Federal Court Cour fédérale

Date: 20160307

Dockets: IMM-63-16
IMM-502-16

Citation: 2016 FC 289

Ottawa, Ontario, March 7, 2016

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JACOB DAMLANY LUNYAMILA

Respondent

REASONS FOR JUDGMENT

[1] These are the reasons why I rendered judgment (2016 FC 288) in favour of the Minister in his applications for judicial review of the January and February 2016 decisions of the Immigration Division of the Immigration and Refugee Board [IRB] in which it was ordered that Mr. Lunyamila be released from detention, notwithstanding that in previous reviews over more than two years he had been held in custody as being a danger to the public and a flight risk.

[2] There are two issues. The first is whether either decision was reasonable. The second is whether it was open to the Immigration Division Member in February to order Mr. Lunyamila's release given that this Court had stayed his January order pending the outcome of the Minister's application for leave and, if granted, judicial review.

[3] Mr. Lunyamila is a criminal. The Vancouver Police Department has determined that he is a chronic offender, a persistent criminal who causes significant societal harm. He has been convicted 54 times on a wide range of serious offences. Nevertheless if he were Canadian he would be free today to roam the streets as he has served his sentences. However, he is not Canadian. He came here as a refugee from Rwanda. Because of his subsequent criminality he was ruled inadmissible to Canada. The Minister's delegate issued an opinion that he was a danger to the people of Canada, a danger which outweighed whatever may befall him should he be returned to Rwanda. Mr. Lunyamila's application for leave to have that decision judicially reviewed was dismissed by this Court.

[4] The Canadian Border Services Agency [CBSA] is obliged by law (section 48 of the *Immigration and Refugee Protection Act* [IRPA]) to return Mr. Lunyamila to Rwanda as soon as possible. However, there are serious roadblocks. The Rwandan authorities require him to sign certain documents, which he refuses to do. In addition the Rwandan authorities require him to have certified identity documents. He came here without documentation.

[5] Mr. Lunyamila was initially detained in 2013 as a flight risk and a danger to the public. As a result he has been held in detention for over two years, such detention being subject to 30-day reviews in accordance with section 57 of IRPA.

[6] His detention was reviewed more than 25 times and with one earlier exception, always maintained until January of this year. He was then ordered released on conditions. The Minister immediately sought a stay of that release order under docket IMM-63-16. Following an interim stay granted by Madam Justice Simpson to allow the parties to gather material to put before the Court, Mr. Justice Shore granted the stay of release pending the outcome of the underlying application for leave and judicial review.

I. Review of the January 2016 Decision

[7] The decision maker was well aware that a departure from earlier detention review decisions should be accompanied by a clear explanation (*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4). Mr. Lunyamila has steadfastly refused to sign documents required by the Rwandan government. It seems that without his signature Rwanda will not accept him. However, the Member seized upon the fact, which had not been picked up in earlier detention reviews, that even if Mr. Lunyamila were to sign the required documents, he still would not be allowed to return because the Rwandan authorities also require certified identification documents. Mr. Lunyamila left Rwanda without any such documentation, which may well not exist. Representations on behalf of the Minister to the Member that were Mr. Lunyamila to sign the application forms it might well be that the identity issue could be

overcome as has happened with respect to other countries. The Member considered this scenario to be highly speculative.

[8] This lead the Member to conclude that Mr. Lunyamila may well be subject to indefinite detention. This runs against Canadian values and raises Charter of Rights and Freedoms issues under the *Constitution Act, 1982*. Each detention review is always somewhat different from previous ones in that there is always a further passage of time (*Warssama v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1311).

[9] The Member was also of the view that Mr. Lunyamila was not the man he used to be. Much of his criminality arose from anger and depression, mostly, but not always, fueled by alcohol and drug abuse. Mr. Lunyamila had not had a drink or taken drugs for over two years (he was incarcerated and did not have the opportunity), had taken anger management courses and so should be released.

[10] With respect, I consider this decision to be unreasonable. The decision is based on a hope and a prayer. The record does not support the Member's conclusions. Mr. Lunyamila has been convicted for violent assault, including sexual assault. He has carried concealed weapons and attacked strangers on the street without provocation. There is nothing in the record to support the proposition that enforced abstinence will lead to sobriety in the future, particularly since he was to be released into a home where alcohol was available.

[11] Furthermore, there is nothing in the record to support the proposition that he will report regularly as set out in the terms of his release. He was released once before in 2013 and was promptly re-arrested because he failed to abide by the terms thereof. A review of his convictions from 1999 until he was jailed in 2013 under IRPA shows that he failed to attend court or to comply with undertakings, or to comply with reconnaissance, or to comply with probation orders ten times.

[12] This decision was not within the range of reasonable outcomes as set forth in Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190 and was made without regard to the material in the record, contrary to section 18.1 of the Federal Courts Act.

[13] Mr. Lunyamila had been arrested and detained in accordance with section 54 of IRPA because the officer had reasonable grounds to believe he was a danger to the public, unlikely to appear for examination or an admissibility hearing or removal from Canada. The reasonableness of that initial decision is not in doubt. IRPA goes on to require that his detention be reviewed within the first 48 hours, within a further seven days thereof, and each and every 30 days thereafter. Section 248 of the Immigration and Refugee Protection Regulations sets out five factors to be considered:

248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	**248** S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
(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.

