Federal Court  Cour fédérale

Date: 20110525

Docket: IMM-3224-11

Citation: 2011 FC 609

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 25, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

MOHAMED SAKO

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The release of an individual recognized as a danger to the public represents a serious risk that society, pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), should not have to face. It is a risk that the Court cannot allow itself to impose according to the IRPA, paragraphs 3(1)(*h*) and 4(2)(*h*), which contains key principles established by Parliament that the Court has a duty to interpret, not to reformulate. (The separation of powers under constitutional

supremacy gives a jurisdiction to each of the three branches of government. The executive branch executes and implements the legislation legislated by the legislative branch; and the Court has a duty to interpret the Law, not to formulate or reformulate it).

[2] The respondent has a significant criminal record. He has been convicted, on numerous occasions, of various types of offences, including violent crimes. By ordering his release on non-binding conditions that do not eliminate the danger, the Immigration Division (ID) ignored the statutory scheme established by the IRPA and unreasonably assessed the danger posed by the respondent.

[3] The Court is in complete agreement with the applicant's comments.

[4] To prevent the respondent's release from causing irreparable harm, the ID's decision must be stayed until the application for leave is determined or until judgment is rendered on the application for judicial review.

II. Facts

[5] The respondent, Mohamed Sako, has been detained by the Canada Border Services Agency (CBSA) since his release from prison on May 7, 2011. He had finished serving a three-month sentence for assault causing bodily harm and mischief.

[6] On May 9, 2011, the ID ordered the continued detention of Mr. Sako. During the hearing held that same day, the CBSA submitted the ruling dated December 4, 2008, in which the

Commission des libérations conditionnelles du Québec refused to order the conditional release of Mr. Sako because he represented [TRANSLATION] “an undue risk to society”, he refused to take responsibility for his criminal acts and he had adopted a criminal lifestyle.

[7] During Mr. Sako’s second detention review hearing on May 16, 2011, the CBSA put Mr. Sako’s criminal record in evidence:

a. April 19, 2001: credit card theft; $300 fine and absolute discharge;
b. January 21, 2008: obstruction and breach of recognizance; $150 fine and one year of probation;
c. January 30, 2008: fraud under $5,000 and conspiracy; credit card theft (two counts); 30 days’ imprisonment and one year of probation;
d. February 22, 2008: credit card theft (two counts) and fraud under $5,000; 30 days’ imprisonment and one year of probation;
e. February 27, 2008: assault with a weapon and uttering threats; 15 days’ imprisonment and two years of probation;
f. July 9, 2008: procuring; imprisonment of 12 months and 18 days; three years of probation;
g. February 17, 2011: credit card theft; 30 days’ imprisonment and two years of probation;
h. February 17, 2011: failure to comply with an order; 30 days’ imprisonment and two years of probation;
i. February 17, 2011: possession of property obtained by crime; 30 days’ imprisonment and two years of probation;

j. February 17, 2011: assault and obstruction; 30 days' imprisonment and two years of probation;

k. February 17, 2011: assault causing bodily harm and mischief; three months' imprisonment and three years of probation.

[8] Two of Mr. Sako's victims were his ex-girlfriends.

[9] Still on May 16, 2011, the ID ordered his release on conditions that, on their face, do not eliminate the significant danger he represents:

a. report to the CBSA or the ID at designated times for any statutory obligation, including removal;

b. inform the CBSA of his address before being released and inform the CBSA in person of any change before it takes effect;

c. report to the CBSA office closest to his residence within 48 hours of being released and once a week after that;

d. keep the peace and be of good behaviour;

e. confirm his departure from Canada with a CBSA officer;

f. cooperate fully with the CBSA to obtain a travel document;

g. do not engage in activities that give rise to a conviction;

h. inform a CBSA officer of each conviction and charge;

i. obey a curfew from midnight to 6 a.m., unless otherwise authorized in writing by the CBSA under certain circumstances;

j. do not consume alcohol or drugs;

k. comply with the conditions imposed by the criminal courts.

[10] On May 16, 2011, the Minister filed an application for leave against this decision and *ex parte* asked the Court to order a stay of the ID's decision to allow time for a formal stay motion to be heard and determined.

III. Issues

[11] Must the Court order the stay of the ID's decision dated May 16, 2011? More specifically, it must rule on the following issues:

a. **Serious issues**. In ordering the release of Mr. Sako, did the ID ignore the factors imposed by the IRPA? Did it unreasonably assess the danger posed by Mr. Sako? Did it impose conditions that eliminate this danger?

b. **Irreparable harm and balance of convenience**. Given the danger posed by Mr. Sako, does his release on conditions that do not make it possible to eliminate danger cause irreparable harm to public safety? Does the balance of convenience favour the Minister?

IV. Analysis

Serious issues

[12] The release conditions issued by the ID are indicative of three things: first, that it did not consider the factors imposed by section 58 of the IRPA or subparagraph 246(*f*)(ii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), and therefore committed an error in law (*Canada (Ministre de la Sécurité publique et de la Protection civile) v.*

Vargas, 2009 CF 1005 at paragraph 37); second, that it unreasonably assessed the significant danger posed by Mr. Sako; and third, that the conditions themselves do not take into account the requirement to eliminate danger. This third error is also an error in law (*Canada (Minister of Public Safety and Emergency Preparedness) v. Al Achkar*, 2010 FC 744, 371 FTR 231 at paragraph 48).

