

**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 DECISION AND REASONS

**PRIVATE PROCEEDING
(PRIVATE AND LIMITED ACCESS PUBLICATION BAN)**

Between/Entre:

**The Minister of Citizenship and Immigration
Le Ministre de la Citoyenneté et de l'Immigration**

And/Et

**Date
of Hearing**

22 DECEMBER 2010

**Date de
l'audience**

Place of Hearing

VANCOUVER, BRITISH COLUMBIA

Lieu de l'audience

Date of Decision

22 DECEMBER 2010

Date de la Décision

Member

A. MERAI-SCHWARTZ

Commissaire

For the Person Concerned

G. CHAND

Pour L'intéressé

Minister's Counsel

A. LALJI

Conseil de L'intimé

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22 DECEMBER 2010

B0-00997

DETENTION REVIEW HEARING

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Metro Vancouver
Detention Commenced 14 August 2010
Detained

MEMBER..... A. MERAI-SCHWARTZ
MINISTER'S COUNSEL.....A. LALJI
COUNSEL..... G. CHAND
INTERPRETER..... H. SOUNDARARAJAH

--- PROCEEDINGS COMMENCED

DECISION AND REASONS BY THE MEMBER:

MEMBER MERAI-SCHWARTZ: Now, sir, I have had an opportunity to review the facts of your case, and I'm ready to give my decision and reasons for decision. There are two issues before me today, and the Minister is seeking your continued detention on two grounds. The first ground is that you are a danger to the public, and the second ground is that you are unlikely to appear for your admissibility hearing.

Now, I have carefully considered the submissions made by the Minister's representative and your counsel. I have also reviewed the exhibits on file, and I have reviewed the transcript from the proceeding previous to this, I guess it would be as of November the 9th, wherein my colleague found that, while you were not unlikely to appear for removal from Canada, he did find you to be a danger to the public.

Now, I will say that the information before me today and with respect to my colleague does lead me to a different conclusion on both grounds. I have found that on the balance of probabilities you are not a danger to the public, but I have also found that on the balance of probabilities you are unlikely to appear for you admissibility hearing, and I will let you know why I've made that determination.

With respect to danger to the public, now this is a very serious allegation in -- under Immigration law, and as a context for what I've considered here, I will quote from my colleague's decision on danger from the November 9th hearing. At line 28 of the transcript of the proceedings at page 40, my colleague stated, and there were some other preliminary statements, and then he said [as read in]:

22 DECEMBER 2010

B0-00997

1 The element of danger is implicit and obvious; sexual offences, drug offences,
2 offences involving weapons. Therefore, I find that, as a matter of law, 246 does not
3 actually require that the danger that arises from the person's involvement in people
4 smuggling be made out but rather simply the person's involvement in people
5 smuggling itself is all that has to be made out.

6
7 I will respectfully disagree with my colleague on this issue. I do not feel that -- find that
8 simple membership or association with a group or an enterprise equals danger. I find that
9 the context of the participation has to be considered. I will note that you are alleged to be a
10 member of the crew aboard the MV Sun Sea, and that you are going to be reported under
11 sections 34, 35 and 37 of the *Immigration and Refugee Protection Act*.

12
13 I have heard today that there are three factors that I have been asked to take into
14 consideration with respect to the Minister's submission on danger. One is the Minister's
15 opinion. Secondly, it's the allegation of you being involved in people smuggling, and
16 thirdly it's you alleged association with the criminal organization that brought the --
17 organized the enterprise of the smuggling operation.

18
19 Now, when it comes to making a determination of danger to the public, what I must do as a
20 member of the Immigration decision [sic] is assess the present or future danger that you
21 might pose to the public. I have carefully considered the circumstances of your case in
22 particular. From the information that is before me, it would appear that you are or were a
23 member of the crew in some capacity, and the seriousness of this allegation cannot be
24 underestimated given that this membership in the crew gives rise to the inadmissibility
25 allegations.

26
27 However, I have not found any evidence or been directed to any information that shows me
28 that your participation in this enter -- in this -- as a crew member was that of an
29 enforcement role, that there was violence involved or that you were involved in coercion or
30 control of the passengers on board the ship.

31
32 In fact, the information that I have been provided that it is through your work it appears
33 that the boat actually made it to the shores of Canada, and while I'm not suggesting that I
34 commend your activities in regard, that is something -- it does serve to describe that, while
35 it does appear you were involved in the enterprise of the people smuggling, you did -- your
36 services did ensure that at least the boat made it, notwithstanding the negative implications
37 of the project as a whole.

38
39 Now, I haven't heard or seen no evidence that you are going -- have -- are going to be
40 taking on any further role with respect to this enterprise, that you perhaps are now going to
41 be an agent who would be engaging in actions that pose either a present or future danger to

22 DECEMBER 2010

B0-00997

1 the public, so it is with this light that I have made -- have considered the element or the
2 grounds of danger to the public.

