Federal Court  Cour fédérale

Date: 20120510

Docket: IMM-36-12
IMM-1698-12
IMM-2813-12

Citation: 2012 FC 563

Ottawa, Ontario, May 10, 2012

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B072

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These reasons are issued in connection with three applications for judicial review brought by the Minister of Citizenship and Immigration (Minister) all concerning the release of the Respondent from immigration detention by decisions rendered by members of the Immigration Division. The three applications were consolidated by Orders of the Court dated March 15, 2012 and April 5, 2012, and heard at Vancouver, British Columbia, on an expedited basis on April 13, 2012. It bears repeating that these proceedings are subject to a confidentiality order issued by the Court on

March 8, 2012 protecting the identities of the Respondent and members of the Respondent's family. All of the impugned decisions have been stayed by orders from the Court pending the disposition of the Minister's applications.

Immigration Background

[2] The Respondent and members of his family arrived in Canada aboard the "MV Sun Sea" on August 13, 2010. The Respondent has been held in immigration detention since his arrival albeit with the benefit of numerous detention review hearings before the Immigration Division. Initially, the Respondent was held because of concerns about his identity. When he eventually acknowledged who he was, the Minister sought and obtained his continued detention on security grounds. In a detention review hearing held on March 6 and 13, 2011 (the 12th detention review hearing), the Minister also asserted that the Respondent should be held as a flight risk. The presiding member agreed with the Minister that the Respondent represented a flight risk but not that he was a danger to the public. The presiding member specifically noted a history of ongoing deception by the Respondent and found him to be unreliable. This lack of credibility was said to have undermined the ability of a proposed surety to influence the Respondent's behaviour and his detention was ordered continued.

[3] Subsequent detention review hearings resulted in similar dispositions and, on November 10, 2011, the Immigration Division found the Respondent to be inadmissible under section 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], on the basis of a finding of organized criminality for engaging in people-smuggling. In the result, he was ordered deported.

That decision is presently the subject of an application for judicial review for which leave has been granted.

[4] On December 1, 2011, the Immigration Division convened a 19th detention review hearing. The presiding member ordered the Respondent's continued detention on the basis that there was no clear and compelling reason to depart from the earlier findings that he represented a flight risk. The presiding member also considered the finding that the Respondent was inadmissible and subject to a deportation order to be a circumstance favouring his continued detention.

[5] On December 29 and 30, 2011, the Respondent appeared for his 20th detention review hearing. In support of his release, the Respondent proposed a surety and a cash bond of $20,000. It was also pointed out to the presiding member, Member Mackie, that the Respondent had initiated a Pre-Removal Risk Assessment (PRRA) that the Minister estimated would take three months to complete after submissions were received. At the conclusion of the hearing, Member Mackie ordered the Respondent's release from detention on conditions. It is this decision that is the subject of the within application bearing court file number IMM-36-12. The conditions imposed by Member Mackie included the deposit of a $20,000 cash bond by the surety, monthly reporting and continued good behaviour.

[6] In ordering the Respondent's release, Member Mackie acknowledged that there were grounds for continuing the Respondent's detention as a flight risk, but that the risk could be mitigated by appropriate conditions of release. The central findings by Member Mackie include the following:

Having made the decision that ongoing detention is appropriate, I have had to turn my attention to the factors in Regulation 248. At this point in time, the only ground for detention is a finding of flight risk. Regarding the length of time already in detention, detention has continued for this young man for the last 16 months. The length of future detention, if release does not occur, is likely at least a further six months, based on the current information presented yesterday, based only on the processes that are currently under way and without speculating about all future avenues of redress that are open to [the Respondent].

There have been no unexplained delays and the general length of this case is due, in part, because [the Respondent] arrived as one of 492 migrants on a single vessel and also, to some degree, as a result of his lack of truthfulness and candour in the early months of his detention. At this point in time, any period of future detention cannot be viewed as indefinite because the specific processes being undertaken will likely conclude within a reasonable period of time.

The final issue that I've had to address is whether or not the alternative to detention that has been proposed is sufficient to offset the risk that [the Respondent] would not report for removal if released. In considering the general principles of bail that exist in this country and our strong belief in a person's right to liberty wherever possible, it is my finding that the $20,000 cash bond offered, if deposited, with stringent terms and conditions of release, would be adequate to offset the perceived risk. In other words, it is my finding that [the Respondent] will report as required in the future if a large cash bond with very stringent terms and conditions is posted.

