Federal Court  Cour fédérale

Date: 20111018

Docket: IMM-7149-11

Citation: 2011 FC 1177

Ottawa, Ontario, October 18, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

MOE ZAW ZAW

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] An inappropriate decision by a decision-maker can set into motion a danger to the public and, thus, to its children.

[2] The Respondent has been convicted of sexual crimes, having taken place for a period of almost five years in regard to a child.

[3] The evidence from a parole officer was that the Respondent intended to live with Mr. Aung Saw, who is a parent of two young daughters whereas the Respondent had told a parole officer that Mr. Aung Saw was a single man, living alone. On September 12, 2011, a previous decision-maker had determined that the Respondent should not be released from detention given that he intended to reside with a father of two young daughters. One of the conditions of this most recent October 13, 2011 Release Order is that the Respondent is not to be granted unsupervised access to females younger than 18 years of age and the evidence clearly demonstrated that, in fact, upon release, the Respondent would have resided with females younger than 18 years of age.

[4] As specified by the previous first-instance decision-maker, on August 15, 2011, the Respondent was involved in repeated sexual abuse while he was in a position of authority with an accorded level of trust. The situation, as was described in the decision of September 12, 2011, was one which endangers victims and leads to serious emotional and psychological trauma.

[5] Due to a lack of discernment, a child is handicapped by ill-will in its regard, as was so clearly explained in an essay on security for children by Dr. Janusz Korcak, prime defender of children, often cited by the United Nations as the source of inspiration and initiator of the International Convention on the Rights of the Child to which Canada is a party.

[6] By corollary, the recent conclusion in the judgment of *R v Woodward*, 2011 ONCA 610, [2011] OJ No 4216, dated September 26, 2011, rendered by Justice Michael Moldaver, states:

> [76] … the focus … should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it. While the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives of denunciation,

> deterrence, and the need to separate sexual predators from society for society's well-being and the well-being of our children must take precedence.

[7] If the Respondent is released from detention, the safety of the Canadian public will be put at risk. The Respondent is a serious criminal and a danger to the public. It is incumbent for the decision-maker to ask himself if this decision is good for children. If it puts children at risk, the answer is evident.

II. Background

[8] The Applicant seeks a stay of the Order of a Member of the Immigration Division of the Immigration and Refugee Board [Board], dated October 13, 2011, wherein the Member ordered that the Respondent be released from detention on terms and conditions considered questionable.

[9] The Respondent is a citizen of Myanmar. The Respondent was detained by the Canadian Border Services Agency [CBSA]. The Respondent has had the following detention review hearings:

a. the 48-hour detention review hearing on August 8, 2011;

b. the 7-day detention review hearing on August 15, 2011;

c. the first 30-day detention review hearing on September 12, 2011; and

d. the second 30-day detention review hearing on October 13, 2011.

[10] The Respondent’s detention has been reviewed as set out in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[11] In the October decision, the Member released the Respondent on terms and conditions and did not require a cash bond to be posted [Release Order].

[12] The Court agrees with the position of the Applicant that the Respondent should not have been released as he represents a danger to the public.

III. Issue

[13] Has the Applicant met the tri-partite test for warranting a stay of the October 13, 2011 Release Order made with respect to the Respondent?

Test for Granting a Stay

[14] The Supreme Court of Canada has established a tri-partite test for interlocutory injunctions: (i) a serious question to be tried; (ii) whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer an irreparable harm; and (iii) the balance of convenience, in terms of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits (*Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA); *RJR- MacDonald Inc v Canada (Attorney General*), [1994] 1 SCR 311).

IV. Relevant Legislative Provisions

[15] The criteria for release from immigration detention are set out in subsection 58(1) of the *IRPA*, which states:

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 :
(*a*) they are a danger to the	*a*) le résident permanent ou

public;

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.

(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 an examination

(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 qu'il constitue un danger pour la sécurité

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.	publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.
(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.

[Emphasis added].

[16] The *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] set out the factors to be considered in determining whether a person is unlikely to appear for removal from Canada as well as whether the person is a danger to the public or is a foreign national whose identity has not been established (*Regulations* 244-247).

[17] *Regulations* 245 addresses the issue of flight risk and sets out the following factors for consideration:

245. For the purposes of paragraph 244(*a*), the factors are the following:	**245.** Pour l'application de l'alinéa 244*a*), les critères sont les suivants :
(*a*) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of	*a*) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à

Parliament;	une loi fédérale;
(*b*) voluntary compliance with any previous departure order;	*b*) le fait de s'être conformé librement à une mesure d'interdiction de séjour;
(*c*) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;	*c*) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;
(*d*) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;	*d*) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;
(*e*) any previous avoidance of examination or escape from custody, or any previous attempt to do so;	*e*) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;
(*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.

