Federal Court  Cour fédérale

Date: 20101012

Docket: IMM-5742-10

Citation: 2010 FC 1009

Vancouver, British Columbia, October 12, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

XXXX

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Minister of Citizenship and Immigration (the Minister) seeks from this Court an order temporarily staying the respondent's release from detention with conditions pursuant to the October 1, 2010 decision of Member Shaw Dyck of the Immigration Division (the Member).

[2] The respondent is one of the 492 persons who arrived in this country on August 13, 2010, aboard the MV "Sun Sea"; she has been detained since arrival on grounds that her identity has not

been established. She has had four detention reviews as required by the *Immigration and Refugee Protection Act* (IRPA) and has been interviewed four times by officials of Citizenship and Immigration Canada (CIC) for the purpose of obtaining information which might lead to her identity being satisfactorily established. Her detention was continued after the first three reviews with the one previous to the decision under review being dated September 14, 2010.

[3] The respondent is a 32-year-old married woman of Tamil ethnicity and a citizen of Sri Lanka. She arrived on the MV "Sun Sea" accompanied by a man and two-year-old child who she claims are her husband and daughter. She is detained with the child at the Burnaby Youth Detention Centre; her husband is separately detained at a facility in Maple Ridge. He has recently been ordered released from detention, a decision sought to be stayed by the Minister. The hearing of the Minister's stay motion in his case will be heard later this week.

[4] This is not a case where the respondent did not have any identification papers whatsoever. However, she was without her passport which she claims was used to travel by air from Colombo to Thailand and was left with her agent on his orders. The record indicates there is no evidence of her entry in Thailand by plane. What she produced by way of identification were:

(a) A National Identity Card (NIC) which was analysed to have been altered but the significance of the alteration is yet to be determined;

(b) Her birth certificate;

(c) Her marriage certificate; and

(d) She did not produce a birth certificate for the child.

[5] Two of my colleagues have issued recent decisions on stay of release from detention applications by the Minister of persons who arrived on the MV “Sun Sea”. Mr. Justice de Montigny rendered two decisions in Court files IMM-5560-10 and IMM-5368-10, both decided on September 17, 2010. He dismissed the Minister’s stay applications. Madam Justice Bédard rendered her decision on September 23, 2010, in which she granted a stay of a release order. She held that on the particular facts of the case before her, there was a manifest lack of evidence on the respondent’s identity.

[6] In all three cases, both of my colleagues recognized that identity was the lynchpin of Canada’s immigration regime.

[7] The conjunctive test which the Minister must satisfy the Court in order to obtain a stay pending the determination of the Minister’s application for leave and judicial review of Member Shaw Dyck’s decision is well known. The Minister must establish: (1) one or more serious issues to be tried; (2) he would suffer irreparable harm if the stay was not granted, i.e. if the respondent was released on the conditions imposed by the Member; and (3) the balance of convenience favours the Minister.

[8] In my view, before embarking upon the required tri-partite analysis, it is necessary to understand the detention and release framework established by IRPA and particularized in the *Immigration and Refugee Protection Regulations* (IRPR).

[9] Moreover, some appreciation of the rationale behind the Member's decision is also needed.

II. The Detention and Release Scheme

[10] The legislative and regulatory scheme on detention and release is contained in Division 6 of IRPA and the prescribed factors are spelled out in sections 244 to 248 of the IRPR.

[11] Section 58 of IRPA provides that the Immigration Division shall order the release [from detention] of a foreign national unless it is satisfied, taking into account prescribed factors, that such person is either (a) a danger to the public or (b) a flight risk or (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or violating human or international rights or (d):

(*d*) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.	*d*) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.

[My emphasis]

[12] The prescribed factors for the purpose of assessing whether the respondent is a person whose identity has not been established are set out in the IRPR. Section 244 of the IRPR has prescribed separate factors which shall be taken into consideration when assessing whether a person

is (a) a flight risk; (b) a danger to the public; or (c) is a foreign national whose identity is not established.

