Federal Court Cour fédérale

Date: 20101105

Docket: IMM-5427-10

Citation: 2010 FC 1095

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

XXXX

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] This is an application for judicial review by the Minister of Citizenship and Immigration (Minister) challenging a decision of the member of the Immigration and Refugee Board (Member) made September 16, 2010 in which he ordered the release of the Respondent from detention upon terms.

[2] The Member found that the Minister had not made "reasonable efforts" to determine the Respondent's identity. This is, apparently, the Court's first consideration of s. 58(1)*(d)* of the *Immigration and Refugee Protection Act* (IRPA). Justice Barnes' decision in *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 112 (a different respondent) dealt with s. 58(1)*(c)*.

[3] The Respondent's identity has been protected by Court Order.

II. FACTUAL BACKGROUND

[4] The Respondent arrived in Canada on August 13, 2010 aboard the *MV Sun Sea* along with 491 others, all of whom were initially detained for purposes of identification and admissibility. She was accompanied by three children whom she claims are hers.

[5] The Respondent had no identification documents for either herself or the children. She claimed that her passport was taken away by the "agent" who had organized the voyage and that her other identification documents had been left in Sri Lanka.

[6] The Respondent has had three detention hearings. The 48-hour review was held August 18, 2010; the 7-day review on August 25, 2010; and the 30-day review on September 16, 2010.

[7] The first two detention reviews resulted in continued detention because the Respondent's identity had not been established. At the conclusion of the September 16th hearing, the Member concluded that the Minister had not made "reasonable efforts" to establish the Respondent's identity

and released her on terms which included reporting to Canada Border Services Agency (CBSA) once a month.

[8] The decision under review was made by a Board member whose name is strikingly similar to this judge but is not in any way connected – Member Michael McPhalen.

[9] The Member made a number of comments critical of the Minister's efforts. These include:

(a) that the Respondent had reasonably cooperated with the Minister/CBSA.

(b) that despite filling out a form giving the mother's address and being interviewed twice, CBSA only learned of the address on September 8 and as of the hearing date (September 16) had not written a letter to the mother. The mother is alleged to have the Respondent's identity documents.

(c) that CBSA did try to contact the Respondent's brother in Sri Lanka (the one with the telephone) without success, possibly because he was moving to France.

(d) that, while the Respondent had no contact information for another brother in Toronto, CBSA had made no effort to contact that brother.

(e) that the Minister's counsel could not inform the Member when UNHCR had been contacted (presumably to confirm that the Respondent had been in a refugee camp as she claimed).

[10] The Member, having concluded that the Minister had not taken reasonable steps to determine the Respondent's identity, then ordered her release on the following terms:

(a) to report to CBSA on the second Monday of each month;

(b) to report changes of address in person; and

(c) to cooperate with CBSA in obtaining identity documents.

[11] The Member did acknowledge the strained circumstances under which the Minister was operating dealing with a sudden and large influx of unknown immigrants. He also recognized the particular challenge posed by the Respondent's complete absence of identity documents.

[12] Despite the Member's decision, the Respondent has not been released. Justice Bedard stayed the release until this judicial review was determined.

III. ISSUES

[13] The Member's decision was made pursuant to s. 58 of IRPA which reads:

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	*c*) le ministre prend les

necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or

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.**

(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.

(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.

(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

(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

payment of a deposit or the posting of a guarantee for compliance with the conditions.	remise d'une garantie d'exécution.

[Emphasis added]

[14] In considering whether to order release, the Board is required to consider s. 247 of the *Immigration and Refugee Protection Regulations*:

247. (1) For the purposes of paragraph 244(*c*), the factors are the following:	**247.** (1) Pour l'application de l'alinéa 244*c*), les critères sont les suivants :
(*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;	*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*) 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;	*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*) the destruction of identity or travel documents, or the use of fraudulent documents in	*c*) la destruction, par l'étranger, de ses pièces d'identité ou de ses titres de

order to mislead the Department, and the circumstances under which the foreign national acted;	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*) the provision of contradictory information with respect to identity at the time of an application to the Department; and	*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*) the existence of documents that contradict information provided by the foreign national with respect to their identity.	*e*) l'existence de documents contredisant les renseignements fournis par l'étranger quant à son identité.
(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.	(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.

