Federal Court  Cour fédérale

Date: 20100202

Docket: IMM-6267-09

Citation: 2010 FC 112

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

XXXX

Respondent

REASONS FOR JUDGMENT

BARNES J.

[1] This is an application by the Minister of Citizenship and Immigration (Minister) challenging a decision of the Immigration Division of the Immigration and Refugee Board (Board) which, at the conclusion of a detention review hearing held under s. 57 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), ordered the Respondent's release from detention. This application raises, apparently for the first time, a question concerning the scope of the Board's authority under ss. 58(1)(c) of the IRPA. The Respondent is not identified in this proceeding in

accordance with the Order of this Court issued on December 11, 2009 and which prevents the publication of any information which could identify the Respondent or any of his family members.

I. Background

[2] The Respondent is one of the 76 Sri Lankan migrants who recently arrived off the shores of Canada aboard a vessel named the *Ocean Lady*. On October 17, 2009 the *Ocean Lady* was intercepted by Canadian authorities and all of those on board were detained under the IRPA for examination concerning their admissibility to Canada. The Applicant, the Minister, wanted to determine if any of these persons were members of the Liberation Tigers of Tamil Eelam (LTTE), which is a group designated by Canada as a terrorist organization.

[3] The Respondent has been held in detention under the IRPA since his initial arrest on October 17, 2009. On November 5, 2009 the Board convened a detention review hearing to consider the basis for the Respondent's continued detention. The Minister took the position at the hearing that the Respondent's detention continued to be justified under ss. 58(1)(c) of the IRPA and, in particular, because the Minister was taking necessary steps to inquire into a reasonable suspicion that the Respondent was inadmissible to Canada. The Board agreed with the Minister and ordered the Respondent's continued detention.

[4] As required under the IRPA the Board convened a further detention review hearing on December 9, 2009. After reviewing the written record including the transcripts from the cross-examination of several witnesses and hearing arguments from counsel for the parties, the Board

ordered the Respondent's release from custody on conditions. It is from this decision that this application for judicial review arises.

II. The Decision Under Review

[5] In support of the decision to release the Respondent, the Board made a number of evidentiary findings. Specifically, it found the Respondent credible and the Minister's expert witness, Dr. Gunaratna, not credible. The Board also found as a fact that the "Princess Easwary [a.k.a. *Ocean Lady*]… possibly was an LTTE-controlled ship," that there were "perhaps…several" LTTE members on board, and that "traces of several explosives" had been found. The Board also concluded that there was no evidence "at this point… that would tie [the Respondent] to being a past or present LTTE member". These and other findings are set out in the following passages from the Board's decision:

> MEMBER NUPPONEN: Taking into account the investigation to date and where it is intended to go, releasing you still appropriately balances the various interests involved. I will be very clear. If I felt that the objectives in section 3, noted by Ms. Mensink, would be compromised by releasing you, I would not release you.
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> […]
>
> So I fully accept that the test is very low. However, there must be factual elements that can be judicially assessed. In this case there are some issues as to how evidence is and can be assessed. Perhaps what I'll do is I'll go through what I considered to be evidence, credible and trustworthy, which in the most part is not in dispute. That evidence comes from a number of sources, mainly government officials from Canada.
>
> […]
>
> Dr. Gunaratna explained that various governments have access to the Terror Database at his institute in Singapore. He stated that

the government of Sri Lanka has not paid for access to the site. Considering that he assisted a former President in writing his memoirs, it's perhaps not overly astounding that paid membership would not be required for access. What I'm saying is that there is an ongoing close relationship between Dr. Gunaratna and the government of Sri Lanka. Therefore, when the good doctor says that the *Princess Easwary* is an LTTE ship without revealing any sources, one needs to put some thought into that. Who, in fact, are those sources? How credible and trustworthy are those unknown secret sources?

[…]

MEMBER NUPPONEN: In this case, I am asked to accept what comes out of the mouth of Dr. Gunaratna without question. Because of his close relationship with the government of Sri Lanka, there is more than just a slight basic apprehension of bias. Because of the close ties, the bias is real and that calls into question Dr. Gunaratna's impartiality in the matter. For me to accept Dr. Gunaratna's evidence, I would need to have other evidence which would allow me to conclude that yes, his suggestions are correct.

[…]

Dr. Gunaratna would like to have us believe that there are potentially many LTTE members on board the boat. However, he did note that LTTE members, as compared to the population of young Tamils, is a very small proportion, a tiny proportion. From my very careful review of all the evidence in this case, I believe it would be wrong to conclude that there are many LTTE members on the passenger list in this case. I accept that there perhaps are several. At this point, there is nothing whatsoever that would tie you to being a past or present LTTE member. I repeat, absolutely nothing.

