Federal Court  Cour fédérale

Date: 20101203

Docket: IMM-6660-10

Citation: 2010 FC 1227

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B479

Respondent

REASONS FOR ORDER

ZINN J.

[1] On November 26, 2010, I granted the Minister's motion and stayed the respondent's release from immigration detention until the earlier of either the determination of the Minister's application for judicial review on the merits or an order of a Member of the Immigration Division releasing the respondent from detention following a statutorily required detention review hearing. I also granted the Minister's application for leave to judicially review the decision of the Member

releasing the respondent and ordered that it be heard on an expedited basis. The following are my reasons for so doing.

[2] The respondent is a Sri Lankan national who arrived in Canada aboard the *Sun Sea*, with some 490 other illegal migrants, on August 13, 2010.

[3] The record before the Court establishes that the respondent has undergone many interviews (August 27, 2010, October 2, 2010, October 18, 2010 and November 5, 2010) and has had five detention review hearings as mandated by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (August 19, 2010, August 25, 2010, September 13, 2010, October 16, 2010, and November 10, 2010).

[4] At first, the Minister argued for the respondent's continued detention on the basis of identity (s. 58(1)(d) of the Act). Until the detention review held on October 16, 2010, the respondent's detention was continued by the Board on the basis of identity. However, since October 16, 2010, the Minister has sought continued detention because of a suspicion that the respondent is inadmissible on grounds of security (s. 58(1)(c) of the Act). That section reads as follows:

> 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
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> …
>
> (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; …

[5] At the review on October 16, 2010, the Member found that the Minister had not made reasonable efforts to establish the respondent's identity and held that continued detention on that basis was not warranted. The Minister submitted that there was a reasonable suspicion that the respondent was inadmissible on security grounds. The Member found that the Minister's suspicion that the respondent was inadmissible "on grounds of security" as provided for in s. 58(1)(c) was "reasonable" as is required under that section.

[6] The Member then turned his attention to whether the "Minister is taking the necessary steps to inquire into that suspicion." The Member had concerns regarding the investigative process the Minister was following:

> Which brings me to looking at whether the Minister is taking the necessary steps to inquire into that suspicion. This is one part of the equation that I find difficult, in a way, to analyse. The suspicion is reasonable. There are steps that the Minister can take in order to continue to try to verify that suspicion. However, the Minister also had on file a number of documents that would have probably helped to sort of answer the questions, with respect to that suspicion, and those steps weren't taken, so that's really troubling to me.
>
> However, I bear in mind the jurisprudence from the Federal Court, namely the case that came out last year with respect to the *Ocean Lady* and my supervisory role in that respect is fairly limited. Is the Ministry taking the necessary steps? Is the investigation of the Minister in good faith? Although I do find fault with it, I can't say that it goes -- that it's done in bad faith. There are necessary steps that are open to the Minister and that should lead in a way for the Minister to either decide whether the security concerns are warranted or not.
>
> So given that, I will maintain detention. However, I will simply mention for the record, that I would expect the Minister to move fairly fast on this case. First, there are documents on file that go towards this issue, therefore the steps should be taken with respect to these documents. In addition, the Minister should make every effort to, once they receive those Court documents, to take action on them and determine rapidly whether the suspicion is warranted or not.

> So for today, I maintain detention. However I think, should nothing be done by the next detention review, another Member may be a little bit more stricter than I am today.
>
> In maintaining the detention and in looking at the security issue, I do take into account the fact of this within the context of a mass arrival and therefore that gives some lenience to the Minister.

[7] The Member said that he was examining whether the "Minister is taking the necessary steps to inquire into that suspicion" [emphasis added]. The use of the word "the" by the Member suggests that a Member has authority to adjudicate on the appropriateness, sufficiency and timing of the steps and not merely whether the step or steps being taken are necessary ones. This may be an error in interpreting the jurisdiction of the Board when exercising its supervisory jurisdiction under s. 58(1)(c) of the Act. In my view, the Member whose decision is under review interpreted his role in the same manner as his predecessor.

