Federal Court  Cour fédérale

Date: 20161021

Docket: IMM-4317-16

Citation: 2016 FC 1186

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 21, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JING LIN SUN

Respondent

ORDER AND REASONS

[1] On October 14, 2016, my colleague, Justice Denis Gascon, issued an interim stay order, allowing the respondent, Jing Lin Sun, to remain in custody until the applicant, the Minister of Public Safety and Emergency Preparedness, could make an application for stay to allow a decision to be made on the Minister's application for leave and for judicial review. These measures were deemed necessary because a member from the Immigration Division of the

Immigration and Refugee Board of Canada had decided, on October 13, 2016, to release the respondent, who was in custody awaiting deportation from Canada. The application for stay is in support of the application for leave and for judicial review of the decision rendered by a member of the Immigration Division, which ended Ms. Sun's detention on October 13, 2016, imposing strict release conditions.

[2] It is not necessary to go into great detail regarding the facts. The respondent is a Chinese citizen, who is currently 60 years old. She obtained permanent resident status after arriving in Canada in 1997; she was sponsored by her husband. Between 1999 and 2011, she was found guilty of nine criminal charges, ranging from fraud and theft under $5000.00, to cheating at play, public mischief and failure to appear. In 2002, she was found guilty of keeping a common bawdy-house, but it was the judgment rendered in May 2011 that saw her sentenced to four years in prison. The other offences, except that of public mischief, were punished with fines. She has been subject to a deportation order since September 2, 2015.

[3] The respondent was incarcerated in a federal penitentiary until June 10, 2016, having been found guilty on May 9, 2011, of sexual assault and of the offence set out in section 171 of the *Criminal Code*, R.S.C., 1985, c. C-46. Other than the fact that these very serious offences involved a child, the specific details of the offences are not known for the purposes of this decision. This is not about further punishing Ms. Sun for crimes already punished. Incidentally, despite the seriousness of the offences, she was granted conditional release while she appealed her case. This conditional release was granted by the Court of Appeal with no objection from the Crown (May 17, 2011). Ms. Sun began serving her sentence on September 5, 2013, once her appeals were exhausted.

[4] It was upon her release from the penitentiary, on June 10, 2016, that the respondent fell under the jurisdiction of the Minister of Public Safety and Emergency Preparedness, pending her deportation.

[5] As required by law, detention reviews were then held regarding the grounds for her detention. There were five of them: June 13, June 20, July 19, August 16, and September 15.

[6] At the sixth review, on October 13, a new member chose not to continue the respondent's detention. One of the reasons cited had to do with pending remedies. It appears that a decision still needs to be rendered regarding an application for a pre-removal risk assessment (PRRA). Despite the Canada Border Services Agency's insistence to the Minister of Citizenship and Immigration, this decision has yet to be rendered. As of October 14, 2016, we had already been awaiting the decision for more than 60 days. Furthermore, this is a second PRRA application. The first, which received a decision on March 10, 2016, was subject to judicial review, which was granted at the government's request. Once the PRRA decision was nullified, Ms. Sun was granted a period of time to bolster her arguments, and the case has apparently been in the hands of a new officer since August 10, 2016. On October 13, more than 60 days had elapsed, and the respondent had been detained for over four months.

[7] Essentially, the decision rendered on October 13 differs from the others in that the member was satisfied that conditions could be imposed on the respondent that would ensure she would not be a danger to public safety and would not resist the removal order when it became enforceable. Some of the conditions were different from those that had been discussed by the member's colleagues in the previous decisions—particularly the fact that the respondent would

be placed under house arrest at the home of the sponsor, who would have to pay a deposit of $10,000.00. The proposed sponsor was satisfactory to the member and was different from the other sponsors proposed in the past.

[8] It is section 58 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA) that applies in this case. Paragraphs 58(1)(a) and (b), as well as subsection 58(2) read as follows:

Release — Immigration Division	**Mise en liberté par la Section de l'immigration**
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);
. . .	[…]
Detention — Immigration Division	**Mise en détention par la Section de l'immigration**
(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an	(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour

admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.	la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

[9] In order to be granted the requested stay, the Minister must convince this Court, on the balance of probabilities, that the three-prong test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-Macdonald*], and *Toth v. Canada (Minister of Employment and Immigration)*, (1988), 86 NR 302 (F.C.A.), has been satisfied. Thus, if the Minister fails to satisfy any of the elements of this test, the application for stay must be denied. The test requires:

1) That the stay applicant establish that there is a serious question to be tried in the underlying application. Thus, in this case, the Minister is requesting, via judicial review, that the decision to release the respondent be nullified. In order to satisfy the test, the Minister must show that there is a serious question to be tried in this regard;

2) that irreparable harm would ensue if the stay were not granted; and

3) that the balance of inconvenience favours the stay applicant.