The bondsperson, Ms. Vaithiyanathan, testified at length at yesterday's hearing by teleconference. It is clear that she understands her responsibilities as a bondsperson and, although she is not a relative or a friend of long standing, she has known [the Respondent] for at least six months and she is in frequent telephone contact with him, speaking to him as often as four times a week. Additionally, in November of 2011, she travelled from Maple, Ontario, to Maple Ridge, B.C., specifically to meet him and meet with him at Fraser Regional Correctional Centre where he is detained. Since that meeting, she has continued the frequent telephone contact with him.

She seems to have a good grasp of his current situation and the challenges he faces. She stated that she trusts him and believes that he will abide by conditions of release and additionally, that she will do everything reasonably possible to ensure that he does

abide by terms and conditions of release. She has even offered him the opportunity to live in her home and if that proves too crowded, since she is a married woman with three children and in-laws -- I should rephrase that, I'm not sure they're in-laws, they may be her parents -- so if it proves too crowded, she will find him a residence nearby.

If his wife is allowed to move to Ontario with him, she acknowledges it could be a bit crowded, but she is quite confident that they will all cope and that she will do whatever is necessary to assist him in complying with all CBSA requirements, even indicating that if she was concerned that he was not complying with the terms and conditions of release that she would immediately contact CBSA. It's also important to note that she is not a wealthy woman, has never posted a bond for a migrant before, has a significant mortgage and all three children still living at home, but has still agreed to post what for her is a large cash bond because of her faith in [the Respondent]. I find that knowing that she is risking the stability of her financial future to assist him and his wife will strongly influence [the Respondent] to do what is required of him to ensure that her bond is not forfeited.

Probably one of the very few areas in which my rationale would deviate from that of one previous Member, it is my view that, having brought his wife to Canada with him and now having a Canadian born child, both of whom are here in the Vancouver area at large, and his wife being in the process of a refugee determination hearing, is actually a factor that weighs in his favour. I do not accept that he is likely to do anything that will jeopardize his wife's opportunities in Canada.

Other motivating factors that I believe will also cause him to report as required are that his case is not over. Although he will not be allowed to pursue a refugee claim at this point, he has the right and has initiated an application for a pre-removal risk assessment.

As well, the decision made at the admissibility hearing is being challenged in Federal Court and there was talk by previous counsel of a possible application for Ministerial consideration under subsection 37(2) of the Act. So with all of this ahead of him, I believe that with the alternative proposed put in place, that these things are adequate to mitigate the risk of flight in his case.

This decision was stayed by the Order of Justice François Lemieux on February 10, 2012. Justice Lemieux identified a serious issue arising from Member Mackie's arguable failure to fully assess the ability of the surety to control the Respondent's behaviour.

[7] On February 13, 2012, the Immigration Division convened its 21st detention review hearing. Once again, the presiding Member, Member Tessler, ordered the Respondent's release from detention on conditions. Member Tessler found the Respondent to be a moderate to low flight risk, but that the risk could be appropriately mitigated by the posting of a $20,000 cash bond by the surety and by weekly reporting. It is this decision that is the subject of the Minister's application bearing court file number IMM-1698-12. The key findings by Member Tessler were as follows:

> I find that I'm not in agreement with the characterization of [the Respondent] as a high or substantial flight risk. I reserve this characterization for persons for whom there is evidence of an extraordinary reason for believing that they would not cooperate with their removal, the best example being fugitives from justice who have come to Canada to avoid prosecution in their home country -- to avoid prosecution in their home country and who have the means and sophistication to evade removal, and I note that even in those cases release is not out of the question where the terms and conditions address the risk.
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> All refugee claimants assert that they cannot be returned to their home country because they face persecution. The reality is that they are rarely detained as flight risks. I do not believe that the Minister has established here that [the Respondent] is a flight risk than anyone else who does not want to return to their home country. So while I agree with my colleagues that [the Respondent] is a flight risk on the basis that his reliability has been compromised by his untruthfulness with immigration authorities, the characterization of [the Respondent] as a serious or high -- or high flight risk is not, in my opinion, justified. The Minister has not established that there is any greater motivation for [the Respondent] to avoid removal than the ordinary person in flight from unrest in their home country.
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> With a brother in Canada, a wife and infant child in Canada, and a child that he's never been able to spend time with as he was born

here while -- she was born here while he was in detention, the likelihood of [the Respondent] choosing to go underground or fleeing Canada on his own is significantly lessened.

He testified at this hearing that he does not want to break up his family and will not do anything to jeopardize his ability to keep the family together. He was very emotional describing his displacement -- the displacement endured by his family during the Sri Lankan Civil War. He is well aware that he may be returned to Sri Lanka by way of deportation; meanwhile he is a person waiting a pre-removal risk assessment, he has a wife and child in Canada, and wants to be reunited with them. He has acknowledged that he will cooperate with his removal to Sri Lanka if that is necessary.

