

Federal Court



Cour fédérale

**Date: 20091008**

**Docket: IMM-4914-09**

**Citation: 2009 FC 1022**

**BETWEEN:**

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

**Applicant**

**and**

**SAUL CASTILLO**

**Respondent**

**REASONS FOR ORDER**

Lemieux J.

Introduction

[1] On October 6, 2009, at the urgent request of the Minister of Public Safety and Emergency Preparedness (the Minister), I granted, until October 9, 2009, the date of the respondent's next detention review, a stay of the oral decision dated October 5, 2009, delivered by a member of the Immigration Division (the panel) of the Immigration and Refugee Board (the IRB) ordering the conditional release of Saul Castillo, who had been arrested on October 2, 2009, further to an arrest warrant issued by the Chief of Operations of the Canada Border Services Agency (the Agency). I am of the opinion that there are reasonable grounds to believe that Mr. Castillo is inadmissible on grounds of serious criminality and that he is a danger to public safety and a flight risk before his inadmissibility hearing is held.

[2] The following conditions were imposed by the panel:

- (1) \$5,000.00 bond deposited by his friend, Luis Oltega;
- (2) Must reside at all times with his former spouse, Yolande Vasquez, who has custody of their two children;
- (3) Must advise the Agency of any address change;
- (4) Must attend all meetings called by the Agency;
- (5) Must report to the Agency offices every two weeks; and,
- (6) Must not associate with any person whom Mr. Castillo knows to have a criminal record.

#### Statutory and regulatory framework

[3] Section 58 of the *Immigration and Refugee Protection Act (IRPA)* states the principal conditions of the release of a detainee under this Act. I cite it in the Annex to these reasons.

[4] Regulatory factors can be found in sections 244 to 248 of the *Immigration and Refugee Protection Regulations (IRPR)*, which I cite in the Annex.

#### Panel's decision

[5] As mentioned, the panel rendered its oral decision after the hearing of October 5, 2009. The panel had to review the detention of Mr. Castillo under section 57 of the IRPA, which provides that the Immigration Division must review the reasons for his continued detention within forty-eight hours after the detention begins.

[6] The panel reviewed documents filed by the Minister's representative; the representative also questioned Mr. Castillo and his guarantor, Mr. Oltega. Then, the panel heard each party's submissions.

[7] First, the panel listed the following essential facts, which I summarize:

- Mr. Castillo became a permanent resident of Canada in 1988 in the spousal category after coming here in 1987 in order to claim refugee protection, which was not granted to him because he did not appear at the hearing;
- On February 22, 2006, he was convicted of (a) conspiracy to export cannabis and (b) conspiracy to import cocaine. He was sentenced to six months' imprisonment with nine months in pre-trial detention;
- On March 13, 2006, he was convicted of conspiracy to import cannabis resin; he was sentenced to thirteen months' imprisonment with twenty-three months in pre-trial detention;
- It was submitted in evidence that the 2006 convictions were part of a police investigation called *Projet Bœuf*, which looked into a drug network involving certain gangs and resulted in twelve co-accused being charged, including Mr. Castillo;

- The respondent finished his sentence in September 2007 and the following month he was arrested by the Montréal police. In the vehicle he was driving, the police seized two hundred and fifty tablets of speed, two packets of crack, and marijuana. However, the police did not pursue these charges;
- On January 13, 2008, Mr. Castillo was arrested by the Montréal police for impaired driving. The police discovered a firearm in the vehicle. He was charged with possession of a firearm and of violating an order to not possess a firearm. He was granted conditional release. The police also found close to \$8,000.00 in cash in the vehicle. When Mr. Castillo was arrested in October 2009, his criminal trial for the two offences related to the firearm were pending; and,
- In July 2008, a report under section 44 of the IRPA was prepared further to the 2006 convictions. He was called to a hearing but did not appear following the notices to appear of March 10 and April 28, 2009, which resulted in an arrest warrant being issued on October 2, 2009.

(a) Danger to the public

[8] With the facts summarized, the panel continued its analysis of whether Mr. Castillo represents a danger to the public. The member focused her analysis on the respondent's involvement "in the drug trade . . . in selling drugs, and . . . what I place most weight on is the convictions . . . two convictions for conspiracy, exporting, importing, and importing again, and you have had two relatively lengthy sentences."

[9] The panel added the following:

What concerns me, and I cannot ignore this, because I asked you the question, you spent the entire year in prison in 2006, and a large part of 2007. Apparently, you got out of prison in about September 2007, and you were arrested again in October 2007 with drugs in your vehicle.

