Federal Court  Cour fédérale

Date: 20160318

Docket: IMM-889-16

Citation: 2016 FC 331

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 18, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ALAIN KALONDO MUKENGE

Respondent

ORDER AND REASONS

[1] This is an application for leave and for judicial review under section 72 of the *Immigration and Refugee Protection Act* (S.C 2001, chapter 27) (the Act) from a decision rendered on February 29, 2016 by a member of the Immigration Division of the Immigration and Refugee Board of Canada (the Member), ordering the release of the respondent on certain

conditions. He has been held for immigration purposes since January 22, 2016 because of his inability to prove his identity.

[2] On the day when the Member rendered her decision, the Minister of Public Safety and Emergency Preparedness (the Minister) obtained from the Court a temporary stay of this decision until judgment was rendered on the Minister's stay motion. On March 6, 2016, my colleague, Justice Denis Gascon, granted the stay motion and ordered a stay of the respondent's release [TRANSLATION] "until the next mandatory detention review for Mr. Mukenge, set for March 30, 2016 or, if this decision is prior to that date, until the Court renders its decision on the application for leave and for judicial review from the Member's decision made on February 29, 2016."

[3] On March 8, 2016, I ordered expedited processing of this application for leave and for judicial review, and set the hearing date for March 16, 2016 in Montréal. I also ordered that the application be processed on the basis of the Motion Records filed by the parties in addition to the stay motion, subject to the right of each party to file and serve a complementary record. The applicant exercised this right, but the respondent did not.

[4] The context specific to this case was summarized as follows by Gascon J. in his ruling on the stay motion.

> 1. Mr. Mukenge is a citizen of the Democratic Republic of the Congo;
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> 2. On January 22, 2016, Mr. Mukenge filed a claim for refugee protection. Because Mr. Mukenge's passport revealed anomalies, the Canada Border Services Agency (CBSA) held him for

> immigration purposes on the grounds that his identity had not been, but might be, established;
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> 3. Mr. Mukenge said that other than his passport, he had no access to other identification documents because his house was ransacked and he was detained in the Congo;
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> 4. There were two detention reviews: one on January 25, 2016; the other on February 1, 2016, following which Mr. Mukenge's detention was maintained. A detailed decision was rendered by the Division following both of these reviews;
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> 5. On January 25, 2016, Mr. Mukenge's passport was sent to the CBSA laboratory for analysis and evaluation and, on February 22, 2016, the evaluation results revealed that the document had been altered and that the biometric page in Mr. Mukenge's passport was counterfeit;
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> 6. During an interview with the CBSA on February 25, 2016, Mr. Mukenge said that he did not agree with this evaluation and maintained that his document was authentic and issued by Congolese authorities. According to the CBSA representative's notes, Mr. Mukenge said that he had not taken any further action and had no new information to provide since the February 1 review. Again according to the CBSA representative's notes, Mr. Mukenge also said that he could not provide other pieces of identification while he was detained and that it was difficult to find people to help him regarding his identity;
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> 7. A third detention review was held on February 29, following which the Member ordered Mr. Mukenge's release. At this hearing, Mr. Mukenge told the Member that he had taken steps to contact people to find him documents such as a birth certificate;

[5] As noted by Gascon J., the Member drew the following conclusions after this third detention review:

> 1. The Minister's efforts were unreasonable because from February 1 to February 25, 2016, [TRANSLATION] "no effort was made";
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> 2. In the interviews, Mr. Mukenge had said that he had made efforts with people from his country and that he was awaiting

> [TRANSLATION] "letters from people or from brothers and sisters and possibly a birth certificate";
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> 3. Mr. Mukenge [TRANSLATION] "cooperated from the start";
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> 4. Mr. Mukenge poses [TRANSLATION] "a certain risk of flight" for the reasons indicated by the Minister because his identity has not been established to the satisfaction of the CBSA, he is a refugee claimant and his passport is a document considered counterfeit;
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> 5. Risk of flight is nonetheless [TRANSLATION] "not at this point so high that no alternative is possible" and under certain conditions, the risk of flight posed by Mr. Mukenge could be offset.

[6] The Minister argues that the Member erred irremediably (i) by finding, contrary to the evidence in the docket, that no effort was made since the February 1, 2016 detention review to prove the respondent's identity and that conversely, the respondent [TRANSLATION] "had cooperated from the start"; (ii) by releasing the respondent on $2000 bail posted by [TRANSLATION] "anyone," and (iii) by failing to explain why she chose to depart from the decisions rendered at the first two detention reviews on January 25 and February 1, 2016.

