Federal Court  Cour fédérale

**Date: 20091110**

**Docket: IMM-3538-09**

**Citation: 2009 FC 1152**

**Montréal, Quebec, November 10, 2009**

**PRESENT: The Honourable Madam Justice Tremblay-Lamer**

**BETWEEN:**

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

**Applicant**

**and**

**MIGUEL ALFONSO SAMUELS**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by the Minister of Public Safety and Emergency Preparedness (the "Minister") pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), for judicial review of an order of Louis Dubé, member of the Immigration Division

(the “Tribunal”) dated June 29, 2009 to release Miguel Alfonso Samuels (the “Respondent”) from detention (the “Release Order”).

**BACKGROUND FACTS**

[2] The Respondent was born in Panama, but the lived for 39 years in Jamaica. He is a citizen of both countries. He came to Canada in 1991 and became a permanent resident.

[3] In 1991 or 1992, the Respondent first showed symptoms of mental illness. By September 1992, he was diagnosed as having schizophrenia.

[4] Since in 1993, the Respondent’s criminal convictions have been so many that no-one seems able to count them anymore. Five times he was convicted for sexual assault; six or seven times for assault; six times for theft under $5000; twice for fraudulently obtaining transportation; twice for mischief under $5000; twice for failing to comply with probation orders; and once each for common nuisance and for possession of property obtained by crime. In total, the Respondent has 27 or 30 criminal convictions, as well as over ten provincial convictions.

[5] The Respondent has been arrested frequently, both following his criminal and other offences and pursuant to the *Mental Health Act*, R.S.O. 1990, c. M.7. Cutting short an almost interminable story, I will only summarize his detention history since his last criminal conviction on March 14, 2005.

[6] The respondent's court detention pursuant to that conviction ended on April 23, 2005, and he was immediately placed in immigration hold.

[7] He was only released from immigration hold on October 12, 2006, under the Toronto Bail Program, for which he would be supervised by Steven Sharp.

[8] The Toronto Bail Program withdrew its supervision of the Respondent in January 2007. Mr. Sharp explained that contrary to his release conditions, the Respondent repeatedly left his residence unescorted. On January 8, 2007, he was returned to his residence by a police officer. Moreover, he refused to take his medication, sometimes feigning that he had done so. In short, "Mr. Samuels [had] stopped cooperating and [was] not amenable to the services provided." Because of this, Mr. Sharp was of the opinion that public safety would be a concern if the Respondent remained in the community.

[9] He was then re-arrested and returned to immigration hold, remaining in detention ever since.

[10] It must further be noted that the Respondent has never had a fixed domicile in Canada; when not in detention, he lived at shelters or with family. However, he has been banned from at least two shelters, and his family, though supportive for a long time, became intolerant of his behaviour and refusals to co-operate with them in 2007.

[11] In April 2007, he was interviewed by Dr. Pierce, a forensic psychiatrist at the Centre for Addiction and Mental Health, who determined that he was suffering from schizophrenia or a similar

illness. While schizophrenia can often be successfully treated if the patient takes appropriate medication, the symptoms are made worse by drug use, which appeared to be the Respondent's case. Dr. Pierce also indicated that the results of a screening test suggested that the Respondent was likely to commit further sexual offences if given the opportunity.

[12] On June 2, 2009, a risk-assessment officer reached a positive decision on the Appellant's Pre-Removal Risk Assessment (PRRA). The Minister is now seeking a danger opinion against the Respondent, which would lead to the Respondent's removal from Canada.

[13] Following the success of his PRRA application, the Respondent sought to be released from detention.

[14] In a fairly brief oral decision, the Tribunal ordered the Respondent's release on June 29, 2009. The Tribunal noted that the Respondent became, by virtue of his PRRA, a protected person. While a danger opinion was being sought, it was likely to take a considerable time – and might yet turn out to be negative, so that it "wouldn't be fair" to keep the Respondent in detention. The Tribunal noted that the respondent had "a pretty impressive criminal file," but concluded that "if there's no removal in sight, [the Tribunal is] not responsible to protect Canadian society anymore." The Minister applied for judicial review of that decision.