[13] Section 247 is the section setting out the prescribed factors for the purpose of assessing whether a person's identity has not been established. Such factors include whether (a) the respondent's cooperation in providing evidence of their identity or assisting the Minister in obtaining that evidence; (b) if a refugee claim has been made, the possibility of obtaining identity documents or information without disclosure to government officials in Sri Lanka; (c) the destruction of identity or travel documents and the circumstances under which the person acted; and (d) the provision of contradictory information with respect to identity at the time of an application.

[14] Finally, section 248 of the IRPR provides that if it is determined that there are grounds for detention, the following factors "shall be considered before a decision is made on detention or release":

(*a*) the reason for detention; (*b*) the length of time in detention; (*c*) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time; (*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and (*e*) the existence of alternatives to detention.	*a*) le motif de la détention; *b*) la durée de la détention; *c*) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps; *d*) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé; *e*) l'existence de solutions de rechange à la détention.

[15] In conclusion, on this point the statutory and regulatory scheme shows the importance Parliament placed on the identity of a person for the purposes of immigration or entry into Canada, including those persons seeking its protection, expressing a particular abhorrence to human smuggling. Identity is one of the four self-standing classes which Parliament identified in section 58 as warranting special attention for a person's detention or release. Each class, namely, danger to the public, flight risk, inadmissibility on grounds of security or violating human or international rights or lack of identity are independent from each other, each having particular conditions of operation and different conditions of application.

[16] *In Canada (Minister of Citizenship and Immigration) v. Gill*, 2003 FC 1398 [*Gill*], this Court at paragraph 22 described the statutory scheme in more particularity and in paragraph 23 set out its views on why IRPA, a new statute enacted in 2002, placed special emphasis on the factor of identification.

III. The Impugned Decision

[17] The heart of Member Shaw Dyck's decision releasing the respondent is expressed in the following terms:

> So I am satisfied then that although the Minister is not satisfied with your identity and that they have made reasonable efforts to establish your identity thus far, and what remains to be done on the Minister's behalf can readily be accomplished with you outside of detention, I am satisfied that release on terms and conditions can address the issue of your ongoing co-operation with the Minister as well as any lingering concerns they may have with respect to flight risk,

> danger and security that have been addressed in terms and conditions in the past. [My emphasis]
>
> So I will invite the Minister to contribute to the terms and conditions of release.

[18] The transcript of this detention review shows it essentially consisted of submissions, by both counsel, of developments since the previous hearing which occurred on September 14, 2010, based on the filing of exhibits. Minister's counsel filed a copy of the Minister's opinion he was not satisfied the respondent's identity had been established but may be established.

[19] She filed another exhibit which consisted of interview notes by a CIC interviewer with the respondent dated September 15, 2010 and September 29, 2010. Duty counsel for the respondent filed the affidavit of Kanthar Sivanthan, a longtime senior official with the Ministry of Education (MOE) in Sri Lanka, dated September 25, 2010. The purpose of his affidavit was to describe the steps to be taken by the Migration Integrity Officer (MIO) in Sri Lanka to whom the Canadian authorities had sent documents for verification of persons who arrived on the MV "Sun Sea" including those of the respondent. He expressed the view that the MIO could not approach school officials without involving the MOE or checking birth certificates without involving the State.

[20] Counsel for the Minister provided updates on developments concerning the Minister's efforts to firm up the respondent's identity by: (1) sharing her biographical information and fingerprints with four foreign governments with two of them reporting no contact in their country by the respondent; (2) efforts to obtain documents from the UNHCR in Thailand where the respondent and her husband filed refugee claims; (3) recent efforts to obtain further documentation on her

identity from her husband's family; (4) the fact the MIO had been sent the respondent's identity documents on September 19, 2010; (5) an argument based on her interviews that the respondent had provided conflicting information on whether she knew anyone in Canada and conflicting knowledge on the date of the issuance of her NIC; (6) her confusion about who filed her passport application in Colombo; (7) the limited amount of information she provided on who in Sri Lanka could assist in confirming her identity; (8) confusion on whether the family had outstanding debts related to their being smuggled into Canada; and (9) the circumstances related to the alteration of her NIC.

