Federal Court  Cour fédérale

Date: 20140331

Docket: IMM-1373-14

Citation: 2014 FC 308

Ottawa, Ontario, March 31, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

GIGA ODOSASHVILI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for leave and judicial review was expedited because Mr. Odosashvili's next detention review by the Immigration Division [ID] is scheduled for Tuesday April 1, 2014. He seeks review of the last decision of the ID made on March 3, 2014 – the 7-day detention review. That decision continued his detention under paragraphs 58(1)(a) and (b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] Leave will be granted and this application for judicial review will be allowed. My reasons for so ordering are briefly set out below.

[3] Mr. Odosashvili, a citizen of the Republic of Georgia, is a permanent resident of Canada. He has recently been charged with the following offences:

(i) December 12, 2013: Charged by the York Regional Police with two counts of break and enter, possession of property obtained by crime over $5000, and obstructing a peace officer; and

(ii) February 13, 2014: Charged by the Toronto Police Service with two counts of break and enter.

[4] Mr. Odosashvili appeared on these charges and was released on conditions and bail. He was detained by the Minister of Public Safety and Emergency Preparedness on February 21, 2014. It is alleged that Mr. Odosashvili is inadmissible on grounds of organized criminality pursuant to subsection 37(1) of *IRPA*, is a danger to the public, and is unlikely to appear for an admissibility hearing.

[5] Mr. Odosashvili's 48 hour detention review was held on February 24, 2014; he was not represented by counsel. On the basis of the material and representations made by Minister's Counsel, Member Henrique ordered his continued detention. She found, on the balance of probabilities, that Mr. Odosashvili was not likely to appear for an admissibility hearing and was a danger to the public. With respect to the allegation that he is a member of a criminal organization, Member Henrique stated as follows:

> Since prior to you being landed in Canada it would appear that you engaged in criminal activity and although there have been no convictions registered against you, it does not take away from the overwhelming documentary evidence that I have before me in Exhibit DR-1 that points directly to your involvement in organized criminality.
>
> A lot of time and resources have been spent by various joint police forces as well as the Canada Border Services Agency.
>
> And as a result of this work the evidence before me does link you to the two individuals that you named that you know who are involved in organized criminality. (emphasis added)

[6] Exhibit DR-1, the Minister's exhibit, which was relied on by Member Henrique plays a prominent role in the subsequent 7-day review presided over by Member Kohler.

[7] The initial submissions of the Minister's counsel at the 7-day review were brief. He referred to the previous decision of Member Henrique and stated that she had noted:

> There was overwhelming documentary evidence in Exhibit DR-1 which points to involvement in organized criminality … (emphasis added)

[8] Mr. Odosashvili's counsel then made submissions on behalf of his client. One of his key submissions was that the evidence offered by the Minister showed only that Mr. Odosashvili was suspected of being associated with suspected members of the Georgian Mafia, but there was nothing showing that that he was associated with a criminal organization as required under paragraph 246(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[9] Minister's counsel than made lengthy reply submissions following which counsel for Mr. Odosashvili requested an opportunity to address what he said were "glaring misrepresentation [*sic*] on the evidence." The Member refused to hear him, subsequently stating for the record: "I did not find that I am required any further information and I was prepared to render my decision at the time."

[10] Mr. Odosashvili raises two issues:

(i) Whether there was a breach of procedural fairness and natural justice because the Member refused counsel an opportunity to address the alleged misrepresentations made by the Minister's counsel in reply; and

(ii) Whether the Member's decision is unreasonable in that the proper test is whether the Applicant has an association with a criminal organization, not whether he is associated with alleged members of a criminal organization.

[11] The real issue, in my view, is whether Mr. Odosashvili's detention review was conducted fairly and whether the decision rendered was reasonable.

[12] I find, for three reasons, that the detention review was not conducted fairly and, as a result, the decision is not reasonable.

[13] First, Exhibit DR-1 filed by the Minister contained a statement that was known or ought to have been known to be false. The February 15, 2014, statutory declaration of Officer Mark Clare states that Malkhaz Tsiklauri and Giorgi Tchintcharauli were charged with break and enter and had

been identified as two of the four leaders of the "Break and Enter Ring." However, all of the criminal charges against those two men were withdrawn by the Crown ten months earlier on April 24, 2013. With that withdrawal, the charges ceased to exist. An affidavit from their criminal counsel attests that the withdrawal was unconditional. Criminal counsel further attests that neither was ever charged with any organized crime related offence.

