Federal Court  Cour fédérale

Date: 20110407

Docket: IMM-1832-11

Citation: 2011 FC 439

Vancouver, British Columbia, April 7, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B456

Respondent

REASONS FOR ORDER AND ORDER

[1] B456 is one of 490 some Sri Lankan Tamils who came to Canada in August 2010 on board the undocumented ship the *Sun Sea*. He, like the others, filed a claim for refugee status. He carried no identification papers.

[2] He was detained and has been subject to 30-day detention reviews. Through diligent time-consuming work by the Canada Border Services Agency (CBSA) his web of deceit was finally cast

aside. He is nothing but a bold-faced liar. It has been established beyond doubt that if he is not still a Tamil Tiger, he certainly was. He was in the armed naval wing of the Liberation Tigers of Tamil Elam (LTTE) a terrorist organization. He was written up as being inadmissible and has now been found by the Immigration Division of the Immigration and Refugee Board to be inadmissible under section 34(1) of the *Immigration and Refugee Protection Act* (IRPA) as being a member of an organization that engages, has engaged or will engage in, among other things, terrorism.

[3] As a result of this determination, he is no longer eligible to claim refugee status. However, he is still entitled to and has demanded a Pre-Removal Risk Assessment (PRRA) in accordance with sections 97 and 112 and following of IRPA.

[4] After his identity was established, and his connection with the Tamil Tigers (although he is maddeningly vague as to when that association ended), he remained in detention. In the review handed down in February, the member charged with the matter considered him to be a flight risk. However, his March detention hearing was heard by another member who ordered his release on terms and conditions.

[5] The Minister has filed an application for leave and for judicial review of that decision and by motion seeks an order staying the release. On consent, an interim stay was granted by Mr. Justice O'Keefe to allow time to obtain relevant transcripts and to properly prepare for the hearing which took place before me yesterday.

I. The Guiding Principles

[6] As in any motion for a stay or for an interlocutory injunction the moving party must establish a serious issue, irreparable harm and that the balance of convenience is in his favour (*Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311).

[7] The second guiding principle is that there must be clear and compelling reasons to depart from previous detention decisions. This was established by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572. In speaking for the Court Mr. Justice Rothstein, as he then was, answered a 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.

[8] I think it fair to say there has been some inconsistency with respect to the treatment of those on board the *Sun Sea*. Their stories differ, the appreciation thereof by different decision-makers may differ, and as well different judges have come to different conclusions in assessing decisions be it on stay motions, such as this, or on judicial review. This is quite understandable because there is intense pressure to render a decision before the next 30-day detention review.

[9] For example, there has been a disagreement as to whether an issue is serious if it is non-frivolous and non-vexatious or whether a more elevated standard is required in that a stay may effectively grant what is being sought on the merits. I refer to the decision of Mr. Justice de Montigny in *The Minister of Citizenship and Immigration v B157*, Docket IMM-6862-10, rendered December 6, 2010.

II. Decision

[10] I have come to the conclusion that a stay of the decision releasing B456 from detention should be granted. The parties agreed that, in that event, I should order an expedited hearing of the judicial review itself. I shall so do.

[11] No matter which test is to be applied, the Minister has established several serious issues.

[12] In the decision rendered February 3, 2011, the deciding member was looking forward to the next significant event in B456's encounter with Canadian authorities, which was an admissibility hearing which was then scheduled for April 27. Thus, he was looking ahead some two-and-a-half months.

[13] Since then the admissibility hearing was moved up and he was declared inadmissible. That decision is not being contested.

[14] The effect of that decision is most significant. B456's long-term goal is to become a permanent resident and thus be in position to sponsor his wife and children who remain in Sri

Lanka. However, as matters presently stand, the effect of sections 21 and 112(3)(a) of IRPA means he can never become a permanent resident and thus is unable to sponsor his family.

[15] There are three recourses available to him, two of which were considered by the deciding member. The PRRA papers have been delivered to him. Although not cast in stone, one might expect a decision within three months. Even if the PRRA is successful, although he would be permitted to remain in Canada, he could not become a permanent resident.

[16] There are two possible ways B456 could become a permanent resident. The first is by way of application of section 34(2) of IRPA which provides:

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[17] There is anecdotal evidence that given the volume of such applications, the investigation which has to be carried out, and the fact that the Minister must decide personally, such an application may be pending for several years before a decision is made.

[18] The other recourse is to apply for permanent resident status from within Canada on humanitarian and compassionate grounds in accordance with section 25 of the Act. The section 34(2) and section 25 applications are quite distinct (*The Minister of Public Safety and Emergency Preparedness v Ramadan Agraira*, 2011 FCA 103 and *Segasayo v Canada (Minister of Citizenship*

and Immigration), 2010 FC 173, [2010] FCJ No 205 (QL), aff'd 2010 FCA 296, [2010] FCJ No 1343, (QL).

[19] Another serious issue is that there was no clear and compelling reason to depart from the February decision. The projected time-frame to the next significant step, now the PRRA rather than the admissibility hearing, is roughly the same. The member also considered the section 34(2) application, which has not yet been filed, and assumed that B456 would not be removed from Canada until the Minister's decision. Such an application does not have the legal effect under the Act or the Regulations of resulting in a stay, and no practice to that effect has been established. See *Smith v. Canada (Attorney General)* 2009 FC 228, [2010] 1 FCR 3. If B456's PRRA application is successful, presumably he would be released from detention. If it is not, then the section 34(2) application may become relevant.

