Date: 20081120

Docket: IMM-3745-08

Citation: 2008 FC 1297

Montréal, Quebec, November 20, 2008

PRESENT: THE CHIEF JUSTICE

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

XIAOQUAN LIU

Respondent

REASONS FOR JUDGMENT

[1] The respondent is suspected of having committed fraud in the People's Republic of China, his country of citizenship, and in the United States.

[2] In March 2007, the respondent sought refugee protection in Canada. He has been in immigration detention since his arrival here. His detention has been reviewed on some twenty

occasions under the provisions of Division 6 of the *Immigration and Refugee Protection Act* (IRPA). On each occasion, a member of the Immigration Division found that the respondent was a flight risk and his detention was continued.

[3] During the detention review of August 22, 2008, the member of the Immigration Division (the member) was advised that the respondent's pre-removal risk assessment (PRRA) would be completed in the latter part of December 2008, by which time he will have been detained for some twenty months. On the basis of this information and with the prospect of further judicial proceedings subsequent to the PRRA, the member concluded that the ongoing detention infringed the respondent's rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. Accordingly, she ordered his release on the condition that he report regularly to the applicant's officials and advise them of his whereabouts.

[4] The applicant immediately filed this proceeding for judicial review and obtained a stay of the execution of the member's order. The hearing of this judicial review was expedited.

[5] In *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214, a decision of the Trial Division of the Federal Court of Canada, Justice Marshall Rothstein referred back for reconsideration the refusal to grant the release of a person who had been in detention for fourteen months. He concluded that the decision-maker erred in law by failing to consider the relevant factors.

[6] Justice Rothstein reiterated the principle that a fair balance be struck between the state's right to control who remains in Canada and the liberty interests of the individual: *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 151-2. He then enumerated a number of considerations which should be included in determining whether detention should be continued (*Sahin*, ¶ 30):

> … Needless to say, the considerations relevant to a specific case and the weight to be placed upon them, will depend upon the circumstances of the case.
>
> (1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.
>
> (2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.
>
> (3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party,
>
> (4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone number, detention in a form that could be less restrictive to the individual, etc.

[7] The guidelines in *Sahin* are now codified in s. 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[8] In *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, the Supreme Court of Canada endorsed the principles in *Sahin* in considering extended periods of detention in

national security cases. The Court noted that a decision-maker should take into consideration the reasons for detention, the length of detention, the reasons for the delay in deportation, the anticipated future length of detention and the availability of alternatives to detention: ¶¶ 108-17.

[9] The member estimated that, in her experience, removal proceedings require approximately eighteen months for conclusion. She added: "That is the context to which I refer to long-term detention and, when balancing it against a risk of flight, decide that it's justified, in spite of s. 7 of the *Charter*."

[10] The following extracts from the transcript of the member's oral reasons further explain her conclusion to order the respondent's release from detention:

> … I am obligated, when considering the application of section 7, to try to estimate the length of time your detention might continue until your removal from Canada, not until the conclusion of the risk assessment application.
>
> …
>
> … I have to conclude, based on the best information I have and my knowledge of judicial proceedings, in the context of immigration law, that it will be an additional long period of time before a final decision determining one way or the other whether you may remain in Canada or must leave is made.
>
> Having made those findings, I conclude to order your continued detention today on this ground, considering the periods of time involved, would be a breach of section 7 of the *Charter*.

[11] Detention under Division 6 cannot be indefinite: *Sahin*, ¶ 23. Lengthy detention, however, does not necessarily mean indefinite detention. Each of the *Sahin* factors must be considered with the appropriate weight placed upon each of them.

[12] Here, the member's reasons do not disclose sufficient consideration of any explanation for the past delay in deportation. The respondent's claim for refugee status was withdrawn nine months after it was made. During this period, the respondent was represented at various times by one of five different counsel. His three requests for hearing postponements were granted. The member's analysis does not indicate whether this "lack of diligence should count against the offending party." (*Charkaoui*, ¶ 114)

[13] The member's opinion concerning the anticipated future length of detention was premature and speculative. From the outset of the detention review process, members of the Immigration Division understood that the respondent would, as is his right, exhaust the remedies available to him under the IRPA.

[14] It was made known to the respondent on June 26, 2008 that he was found to be a person under Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* as a person who has committed a serious non-political crime prior to his entry into Canada. In the view of the respondent's officials, this finding brought him within the scope of s. 112(3) of the IRPA. On July 30, 2008, the Immigration Division was advised that the respondent's officials

had made a positive risk assessment under s. 97 of the IRPA. The PRRA determination was expected to be completed in the second half of December 2008.

[15] It may be that a negative PRRA will precipitate further litigation in the Federal Court. Any such proceeding can be immediately case managed. Expedited time periods for subsequent steps can be sought. If leave is granted, on consent or otherwise, an early hearing date can be requested. With the cooperation of counsel, future applications for judicial review concerning the respondent can and should be heard in at least as timely a fashion as this one.

[16] In many cases, the most satisfactory course of action will be to detain the individual but expedite the immigration proceedings, even where the person who is a flight risk may not pose a public danger: *Sahin*, ¶ 31.

[17] The member's failure to consider properly the *Sahin* factors, particularly the unexplained lack of diligence and the speculative nature of her assessment of further litigation in this Court, constitutes an error of law: *Sahin*, ¶ 33. Here, the member's task was to review the period of detention against the criteria in *Sahin* and s. 248 of the Regulations. Her decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and is therefore unreasonable: *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶ 47.

[18] In view of this conclusion, the applicant's submissions concerning clear and compelling reasons need not be considered.

[19] Accordingly, this application for judicial review will be granted. Counsel may file submissions within five days of the date of these Reasons concerning the certification of a serious question.

"Allan Lutfy"

Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Banafsheh Sokhansanj	FOR THE APPLICANT
Craig Costantino	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C . Deputy Attorney General of Canada Vancouver, B.C.	FOR THE APPLICANT
Elgin, Cannon & Associates Vancouver, B.C.	FOR THE RESPONDENT