

Federal Court



Cour fédérale

Date: 20160727

Docket: IMM-3026-16

Citation: 2016 FC 880

Vancouver, British Columbia, July 27, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Applicant

and

JACOB DAMIANY LUNYAMILA

Respondent

ORDER AND REASONS

[1] This is a motion on behalf of the applicant, the Minister of Public Safety and Emergency Preparedness [Minister], for an order of the Court staying the order of Member King of the Immigration Division [ID] of the Immigration and Refugee Board, dated July 14, 2016, releasing the respondent, Mr. Jacob Damiany Lunyamila, from detention [the Release order], pending final determination of the underlying leave and judicial review application.

[2] The respondent is not Canadian. He came from Rwanda and claimed refugee status in 1994. From the date of his entry to Canada, he has not had Rwandan documents. Be that as it may, in 1996, he was determined to be a Convention refugee. Between 1999 and 2013, he incurred 54 criminal convictions, while several of the offences involved violence or threats of violence. In 2012, following the issuance of a report pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the ID issued a Deportation order after determining the respondent was inadmissible due to criminality under paragraph 36(2)(a) of the IRPA. In 2014, a Minister's Delegate issued an opinion pursuant to paragraph 115(2)(a) of the IRPA that the respondent posed a danger to the public in Canada and that the risk to the Canadian public outweighed the risk of return and any humanitarian and compassionate consideration [the Danger opinion].

[3] The Canada Border Services Agency [CBSA] is obliged by virtue of section 48 of the IRPA to remove the respondent as soon as possible. From approximately May 2014 to March 2015, CBSA attempted to remove the respondent from Canada and return him to Rwanda, but this proved to be impossible due to the lack of proper travel documents issued by the Rwandan authorities. As the respondent arrived in Canada without documentation, his cooperation in requesting appropriate travel documents from Rwanda immigration authorities was necessary, but not forthcoming.

[4] The respondent has been in immigration detention for immigration purposes most of the time since June 19, 2013 (except a brief release of two days in September 2013 pursuant to a detention review order which the respondent neglected to respect). According to uncontradicted

evidence on record, the respondent is a flight risk and a danger to public safety. However, since January 1, 2016, he has been ordered to be released five times by the ID on the basis, essentially, that detention had become indefinite.

[5] More particularly, at detention review hearings held on January 5, 2016 and on February 2, 2016, ID Member Nupponen ordered the release of the respondent on conditions. On March 1, 2016, ID Member King again ordered the respondent's release from detention on conditions (albeit not as stringent as the conditions imposed by Member Nupponen). The Federal Court ordered all of the aforementioned release decisions stayed pending final determination of the Minister's application to judicially review each of the release orders, as appears from the stay orders that were respectively made by Mr. Justice Shore on January 8, 2016, Mr. Justice Noël on February 16, 2016 and Mr. Justice Harrington on March 1, 2016.

[6] Indeed, on March 3, 2016, following an expedited hearing of the matter, Mr. Justice Harrington granted the judicial review of the January and February 2016 release orders in files IMM-63-16 and IMM-502-16 and issued a stay of proceeding in the third file, IMM-913-16: *Canada (Minister of Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 288 [*Lunyamila*]. The net result was that the respondent was to remain in detention in accordance with the stays of the release orders and until another member of the ID would have conducted a fresh detention hearing and reconsidered the matter in light of the reasons given by the Court in *Lunyamila*. The judicial review proceeding with respect to the March 1, 2016 release decision has been held in abeyance (File IMM-913-16) in view of the stay of proceeding ordered by Justice Harrington which is still outstanding and has not been lifted by the Court.

[7] Indeed, there was a detention review hearing on March 31, 2016 before ID Member McPhalen. For the fourth time, the ID Member ordered the respondent's release from detention. In addition to certain standard terms and conditions, Member McPhalen placed additional conditions on the respondent's release, including that he “complete a statutory declaration stating his willingness to return to Rwanda”, which the respondent refused to sign. Madam Justice Kane ordered a stay of Member McPhalen’s aforementioned release decision on April 20, 2016. The leave application file with respect to the March 31, 2016 release decision (IMM-1378-16) is ready for determination by the Court as the applicant and respondent memoranda have been filed and there has been no reply.

[8] In the meantime, the ID informed counsel that in light of the order staying the March 31, 2016 release order “pending a final determination of the application for judicial review” in file IMM-1378-16, “the ID will not hold the detention review that is currently scheduled for April 25, 2016 and will not hold a hearing until the application for judicial review of the March 31, 2016 decision is finally disposed of”. On June 10, 2016, Justice Kane issued the following oral directions:

My order of April 20, 2016 staying the release Order dated March 31, 2016 does not change the operation of subsection 57(2) of the *Immigration and Refugee Protection Act*. The Order stays only the decision of March 31, 2016 pending the final determination of the application for judicial review of that decision.

The last paragraph of the Order, notes the next scheduled statutory review of his detention on April 28, 2016. The paragraph was not meant to suggest that this, and subsequent statutory reviews not occur.

[9] While those four release orders were stayed by the Court, a statutory review of the continuous detention effectively took place for a fifth time in 2016. However, contrary to the findings earlier made by three other ID Members, on June 6, 2016, ID Member Ko found that the respondent's ongoing detention was not, in fact, indefinite, and accordingly ordered the respondent's continued detention. In her reasons, Member Ko referenced, *inter alia*, new evidence from a linguistic analysis demonstrating that the respondent may be of Tanzanian descent and that additional steps were being taken by the Minister in an effort to confirm his identity, including a forthcoming "on the ground" investigation in Tanzania. She ordered that the next detention review be conducted on July 14, 2016. The decision of Member Ko was not challenged by the respondent, apparently for lack of financial resources.

