Federal Court  Cour fédérale

Date: 20110126

Docket: IMM-6390-10

Citation: 2011 FC 94

Toronto, Ontario, January 26, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B188

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] The Minister of Citizenship and Immigration (the "Applicant") seeks judicial review of a decision of Mr. Marc Tessler (the "Member") of the Immigration and Refugee Board, Immigration Division (the "Board"), dated November 1, 2010. In that decision, the Member ordered the release from detention of B188 (the "Respondent") following a detention review pursuant to section 58 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] Operation of the release Order was stayed by Order of Justice Mosley issued on November 2, 2010 pending result of the Applicant's motion to stay the Respondent's release pending the outcome of the Applicant's application for judicial review. Leave to commence this application for judicial review was granted by Justice Mosley by Order dated November 12, 2010 and the Respondent's release was further stayed pending the final disposition of this application for judicial review or until the Respondent's next statutorily required detention review hearing.

FACTS

[3] The Respondent is a citizen of Sri Lanka. He was born in 1980 and lived in northern Sri Lanka, that he described as the Vanni region, an area controlled by the Liberation Tigers of Tamil Eelam (the "LTTE").

[4] In 2002, the Respondent began working as a reporter for a newspaper in the town of Kilinochchi called the "Eelanatham" which translates as "People's Daily". The Respondent was primarily a reporter at Eelanatham, collecting information and writing articles on peoples' daily lives. The "Eelanatham" was widely circulated during times of peace but during hostilities, the LTTE would only permit the newspaper to be distributed locally.

[5] In several interviews by agents of the Canada Border Services Agency (the "CBSA"), the Respondent indicated that the "Eelanatham" is not an LTTE newspaper. He said that the LTTE had two newspapers, that is the "Viduthalai Pulikal" and the "Suthanthara Paravaikal" as well as a radio station and a television station. The Respondent said that the "Eelanatham" was not permitted to

write anti-LTTE stories and he himself was not permitted to write about the LTTE, that task was left to his editors.

[6] The Respondent said that he has never been a member of the LTTE but that his brother joined for 4 or 5 years in 1990. He had two other brothers but they were killed during fighting between the Sri Lankan Army and the LTTE, one in 1990 and the other in 1999.

[7] The Respondent insists that he is not a member of the LTTE. During interviews with CBSA agents, he indicated that the LTTE attempts to gain freedom for the people of his region, but that they are violent, greedy and worthy of condemnation.

[8] The Respondent recognized that the Sri Lankan Army was targeting and murdering journalists, and he believes that he was a target. On April 25, 2009, he was injured during a shell attack. He had attended the scene of a previous shelling in the same area to take pictures when the strike occurred.

[9] The Respondent fled Sri Lanka on November 25, 2009, by flying to Thailand. On May 1, 2010, he boarded the M.V. "*Sun Sea*". He was one of 492 persons smuggled to Canada on board that ship. The M.V. "*Sun Sea*" arrived in Canada on August 13, 2010. The cost of his passage was $8,000 and the Respondent owes an additional $5,000 that remains unpaid. The Respondent has a brother in France who was able to help pay his initial debt. During interviews with the CBSA, and in submissions before the Board through his Counsel, the Respondent stated that his brother could

pay the $5,000 he owes, but as of the date of the detention review hearing, he had been unable to contact that brother since arriving in Canada. The Respondent has no family or friends in Canada.

[10] Upon arrival in Canada, the Respondent was detained for identification purposes. His first detention review pursuant to the Act was held on August 17, 2010. The Board continued his detention, at that time, pursuant to paragraph 58(1)(d) of the Act, on the basis that his identity had not been established. His detention was continued on the same basis following detention review hearings on August 20, September 9 and October 4, 2010.

[11] On October 15, 2010, the Applicant reported the Respondent, pursuant to section 44 of the Act, alleging that he is inadmissible by virtue of paragraph 34(1)(f) that is, that the Respondent is a member of a terrorist organization. More specifically, the Applicant alleges that the Respondent is a member of the LTTE.

[12] The next detention review hearing, as required under the Act, was held on November 1, 2010 relative to the Respondent. At that time, the Applicant argued that the Respondent's detention should continue because he is a flight risk, as described in paragraph 58(1)(b) of the Act.

[13] In his decision, the Member rejected these arguments and decided that it was not unlikely that the Respondent would appear for future hearings, such as a hearing pursuant to subsection 44(2). The Member also found that the debt owed by the Respondent was not so large as to make him vulnerable for coercion from the smugglers and that the Applicant's allegations that the Respondent is inadmissible under paragraph 34(1)(f) is not a straightforward matter.