[8] At the next detention review on November 10, 2010, the Minister sought to continue detention to permit him to continue to take necessary steps to inquire into his reasonable suspicion that the respondent is inadmissible on security grounds. The Member decided that continued detention was not warranted. The Member was not satisfied with the steps the Minister had taken to address his suspicions about the security risk the respondent posed. He admonished the Minister for the investigation undertaken to date, which he described as "woefully inadequate," and he refused to accept the volume of work faced by the Minister as a consequence of some 500 illegal migrants landing in B.C as any justification. He wrote:

> In my opinion, the Minister is not conducting this investigation in good faith. It is piecemeal. It lacks co-ordination. It shows scrambling and an impromptu activity in the face of an upcoming detention review. It appears insincere and lacking a co-ordination. Further detention cannot be justified on this ground.

[9] The Minister's suspicions relating to security appear to have been based on two facts: (1) the respondent had been arrested in Sri Lanka as a suspected LTTE member and been detained there for nearly four years; and (2) there was a suspicion as to the source of the funds he paid to travel to Canada. The respondent informed the Minister on his arrival of the fact of his earlier detention in Sri Lanka and claimed that he was not a member or supporter of the LTTE although he had attended meetings held by the Tigers at a stadium in Mannar but did not talk to them. He also told the Minister that after his release from prison he had married and then travelled to Thailand with his wife. He said that while in Thailand his mother-in-law supported his family by sending 15,000 rupees per month and that she also paid for his travel to Canada. His wife returned to Sri Lanka with their child. He informed the Minister that his wife was aware that he had travelled to Canada. Immediately following the October detention review, the Minister re-interviewed the respondent and spoke to his wife and mother-in-law.

[10] The evidence before the Member on November 10, 2010, established that the Minister had taken the following steps since the last detention review:

(i) The respondent had been interviewed for the fourth time on October 18, 2010.

(ii) Following the respondent's interview, the Minister had a telephone conversation with the respondent's wife and mother-in-law in Sri Lanka to confirm the information the respondent had provided. Contrary to his evidence, they denied knowing that he had left for Canada, denied knowledge of the cost of the trip, and denied having provided

him with the funds to travel to Canada. They both stated that they were poor and could not have funded the respondent's travel, as he had claimed.

(iii) The Minister had another interview with the respondent on November 5, 2010, to confront him with these contradictions. During the interview, the Minister called the respondent's wife and mother-in-law. The mother-in-law stated that she had sent the respondent 15,000 rupees in total to Thailand, a sum significantly less than the 15,000 rupees per month the respondent had claimed, and that she did not send him money to go to Canada. Subsequently, the Minister was told that she and her daughter were lying as they were unsure if they were speaking to the Sri Lankan CID. The Minister concluded that "it will be necessary to have another conversation with subjects [*sic*] wife and mother in law."

(iv) The Minister had translated four of the documents the respondent brought with him being: (1) submissions from the respondent to the UNHCR in Thailand, (2) submissions from the respondent's wife to the UNHCR in Thailand, (3) a complaint to the police about his brother's death; and (4) a one sentence document that read: "On suspicion of having a bomb close by he was taken into custody on 2005 [redacted], the case was heard in [redacted] Magistrate court case [redacted] and 2009 [redacted] he was released, issued at your request." Parts of this last document have been redacted in this Order to prevent identification of the respondent.

(v) On November 10, 2010, CBSA sent letters to UNHCR and the International Committee of the Red Cross asking for all information they may have concerning the respondent.

[11] At the detention review hearing on November 10, 2010, the Minster submitted that the following further steps he was taking were necessary steps:

(i) Conduct another interview with the respondent's family to clear up the contradictory information they had given;

(ii) Question the family about the time the respondent had spent in detention in Sri Lanka;

(iii) Await the information requested from the UNHCR and International Red Cross about the time the respondent spent in detention;

(iv) Follow-up with the lawyer who had represented the respondent when he was in detention in Sri Lanka; and

(v) Await receipt of the documents relating to the respondent's detention and trial in Sri Lanka that the respondent's wife had sent at the end of October.