[14] Second, the Minister's counsel, presumably relying in part on the statutory declaration of Officer Clare made false submissions to the Member. Specifically he stated that: (i) "Mr. Tsiklauri is a member of this criminal organization;" (ii) "The child has two godfathers, one is Mr. Odosashvili … and one is another known member Malkaz Tsiklauri;" and (iii) "Mr. Odosashvili's other friends are members of the criminal organization" (emphasis added).

[15] Contrary to these submissions, there is no evidence in the record that supports the assertion that Malkhaz Tsiklauri, or Giorgi Tchintcharauli, or indeed that anyone is a member of the criminal organization. The Minister and the police may believe they are, but there has been no finding of any criminal court that any one of them is a member of such an organization. Given the forcefulness of these unambiguous statements by counsel, I simply do not accept the submission of the Minister that these statements would have been understood by all to have meant no more than an allegation of membership.

[16] Third, where misrepresentations of this magnitude are made in reply, the detainee ought to have had the right to address them, if by doing no more than pointing out to the Member that they

were untrue. Applicant's counsel attempted, but was not permitted by the Member, to address them, and on these particular facts, that was unfair.

[17] In short, the Minister improperly used the withdrawn charges against Malkhaz Tsiklauri and Giorgi Tchintchrauli as evidence of their involvement in the criminal organization. He then used Mr. Odosashvili's association with these two men as evidence of his association with the criminal organization.

[18] The Member relied on the connection between Mr. Odosashvili and Mr. Tsiklauri and Mr. Tchincharauli in finding that he was associated with a criminal organization and thus a danger to the public. The Member further relied on that association, in part, to find that Mr. Odosashvili was a flight risk, and to deny his proposed surety.

[19] The denial of the surety may also have been influenced by another statement improperly made by the Minister's counsel. In the course of the detention review, it was submitted: "Let us note that during the execution of search warrants where Mr. Odosashvili was originally arrested by the Toronto Police Service approximately $18,000 in cash was seized" (emphasis added). The basis for that submission was a press release issued by Toronto Police Services. It states that there were five search warrants issued that were executed beginning on December 2, 2013, eleven days before Mr. Odosashvili was charged. He was one of four men charged. The release does not say where the funds were seized. Moreover, as was noted by Applicant's counsel, another of the accused, unlike Mr. Odosashvili, was charged with being in possession of property obtained by crime and with

possession of the proceeds of crime. This is strong evidence that the $18,000 was not found where Mr. Odosashvili was arrested, for otherwise he would have faced such charges.

[20] The Court finds these inaccuracies very disturbing. In *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 504, [2012] FCJ No 540 at para 42, Justice Mactavish set out the duty of Minister's counsel duty of candour and fair dealing:

> Individuals representing the Crown before courts and tribunals always have an obligation to be candid and fair in their dealings both with litigants and with the courts and tribunals themselves. The fact that the comments in question were made by the Minister's representative in submissions rather than in evidence does not in any way reduce or limit the representative's duty of candour.

I agree with this observation completely, and would add that the duty of candour and fair dealing takes on added importance and significance when a person's liberty is at stake.

[21] For these reasons, the decision of the ID cannot be allowed to stand. It is based, in part, on inaccurate information provided by the Minister. Absent that information, it cannot be said that the Member would have inevitably continued the detention of the Applicant.

[22] In *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] FCJ No 15 (QL), the Federal Court of Appeal at para 10, held that "if a Member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out." That decision to detain after the first detention review was made, in part, on the inaccurate information provided in the statutory declaration of Officer Clare. Although that decision is not the subject of this review, I note that should the next Member determine that detention is not warranted,

that inaccuracy alone might well provide a clear and compelling reason to depart from that earlier decision.

[23] No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that leave is granted, this application is granted, the decision of the Immigration Division on March 3, 2014, continuing the Applicant's detention is set aside, the matter is remitted to a new panel for a new review of Mr. Odosashvili's detention in accordance with these Reasons, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1373-14
STYLE OF CAUSE:	GIGA ODOSASHVILI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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