Federal Court  Cour fédérale

Date: 20110217

Docket: IMM-472-11

Citation: 2011 FC 175

Vancouver, British Columbia, February 17, 2011

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B386

Respondent

REASONS FOR ORDER AND ORDER

[1] In a motion dated February 3, 2011, the Applicant seeks the following:

1. An Order pursuant to s. 18.2 of the *Federal Courts Act* upon short notice pursuant to Rule 362(2) of the *Federal Courts Rules*, staying the Order of Immigration Division (ID) Member Tessler dated January 25, 2011, until the application for leave and for judicial review is determined on its merits;

2. An Order pursuant to Rule 55 of the *Federal Courts Rules*, dispensing with the need to perfect the application for leave and for judicial review, granting the application for leave and thereafter abridging the time limits for the parties to file and serve their materials and to expedite the hearing of the judicial review application to be scheduled forthwith;

3. In the alternative, an Order pursuant to Rule 21(2) of the *Federal Courts Immigration and Refugee Protection Rules*, abridging the time limits for the parties to serve and file their application records for the application for leave and for judicial review to enable the Court to determine whether to grant leave, and if leave is granted to hear the matter on an expedited basis.

4. An Order that all documents filed or delivered to the Court in the Applicant's application for leave and for judicial review of the Division member's decision be treated as confidential.

Procedural and Factual Background

[2] On January 25, 2011, Justice Noël ordered a stay, on an interim basis, of the January 25, 2011 Release Order to allow for a full hearing on an expedited basis on the merits of the Applicant's stay motion. The Court considered the motion records and heard the parties on the merits of the stay motion in Vancouver, British Columbia, on February 9, 2011.

[3] The Respondent is the subject of two other judicial review applications before the Court, namely: IMM-6839-10 and IMM-7338-10, challenging release orders of the ID dated November 19, 2010 and December 23, 2010, respectively, issued following detention reviews. In both IMM-6839-10 and IMM-7338-10, stays of the release orders of the ID were granted on December 9, 2010 and January 14, 2010, respectively.

[4] On February 8, 2011, the Chief Justice issued Reasons and an Order dismissing the application for judicial review challenging the November 19, 2010 Release Order (*MCI v. B386*, 2011 FC 140).

[5] At the outset of the hearing of the within motion, counsel for the Respondent moved to have the motion dismissed on the grounds that the Court has no jurisdiction to hear the motion since the January 25, 2010 Release Order for which relief is sought is a nullity.

[6] Subsequent to the hearing, by letter dated February 10, 2011, counsel on behalf of the Applicant sought leave to file supplementary submissions and authorities on the issue of mootness. The Court directed that the parties file their respective written submission on mootness no later than February 14, 2011.

Applicant's Submissions

[7] The Applicant submits this motion should be heard because it concerns the only release order in effect with respect to the Respondent. In a succession of detention review orders made by the ID, each successive order supersedes its antecedent: when the ID first orders the release of a person on terms and conditions and that order is stayed or remains unperfected before a second statutorily mandated hearing, the second hearing and its resulting order supersede the first. Thus, the November 19, 2010 ID order considered on judicial review by Chief Justice Lutfy ceased to have effect when the ID issued a subsequent order on December 23, 2010. The dismissal of that application thus poses no barrier to the hearing of this motion.

[8] The Applicant contends that his position is consistent with the jurisprudence of the Federal Court of Appeal and the Federal Court, and the recently stated view of the ID. Moreover, it is consistent with the fact that circumstances arising between detention review hearings are always

subject to change. Hence, an order to release or detain the Respondent at one point in time is not determinative of a subsequent detention review.

Respondent's Submissions

[9] The Respondent maintains the position adopted at the hearing of the motion; that the Court does not have the jurisdiction to hear the Minister's application for a stay of the release order issued by the Immigration Division on January 24, 2011, on the following two grounds. First, that the principles of *res judicata* and issue estoppel apply because the issue of whether the November 19, 2010 release was moot was decided at a pre-hearing conference held on January 18, 2010, at the direction of the Chief Justice. Second, that the Minister's motion amounts to an abuse of process. The Respondent contends that the Minister is asking the Court to endorse a position that would result in rendering moot every judicial review application of a release order for which a stay has been granted; as such reviews cannot fairly be done within 30 days.

Analysis

[10] I do not agree with the Respondent's submission that the issue of mootness was finally decided by the Chief Justice in the pre-hearing conference or in the judicial review of the Respondent's November 19, 2010 detention review. At paragraph 2 of his decision, the Chief Justice clearly states that he continues to have doubts about mootness. Furthermore, his decision does not address the issue of whether the most recent release order supersedes the earlier release orders. As a result, I reject the Respondent's *res judicata* argument.

[11] I do agree, however, with the Respondent, that much of the case law cited by the Minister is distinguishable on the grounds that it concerned a judicial review of a detention order, and the issue of mootness does not appear to have been fully canvassed. This is the case in *Lai v. Canada (MCI)*, 2001 FCA 222. In these cases, mootness and judicial economy issues arise because the remedy sought is another detention review, which must take place within 30 days in any case. I would add that in these cases, the detainee's liberty interests are not impacted in the same way that they are when the Minister brings an application for judicial review of a release order. If a detained person brings a judicial review application of a detention order, the judicial review proceedings do not extend the applicant's detention, as they would remain in detention until they obtain a release order on a subsequent detention review. The spectre of an abuse of process does not arise in the same way as it has in the Respondent's case. When the Minister brings an application for judicial review of a release order, the detained person would have been released but for the Minister's application for judicial review and for a stay, subject to their ability to meet any terms and conditions imposed. Thus, judicial review proceedings of release orders directly engage the detained person's liberty interests as they have the potential to extend the period of detention.