[12] The Member at the November 10, 2010 detention review discounted the contradictions between the respondent and his wife and mother-in-law. He stated that "none of this related at all to the security issue" and stated that it related solely to credibility. With respect to the Member, it is evident that there is a potential relevance to the security issue. One of the Minister's concerns is that the respondent may be a member of the LTTE and that it paid for his travel to Canada. If the wife and mother-in-law were believed, then the source of the respondent's funds to enter Canada was unexplained.

[13] With respect to the steps the Minister submitted were necessary, the Member stated as follows:

So the Minister has described the following steps as those necessary. The first step described is to interview the family again regarding the

contradictory information, that the Minister asserts was provided, and regarding the time he spent in prison. What isn't clear to me is whether there were any questions asked of the family when they were interviewed on the 5th of November about the time that [respondent] spent in prison.

The test regarding necessary steps is whether it has the potential to uncover relevant evidence bearing on the Minister's suspicion. The Minister needs to approach these kinds of investigations thoroughly. So when the Minister has the family on the telephone on the 5th of November, five days before the next detention review, the Minister needs to address specifically the information it requires in respect of its reasonable suspicion.

Now, the Minister has indicated that they've had [respondent] sign Red Cross and UNHCR waivers. I specifically asked what was anticipated that would be received from the Red Cross to the UNHCR, and the Minister advised that they may have information why he was in detention and whether there was any mention of any security concerns. With respect to the UNHCR where [respondent] had registered in Thailand, the Minister wondered whether they might have information in the same regard. This seems a very indirect method of investigation when so many direct avenues have been provided. And I return to the fact that the person concerned brought a document that set out the case number and the Minister has been in possession of that since he arrived, but only had it translated on the 5th of November.

With respect to this Red Cross and UNHCR waiver, the question of the good faith of this so-called necessary step is highlighted by the admission by the Minister, on questioning, that these waivers were signed only today, which indicates to me that the Minister was scrambling to demonstrate the steps were being taken.

The Minister advised as well that another step would be the intention to speak with the person's lawyer in Sri Lanka, but they don't have the name of the lawyer. [Respondent], however, advised that he told them the name of the lawyer. He indicated that the lawyer is now a judge in the local area. He was not asked for his telephone number, but I can't imagine he would know it.

The Minister indicated that when the mother-in-law and wife were interviewed, that they committed to sending an additional document related to the court case and [respondent] indicated that he believes that that document was sent sometime after the 20th of October, and it's reasonable to assume that it's about to arrive.

So the member at the last hearing had concerns about the Minister's steps being taken. I have similar concerns. I appreciate that the Minister's resources are strained by the sheer number of persons who arrived on the MV *Sun Sea*. But the person advised very soon after arrival that he had spent this time in jail on suspicion of LTTE involvement and he was never convicted of a crime and released when, and this is his language, after they felt he was innocent. Had the Minister taken a direct route of translating the document that the person concerned had brought with him, that included the court file number, by now the Minister could probably have confirmed the veracity of [respondent's] history. If they had obtained from him the name of his lawyer at an earlier date and made attempts to contact him using their contacts in Colombo, this matter could have been probably cleared up by now.

Detention is not something to be taken lightly. It concerns me that the Minister throws around the ground of security in the case where the person describes how they were prosecuted for something and found not guilty, and provides this information voluntarily. Then the Minister takes indirect routes to investigate the truth of the story. The only justification for the woefully inadequate investigation here is the sheer volume of work faced by the Minister.

The Federal Court indicates that the Immigration Division has a supervisory jurisdiction and is limited to examining whether the proposed steps have the potential to uncover relevant evidence bearing on the Minister's suspicion and to ensure that the Minister is conducting an ongoing investigation in good faith. In my opinion, the Minister is not conducting this investigation in good faith. It is piecemeal. It lacks coordination. It shows scrambling and an impromptu activity in the face of an upcoming detention review. It appears insincere and lacking a co-ordination. Further detention cannot be justified on this ground.

