Date: 20090831

Docket: IMM-5058-08

Citation: 2009 FC 863

OTTAWA, Ontario, August 31, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JOTHIRAVI SITTAMPALAM

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration and Refugee Board dated November 13, 2008, whereby the tribunal ordered changes in the terms and conditions of the respondent's release from custody.

[2] The applicant submits that Member Harnum's Order compromises the ability of Canada Border Services Agency (CBSA) to properly monitor the respondent and thus brings this application for judicial review of her Order.

[3] The respondent, Mr. Jothiravi Sittampalam, born in 1970, is a Tamil citizen of Sri Lanka. He arrived in Canada in 1990 and made a successful claim to be a Convention refugee. He was landed in Canada as a permanent resident in 1992.

[4] Mr. Sittampalam is the son of one of the leaders of a political group in Sri Lanka. It is this connection which the police speculate has carried old hostilities to Canada.

[5] While residing in Canada he was convicted of the following offences: January 24, 1992, failure to comply with the recognizance; July 8, 1996, trafficking heroin; and February 18, 1998, obstructing a police officer. In consequence of his conviction for drug trafficking, Mr. Sittampalam conceded at an admissibility hearing that he is inadmissible to Canada on grounds of serious criminality under what is now paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("Act"). At a second admissibility hearing he was found to be inadmissible on grounds of organized criminality under paragraph 37(1)(a) of the Act. A panel of the Immigration and Refugee Board, Immigration Division ("the Board") found him to be a member of the AK Kannon gang, believed to be an organization engaged in activities that are part of a pattern of criminal activity as more particularly described in paragraph 37(1)(a) of the Act.

[6] Mr. Sittampalam was arrested and detained on October 18, 2001, the same day on which many others were detained as result of a joint project between immigration officials and the Toronto Police Service. Those detained were alleged to be involved with, or associated with, Tamil gangs in Toronto. The two principal gangs are said to be the AK Kannon and the VVT, the latter being an acronym for the village of Valvettithurai where many members of that gang were born.

[7] On October 4, 2004, the respondent was ordered deported on the basis of serious criminality and organized criminality. The decision was challenged, but both the Federal Court and the Court of Appeal upheld the findings. A Minister's Delegate then issued a Danger Opinion against the respondent under paragraphs 115(2)(a) and (b) of the *Immigration and Refugee Protection Act* (IRPA). Removal was then scheduled for the summer of 2007, but the respondent obtained a stay pending his challenge of the section 115 Danger Opinion. The Federal Court upheld the danger assessment, but required the redetermination of the risk assessment portion of the Danger Opinion.

[8] From the date of his original arrest and detention in 2001, the respondent continued to have regular detention reviews. The respondent was detained on the basis that he was found to be both a danger to the public and unlikely to appear for removal. He was twice ordered to be released in 2004, but both of these decisions were overturned by the Federal Court. On two other occasions, decisions to continue the respondent's detention were overturned by the Court. The decision to release the respondent from detention was challenged unsuccessfully in this Court.

[9] On January 11, 2008, the re-assessment of risk was completed and the respondent was found not to be at risk if returned to Sri Lanka.

[10] The applicant again took steps to remove the respondent. The respondent again brought an application challenging the new risk assessment. He also brought a motion for a stay of removal and, on March 5, 2008, the Court, per Justice Campbell, granted a stay of removal until disposition of the application challenging the new risk assessment. The judicial review of that decision was heard on June 5, 2008 and remains outstanding.

[11] The respondent was ordered released by Member Gratton of the Immigration Division on April 19, 2007 and was released on May 22, 2007.

[12] On January 30, 2008, Member Willoughby amended the original release order to allow the respondent one outing per week.

[13] In August 2008, the respondent requested a variance to the conditions of his release to the Immigration Division. An agreement was made between counsel for the parties that:

a. Mr. Sittampalam be allowed to remain alone in the residence;

b. Mr. Sittampalam could be in the yard alone provided there was a surety in the residence;

c. Mr. Sittampalam be allowed two outings per week (maximum of 4 hours each) as long as prior approval (72 hours) was obtained and he was in the presence of a surety;

d. Mr. Sittampalam be allowed to walk his children to school in the morning and pick them up from school in the afternoon; and

e. Mr. Sittampalam must consult a psychiatrist/psychologist with respect to his mental state and submit a report within 6 months.

[14] The respondent requested an oral hearing to amend the conditions of release, specifically amendments to conditions 2, 4, 15, 16, 17, 18, 24, 26 and 28 of the original release order.

[15] An oral hearing was held before Member J. Harnum on October 8, 2008. At the hearing, the parties made submissions on the amendments requested in the respondent's motion.

[16] On November 13, 2008, Member Harnum released her order. She granted the respondent's motion and made additional amendments to the respondent's term and conditions.

[17] The applicant is judicially reviewing the Member's decision to make additional amendments to the respondent's terms and conditions which were not requested by Mr. Sittampalam in his motion before the Immigration Division.

[18] The parties raise several issues, however, I believe the determining issue to be:

> Did the Member err in her duty of procedural fairness by failing to provide the parties with an opportunity to present submissions regarding the terms of release at issue?

[19] With regard to issues of procedural fairness and natural justice, the reviewing court accords no deference to the decision-maker.

[20] The applicant submits that the Member violated the principle of natural justice in altering and deleting conditions that were not requested to be changed by the respondent and were either not addressed, or clearly not at issue, in the detention review of October 8, 2008. The respondent only requested changes to conditions 2, 4, 15, 16, 17, 18, 24, 26 and 28 of the original release order and the applicant only responded to changes to those conditions.