[12] In *XXXX v. MCI*, 2011 FCA 27, the central reason why the proceedings were found to be moot was the fact that the appellant had already been released from detention. Justice Pelletier's decision in *Canada v. Zhang*, 2001 FCT 521 does concern a release order, but the issue of indefinite detention may not have arisen because Justice Pelletier found that the decision to release was unreasonable. The detained person was not denied the benefit of a positive court decision.

[13] The 30-day delay between detention reviews renders impracticable, even with the best of intentions of all concerned, to have an application for leave and for judicial review of a detention review decision heard and decided before the conduct of another detention review. These are the circumstances which underlie the current matter. Two detention reviews relating to the Respondent were conducted and decided since the stay motion relating to the November 19, 2010 Release Order was granted.

[14] In the context of a mandated detention review every 30 days, the Minister's position would allow the Crown to obtain a prolonged if not indefinite stay of release order(s) through the court process. This is evident in the current proceedings relating to the Respondent. The Minister has filed applications for leave and for judicial review of three successive orders of the ID releasing the Respondent from detention. Accepting the Minister's submission would mean that because the Court's decision upholding the November 19, 2010 Release Order was not rendered prior to the December detention review, it has no effect, since the next release order of the ID is now the operative order. The December release order has also been stayed subject to final determination of the underlying application for leave and for judicial review, or the next detention review. Potentially, this cycle could be unending and the Respondent would never benefit from a positive decision of the Court upholding a release order. This cannot be what was intended by Parliament. The purpose of requiring a detention review every 30 days was to protect the Respondent's liberty interests by affording him a timely review of his detention and clearly not to provide a mechanism to prolong that detention or keep the Respondent in indefinite detention. Yet, this would be the effective result if we accept the Minister's submission. In my view, this would result in nothing short of an abuse of the court process.

[15] It must be remembered that the intervening detention reviews, which also resulted in release orders of the Respondent by the ID, would not have occurred had the Respondent not been detained at the time. The IRPA does not require a review once the Respondent is released from detention. Subject to the conditions of release, the release is indefinite. Consequently, the applications for leave and for judicial review of the subsequent decisions releasing the Respondent were only made possible by reason of his continued detention and would never have been filed had the November 19, 2010 Release Order, now upheld, not been challenged.

[16] The Respondent's case presents a unique fact scenario. If successful on this stay application, the Applicant will have denied the Respondent the benefit of three release orders, and a positive Court decision, through consecutive judicial review proceedings.

[17] Even if the case law cited by the Applicant was not distinguishable and the original release order has been superseded, given the fact scenario at play in this case, I am of the view that application of the cited jurisprudence would be contrary to the interests of justice and result in an abuse of process. The Respondent's liberty interests in this case outweigh the enforcement of this jurisprudence (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 120; *Canada (MCI) v. Parekh*, 2010 FC 692 at para. 24).

[18] The Minister has raised a policy argument in favour of sequentially superseding detention review decisions. The Minister emphasizes that circumstances change, and new evidence is brought forward. I do not find this argument persuasive.

[19] All of the significant information underlying the new grounds for detention raised in the December and January detention reviews was available to the Minister as early as the end of September. The Minister did not raise the Respondent's connections with the smugglers until the December detention review, but the information regarding his connections with smugglers was largely obtained in an interview that took place on September 20, 2010. Similarly, although the Minister did not raise danger to the public until the December detention review, the Respondent's connections with the LTTE were also fully canvassed in the September 20, 2010 interview, and the s. 44 report against the Respondent was written on October 27, 2010. In any event, should new evidence arise, which raises a ground for detention, the Minister has the statutory authority to re-arrest the Respondent (s. 55 of IRPA). This was addressed in *Canada v. Thanabalasingham*, 2004 FCA 4, in which Justice Rothstein stated:

> [25] The Minister is at liberty, at any time, to re-arrest the respondent and secure his detention and continued detention on the basis of adequate evidence. If the Minister is of the opinion that the respondent is a danger to the public, he should take the steps that are available to him under the new Act to secure the respondent's detention.

Conclusion

[20] The relief sought in this motion has become moot by reason of the February 8, 2010 decision of the Chief Justice, dismissing an application for judicial review of the November 19, 2010 Release Order of the Immigration Division releasing the Respondent. The decision essentially maintains that release order and renders it operative.

[21] The motion at bar seeks to stay one of these subsequent release orders pending judicial review of the underlying application challenging the release order. In my view, in the unusual

circumstances surrounding proceedings relating to the Respondent's detention, I find the Release Order challenged in the underlying application to the within motion to be a nullity. To find otherwise would be to give no effect to the Court's decision maintaining the November 19, 2010 Release Order. Consequently, I find the motion and the relief sought therein to be moot.

[22] For the above reasons the Applicant's motion will be dismissed.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-472-11**
STYLE OF CAUSE:	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. B386**
PLACE OF HEARING:	**Vancouver, BC**
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REASONS FOR ORDER AND ORDER:	**BLANCHARD J.**
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APPEARANCES:

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