Date: 20081218

Docket: IMM-5058-08

Citation: 2008 FC 1394

Ottawa, Ontario, December 18, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JOTHIRAVI SITTAMPALAM

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant Minister brings a motion seeking to stay the order of a Member of the Immigration Division of the Immigration and Refugee Board altering the terms and conditions of the respondent's release from detention. For the reasons that follow, I am of the view that the order of the Member must be stayed.

BACKGROUND

[2] Mr. Sittampalam is a citizen of Sri Lanka. He has a lengthy history with immigration officials which is set out in detail in a number of decisions of this Court: See *Canada (Minister of Citizenship and Immigration) v. Sittampalam*, [2004] F.C.J. No. 2152; *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1485; *Sittampalam v. Canada (Solicitor General)*, [2005] F.C.J. No. 1734; *Sittampalam v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 1412; *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 932. The following short outline of the most relevant facts is taken from these earlier decisions and the record before the Court on this motion.

History of Status in Canada

- Mr. Sittampalam came to Canada in February 1990 and made a successful refugee claim. He became a permanent resident on July 17, 1992.
- He has three criminal convictions: (i) failure to comply with a recognizance, (ii) trafficking in a narcotic; and (iii) obstructing a peace officer.
- Mr. Sittampalam has been identified by the police as a leader of A.K. Kannan, one of two rival Tamil gangs that operated in Toronto. Mr. Sittampalam has been investigated for, but never convicted of numerous other offences, including attempted murder, assault with a weapon, aggravated assault, possession of a weapon dangerous to the public, pointing a firearm and using a firearm to commit an offence, threatening, extortion, and trafficking.
- Mr. Sittampalam was reported under subsection 27(1)(d) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the "former Act"), because of his narcotic trafficking conviction.

- Mr. Sittampalam was also reported under the former Act as a person engaged in organized criminality because of his involvement in A.K. Kannan.
- In a decision dated October 4, 2004, a panel of the Immigration and Refugee Board determined that Mr. Sittampalam was inadmissible to Canada on grounds of serious criminality (pursuant to subsection 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and organized criminality (pursuant to subsection 37(1)(a) of the Act). Mr. Sittampalam was ordered deported.
- This Court upheld the Board's determination regarding Mr. Sittampalam's inadmissibility to Canada (*Sittampalam v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1485; aff'd *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1512 (F.C.A.)).
- On July 6, 2006, Mr. Sittampalam was issued a danger opinion under subsection 115(2)(a) and (b) of the Act, which allowed for his refoulement to Sri Lanka. He was scheduled for removal on August 24, 2006. This Court granted a stay of removal pending leave and judicial review of the danger opinion.
- On June 28, 2007, this Court upheld the finding that the respondent is a danger to the Canadian public, but ordered that the decision be sent back to the Minister's delegate for the sole purpose of re-assessing the risk to the respondent upon his return to Sri Lanka (*Sittampalam v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 932).
- On January 11, 2008, the re-assessment was completed and the respondent was found not to be at risk if returned to Sri Lanka. That decision is the subject of an application for judicial

review, which was heard on June 5, 2008. No judgment has yet issued on that application. This Court granted a stay of his removal pending the determination of that review.

History of Detention

- Mr. Sittampalam was arrested and detained on October 18, 2001. He had regular detention reviews as required by the Act. He was twice ordered released in 2004, but both decisions were overturned by this Court (*Canada (Minister of Citizenship and Immigration) v. Sittampalam*, [2004] F.C.J. No. 2152). This Court also overturned decisions of the Board ordering his continued detention (*Sittampalam v. Canada (Solicitor General),* [2005] F.C.J. No. 1734 and *Sittampalam v. Canada (Minister of Public Safety and Emergency Preparedness),* [2006] F.C.J. No. 1412).
- Mr. Sittampalam was ultimately released on May 22, 2007, pursuant to terms and conditions set out in an Order of Member Gratton in a decision dated April 19, 2007.
- The terms of release were twice amended before the amendment that underlies this motion for a stay. On October 4, 2007, the Immigration Division allowed an amendment to the original release Order so that the respondent could move to Ajax, Ontario, and on January 30, 2008, Member Willoughby amended the release Order to allow the respondent one outing per week.

Hearing Before and Decision of Member J. Harnum

[3] In August 2008, the respondent requested an amendment to the terms and conditions of his release. The applicant was prepared to somewhat lessened restrictions on the respondent.

