**Date: 20071128**

**Dockets: IMM-1822-07**
**IMM-1823-07**

**Citation: 2007 FC 1252**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**CHEONG SING LAI**

**Respondent**

## REASONS FOR ORDERS

**HARRINGTON J.**

[1] Mr. Lai is a person of considerable interest to the authorities both here and in China. In China, he is wanted on charges of masterminding a massive smuggling and bribery operation. He and his wife managed to leave there in dubious circumstances and came here in 1999. His claim for refugee status was denied. It was held that the United Nations Convention relating to the Status of Refugees had no application as there were reasons to consider he had committed serious non-political crimes in China. He has not yet exhausted his recourses in Canada. Although the first decision on his pre-removal risk assessment was negative, on judicial review Mr. Justice de Montigny ordered a new PRRA (*Lai v. Canada (Minister of Citizenship and Immigration*, 2007 FC 361, [2007] F.C.J. No. 476). As a result, he has been given a reprieve of at least a year, if not more.

[2] Immigration officials have always considered him a flight risk, unlikely to appear if, as and when he is finally ordered removed from Canada. In accordance with the *Immigration and Refugee Protection Act* (IRPA) or its predecessor the *Immigration Act*, he has always been either detained, or released on conditions. One of the release conditions was a daily curfew, the hours of which varied from time to time.

[3] On 12 April 2007, one week after Mr. Justice de Montigny's decision, Mr. Lai applied to have the curfew lifted in its entirety, the other conditions, such as weekly reporting and cash bail to remain in place. The Minister opposed.

[4] The member of the Immigration Division of the Immigration and Refugee Board charged with the matter, Mr. Ringham, lifted the curfew, and left the other conditions in place. Briefly put, he considered the fact that Mr. Lai had been granted a judicial review of his PRRA decision to be a material change of circumstance in that it would be sometime before he could be removed. Furthermore, although the curfew had been breached from time to time in the past, the breaches were minor and did not suggest he was planning to flee. He specifically pointed out: "There have been no incidents in the last nine months since the curfew was extended to allow liberty from noon to 9:30 p.m."

[5] Mr. Ringham's decision was issued and faxed to the parties at about 2:30 p.m. on April 19. Little did he know, some three hours earlier, at 11:30 a.m., during his hours of curfew, Mr. Lai was spotted by a plain clothes policeman in a drugstore and was arrested.

[6] Section 55 of IRPA provides that an officer may arrest a foreign national who he or she has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or for removal from Canada. Section 57 provides that the reasons for the continued detention must be reviewed within 48 hours after the person is first taken into custody, and regularly thereafter. Section 58 permits the Immigration Division to order the person's release with or without conditions imposed.

[7] The next day, April 20, he was brought before another member of the Immigration Division, Mr. Tessler, on detention review. The authorities did not seek Mr. Lai's continued detention. Rather they wanted the old curfew reimposed, and the bail increased. Mr. Tessler refused. His decision was oral, and has been interpreted by the Minister, upon review of the transcript, as meaning that he, unlike Mr. Ringham, and those who decided about fifteen earlier detention reviews, thought that Mr. Lai was no longer a flight risk at all.

[8] This is a judicial review of both decisions.

**The Law**

[9] Sections 55 and following of IRPA have been interpreted by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C.R. 572, which maintained the decision of Madam Justice Gauthier of this Court, 2003 FC 1225, [2004] 3 F.C.R. 523. Mr. Justice Rothstein answered her certified question as follows:

> [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.
>
> [25] The Minister is at liberty, at any time, to re-arrest the respondent and secure his detention and continued detention on the basis of adequate evidence. If the Minister is of the opinion that the respondent is a danger to the public, he should take the steps that are available to him under the new Act to secure the respondent's detention.

**The Issues**

[10] As regards Mr. Ringham’s decision in IMM-1822-07, the issues are:

a. Did he err by failing to provide clear and compelling reasons for departing from all previous decisions which released Mr. Lai from detention, but subject to a curfew?; and

b. Is the decision now moot?