In summary, [the Respondent] is no more than a moderate or low flight risk. His circumstances suggest that the likelihood of flight has either been overstated in the past or diminished over time.

In light of this finding, I will now turn to the proposed bondsperson.

There was not a great of new information presented at the detention review. There was the Reasons for the Stay, [the Respondent] gave a bit of testimony, and the bondsperson – proposed bondsperson was once again called to give testimony, Ms. Uthayakumari Vaithiyanathan, U-t-h-a-y-a-k-u-m-a-r-i V-a-i-t-h-i-y-a-n-a-t-h-a-n.

In the stay Reasons the judge referred to the comments of the Federal Court in Canada v B157, and I quote:

> First of all, the member nowhere assesses the capacity of the proposed bondsperson to control the detainee's actions; yet, the whole rationale behind the appointment of a bondsperson is to ensure that the person released will comply with conditions of his release and will appear at the proceedings he may be called to attend. For such a surety to be meaningful the bondsperson must have the capacity and the incentive to control the person being released.

My understanding has always been that in release orders a certain amount of risk has always been tolerable or acceptable; that a decision to release on terms and conditions is on the balance of probabilities. Terms and conditions of release, including the posting of bonds or guarantees were never considered in the past to eliminate all risk that a person will abscond. This is particularly true where the concern is that the person would be unlikely to appear for their

removal. If the person fails to appear for their removal then the Minister is merely deprived of the current ability to remove him but at least the public is not endangered, and I note that is why in the *Sahin* decision the Federal Court highlighted the reasons for detention as being a consideration in release.

In addition, there are no absolutes with respect to bondspersons. It's not an exact science and it's not the role of the bondsperson to be a substitute jailer. No bondsperson can provide an absolute guarantee that his or her efforts plus the bond will eliminate all risk that a person would be likely to appear for a future immigration proceeding and comply with all terms and conditions of release. Often the bondsperson is a family member and it can be said that the family relationship itself creates a kind of moral obligation on the person being released to ensure that their family member is not deprived of their monies. It is harder to find this kind of moral suasion from third-party bondspersons where the bondsperson and the person being released, the relationship is not close but that is not to say that it cannot exist.

Where the flight risk is not significant the need for an ideal bondsperson is also reduced. As [the Respondent] is only a low or moderate flight risk, it's unnecessary for the bondsperson to be able to be a constant monitor of his comings and goings. He does not require a form of house arrest and Ms. Vaithiyanathan is not required to be his substitute jailer. $20,000 is a great deal of money and it is not amount that -- it is not an amount that the bondsperson can afford to lose. Her role is to see that [the Respondent] abides by terms and conditions of his release and appear for his removal if required, such that the bond is not forfeited to the government.

Ms. Vaithiyanathan trusts [the Respondent] and his wife through a relationship that she has developed with them. She is prepared to receive [the Respondent] in her home and then when his wife comes to Ontario, to find them accommodation nearby together as she does not have room for [the Respondent], his wife, and child.

Her incentive is to see that her bond is not lost; it's a strong incentive. She is prepared to advise CBSA if she feels that [the Respondent] is in violation of his terms and conditions.

In light of my finding that [the Respondent] is no more than a moderate or low flight risk, I'm satisfied that he will not do anything to put Ms. Vaithiyanathan's bond at risk. There is a relationship between himself and his wife and the bondsperson and they share a common community. He does not want to be separated from his

> family again and it is only through his compliance that he can hope to keep his family together.
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> I would also note that of the 492 persons aboard the *Sun Sea* only six persons remain in detention. Of those released, I am unaware of a single person who has failed to comply with the terms and conditions of their release. This includes [the Respondent's] brother, who was also found inadmissible for aiding and abetting the *Sun Sea* operation, and who is also ineligible to apply for refugee status, and has only the pre-removal risk assessment as his remaining process that may allow him to remain in Canada.
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> CBSA has already visited Ms. Vaithiyanathan's home, interviewed her, and seen where [the Respondent] will initially stay.
> I am aware of the Minister's keen concerns about [the Respondent's] availability for removal. I do not share the Minister's deep suspicion about his future cooperation. It is always the Minister's prerogative, should the Minister perceive an increased risk, to rearrest him and argue for continued detention.
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> I want to be sensitive to the Minister's concerns so I am prepared to impose terms and conditions that address these concerns but, as well, taking into consideration my evaluation of the risk.
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> So I agree that [the Respondent] should report to CBSA on a weekly basis and that way CBSA is regularly in contact with him and aware of his continued presence -- presence in Canada, I will also impose a term and condition that allows CBSA access to [the Respondent's] residence to confirm his compliance with terms and conditions, and, as well, to impose a term and condition that prohibits his contact with anyone involved in human smuggling.
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> So I am prepared to offer [the Respondent] release on terms and conditions.