**ISSUES**

[15] This application raises two issues: first, whether the Tribunal had jurisdiction to maintain the Respondent in detention notwithstanding the positive outcome of his PRRA; and if so, second, whether the Tribunal failed to perform its statutory duty to consider prescribed factors in coming to its decision.

**ANALYSIS**

**1) *Did the Tribunal have jurisdiction to maintain the Respondent in detention?***

Respondent's Submissions

[16] The Respondent argues that the Tribunal could not but release him, because it had no jurisdiction to keep in detention since he became, as a result of a successful PRRA application, a protected person.

[17] The Respondent is relying on s. 58 of the *IRPA*, which provides that :

| Release — Immigration Division | Mise en liberté par la Section de l'immigration |
|---|---|
| 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 tel des faits suivants : |
| (*a*) they are a danger to the | *a*) le résident permanent ou |

public;

(*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);

(*c*) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or

(*d*) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

l'étranger constitue un danger pour la sécurité publique;

*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);

*c*) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;

*d*) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.

Detention — Immigration Division

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is

Mise en détention par la Section de l'immigration

(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

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| unlikely to appear for examination, an admissibility hearing or removal from Canada. | |
| … | … |

[18] The Respondent submits that pursuant to paragraphs 232(*d*) and 232(*e*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*Regulations*"), the effect of his positive PRRA is to stay the removal order issued against him. The Regulations provide that:

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| 232. A removal order is stayed when a person is notified … that they may make an application [for a PRRA], and the stay is effective until the earliest of the following events occurs | 232. Il est sursis à la mesure de renvoi dès le moment où le ministère avise l'intéressé […] qu'il peut faire une demande [pour un examen de risques avant-renvoi]. Le sursis s'applique jusqu'au premier en date des événements suivants : |
| … | … |
| (*d*) if a decision to allow the application for protection is made under paragraph 114(1)(*a*) of the Act and the person has not made an application within the period provided under subsection 175(1) to remain in Canada as a permanent resident, the expiry of that period; | *d*) s'agissant d'une personne à qui l'asile a été conféré aux termes du paragraphe 114(1) de la Loi et qui n'a pas fait sa demande de séjour au Canada à titre de résident permanent dans le délai prévu au paragraphe 175(1), l'expiration du délai; |
| (*e*) if a decision to allow the application for protection is made under paragraph 114(1)(*a*) of the Act, the decision with respect to the person's application to remain in Canada as a permanent resident is made… | *e*) s'agissant d'une personne à qui l'asile a été conféré aux termes du paragraphe 114(1) de la Loi, la décision quant à sa demande de séjour au Canada à titre de résident permanent… |

[19] Since subsection 48(1) of the *IRPA* provides that "[a] removal order is enforceable if it has come into force and is not stayed," a stayed removal is unenforceable. The Respondent argues that

since the removal order issued against him is unenforceable, he is not "subject to a removal order" for the purposes of subsection 58(2) of the *IRPA*, and therefore the Tribunal could not continue his detention and had release him.

Minister's Submissions

[20] The Minister argues that the Tribunal did have jurisdiction to keep the Respondent in detention.

[21] The Minister submits the provisions of s. 58 of the *IRPA* and the relevant regulations contain all the criteria applicable to detention and release by the Tribunal. According to the Minister, "[a]s long as the section 58 statutory and regulatory criteria are properly considered, detention or release may be ordered, that latter with any appropriate conditions."

[22] In the Minister's view, par. 58(1)(*a*) of the *IRPA* authorized the Tribunal to order the Respondent's detention if it found – as the Minister submits it ought to have – that the Respondent is a danger to the public. As the criteria set out in the several paragraphs of subs. 58(1), are not cumulative, it matters not whether the Respondent is the subject of a removal order.

[23] Be that as it may, the Respondent is still subject to the removal order issued on April 15, 2004, the positive decision on his PRRA application notwithstanding. The Minister submits that the effect of that decision is "simply protection under subs. 115(1) of the *IRPA* against refoulement to a

country where he would be at risk." While the positive PRRA decision was a factor that the Tribunal had to consider, it was not the only one. It neither granted the Respondent permanent residence nor voided the removal order. The Minister relies on s. 51 of the *IRPA*, pursuant to which "[a] removal order that has not been enforced becomes void if the foreign national becomes a permanent resident," which the Respondent is not.

