factors set out in this Part shall be taken into consideration when assessing whether a person …. (c) is a foreign national whose identity has not been established".

[27] Section 247.(1) of *IRPA* is headed "Identity not established" and provides for the purposes of paragraph 244(c), the factors are the following:

Identity not established	**Preuve de l'identité de l'étranger**
247. (1) For the purposes of paragraph 244(c), the factors are the following:	247. (1) Pour l'application de l'alinéa 244c), les critères sont les suivants :
(a) the foreign national's cooperation in providing evidence of their identity, or assisting the Department in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father or providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;	a) la collaboration de l'intéressé, à savoir s'il a justifié de son identité, s'il a aidé le ministère à obtenir cette justification, s'il a communiqué des renseignements détaillés sur son itinéraire, sur ses date et lieu de naissance et sur le nom de ses parents ou s'il a rempli une demande de titres de voyage;
(b) in the case of a foreign national who makes a claim for refugee protection, the possibility of obtaining identity documents or information without divulging personal information to government officials of their country of nationality or, if there is no country of nationality, their country of former habitual residence;	b) dans le cas du demandeur d'asile, la possibilité d'obtenir des renseignements sur son identité sans avoir à divulguer de renseignements personnels aux représentants du gouvernement du pays dont il a la nationalité ou, s'il n'a pas de nationalité, du pays de sa résidence habituelle;
(c) the destruction of identity or travel documents, or the use of fraudulent documents in order to mislead the	c) la destruction, par l'étranger, de ses pièces d'identité ou de ses titres de voyage, ou l'utilisation de documents frauduleux

Department, and the circumstances under which the foreign national acted;	afin de tromper le ministère, et les circonstances dans lesquelles il s'est livré à ces agissements;
(d) the provision of contradictory information with respect to identity at the time of an application to the Department; and	d) la communication, par l'étranger, de renseignements contradictoires quant à son identité pendant le traitement d'une demande le concernant par le ministère;
(e) the existence of documents that contradict information provided by the foreign national with respect to their identity.	e) l'existence de documents contredisant les renseignements fournis par l'étranger quant à son identité.

[28] For the sake of completeness, I also set out section 178 of the *Immigration and Refugee Protection Regulations* which were referred to by the tribunal. It deals with situations where an applicant for permanent residence does not hold a document prescribed in any of paragraphs 50(1)(a) to (h) of the *IRPR*. Section 178 of the *IRPR* reads:

Identity documents	**Pièces d'identité**
178 (1) An applicant who does not hold a document described in any of paragraphs 50(1)(a) to (h) may submit with their application	178 (1) Le demandeur qui ne détient pas l'un des documents mentionnés aux alinéas 50(1)a) à h) peut joindre à sa demande l'un ou l'autre des documents suivants :
(a) any identity document issued outside Canada before the person's entry into Canada; or	a) toute pièce d'identité qui a été délivrée hors du Canada avant son entrée au Canada;
(b) if there is a reasonable and objectively verifiable explanation related to circumstances in the applicant's country of nationality or former habitual residence for the applicant's inability to obtain any identity documents, a statutory declaration made by the applicant attesting to their identity, accompanied by	b) dans le cas où il existe une explication raisonnable et objectivement vérifiable, liée à la situation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle, de son incapacité d'obtenir toute pièce d'identité, une affirmation solennelle dans laquelle il atteste de son identité et qui est accompagnée :

(i) a statutory declaration attesting to the applicant's identity made by a person who knew the applicant, a family member of the applicant, or the applicant's father, mother, brother, sister, grandfather or grandmother prior to the applicant's entry into Canada, or

(ii) the statutory declaration of an official of an organization representing nationals of the applicant's country of nationality or former habitual residence attesting to the applicant's identity.

Alternative documents

(2) A document submitted under subsection (1) shall be accepted in lieu of a document described in any of paragraphs 50(1)(a) to (h) if

(a) in the case of an identity document, the identity document

(i) is genuine,

(ii) identifies the applicant, and

(iii) constitutes credible evidence of the applicant's identity; and

(b) in the case of a statutory declaration, the declaration

(i) is consistent with any information previously provided by the applicant to the Department or the Board, and

(ii) constitutes credible evidence of the applicant's identity.
SOR/2004-167, s. 49.

(i) soit de l’affirmation solennelle d’une personne qui a connu le demandeur, un membre de sa famille, son père, sa mère, son frère, sa soeur, son grand-père ou sa grand-mère, faite avant l’entrée du demandeur au Canada, attestant de l’identité du demandeur,

(ii) soit de l’affirmation solennelle d’un représentant d’une organisation qui représente les ressortissants du pays dont le demandeur a la nationalité ou dans lequel il avait sa résidence habituelle, attestant de l’identité de ce dernier.

