

**IMMIGRATION AND REFUGEE BOARD
OF CANADA
IMMIGRATION DIVISION**



**COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ DU CANADA
SECTION DE L'IMMIGRATION**

File No./Dossier : B0-00997

TRANSCRIPT OF PROCEEDINGS/PROCÈS-VERBAL

**PRIVATE PROCEEDINGS
WITH LIMITED PUBLICATION BAN**

Between/Entre:

**The Minister of Public Safety and Emergency Preparedness
Le Ministre de la Sécurité publique et de la Protection civile**

And/Et

s.19(1)

**Date
of Hearing**

NOVEMBER 9, 2010

**Date de
l'audience**

Place of Hearing

FRCC

Lieu de l'audience

Date of Decision

NOVEMBER 9, 2010

Date de la Décision

Member

D. YOUNG

Commissaire

For the Person Concerned

G. CHAND

Pour L'intéressé

Minister's Counsel

K. NICOLAOU

Conseil de L'intimé

9 NOVEMBER 2010

B0-00997

1 are my replies.
2

3 DECISION AND REASONS BY THE MEMBER:
4

5 MEMBER YOUNG: Okay. Sir, I'm required to consider whether or not you are likely to
6 appear for -- I believe at this point it's an admissibility hearing is the next step that's
7 coming up in your immigration proceedings in Canada. The law in Canada sets out, as
8 your counsel has highlighted, that the Minister has the onus of proving that you should not
9 be released, otherwise you'll have to be released. Section 245 of the Regulations sets out
10 several criteria for analyzing -- balancing the likelihood that you will be -- you will appear
11 for your, in this case, admissibility hearing.
12

13 The Minister has put quite a bit of his reliance and his statements and his submissions on
14 the matter of your involvement as a crew member on the "Sun Sea". I understand that it's
15 your contention that when you and others arrived, you were merely asked if you had any
16 naval skills and, depending on what skills you had, you were put to work, but you were not
17 part of the organization that was in any way responsible for getting the trip together or in
18 any way in advance of joining the ship being a part of the plans.
19

20 I can tell you from the start that I don't accept that as credible. I find that highly
21 implausible. I think it's highly unlikely that an operation of this size was just going to go
22 out to sea and hope they had people to run the boat, so right from the present, as a finding
23 of fact, I do not find that to be true.
24

25 That said, even though I do find that you were involved in people smuggling, the issue
26 becomes whether or not that involvement would likely lead you to not appear, because I do
27 find, in accordance with your counsel's submission, that it's not merely a matter of being a
28 member of the crew, it's a matter of a link being a member of the crew somehow resulting
29 in you not being likely to appear.
30

31 Now, if I understand the Minister's submission at this point, you are going to be scheduled
32 at some point for an admissibility hearing and, depending on the outcome of that
33 admissibility hearing, you may not be permitted to seek refugee protection in Canada as a
34 Convention refugee. Three are, as counsel has pointed out, other applications you can
35 make in Canada and that because you have -- you will have this pending admissibility
36 hearing and because that admissibility hearing may go against you, therefore that's how, if
37 I understand the Minister's submission -- that's how the fact that you were a member of the
38 crew would likely lead you -- would lead you to be unlikely to appear because having an
39 admissibility hearing that may go against you, your motivation to cooperate will then end.
40

41 My concern and my problem really with this contention from the Minister is the Minister
42 says that -- well, counsel says that this is speculation, we don't know what's going to

9 NOVEMBER 2010

B0-00997

1 happen at the admissibility. The Minister's representative says that well, we don't know for
2 sure either because we're still looking into this. It makes me wonder what stage the
3 Minister's inquiries of this matter are at. Is the Minister still investigating security matters
4 or is the Minister simply -- I don't know what stage the Minister is at, which causes me
5 some difficulty in that I don't know how exactly to take the Minister's counsel's predictions
6 as to how this will play out. That affects the weight that I can give to a factor under 245(f).
7

8 Your counsel has indicated that you have told him that you have complied with a departure
9 order previously in Singapore, that you have previously followed terms and conditions in
10 both the U.K. and Germany. This information was not challenged by the Minister's
11 counsel, although he did have an opportunity, if he wished, to cross-examine you on that.
12

13 We also have the matter of ties to Canada. We've been told you have a brother and counsel
14 has argued that this is a -- I don't know how to phrase it -- it's a factor that can be argued
15 either way. The Minister has argued that because your brother tried to sponsor you before
16 and because you have a brother here, that this could assist you in avoiding the immigration
17 authorities and counsel has argued that usually the conclusion that's argued about having
18 family in Canada is that this is a reason to believe that you wouldn't evade the immigration
19 authorities and report as required. There's no information before me to suggest that your
20 brother has any prior record or activities that would suggest he would try to subvert the
21 immigration laws in Canada. On the contrary, the evidence or the information before me is
22 that he previously offered to sponsor you through processes that are in place. Therefore,
23 I'm considering that to be a factor in favour of releasing you, not against releasing you.
24

25 Strictly on the question of whether or not you are likely to appear, weighing the factors that
26 I have, the only real fact that I think that strongly weighs against you in any sense is that
27 you were a member of the crew but it's not -- in my view, the Minister's suggestion as to
28 how that may play out in that you no longer have any motivation to appear is not a strong
29 enough factor for me to order continued detention on whether or not -- simply on the issue
30 of likelihood that you will appear so, therefore, I will not be ordering on that ground.
31

32 I understand the Minister wants to make another submission on another ground and we will
33 hear that after lunch.
34

35 MINISTER'S COUNSEL: Thank you. I'll bring a copy of the decision that I was speaking
36 to earlier because it's relevant to what --
37

38 MEMBER YOUNG: Please. It's not in here and if it's going to be relevant, I'd appreciate
39 a copy, thank you.
40

41 --- PROCEEDINGS RECESSED
42

9 NOVEMBER 2010

B0-00997

1 --- PROCEEDINGS RECESSED

2

3 --- PROCEEDINGS RECONVENED

4

5 DECISION AND REASONS BY THE MEMBER:

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7 MEMBER YOUNG: We're back on the record.