[15] There are three issues raised in this judicial review:

(1) Did the Member err in assessing whether the Minister was "making reasonable efforts" pursuant to s. 58(1)*(d)* to establish identity?

(2) Did the Member err in failing to consider other grounds for detention?

(3) Did the Member err in imposing the terms and conditions of release?

IV. ANALYSIS

A. *Preliminary Matters*

[16] There was some issue raised by the Respondent that the Applicant's Memorandum was interspersed with references to evidence that was not before the Member. There has been no clear identification of all of this so-called evidence but two matters stand out.

[17] The first is that the Minister had in fact written to the Respondent's mother at least a day before the hearing and seven days after becoming aware of her address. The Minister's counsel was not aware of this circumstance at the time of the September 16th hearing.

[18] It is obviously something the Member cannot be criticized for not considering. However, it goes directly to a critical factor that the Member considered showed that the Minister had not made "reasonable efforts". It also shows the "rough and ready" nature of the detention hearings and the real-time atmosphere in which all are working. It speaks to the need for caution in criticizing the Minister's officials and in concluding that reasonable efforts have not been made.

[19] The second is that the Minister had in fact contacted UNHCR to determine if the Respondent had been at a camp which would assist in establishing her identity. That apparently is the usual protocol except that the Respondent was not in a UNHCR camp – a matter which was not known to the Minister.

[20] This evidence is important to the rationale underlying the Member's decision and ought, given the unique circumstances of these detention reviews, be admitted for the reasons discussed in paragraph 18.

B. *Standard of Review*

[21] The Applicant has described the issues in this matter as questions of law and jurisdiction. To the extent that the issues relate to the legal test and the constituent elements thereof, the Applicant is correct in arguing that the standard of review is correctness (*Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 112 (*Ocean Lady*); *Canada (Minister of Citizenship and Immigration) v. Singh*, 2004 FC 1634).

[22] However, there are elements of this matter of interpretation and application of s. 58(1)*(d)* which involved mixed law and fact. That analysis is subject to the reasonableness standard of review (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

C. *Issue 1: Error in Interpretation and Application of S. 58(1)*(d)

[23] Identity is a virtual *sine qua non* of immigration law. Identity is the springboard for such issues as admissibility, eligibility for refugee status and determination of the need for protection. It is also critical to an assessment of potential danger to the public, threat to security and flight risk, to name but a few of the issues for which identity is an essential component.

[24] The Member erred in not recognizing that the obligation to establish one's identity rests first and always with the claimant. The Minister's obligation is to make reasonable efforts. Neither has the complete onus of proof, neither can sit back and do nothing.

[25] The Court is advised that even though the Respondent was in detention, she had available to her the capacity to use the mail, to make long distance telephone calls and to engage the assistance of the Tamil-Canadian community in contacting relatives and friends. She had counsel available as well.

[26] In assessing the Minister's efforts, the Member paid scant, if any, attention to efforts of the Respondent other than to note that she was cooperating with the CBSA by listing her mother and brothers as people to contact.

[27] The determination of "reasonable efforts" is conditioned to some extent by the efforts of a claimant. This is over and above the obligation to not obstruct and to cooperate. It requires the Member to make a qualitative evaluation of the efforts on the part of both parties.

[28] In *Ocean Lady*, above, Justice Barnes determined that in considering "necessary steps" under s. 58(1)*(c)*, one examines whether there is a rational connection between the steps being taken and the purposes of the inquiry as to admissibility (the potential to uncover relevant evidence) and whether the Minister is acting in good faith.