[…]

At this juncture, perhaps I'll comment on the nature of the interviews and my assessment of you insofar as those interviews go. My assessment is that you were nothing other than fully open and fully honest. I noted in the hearing that there had been a great deal of questioning about LTTE-type subjects included in the interviews. From the interviews, it's amply clear that you had problems with the LTTE. You don't like the LTTE. On the other hand, you don't particularly like the government of Sri Lanka itself. That's quite

> understandable actually, considering you appear to have lost some family members at the hands of the government possibly. So your ultimate decision to get yourself out of there is quite understandable.
>
> You provided several interviews and Minister's counsel suggested that there were some inconsistencies and problems with credibility. I see no such thing. What I see is you giving particulars in various degrees of specificity at various points. There is nothing wrong with that. That may have been the result of your perception of what the question was and what was being expected of you. For instance, if somebody asks me what did I do in 1976, I could give vastly different answers depending on what I thought that the person was really asking of me. So with the information that you gave, I don't see inconsistencies. You were simply provided [*sic*] the information that you felt needed to be provided at that particular point. There's nothing inconsistent about that.
>
> […]
>
> Even if the *Princess Easwary* was an LTTE ship, at this point I do not believe that that makes a difference, even though at this point, as I've noted, the evidence on that particular fact is very sketchy and unreliable. You've told us that you have no particular like of the LTTE. Your evidence was in the declaration that if you had known that it was an LTTE ship, you wouldn't have got on it. I consider that statement credible and trustworthy, looking at all the evidence, so even if the ship had been or, unknown to you still was an LTTE ship, that doesn't impugn you. You have used your hard-earned money from Qatar, supplemented by money from your family, to get on the boat so that you could get away to safe haven. The current or past ownership of the boat was not an issue to you, other than the fact that if it was an LTTE boat and you had known it, you wouldn't have gotten on it.

[6] The Board then went on to critically assess the necessity and quality of the Minister's ongoing investigation into a concern that the Respondent may be inadmissible to Canada because of a connection to the LTTE. The Board identified a number of steps that the Minister was intending to take to investigate this concern including a further interview, the analysis of an anchor tattoo, more

forensic testing, cross-referencing information obtained from the men on board, interviews with many third-party witnesses, and a collaborative debriefing by the investigative agencies involved. With respect to each of those matters the Board found that nothing of value would be likely to arise to implicate the Respondent. This aspect of the Board's assessment included the following findings and observations:

> You've been interviewed in great detail about the LTTE, as far as I can tell. However, a further interview is arranged. At this point, I need to wonder what else it is that you could provide at this point on this very important issue.
>
> […]
>
> However, Minister's counsel noted that there would be further investigations going on with respect to tattoos of anchors, even though your anchor does not look like an LTTE anchor. One questions whether that type of ongoing investigation is a useful use of an officer's time. That's not for me to say. However, I do need to question whether it is a necessary step. However, if the Minister wishes to pursue that, the Minister can do that.
>
> […]
>
> The Minister, of course, can keep on swabbing the ship until everything has been swabbed; however, considering the very small number of positive hits which have been found today from a very large number of swabs, one once again needs to question what the purpose that really would be and if there are further hits, what then? What is that supposed to mean?
>
> It's clear that you had no knowledge of the possible past history of the ship. Even if the ship had been used for transporting munitions and explosives, you didn't know about it. You don't like the LTTE and you would not have been on the boat if you had known that there possibly was an LTTE connection. You are not one of the two people that had explosive hits on his clothing. My conclusion is that your clothing and other effects have been tested and you're clear, so I really don't see how further swabbing of the boat and possessions for explosives could impact negatively on your situation.

[…]

> A project which appears to be under way is corroborating information from individual travellers on the boat with information received from other travellers on the boat. Minister's counsel told us that that was to determine if there were inconsistencies or other negative things to be found, I suppose. I can see that as constituting a vast project which is, if it's going to be done with any professionalism, will require a vast number of analysts. Again that's up to the Minister, if the Minister wishes to do that. However again, looking at the file in totality, I look at what information you've provided and it is internally consistent and coherent. At this point, there is no information that I can see that would in any meaningful way contradict or indicate as being false anything that you have said.
>
> Minister's counsel noted that part of that current exercise was to provide phone numbers and email addresses to National Headquarters and to get a report back from them. You had noted to your counsel that you did not have a cell phone on the boat. You indicated that the email addresses were basically of other people on the boat who you might wish to keep in contact with after arrival at your destination. I don't see that investigation of those types of things will essentially lead anywhere. However, again at this point, if the Minister wishes to follow through with that, that's up to the Minister.
>
> […]
>
> Minister's counsel indicated that a migration integrity officer will be confirming if the ship was in India as per the Lloyd's report. She indicated that the information from migrants needs to be cross-checked, I believe, with what the Lloyd's record stated. Again, from your particular perspective, I really don't see that that makes any difference here.