[14] The Board found that since many persons come to Canada without friends or relatives who are already established here, the fact that the Respondent had no such contacts did not present a flight risk. The Board noted that there is a general flight risk for those arriving in Canada in the circumstances of the Respondent. This, and the potential for an eventual removal order, could be mitigated by strong terms and conditions. The Board imposed terms and conditions, including weekly reporting requirements and a stipulation that he not associate with criminal organizations, but refused to impose a cash bond.

ISSUES

[15] The Applicant raises three issues in this application for judicial review. First, he argues that the Board erred in law and misapplied paragraph 58(1)(b) of the Act by discounting the factors set out in subsections 245(f) and (g) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"). The Applicant argues that the Board made its decision on the basis of the Member's personal belief and speculation and in the absence of countervailing evidence.

[16] Second, the Applicant submits that the Board erred in law and misapplied paragraph 58(1)(b) of the Act by failing to consider the likelihood that the Respondent will not appear for his ultimate removal from Canada, rather than speculating that the Respondent will successfully defend the admissibility hearing or seek relief from any inadmissibility pursuant to subsection 34(2) of the Act.

[17] Third, the Applicant argues that on the facts of this case, the minimal terms and conditions of release ordered by the Board were unreasonable.

DISCUSSION AND DISPOSITION

(i) Standard of Review

[18] The first matter to be addressed is the appropriate standard of review. Having regard to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, there are now only two standards of review, that is correctness and reasonableness. Questions of law and issues of procedural fairness will be reviewed on the standard of correctness. Questions of fact and questions of mixed fact and law are subject to review on the standard of reasonableness.

[19] The issue of whether the Board erred by failing to apply the factors set out in subsections 245(f) and (g) is a question of law and reviewable on the standard of correctness. The alleged failure of the Board to consider whether the Respondent will appear for a removal order is an issue of mixed law and fact; see *Canada (Citizenship and Immigration) v. X*, 2010 FC 109. The Board's choice of release conditions is a matter of mixed fact and law, reviewable on the standard of reasonableness. The manner in which the Board weighs the evidence before it, in reaching its conclusions, is also reviewable on the standard of reasonableness.

(ii) Correct Legal Test

[20] Section 58 of the Act governs relief and detention, and provides as follows:

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is	58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu

satisfied, taking into account prescribed factors, that

des critères réglementaires, de tel des faits suivants :

(a) they are a danger to the public;

a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

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

c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;

(d) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.

Detention — Immigration Division

Mise en détention par la Section de l'immigration

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of

(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit

an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.	qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.
Conditions	Conditions
(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.	(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

[21] The thrust of subsection 58(1) is that a person in detention will be released unless the Board "is satisfied, taking into account prescribed factors" that the person should not be released. The prescribed factors are set out in part 14 of the Regulations which includes sections 244 to 250. Sections 244, 245 and 247 of the Regulations are relevant to the within application.

[22] Section 244 provides as follows:

244. For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person	244. Pour l'application de la section 6 de la partie 1 de la Loi, les critères prévus à la présente partie doivent être pris en compte lors de l'appréciation:
(a) is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could	a) du risque que l'intéressé se soustraie vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant

lead to the making of a removal order by the Minister under subsection 44(2) of the Act; (b) is a danger to the public; or (c) is a foreign national whose identity has not been established.	mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi; b) du danger que constitue l'intéressé pour la sécurité publique; c) de la question de savoir si l'intéressé est un étranger dont l'identité n'a pas été prouvée.

[23] Subsection 244(a) is relevant to the present matter since the Applicant is basing his case upon the alleged unlikeliness that the Respondent will appear for an admissibility hearing. The Applicant submitted before the Board that the Respondent is likely to be found inadmissible. On that basis, he argued that the Respondent has an interest in not attending an admissibility hearing. The Applicant also argued to the Board that the Respondent is unlikely to present himself for removal, once ordered to do so.

[24] Section 245 of the Regulations is a list of factors that relate specifically to the issue of flight risk, pursuant to subsection 244(a), quoted above. As noted earlier, the only two provisions of section 245 that are relevant in the within matter are subsections (f) and (g). Since flight risk is the consideration, the Board must ask whether involvement in a people smuggling or trafficking operation would lead a person in the circumstances of the Respondent to not appear. As well, subsection (g) requires the Board to consider the existence of strong community ties in Canada as a factor in assessing the existence of a flight risk.

[25] The Applicant argues that the Board based its decision on speculation and not on the factors set out in section 245 of the Regulations. In particular, he submits that the Board ignored subsections 245(f) and (g) which provide as follows:

245. For the purposes of paragraph 244(a), the factors are the following:	245. Pour l'application de l'alinéa 244a), les critères sont les suivants :
…	…
(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and	f) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244a) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;
(g) the existence of strong ties to a community in Canada.	g) l'appartenance réelle à une collectivité au Canada.

