Federal Court  Cour fédérale

**Date: 20190516**

**Docket: IMM-3051-19**

**Citation: 2019 FC 729**

[CERTIFIED ENGLISH TRANSLATION REVISED BY THE AUTHOR]

**Ottawa, Ontario, May 16, 2019**

**PRESENT: Mr. Justice Grammond**

**BETWEEN:**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Applicant**

**and**

**SAEID BANIASHKAR**

**Respondent**

## ORDER AND REASONS

[1] Mr. Baniashkar is being detained under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. On May 13, 2019, a member of the Immigration Division [ID] of the Immigration and Refugee Board ordered his release on bail. The Minister is now seeking a stay of that decision, so that Mr. Baniashkar will remain in detention. I am granting the Minister's

motion because the ID apparently did not consider the danger which Mr. Baniashkar presents to the public, especially to his daughter.

## I. Background

[2] Mr. Baniashkar is an Iranian citizen. He arrived in Canada on a study permit in October 2015, accompanied by his then wife and their daughter, who was just a few months old at the time.

[3] In June 2017, a criminal complaint was filed against Mr. Baniashkar for domestic violence against his wife. He was charged with assault and released, subject to certain conditions. On January 15, 2018, Mr. Baniashkar made an undertaking under section 810 of the *Criminal Code*, the purpose of which was to prevent the recurrence of similar events. Around that same time, Mr. Baniashkar and his wife separated, and divorce proceedings were initiated.

[4] On January 19, 2018, Mr. Baniashkar left Canada with his daughter, who was two years old at the time, and travelled to Iran.

[5] Mr. Baniashkar returned to Canada alone on June 10, 2018. He was arrested upon his arrival at the airport. Following lengthy negotiations, an agreement was subsequently reached, according to which the section 810 order would be vacated and the child would be brought back to Canada.

[6] The child was brought back to Canada in October 2018 and entrusted into the care of her mother. Mr. Baniashkar was charged with child abduction and released on certain conditions pending trial.

[7] In February 2019, Mr. Baniashkar breached some of the conditions of his release. He was arrested by the police. On February 28, 2019, he pleaded guilty to charges of child abduction, breach of conditions and failure to comply with an undertaking. In light of the agreement reached with the Crown for the purpose of repatriating the child and the time spent in detention before his guilty plea, Mr. Baniashkar was sentenced to serve 15 days in prison. He was also the subject of a probation order for a period of three years.

[8] On April 5, 2019, Mr. Baniashkar finished serving his sentence. He was then turned over to the Canada Border Services Agency, which detained him under IRPA.

[9] The ID kept Mr. Baniashkar in detention further to reviews conducted on April 8, 2019, and April 16, 2019. However, on May 13, 2019, following a subsequent review, the ID ordered Mr. Baniashkar's release on bail; it also imposed certain conditions and ordered two guarantors, Mr. Rajabali and Mr. Zandi, to each post bail in the amount of $7,500.

[10] The Minister filed an application for leave and for judicial review of the decision rendered by the ID on May 13, 2019. The Minister also brought a motion for a stay of this decision, so that Mr. Baniashkar would remaian in detention. It is this stay motion that I am deciding today.

## II. Analysis

### A. *Preliminary considerations*

[11] Section 55 of IRPA authorizes, under certain circumstances, the detention of foreign nationals or permanent residents. Insofar as the person concerned has not been charged with a crime, this kind of detention is an exceptional measure. For this reason, IRPA provides for close supervision of any such detention. Section 57 requires the ID to conduct a review of the detention, initially within 48 hours and subsequently within seven days of the initial review, and then at least once during each 30-day period following each previous review. Section 58 provides that the ID must release the person concerned unless it is demonstrated that, among other possibilities, the person is a danger to the public or is unlikely to appear for certain measures required pursuant to IRPA.

[12] In *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 [*Chhina*], the Supreme Court acknowledged a number of key criticisms of the detention review process under IRPA. At paragraph 63, the majority opinion of the Court stated the following:

> An external audit commissioned by the chair of the Immigration and Refugee Board offers a timely, and frankly unfortunate, picture of how the scheme is being administered for those in long-term detention. The 2018 audit highlights how, in practice, detainees do not receive the full benefit of the scheme:
>
> - in principle, the Immigration Division should place the onus on the Minister to continue detention; in practice they often fail to do so (2017/2018, Audit, at p. 18);
>
> - in principle, the Immigration Division should be approaching each detention review afresh; in practice, the Immigration Division is overly reliant on past detention review decisions (2017/2018, Audit, pp. 31-32);

- in principle, the Immigration Division should be impartial and independent from the Canadian Border Services Agency; in practice, the Immigration Division often overly relies on the Canada Border Services Agency's submissions (2017/2018, Audit, pp. 17-18); and;

- in principle, the Immigration Division should be reviewing *IRPA* detentions for compliance with ss. 7, 9, and 12 of the *Charter*; in practice, as a result of their failure to consider each detention review afresh, they do not do so (2017/2018, Audit, pp. 31-32).

