Federal Court  Cour fédérale

Date: 20110208

Docket: IMM-6839-10

Citation: 2011 FC 140

Ottawa, Ontario, February 8, 2011

PRESENT: THE CHIEF JUSTICE

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B386

Respondent

REASONS FOR ORDER AND ORDER

[1] The respondent, B386, is one of the 492 individuals who arrived in Canada on August 13, 2010, on board the *MV Sun Sea* vessel. The respondent and the other migrants were detained by the Canada Border Services Agency to determine their identity and admissibility to Canada.

[2] This is a judicial review of the November 19, 2010 decision of the Immigration Division (the member) to release the respondent from detention. The respondent's December 2010 and January 2011 detention reviews have already taken place, and are the subject of further judicial

review proceedings in this Court. In response to a question from the Court, counsel for both parties were of the view that this judicial review of the respondent's November 2010 detention review was not rendered moot by the subsequent Immigration Division decisions in December, 2010 and January, 2011. The issue was not fully argued. I continue to have doubts on the matter, but have chosen to issue this decision in any event.

[3] The respondent, a Sri Lankan citizen who is 30-years-old and single, contracted to pay $30,000 to a smuggler for his trip to Canada by sea. He made a down payment of $5000 and signed a letter which stated that if his sister failed to pay the $25,000 balance he would submit to any action taken by the smuggler.

[4] On November 19, 2010, the member ordered the respondent's release from detention on the posting of a cash bond of $2000 to be paid by "any person". It is my understanding that the bond has now been paid by a specific person whose identity is known to both parties. Accordingly, the applicant's contestation of the release order on the ground that it should have been directed to an identifiable individual has become moot.

[5] The applicant suggests that the member erred in providing an opportunity to cross-examine the proposed bondsperson after the release order had been rendered: *Canada (Minister of Citizenship and Immigration) v. Zhang*, 2001 FCT 521 at paragraph 17. However, the application of *Zhang* in this proceeding is academic.

[6] After allowing counsel to file the relevant documents, the member immediately received fairly straightforward and succinct submissions from both counsel. She then concluded that the flight risk presented by the respondent could be mitigated through a bond with terms and conditions. While she did then afford the Minister's counsel with the opportunity of cross-examining the bondsperson, this was refused. The hearing took place in Vancouver and the bondsperson resided in Toronto. After a short recess, the parties appeared to have agreed to terms for the cash bond which were then endorsed by the member. The issue was resolved with no cross-examination. Any suggested error is not one which would attract the Court's intervention in this case.

[7] The Minister's principal submission in this application for judicial review is that the member "entirely ignored" and did not mention either s. 245(f) or (g) of the *Immigration Refugee and Protection Regulations* or the respondent's vulnerability to coercion or influence from the smugglers. This argument does not withstand the test of scrutiny.

[8] First, the member was acting pursuant to her appointment to the Immigration Division. A member of the Immigration Division regularly deals with flight risk and detention reviews. The detention review underlying this proceeding is only one of some 490 other cases of persons on the same vessel whose detentions were being contemporaneously reviewed.

[9] As my colleague Justice Michael Phelan aptly noted, detention hearings are often "rough and ready" proceedings: *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 1095 at paragraph 18. In response to the applicant's submission that the member did not consider the facts surrounding the respondent's contact with smugglers, the simple answer is that the respondent

arrived in Canada on a boat with about 490 other individuals, many of whom had some contact with smugglers. It is not realistic, absent other evidence, to conclude that the member ignored s. 245(f) because of her failure to specifically mention it, particularly in the context of the significant number of persons on the *MV Sun Sea* whose detentions were being reviewed.

[10] Furthermore, the Minister's representative did not raise s. 245(f) as a ground for detention in his submissions at the detention review hearing, nor did he make any reference to the facts concerning the respondent's vulnerability to coercion from smugglers.

[11] Second, with respect to s. 245(g), even taking into account the applicant's most unlikely assumption that the member was not aware of the applicability of the provision, the respondent's counsel specifically referred to s. 245(g) of the Regulations in his submissions.

[12] Similarly, the phrase "unlikely to appear" or "likely to appear" or words to the same effect are referred to more than once in the short transcript and in the member's brief decision. The Minister has fallen far short of his burden to establish that the member was unaware of the relevant statutory provision, flight risk and the respondent's involvement with the LTTE.

[13] If there was any doubt on the issue, one need only refer to the following extract from the member's decision:

> The issue before me is the likelihood of you appearing for your admissibility hearing and looking forward to possible removal from Canada …

> […] It is alleged in your particular case that your refugee claim is now endangered […], and this would presumably motivate you not to appear for the hearing […]. As a result then, the Minister is of the view that you are a flight risk and seeks your continued detention.
> Your counsel has indicated that the allegation is basically that you worked for the LTTE, which controlled the area in which you were living. He also asserts that even if you can't make a refugee claim, if you are found described in the allegation, there is still other processes available to you, such as making a pre-removal risk assessment application and applying for an exemption from the Minister to the effect that your presence in Canada would not be detrimental to the national interest. So in your counsel's mind, there is plenty of reason for you to appear for immigration processes, including removal from Canada or your admissibility hearing.

[14] For these reasons, this application for judicial review will be dismissed. Counsel sought an opportunity to suggest the certification of a serious question, although none was presented at the hearing. Any suggested question for certification should be filed within three days of the date of this order.

ORDER

THIS COURT ORDERS that this application for judicial review be dismissed. Counsel sought an opportunity to suggest the certification of a serious question, although none was presented at the hearing. Any suggested question for certification should be filed within three days of the date of this order.

"Allan Lutfy"

Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6839-10
STYLE OF CAUSE:	MCI v. B386
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 19, 2011
REASONS FOR JUDGMENT:	LUTFY C.J.
DATED:	February 8, 2011

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