[11] As regards Mr. Tessler’s decision, IMM-1823-07, the issues are:

a. Did he find that Mr. Lai is likely to appear for removal?

b. If so, did he err by failing to provide clear and compelling reasons for departing from earlier decisions?; and

c. Did he fail to conduct an independent assessment of the Minister's application to reimpose the curfew?

**Standard of Review**

[12] The functional and pragmatic approach to a judicial review in the context of detention on the grounds of constituting a danger to the public or a flight risk was very carefully analyzed by Madam Justice Gauthier in *Thanabalasingham,* and upheld by the Federal Court of Appeal. Findings of fact are reviewed on patently unreasonable standard and mixed issues of fact and law on a reasonableness standard. Holdings in law are entitled to no deference. The correctness standard applies. The requirements of IRPA are matters of law.

**Mootness**

[13] Although it could be said that Mr. Ringham's decision, IMM-1822-07, is moot because it has been overcome by Mr. Tessler's decision, and it would be meaningless to grant judicial review of that decision, unless judicial review were also granted of Mr. Tessler's decision, nevertheless, in my discretion, I think it more appropriate to deal with it on the merits. Obviously, if judicial review is granted, the order would be that both decisions be sent back for a single redetermination by another officer.

**Member Ringham's Decision, IMM-1822-07**

[14] In my opinion, there is no reason to disturb Mr. Ringham's decision. The detention and release provisions of IRPA, sections 54 through 61, have been fleshed out by sections 244 to 250 of the IRPA Regulations. They set out factors to be considered generally, and others depending if the detained person is considered a flight risk, a danger to the public, or both. Mr. Thanabalasingham was considered to be both. Mr. Lai has only been considered a flight risk.

[15] Mr. Ringham took into account the fact that Mr. Lai is a fugitive from justice in China in relation to a matter which if committed in Canada would constitute an offence here, his previous compliance or lack of compliance with conditions of release, and the length of time before he would be removal ready.

[16] More particularly, he considered Mr. Justice de Montigny's decision to order a new PRRA to be a material change in circumstances. Although Mr. Lai had been aware of the

negative PRRA decision several days before being officially informed thereof, he had taken no steps to either flee or go underground. Although he had occasionally breached his curfew (for example he attended a birthday party for his daughter at a restaurant when he should have been at home), these were considered minor slips and did not indicate an intention to evade the authorities. Mindful that a considerable length of time would pass before Mr. Lai could be removed, a condition precedent of which would be another negative PRRA decision, Member Ringham was of the view that there was a continued level of risk, but it could be adequately dealt with by alternatives to detention which did not include a curfew. These other conditions included cash bail, weekly reporting, making telephone records available, and avoiding certain people and places.

[17] These were mixed findings of fact and law. The member is entitled to deference on a reasonableness standard of review, and so the decision should stand.

**Member Tessler's Decision, IMM-1823-07**

[18] Mr. Tessler's decision was given orally the following day, immediately following the detention review. He received in evidence a written statement from the Vancouver police officer, and proof that Mr. Lai had purchased non-prescription eye drops, and a few other items at a drugstore, approximately 30 minutes before his curfew ended. He was accompanied by another Asian man. Although Mr. Lai is excused from his curfew if medical grounds warrant, he did not raise his health as a justification for breaching the curfew. In addition, and quite understandably

with some reluctance, Mr. Tessler received the oral testimony of an immigration enforcement officer and an inland enforcement officer with the Canadian Border Services Agency.

[19] At the hearing before Mr. Ringham, which was by way of written submissions, Mr. Lai's position that he had not been in breach of curfew since his daughter's birthday party in August 2005 was not opposed. However, the authorities knew perfectly well there had been subsequent breaches but never lasting more than an hour or so. They knew because they had him under surveillance in February and March 2007. They also put into question whether he sought permission for changes of address in advance, which was one of the conditions of his release. It appeared that he gave notification after the fact, but was never called on it. They also considered some of his journeys around town to be suspicious.