[8] This decision was stayed by the Order of Justice Simon Noël on March 8, 2012. Justice Noël identified a number of serious issues concerning the reasonableness of Member Tessler's evidentiary analysis which he felt would benefit from a full and expedited hearing.

[9] On March 14, 2012, the Immigration Division convened its 22nd detention review hearing before Member McPhelan. In the course of submissions, counsel for the Minister told Member McPhelan that the case was complex and high profile. For those reasons, guidance from headquarters in Ottawa was being sought and, in the result, "providing firm timelines for the resolution of [his PRRA application] isn't as easy as it would be with other standard cases". Nevertheless, the first stage of the PRRA was ostensibly being assessed on a priority basis and was estimated by counsel to be completed by the end of April. According to counsel for the Minister, the only other new development was that the Respondent was likely to be criminally charged for participating in a human smuggling operation.

[10] Counsel for the Respondent pointed out to Member McPhelan that, in a related case, the Minster's counsel had been unable to provide a reliable estimate for the completion of the outstanding PRRA. According to counsel, this uncertainty was such that the Respondent's detention had no obvious end in sight.

[11] Member McPhelan rendered a decision on March 21, 2012 and, once again, ordered the Respondent's release from custody on conditions. The conditions included the posting of a $20,000 cash bond by a family acquaintance, a curfew and daily reporting.

[12] Member McPhelan's lengthy decision reviews the Respondent's detention history including the reasons that had supported his ongoing detention for the previous 19 months. In deciding to release the Respondent, Member McPhelan cited in detail the Respondent's detention history and

made several findings concerning the risk that he would not abide by the terms of release. Those findings included the following:

a. The Respondent had initially deceived immigration authorities about his true identity and was held in detention until January 2011 on identity grounds;

b. After January 12, 2012, the Respondent was detained on security grounds because of his suspected involvement with the LTTE;

c. On May 6, 2011, the Minister argued for the Respondent's continued detention because he represented a flight risk and the presiding member agreed. The presiding member found that the Respondent was not a danger to the public. The presiding member also found that the Respondent's assurances were, in the face of his lack of credibility, insufficient to justify a simple release on conditions;

d. On November 16, 2011, the Immigration Division held the Respondent to be inadmissible to Canada because he was one of the principal organizers of the "MV Sun Sea" smuggling operation;

e. At the detention review hearing on December 1, 2011, the Respondent's detention was continued on the basis that he was extremely motivated to avoid removal to Sri Lanka and, therefore, represented a significant flight risk. The presiding member also expressed a concern that the Respondent had refused to sign a travel document necessary to facilitate his eventual removal;

f. At the detention review of December 29, 2011, the Respondent was ordered released on conditions [see reasons at paragraph 6, above]. At this point, the Respondent had signed the necessary travel document. Member Mackie had concerns that the

Respondent continued to be a flight risk but that this release could be justified on the strength of a surety, the posting of a $20,000 cash bond and regular reporting;

g. Member McPhelan was not convinced that the surety's $20,000 cash bond would influence the Respondent's behaviour, but that the presence of his family in Canada and their pursuit of refugee status would motivate his good behaviour. With respect to this influence, Member McPhelan observed:

> …I accept counsel's submissions that you want to be reunited in Canada with your wife and child and their attendance throughout the whole of the last hearing shows the strength of that relationship. I agree with Member Mackie that the presence of your wife and child in Canada tends to reduce your flight risk.

h. The Respondent's Federal Court challenge to the Immigration Division's inadmissibility ruling represented a "very strong inducement" to abide by the terms of release;

i. The Respondent's ongoing PRRA was a very viable option which made it unlikely that he would go underground before its completion;

j. The Respondent's regulatory charges in Thailand were not a significant factor although they indicated a negative "tendency";

k. The Respondent's involvement in the "MV Sun Sea" smuggling operation and his broad use of a fraudulent passport reflected a willingness to contravene Canadian immigration laws and aggravated the risk of flight;

l. The Respondent continued to lack credibility and his assurances of good behaviour could not be relied upon at face value; and

m. It was likely that the Respondent would continue to report until the completion of his PRRA but, in the face of an imminent removal, it was unlikely that he would report.