[21] Counsel for the respondent countered these submissions in a number of ways focusing on the fact the NIC's alteration was minor and the respondent had nothing to do with that alteration; the MIO's four-week response time was wishful thinking with the record indicating he had yet to meet that deadline in any investigation which had been requested of him by Canadian officials; the UNHCR does not authenticate documents nor does it share information; there is no substance to the Minister's argument she was not cooperating in the effort to confirm her identity.

[22] Counsel for the respondent also pointed to the fact she had completed her Schedule 1 information form for the purpose of ascertaining her eligibility to her refugee claim filed in Canada, which seems to have been accepted by the Minister. She argued that in all of the circumstances it was not premature to consider alternatives for her release as Member Rempel had decided on the September 14, 2010 review. In her view, the respondent should be released in the same way and for the same reasons as a number of women aboard the MV "Sun Sea" had.

[23] Member Shaw Dyck's decision shows she was concerned with whether the investigations embarked upon by the Minister would lead to anything new. She said she was basically left with the MIO's inquiry which has yet to reveal anything. She agreed with counsel for the respondent's submission that her client had not tried to mislead the authorities on the issue of her identity and accepted her excuse for withholding information about whom she knew in Canada.

[24] In sum, the Member concluded the Minister's officials had accomplished a great deal in their endeavour to establish her identity and what remained did not require her on-going detention particularly in the light of the alternative to detention.

IV. Analysis

A. *Serious Issue*

[25] Counsel for the Minister argued Justice de Montigny had erred in setting the standard for serious issue at the level of showing quite a strong case rather than the lower level of simply showing the serious issue was not frivolous or vexatious. I need not decide the question because I am satisfied the Minister has met the higher onus.

[26] As argued by the Minister, serious issues arise in this case on whether the Member properly interpreted and/or respected the statutory scheme related to the detention and release under IRPA and IRPR, and in particular whether she erred:

(1) In releasing the respondent despite her finding the Minister is making reasonable efforts to establish her identity, that her identity had not yet been satisfactorily established and the Minister's investigation was legitimately ongoing in good faith;

(2) The Member took into account and balanced all of the factors set out in paragraph 248 of the IRPR and, in particular, balanced the reasons for detention (lack of identity), the length of time for detention, any lack of diligence on the part of CIC or CBSA with the alternatives for detention;

(3) The Member considered or properly applied the factors set out in section 247 of the IRPR and, in particular, whether there was conflicting evidence on the issue of identity provided by the applicant; and

(4) Had the Member failed to provide clear and compelling reasons to depart from the September 14, 2010 decision refusing to release the respondent?

B. *Irreparable Harm*

[27] I am of the view the Minister has met the irreparable harm test. The words of Justices Sopinka and Cory in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 71 are apt:

> […] In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the

> court should in most cases assume that irreparable harm to the public interest would result from the restrain of that action.

[28] The application of this concept of irreparable harm in public interest matters is emphasized in immigration cases where identity is an issue and where there are serious questions about the person's identity which is the case here.

C. *Balance of Convenience*

[29] In my view, the balance of convenience strongly favours the Minister. The respondent is a participant in a massive smuggling effort for which she has paid a considerable amount of money. I recognize she may fear persecution in her native country. However, this form of seeking refugee status has no place in the proper application of humanitarian law.

ORDER

THIS COURT ORDERS that the respondent's release from detention is stayed until the earlier of either the determination of the Minister's leave and judicial review application on the merits or the respondent's next statutorily required detention review hearing.

"François Lemieux
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATE OF HEARING:	October 8, 2010
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