[26] As noted by the Respondent, only two subsections of section 245 of the Regulations apply in this case. In the detention review hearing of November 1, 2010, the Applicant only relied on the factors set out in subsections 245(f) and (g).

[27] The Applicant argues that instead of considering whether the Respondent is likely to appear for his removal, the Board focused on whether the Respondent could successfully defend the allegation of inadmissibility. In other words, he submits that the Board concentrated on whether the Respondent will likely be removed from Canada, not whether he is likely to appear for removal if so ordered. Relying on the decision in *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (T.D.), the Applicant argues that persons may be detained if the Minister is of the opinion that they will not appear for a removal order if one is issued.

[28] The Applicant submits that the Board did not consider whether the Respondent would appear for removal if so ordered and thereby committed an error of law.

[29] The Respondent takes the position that this argument is without merit and submits that the Board, according to its reasons, clearly considered the possibility that the Respondent poses a flight risk, including whether he would appear for removal if so ordered. In doing so, the Board did more than required.

[30] The Respondent submits that paragraph 58(1)(b) is disjunctive, meaning that the Board need only consider whether the Respondent was unlikely to appear for any one of the processes identified in that provision. In this case, the Respondent argues that the Board was only required to consider whether the Respondent was unlikely to appear for an admissibility hearing.

[31] Further, the Respondent argues that if he is deemed to be inadmissible, the Applicant may re-arrest him, without warrant, pursuant to subsection 55(2) of the Act. As well, if the Board were required to determine if the Respondent would present himself for removal, the Board would have been required to consider how long it will take for that removal to be completed in accordance with the law, having regard to subsection 248(c) of the Regulations.

[32] A recent decision of this Court favours the statutory interpretation urged by the Respondent. In *Canada (Minister of Citizenship and Immigration) v. B157*, 2010 FC 1314, Justice de Montigny held at para. 45, in very similar circumstances, that:

> [45] There were good reasons for the Member to focus on the next immigration proceeding rather than the removal. An officer may always, with or without a warrant, re-arrest the Respondent if he has reasonable grounds to believe he is inadmissible (an easily-met condition if the Respondent were found inadmissible by the Immigration Division) and is unlikely to appear for his removal: s. 54 of *IRPA*.
> …
> [47] In light of these further proceedings that are set to occur before removal and of the possibility of re-arresting the Respondent, the Member's failure to conduct a premature analysis of the likelihood to appear for removal, as compared to the probability of appearing for the inadmissibility hearing, does not represent a fatal flaw in his decision.

[33] The *B157* decision was rendered after this application for judicial review was heard. The parties were given a chance to address the applicability of Justice de Montigny's decision to the case at bar. Their further submissions have been considered.

[34] I agree with Justice de Montigny's analysis. In any event, and contrary to the Applicant's argument, the Board in fact did consider whether the Respondent was unlikely to appear if ordered to be removed.

[35] The Board's reasons make it clear that it did consider whether the Respondent would appear for an admissibility hearing and that, at the same time, it was aware of the potential for the Respondent to eventually face a removal order. The Board found that the Applicant's allegation of the Respondent's membership in the LTTE is not straightforward, thereby giving the Respondent an incentive to present himself for the admissibility hearing. The Board found that the flight risk that could arise from the potential of an eventual removal order could be mitigated by strong terms and conditions.

[36] I am not persuaded by the Applicant's submissions that the Board failed to consider or apply the correct legal test. It is clear from its decision that the Board specifically referred to the factors identified in section 245 of the Regulations and applied those factors to the facts presented. The Board committed no error of law.

(iii) Erred in Finding No Flight Risk

[37] The Applicant further submits that the Member's decision that the Applicant is not a flight risk was based on speculation and not on the evidence that was presented. In particular, the Applicant argues that the Board failed to focus on the evidence supporting the conclusion that the Respondent was a member of the LTTE.

[38] The Respondent argues that the Applicant bears the burden, on the balance of probabilities, of showing that it was unlikely that he would appear for an admissibility hearing. The Respondent submits that the Applicant was required to establish a link between the debt owed to the smugglers and his lack of family connection in Canada to the likelihood that he would not appear for an admissibility hearing. The Respondent submits that the Applicant has failed to submit this evidence.

[39] With respect to subsection 245(f), the Respondent argues that contrary to the Applicant's submissions, there is evidence on the Record concerning the Respondent's brother in France and that he would pay the outstanding $5,000 debt due to the smugglers.

