Federal Court  Cour fédérale

Date: 20091005

Docket: IMM-4883-09

Citation: 2009 FC 1005

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, October 5, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

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

Applicants

and

JOSE GUIOVANNY TORRES VARGAS
alias JOSE GUIOVANNY TORRES OLMEDO

Respondent

REASONS FOR ORDER AND ORDER

Preliminary remarks

[1] The Court has specified that once a member has determined that a person is a danger to the public and a flight risk, there is no real alternative to detention (*Canada v. Singh*, 2001 FCT 954).

[2] The inconveniences that could be caused by continued detention pending this Court's determination of the application for leave and judicial review from that decision or until the next detention review do not displace the interests of the public, which the Ministers seek to preserve in applying the *Immigration and Refugee Protection Act*, 2001 S.C. c. 27 (paragraph 3(1)(*h*)).

3. (1) The objectives of this Act with respect to immigration are […] (*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;	**3.** (1) En matière d'immigration, la présente loi a pour objet […] *h)* de protéger la santé des Canadiens et de garantir leur sécurité;

[3] In this case, the member acknowledged that the respondent was both a danger to the public and a flight but nevertheless ordered his conditional release.

[4] The respondent is to appear in court shortly on three counts of robbery and possession of stolen property, as well as charges of conspiracy, assault, assault with a weapon and possession of weapons for a dangerous purpose.

[5] In addition, the applicant failed to comply with his release conditions on several occasions and is currently facing, as noted, other charges for breach of conditions.

[6] Furthermore, the respondent is under a deportation order due to his membership in a criminal organization.

[7] In *Canada (MCI) v. Thanabalasingham (C.A.)*, 2001 FCA 4, at paragraph 4, the Court ruled that:

> … the detained person bears the burden of proving that previous decisions to detain should be set aside.

Introduction

[8] The Minister seeks to obtain an order from this Court staying the order to release the respondent made by the member of the Immigration Division of the Immigration and Refugee Board.

[9] Following a review of the case and after having had the opportunity to hear both counsel by telephone conference on Sunday, October 4, 2009, the Court agrees with the applicants' position.

Facts

[10] On September 3, 2009, the member heard and dismissed the respondent's application for release on the following grounds:

> [TRANSLATION]
>
> (a) The person who is supposed to act as guarantor, Frédéric Huzel, clearly did not have sufficient knowledge of the respondent's criminal file and immigration file to offset the flight risk and the danger posed, and thereby ensure control would be exercised over the respondent;
>
> (b) Indeed, Mr. Huzel's testimony revealed a number of contradictions that showed a limited knowledge of the respondent, among other things:
>
> (i) Although he claimed having known the respondent for a year, he was unaware that the respondent's primary occupation for the past 11 years had been working as a personal trainer and that they had a shared love of sport;
>
> (ii) While the respondent claimed to have had telephone conversations in Spanish with Mr. Huzel several times a week, Mr. Huzel stated that he had never spoken with the respondent on the telephone and that he was not able to carry on a conversation in Spanish;

> (iii) Mr. Huzel also stated that the respondent and his spouse had been over for dinner at his home while the respondent stated that he had never set foot in Mr. Huzel's place and did not know where he lived (Marilyne Trudeau's affidavit, para.2; Exhibit C from Sheila Markland's affidavit).

[11] On October 2, 2009, the same member ordered the respondent's release.

[12] At the hearing, the member upheld his previous findings regarding the respondent's flight risk and high level of danger, stating that there was no new evidence that would warrant a different finding (Marilyne Trudeau's affidavit, para. 4).

[13] The respondent proposed the same alternative to detention he had during the preceding review, that is to say, the deposit of a cash bond in the amount of $12,000 ($7,000 from Mr. Huzel and $5,000 from the respondent's spouse, Vanessa Pinto) and his supervision by Mr. Huzel.

[14] The respondent proposed that he live under house arrest, at the home of Mr. Huzel, 24 hours a day.

[15] The member, following an objection by the hearing officer, refused to rehear Mr. Huzel, because his testimony sought to correct previous contradictions and no new evidence was presented.

[16] The member found this additional proposal to be a substantial improvement over the previous offer.

[17] Despite the fact that no new evidence had been submitted since the previous review, the member nonetheless deviated from his previous reasons with respect to the quality of the guarantor and his inability to exercise control over the respondent (Ibid, para. 9).

[18] The respondent was under a deportation order dated August 4, 2009 due to his membership in a criminal organization (Ibid, para. 10 and Exhibit G from Sheila Markland's affidavit).