[10] On July 14, 2016, ID Member King heard the matter and made the Release order whose reasonableness is attacked by the Minister in the herein judicial review proceeding. Member King disagreed with ID Member Ko's decision. Member King reached a similar conclusion as herself and Member Nupponen and McPhalen had arrived at in four of the five previous detention reviews conducted in 2016. She concluded that contrary to section 7 of the *Canadian Charter of Rights and Freedoms* [Charter], and as those rights are expressed in section 248 of *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], the continuous detention of the respondent has become indefinite despite the efforts made by the Minister and the lack of cooperation by the respondent.

[11] Member King thus ordered the respondent's release from detention on what can be termed as "habitual conditions" of release, that is: the respondent must present himself at the

date, time and place that a CBSA officer requires him to appear to comply with any obligation imposed on him under IRPA, in his being removed if necessary; that the respondent is to provide the CBSA prior to release, with his residential address and advise CBSA in person of any change in address before making any change; that he is to report to an officer of the CBSA office within 48 hours of his release; that he report once a week; that if there is a stay by the Court of the Release order and if another detention review hearing is required, it will be held before the ID in August 11, 2016, at 11 o'clock. On the other hand, Member King refused to order the additional conditions of release proposed by the CBSA's representative or previously included in the release orders earlier made in February and March 2016 by Members Nupponen and McPhalen.

[12] The respondent is still in detention today. On July 14, 2016, on an urgent basis, after a review of the materials and letter filed at that time on behalf of the Minister, Mr. Justice Russell granted an interim stay of the Release order and directed that the matter be decided by the undersigned judge after hearing the parties in Vancouver, B.C. on July 26, 2016.

[13] I have considered the totality of the evidence submitted by the two parties, as well as the representations by counsel. The test for the granting of a stay is well known. As set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 and as articulated by the Federal Court of Appeal in *Toth v Canada (Minister of Employment and Immigration)* (1988) 86 NR 302 (FCA), the applicant has to satisfy the Court that all three of the following conditions are met: there is a serious issue raised; the applicant will suffer irreparable harm; the balance of convenience favours the applicant.

[14] I have decided to allow the present motion and grant a stay in this case.

[15] First, I am satisfied that the Minister has established one or more serious issues, being notably:

- i. Member King allegedly made reviewable errors in determining that the respondent's detention had become indefinite and this constituted a breach of section 7 of the *Charter*, and in dismissing the evidence relevant to the factors mentioned in section 248 of the *Regulations* advanced by the Minister and also with respect to the continuous efforts of the Minister to establish the respondent's identity and the new steps taken with the authorities of Tanzania;
- ii. Member King allegedly failed to provide clear and compelling reasons for deviating from the June 16, 2016 decision of Member Ko;
- iii. Considering the danger to the public, Member King allegedly failed to impose reasonable terms and conditions of release, including that the respondent not engage in any activity that results in a conviction under any Act of Parliament, that he complete a statutory declaration and cooperate with the CBSA with respect to the identity information on documents required to obtain travel documents to Rwanda, and that he comply with any reasonable condition with respect to his alcohol problem and directly in relation with the risk of violence and previous criminal convictions.

[16] Secondly, I am also satisfied that the Minister has established with clear and convincing non-speculative evidence that it would constitute irreparable harm to release the respondent at the present time on the minimal terms and conditions currently included in the Release order of July 14, 2016. The irreparable harm arises from the fact that the Minister has presently serious concerns with respect to the danger to the public related to the respondent, and that the minimal conditions of the Release order do not address same.

[17] Thirdly, the balance of convenience rests with the Minister. The respondent shall continue to have his regular detention reviews and the Minister will continue his investigation. If the Minister's concerns are satisfactorily addressed during the future detention review hearing that is supposed to take place before the ID on August 11, 2016, the respondent shall be released from detention considering that the present conditions of release already address the issue of flight risk (e.g. weekly reporting obligations).

[18] Indeed, the respondent is entitled to a detention review every 30 days whether or not a stay of the release order is granted by this Court. In *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCJ No 15, the Federal Court of Appeal provided guidance with respect to this issue. Writing for the Court, Rothstein J.A. (as he then was) noted:

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.

[19] In view of the uncertainty or confusion apparently created by the wording of the stay orders previously made by my colleagues, I have decided to use wording similar to that of Mr. Justice Zinn's stay order in *Canada (Citizenship and Immigration) v B479*, 2010 FC 1227 at para 30. Accordingly, the stay granted today by the Court shall be granted until the earlier of either the final determination of the Minister's application for leave and judicial review or an order of a Member of the ID releasing the respondent from detention following a statutorily required review hearing.

[20] I can only urge the parties to take appropriate steps to have this matter heard on the merits expeditiously, and as it may be proper, decided at the same time and by the same judge who will hear the other judicial review applications that are presently pending and raise a set of common issues, as the case may be.

ORDER

THIS COURT ORDERS that the present motion for a stay by the Minister of Public Safety and Emergency Preparedness [Minister] be allowed and that the Release order made by Immigration Division Member King on July 14, 2016 be stayed until the earlier of either the final determination of the Minister's application for leave and judicial review or an order of a member of the Immigration Division releasing the respondent from detention following a statutorily required review hearing.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3026-16

STYLE OF CAUSE: THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS v JACOB DAMIANY
LUNYAMILA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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**REASONS FOR ORDER AND
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