[14] These factors are not watertight compartments and in Mr. Lunyamila's case are certainly jumbled together. Although the CBSA has been in touch with the Rwandan authorities the Member considered that the inquiries were not robust enough. If so, and there may well be some merit to that view, the remedy was not to release Mr. Lunyamila but rather to call upon the CBSA to get a definitive decision one way or another as to whether his lack of identity papers could be overcome should he sign the required applications. It is only with a definitive answer that one can assess how long detention is likely to continue.

[15] Releasing Mr. Lunyamila on the term that he report regularly is certainly not justified by his past record. He has been convicted ten times for being a no-show.

II. Review of the February 2016 Decision

[16] My analysis of the January decision applies equally to the February decision of the same Member, with one significant addition. On January 6th, Mr. Lunyamila was served with the

interim order of this Court staying his release. This is what Ben Kim of the CBSA who served the stay order had to say about his encounter with Mr. Lunyamila:

> … I attended the Fraser Regional Correctional Centre (FRCC) in Maple Ridge, B.C., to deliver four Federal Court documents to a detained Rwandan male known to me as LUNYAMILA, Jacob Damiany D.O.B. 14-Sep-1976. The subject already knew me well from multiple previous interactions during the course of my duties as a Detainee Liaison Officer. The subject was brought up to the Records area by B.C. Corrections officers and served with the documents. The subject immediately became very upset, and began shouting and demanding to be released as ordered by "the judge". I repeatedly explained to the subject that he had already been informed of the CBSA appeal of the release order, and that I was simply there to provide him with his copies of the relevant documents. He then became extremely agitated and started yelling at the top of his voice. He exhibited pre-assault cues as his eyes were bulging, his body became tense, and foam was forming around his mouth. He bladed his body off into a fighting stance and pointed at me aggressively while calling me a "gang member".
>
> At that point FRCC Records Supervisor Paul Shand interjected and told the subject not to make personal attacks at me as this was not a personal matter. One of the Correctional Officers then took the subject's left hand in an attempt to apply handcuffs. The subject began screaming hysterically and physically resisting restraints. Three more Correctional Officers then assisted and were required to use significant force to take the subject to the ground and subdue him. The subject struggled and screamed wildly on the floor for several minutes while leg shackles were brought to the scene and applied to his ankles. Eventually the subject was stood up and taken away by the four officers and placed in segregation, which ended my dealings with the subject.

[17] The Member was not concerned with this display. In his February 2nd decision he said to Mr. Lunyamila:

> It's understandable what your reaction was to the information provided to you by Mr. Kim. You were astonished. You were horrified, essentially. You've been in detention for some two-and-a-half years and it's understandable at this point, having been issued a release order, it would be an incredible, incredible surprise to you and fright to you, to not be released at that point.

My reading of the declaration of Mr. Kim is that in your encounter with him, you didn't exhibit an appropriate attitude, essentially.

I'm told that Mr. Kim is trained to consider if there is aggressive or assaultive behaviour arising. He states in the declaration that your eyes were bulging, your body was tense, there was foam in your mouth and you bladed your body. So he wasn't happy with that body language that you were exhibiting.

You told us that you made no move to actually hit him or raise a fist of any sort. I'm sure that would have been mentioned in the declaration if that took place. So essentially, what you exhibited was bad body language or bad attitude.

So we know that the ultimate result was that you were taken to the ground by a number of officers. You were shackled and you were handcuffed.

Mr. Nowak explained that Mr. Kim is trained in de-escalation procedures. It seems to me that the de-escalation procedures he used didn't really work because you ended up on the ground shackled and handcuffed. So I'm sure Mr. Kim will think if there are other tools in his tool box that he could use with people that are confronted with very difficult information such as yourself.

It is really very troubling that you ended up on the floor, shackled and handcuffed.

So were you peaceful and exhibiting appropriate body language when you were told that you weren't being released? No. You weren't. However, that's who you are, Mr. Lunyamila. I'm not here to effect any attitude change in you. I'm not going to say whether it seems that the Corrections people want to effect an attitude change. That's not what we're looking at.

However, I accept Mr. Carvalho's comments, as well as your comments, completely in that regard. You were horrified by the fact that the decision from a member of this Division was not being followed through.

So does that somehow confirm or exemplify or increase the danger that you present? Absolutely not. And if that's what the purpose of the declaration was, the declaration didn't succeed.

So on the danger issue, I am satisfied that the terms and conditions as previously imposed are appropriate.

[18] I find this analysis astonishing. Mr. Lunyamila clearly does not have his anger issues under control. Calling a CBSA officer whom he dealt with on previous occasions a "gang member" is completely consistent with his previous random attacks on strangers on the street.

[19] It was completely unreasonable to hold Mr. Lunyamila was not a danger to the public. The Member noted that the CBSA officer was trained in de-escalation procedures but that they didn't really work. Exactly what de-escalation procedures does a stranger walking along Robson Street in downtown Vancouver have?