Specifically, the applicant attests in an affidavit filed in this proceeding that it agreed to the following amendments:

(i) Mr. Sittampalam be allowed to remain alone in the residence;

(ii) Mr. Sittampalam could be in the yard alone provided there was a surety in the residence;

(iii) Mr. Sittampalam be allowed two outings per week (maximum of four hours each) as long as prior approval (72 hours) was obtained and he was in the presence of a surety;

(iv) Mr. Sittampalam be allowed to walk his children to school in the morning and pick them up from school in the afternoon; and

(v) Mr. Sittampalam must consult a psychiatrist/psychologist with respect to his mental state and submit a report within six months.

[4] Mr. Sittampalam sought further amendments to the terms of the release order which were opposed by the applicant. On Wednesday, October 8, 2008, a hearing was held before Member Harnum. Counsel for the respondent provided the Member with a six-page document that outlined the amendments being sought. Mr. Sittampalam gave evidence and counsel for both parties made lengthy submissions to the Member on the amendments being sought by the respondent. During the course of the proceeding the respondent dropped or modified some of his demands.

[5] On November 13, 2008, Member Harnum released her order in the form of a four-page document headed "Order for Release'. This was distributed to the parties with a cover sheet that

stated: “Reasons to follow November 24, 2008”. No reasons have been provided. The applicant, in its affidavit in support of this motion, attests that numerous inquiries have been made concerning the status of the reasons but no information of assistance has been forthcoming. The lack of response and the failure to provide reasons may be explained by the fact that Member Harnum left her position as a Member of the Immigration Division, shortly after issuing the order amending the respondent’s terms and conditions of release.

[6] The applicant submits that Member Harnum’s Order compromises the ability of Canada Border Services Agency to properly monitor the respondent and thus brings this motion to stay her Order pending a determination of its application for leave and for judicial review of her Order.

ANALYSIS

[7] In determining whether the applicant is entitled to an interim injunction staying the Order of Member Harnum, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.). The applicant must establish that:

(i) There is a serious issue to be tried;

(ii) The applicant will suffer irreparable harm if the injunction is not granted; and

(iii) The balance of convenience favours the granting of the injunction.

The tripartite test is conjunctive; the applicant has to satisfy all three elements of the test before it will be entitled to the relief sought.

[8] The applicant has raised the following four issues that it submits are serious issues in the underlying application:

(i) Whether the Member's reasons are adequate;

(ii) Whether the Member erred in departing from the orders of previous Members without clear and compelling reasons for so doing;

(iii) Whether the Member breached the applicant's right to procedural fairness in making alterations and deletions to conditions of release that were not requested by the respondent and that were not at issue in the detention review of October 8, 2008; and

(iv) Whether the Member erred and the applicant was denied procedural fairness in making changes to the conditions of release that differed from and were less restrictive than those requested by the respondent.

[9] A serious issue is one that is neither frivolous nor vexatious. I am satisfied that each of the four issues raised by the applicant is a serious issue in the underlying application. In particular, the allegation that the Member issued an Order amending previous terms of release that were not before her and without alerting either party of her intent to do so is a serious breach of procedural fairness. As well, the failure, at present, to provide reasons also raises a serious issue in light of the statutory requirement that reasons are to be provided: See section 169 of the Act.

[10] The applicant raised a number of allegations of irreparable harm. Generally they fall within one of the following descriptions:

(i) The lessening of the conditions of release will put the safety of the Canadian public at risk, given that the respondent has been found to be a danger to the Canadian public;

(ii) The lessening of the conditions of release may put the respondent at greater risk as he has previously been the subject of threats and attacks and because recently he appears to have become psychologically unstable as he has twice overdosed and recently has threatened to kill himself; and

(iii) The lessening of the conditions of release increases the likelihood that the respondent will not be continuously monitored and he may disappear or fail to appear for removal should the outstanding judgment on his judicial review application be dismissed.

[11] I am not convinced that the alleged harm in (ii) above, i.e. harm to the respondent, meets the test set out in the jurisprudence as it is not obvious that it amounts to harm to the applicant. It might be said that the applicant has a duty to protect all persons under its supervision and thus harm to the respondent also, indirectly, harms the applicant. However, the applicant's motivation in opposing the requested changes to the conditions of release was not his concern for the respondent's well-being.