In general, it is not difficult for the Minister to establish a reasonable suspicion, and in general, it is not difficult for the Minister to establish that it is taking necessary steps. But as far as I'm concerned, since the last detention review, the investigation has proceeded in fits and starts and could have been concluded by now had someone taken initiative and examined the matter as a whole. All of the pieces have been sitting on the Minister's file since August. And while I appreciate that the Minister has been doing mostly identity investigations, this information was on the Minister's file as far back as the 27th of August and the Minister has failed to act on this information.

> So I'm not satisfied that detention can be continued on these grounds. While the Minister has a suspicion, it should have been addressed and alleviated by now, or otherwise, if the necessary steps had been taken. They were not taken.

[14] The Member appears to have engaged in an analysis of how the investigation ought to have been conducted without ever addressing the question of whether the steps proposed by the Minister have the potential to uncover relevant evidence bearing on the Minister's suspicion which would make them necessary steps within the meaning of the Act. The latter is the question that the Member was required to address. I am of the view that an issue is raised as to whether the Member properly interpreted and applied s. 58(1)(c) of the Act.

[15] The Member also appears to have considered that a piecemeal and poorly co-ordinated investigation coupled with an appearance of insincerity proves that the investigation was done dishonestly or with *male fides*. This raises an issue as to whether the Member applied the correct test in assessing whether the Minister's investigation had been done in good faith.

[16] While detention is not taken lightly, those who arrive *en masse* should expect that this extraordinary occurrence will require significant resources and that it will take some significant time to resolve the public interest concerns of the country upon whose shores they have landed. The Board should also be cognizant of this reality when assessing the measures taken by the Minister. Although the Member said that he had taken into account the extraordinary circumstance of so many illegal migrants landing at once, it is not evident to me that he gave it more than lip service. While it may be appropriate to expect that the Minister will take a coordinated and focused approach when faced with one illegal immigrant landing at Vancouver Airport, it is hardly

surprising that when 500 land at a B.C. port the steps taken may appear to lack co-ordination and to be piecemeal. They probably are. Issues of the identity of these persons of necessity must be dealt with first before any other issues are explored.

[17] In short, I find that the Minister has established at least two issues that require further examination. Are these serious issues?

[18] There are recent Orders of this Court in which it has been held that there is an elevated threshold for "serious issue" when considering a motion to stay an order releasing a person from immigration detention. I am concerned whether the imposition of the higher threshold in such cases accords with the jurisprudence in this Court and the Court of Appeal.

[19] In his September 17, 2010 Order in *Canada (Minister of Citizenship and Immigration) v. XXXX*, Court Dockets IMM-5368-10 and IMM-5359-10, IMM-5360-10, and IMM-5361-10 Justice de Montigny wrote: "Following the decision of the Court of Appeal in *Baron v. Canada (M.P.S.E.P)*, 2009 FCA 81, it is now settled law that an elevated standard of review applies when determining whether a serious issue has been raised with respect to a stay motion that, if granted, would effectively grant the relief sought in the underlying judicial review application. … [I]f the stay were granted the Minister would, for all intents and purposes, be granted the remedy that he is seeking in the underlying application for judicial review."

[20] With the greatest of respect, granting a stay of an order releasing a person from immigration detention does not effectively grant the Minister the relief sought in the underlying judicial review application challenging the order to release. It merely preserves the *status quo*.

[21] The Federal Court of Appeal in *Baron* endorsed the view of Justice Pelletier, as he then was, in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 where he held, on the facts before him, that when considering the motion to stay an order for removal the Court ought not merely consider whether the applicant had raised an issue that was not frivolous or vexatious but "go further and closely examine the merits of the underlying application." The fundamental reason why Justice Pelletier so held was because the decision underlying the application for judicial review was not the order for removal, but was a decision of a removal officer refusing to defer removal.

[22] Justice Pelletier noted that there were two different situations that may give rise to motions to stay removal. The first situation is where the motion to stay the removal order is brought within an application for judicial review that challenges the removal order itself. The second situation is where the motion to stay the removal order is brought within an application for judicial review that challenges the refusal of an officer to defer removal. *Wang* was an example of the second situation. Mr. Wang's refugee claim had been dismissed and thus he was subject to removal. When he was informed that he was to be removed to China, he asked the officer to defer his removal pending the disposition of his recently filed H&C application. The officer refused and it was the officer's refusal to defer that was challenged in the judicial review application; it was not the earlier order for removal.