[13] In *Chhina*, the majority opinion of the Court noted certain flaws in our Court's approach to the judicial review of decisions rendered by the ID in detention matters. For its part, the dissenting opinion written by Justice Rosalie Abella instead stressed the need to interpret IRPA in a way that would address these flaws. Indeed, at paragraph 74, she stated:

> The better approach is to continue to read the language of *IRPA* in a manner that is as broad and advantageous as *habeas corpus* and ensures the complete, comprehensive and expert review of immigration detention that it was intended to provide, as all of this Court's previous jurisprudence has done. It is far more consistent with the purposes of the scheme to breathe the fullest possible remedial life into the *Act* than to essentially invite detainees to avoid the exclusive scheme and pursue their analogous remedies elsewhere.

[14] Insofar as Justice Abella states that our Court should change its approach to interpreting or applying certain provisions of IRPA, I find that her opinion is not contradicted by the majority opinion, which criticizes this interpretation or application. In my opinion, *Chhina* provides a clear indication that certain aspects of our Court's case law must be reviewed.

B. *Applicable test*

[15] The legislative basis for staying an administrative decision is set out in section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which provides that our Court may issue interim orders pending the final disposition of an application for judicial review. In granting such a remedy, we apply the same test as for granting an interlocutory injunction. The Supreme Court of Canada recently restated the applicable test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
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> (*R v Canadian Broadcasting Corp.*, 2018 SCC 5 at paragraph 12, [2018] 1 SCR 196, citations omitted)

[16] This three-pronged test is well known. It was set out in earlier decisions of the Supreme Court (*Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110; *RJR — MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]). It goes without saying that the application of this test is highly contextual and that it depends, to a large extent, on the facts of the case.

[17] However, in *RJR*, the Supreme Court indicated that a higher standard, a strong *prima facie* case, should be applied at the first stage of the test when "the result of the interlocutory motion will in effect amount to a final determination of the action" (*RJR*, at page 338).

[18] When the Minister applies for a stay of an ID decision ordering a person's release, this has the practical effect of continuing that person's detention at least until the next periodic review conducted by the ID. Even though, in some cases, our Court has been called upon to hear and determine an application for judicial review after a stay has been granted, I believe that, in most cases, the stay grants the relief sought by the Minister. See on this point *Canada (Public Safety and Emergency Preparedness) v Mukenge*, 2016 FC 331 at paragraph 8. It is therefore appropriate to require the demonstration of a strong *prima facie* case at the first step in the test set out in *RJR*.

C. *Strong prima facie case*

[19] The Minister submits that the ID rendered an unreasonable decision, not only by failing to consider the danger that Mr. Baniashkar presents to the public and the fact that the two proposed guarantors are unable to exert any influence whatsoever over Mr. Baniashkar's conduct, but also by departing from earlier decisions without offering any explanation for doing so.

[20] I will address the last argument first. Relying on certain passages in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572, the Minister argues that the ID errs when it fails to clearly explain why it departs from its previous decisions. However, as I mentioned earlier, the Supreme Court criticized this approach in *Chhina* and noted that this could lead to "self-referential reasoning" (paragraph 62). On this point, Justice Abella stated, "It is not enough for the Minister to rely on previous Immigration Division decisions to satisfy the Immigration Division on the s. 58 and s. 248 inquiry" (paragraph 127).

Therefore, the ID should not be faulted for departing from its earlier decisions in rendering its decision on May 13.

[21] Nevertheless, I believe that the Minister succeeded in making a strong *prima facie* case with respect to the issue of danger to the public.

[22] In this regard, Mr. Baniashkar pleaded guilty to the offence of child abduction under section 283 of the *Criminal Code*. This necessarily involves acknowledgement of the fact that he committed the acts that constitute the essential elements of the offence. In spite of this, Mr. Baniashkar maintains that he never intended to abduct the child, that he had advised his ex-wife that he intended to travel to Iran and that the delay in bringing the child back to Canada stemmed from the loss of her visitor status, which she had lost as a result of the refugee protection claim filed by his ex-wife after he left for Iran.

[23] However, overwhelming evidence tends to show that Mr. Baniashkar had planned the abduction of his daughter. I can hardly disregard his guilty plea.