[24] Therefore, the removal order against the Respondent still exists, though its execution is stayed, pursuant to the *Regulations*, until a review of the Respondent's application for permanent residence. Such review will not be concluded before a decision on the danger opinion regarding the Respondent, which the Minister is seeking.

[25] The Minister submits that finding that the Tribunal lacked jurisdiction to detain the Respondent would mean that "where a permanent resident or a protect person becomes subject to a removal order that cannot yet be executed the [Immigration Division] has no legal authority to detain or release the person with conditions." Such an interpretation of the *IRPA* would fly in the face of Parliament's objectives, notably the safety of Canadians, and such a result would be absurd.

Analysis

[26] As stated above, the parties agree that a positive PRRA is a stay of a removal order issued against a refugee claimant. They differ as to whether a person a removal order against whom is stayed is still "subject to a removal order" for the purposes of subsection 58(2) of the *IRPA*. The

Minister argues that he or she is, since the stay does not void the removal order – only a grant of permanent residence does. The Respondent submits that under a purposive interpretation of subsection 58(2) consistent with the respect of the *Canadian Charter of Rights and Freedoms*, and of its guarantee of liberty a removal order that is unenforceable is irrelevant.

[27] I agree with the Minister. A removal order that is stayed is not void. Although it cannot be executed pending a ruling on a protected person's application for permanent residence or the passing of the deadline to file such an application, it still exists and is valid and, in my opinion, the person against whom it was issued is still "subject to it."

[28] The Respondent is, in effect, asking the Court to read the exclusion of stayed removal orders into subsection 58(2), which would then provide (in the part relevant to this case) that "[t]he Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national … is subject to an *enforceable* removal order and that the permanent resident or the foreign national is a danger to the public…"

[29] I am not persuaded by the Respondent's submission that this reading in is necessary to ensure that the provision complies with the *Charter*. Pursuant to subsection 57(2) of the IRPA, the Respondent has a right to have his detention reviewed every 30 days. The purpose of these reviews is to take into account any new events in the Respondent's case. The Immigration Division must, pursuant to section 248 of the *Regulations*, consider the anticipated length of his future detention and the existence of alternatives to detention. In my view, these elements confirm that the statutory

scheme created by Division 6 of the *IRPA* and the *Regulations* already reflects concerns associated with the *Charter*.

[30] I add that the *Charter*'s guarantee of the right to liberty is not absolute; the *Charter* only prohibits deprivations of liberty inconsistent with principles of fundamental justice. The Respondent makes no submissions on whether detention for a limited (though admittedly potentially significant) period, of a person who is a danger to the public is in fact inconsistent with such principles. In the absence of any debate on this point, I do not think it this Court's role to re-write the statute in the way suggested by the Respondent.

[31] I find that the Tribunal had jurisdiction to order the continued detention of the Respondent, if it was satisfied that he was a danger to the public.

**2) *Did the Tribunal fail to perform its statutory duties?***

[32] The Minister argues that the Tribunal failed to perform its statutory duty to assess factors which the *IRPA* and the *Regulations* mandate it to take into account in ordering the detention or release of a person.

[33] The Respondent does not directly reply to this argument, but submits that "the decision, reasons and release order must be looked at in their entirety." Given that the Respondent is a

protected person and that a danger opinion will not be issued before long, the Tribunal's decision to release the Respondent on conditions is reasonable.

[34] Section 244 of the *Regulations* provides that factors set out in the following sections "*shall be taken into consideration* when assessing whether a person … (*b*) is a danger to the public" [my emphasis] pursuant to subs. 58(1) of the *IRPA*.