Listen, sir, I understand that no action was taken regarding the events of October 2007. However, and without intending to moralize, it is obvious to me that you did not learn much from your time in prison and the convictions entered against you. This is quite serious, when we are talking about drug trafficking, importing drugs, and complicity in all that. Regardless of whether your role was a minor one or a major one, it is quite serious and I do not really need, with all due respect for Mr. Ferdoussi, to have the police here to explain to me whether or not drug trafficking is dangerous to the public; it is my opinion that drug trafficking is dangerous to the Canadian public.  
[Emphasis added.]

[10] However, in its reasons, the panel disregarded Mr. Castillo's involvement in organized crime. The member was of the opinion that she did not have sufficient information.

[11] The panel expressed its finding as follows:

However, on the question of danger to the public, as I explained a moment ago, I am of the opinion that your background, the fact that you have been appearing at the courthouse since 1988, in criminal court, on charges. I cannot place a great deal of weight on charges on which no action was taken. However, as I explained, sir, I cannot simply ignore the fact that you have been here for 20 years and for 20 years you have been appearing in criminal court at one time or another. That is in fact a matter of concern.

So yes, there is a danger to the public. As I explained, in terms of the fact that you are involved in drug trafficking. I understand that perhaps there has been no direct violence, based on the facts presented to me, but I am of the opinion, strongly of the opinion, that

violence is not the only thing that causes a danger to the public. It is also the fact that you are involved, as I said, in a very dangerous trade, if I may use that word. [Emphasis added.]

(b) Flight risk

[12] The panel expressed the following considerations:

- He is faced with a removal measure with seemingly no right to appeal; and,
- He has family here and “it will in fact be somewhat difficult for you to do that” (leave Canada).

[13] Notwithstanding that Mr. Castillo still had remedies, the panel believed that “yes, there is also a flight risk in your case”. The panel balanced this finding with the fact “that the main reason you are before me today is the entire question of your address”, which the panel said “operates in your favour.” The member considered why the respondent did not appear at the hearing. On the one hand, he had not received the notice to appear because he had moved without notifying Citizenship and Immigration Canada and, on the other hand, he had had contact through his counsel with the Agency regarding a possible hearing on his inadmissibility. The member expressed herself as follows:

At this stage, it is the entire question, if I release you today, of whether you are going to appear for the immigration proceeding, and of course for removal, if that is ultimately what has to be done, what has to be enforced.

To decide that, sir, as I have explained, I have assessed all the information I have before me, but also considered whether there is an alternative that might offset the flight risk and the danger that I

believe is in fact present to some degree. I am taking into consideration that you are telling me today that even if you have to leave Canada you are going to comply with this and do what is necessary afterward to come back to Canada eventually, if that door is open to you.

Listen, sir, as I have explained, there are no guarantees in all this. You may perhaps come back some day, but, as I explained, there is no guarantee of that.

(c) The guarantor

[14] According to the member, the guarantor has been the respondent's friend for a few years and wanted to deposit five thousand dollars as a guarantee that Mr. Castillo would comply with the conditions of his release. The panel also mentioned the fact that his spouse (former spouse) appeared at the hearing, but did not testify; Mr. Castillo had lived with her for the last year and she too undertook that he would comply with the conditions of his release.

[15] Without minimizing the fact that the panel believed that Mr. Castillo is "someone who has exhibited disrespect for Canadian law on several occasions" and has a "serious . . . record, in my view", the panel had to determine whether there was a "relatively reasonable alternative to detention at this stage".

[16] Taking into consideration the fact that Mr. Castillo was currently again a permanent resident and his immigration assessment "apart from the last two notices, with which you unfortunately did not comply because of an address problem . . . [given] . . . to the courthouse . . . you have understood that the change of address also has to be given to the Agency", the member believed and found the following:

I think in the circumstances I could make an offer of release, with the alternative that has been presented today. Of course, with certain more stringent conditions that could offset the risks you present.

So listen, sir, first, the condition to be complied with is of course that the sum of \$5,000 must be deposited by your friend Mr. Ramirez Oltega. I consider the sum of \$5,000 to be reasonable in the circumstances. Mr. Ramirez Oltega testified under oath that he in fact has a very high salary, that it is his money that he has saved in the last year, and that he understands that if you fail to comply with even one of the conditions he will lose the money. So in the circumstances I order that the sum of \$5,000 be deposited. [Emphasis added.]

### Analysis and conclusions

[17] In order for the stay requested by the Minister to be granted he must, as clearly indicated in the case law, establish each of the following elements: (1) one or more serious questions; (2) irreparable harm if the stay is not granted and (3) the fact that the balance of inconvenience favours the applicant. For the reasons I expressed orally on October 6, 2009, I am of the opinion that the Minister has met his burden.

[18] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Supreme Court of Canada explained that “serious question” signifies that the error attributed to the panel is not frivolous or vexatious, meaning that the question raised has no merit. According to Justice Sopinka and Justice Cory, a prolonged examination of the merits at this stage is neither necessary nor desirable.