[20] The member also erred in stating: "I believe that now the admissibility hearing is over, your removal from Canada is not as imminent as suggested by Minister's counsel. Therefore I find that I have clear and compelling reasons to depart from member Tessler's decision on the 3rd of February, 2011."

[21] This viewpoint is clearly wrong. In February the admissibility hearing was pending. If he was not declared to be inadmissible, then his refugee claim would be reactivated. If unsuccessful, he would still be entitled to a PRRA. It would only be after the PRRA that he would be removal-ready. Now that the whole process has been accelerated, the risk to B456 that he would be removed from Canada is more imminent than it was in February.

[22] The member also got the PRRA wrong. The practice is that after the decision is rendered the applicant is called in for a personal interview to receive the decision. If the decision is unsuccessful, the applicant is interviewed about appearing for removal and if the officer is not satisfied he would then be arrested. Although that may be the practice, the decision has been made before the call-in notice and cannot be changed if the applicant fails to appear. The member was of the view he had every reason to appear because his ultimate goal was to become a permanent resident, and only by appearing would he find out that the decision is positive. If the decision is positive he can find out about it by other means, and even if positive it does not assist him in seeking permanent resident status.

[23] As to irreparable harm, the member recognized that B456 is a flight risk but that the terms and conditions imposed alleviated that risk. His long-lost brother posted a $5,000 bond and a promissory note for another $30,000, which is very significant considering his limited resources, other than equity in his house.

[24] I question the reasonableness of that assessment, but do not have to come to any conclusion. It may well be that the member has more of the milk of human kindness than I do. Should one assume that one who has lied through his teeth and not communicated with his brother for 20 years will live up to his promise to his brother to abide by the terms and conditions of his release?

[25] Although irreparable harm could be framed several ways, there is irreparable harm in that B456 is a flight risk. There is also significant public interest in the administration of the Act as noted by Mr. Justice Mosley in *The Minister of Citizenship and Immigration v B188*, IMM-6390-10 and

Mr. Justice Zinn in *The Minister of Citizenship and Immigration v B017*, IMM-6541-10. There is a public interest in dealing effectively with large scale people-smuggling operations. This applies equally to the balance of convenience. It is far better to preserve the *status quo ante* until the merits of the application for judicial review can be considered. The hearing is expedited and B456 is statutorily entitled to another detention review, which may be as early as next week.

[26] Counsel for B456 submitted that it should make no difference how one arrives in Canada. I disagree. Although all the hearings relating to those on board the *Sun Sea* naturally focus on immigration and refugee law, it cannot be forgotten that the *Sun Sea* is a ship and that the admiralty jurisdiction of this Court is also in issue. The (UK) *Colonial Courts of Admiralty Act, 1890*, 53 & 54 Vic, c 27, gives this Court jurisdiction over prize and ships engaged in the slave trade. An undocumented ship such as the *Sun Sea*, which has violated a plethora of international and Canadian laws, faces a rebuttable presumption that she is engaged either in piracy or in the slave trade. The English admirals did not take kindly to such activities. Neither should we.

ORDER

THIS COURT ORDERS that:

1. The motion for a stay is granted;

2. The respondent's release from detention is stayed until the earlier of either the determination of the Minister's application for judicial review on the merits or the respondent's next statutorily required detention review hearing;

3. The application for leave is granted and the application for judicial review is deemed to have been commenced;

4. The hearing will be held on Thursday, May 26, 2011, to commence at 9:30 a.m., at 701 West Georgia Street, 3rd Floor, in the City of Vancouver, Province of British Columbia, for a duration not exceeding three (3) hours;

    a. The record shall comprise the motion records as well as such additional documents, if any, of which the tribunal shall send certified copies to the parties and the registry of the Court on or before April 15, 2011.

    b. Further affidavits, if any, shall be served and filed by the applicant on or before Tuesday, April 19, 2011.

    c. Further affidavits, if any, shall be served and filed by the respondent on or before April 26, 2011.

d. Cross-examination, if any, on affidavits shall be completed on or before May 2, 2011.

e. The applicant's further memorandum of argument, if any, shall be served and filed on or before May 6, 2011.

f. The respondent's further memorandum of argument, if any, shall be served and filed on or before May 11, 2011.

g. The transcript of cross-examinations, if any, shall be filed on or before May 11, 2011.

5. The applicant shall serve and file a motion for a confidentiality order under Rule 151 of the *Federal Courts Rules* to be determined by the case management judge or the hearing judge; and

6. Until such time as the motion for a confidentiality order is determined, the Application for Leave and for Judicial Review and all documents filed or delivered in connection therewith shall be sealed and treated as confidential.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1832-11**
STYLE OF CAUSE:	**MCI v. B456**
PLACE OF HEARING:	**Vancouver, BC**
DATE OF HEARING:	**April 6, 2011**
REASONS FOR ORDER AND ORDER:	**HARRINGTON J.**
DATED:	**April 7, 2011**

APPEARANCES:

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