[10] The applicant claimed that it was enough that the question was not frivolous or vexatious in order to satisfy the first element of the test. In my opinion, this is not the state of the law. The test is considerably more stringent. Indeed, the case law of this Court is unwavering in stating that if the stay grants the stay applicant the relief that it seeks via judicial review, the fact that the

question is neither frivolous nor vexatious is insufficient. In *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FCR 682 [*Wang*], Justice Pelletier, as he then was, referred to the Supreme Court's decision in *RJR MacDonald*. Paragraph 11 of this decision states:

> [11] In *RJR--MacDonald Inc.*, supra, the Supreme Court of Canada held that, in the context of constitutional issues, motions judges faced with a request for an interlocutory injunction ought not to delve into the merits of the underlying application other than to determine that there is indeed a serious issue to be tried. But the Court went on to identify two circumstances where the Court should address the merits, one of which is where the interlocutory application will effectively decide the underlying application. [...] It is not that the tri-partite test does not apply. It is that the test of serious issue becomes the likelihood of success on the underlying application since granting the relief sought in the interlocutory application will give the applicant the relief sought in the application for judicial review.

[11] The Minister, believing that an issue need only to be neither frivolous nor vexatious, made a short demonstration of the serious issue to be raised before the Court for judicial review. The Minister argued that the member did not sufficiently explain the merit of the sponsor proposed in order to gain conditional release for the respondent. The Minister also stated its belief that the sponsor was not an appropriate choice. Nevertheless, the member placed the respondent under house arrest at the sponsor's residence and required a significant deposit—in the amount of $10,000.00. Ms. Sun cannot leave the residence unless accompanied by the sponsor. The Minister pointed out that Ms. Sun has already been found guilty of a failure to appear, for which she was fined 100.00. However, the respondent obtained an appeal bond, after having been convicted and sentenced to four years in prison, and showed up at the prison after her appeals were unsuccessful. The Minister's disagreement with the member's decision does not mean that the decision does not fall within a range of possible acceptable outcomes.

[12] In addition, the stay applicant refers to the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572 [*Thanabalasingham*]. According to the Minister, the member [TRANSLATION] "was obligated to clearly explain his reasons for departing from his colleagues' decisions" (paragraph 53 of the memorandum of fact and law). In support of this argument, only the end of paragraph 24 of the Federal Court of Appeal's decision was cited:

> . . . 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.

Unfortunately, the first two-thirds of the paragraph was omitted:

> 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.

[13] Based on my reading of the case, the Federal Court of Appeal acknowledges that each review requires a new decision regarding the detention. The Court did not accept the Minister's position "that the findings of previous members should not be interfered with in the absence of new evidence" (paragraph 7). The Court simply determined that the member must consider the previous decisions when rendering a decision.

[14] It appears that new evidence could be a valid basis for departing from a prior decision, but also that "a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision" (paragraph 11).

[15] Clearly, context is everything. I have found no argument anywhere to suggest that the member, on October 13, 2016, did not take the previous decisions into consideration. Furthermore, in my view, he stated his reasons for disagreeing with the previous members. Whether his reasons were sufficiently convincing is debatable. But it cannot be said that the member deviated from the case law of the Federal Court of Appeal.

[16] At this stage, the Minister's burden is therefore not the one it was seeking to discharge. The Minister had to demonstrate the likelihood of success of the underlying application in order for it to be a serious issue. Since the standard of review in this matter is the reasonableness of the decision rendered on October 13, it needed to be demonstrated that, most likely, the decision was unreasonable in that it did not satisfy the criteria of justification, transparency and intelligibility and did not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47). The test is not to determine that the matter at hand is neither frivolous nor vexatious. Far more than this must be demonstrated.

[17] It will, however, be up to the judicial review to address this matter in depth, since I am not convinced that a serious issue, within the meaning of *Wang* and *RJR MacDonald*, is at hand in the present case. There is no reason to dispose of the issue on its merits. This is not the task

before us. It is sufficient to note that the likelihood of success was not satisfied in this particular case.