[20] However, they never called these matters to his attention, and never detained him either as a flight risk or as a danger to the public. They did not want him to know that he had been under surveillance and so did not come forward with this information before Mr. Ringham.

[21] It is certainly arguable that it is an abuse of process to bring up matters which could have been brought up earlier. In any case, the transcript of the hearing clearly shows that Member Tessler took these matters into account.

[22] The Minister submits that Mr. Tessler, unlike all those who conducted earlier detention reviews, including Mr. Tessler himself, found that Mr. Lai was not a flight risk. As a matter of

law, his decision should be set aside because he did not set out clear and compelling reasons for this new prediction. Counsel for Mr. Lai submits that a review of the entire transcript clearly reveals that Mr. Tessler still considered Mr. Lai a flight risk, but that it was not necessary to reimpose the curfew because the other conditions of his release sufficed. Mr. Lai's counsel is correct.

[23] In giving his decision orally, the verbatim reporter took down that he said: "Ultimately, my decision here is that Mr. Lai is not unlikely to appear for his removal." This double negative is found at page 42 of a 43-page transcript. At the outset, Member Tessler was informed that rather than seek Mr. Lai's continued detention, the Minister was asking for release on terms and conditions which were the existing terms and conditions plus re-imposition of the curfew and a $30,000 increase in bail. Member Tessler informed the Minister's counsel, at page 3 of the transcript: "…I think you better make your arguments on unlikely to appear."

[24] In addition, even if one limits oneself to the reasons, Member Tessler did not come to the view that Mr. Lai was no longer a flight risk. He noted that Mr. Lai was not currently removable and that if he were detained he would remain in custody for a considerable amount of time: "…the minimum a couple of more years of litigation at the very least".

[25] He also noted there was a dispute about seeking permission or giving notice of a change of address. That fact, if fact it is, was discovered more than two months before the hearing, and no arrest was made.

[26] After also recounting the other breaches of curfew, he pointed out that the Minister had an opportunity to present that evidence before Mr. Ringham, rather than by surprise before him and without prior disclosure.

[27] He said: “In my opinion, the Minister forgave Mr. Lai his repeated breaches of his curfew as they made no attempt to arrest him nor did they use that material in the opposition to lifting the curfew.” The arrest the day before “…clearly was with respect to a trivial breach…” His view was that the Minister was attempting to rehash Member Ringham’s decision, rather than to seek a judicial review thereof in this Court.

[28] He went on to review the terms and conditions which were then in place, pointed out that there was no evidence in seven years that Mr. Lai had made any attempt to flee, and that the Minister also has discretion, if, at a later date, information comes to hand to suggest he is planning to flee, to detain him once again.

[29] The Minister complains that Mr. Tessler did not make a fresh independent review, as required. On the contrary, he was very familiar with the file. He did not simply rubber stamp Member Ringham’s decision, he agreed with it, and stated why.

[30] The Minister criticizes both decisions. The significance of the curfew was that without it Mr. Lai would have taken steps to go underground, or at least made his preparations. However

both members weighed the evidence and do not share that opinion. Their conclusions were not unreasonable, and should not be disturbed.

[31] Mr. Lai has now been on release for seven months, without a curfew. No officer has arrested him in the belief he constitutes a flight risk.

[32] For these reasons, the two applications for judicial review are dismissed. The parties agree, as does the Court, that there is no question of general importance to certify.

"Sean Harrington"
Judge

Ottawa, Ontario
November 28, 2007

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1822-07 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. CHEONG SING LAI |
| **PLACE OF HEARING:** | Vancouver, B.C. |
| **DATE OF HEARING:** | November 20, 2007 |
| **REASONS FOR ORDER:** | HARRINGTON J. |
| **DATED:** | November 28, 2007 |

**APPEARANCES:**

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| Mr. Adrian D. Huzel | FOR THE RESPONDENT |

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