[40] The Respondent notes that at the hearing, the Applicant presented no evidence showing a link between that debt and the Respondent's alleged vulnerability to the smugglers. The Respondent argues that the Applicant himself is relying on speculation in making the argument that the outstanding debt means that the Respondent is vulnerable to the smugglers.

[41] The Minister bears the burden of showing that the Respondent is a flight risk. The Federal Court of Appeal held, in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 572 at para. 24, as follows:

> The reasons of Gauthier J. are logical and clear. I am fully satisfied that she correctly applied the proper standards of review to Mr. Iozzo's findings and that she correctly interpreted the relevant law. I would dismiss the appeal. I would answer the certified question as follows:
>
> > At each detention review made pursuant to sections 57 and 58 of the Immigration Refugee Protection Act, S.C. 2001, c. 27, the Immigration Division must come to a fresh conclusion whether the detained person should continue to be detained. Although an evidentiary burden might shift to the detainee once the Minister has established a prima facie case, the Minister always bears the ultimate burden of establishing that the detained person is a danger to the Canadian public or is a flight risk at such reviews. However, previous decisions to detain the individual must be considered at subsequent reviews and the Immigration Division must give clear and compelling reasons for departing from previous decisions.

[42] Having considered the materials filed and the submissions of the parties, I am satisfied that the Board's decision with respect to subsections 245(f) and (g) of the Regulations is reasonable. The Board's finding that the amount owed by the Respondent to the smugglers is not so great as to give rise to undue influence of the smugglers over the Respondent, is justifiable and defensible. The

evidence on the Record is that the Respondent's brother may be able to pay the $5,000. The Board took this evidence into account.

[43] There is nothing unreasonable in the Board's analysis of the Respondent's lack of ties to Canada. The wording of subsection 245(g) simply asks the Board to consider the existence of strong ties to a community in Canada. This language gives no direction that the existence of such ties is a positive or negative factor to be considered in assessing whether someone is a flight risk. While this is a factor militating towards continued detention, the Member did not find that it overrode other considerations.

[44] Overall, it was reasonable, in my opinion, for the Board to consider the strength of the Applicant's allegations that the Respondent is a member of a terrorist organization in determining whether or not the Respondent poses a flight risk. It was reasonable for the Board to note that it is not clear that the Applicant will succeed in an admissibility hearing. There is nothing speculative in this regard.

[45] This case is distinguishable from the facts in *B157*. The key factual difference is the strength of the allegation that B157 is a member of the LTTE in that case. Further, it is my opinion that the Board in this case meaningfully addressed the submissions of the Applicant with regard to the debt the Respondent owes to the smugglers and the allegation that the Respondent is a member of the LTTE in considering subsection 245(f) of the Regulations.

(iv) Terms and Conditions

[46] The next issue is whether the Board erred in its choice of terms and conditions. As noted above, this issue is reviewable on the standard of reasonableness.

[47] The Applicant argues that since the Respondent has no connections in Canada, the Board's decision to release him on minimal terms, is unreasonable. He submits that all of the conditions are unreasonable, including the failure to impose a cash bond, because the Respondent has no residence and no money.

[48] The Respondent, in reply, argues that the Board accepted and imposed nearly all of the conditions that had been requested by the Applicant at the detention review hearing. In particular, the Respondent is required to report to a specific CBSA officer once a week and is prohibited from associating with members of criminal organizations, including members of the LTTE and the World Tamil Movement.

[49] The Respondent also submits that the Board made a reasonable decision in refusing to require a cash bond, as the imposition of a cash bond would effectively amount to continued detention, since the Respondent had no means to post such a bond.

[50] I agree with the submissions of the Respondent concerning the reasonableness of the terms and conditions imposed by the Board. The Board accepted all the written terms and conditions proposed by the Applicant except for two, which the Board determined to be either irrelevant or redundant, but refused to impose a cash bond.

[51] Since the Board found that there was some risk of flight, something that is generally shared by refugee claimants who gain unlawful entry into Canada, the weekly reporting requirement was reasonable. The Board's refusal to impose a cash bond was also reasonable due to the Respondent's limited resources, his lack of ties in Canada, and the ability of the Applicant to re-arrest the Respondent if he is found to be inadmissible.

CONCLUSION

[52] In the result, I am satisfied that the Board applied the correct legal test and reached a reasonable decision with respect to the release of the Respondent from detention, including the imposition of reasonable terms and conditions. The application for judicial review is dismissed.

[53] The parties were given the opportunity to submit a proposed question for certification. By correspondence to the Registry of the Court on December 23, 2010 the Applicant advised that no question would be proposed. No question was suggested by the Respondent.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed, no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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