Date: 20090121

Docket: IMM-254-09

Citation: 2009 FC 52

Ottawa, Ontario, January 21, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicants

and

SUWALEE IAMKHONG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] [24] …previous decisions to detain the individual must be considered at subsequent reviews and the Immigration Division must give clear and compelling reasons for departing from previous decisions. (Emphasis added).

(As held by the Federal Court of Appeal, in a decision penned by Justice Marshall Rothstein, in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C.R. 572 (C.A.)).

II. Introduction

[2] The Ministers are requesting an order staying the Immigration Division's order to release the Respondent.

[3] The Ministers are of the view that the Respondent is a danger to the public and that she is unlikely to appear for her removal from Canada.

III. Background

[4] The Respondent, Ms. Suwalee Iamkhong is a citizen of Thailand.

[5] In 1994, she traveled to Hong Kong to work as an exotic dancer. In Hong Kong, she had her blood tested and was told that she was HIV-positive.

[6] Two weeks after the blood test she received a work visa to enter Canada to work as an exotic dancer, which she did from her arrival in Canada in 1995.

[7] Four months after her arrival and as part of the visa renewal process, the Respondent had a medical examination, which included a blood test. The test results were acceptable and the visa was renewed. The visa continued to be renewed periodically for some considerable time. The Respondent maintains that she mistakenly thought that the blood test she took for her visa renewal included an HIV test. Because the visa was renewed she claims that she thought, again mistakenly, that the HIV- positive result in Hong Kong was an error.

[8] The Respondent married a Canadian citizen and had unprotected sex with her husband. In February of 2004, the Respondent became ill and was diagnosed as HIV-positive. In 2004, criminal charges were brought against her and she was convicted of criminal negligence causing bodily harm and aggravated assault, under sections 221 and 268 of the *Criminal Code*, R.S., 1985, c. C-46.

[9] On January 16, 2007, the Respondent was convicted of these offenses and on August 16, 2007, she was sentenced to three years, less one year of credit for time served in pre-trial detention, on each count, to be served concurrently.

[10] As a result of these convictions, an inadmissibility report was issued against her pursuant to section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and this report was referred to an admissibility hearing. The Respondent challenged this report but her application for judicial review was dismissed in *Iamkhong v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1349.

[11] The Respondent completed her sentence and was delivered to the immigration authorities pursuant to section 59 of the IRPA.

[12] She was detained under the IRPA and had three detention review hearings.

[13] The first hearing was held on December 16, 2008. The second detention review was held on December 23, 2008. The third and final detention review took place on January 19, 2009.

[14] The Ministers are challenging the order of the Immigration Division whereby the Respondent was released. The Ministers filed an application for Leave and for Judicial Review against this decision and this proceeding is the underlying application in the case at bar.

IV. Issue

[15] The issues are whether the Ministers established that there is a serious issue to be tried, that they will suffer irreparable harm if the Respondent is released from detention and that the balance of inconvenience favours them (*Toth v. M.E.I.*, (1988) 86 N.R. 302 (F.C.A.)).

IV. Analysis

A. Serious issue

[16] The meaning of the term "serious issue" is derived from the decisions of the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. In these two cases, the Supreme Court explained that the term "serious issue" means that the application is not frivolous or vexatious; therefore, the threshold is low and involves a preliminary assessment of the merits of the case. A prolonged examination of the merits is neither necessary nor desirable (*RJR-MacDonald Inc. v. Canada (Attorney General)*, above at pp. 335, 337-338). As the application is neither vexatious nor frivolous, the Court concludes that a serious issue has been raised and the second and third prongs of the tests are therefore considered below.

[17] The threshold of “serious issue to be tried” is significantly lower than the threshold of a *prima facie* case (*North American Gateway Inc. v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1997] F.C.J. No. 628, 214 N.R. 146, at pp. 148-149 (C.A.); *North of Smokey Fishermen's Assn. v. Canada (Attorney General)*, 2003 FCT 33, 229 F.T.R. 1 at para. 18).