[7] For his part, the respondent argues that to the extent possible, he fully cooperated in proving his identity and that he had no reason to question the authenticity of his passport. He asked the Court to review the Member's decision in light of his particular situation—that of a refugee claimant who came to Canada after months of captivity in his homeland and, for all intents and purposes, does not know anyone in Canada and therefore has few ways to come up with new documents to prove his identity. Lastly, he argues that the Court should discourage taking detention for reasons of identity [TRANSLATION] "lightly" and that there is no reason to interfere with the Member's decision, as the Minister is asking, because it is perfectly reasonable under the circumstances.

[8] These arguments were carefully reviewed by Gascon J. within the scope of the stay motion filed by the Minister. Keeping in mind that the test of serious issue to be tried may be more demanding when, as was the case here, granting the relief sought in the stay motion will give the applicant the relief sought in the underlying application for judicial review (*Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at paragraph 11), Gascon J. engaged in an analysis to determine whether the Minister had [TRANSLATION] "realistic chances of success" and would [TRANSLATION] "likely have succeeded.". Proceeding with this analysis in an appropriate manner subject to the reasonableness standard of review (*Canada (Citizenship and Immigration) v. X*, 2010 FC 1095 at paragraph 22), he found that this was the case, the Member's decision seeming likely unreasonable to him in several respects.

[9] The respondent did not convince me that there is reason to assess the merit of the Minister's action in a way that differed from how Gascon J. assessed it, or to question his findings of fact and law. For the same reasons as those cited by Gascon J., I find that the Member's decision was unreasonable in more ways than one and that the Minister's action must therefore be successful. I agree, as did Gascon J. with the Minister's argument as follows:

1. The Member's claim to the effect that the Minister made no effort between February 1 and February 25, 2016 is not supported by evidence. During this period, the Minister completed his evaluation of the respondent's passport, the only piece of identification provided by the respondent since he was detained—a piece of identification that was proven to be altered and counterfeit;

2. The Member could not claim that the respondent [TRANSLATION] "had cooperated from the start" without ignoring the fact that the onus of proving his identity is, under section 58 of the Act, first and foremost upon him, which imposes upon him, in this respect, an active obligation to bring something to the Minister (i.e. to provide the Minister with useful information to prove his identity). The evidence demonstrates that during the month of February, which was taken into account by the Member in her decision, no such information was provided by the respondent;

3. Associating, as the Member did, the release of a person whose identity has not been established with bail posted by an unidentified individual appears indefensible; posting of bail by a person whose identity has not been established cannot reasonably serve as a guarantee, as stated by Gascon J., to ensure the presence of a person whose own identity has not been established; and

4. The Member should have (*Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4 at paragraphs 12, 13 and 24), but failed to, explain clearly and convincingly why she departed from her colleagues' contrary findings rendered during the detention reviews on January 25 and February 1, 2016. That obligation applied even more given the confirmation following the review ordered by the Minister that the respondent's passport was altered. As noted by Gascon J., because of that alteration, even more discretion and care should have been exercised with respect to releasing the respondent.

[10] In light of the preceding, I find that the Member's decision does not, in the circumstances of this case, fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47) and that it must consequently be quashed. I reiterate that the respondent will be entitled to a review of his detention on March 30 or even earlier if he provides the Minister with information that will help prove his identity.

[11] Although I am aware that detention is a measure that calls significant personal interests into question and that consequently, it must not be taken lightly, I reiterate that identity remains the cornerstone of the Canadian immigration system (*Canada (Citizenship and Immigration) v. Singh*, 2004 FC 1634 at paragraph 38; *Canada (Citizenship and Immigration) v. X*, 2010 FC 1095 at paragraph 23) and that non-confirmation of identity under the Act is still a ground for detention (*Canada (Citizenship and Immigration) v. B046*, 2011 FC 877 at paragraphs 36 and 37).

[12] The parties agree that there is no need in this case to certify a question to the Federal Court of Appeal. I agree with this opinion.

ORDER

THE COURT ORDERS that:

1. The application for judicial review is allowed;

2. The decision rendered on February 29, 2016 by the Immigration Division of the Immigration and Refugee Board of Canada ordering the respondent's release on certain conditions is dismissed and the matter is referred back to the Immigration Division for redetermination by a different panel; and

3. There is no question to be certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-889-16
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. ALAIN KALONDO MUKENGE
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MARCH 16, 2016
ORDER AND REASONS:	LEBLANC J.
DATE OF REASONS:	MARCH 18, 2016

APPEARANCES:

Daniel Latulippe Alain Langlois	FOR THE APPLICANT
Stewart Istvanffy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT
Istvanffy Stewart Avocat Barristers and Solicitors Montréal, Quebec	FOR THE RESPONDENT