[23] Justice Pelletier held that where an application challenging the validity of the removal order itself was the underlying application, then the "not frivolous or vexatious" test for serious issue was appropriate and applicable because staying the implementation of the removal order "did not effectively grant the relief sought in the underlying judicial review application because it was in relation to another decision [namely, the removal order]." However, where what was challenged in the underlying judicial review application is the decision refusing to defer enforcement of the removal order, then granting a stay of enforcement "gives the applicant that which the removal officer refused." A stay granted by the Court on an application to review the refusal to defer removal grants the applicant exactly the remedy he or she sought from the officer and grants it before the merits of the application are heard. As Justice Pelletier observed, "It is in this sense that one can say that the disposition of the motion for a stay of execution decides the underlying application for judicial review."

[24] The situation here is not parallel to that in *Wang*. Here the decision subject to the judicial review application is the decision of the Board releasing B479 from immigration detention. The Minister is challenging the legality of that decision in the underlying application. A stay of that decision pending a hearing on the merits does not decide the underlying application and it does not, in the sense described in *Wang*, give the Minister the relief sought before the merits of his application are determined. *Wang* would only be parallel to the situation facing B479 if there was some mechanism available by which the Minister could seek a deferral from the Board of the release and, if refused, seek judicial review of that refusal. In that case, a stay of release from detention pending the Court's determination of the refusal to defer release would grant the Minister exactly the remedy he sought but had been denied.

[25] Admittedly, a stay of release from detention does grant the Minister that which was sought at the hearing - the continued detention of B479; however, that is no different a situation than that which arises in every stay application which, by definition, seeks to maintain the *status quo* pending a decision on the merits.

[26] For these reasons, I am of the view that the serious issue test is to be measured on the standard set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, namely whether "there is a serious question to be tried as opposed to a frivolous or vexatious claim."

[27] In this case, I am satisfied that the applicant has established that there is more than one serious issue to be tried. Further, I am satisfied that the applicant has an arguable case in which there is a possibility of success with respect to these issues and thus shall grant leave to judicially review the decision, as requested.

[28] I am also satisfied that the applicant has established that irreparable harm will occur if the stay is not granted. The irreparable harm arises from the fact that the Minister has a security concern related to the respondent and there is a serious possibility that his release would defeat the purpose that underlies s. 58(1)(c) of the Act. As was recently noted by Justice Barnes in *Canada*

(Minister of Citizenship and Immigration) v. XXXX, 2010 FC 112 at para 21 "While the importance of not unduly detaining such persons cannot be forgotten, the protection of Canadians and Canada's pressing interest in securing its borders are also worthy considerations."

[29] Lastly, the balance of convenience rests with the Minister. The respondent shall continue to have his regular detention reviews and the Minister will continue his investigation. If the Minister's suspicion is satisfactorily addressed, the respondent shall be released from detention.

[30] The applicant asks that the stay be in effect until the application for judicial review is determined on its merits. Some recent Orders of the Court have issued stays in these circumstances until the earlier of either the determination of the application for judicial review on the merits or the respondent's next statutorily required detention review. The applicant expressed a concern that the latter wording might mean that the release order becomes effective after the next review, even if the next review orders continued detention. On the other hand, the former wording has apparently led some Members to find that all detention reviews are stayed until the judicial review application is determined on its merits. In my view, the respondent is entitled to the detention reviews every 30 days whether or not a stay of a release order is granted by this Court. In order to make that clear, the stay shall be granted until the earlier of either the determination of the Minister's application for judicial review on the merits or an order of a Member of the Immigration Division releasing the respondent from detention following a statutorily required detention review hearing.

"Russel W. Zinn"

Judge

Ottawa, Ontario

December 3, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Caroline Christiaens	FOR THE APPLICANT
Douglas R. Cannon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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