[21] The applicant notes that despite clear statements, the Member made significant changes to conditions which were not argued and which were not raised as being at issue in the hearing. This, he argues, deprived him of any opportunity to address these conditions and submit evidence to support his position.

[22] On December 12, 2008, Mr. Justice Russel Zinn ordered a stay of the decision of the tribunal dated November 13, 2008, which changed the conditions of the respondent's release.

[23] The present application before the undersigned deals with the judicial review of the decision of November 13, 2008.

[24] Essentially the position of the respondent is that all of the conditions of the original release order were on the table when the parties were before the tribunal, whether or not specific changes had been requested by the respondent.

[25] The respondent therefore argues that the applicant should have brought evidence and argued before the tribunal respecting conditions that he now complains were changed without changes having been requested, and he cannot now complain at this stage.

[26] The Supreme Court concluded that extended detention or release on strict conditions was constitutionally valid only if there were regular reviews, which the Court indicated meant every six months. The Court recognized a growing onus on the Minister to justify restrictions as more time passes. It concluded that: "… alternatives to lengthy detention pursuant to a certificate, such as

stringent release conditions, must not be a disproportionate response to the nature of the threat". The Court further noted:

> 117. In other words, there must be detention reviews on a regular basis, at which times the reviewing judge should be able to look at all factors relevant to the justice of continued detention, including the possibility of the IRPA's detention provisions being misused or abused. Analogous principles apply to extended periods of release subject to onerous or restrictive conditions: these conditions must be subject to ongoing, regular review under a review process that takes into account all the above factors, including the existence of alternatives to the conditions.

[27] It is clear from the reasoning of the Supreme Court that there must be regular reviews during which restrictive conditions of release must be assessed to determine if they remain necessary. This review is not dependant on what the subject of the conditions seeks. Rather it is a constitutional requirement that the reviewing authority ensure that conditions are not disproportionate to the risk.

[28] Recognizing that the threshold for the finding of serious issue in a stay motion is lower than that in a judicial review and although the fate of this judicial review is not tied to Justice Zinn's stay of the order, we cannot ignore his finding that:

> [15] [...] In this case, the Member relaxed these conditions on her own, without being asked and without the benefit of submissions by either party. In my view the absolute legal right of each party to make submissions on the particular terms of release that she was considering, was lost.

[29] The parties did not receive an opportunity to make submissions as to the appropriateness of the Member's new terms of release. The scope of the Member's decision overstretched Mr. Sittampalam's original request to review certain specific conditions. The respondent only requested changes to conditions 2, 4, 15, 16, 17, 18, 24, 26 and 28 of the original release order. Despite these clear statements, the Member made significant changes to conditions which were not argued and which were not raised as being at issue in the hearing. In failing to provide the parties with an opporunity to make submissions and in altering and deleting conditions that were not requested by the respondent, the Member breached the principles of procedural fairness, specifically the right to be heard and to know the case to be met. This error warrants this Court's intervention.

[30] Accordingly, this application for judicial review will be allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is granted and the decision of November 13, 2008 is set aside for all purposes. The matter is referred back for redetermination by a different officer. In that redetermination, the officer should take into consideration the reasons set forth in paragraph 29 of the present judgment.

The following question is certified:

> Do the principles set forth by the Supreme Court of Canada in *Charkaoui v. M.C.I.*, [2007] S.C.J. No. 9, respecting a review of the conditions of release from detention, where the detention is based on a "Security Certificate", apply as well to detention reviews under subsection 58(3) of IRPA?

"Louis S. Tannenbaum"

Deputy Judge

AUTHORITIES CONSULTED BY THE COURT

1. *M.P.S.E.P. v. Sittampalam*, 2008 FC 1394
2. *A.G. of Canada v. Sketchley*, 2005 FCA 404
3. *Cepeda-Gutierrez v. Canada (M.C.I.)*, (1998), 157 F.T.R. 35
4. *Charkaoui v. M.C.I.*, 2007 SCC 9
5. *Mahjoub v. M.C.I. and M.P.S.E.P.*, 2007 FC 1366
6. *Mahjoub v. M.C.I. and M.P.S.E.P.*, 2007 FC 171
7. *M.C.I. v. Thanabalasingham*, 2004 FCA 4
8. *M.C.I. v. Sittampalam*, 2004 FC 1756
9. *Harkat v. M.C.I.*, 2007 FC 416
10. *Bains v. M.E.I.* (1990), 109 N.R. 239 (F.C.A.)
11. *M.P.S.E.P. v. Sittampalam*, [2004] F.C.J. No. 2152
12. *M.C.I. v. Thanabalasingham*, [2003] F.C.J. No. 1548
13. *M.C.I. v. Thanabalasingham*, [2004] F.C.J. No. 15 (CA)
14. *A.G. of Manitoba v. Metropolitan Stores*, [1978] 1 S.C.R. 110
15. *M.C.I. v. Sittampalam*, [2004] F.C.J. No. 2152
16. *Sittampalam v. Solicitor General*, [2005] F.C.J. No. 1734
17. *Harkat v. M.C.I.*, [2006] F.C.J. No. 934
18. *Harkat v. M.C.I.*, [2006] F.C.J.No. 770
19. *M.C.I. v. Harkat*, [2006] F.C.J. No. 1091
20. *Mahjoub v. M.C.I.*, [2007] F.C.J. No. 206
21. *Jaballah v. M.C.I.*, [2007] F.C.J. No. 518

FEDERAL COURT

SOLICITORS OF RECORD

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