Date: 20080417

Docket: IMM-3883-07

Citation: 2008 FC 495

Ottawa, Ontario, April 17, 2008

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JOSE FRANCISCO CARDOZA QUINTEROS

Respondent

REASONS FOR ORDER AND ORDER

[1] At the conclusion of a September 13, 2007 detention review hearing, a Member of the Immigration and Refugee Board, Immigration Division, ordered the Respondent's release on terms and conditions. The Minister seeks to have this decision set aside.

[2] When assessing whether an individual is a danger to the public in the context of a detention review hearing, subsection 246(*f*)(ii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) requires a consideration of whether the individual has pending

charges or a conviction for an offence outside of Canada that "if committed in Canada, would constitute an offence under an Act of Parliament for […] an offence involving violence or weapons […]". As the determinative issue in this judicial review concerns the Member's finding in relation to this provision, only a brief recital of the facts is necessary.

[3] The Respondent, a citizen of El Salvador, claimed refugee protection upon his arrival in Canada on September 2, 2007.

[4] At a subsequent September 4, 2007 interview conducted by the Canada Border Services Agency (CBSA), the Respondent admitted his five year membership in the El Salvadoran gang, Mara Salvatrucha (MS-13). He gave a detailed statement about the gang, its violent, criminal activities, and his own involvement in multiple acts of violence. He also stated that he had been convicted of armed robbery. As a result, CBSA reported the Respondent as being inadmissible under paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[5] The first detention review hearing resulted in the Respondent's continued detention because his identity had not been established. At his second detention review hearing, the Minister asked for a continuation of the Respondent's detention on the basis that he posed a danger to the public and was unlikely to appear for his inadmissibility hearing. When asked by the Member to identify the evidence being relied upon in support of the factual assertions being made in relation to subsection 246(*f*)(ii), the Minister's counsel was not able to point to any specific evidence. In his response to the Minister's submissions, duty counsel acting for the Respondent advised that his

client denied being a member of the MS-13, that everything he had stated at the earlier interview was wrong, and that he had only one conviction for theft.

[6] In his consideration of the subsection 246(*f*)(ii) factor, the Member stated that "[a]s far as I can tell at this point, your only conviction is for theft, or perhaps robbery, regarding a cell phone. That doesn't fit within subsection (*f*)."

[7] The Applicant submits that the Member erred in law in making this finding.

[8] As the Member's finding that robbery does not fit within subsection (*f*) raises a general question of law, it is reviewable against a standard of correctness see: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 60.

[9] The Respondent argues that there was insufficient evidence of the circumstances of any purported convictions against the Respondent for the Tribunal to give much weight to the conviction.

[10] On my reading of the Tribunal record, there was evidence of two possible convictions. One, duty counsel acknowledged on behalf of the Respondent that he had a theft conviction. Two, the Respondent's own admission of a conviction for armed robbery contained in the transcript of the CBSA interview that was tendered as an exhibit at the detention review hearing.

[11] "Robbery" is defined in section 343 of the *Criminal Code*, R.S.C. 1985, c. C-46. It reads:

343. Every one commits robbery who	343. Commet un vol qualifié quiconque, selon le cas :
(a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;	a) vole et, pour extorquer la chose volée ou empêcher ou maîtriser toute résistance au vol, emploie la violence ou des menaces de violence contre une personne ou des biens;
(b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;	b) vole quelqu'un et, au moment où il vole, ou immédiatement avant ou après, blesse, bat ou frappe cette personne ou se porte à des actes de violence contre elle;
(c) assaults any person with intent to steal from him; or	c) se livre à des voies de fait sur une personne avec l'intention de la voler;
(d) steals from any person while armed with an offensive weapon or imitation thereof.	d) vole une personne alors qu'il est muni d'une arme offensive ou d'une imitation d'une telle arme.

[12] In Canada, while the offence of theft is not an offence "involving violence or weapons", by definition, robbery clearly falls within the provisions of subsection 246(*f*)(ii). Quite apart from the failure to make a finding as to whether the available evidence was sufficient to support a finding that the Respondent had a robbery conviction, the member erred in law in concluding that even if he did have a robbery conviction, it did not come within the purview of subsection 246(*f*)(ii).

[13] At the hearing, the Respondent also argued that since the Minister did not pursue the argument regarding the conviction at the detention review hearing, the Minister should not be

permitted to raise the matter on judicial review. I reject this argument. Although at the detention review the Minister's counsel could not point to any specific evidence in relation to a conviction, it is evident that the Member was aware of the evidence concerning the robbery conviction and made a determination.

[14] For the above reasons, the judicial review is allowed and the matter will be remitted for a re-determination by a different Member. Neither party submitted a question for certification.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is allowed, the September 13, 2007 decision is set aside, and the matter is remitted for re-determination by a different Member of the Immigration and Refugee Board, Immigration Division.

2. No serious question of general importance is certified.

"Dolores M. Hansen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3883-07
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION, Applicant and JOSE FRANCISCO CARDOZA QUINTEROS, Respondent
PLACE OF HEARING:	VANCOUVER, B.C.
DATE OF HEARING:	APRIL 8, 2008
REASONS FOR ORDER AND ORDER:	HANSEN, J.
DATED:	APRIL 17, 2008

APPEARANCES:

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