

Date: 20090114

Docket: A-642-08

Citation: 2009 FCA 7

Present: RICHARD C.J.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**Appellant
(Applicant in the Federal Court)**

and

**Dong Zhe LI
Dong Hu LI**

**Respondents
(Respondents in the Federal Court)**

Heard by teleconference between Ottawa, Ontario, and Vancouver, British Columbia
on January 14, 2009.

Order delivered at Ottawa, Ontario, on January 14, 2009.

REASONS FOR ORDER BY:

RICHARD C.J.

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REASONS FOR ORDER

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[1] This is a motion by the appellant seeking a stay of the Orders of Justice Heneghan dated December 23, 2008 and December 29, 2008 wherein Justice Heneghan dismissed the Minister's application for judicial review of the decision of Member King of the Immigration Division which ordered that the respondents, LI, Dong Hu and LI, Dong Zhe be released from Immigration detention subject to certain terms and conditions.

[2] In particular, the appellant is seeking an Order for a stay of release of the respondents until the earlier of either the final determination of the underlying appeal or the next statutorily required detention review under the *Immigration and Refugee Protection Act*.

[3] The supporting affidavit of Randal Hyland, Hearings Officer, sworn on December 30, 2008, states that Dong Hu Li and Dong Zhe Li (Li brothers) are fugitives from China. They are subjects of warrants of arrest issued by the Chinese authorities who allege that the Li brothers are wanted for conspiring to commit fraud involving millions of dollars through the transfer of funds from bank accounts of victim companies into the bank accounts of companies controlled by either Dong Zhe Li or Dong Hu Li. The Li brothers have been under Immigration detention since February 2007 when they were arrested by Canadian authorities because an Exclusion Order was issued against them and they were unlikely to appear for removal.

[4] Counsel for the appellant argues that there is a serious issue in the underlying appeal given that the Federal Court Judge certified the following serious question of general importance:

Does lengthy detention become “indefinite” detention, and consequently a breach of section 7 of the *Charter*, where the tribunal estimates future length of detention based on a detainee’s anticipated pursuit of all available processes under IRPA and the Regulations including Federal Court proceedings?

[5] With respect to irreparable harm, counsel for the appellant argues that the Li brothers are fugitives from justice and that the Immigration Division members have repeatedly found the Li brothers to be a serious flight risk and that the Li brothers’ history reveals that they will make every effort to avoid Canadian authorities.

[6] Counsel for the appellant also refers to previous orders of the Federal Court granting a stay of the execution of the Release Orders where the Federal Court found that the Minister will suffer irreparable harm if the stay is not granted. (IMM-2818-08, IMM-2820-08, June 30, 2008 per Tremblay-Lamer J. and IMM-4038-08, IMM-4039-08, October 1, 2008 per de Montigny J.).

[7] With respect to the balance of convenience, counsel for the appellant claims that it favours staying the Li brothers release considering that they are fugitives from justice, their flight risk, and their history of avoiding Canadian authorities.

[8] Counsel for the appellant has undertaken to the Court that the appellant will take steps to expedite the hearing of the appeal.

[9] Counsel for the respondents concedes for the purposes of this stay motion only that there is a serious issue since the Trial Division has declared a certified question.

[10] However, the respondents assert that there is no irreparable harm and that the balance of convenience favours them and not the appellant and as such the stay motion should be dismissed.

[11] The respondents allege that any risk that does arise from the loss of public faith that persons subject to removal orders might not be removed by absconding is not substantial enough, when based upon speculation, to deprive them of their (albeit strictly controlled) liberty.

[12] The respondents further assert that even if there is some risk of eroding public confidence in the effectiveness of the removal process if the Li brothers abscond, the more important risk is that continued detention is and will continue to violate the Li brothers' right to not be detained indefinitely. The balance of convenience favours upholding member King's order of release and Madam Justice Heneghan's affirmation of that order especially since the terms and conditions of release are very strict.

[13] The respondents also raise the issue of clean hands and claim that the appellant withheld the disclosure of evidence that was relevant to the issue of detention which was available on April 24, 2008 and was not disclosed to the respondents until August 11, 2008; in particular, the PRRA Officer's decision that they were at risk of torture should they be returned to China.

[14] However this finding was made known to the respondents on or about June 13, 2008 (Respondents' Motion Record TAB 4) and is subject to a final determination by the Minister's delegate.

[15] The issue of the lawfulness of the process of restriction assessment has been challenged in another proceeding before the Federal Court (IMM 3786-08).

[16] In my opinion, these considerations do not constitute sufficient grounds to refuse the requested stay of proceedings.

[17] Accordingly, I am satisfied that the appellant has met the three-part test in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[18] The Release Orders of Immigration division Member King, dated September 11, 2008 and the Order of Justice Heneghan dated December 23, 2008 and December 29, 2008 in FC File Nos. IMM-4038-08 and IMM-4039-08, will be stayed until the earlier of either :

- (a) the final determination of the appeal; or
- (b) the respondent's next statutorily required detention review hearing;

“J.Richard”
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-642-08

STYLE OF CAUSE: The Minister of Citizenship and
Immigration v. Dong Zhe Li & Dong
Hu Li

MOTION DEALT BY TELECONFERENCE WITH APPEARANCE OF PARTIES

REASONS FOR ORDER BY: RICHARD C.J.

DATED: January 14, 2009

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FOR THE RESPONDENT

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