III. The Legality of the February Release

[20] To explain my concerns, the following timeline may prove helpful:

5 January 2016	Mr. Lunyamila is ordered released from detention. The very same day the Minister applied for leave and judicial review under docket number IMM-63-16 and obtained an interim stay from Madam Justice Simpson.
8 January 2016	Mr. Justice Shore extended the interim stay to 19 January as a transcript of the hearing was not yet available.
20 January 2016	Mr. Justice Shore granted an interlocutory stay. While he noted that there would be another 30-day review upcoming and that the case might possibly be heard on an expedited basis he stayed the release "until the application for leave and judicial review is determined on the merits."
2 February 2016	Mr. Lunyamila was again ordered released by the IRB. The Minister again was able to file an application for leave and judicial review that day under IMM-502-16 and obtain an interim stay of release from Mr. Justice Mosley, in effect until 16 February.
16 February 2016	Mr. Justice Simon Noël set a timetable with respect to both the January and February decisions, leading to the applications for leave to be heard on 3 March 2016, and if granted, immediately followed by a hearing on judicial review. His order in both docket numbers provides, "the interim stay of the release is extended until a final determination…"
1 March 2016	Mr. Lunyamila was again ordered released and again the Minister applied for leave and for judicial review. He also applied for a stay of

	the release which normally would have gone to the ROTA judge in Vancouver. However, as I was already in Vancouver on other matters, and assigned to hear the applications for leave and judicial review on 3 March, it was I who reviewed the matter and granted an interim stay of the release. The docket number in question is IMM-913-16.
3 March 2016	I granted leave to judicially review the January and February decisions and then granted the applications, with reasons to follow. I simply stayed proceedings with respect to the March decision.

[21] I find it somewhat disconcerting that an individual who has been held in detention for more than two years as being a danger to the public can be ordered released with immediate effect. This lead to a mad scramble on the part of the Department of Justice, which fortunately was able to obtain an *ex parte* interim stay of that release. While the liberty of the individual is most important, so too is the safety of the public. Surely it would be better to delay the release, even if only for 24 hours, in order to allow the Minister to assemble a more complete record.

[22] Fortunately the Minister was able to repeat the same process with respect to the February decision. However, it is always possible that there be a slip up and that the detainee be released before the Minister is able to obtain a stay. In that case what is the jailer to do? On the one hand the IRB has ordered his release; on the other hand this Court has ordered that his release be stayed. It of course can be argued that the January decision had become moot. However, a decision in that regard is to be made by this Court, not by the IRB, and not by the jailer. If I were the jailer and released someone like Mr. Lunyamila, I would be concerned that I would be brought before the Court to show cause why I should not be held in contempt of court.

[23] There is not much guidance on this subject.

[24] While it could have been open to this Court to grant a stay only until the next detention review, both Mr. Justice Shore and Mr. Justice Simon Noël ordered stays until the outcome of the applications for leave and, if granted, the judicial reviews.

[25] In *X v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 27 the Federal Court of Appeal held that the release of the detainee following a subsequent detention review rendered the original decision staying the release moot. However, the detainee was released on agreed terms and conditions, which is not the case here. Although there was thus no live issue remaining, the question then arose as to whether the Court should exercise its discretion to hear the appeal. In the circumstances the Court did not as there were other cases pending which would raise similar issues.

[26] *Sungu v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 5 is similar to the present case. Following several detention reviews the Immigration Division ordered that Mr. Sungu be released. The Minister brought on an application for leave and judicial review and obtained a stay. As noted by Mr. Justice Stratas in a judgment delivered from the bench, "[t]he Federal Court judge granted the stay. He also ordered that the appellant is to have his detention reviewed every 30 days and added that only the Federal Court could make a release order."

[27] Mr. Sungu contended that the Federal Court did not have jurisdiction to usurp the jurisdiction of the IRB with respect to detention reviews, a point not disputed by the Minister. The Court dismissed the appeal on grounds of mootness, as after the Federal Court's decision

Mr. Sungu requested that he be removed from Canada, which he was. The Court did not say whether it agreed with the parties with respect to the terms of the stay of the earlier detention order.

[28] There is no clear statement in this judgment that the Immigration Division of the IRB can trump an order of this Court. It seems to me it would be far better if one were to order the release in a subsequent detention review subject to the outcome of the judicial review in which this Court had already granted a stay of release. It would then fall upon the detainee, not the Minister, to move the Court to have the earlier stay set aside in accordance with section 50 of the *Federal Courts Act*.

[29] Hopefully the reconsideration by the IRB of the January and February decisions will be heard together with the April detention review. I would expect that the CBSA will have pressured the Rwandan authorities for a decision one way or the other. Is it not a breach of international law to refuse to take back one's own?

IV. Certified Question

[30] Mr. Lunyamila shall have until March 11, 2016 to propose a serious question of general importance which could support an appeal to the Federal Court of Appeal. If such a question is proposed, the Minister shall have until March 15, 2016 to reply.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-63-16, IMM-502-16
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v JACOB DAMLANY LUNYAMILA
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