[13] Member McPhelan then concluded the analysis of the evidence and the law in the following way:

> You have been detained now for 19 months. In Canada, detention is considered to be an extraordinary measure and that alternatives are to be considered. You are a young man with no criminal convictions facing comparatively minor charges in Thailand with no proven LTTE connections. You are not currently frustrating removal by refusing to sign a travel document application. You are not a danger to the public in Canada or a threat to the security of Canada, yet you are still in detention after so much time.
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> In *Sahin* the court said there is a stronger case for continuing long detention when an individual is considered a danger to the public as opposed to merely a flight risk. Regarding the future length of detention, you cannot be removed until the outcome of PRRA is known and CBSA obtains a Sri Lankan travel document. The Minister's representative said the local PRRA coordinator's best estimate was that processing your PRRA application could be concluded by the end of April. He said that the "Sun Sea" cases are complex and high-profile and they are seeking guidance from their headquarters in Ottawa in making these decisions.
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> Later in the hearing, when I asked a question in clarification, the Hearings Officer said the estimate of completing processing by the end of April is a time estimate to determine whether or not you are at risk. He declined to say how long PRRA would take if the case goes for balancing in Ottawa. Counsel disagreed with the Minister's time estimate and submitted that in another "Sun Sea" PRRA case of which he was aware, that at subsequent detention reviews the Minister's representative began giving longer and longer time estimates for the completion of PRRA and finally admitted that they did not know how long the PRRA would take because the matter was being dealt with in Ottawa. I'm also aware of that case.
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> I consider that a time estimate of a decision by the end of April if you are found not to be at risk is optimistic and I have no idea how long processing your application will take if it has to go for balancing. Accordingly, it is very difficult to estimate how long you may remain in detention. There's been no delay or lack of diligence on the part of CBSA in this matter. There is some delay attributable to your lack of cooperation with CBSA's investigation and because you refused to

sign a travel document application at first, there was a one month delay before you were invited to apply for PRRA.

I'm satisfied that there's been a realistic alternative to detention proposed which involves strict conditions, including a curfew, which I intend to set at 8:00 p.m. until 6:00 ,a.m.; a $20,000 cash bond and I'm suggesting weekly reporting because I've looked at where the bondsperson lives and where the person concerned would live in relation to GTEC's offices. It doesn't really seem that daily reporting would be feasible. I believe it's half an hour each way by freeway. With frequent reporting and strict conditions, CBSA can always re-arrest you if they believe there's a significant change in the flight risk.

Regarding the suitability of the bondsperson, I'm not sure why Mr. Justice Noel referred to Regulation 47(2)(b). Originally this person was going to sign a guarantee but after a discussion with counsel that was changed to the paying of a cash deposit. The Regulations draw a distinction between a guarantor and someone who pays a deposit. This person is not a guarantor, she's a bondsperson. Regulation 47(2) refers to the requirements if a guarantee is posted. I do not see that Regulation 47(2)(b) refers to bondspersons or is strictly applicable to a bondsperson.

Nevertheless, I have considered what effect the posting of a cash bond by this person is likely to have on your behaviour. This person is an acquaintance of yours of six months. Unlike Members Mackie and Tessler, I find it hard to see how, for this particular bondsperson, you will feel compelled not to put her money at risk. The bondsperson explained before Member Mackie how she was raising the cash deposit and she has already posted the money. CBSA has had the opportunity to visit her home. Her unchallenged evidence before Member Tessler was that officers attended her home for two hours, asking questions and taking pictures. In spite of this, and with the Minister's resources, the Minister has not demonstrated that she is an unsuitable bondsperson.

She is aware that you are inadmissible for human smuggling and may be required to leave Canada. You will be living in her home. She understands her responsibilities as a bondsperson. She knows that her money is at risk if you do not comply with terms and conditions and I believe she will notify CBSA if you breach those conditions. The posting of a bond by this person doesn't create a situation where you will feel compelled not to put her money at risk but the fact that she has posted her money and will be supervising you provides an extra level of monitoring your compliance with

conditions in addition to what CBSA will be able to provide. Accordingly, I find that Ms. Vaithiyanathan is an acceptable bondsperson and I find that the alternative to detention that's been proposed is a realistic one in all of the circumstances.

Previously you were detained for admissibility hearing. Now the Minister was asking me to keep you detained for removal from Canada. The timelines for detention are now different and, of course, you have spent more time in detention. I consider that I have clear and compelling reasons for coming to a different conclusion than those members who previously kept you detained.

It was only at the October and November 2011 hearings that there was a bondsperson offering to post $10,000 as an alternative to detention for admissibility hearing. This was a different bondsperson than will be posting the bond this time. When the Member rejected the first bondsperson who offered to post $10,000 at the detention review in October, he was detaining you for the conclusion of your admissibility hearing. He wasn't facing a decision as to whether to detain you for removal. He noted that the decision in the admissibility hearing had been reserved for more than a week, that the Member presiding over the admissibility hearing was giving the decision priority because you were detained and he didn't expect detention for the admissibility hearing to be lengthy.