[12] I am also not satisfied that the possibility of the respondent disappearing or failing to attend for removal is more than speculation on the part of the applicant. There is not clear and convincing evidence before the Court on which it could be said that this harm is likely. As was stated by the

Court in *Ramratran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 377, [2006] F.C.J. No. 472 (QL):

> As a stay or interlocutory injunction is determined prior to the determination of the issues on judicial review, the evidence in support of irreparable harm must be clear and non-speculative; the Court must be satisfied that irreparable harm will occur if the relief sought is not granted.
>
> (emphasis added)

[13] Notwithstanding my findings with respect to allegations (i) and (ii), I am nonetheless satisfied that on the facts before the Court, there is clear and convincing evidence that irreparable harm will occur as a result of the lessening of the conditions of the respondent's release, in the manner ordered by the Member. The clear and convincing evidence that supports that finding is firstly, the finding of the Minister's delegate, upheld by this Court, that Mr. Sittampalam is a danger to the public, and secondly, the fact that the respondent had no opportunity to make submissions to the Member with respect to some of the terms and conditions she altered. The following serves as an illustration.

[14] The previous order for release provided that Mr. Sittampalam was to remain in his residence unless otherwise provided in the terms of release. He was permitted to be outside his residence, one time each week on an outing, of limited duration, provided 72 hours notice was given, and he was accompanied by a supervisor with continuous supervision. The list of those qualified as supervisors was set out in the original order. Mr. Sittampalam was seeking an amendment that would permit him to be away from his residence to take his children to and from school and to seek employment and to work. In the course of the hearing counsel dropped the request related to employment,

indicating that the respondent would come back to the Division, if he wished to seek employment outside the home (see page 143 of the transcription of the hearing before the Member). However, the respondent made no request to amend the notice required for outings or the requirement that he be supervised. It is not surprising therefore that the respondent made no submissions on this – it was simply not an issue in dispute before the Member. The Member, however, reduced the advance time to be provided to the applicant of outings outside the residence to 24 hours, eliminated the need for supervision entirely and permitted the respondent to be outside the house at any time, subject to the revised notice conditions, between 6 a.m. and 11 p.m.

[15] Mr. Sittampalam's previous terms and conditions of release were close to terms of house arrest – his counsel described them as intrusive and onerous. That they may have been; however, they were terms imposed by a Member of the Division after both parties had an opportunity to make submissions as to their appropriateness. In this case, the Member relaxed these conditions on her own, without being asked and without the benefit of submissions by either party. In my view the absolute legal right of each party to make submissions on the particular terms of release that she was considering, was lost. Each party suffered irreparable harm as a direct result of the manner in which the Member proceeded. There is nothing that can compensate for the loss of the right to make submissions prior to the release of the respondent on these relaxed terms. This stay must be granted to prevent this irreparable harm to the parties.

[16] This is a harm that is separate from the harm to the public that was urged upon the Court by the applicant in his written submissions. In that respect the respondent submits that there is no

recent evidence to support any harm to the public under the relaxed terms of release. I cannot agree. While the immediacy of the harm may have dissipated over time, the fact remains and cannot be ignored that he has been and continues to be a danger to the public, as it has been determined by the Minister. The respondent relies heavily on the following passage from the judgment of Justice Blais, of this Court, as he then was, in *Canada (Minister of Citizenship and Immigration) v. Sittampalam*, 2004 FC 1756, [2004] F.C.J. No.. 2152 (QL) at paragraph 17:

> If one of the grounds for detaining the respondent is that he is a danger to the public, it may be that the danger to the public dissipates due to the length of time in detention, or that the evidence supporting a detention order will turn stale. Length of detention is properly considered with regard to a dissipated threat or stale evidence regardless of whether the length of time in detention was by virtue of the respondent's own delay in the matter. The responsibility of the Board if it does conclude that evidence is stale by virtue of the passing of time is a different matter and will be dealt with below.

Justice Blais, in the passage cited, was considering the respondent's situation as a detained person before the Minister's danger opinion under section 155 issued. That opinion was that Mr. Sittampalam "constitutes both a current and future danger to the public pursuant to paragraph 115(2)(a) of the *IRPA*…" (emphasis added). Mr. Sittampalam's challenge to that finding was dismissed by this Court. In the face of the Minister's determination and this Court's finding, it can be said that the respondent's release on terms that have not been fully argued before the Member, results in an irreparable harm to public safety and security.

[17] I am also satisfied that the balance of convenience rests with the applicant. The proper application of the provisions of the *Immigration and Refugee Protection Act* is a matter of public interest which, in my view, and in this case, outweighs the interests of the respondent.

[18] For all of these reasons the tri-partite test has been met by the applicant and the Order of the Member will be stayed.

ORDER

THIS COURT ORDERS that the decision of J. Harnum, a Member of the Immigration Division of the Immigration and Refugee Board, dated November 13, 2008, altering the terms and conditions of the release of the respondent from detention, is stayed pending the final determination of the application for leave and judicial review of that decision.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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