[18] *Regulations* 246 addresses the issue of danger to the public and sets out the following factors for consideration:

(*a*) the fact that the person	*a*) le fait que l'intéressé

constitutes, in the opinion of the Minister, a danger to the public in Canada or a danger to the security of Canada under paragraph 101(2)(*b*), subparagraph 113(*d*)(i) or (ii) or paragraph 115(2)(*a*) or (*b*) of the Act;

(*b*) association with a criminal organization within the meaning of subsection 121(2) of the Act;

(*c*) engagement in people smuggling or trafficking in persons;

(*d*) conviction in Canada under an Act of Parliament for

(i) a sexual offence, or

(ii) an offence involving violence or weapons;

(*e*) conviction for an offence in Canada under any of the following provisions of the Controlled Drugs and Substances Act, namely,

(i) section 5 (trafficking),

(ii) section 6 (importing and exporting), and

(iii) section 7 (production);

constitue, de l'avis du ministre aux termes de l'alinéa 101(2)*b*), des sous-alinéas 113d)(i) ou (ii) ou des alinéas 115(2)*a*) ou *b*) de la Loi, un danger pour le public au Canada ou pour la sécurité du Canada;

b) l'association à une organisation criminelle au sens du paragraphe 121(2) de la Loi;

c) le fait de s'être livré au passage de clandestins ou le trafic de personnes;

d) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des infractions suivantes :

(i) infraction d'ordre sexuel,

(ii) infraction commise avec violence ou des armes;

e) la déclaration de culpabilité au Canada quant à une infraction visée à l'une des dispositions suivantes de la Loi réglementant certaines drogues et autres substances:

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

(*f*) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament for	(iii) article 7 (production); *f*) la déclaration de culpabilité ou la mise en accusation à l'étranger, quant à l'une des infractions suivantes qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale :
(i) a sexual offence, or	(i) infraction d'ordre sexuel,
(ii) an offence involving violence or weapons; and	(ii) infraction commise avec violence ou des armes;
(*g*) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under any of the following provisions of the Controlled Drugs and Substances Act, namely,	*g*) la déclaration de culpabilité ou la mise en accusation à l'étranger de l'une des infractions suivantes qui, si elle était commise au Canada, constituerait une infraction à l'une des dispositions suivantes de la Loi réglementant certaines drogues et autres substances:
(i) section 5 (trafficking),	(i) article 5 (trafic),
(ii) section 6 (importing and exporting), and	(ii) article 6 (importation et exportation),
(iii) section 7 (production).	(iii) article 7 (production).
[Emphasis added].	

[19] *Regulations* 248 sets out the following factors to be considered before a decision is made on detention or release in the case where it is determined that there are grounds for detention:

(*a*) the reason for detention;	*a*) le motif de la détention;
(*b*) the length of time in detention;	*b*) la durée de la détention;
(*c*) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	*c*) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	*d*) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(*e*) the existence of alternatives to detention.	*e*) l'existence de solutions de rechange à la détention.

V. Analysis

[20] New documentary evidence was presented at the detention review of October 13, 2011 on the issue of the Applicant's danger to the public.

A. Serious Issue

[21] The threshold test for a serious issue is low. In the face of overwhelming evidence, the Respondent is a danger to the public and a serious issue has been raised (*RJR- MacDonald*, above).

[22] In *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572 (CA), Justice Marshall Rothstein stated:

> [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.
>
> [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.

(Reference is also made to *Canada (Solicitor General) v Oraki*, 2005 FC 555; *Canada (Minister of Citizenship and Immigration) v Sittampalam*, 2004 FC 1756, 266 FTR 113; *Canada (Minister of Public Safety and Emergency Preparedness) v Welch*, 2006 FC 924, 297 FTR 58).

[23] The Member erred by failing to clearly explain why the prior assessment of the evidence did not justify continued detention, what had given rise to the changed opinion and why the newest evidence from the parole officer respecting the Respondent's risk to the community did not support a further 30-day detention.

[24] The evidence from the parole officer indicated a misrepresentation regarding the living conditions of the person with whom the Respondent had indicated he would be residing upon his release, namely Mr. Aung Saw. The parole officer indicated in her letter that the Respondent had advised her that he intended to live with a person who was single, living alone and could provide him with employment; the member presiding at the September 12, 2011 detention review hearing had evidence that Mr. Aung Saw lived with two very young daughters and specifically noted that it would be inappropriate for the Respondent to reside with Mr. Aung Saw because it would be a

violation of the Respondent's parole conditions to do so. In light of the Respondent's convictions for sexual contact with a child and sexual counseling of a child and his failure to satisfactorily complete the sexual offender treatment programming, the Member's terms and conditions do not go far enough in ensuring that the Canadian public is protected from the Respondent.