Among the reasons that he rejected that bondsperson were that there was no indication that that bondsperson had ever met you or even spoken to you. That first bondsperson knew your wife but didn't know much about you and your circumstances. He left open the possibility of release if there was a suitable bondsperson. He said at page 6 of the transcript on line 28;

> Now, if in the future it appears that you are facing lengthy further detention and if it could be established that Ms. Krishnamoorthy was well aware of particular circumstances of your case and if she were still willing to post a bond on your behalf and if she could provide some specific indication of how she would be able to influence you and affect your behaviour, then perhaps the outcome would be different But that's a lot of ifs and, with the information before me today, I'm not able to conclude that this is an adequate alternative in the particular circumstances of your case.

> When I detained you for your admissibility hearing on November 3, 2011, the circumstances were similar. I expected that there would be a decision in the admissibility hearing likely within a month and that your detention situation could be re-evaluated after the decision from the admissibility hearing was known.
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> At the December 1, 2011, detention review, for the first time CBSA sought your detention for removal from Canada. You weren't represented by counsel on that day, you did not propose an alternative to detention and not surprisingly, the Member kept you detained. The situation is different now. This new bondsperson has met you in person. She talks to you on the phone regularly. She knows quite a bit about your circumstances. She knows that you've been found to be a people-smuggler.
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> You have been in detention another four months since 1 last saw you in November. The timelines for future detention are less clear now than they were then. If your PRRA requires balancing, the Minister cannot give a time estimate for completion and it's because of those changes circumstances I'm offering you release now when I didn't in November of 2011.

[14] This decision was stayed by my Order of April 5, 2012 issued on consent pending the determination of these applications for judicial review.

Issues

[15] What is the appropriate standard of review?

[16] Do the detention review decisions that are the subject of these applications contain reviewable errors?

Analysis

[17] For the reasons that follow, it is only necessary to deal with the Minister's application challenging the Immigration Division's third order releasing the Respondent from custody, that being the decision made by Member McPhelan on March 21, 2012. Because I have found that decision to be reasonable, the Minister's challenge to the earlier release orders by Members Tessler and Mackie are dismissed as moot.

[18] The Minister contends that Member McPhelan erred by making premature and speculative findings concerning the anticipated future duration of the Respondent's custody and by making unreasonable and perverse findings concerning the adequacy of the alternatives to detention. The Minister also argues that Member McPhelan erred by paying insufficient attention to the findings made in earlier detention reviews that the Respondent lacked credibility, that he represented a significant flight risk and that he could not be controlled by a bondsperson.

[19] On the record before me the above issues are ones of mixed fact and law for which the deferential standard of reasonableness applies: see *Canada (MCI) v B046*, 2011 FC 877 at para 32, 394 FTR 217; *Canada (MCI) v B157*, 2010 FC 1314 at paras 23-25, 379 FTR 251;and *Sittampalam v Canada (MCI)*, 2006 FC 1118 at para 7, 300 FTR 48.[1]

[20] Subsection 58(1) of the *IRPA* directs the Immigration Division to release a foreign national unless it is satisfied, upon taking account of the prescribed factors that the person is a danger to the

[1] I recognize that a speculative finding that is material to a decision may constitute an error of law: see *Canada (MCI) v Li*, 2009 FCA 85, [2010] 2 FCR 433. However, in this case, I do not agree that the Member engaged in a premature or speculative exercise in expressing concern about the reliability of the Minister's estimate to complete the first stage of the Respondent's PRRA.

public or is unlikely to appear for an examination or for removal. Sections 245 and 248 of the *Immigration Refugee Protection Regulations*, SOR 2002-227[*IRP Regulations*], set out the factors that the Immigration Division must consider in the application of subsection 58(1). In the case of section 248, if it is determined that grounds for detention exist, the Immigration Division is nevertheless directed to consider the following additional factors:

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.

[21] Counsel for the Minister argues that Member McPhelan made the same mistake identified by the Federal Court of Appeal in *Canada (MCI) v Li*, see footnote 1 above, by prematurely speculating about the time that was required to complete the first stage of the Respondent's PRRA. According to this submission, Member McPhelan ought to have continued the Respondent's detention until the Minister's time estimate had run its course. This impermissible speculation is said to be evident in the following passages from the decision:

> …Regarding the future length of detention, you cannot be removed until the outcome of the PRRA is known and CBSA obtains a Sri Lankan travel document. The Minister's representative said the local PRRA coordinator's best estimate was that processing your PRRA application could be concluded by the end of April. He said that the "Sun Sea" cases are complex and high-profile and they are seeking guidance from their headquarters in Ottawa in making these decisions.