[29] Those two criteria are an appropriate starting point for s. 58(1)*(d)* as well. The term "reasonable steps" in s. 58(1)*(d)* connotes a broader range of actions than "necessary steps" but the analytical framework is essentially the same.

[30] In the present case the Member did not address whether what the Minister had done, was doing and intended to do was rationally connected to the purpose of the provision – that the steps had the potential to uncover evidence.

[31] More appropriate than the Applicant's submission that the Member transferred the onus of proving identity on to the Minister, the Member in reality failed to consider relevant issues and evidence. Under s. 58 both parties have obligations and the fulfillment of one party's obligations, in this case the Minister's, is influenced by the other party's conduct. The Member failed to consider this reciprocal and reciprocating legal obligation.

[32] In addition to not considering relevant issues in the "reasonable efforts" analysis, the Member focused on what he thought should have been done rather than on the "reasonableness" of what had been done and was intended to be done in the future. Courts of Appeal remind trial courts that in determining whether a decision under review is reasonable, courts are not to substitute its view of what the Court would do for a consideration of whether what was done was reasonable. The Member made that type of error.

[33] The Member also made unreasonable and plainly incorrect findings. The finding regarding the failure to contact the Respondent's mother, through no fault of the Respondent, was factually wrong.

[34] In examining the Minister's efforts, the Member, while acknowledging the absence of any identification documents, did not consider the Respondent's actions and their impact on the Applicant's efforts.

[35] The Respondent, knowing she was coming to Canada where she had a brother, provided no contact information or location other than saying that he was in Toronto. She had nothing but an area address for her mother. Further, she suggested to CBSA that the most useful contact was her brother in Sri Lanka who had a telephone. After repeated attempts by CBSA to contact him, she suggested that he might have finally completed his move to France; an eventuality of which she was aware but had not disclosed.

[36] It was not reasonable in these circumstances where the Respondent directs CBSA as to the likely source of her identity documents to fail to consider the impact that her direction had on the Minister's officials and the focus of their efforts.

D. *Issue 2: Failure to Consider Other Grounds*

[37] The Applicant has argued that the Member failed to consider other grounds for detention. These include the potential flight risk, the potential of coercion imposed by the smugglers, and the potential of the Respondent to go "underground" and disappear.

[38] These were not argued before the Member and therefore the Member's reasons cannot be criticized for failure to consider these other factors.

[39] They are, however, factors which might more properly be considered in the terms and conditions of release.

E. *Issue 3: Terms and Conditions of Release*

[40] The issue of terms and conditions of release, assuming release itself is sustainable in law (which it is not) must be assessed on a reasonableness standard with deference owed to the Member who has a broad discretion in this area.

[41] The evidence in this case is that identity is still properly in doubt; that the ship and its human cargo were part of human smuggling/organized crime activity; that the Respondent's brother in Sri Lanka/France had the resources to pay for the Respondent's voyage; that the Respondent had no documents for either herself or the accompanying children claimed to be hers.

[42] The Member accepted that the Respondent's release was a close call, done with considerable reluctance; however, the Member permitted the release on the most minimal of terms and conditions.

[43] In assessing the reasonableness of a decision, it is appropriate to consider whether the decision is balanced in view of all of the facts and whether the terms and conditions were a

disproportionate response to the frailties of the Respondent's position and the risks inherent in releasing an unidentified individual.

[44] The Member erred in not considering these competing factors and therefore reached an unreasonable conclusion. The release of an unidentified individual and three children with no more than a once a month reporting requirement is not within the range of acceptable outcomes in these circumstances.

V. CONCLUSION

[45] In granting this judicial review, the Court is mindful of the hot house environment in which all parties including Board members operate, the strained resources and the strains on people and their patience.

[46] However, for all of the above reasons, this judicial review will be granted.

[47] Prior to issuing a formal Order, the parties shall have seven (7) days to make their submissions on whether there is a question(s) which ought to be certified.

"Michael L. Phelan"
Judge

Ottawa, Ontario
November 5, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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