[19] The Minister’s counsel maintains that the member admitted that the respondent was both a danger to the public and a flight risk, but nevertheless ordered his conditional release. Mr. Castillo’s



counsel claims that the panel did not make such findings because the member was of the opinion that the respondent represented “a certain danger to the public.”

[20] I agree with the Minister on this point. In reading the member’s words in context and in assessing them as a whole, I believe that the panel found that Mr. Castillo was a danger to the public and represented a flight risk. During the hearing, Mr. Castillo’s representative acknowledged that there was some uncertainty on this point.

[21] In my opinion, if he was right, there is a serious question by reason of the fact the panel did not provide adequate explanations of its reasons. The recent Supreme Court of Canada case law is very clear on this point. See *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paragraph 63; and *Her Majesty the Queen v. H.S.B.*, 2008 SCC 52, at paragraph 2.

[22] Therefore, I believe that the Minister’s counsel raised the following serious questions in this case:

- (1) Did the panel respect the instructions in *Canada (Minister of Citizenship and Immigration) v. Singh*, 2001 FCT 954, recently confirmed in *Ministre de la Sécurité publique et de la protection civile et al v. Jose Guiovanny Torres Vargas et al*, 2009 CF 1005?
- (2) Did the panel properly assess the requirement in paragraph 47(2)(b) of the IRPR that the guarantor must be able to ensure that Mr. Castillo will comply with the conditions

imposed on his release? The panel did not analyze this ability for the guarantor or the respondent's former spouse.

(3) Are his release conditions reasonable under the circumstances?

[23] In the case at bar, the existence of irreparable harm was demonstrated by the very fact that if the stay were not granted, Mr. Castillo would be released, even though the panel considered him a danger to the public and did not analyze the ability of his guarantor (or former spouse) to control his actions. The Minister has a duty to protect Canadian society. One of the IRPA's purposes is to maintain the security of Canadians (see paragraph 3(1)(h) of the IRPA).

[24] Since it was demonstrated that there is one or more serious questions and that irreparable harm would result if the stay were not granted, it logically follows that the balance of inconvenience favours the Minister. I would add another factor, public interest, which adds significant weight to this balance.

[25] For these reasons, the stay was granted.

“François Lemieux”

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Judge

Ottawa, Ontario  
October 8, 2009

Certified true translation  
Janine Anderson, Translator

ANNEX A

*Immigration and Refugee Protection Act, 2001, c. 27*

*Loi sur l'immigration et la protection des réfugiés, 2001, ch. 27*

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);

(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 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.

d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais 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.

## Detention — Immigration Division

(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 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.

### Conditions

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

## *Immigration and Refugee Protection Regulations, SOR/2002-227*

### Factors to be considered

244. For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person

(a) is 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) of the Act;

(b) is a danger to the public; or

## Mise en détention par la Section de l'immigration

(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 la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

### Conditions

(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

## *Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227*

### Critères

244. Pour l'application de la section 6 de la partie 1 de la Loi, les critères prévus à la présente partie doivent être pris en compte lors de l'appréciation :

a) du risque que l'intéressé se soustrairait vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi;

b) du danger que constitue l'intéressé pour la sécurité publique;

(c) is a foreign national whose identity has not been established.

c) de la question de savoir si l'intéressé est un étranger dont l'identité n'a pas été prouvée.

Flight risk

Risque de fuite

245. For the purposes of paragraph 244(a), the factors are the following:

245. Pour l'application de l'alinéa 244a), les critères sont les suivants :

(a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;

a) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;

(b) voluntary compliance with any previous departure order;

b) le fait de s'être conformé librement à une mesure d'interdiction de séjour;

(c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;

c) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;

(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

d) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;

(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

e) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

f) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244a) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;

(g) the existence of strong ties to a community in Canada.

g) l'appartenance réelle à une collectivité au Canada.

Danger to the public

246. For the purposes of paragraph 244(b), the factors are the following:

(a) the fact that the person constitutes, in the opinion of the Minister, a danger to the public in Canada or a danger to the security of Canada under paragraph 101(2)(b), subparagraph 113(d)(i) or (ii) or paragraph 115(2)(a) or (b) of the Act;

(b) association with a criminal organization within the meaning of subsection 121(2) of the Act;

(c) engagement in people smuggling or trafficking in persons;

(d) conviction in Canada under an Act of Parliament for

(i) a sexual offence, or

(ii) an offence involving violence or weapons;

(e) conviction for an offence in Canada under any of the following provisions of the Controlled Drugs and Substances Act, namely,

(i) section 5 (trafficking),

(ii) section 6 (importing and exporting), and

(iii) section 7 (production);

