Federal Court  Cour fédérale

Date: 20141023

Docket: IMM-7279-14

Citation: 2014 FC 1011

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 23, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

CHIFRA ORASSIN

Respondent

JUDGMENT AND REASONS

[1] The applicant appears before this Court with an application for a stay of the release order issued by a member of the Immigration Division [ID] of the Immigration and Refugee Board.

[2] The member ordered the release of the respondent on two conditions: that she provide her home address and report to the Canada Border Services Agency once a week, without any

deposit or guarantee. The member did not give clear and compelling reasons as to why he completely ignored the previous reasoning of his colleagues without a change in the respondent's situation or circumstances.

I. Serious issue

[3] The respondent did not satisfy the previous conditions regarding her criminal record and did not give her address to the authorities.

[4] In the past, the respondent did not report for removal and provided a false identity when she was arrested by the police. In addition, a guaranty of $1,000 that her guarantor had agreed to was seized as a result of the respondent's failure to comply with the conditions. (Decision of October 6, 2014, by the ID, motion record, page 28)

[5] The member could have given a different decision than what had been given previously if he explained why he departed from the earlier reasoning with respect to the respondent.

[6] The Federal Court of Appeal, in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCJ 572, specified how to approach a detention review by ensuring that previous decisions are considered. Accordingly, to disregard earlier reasoning by the ID, a member is required to give clear and compelling reasons justifying the member's departure from a previous determination.

> [24] The reasons of Gauthier J. are logical and clear. I am fully satisfied that she correctly applied the proper standards of review to Mr. Iozzo's findings and that she correctly interpreted the

> relevant law. I would dismiss the appeal. I would answer the certified question as follows:
>
> > At each detention review made pursuant to sections 57 and 58 of the *Immigration Refugee Protection Act*, S.C. 2001, c. 27, the Immigration Division must come to a fresh conclusion whether the detained person should continue to be detained. Although an evidentiary burden might shift to the detainee once the Minister has established a *prima facie* case, the Minister always bears the ultimate burden of establishing that the detained person is a danger to the Canadian public or is a flight risk at such reviews. However, 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.

[7] The member's decision disregarded previous decisions without demonstrating a clear and compelling justification.

[8] In the past, the respondent did not report for removal. She returned to Canada illegally at the time by working, also illegally, as a dancer, knowing in addition that she had given a false identity when the police arrested her. The member completely ignored this evidence.

[9] The Federal Court of Appeal already issued a decision (*Canada (Minister of Citizenship and Immigration) v Li*, 2009 FCA 85) with respect to decision-makers who speculate rather than analyze the evidence before them.

> [62] With respect, I do not think that it was appropriate for the Division, at the September 11, 2008 review hearing, to ground an assessment of the anticipated future length of detention on a mere preliminary opinion when the final decision would come only a month later and a review of the detention is held every month. The Division was led by this opinion to assume that judicial review

proceedings would be authorized by the Federal Court and that an appeal would necessarily be heard by the Federal Court of Appeal. It then felt justified to review its previous time estimate to include the additional time which would result from its assumption.

[63] The assumption was based on speculation as to the eventual PRRA decision of the Minister. Considering that another review had to be held a month later, it was neither necessary nor reasonable at that time to engage in this kind of speculation and make this kind of assumption. As we shall see below, the ensuing assessment of the future length of detention was speculative and premature.

. . .

[66] Now, however, according to subsection 57(2) of the IRPA, there has to be a review "at least once during each 30-day period following each previous review". This short delay of 30 days or less between each review allows for an estimation based on actual facts and pending proceedings instead of an estimation based on speculation as to potential facts and proceedings.

[67] Every 30 days, the reviewing authority obtains an accurate picture of the detention situation. It can look at the actual length of detention served and at the pending proceedings. It may also review the state of these proceedings, their progress over time and make a realistic estimation of the expected future length of detention based on existing facts rather than assumptions. Then it may count the length of time served and add to it the time needed to deal with the current pending proceedings. Should there be an overestimation or an underestimation of the anticipated future length of detention, it can be quickly corrected at the next review hearing, held at most 30 days later.

[68] To summarize, section 57 of the IRPA provides what the Supreme Court of Canada termed a robust detention review based on actual information reviewable every 30 days. In my respectful view, it was a reviewable error of law as well as unreasonable for the Division to speculate on the Minister's forthcoming decision, on potential but as yet non-existing proceedings, and to assume from that speculation that such proceedings would be authorized by the Federal Court and reach this Court. It was also a reviewable error of law for the Federal Court to endorse the speculative approach taken by the Division.

[10] Since the respondent worked illegally with a flagrant contempt for Canadian laws, the matter does not lend itself to speculation but rather to a thorough analysis of the evidence.

II. Irreparable harm

[11] If the respondent were released, the application for leave and judicial review would become moot.

III. Balance of probabilities

[12] The Court notes that if the stay motion is granted, the respondent will have a fresh detention review within 30 days and will even have the possibility of an expedited review. Also, if the stay is not granted, the respondent could repeat her previous behaviour, which would prevent the applicant from enforcing the removal order. The Court notes that a possible removal is scheduled for the United States, based on the Court's latest information.

[13] The applicant has met the three conjunctive criteria set out by the Supreme Court of Canada in *R.J.R. – MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

[14] Therefore, the Court orders a stay of the order releasing the respondent until the respondent has a fresh review of her detention with a decision issued in support.

JUDGMENT

THIS COURT ORDERS a stay of the order releasing the respondent until the respondent has a fresh review of her detention with a decision issued in support.

"Michel M.J. Shore"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7279-14
STYLE OF CAUSE:	MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v CHIFRA ORASSIN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 23, 2014
JUDGMENT AND REASONS:	SHORE J.
DATED:	OCTOBER 23, 2014

APPEARANCES:

Sonia Bédard	FOR THE APPLICANT
Stewart Istvanffy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT
Law Office of Stewart Istvanffy Montréal, Quebec	FOR THE RESPONDENT