Documents de remplacement

(2) Les documents fournis au titre du paragraphe (1) en remplacement des documents mentionnés aux alinéas 50(1)a) à h) sont acceptés si :

a) dans le cas d’une pièce d’identité, la pièce, à la fois :

(i) est authentique,

(ii) identifie le demandeur,

(iii) constitue une preuve crédible de l’identité du demandeur;

b) dans le cas d’une affirmation solennelle, l’affirmation, à la fois :

(i) est compatible avec tout renseignement fourni précédemment par le demandeur au ministère ou à la Commission,

(ii) constitue une preuve crédible de l’identité du demandeur.
DORS/2004-167, art. 49.

Analysis

a) The Standard of Review

[29] Since the reform of the standard of review analysis undertaken by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*) through the elimination of the patent unreasonableness standard, there are only two standards of review: correctness and reasonableness.

[30] At paragraph 51 of *Dunsmuir*, Justices Bastarache and LeBel stated questions of fact, discretion and policy as well as questions where the legal issues cannot easily be separated from factual issues generally attract the standard of reasonableness while many legal issues attract a standard of correctness. A reasonableness standard requires deference on the part of the reviewing Court in judicial review applications. When applying the correctness standard, the reviewing Court will not show deference but rather will undertake its own analysis to decide whether it agrees with the tribunal's decision and, if not, will substitute its own view and provide the correctness standard (see *Dunsmuir* at paragraphs 48, 49 and 50). Moreover, in *Dunsmuir* at paragraph 57, Justices Bastarache and LeBel held that an exhaustive review is not required in every case to determine the proper standard of review if the existing jurisprudence has satisfactorily settled the matter.

[31] In *Thanabalasingham*, Justice Rothstein held at paragraph 24 that my colleague Justice Gauthier had correctly applied the proper standards of review in that case. The conclusion my colleague reached on the standard of review of a decision to release from detention or not under sections 57 and 58 of *IRPA* largely depended on the nature of the question at issue: (1) questions of law are reviewed on a correctness standard; (2) questions of fact (previously reviewed on a patently unreasonableness standard) are now reviewed on a reasonableness standard; and, (3) mixed questions

of fact and law, the standard of review depended on whether the mixed question was "factually intensive or legally inclusive". In summary, in *Thanabalasingham* reported at [2004] 3 F.C.R. 523 my colleague Justice Gauthier:

1) Reviewed on a correctness basis the issue of the nature of detention review under sections 57 and 58 of *IRPA* and the burden of proof because they raised questions of law.

2) Reviewed on the basis of patent unreasonableness the issue of the assessment of evidence because this question was largely fact-based.

[32] One additional comment arises and it relates to the existence of section 18.1(4)(d) of the *Federal Courts Act* which provides that the Federal Court may set aside the decision of a federal tribunal if the Court is satisfied the tribunal based its decision "on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[33] The Supreme Court of Canada very recently in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 had an opportunity to consider the impact of paragraph 18.1(4)(d) on the standard of review. Justice Binnie, for the majority, found:

1) This paragraph in the *Federal Courts Act* was not a legislated standard of review.

2) This paragraph did, however, reflect the intention of Parliament as to the degree of deference applicable to findings of fact of a federal tribunal. Such conclusions of fact commanded a high degree of deference (see paragraphs 3 and 45).

b) Application to this case

Issue 1 – Reasons for departing from previous decisions

[34] In *Sittampalam v. Canada (Solicitor General)*, 2005 FC 1352, my colleague Justice Dawson had an opportunity to summarize what *Thanabalasingham* stood for:

> **19** In *Thanabalasingham*, *supra*, the Federal Court of Appeal considered the nature of the detention review hearing before the Board and articulated the following principles. 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. [My emphasis.]

[35] In *Thanabalasingham*, Justice Rothstein explained why there are good reasons for requiring such clear and compelling reasons. This is what he wrote at paragraph 11:

> **11** 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. [My emphasis.]

[36] At paragraphs 12 and 13 of his reasons, Justice Rothstein explained what was the best way a tribunal should provide clear and compelling reasons:

> **12** 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.
>
> **13** 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. [My emphasis.]

[37] From the Federal Court of Appeal's teaching in *Thanabalasingham*, we learn the record in detention reviews is built up on a continuous basis from one review to the other and the Tribunal Member is expected to take into consideration the reasons for previous detention orders. Yet the Tribunal Member must decide anew whether continued detention is warranted hence the requirement that a different decision than the ones reached in the past requires from the Tribunal Member "clear and compelling reasons" for doing so.

[38] My review of the transcripts of the detention reviews in this case and the reasons expressed by various tribunal members is that, whether during the several interviews the respondent had with various Immigration Officers (at the airport on July 22, 2008, on July 31, 2008, on August 26, 2008 and on September 16, 2008) or during her testimony at the detention reviews, various tribunal members had serious problems with the testimony.