[7] The Board concluded its assessment of the evidence in the following way:

> Now, I accept that at the last detention review hearing conducted by Member King, she concluded that there was a reasonable suspicion. She was satisfied that necessary steps were taken. It was quite clear that she intended that the matter needed to progress, and I believe at a good pace. Bearing the legal test in mind, I'll make some very simple

> statements now. Is there a suspicion that you are inadmissible on security grounds? Yes, there's a suspicion. Is there a reasonable suspicion that you are inadmissible on those grounds? Taking into account all of the information and submissions which I have before me today, I conclude that the suspicion is no longer reasonable. I conclude it is a mere suspicion. It is a mere possibility that you are inadmissible on those grounds. People in Canada are not detained on such mere possibilities. In this case, there needs to be a reasonable suspicion and, in my view, that suspicion is absent.
>
> If I am wrong on that, I'm not satisfied that the steps which are being envisaged at this point in fact are necessary. I'm not satisfied that the steps set out as being necessary would lead to a suitable solution in answer to the problem before us. The steps suggested simply note possibilities where information may come out. With the information that I have before me today, the steps to be taken are essentially, at this point, no more than a fishing expedition and are not necessary steps as regarding the statute. So the Minister has not discharged the onus on the Minister.
>
> Detention is to be seen as a last resort. The Minister has had the benefit of having you in detention for upwards of six weeks.
>
> INTERPRETER: I didn't follow that, I'm sorry.
>
> MEMBER NUPPONEN: The Minister has had the benefit of having you in detention for upwards of some six weeks. Continuing your detention at this point would be something in the nature of something other than a last resort, even with the very low test which is involved.

III. Issues

[8] (a) Did the Board err in its interpretation of ss. 58(1)(c) of the IRPA?

(b) Did the Board breach the duty of fairness by preventing the Applicant from making its case with respect to the issue of conditions for the Respondent's release?

IV. Analysis

[9] The question before me is whether the Board erred in law by misconstruing the scope of its authority under ss. 58(1)(c) of the IRPA. This is an issue of law which must be assessed on the standard of review of correctness: see *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409 at para. 16. The Respondent has also raised an issue of procedural fairness which must also be examined on the basis of correctness: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[10] The Minister contends that the Board was wrong in failing to recognize the limitation imposed by ss. 58(1)(c) – a limitation which required the Board to extend deference to the Minister's assessment of the available evidence and to the need for further investigation into the Respondent's admissibility to Canada. Counsel for the Respondent took the contrary view and maintained that the Board was correct in its assessment of the evidence and that the Minister had simply not met the burden of proof required to maintain the Respondent in custody.

[11] I have concluded that the Board erred in law in the exercise of its statutory authority such that the Respondent's release from detention was not justified for the reasons it gave.

[12] A foreign national attempting to enter Canada may be arrested without warrant and detained in custody if the arresting officer has reasonable grounds to suspect that the person is inadmissible

on grounds of security or for violating human or international rights. The continuing detention of such a person is subject to the requirements set out in s. 58 of the IRPA, which states:

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that	58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :
(a) they are a danger to the public;	a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;
(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);	b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);
(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or	c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;
(d) the Minister is of the opinion that the identity of the foreign national has not been, but may	d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais

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.	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.

[13] A plain reading of this provision indicates that the Board is required to extend deference to the Minister in the exercise of its mandate under ss. 58(1)(c). Unlike ss. 58(1)(a) and (b), ss. 58(1)(c) and (d) refer respectively to the Minister's "suspicion" and to the Minister's "opinion".[1] Both of these latter provisions involve situations of ongoing investigation by the Minister into unresolved concerns about security, admissibility or identity.

[14] If it was intended by Parliament that the Board was entitled under ss. 58(1)(c) to carry out a *de novo* assessment of the available evidence and to decide for itself whether a reasonable suspicion exists, no purpose would be served by referring to the Minister. If that was the intent, this section would have been written in a manner consistent with ss. 58(1)(a) and (b) which do provide for an independent assessment of the evidence by the Board.[2]

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[1] The statutory predecessor to ss. 58(1)(d) of the IRPA was examined by Justice Yvon Pinard in *Canada (Minister of Citizenship and Immigration) v. Bains* (1999), 85 A.C.W.S. (3d) 391, [1999] F.C.J. No. 11 (QL) (F.C.T.D.). Justice Pinard overturned the Board's release order on the ground that it had wrongly substituted its own assessment of the evidence for that of the Minister.