8

9 This is my decision on the second part of the Minister's request today. Earlier I addressed
10 the matter that detention should be continued on the basis that Mr. was
11 unlikely to appear and now I will be addressing the matter of whether he should be
12 continued in detention on the basis that he's a danger to the public.

13

14 The main point that's been put forth in both parts of this is his involvement with the ship
15 itself. The allegation is that he was part of the crew. The question is how much so and
16 how that plays out in Regulations 245 and 246.

17

18 With regard to one point that I think is very important there, and that is how this factor
19 plays into the considerations. In 245(f), we are told that the factor is involvement in people
20 smuggling -- I'm going to paraphrase -- that would likely lead to the person not appearing.
21 So there, as I discussed earlier in the previous decision, the point is that a direct link
22 between the involvement in people smuggling and the question of whether or not they're
23 likely to appear. Contrast that with 246. It's stated differently. For the purposes of 244(b),
24 which is danger to the public, the factors are as following and (c) engagement in people
25 smuggling and trafficking in persons. What it doesn't say clearly is it doesn't go on to say
26 such that the person would now be a danger to Canada or a danger to the public.

27

28 The other factors are listed. The element of danger is implicit and obvious, sexual
29 offences, drug offences, offences involving weapons. Therefore I find that, as a matter of
30 law, 246 does not actually require that the danger that arises from the person's involvement
31 in people smuggling be made out but rather simply the person's involvement in people
32 smuggling itself is all that has to be made out.

33

34 Part of the reason why -- we can speculate as to why Parliament included that, but it's clear
35 that Parliament changed the legislation to make this element a much stronger element of
36 our immigration law. They increased the penalties. The court case that the Minister's
37 counsel referred to predates IRPA but it discusses the reasons why people smuggling is a
38 serious offence and discusses the harm to Canada, et cetera. That's the first part.

39

40 The next question for me is: Was he engaged in people smuggling? The testimony of Mr.
41 is that he was merely a passenger who, among I think up to 15 people was
42 his number, other people, occasionally helped out doing, if I can describe it, as grunt work

9 NOVEMBER 2010

B0-00997

1 in the engine room. The Minister is alleging that his involvement was much higher and
2 that he had a much more important role in the engine room. There was a statutory
3 declaration presented which primarily seems to discuss the question of how much he was
4 to be paid but I think that some -- although I agree with counsel that there is an element of
5 unreliability that flows from this, having been a description of a stat dec and a description
6 of the conversation, but still there is agreement in this information there is some evidence
7 that there are actually a limited number of crew members who were responsible for this
8 job.

9
10 What we also have is Mr. [redacted] own statements that talk about his previous
11 involvement working on an LTTE ship and I do note that he did say that he wasn't aware of
12 exactly what they were doing, just as his statements today are that he was only minorly
13 involved. But I think that if you take his past experience in consideration -- and I have to
14 decide which is the more likely story, what's more probable than not -- then I have to find
15 that it's more probable that he was actually a member of the crew, that he wasn't just
16 somebody who happened to be on a ship and happened to be asked to help out, that he was
17 a member of the crew and so I find, on a balance of probabilities, he was a member of the
18 crew and therefore I find that he was engaged in people smuggling.

19
20 The Minister has also asked that I consider whether or not he had been involved with a
21 criminal organization within the meaning of section 121(2). The question of whether he
22 was involved with a criminal organization -- the Minister is relying on the fact that the
23 nature of the endeavour itself, the numbers of people involved, the distance, must have
24 required a level of organization and planning to bring it into subsection (2). I find that
25 compelling and I do agree with the Minister in that regard, that in this case the fact speaks
26 for itself.

27
28 Counsel suggests that even if I find that the factors under 246 do justify continued
29 detention, that the Minister has met their onus in that regard, that I also consider an
30 alternative and that is having him stay with his brother and his brother present a bond, I
31 believe it was --

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33 COUNSEL: \$3,000.

34
35 MEMBER YOUNG: -- \$2,000. Thank you, Counsel.

36
37 COUNSEL: \$3,000.

38
39 MEMBER YOUNG: \$3,000, sorry. My problem with that is that because of the
40 importance of that one factor -- and I know it's not the only factor, but it's one that
41 Parliament has clearly placed front and centre as being a very serious factor. As I've
42 already discussed, the reasons why it may be considered serious have already been

9 NOVEMBER 2010

B0-00997

1 discussed by the courts in the case that's been sent to us, so I'm not going to offer release at
2 this time and I am going to continue detention.

3

4 That concludes this review. We will go off the record and set a new date.

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6 --- PROCEEDINGS CONCLUDED (NEXT DETENTION REVIEW SCHEDULED FOR
7 3 DECEMBER 2010)

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I, the undersigned, hereby certify that the preceding constitutes a transcript of proceedings, transcribed from taped proceedings, to the best of my skill and ability, of a Detention Review hearing held at Vancouver, British Columbia.

Lynn Irwin