[24] Moreover, it is not disputed that Mr. Baniashkar has obtained a judgment in Iran granting him sole custody of his daughter.

[25] The transcript of the reasons delivered by the ID at the hearing does not demonstrate that the ID considered all these elements demonstrating a significant risk that Mr. Baniashkar would

once again try to abduct his daughter, or the gravity of the consequences for the child if her father were to take her to Iran again.

[26] An additional element must be mentioned. An officer from the SPVM, Montréal's police department, testified at the initial review of Mr. Baniashkar's detention. She confirmed that he presented such a risk that, if released, it would be necessary to relocate his ex-wife and daughter to a shelter. The transcript of the reasons for the decision dated May 13, 2019 suggests that the ID treated this possibility in a somewhat cavalier manner. In my view, the ID should have provided a clearer explanation for why it did not ascribe any weight to this evidence.

[27] Mr. Baniashkar maintains that the ID was right to order his release because there was no evidence to show that he was likely to abduct his daughter again. The ID did not receive any reports from a psychologist or criminologist in that regard. However, I would recall that the first 30-day review of Mr. Baniashkar's detention has just taken place, and it is unlikely that such a report can be obtained within such a short timeframe. At this point, I believe it is reasonable to rely on whatever evidence filed in the record, including the conviction for child abduction, and draw common-sense inferences from those facts. If Mr. Baniashkar's detention is to be continued, it is for the ID to decide whether and when an expert report will be necessary to prove the danger presented by Mr. Baniashkar.

[28] Since I have found that the Minister made out a strong *prima facie* case with regard to the issue of danger to the public, it is not necessary for me to address the issue of the suitability of the proposed guarantors.

D. *Irreparable harm*

[29] The Minister first submits that, absent a stay, there will no longer be an effective opportunity to obtain judicial review of the ID decision. I cannot subscribe to such an argument. In matters concerning removals from Canada, it is well established that the fact that an application for judicial review might become moot if the applicant is removed is not sufficient grounds for a stay: *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42 at paragraph 8; *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraph 50, [2010] 2 FCR 311; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paragraphs 35–39, [2012] 2 FCR 133; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraphs 56–57. The same principle should be applied in this case; otherwise, the Minister could automatically obtain a stay of the release of any person detained under IRPA by simply filing an application for judicial review.

[30] However, in the specific circumstances of this case, I believe that the danger linked to the possibility that Mr. Baniashkar may once again abduct his daughter and take her to Iran constitutes irreparable harm. At this time, it is Mr. Baniashkar's ex-wife who has sole custody of her daughter. Since Iran is not a party to the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, commonly referred to as the Hague Convention, and given the state of diplomatic relations between the two countries, it may prove very difficult to secure the child's return. The steps required to secure the child's return in 2018 are indeed proof of this. Another abduction therefore risks separating the child from her mother for an indefinite period of time. As I mentioned in *Iheonye v Canada (Public Safety and Emergency Preparedness)*,

2018 FC 375 at paragraph 20, the disruption of a person's childhood may constitute irreparable harm.

E. *Balance of convenience*

[31] In a detention review, one must not forget that an individual's liberty is at stake. Granting a stay will obviously impose significant inconvenience on Mr. Baniashkar – he will remain in detention.

[32] However, it is possible to minimize the extent of this inconvenience. IRPA provides that detention must be reviewed every 30 days. Even though the Minister is asking me to stay Mr. Baniashkar's release until our Court makes a decision on the application for leave and for judicial review, I believe that it is preferable to grant the stay only until the next detention review by the ID. At that time, the ID will have to examine all of the circumstances afresh in order to determine whether Mr. Baniashkar's detention is still necessary.

[33] Based on these conditions, I believe that the harm that this stay motion seeks to prevent clearly outweighs any inconvenience resulting from Mr. Baniashkar's continued detention for a period of 30 days.

## III. Conclusion

[34] Since the Minister was able to satisfy the three-prong test set out in *RJR*, I will grant the motion and order a stay of Mr. Baniashkar's release until the next monthly review of his detention.

**ORDER in IMM-3051-19**

**THIS COURT ORDERS that** the respondent's release be stayed until the next detention review by the Immigration Division under section 57 of the *Immigration and Refugee Protection Act*.

"Sébastien Grammond"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3051-19 |
| **STYLE OF CAUSE:** | THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v SAEID BANIASHKAR |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF THE HEARING:** | MAY 16, 2019 |
| **ORDER AND REASONS:** | GRAMMOND J. |
| **DATED:** | MAY 16, 2019 |

**APPEARANCES:**

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| Constance Connie Byrne | FOR THE RESPONDENT |

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