[2] This interpretation is consistent with the presumption against surplusage: see *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 at para. 28.

[15] Although the statutory interposition of the Minister was intended to require the Board to pay deference to the Minister's view of the evidence, that is not to say that the Minister is entitled to form a suspicion on the strength of bare intuition or pure speculation. A reasonable suspicion is one which is supported by objectively ascertainable facts that are capable of judicial assessment: see *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 at para. 75.

[16] The question that must be answered by the Board is not whether the evidence relied upon by the Minister is true or compelling, but whether that evidence is reasonably capable of supporting the Minister's suspicion of potential inadmissibility. Evidence which is objectively ascertainable may be circumstantial, as it was in this case, and it may be open to more than one interpretation. It may also be contradicted by other available evidence. But the question that remains is whether the evidence, when considered globally, could support the possibility of inadmissibility: see *R. v. Jacques*, [1996] 3 S.C.R. 312 at 326, [1996] S.C.J. No. 88 (QL) (S.C.C.).

[17] The significant error in the Board's approach to the evidence in this case is that it effectively usurped the Minister's role to weigh the available evidence in formulating a suspicion. The Board apparently thought that it was entitled to conduct an assessment of the credibility of the Respondent and of the Minister's expert witness and to substitute its views of that evidence for those of the Minister. Having then found the Respondent to be credible (notwithstanding several obvious problems with that evidence) and Dr. Gunaratna not to be credible, the Board concluded that no reasonable suspicion remained.

[18] In reviewing the available evidence, the Board lost sight of the proper focus of its enquiry which was to consider whether the Minister was taking necessary steps to verify a reasonable suspicion of inadmissibility. The question was not whether this ship was actually controlled by the LTTE – a fact which the Board acknowledged as a possibility – or whether the Respondent was actually a past or present member of the LTTE, but rather, whether there was sufficient evidence to support the Minister's suspicion that he was inadmissible on security grounds and whether the Minister was still undertaking the necessary investigation in support of that suspicion.

[19] Having found that it was possible that this was an LTTE-controlled ship, that several of those on board were likely LTTE members, and that traces of explosives had been detected, the Board, had it applied the correct test, could not reasonably have concluded that a reasonable suspicion of the Respondent could not have been held by the Minister.

[20] Essentially, the same error was repeated in this case in the Board's treatment of the evidence surrounding the Minister's ongoing investigation. It is not the role of the Board to dictate the steps that are necessary for the conduct of the Minister's ongoing investigation. If those steps had the potential for uncovering evidence to implicate the Respondent, it was wrong for the Board to describe them as a "fishing expedition" or to presume that the Minister's further investigation would be fruitless. It was for the Minister to decide what further investigatory steps were needed. The Board's supervisory jurisdiction on this issue is limited to examining whether the proposed steps have the potential to uncover relevant evidence bearing on the Minister's suspicion and to ensuring that the Minister is conducting an ongoing investigation in good faith.

[21] The Board appears to have held a rather simplistic view of the complexity of an investigation involving the unexpected arrival of 76 migrants from a war zone. While the importance of not unduly detaining such persons cannot be forgotten, the protection of Canadians and Canada's pressing interest in securing its borders are also worthy considerations. The government cannot use ss. 58(1)(c) as the basis for indefinitely detaining foreign nationals, but it is entitled to a reasonable time to complete its admissibility investigation. In cases of mass arrivals from some parts of the world it may well take several months for the Minister to complete an investigation, particularly where the identity of the individuals is in issue. In this case, the Minister's investigation was clearly incomplete and it was wrong for the Board to decide for itself that, in the case of the Respondent, enough had been done or that more should have been done.

[22] For all of these reasons, the Board's decision to release the Respondent from custody must be set aside. Because the Respondent has an ongoing right to the periodic review of his detention it is unnecessary to order a rehearing of this matter which, if he remains in custody, will occur in the ordinary course.

[23] I am not convinced that the Board acted unfairly in its response to the Minister's request to reopen the hearing to deal with the conditions of the Respondent's release. The Board invited representations from counsel for the Minister. It is apparent from the transcript that counsel was not in a position to make those representations in a meaningful way, but the opportunity was given. While the Board could have handled this matter in a better way and seems to have paid limited

attention to the important issue of conditions for release, I am not satisfied that what took place constituted a breach of fairness.

[24] The parties requested an opportunity to propose a certified question. The Respondent will have seven (7) days to do so in a written submission not to exceed five (5) pages in length. The Applicant will then have seven (7) days to reply in writing not to exceed five (5) pages in length. The Judgment of the Court will then issue.

" R. L. Barnes "

Judge

Ottawa, Ontario
February 2, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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