[39] I cite the following examples:

1. On the first detention review, Commissioner Ladouceur noted the discrepancy that she told the Immigration Officer at the airport she travelled alone and what she testified before him – that

she travelled with a helper. He also noted the fundamental problem on identity was she had travelled on a passport but yet had none in her possession when she arrived in Montreal.

2. At the second detention review, Commissioner Bibeau noted she had several problems with her testimony leading to her to conclude her cooperation had been quite limited because her answers seemed to be quite imprecise or vague, noting: (1) the implausibility of the amount she testified paying the smuggler; (2) the discrepancy between the smuggler's name Mathew at the airport interview; Paul during the interview on July 31, 2008; and, (3) the documents she presented to support her identity were non conclusive as to her identity. She also found the efforts being made by CIC to discover her identity were reasonable: efforts to determine her status in Switzerland and Germany as well as efforts to determine whether Ms. Iyodele had entered Switzerland.

3. At the September 5, 2008 detention review, Commissioner Germain heard submissions from the Minister's counsel on the CIC's efforts to determine her identity: (1) response from Germany she was not known there; (2) a determination her second batch of documents which had been sent for examination were not conclusive of her identity; (3) the results of the August 26, 2008 interview with an Immigration Officer which revealed a major contradiction now saying she travelled with a handler on the flight from Munich to Montreal and handed him back the blue passport versus what she had previously said – that she travelled alone and destroyed the blue passport on the plane; (4) the fact she is now saying she still owes money to Paul but does not know where he is; and, (5) her testimony she does not know where her child's father is or how to contact him. She also noted the respondent's uncle had been

interviewed. Commissioner Germain was satisfied the Minister's efforts at finding her identity were reasonable in the circumstances because the respondent was not fully cooperating with CIC; she was providing limited information, observing the respondent cannot confirm or infirm the way she travelled, which according to the Commissioner, makes it more difficult for CIC to establish her identity.

[40] From a factual perspective, I mention the respondent was further interviewed by an Immigration Officer on September 16, 2009. During that interview, she changed her testimony again to say that between Munich and Montreal, she travelled alone and destroyed her passport. At that hearing, counsel for the Minister said CIC's investigations disclosed there were no flights from Accra to Geneva which triggered a whole new set of enquiries as to how she travelled. It was also at this hearing the respondent disclosed for the first time she could not read.

c) Conclusions

[41] On this record, I find persuasive counsel for the Minister's submissions the tribunal breached the teaching of the Federal Court of Appeal in *Thanabalasingham*, by failing to provide clear and compelling reasons why she departed from the findings of the previous commissionaires who had determined the Minister's efforts were reasonable and her collaboration weak and limited. I reach this conclusion for the following reasons:

1) The tribunal never explained how she came to the conclusion the documents the applicant or her uncle provided established her identity when the evidence before her and the findings of

her colleagues pointed otherwise as the expertise report on the document stated those documents could not serve to establish the respondent's identity.

2) The tribunal never came to grips with the constant changes or additions in and to the respondent's story and how these impacted on her credibility as determined by her colleagues. In coming to the conclusion she did, she accepted the respondent's story without saying why she should be believed when her other colleagues thought otherwise.

3) The tribunal did not assess the impact of the rolling changes in the applicant's story had on the Minister's efforts to discover her identity. CIC's investigation into the fact there were no flights between Accra and Geneva shifted enormously the landscape and forced the Minister, CIC and CBSA to engage in another round of inquiries. I cite my colleague Justice Shore's decision in *Timothy Igbinosa v. the Minister of Public Safety and Emergency Preparedness, et al*, 2008 FC 1372, at paragraph 64, where he recognized the applicant's inadequate collaboration and lack of credibility complicated efforts to determine identity and thereby caused renewed efforts and different investigations.

[42] As noted, the tribunal questioned the relevance of many of the efforts CIC was taking. Those criticisms, in my view, are not reasonable in the circumstances particularly when a centerpiece of her testimony proved not to be so – her flight from Accra to Geneva and her stay there for four days. That discrepancy cannot be simply washed away by the respondent's statement: "That is what the smuggler told me. I really did not know I was in Geneva or Switzerland".

[43] For these reasons, this judicial review application must be allowed. I need not deal with the other issues raised by counsel for the Minister.

[44] I hasten to add this determination is consistent with the emphasis and importance Parliament placed on a person's identity when the *IRPA* was proclaimed in force in 2002. (See *Canada (Minister of Citizenship and Immigration) v. Gill*, 2003 FC 1398.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the tribunal's decision to release the respondent is quashed and the issue of her continued detention is returned for reconsideration by a different member of the Immigration Division. No certified question was proposed.

"François Lemieux"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4508-08
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. SANDRA SIKIRATU IYILE
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	June 16, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Lemieux J.
DATED:	July 6, 2009

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