[19] The respondent's claim for refugee protection was deemed inadmissible by reason of the determination that he fell under section 37 of the Act.

[20] The respondent pleaded guilty and was convicted on two counts of breach of conditions.

[21] The respondent was charged with three other counts of breach of conditions (500-01-020610-090).

[22] The respondent has several criminal charges pending, other that those for breach of conditions, namely:

> (a) Robbery and possession of stolen property of less than $5,000 (SPVM # 108-065-244);
> (b) Aggravated assault and assault with a weapon, and possession of a weapon for a dangerous purpose (500-01-009788-081);
> (c) Robbery and possession of stolen property of less than $5,000 (SPVM # 108-065-244);
> (d) Robbery and possession of stolen property of less than $5,000 and conspiracy (SPVM # 108-065-244) (Marilyne Trudeau's affidavit, para. 14; Exhibit D from Sheila Markland's affidavit).

[23] The guarantor who is supposed to ensure that the respondent complies with the conditions is employed and would therefore be unable to ensure that the respondent does not leave the residence.

[24] The guarantor and the respondent only have tenuous ties to each other, which creates no moral obligation on the part of the respondent to comply with the conditions of his release (Marilyne Trudeau's affidavit, para. 16).

[25] The second guarantor, Vanessa Pinto, has always been deemed as being unable to act as a guarantor or exercise control over the respondent, since July 2009 (Marilyne Trudeau's affidavit, para. 19, Exhibit A, B and C from Sheila Markland's affidavit).

[26] The member had already determined that Mr. Huzel would not be a reasonable guarantor (Exhibit C from Sheila Markland's affidavit) and no new evidence was adduced to change that finding.

[27] The member acknowledged that the respondent continues to be a flight risk and pose a danger to the public.

Issue

[28] The only issue is whether the Ministers have demonstrated the existence of a serious issue and irreparable harm, and that the balance of convenience is in their favour.

Analysis

[29] The Ministers must meet the conditions of the tripartite test set out in *Toth* v. *M.E.I.* (1988) 86 N.R. 302 (F.C.A.). All three conditions must be met. Failure to meet one of these would therefore be fatal.

A. Serious issue

[30] The term "serious issue" or "question sérieuse" in French is derived from the Supreme Court of Canada's decision in *Manitoba (A.G.)* v. *Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110 and *RJR-MacDonald Inc.* v. *Canada (A.G.)*, [1994] 1 S.C.R. 311.

[31] In both of these decisions, the Court explained that the "serious issue" means that the application is not frivolous or vexatious. However, the threshold is very low. An analysis of the merits of the application is neither necessary nor desirable (RJR-MacDonald, *supra*, p. 335, 337-338; *Wang v. MCI*, 2001 FCT 148, para. 11). Once the judge is satisfied that the application is not frivolous or vexatious, he or she must, as a general rule, find that the serious issue test has been met.

[32] The serious issue threshold is lower than that for 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, pp. 148-149 (C.A.); *North of Smokey Fishermen's Association v. Canada (Attorney General)*, 2003 FCT 33, para. 18.

(a) Applicable legislation

[33] Subsection 58(1) of the *Immigration and Refugee Protection Act* states as follows:

58 (1). The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that	58 (1). La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tells des faits suivants:
(a) they are a danger to the public;	(a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;
(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);	(b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);
…	(…)

[34] Sections 244, 245, 246, and 248 of the *Immigration and Refugee Protection Regulations* ("Regulations") list the factors that **must** be taken into account to determine whether the detention of a person should be continued.

[35] These factors include, among others, the risk of the person failing to appear for examination, the danger they may pose to the public and their membership in a criminal organization.

[36] By ordering the respondent's conditional release, the member committed several errors of law and fact.

(b) Respondent is a danger to Canadians and a flight risk

[37] The member committed an error of law by concluding that the conditions of release were sufficient to offset the fact that the respondent is a danger to the public and a flight risk.

[38] In *Canada (M.C.I) v. Singh*, *supra*, the Court specified that once an adjudicator has determined that a person is a danger to the public and a flight risk, there is no real alternative to detention.

[39] In this case, however, the member acknowledged that the respondent was both a danger to the public and a flight risk, but nevertheless ordered his conditional release (Marilyne Trudeau's affidavit, para. 20).

[40] The respondent is to appear in court shortly on three counts of robbery and possession of stolen property, and charges of conspiracy, assault, assault with a weapon and possession of weapons for a dangerous purpose.

[41] In addition, the applicant failed to comply with his release conditions on several occasions and is currently facing, as noted, other charges for breach of conditions.