[18] But there is more. Regarding irreparable harm, the applicant simply states that the respondent's release constitutes irreparable harm, since she represents a danger to the public and may fail to appear for her removal. This is, at best, a circular argument. The standard to which the stay applicant is held is different. In my opinion, it is inappropriate to try to argue, as it appears the applicant is doing, that what really matters in the end is the serious issue. The satisfaction of the other two criteria would follow. In fact, when we look at it, the Crown's position in this case is that the serious issue need only to be neither frivolous nor vexatious and that the irreparable harm results from the fact that this individual was detained in the past due to fears about the danger she might pose to the public and the flight risk.

[19] In *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112, Justice Stratas emphasized that:

> [19] Each branch of the test adds something important. For that reason, none of the branches can be seen as an optional extra. If it were otherwise, the purpose underlying the test would be subverted.
>
> [20] The test is aimed at recognizing that the suspension of a legally binding and effective matter – be it a court judgment, legislation, or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing: *Mylan Pharmaceuticals ULC v. AstraZeneca Inc.*, 2011 FCA 312 (CanLII) at paragraph 5. The binding, mandatory nature of law – which I shall call "legality" – matters. Indeed, it is an aspect of the rule of law, a constitutional principle: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at paragraph 58.
>
> [21] Therefore, a suspension or stay should be granted only after all three branches of the test, with their associated policies, favour a temporary suspension of legality.

[20] What about the irreparable harm? Is it sufficient to invoke it? Stratas J. does not think so. In *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, he said this:

> [15] General assertions cannot establish irreparable harm. They essentially prove nothing:
>
> > It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.
>
> (*Stoney First Nation v. Shotclose*, 2011 FCA 232 (CanLII) at paragraph 48.) Accordingly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, at paragraph 31.
>
> [16] Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": *Glooscap*, supra at paragraph 31. See also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 (CanLII) at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84, at paragraph 17.

In our case, it appears to me that the stay applicant took for granted the dangers that it in fact needed to prove to obtain this stay. Clearly, when imposing the release conditions, on October 13, 2016, the member was satisfied that the respondent did not pose a danger to public safety and would not avoid her removal. Yet the very text of section 58 of the IRPA establishes that the Minister bears the burden of establishing this. This must be done repeatedly. Clearly, it was not done to the satisfaction of the member on October 13, 2016. In *Thanabalasingham*, Rothstein J. wrote in paragraph 8 of his decision:

> [8] Nothing in the new sections 57 and 58 indicates that MacKay J.'s reasoning should not continue to apply to detention review hearings held under the new Act. As adjudicators did under the former Act, the Immigration Division reviews "the reasons for the continued detention" (emphasis added). Nor does the new Act draw any distinction between the first and subsequent detention reviews or impose any requirement for new evidence to be presented. Rather, at each hearing, the member must decide afresh whether continued detention is warranted.

[21] In our case, the existence of irreparable harm was not demonstrated. No sufficiently probative evidence established that a strong likelihood of irreparable harm would inevitably result. The counsel reiterated at the hearing that anything is possible and that the respondent could violate the conditions. Unfortunately, such is not the nature of the test. I in no way doubt that there are circumstances justifying the inference that irreparable harm may result from a release decision. I even admit that a very serious matter—for example, that the member's exercise of discretion is totally arbitrary and that the detainee's past is probative of what she will do in the future—could bolster the argument of irreparable harm or the balance of inconvenience (*Longley v. Canada (Attorney General)*, 2007 ONCA 149). However, in this case, this was not demonstrated to the Court's satisfaction.

[22] I would add that, in the circumstances, the balance of inconvenience clearly favours the respondent, since her interest in being granted conditional quasi-release—not being detained in an institution, but rather held under house arrest—outweighs the Minister's interest in detaining her without having established the irreparable harm or even a serious issue within the meaning of *Wang*. In my opinion, a certain amount of weight must be given to the interests of liberty and, as Rothstein J. noted in *Thanabalasingham*, "detention decisions must be made with section 7 Charter . . . considerations in mind" (paragraph 14).

[23] I would also like to cite the entirety of the last paragraph of the decision in *Thanabalasingham*:

> [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.

[24] The release conditions seem strict to me, and the respondent (and her sponsor as well, for that matter) would be wise to take them very seriously.

ORDER

THIS COURT ORDERS that:

The application for stay of the decision rendered by a member of the Immigration Division on October 13, 2016, granting Ms. Sun conditional release, is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lynne Lazaroff Margarita Tzavelakos	FOR THE APPLICANT
Marie-Pierre Labbé	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Marie-Pierre Labbé Solicitor Ottawa, Ontario	FOR THE RESPONDENT