

**Date: 20080926**

**Docket: IMM-4187-08**

**Citation: 2008 FC 1088**

**Ottawa, Ontario, September 26, 2008**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

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

**Applicant**

**and**

**MICHAEL XANTHOUDAKIS and  
ENELIKO SABINE**

**Respondents**

**REASONS FOR ORDER AND ORDER**

[1] The Minister applies under section 18.2 of the *Federal Courts Act* for an order staying the order of Immigration Division Member Paul Kyba dated September 22, 2008, releasing the Respondents from detention, on terms and conditions as set out in that order. The Minister asks that the order be stayed until a final determination has been made in its application for leave and judicial review of that order.

[2] Mr. Xanthoudakis is an Australian citizen and the owner of a T-shirt business. Mr. Sabine is a citizen of New Zealand and is employed as a mechanical engineer at the Sydney Opera House in Australia.

[3] They travelled together to Canada from Australia on September 18, 2008. They were examined by the Canada Border Services upon entry to Canada in Winnipeg. They stated that they were coming to Canada to go fishing at a forest lodge, but they had no fishing equipment with them. They stated that they were being met by an individual they met through the internet but they did not have his name only his phone number.

[4] The individuals that were at the airport to meet them are members of the Rock Machine, a motorcycle club that was notorious in the late 90's and early part of this decade for its criminal activities and violent dispute with the Hells Angels motorcycle club. The Member found that the Applicants were to be taken from Winnipeg to Gimli, where there was to be a meeting where the Applicants may have become members of the Rock Machine. The Minister alleges that the Respondents wish to form a branch of the Rock Machine in Australia. In their luggage was clothing and badges of the Rock Machine and a list of names of members.

[5] The Respondents were detained at the Airport and, as required by subsection 57(1) of the *Immigration and Refugee Protection Act*, a detention review hearing was

held on September 22, 2008. The Minister sought their continued detention on the grounds that they are a danger to the public and unlikely to report for an admissibility hearing. The Minister relied on subsection 246(b) of the *Immigration and Refugee Protection Regulations*, S.O.R. 2002-227, which provides that a factor to be taken into consideration is assessing whether a person is a danger to the public is “association with a criminal organization within the meaning of subsection 121(2) of the Act”. That subsection defines criminal organization as “an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity ...”

[6] In a decision made immediately following the hearing, Member Paul Kyba came to the conclusion that the Respondents should be released from detention on terms and conditions.

[7] The Minister has applied for leave and judicial review of that decision, and in the interim, seeks a stay of the Respondents’ release.

[8] In order to obtain a stay an applicant must demonstrate: (1) that there is a serious issue to be tried; (2) that the applicant would suffer irreparable harm if no order were granted; and (3) that the balance of convenience favours the granting of the order: *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.).

[9] Upon hearing counsel for the parties and reading the material filed, I am satisfied that the first part of the tripartite test has been met. There is a serious issue as to whether the Member erred and applied the wrong test in asking whether the Respondents were “members” of the Rock Machine, rather than asking whether they were “associated with” the Rock Machine. Further there is a serious issue as to whether, having found that the Rock Machine was a criminal organization some time ago, the Member erred in failing to find that this satisfied the definition of a ‘criminal organization’ set out in subsection 121(2) of the Act.

[10] Given the nature of the serious issue, I find that the danger to the public, if a stay is not granted, is not purely speculative. The danger is real and constitutes irreparable harm.

[11] The balance of convenience lies with the Minister and the public interest in enforcing the provisions of the Act and in protecting the public.

[12] Consequently, Member Paul Kyba’s order dated September 22, 2008, releasing the Respondents from detention will be stayed.

**ORDER**

**THIS COURT ORDERS THAT** the decision of Paul Kyba, dated

September 22, 2008, is stayed until the earlier of:

- (a) the application for leave and for judicial review is determined on its merits; or
- (b) the Respondents' next statutorily required detention review hearing.

"Russel W. Zinn"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4187-08

**STYLE OF CAUSE:** THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS v.  
MICHAEL XANTHOUDAKIS and  
ENELIKO SABINE

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** September 26, 2008

**REASONS FOR ORDER  
AND ORDER:** Zinn J.

**DATED:** September 26, 2008

**APPEARANCES:**

Sharlene M. Telles-Langdon FOR THE APPLICANT

Edward Rice FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

JOHN H. SIMS, Q.C. FOR THE APPLICANT  
Deputy Attorney General of Canada  
Winnipeg, Manitoba

EDWARD RICE FOR THE RESPONDENTS  
Barrister & Solicitor  
Winnipeg, Manitoba