[42] Nothing in the evidence leads to the conclusion that the respondent will comply with the conditions imposed on his release.

[43] Indeed, the respondent has only tenuous ties to his guarantors and therefore in under no moral obligation to comply with his conditions in order to prevent these persons from losing their deposited guarantee.

[44] Furthermore, the respondent's principal guarantor would not be in a position to exercise control over the respondent to ensure that he complies with the conditions of the release order because he is employed and would be away from his home for long periods of time.

[45] The release order is therefore clearly unreasonable.

(c) Prospective guarantors would not be reasonable guarantors

[46] The member agreed to have Mr. Huzel act as guarantor when he had indicated in the previous detention review, on September 3, 2009, that this same guarantor did not have sufficient knowledge of the respondent to act in that capacity (Marilyne Trudeau's affidavit, paras. 2, 19).

[47] It was up to the member to explain how the situation had changed over the past 30 days for him to have come to a different conclusion, given the fact that no new evidence had been adduced.

[48] The member even refused to rehear Mr. Huzel, concluding that the purpose of his testimony was to correct the contradictions that had been raised by the member at the previous hearing (Ibid, para. 8).

[49] As for the second guarantor, Ms. Pinto, she had always been deemed to have been unsuitable as a guarantor, since July 2009.

[50] However, the member agreed to have her guarantee the respondent's release by paying $5,000 without explaining how or why he deemed her able to act as guarantor (Ibid. paras. 17-18).

[51] The member rendered a decision that departs completely from previous detention review decisions.

[52] Yet the courts have consistently held that a member has an obligation to clearly explain why he or she has elected not to follow the case law, particularly with regard to the issue of guarantors.

[53] In *Canada (MCI) v. Thanabalasingham (C.A.)* 2004, FCA 4, at para. 4, the Court held that:

> …. 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. (*Minister of Public Safety and Emergency Preparedness v. Iamkhong*, 2009 FC 52, para. 3).

[54] The member erred by failing to apply paragraph 47(2)(*b*) of the Regulations, which states that a person who posts a guarantee must be able to ensure that the person in respect of whom the guarantee is required will comply with the conditions imposed.

[55] The member failed to consider whether the guarantors were able to ensure that the respondent would comply with the conditions of his release in order to manage his dangerousness: he completely omitted discussing Ms. Pinto, even though she is the respondent's spouse, and he completely contradicted himself with regard to Mr. Huzel, without any new supporting evidence.

[56] The member was of the view that the principal guarantor, Mr. Huzel, would be able to exercise control over the respondent.

[57] Yet the member failed to consider that Mr. Huzel would be at work during the day, thereby rendering him unable to supervise the respondent during that time.

[58] The member also failed to take into account the fact that Mr. Huzel and Ms. Pinto had only a very limited knowledge of the respondent and, as a result, any influence or control they might have over him would be extremely limited (*Minister of Public Safety and Emergency Preparedness v. Sankar*, 2009 FC 934, para. 13).

[59] In light of the foregoing, the member's decision is unreasonable and there is a serious issue to be tried.

B. Irreparable harm

[60] It is acknowledged by the member that the respondent poses a danger to Canadians, which constitutes irreparable harm (Ibid. par. 12).

[61] He is facing criminal charges of an extremely serious nature and has demonstrated on five occasions that he has no respect for court orders.

[62] His release exposes the Canadian public to a high risk because the offences with which the respondent is charged are all of a violent nature.

[63] The respondent is also a flight risk and the evidence shows that the two guarantors accepted by the member are unable to exercise control over the respondent.

[64] The respondent's release would interfere with the Ministers' duties to Canadian society and to protect the public.

[65] If the respondent is released, the application for leave and judicial review filed by the Ministers would become moot, thereby depriving the Ministers of the opportunity of verifying the legality of the member's order by means of judicial review.

[66] This factor also constitutes irreparable harm.

C. Balance of convenience

[67] The balance of convenience favours the Ministers.

[68] Section 48 of the IRPA provides that a removal order must be enforced as soon as is reasonably practicable. There is a public interest in having a system that operates in an efficient, expeditious and fair manner.

[69] The inconveniences that could be caused by continued detention pending this Court's determination of the application for leave and judicial review from that decision or until the next detention review do not displace the interests of the public, which the Ministers seek to preserve in applying the Act.

[70] The respondent's constant failure to respect court orders, combined with the danger he poses and his flight risk are salient factors that militate in favour of the order sought by the Ministers.

[71] Thus, the balance of convenience decisively favours the Ministers.

ORDER

THE COURT ORDERS that the motion for a stay be granted.

"Michel M.J. Shore"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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