[25] On consideration of all of the above factors and based on all of the evidence before the Member, no alternative exists to detention as it was clear from the evidence before the Immigration Division that the respondent was a danger to the public.

B. Irreparable Harm

[26] The Applicant will suffer irreparable harm if the Respondent is released from detention. The Respondent's release from detention is contrary to the legislative objectives set out in the *IRPA*, particularly the objectives of protecting the safety of Canadians and maintaining the security of Canadian society.

[27] The Respondent has been convicted of sexual crimes against children. The evidence from a parole officer was that the Respondent intended to live with Mr. Aung Saw, who is a parent of two young daughters whereas the Respondent had told a parole officer that Mr. Aung Saw was a single man, living alone. On September 12, 2011, a decision-maker had determined that the Respondent should not be released from detention given that he intended to reside with a father of two young daughters. One of the conditions of this most recent October 13, 2011 release order is that the Respondent is not to be granted unsupervised access to females younger than 18 years of age.

[28] As was stated by the first-instance decision-maker, on August 15, 2011, the Respondent was involved in repeated sexual abuse while he was in a position of authority and had a level of trust. This is considered to be a situation that leads victims to have serious emotional and psychological trauma.

[29] If the Respondent is released from detention, the safety of the Canadian public will be put at risk. The Respondent is a serious criminal and a danger to the public. It is incumbent for the decision-maker to ask himself is this decision good for children. If it puts children at risk, the answer is evident.

[30] If the Respondent is released, this application for leave and judicial review will become moot, thereby depriving the Applicant of the opportunity to determine the legality of the Member's Order. This will constitute irreparable harm.

C. Balance of Convenience

[31] The third part of the tripartite test has also been met, insofar as the balance of convenience favours the Applicant.

[32] The public interest is to be taken into consideration and weighed together with the interests of private litigants (*Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110).

[33] The balance of any inconvenience which the Respondent may suffer as a result of his continued detention until his next scheduled detention review hearing or until the Court disposes of

the underlying application for leave and for judicial review does not outweigh the public interest which the Applicant seeks to maintain in the application of the *IRPA*.

[34] Important factors to consider under this branch of the test include all the circumstances that led to the Respondent's criminal history and his continued detention, evidence of his lack of truthfulness respecting the living conditions to which he would be going upon release from detention and is a danger to the public.

[35] In *Dugonitsch v Canada (Minister of Employment and Immigration)* (1992), 53 FTR 314, [1992] FCJ No 320 (TD) (QL/Lexis), Justice Andrew MacKay stated:

> Absent evidence of irreparable harm, it is strictly speaking unnecessary to consider the question of the balance of convenience. Nevertheless, it is useful to recall that in discussing the test for a stay or an interlocutory injunction in the Metropolitan Stores case Mr. Justice Beetz stressed the importance of giving appropriate weight to the public interest in a case where a stay is sought against a body acting under public statutes and regulations which have not yet been determined to be invalid or inapplicable to the case at hand. That public interest supports the maintenance of statutory programs and the efforts of those responsible for carrying them out. Only in exceptional cases will the individual's interest, which on the evidence is likely to suffer irreparable harm, outweigh the public interest. This is not such an exceptional case.

VI. Conclusion

[36] For all of the above reasons, the Release Order, dated October 13, 2011, is stayed until the Respondent's next statutorily required detention review or until this Court concludes on the matter of the Applicant's application for leave and for judicial review.

JUDGMENT

THIS COURT ORDERS that the Release Order of the Member of the Immigration Division of the Immigration Refugee Board, dated October 13, 2011, be stayed until the Respondent's next statutorily required detention review or until this Court has had an opportunity to conclude with the Applicant's application for leave and for judicial review

Obiter

It is recommended, further to the representations and expressed interests of the self-represented Respondent (who chose to be self-represented), a practicing Buddhist, that he receive the Buddhist scriptures as well as Buddhist meditation material from the well known author, S.N. Goenka (a former citizen of the then Burma) such as any of the following: The Discourse Summaries: Satipatthana Sutta Discourses (Talks from a Course in Mahasatipatthana Sutta); The Caravan of Dhamma; Meditation Now (Inner Peace through Inner Wisdom) and, if possible, that the Respondent and those detaining him be able to view the film "Doing Time Doing Vipassanna" which exemplifies evidence of the largest measure of the taking of stock of one's previous behaviour, or the taking of one's ethical temperature, by those who have gone through the Vipassanna program of S.N. Goenka.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7149-11
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v MOE ZAW ZAW

MOTION HELD VIA TELECONFERENCE ON OCTOBER 18, 2011 FROM OTTAWA, ONTARIO AND EDMONTON ALBERTA

REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	October 18, 2011

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