(i) Flight Risk

[18] At the 30-day detention review hearing, the Board member ordered the Respondent’s release by accepting a bond of $6000 in cash and $17000 in performance from several individuals without first assessing these individuals’ reliability as bondspersons, specifically, in regard to influence exerted on the Respondent.

[19] Yet, at the 7-day detention review hearing, another adjudicator refused the release, finding that the Respondent’s brother-in-law and a friend did not exert sufficient influence on her to ensure compliance.

[20] At the 30-day detention review hearing, the Board member was required to explain why he decided to depart from his colleague’s earlier decision without examining the bondspersons. The Board member did not have evidence as to whether these bondspersons asserted sufficient control over the Respondent. The Federal Court of Appeal held, in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C.R. 572 (C.A.):

> [24] …previous decisions to detain the individual must be considered at subsequent reviews and the Immigration Division must give clear and compelling reasons for departing from previous decisions. (Emphasis added).

[21] In the case at bar, the Board member did not explain any consideration as to why the bondspersons were suitable whereas his colleague concluded that the Respondent's brother-in-law and a friend were not sufficiently suitable.

[22] The Board member did not sufficiently examine the character of the bondspersons, themselves, or the relationship of the bondspersons to the Respondent. This also constitutes an error:

> [22] In my view, the effect of a security deposit must be considered as part of the consideration of the question as to whether the detainee is likely to appear for removal. This in turn requires consideration of the character of the person posting the security since it is possible that the posting of security by certain elements will reduce the likelihood of the detainee appearing for removal. Consequently it was unreasonable for the Adjudicator to order that the security deposit in this case could be posted by anyone. If he thought that security was required to ensure the appearance of the respondents for removal, he was required to direct his mind to the issue of the circumstances of the person putting up the deposit and their relationship to the respondent.

(*Canada (Minister of Citizenship and Immigration) v. Zhang*, 2001 FCT 522, 205 F.T.R. 91).

(ii) Danger to the Public

[23] The second issue raised by the Ministers is the Board's error regarding the danger that the Respondent represents for the public. The Board member had evidence before him that the Respondent was convicted of two serious offences. The Board member also had evidence before him that the Respondent intentionally infected her husband (*Mens rea* was required for a conviction

on both counts). At the 7-day detention review hearing, the adjudicator specifically noted that the Respondent was not credible when she was alleging that she did not know about her HIV infection.

[24] At the 30-day hearing, the Board member had no additional evidence to reliably ensure that the Respondent had rehabilitated or that she would not reoffend.

[25] Recognizing the consequences of the offences, the Board member needed clear and convincing evidence that the Respondent would not have unprotected sex before concluding that the Respondent would not be a danger to the public.

[26] In light of the foregoing, the Ministers meet the low threshold of “serious issue to be tried”, which, as specified, is much lower than the threshold of a *prima facie* case.

B. Irreparable harm

[27] Irreparable harm would occur if the Respondent is released as she would not appear nor be available for removal from Canada. This would prevent the Minister from fulfilling his statutory obligations.

[28] In addition, if the Respondent reoffends, as recognizing from elements of the background of the case (level of understanding due to less than completion of primary education, previous assault convicted offences, even with voluntary service), by having unprotected sex, this would result in irreparable harm for a victim.

C. Balance of convenience

[29] The inconvenience experienced by the Respondent is limited to a detention of a maximum of 30 days until her next detention review. Inversely, if the Respondent is released and she does not appear for her removal, the Minister and the Canadian public will experience much greater inconvenience.

[30] The balance of convenience favours the Ministers.

V. Conclusion

[31] In light of the above, the stay motion is granted until the final determination of the underlying application.

JUDGMENT

THIS COURT ORDERS that the stay motion be granted until the final determination of the underlying application.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-254-09
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP IMMIGRATION v. SUWALEE IAMKHONG
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 21, 2009 (by teleconference)
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	January 21, 2009

APPEARANCES:

Mr. Alexandre Tavadian	FOR THE APPLICANTS
Ms. Aadil Mangalji	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANTS
AADIL MANGALJI Barrister and Solicitor Toronto, Ontario	FOR THE RESPONDENT