[13] In December 2008, the Commission des libérations conditionnelles du Québec had already found that Mr. Sako posed [TRANSLATION] "an undue risk to society". It found that, at the end of its hearing, he did not take responsibility for the actions for which he was charged, he minimized them or sought to have himself exonerated, he refused to participate in any program because he did not see any problem and he had adopted a disorganized lifestyle characterized by associating with criminals and using drugs.

[14] After he finished serving his sentence of more than one year for procuring and 15 days for assault with a weapon and threats, he was convicted of multiple criminal offences ranging from failure to comply with an order to assaults, obstruction, assault causing bodily harm and mischief. Two of Mr. Sako's girlfriends were victims of his assaults, of a more or less serious nature. The courts imposed four terms of imprisonment of 30 days and one of three months, all with periods of two or three years of probation.

[15] Under these circumstances, the Minister intends to issue a danger opinion against Mr. Sako. A decision will be made within the next three months. A first set of documents was therefore issued to him in this regard on June 29, 2010. Mr. Sako has yet to respond, even though the Minister gave him 15 days to present his submissions.

[16] Mr. Sako poses a danger to the public under paragraph 58(1)(*a*) of the IRPA. The ID nevertheless ordered his release on conditions so minimal that they do not make it possible to keep the danger posed by Mr. Sako at an acceptable level.

[17] Of course, section 58 of the IRPA makes release the rule. Detention must become the exception. However, in assessing risk, the ID must consider alternatives to detention (Regulations, paragraph 248(*e*)). In that regard, the ID committed a second error.

[18] The conditions that it imposed on Mr. Sako would have been completely acceptable if he had had no criminal record or violent past, if he had generally appeared for all appointments and meetings, if he had complied with the conditions imposed on him by the courts of other jurisdictions and if he had acknowledged his wrongdoings. Because Mr. Sako's conduct does not fit these characteristics, the ID has a duty to consider the need to: (1) order his continued detention using a solution that should be preferred under the circumstances, or (2) impose conditions that reduce, inasmuch as possible, the danger posed by Mr. Sako. None of the imposed conditions make it possible to reach this objective.

[19] First, the release does not appear to be accompanied by any suitable surety of any kind, given the facts in the record:

a. turn himself in—which he will probably not be inclined to do as he does not even acknowledge his criminal responsibility;

b. not engage in criminal activities, which he is unable to do according to the Commission des libérations conditionnelles;
c. obey a curfew from midnight to 6 a.m.—but he may reside where he pleases and has only to provide an address, any address;
d. report to the nearest CBSA office once a week—whereas it was not his practice to comply with internal rules in the detention facilities in which he was incarcerated;
e. comply with the conditions imposed by the criminal courts—he was convicted for not complying with them;
f. keep the peace and be of good behaviour, which he is also unable to do.

[20] Clearly, if he is released under these conditions, Mr. Sako will continue to be a danger to the public in Canada. The ID did not impose any conditions encouraging him to adopt non-violent behaviour or requiring him to abandon the lifestyle he adopted several years ago.

Irreparable harm and balance of convenience

[21] Given the nature of the offences committed by Mr. Sako, the high risk to reoffend and the fact that he is shirking his criminal responsibility; his release would cause irreparable harm. It is in the public interest that he be in continued detention until the application for leave against the decision to release him is determined or, if need be, until judgment is rendered on the application for judicial review, the Minister having the duty to protect Canadian society (*Canada (Minister of Public Safety and Emergency Preparedness) v. Castillo*, 2009 FC 1022 at paragraphs 23-24).

[22] The release conditions, which do not make it possible to eliminate the danger posed by Mr. Sako, also constitute irreparable harm (*Canada (Minister of Public Safety and Emergency Preparedness) v. Sankar*, 2009 FC 934 at paragraphs 14 and 17).

[23] Furthermore, if Mr. Sako is released, the Minister's application for leave will become moot (*Vargas*, above, at paragraph 66).

V. Conclusion

[24] In rendering its decision, the ID committed three errors: (1) it did not consider the statutory scheme applicable to detention reviews; (2) in light of the evidence of Mr. Sako's serious criminality, it unreasonably assessed the danger he poses; and (3) the release conditions it imposed do not make it possible to eliminate the danger.

[25] Under these circumstances, releasing a man as dangerous as Mr. Sako constitutes irreparable harm to public interest. The balance of convenience cannot but tip in favour of the Minister.

[26] For all of the above-mentioned reasons, the stay of the decision rendered by the ID dated May 16, 2011, is granted until the application for leave is determined or, if need be, until judgment is rendered on the application for judicial review.

ORDER

THE COURT ORDERS a stay of the decision rendered by the ID dated May 16, 2011, until the application for leave is determined or, if need be, until judgment is rendered on the application for judicial review.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3224-11
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. MOHAMED SAKO

MOTION CONSIDERED BY CONFERENCE CALL ON MAY 25, 2011, BETWEEN OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC

REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	May 25, 2011

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