(f) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament for

Danger pour le public

246. Pour l'application de l'alinéa 244b), les critères sont les suivants :a) le fait que l'intéressé constitue, de l'avis du ministre aux termes de l'alinéa 101(2)b), des sous-alinéas 113d)(i) ou (ii) ou des alinéas 115(2)a) ou b) de la Loi, un danger pour le public au Canada ou pour la sécurité du Canada;

b) l'association à une organisation criminelle au sens du paragraphe 121(2) de la Loi;

c) le fait de s'être livré au passage de clandestins ou le trafic de personnes;

d) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des infractions suivantes :

(i) infraction d'ordre sexuel,

(ii) infraction commise avec violence ou des armes;

e) la déclaration de culpabilité au Canada quant à une infraction visée à l'une des dispositions suivantes de la Loi réglementant certaines drogues et autres substances:

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

(iii) article 7 (production);

f) la déclaration de culpabilité ou la mise en accusation à l'étranger, quant à l'une des infractions suivantes qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale :

(i) a sexual offence, or

(ii) an offence involving violence or weapons; and

(g) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under any of the following provisions of the Controlled Drugs and Substances Act, namely,

(i) section 5 (trafficking),

(ii) section 6 (importing and exporting), and

(iii) section 7 (production).

#### Identity not established

247. (1) For the purposes of paragraph 244(c), the factors are the following:

(a) the foreign national's cooperation in providing evidence of their identity, or assisting the Department in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father or providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;

(b) in the case of a foreign national who makes a claim for refugee protection, the possibility of obtaining identity documents or information without divulging personal information to government officials of their country of nationality or, if there is no country of nationality, their country of former habitual residence;

(i) infraction d'ordre sexuel,

(ii) infraction commise avec violence ou des armes;

g) la déclaration de culpabilité ou la mise en accusation à l'étranger de l'une des infractions suivantes qui, si elle était commise au Canada, constituerait une infraction à l'une des dispositions suivantes de la Loi réglementant certaines drogues et autres substances:

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

(iii) article 7 (production).

#### Preuve de l'identité de l'étranger

247. (1) Pour l'application de l'alinéa 244c), les critères sont les suivants :

a) la collaboration de l'intéressé, à savoir s'il a justifié de son identité, s'il a aidé le ministère à obtenir cette justification, s'il a communiqué des renseignements détaillés sur son itinéraire, sur ses date et lieu de naissance et sur le nom de ses parents ou s'il a rempli une demande de titres de voyage;

b) dans le cas du demandeur d'asile, la possibilité d'obtenir des renseignements sur son identité sans avoir à divulguer de renseignements personnels aux représentants du gouvernement du pays dont il a la nationalité ou, s'il n'a pas de nationalité, du pays de sa résidence habituelle;

c) la destruction, par l'étranger, de ses

(c) the destruction of identity or travel documents, or the use of fraudulent documents in order to mislead the Department, and the circumstances under which the foreign national acted;

(d) the provision of contradictory information with respect to identity at the time of an application to the Department; and

(e) the existence of documents that contradict information provided by the foreign national with respect to their identity.

#### Non-application to minors

(2) Consideration of the factors set out in paragraph (1)(a) shall not have an adverse impact with respect to minor children referred to in section 249.

SOR/2004-167, s. 65(E).

#### Other factors

248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:

(a) the reason for detention;

(b) the length of time in detention;

(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;

(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and

pièces d'identité ou de ses titres de voyage, ou l'utilisation de documents frauduleux afin de tromper le ministère, et les circonstances dans lesquelles il s'est livré à ces agissements;

d) la communication, par l'étranger, de renseignements contradictoires quant à son identité pendant le traitement d'une demande le concernant par le ministère;

e) l'existence de documents contredisant les renseignements fournis par l'étranger quant à son identité.

#### Non-application aux mineurs

(2) La prise en considération du critère prévu à l'alinéa (1)a ne peut avoir d'incidence défavorable à l'égard des mineurs visés à l'article 249.

DORS/2004-167, art. 65(A).

#### Autres critères

248. S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :

a) le motif de la détention;

b) la durée de la détention;

c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;

d) les retards inexplicables ou le manque inexplicable de diligence de la part du ministère ou de l'intéressé;



(e) the existence of alternatives to detention.

e) l'existence de solutions de rechange à la détention.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-4914-09

**STYLE OF CAUSE:** THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS v. SAUL CASTILLO

**PLACE OF  
CONFERENCE CALL:** Ottawa, Ontario; Montréal, Quebec

**DATE OF  
CONFERENCE CALL:** October 6, 2009

**REASONS FOR ORDER:** LEMIEUX J.

**DATED:** October 8, 2009

**APPEARANCES:**

Zoé Richard FOR THE APPLICANT

Waïce Ferdoussi FOR THE RESPONDENT

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