> Later in the hearing, when I asked a question in clarification, the hearings officer said the estimate of completing processing by the end of April is a time estimate to determine whether or not you are at risk. He declined to say how long PRRA would take if the case goes for balancing in Ottawa. Counsel disagreed with the Minister's time estimate and submitted that another "Sun Sea" PRRA case of which he was aware, that at subsequent detention reviews the Minister's representative began giving longer and longer time estimates for the completion of PRRA and finally admitted that they did not know how long the PRRA would take because the matter was being dealt with in Ottawa. I'm also aware of that case.
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> I consider that a time estimate of a decision by the end of April if you are found not be at risk is optimistic and I have no idea how long processing your application will take if it has to go for balancing. Accordingly it is very difficult to estimate how long you may remain in detention. There's been no delay or lack of diligence on the part of CBSA in this matter. There is some delay attributable to your lack of cooperation with CBSA's investigation and because you refused to sign a travel document application at first, there was a one month delay before you were invited to apply for PRRA.
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> …
>
> You have been in detention another four months since I last saw you in November. The timelines for future detention are less clear now than they were then. If your PRRA requires balancing, the Minister cannot give a time estimate for completion and it's because of those changes in circumstances that I'm offering you release now when I didn't in November of 2011.

[22] I do not agree that this part of the decision amounts to speculation. Member McPhelan noted the Minister's position that the Respondent's PRRA would likely be completed within the following six weeks but found this to be "optimistic". This does not seem to me to be an unreasonable conclusion in the face of the submission by the Minister's counsel that, because of the involvement of "headquarters", firm timelines were not as easy to obtain as in "standard" cases. Indeed, it is surprising to me that in a supposedly high priority case involving a person held in

custody since August 13, 2010, it would take more than three months to complete a perfected PRRA. This Court has previously stated that the hardship of continuing immigration detention is required to be mitigated by the expeditious resolution of outstanding immigration processes: see *Sahin v Canada (MCI)*, [1995] 1 FC 214 at paras 32-33, 85 FTR 99 (TD).

[23] It is not enough for the Minister to say to the Member that a PRRA is underway. It was open to the Minister to provide clear details about the status of the Respondent's PRRA, the precise reasons why it required 3.5 months to complete and why the involvement of headquarters would give rise to delays or uncertainties. The Minister failed to provide that information to Member McPhelan and, in the face of that failure, it is not open to the Minister to complain about speculation. Member McPhelan's concern had an evidentiary basis and it was, therefore, not speculation to say that "it is very difficult to estimate how long you may remain in detention". This uncertainty was a factor weighing in favour of the Respondent's release: see *Charkaoui v Canada (MCI)*, 2007 SCC 9 at para 115, [2007] 1 SCR 350.

[24] It also seems to me that the Minister has placed undue emphasis on the time required to complete the Respondent's PRRA. That issue was of no immediate significance because, as Member McPhelan noted, the Respondent had also challenged the inadmissibility finding by the Immigration Division – a process requiring several months to complete and which was found to be "a very strong inducement" to abide by the terms of release.

[25] The Minister also contends that the decision to release the Respondent was unreasonable because Member McPhelan had found that in the face of imminent deportation the Respondent was

unlikely to report. According to the Minister, this finding is inconsistent with the terms of section 244 of the *IRP Regulations*, which requires the continued detention of such a person.

[26] I do not agree that the passage relied upon by the Minister can be read in isolation from Member McPhelan's remaining analysis. It is at least implicit from the reasons that Member McPhelan's concern about the risk of flight was expressed before the application of the factors set out in section 248 of the *IRP Regulations* including the length of this detention, the time required to complete outstanding proceedings and the existence of alternatives to detention. In other words, Member McPhelan found that the inherent risk of flight was ultimately outweighed by the section 248 factors.

[27] The Minister also complains that Member McPhelan erred by relying on alternative measures to detention that were insufficient to mitigate the Respondent's previously recognized risk of flight. In the face of the Respondent's established lack of credibility, his key role in organizing the "MV Sun Sea" venture and his lack of concern for the interests of the surety, it was perverse to find that anything short of continued detention would assure his presence for removal. According to this argument, Member McPhelan unreasonably departed from the previous findings of the Immigration Division in the absence of clear and compelling reasons: see *Canada (MCI) v Thanabalasingham*, 2004 FCA 4 at paras 11-13, [2004] 3 FCR 572.

[28] Member McPhelan did, however, identify the changes of circumstance that supported the Respondent's release including the following:

a. the Respondent's added time in detention;

b. the unreliability of the Minister's estimates of the time required to complete the Respondent's PRRA;

c. the timeline for the Respondent's future detention was "less clear" than earlier;

d. the doubling of the proposed cash bond;

e. the strength of the new surety as compared to the initial proposed surety; and

f. the fact that the Respondent had signed the required travel document.