[35] The relevant provisions of the *Regulations* are sections 246 and 248, which provide that:

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| 246. For the purposes of paragraph 244(*b*), the factors are the following: | 246. Pour l'application de l'alinéa 244*b*), les critères sont les suivants : |
| … | … |
| (*d*) conviction in Canada under an Act of Parliament for | *d*) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des infractions suivantes : |
| (i) a sexual offence, or | (i) infraction d'ordre sexuel, |
| (ii) an offence involving violence or weapons; | (ii) infraction commise avec violence ou des armes; |
| … | … |
| 248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release: | 248. S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté : |
| (*a*) the reason for detention; | *a*) le motif de la détention; |
| (*b*) the length of time in detention; | *b*) la durée de la détention; |
| (*c*) whether there are any elements | *c*) l'existence d'éléments permettant |

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| that can assist in determining the length of time that detention is likely to continue and, if so, that length of time; | l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps; |
| (*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and | *d*) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé; |
| (*e*) the existence of alternatives to detention. | *e*) l'existence de solutions de rechange à la détention. |

[36] As the Minister points out, the Tribunal seems to have been oblivious to these factors or at any rate to most of them, the length of time of past and future detention being an obvious exception.

[37] While the Tribunal recognized that the Respondent has "a pretty impressive criminal file," it did not note, and seems not to have considered the implications of, the fact that this criminal file included multiple convictions for sexual offences and other offences involving violence.

[38] The Tribunal failed to exercise its statutory duty, which is an error of law, and its decision must be quashed.

[39] In view of this conclusion, it is unnecessary for me to consider the other issues raised by the Minister.

[40] The Tribunal's order releasing Mr. Samuels is quashed, and his release application will be heard by a differently constituted panel of the Immigration Division.

**SERIOUS QUESTION OF GENERAL IMPORTANCE**

[41] The Minister asked the Court to certify that this case involves a serious question of general importance, in conformity with par. 74(*d*) of the *IRPA*, if it found that the Tribunal lacked jurisdiction to continue the Respondent's detention or to impose conditions on his release.

[42] The Minister proposes that the question be worded as follows:

> Where a foreign national who is detained or released on conditions is under a removal order that cannot be executed pending an immigration process and receives a positive PRRA, does the Immigration Division have the statutory authority under the IRPA to detain the foreign national or to release the foreign national on conditions, or otherwise to continue the release of the foreign national on conditions?

[43] The Minister submits that this question meets the well-known criteria set out by the Fedral Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* (1994), 176 N.R. 4, [1994] F.C.J. No. 1637 (QL), in that it transcends the interests of the parties to this case and would be dispositive of the appeal.

[44] The Respondent also submits that this case raises an important question, but suggests that it be reworded as:

> Does the Immigration Division retain jurisdiction to detain a foreign national once the foreign national has been found to be a refugee or a protected person?

[45] I agree that this is a serious issue of general importance. The terms “subject to a removal order” in s. 58 of the *IRPA* are ambiguous, because it is not clear whether the removal order must be enforceable or not. On the one hand, the statute does not expressly provide that it must; on the other, a removal order may be unenforceable, and the foreign national may remain in detention, for lengthy periods of time merely because he has been found by an administrative officer, on a balance of probabilities, to constitute a danger. This ambiguity must be resolved not only for the benefit of the parties, but also for that of any other foreign national who becomes a protected person while detained or released on conditions by the Immigration Division.

[46] Therefore I certify that the following question is serious and of general importance, so that an appeal from this decision may be made pursuant to paragraph 74(*d*) of the *IRPA*:

> Does the Immigration Division retain jurisdiction to detain a foreign national once the foreign national has been found to be a refugee or a protected person?

**JUDGMENT**

**THIS COURT ORDERS that:**

The application for judicial review is granted, the decision of the Tribunal is quashed, and the matter is referred for re-determination for a differently constituted panel of the Immigration Division.

The following question is certified as serious and of general importance, so that an appeal may be made from this decision pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*:

> Does the Immigration Division retain jurisdiction to detain a foreign national once the foreign national has been found to be a refugee or a protected person?

"Danièle Tremblay-Lamer"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3538-09 |
| **STYLE OF CAUSE:** | THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. MIGUEL ALFONSO SAMUELS |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | October 22, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | TREMBLAY-LAMER J. |
| **DATED:** | November 10, 2009 |

**APPEARANCES:**

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| Carole Simone Dahan | FOR THE RESPONDENT |

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| The Refugee Law Office<br>Toronto, Ontario | FOR THE RESPONDENT |