[29] The fact that the Minster does not agree that these changes are sufficient to justify the Respondent's release does not mean that it was unreasonable for Member McPhelan to act on them. This argument is no more than an invitation to reweigh the evidence and that is not the role of the Court on judicial review.

[30] I also do not agree that there is an inconsistency in Member McPhelan's finding that the Respondent was unlikely to be concerned about the financial interests of the surety and the finding that the surety was an "acceptable bondsperson". Member McPhelan clearly understood that the value of the surety did not lie exclusively in the realm of moral suasion. In this situation, the surety was well informed about the Respondent and his family and had a strong motivation to supervise the Respondent's behaviour including his compliance with a curfew. It is apparent from Member McPhelan's decision that the Respondent was more likely to be motivated by the presence of his family in Canada and by his desire to pursue his claim to protection to a final conclusion. This is not a situation where the Board failed to carry out any analysis of the suitability of the surety. Although Member McPhelan had concerns about the ability of the surety to influence the

Respondent, this did not mean that the surety could not play a useful role in monitoring his compliance with the terms of release.

[31] It is of some significance that the three recent decisions that are now challenged by the Minister were rendered by three different members of the Immigration Division of which two had at earlier points in the process ordered the Respondent's continued detention. In the case of the most recent order of release, Member McPhelan continued the Respondent's detention on at least three occasions in 2011 before coming to a different view on March 14 of this year. This is neither surprising nor troubling. It indicates an open-minded approach to the serious issue of lengthy immigration detentions of the sort that has occurred here and it is a recognition of the point made by the Supreme Court of Canada in *Charkaoui v Canada (MCI)*, above, that the ongoing process of immigration detention review must be meaningful and take into account the evolving context and circumstances of each case.

[32] Since cases like this one do not remain static, the process requires vigorous re-revaluation of detentions. This is particularly true where, as here, no serious danger to public safety has been identified. To put it simply, as the length of a person's detention increases with no obvious end in sight, so too does the concern for their loss of liberty and the need to consider alternatives. This point was well-expressed by my colleague Justice Yves de Montigny in *Canada (MCI) v B157* (Order, 6 December 2010), Ottawa IMM-6862-10 (FCTD), in the following passage:

> First of all, it seems to me that a person should not be deprived of his or her liberty lightly, especially when that person has already been detained for more than three months. I am mindful of the public interest in ensuring that smuggling operations are not condoned and that people involved in such illegal schemes be treated accordingly. But this concern should not obscure the fact that the

> freedom from imprisonment or detention is certainly one of the most basic human rights and a cornerstone of a constitutional state, and that a person should not be denied the benefit of a release order without a careful examination of the arguments advanced to challenge that order. In the absence of any evidence that a person is a danger for the public, I would think that the longer a person has been detained, the more probing should be the review by this Court of the arguments advanced by the Minister to challenge the release order made by the Immigration Division.

[33] I would add to this that immigration detention is not a form of punishment. It can only be imposed if the statutory conditions for detention have been satisfied. In this case, the relevant issue was whether the Respondent's detention should be continued because he is unlikely to appear for a hearing or for removal. The Respondent's apparent involvement in a sophisticated human smuggling operation and his lack of credibility were relevant factors but so were the presence of his family in Canada, their ongoing attempts to obtain Canadian protection, the strength of the surety and the amount of the bond, the Minister's inability to accurately estimate the time required to complete the Respondent's PRRA, the time needed to resolve his judicial challenge to the inadmissibility ruling and the fact that he had been in detention for 19 months. The Member weighed those factors appropriately and concluded that the conditions for continuing the Respondent's detention were no longer compelling.

[34] The Immigration Division's responsibility over detention reviews is onerous. At its heart lies the difficult task of predicting future behaviour on the basis of past events and conduct. The Immigration Division must also balance the competing interests of a detainee not to be unduly deprived of freedom with the public interest in upholding the law including the effective execution of immigration removals. There is rarely one correct answer to cases like this one. Every person

facing removal from Canada to a place that is less desirable represents, at some level, a flight risk. The Member understood that fact, weighed the available evidence and concluded that the risk was manageable with onerous conditions of release. It is not the role of the Court on judicial review to substitute its judgment for that of the responsible decision-maker and, even if I had that authority, this is not a decision that I would have been inclined to set aside. The decision was amply supported by the evidence and reasonable in the sense that it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: see *Canada (MCI) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339 . The Minister's application is accordingly dismissed.

[35] At the conclusion of argument in this case, counsel for both parties expressed a desire to propose a certified question. The Applicant will have two days from the date of this Judgment to propose a certified question in writing and the Respondent will have two days thereafter to reply.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed. Judgment with respect to a certified question in Court file IMM-2813-12 is reserved pending the receipt of further submissions from the parties, if any.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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