3
4 I have also taken into consideration the alleged work that you did aboard an LTTE ship
5 from 1990 to 1996. However, again, I have no evidence before me that shows you had any
6 association with the LTTE past that, and I also have no evidence or information before me
7 that shows that you engaged in any violent actions while working on board this ship, and
8 again I do not find that that past work demonstrates a present or future danger to the public
9 in Canada.

10
11 Now, another element when I make -- that I consider when assessing whether an individual
12 poses a danger to the public is drawing inferences from any past criminal records, and I
13 have no evidence before me that there is any criminal -- you have a criminal record. I also
14 consider whether you have committed a serious crime in the past, and while I can ascribe
15 some past poor conduct to you in the context of your Immigration -- dealings with
16 Immigration processes in other countries, there is no evidence before me that you have
17 committed any violent crimes in those -- in the context of those or in -- broken any other --
18 other laws in any of those other countries.

19
20 Some other factors I did consider is your -- what I can make of your character based upon
21 the information before me, and while I do note that you have engaged in various self-
22 serving actions in order to make every attempt to obtain refugee status in a number of
23 different countries, again there has been no evidence of violence in those -- in that regard,
24 and as I mentioned before it appears that even the alleged work on the LTTE ship was as
25 crew in that context as well, but not as an enforcer or didn't involve any violence that I
26 could see.

27
28 So though I do recognize that there are factors that could lead me to a conclusion that you
29 are a danger to the public, I do not find that, when considered -- considering danger to the
30 public as a whole and all the other factors that could be prescribed to you, that you do
31 represent a danger to the public in Canada.

32
33 I have considered the factor that you were a member of the crew, but again there's no
34 evidence that you were an organizer. You -- it seems to me more like you were associated
35 or working for the group that organized the enterprise.

36
37 Now, I've made this determination being mindful of the Minister's opinion, but that, you
38 know, and I note that it's not the Minister's opinion alone that exists in your case, but I do
39 find that, based on the reasoning that I have set out, I do not find that on the balance of
40 probabilities that you are a danger to the public, and that you are a person who could
41 potentially compromise the health, safety and good order of Canadian society.

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22 DECEMBER 2010

B0-00997

1 And this is based, to a great extent, on what I understand to be the nature of your role on
2 the ship and as part of the crew, and in the absence of any evidence of a violent history or
3 violence on board the ship.

4
5 So, having made a finding that -- and departing -- respectfully departing from the finding
6 of my colleague, based on what I feel are clear and compelling reasons that I have set out, I
7 will turn to my determination with respect to unlikely to appear.

8
9 Now, I have made a finding that you are unlikely to appear for your admissibility hearing
10 because I have found that numerous factors set out under s. 245 of the Regulations can be
11 ascribed to you, and could be applied in your case, and because of the number of factors
12 that apply in this case I do find that this does weigh in favor of your continued detention on
13 the ground of unlikely to appear. And I find that especially now, given that you will soon
14 be reported and referred on grounds under the *Immigration Act*, specifically sections 34, 35
15 and 37, and I find that this particular circumstance makes your situation here in Canada
16 quite different from the situations you've faced when you were in the other countries and
17 going through immigration processes there.

18
19 Specifically, the seriousness of the allegations that, if proven, could lead to not only you
20 inadmissibility to Canada but potential criminal charges, as we have seen, as an example
21 seen in the *Lee* [phonetic] decision from the B.C. Supreme Court.

22
23 Therefore, given the different circumstances that appear in this case, I find that that could
24 lead you, on the balance of probabilities, to not appear for your admissibility hearing.

25
26 Now, I'll give you the reason why. There is evidence before me that, when things are not
27 going your way in various Immigration processes around the world, you have been
28 industrious and able to come up with various alternatives to find another path towards your
29 ultimate goal. For example, what's been put into evidence and what I've been informed of
30 that, rather than reporting for removal in Germany, which would have removed you to Sri
31 Lanka, you secured the services of an agent to smuggle yourself illegally into the United
32 Kingdom where you made another refugee claim.

33
34 I find that you demonstrate a capacity and ability to use Immigration laws to your benefit,
35 and that you are likely to be able to continue to do so in the context of the Canadian
36 Immigration system if given an opportunity. I find that you -- there are factors under
37 248(b) and (c) with respect to whether you are likely to appear for your admissibility
38 hearing, and I bring again to the -- on the record the example in Germany, and I note that
39 there is also a ground under 245(d) where you overstayed in New Zealand, and you were
40 ordered deported.

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22 DECEMBER 2010

B0-00997

1 I find that there is factors under 245(e), and I accept the Minister's representative's
2 submission that avoidance of examination can also be obtained through misrepresentation.
3 It does show a disregard for Immigration laws. It does show a capacity to avoid certain
4 processes by not providing truthful information, and I do find that providing misleading
5 statements to Immigration authorities have a similar affect as if you were to avoid the
6 examination all together.

7
8 I do find that the factor under 245(f) can apply in your case, and I do find that your
9 involvement as a member of the -- alleged member of the crew could lead you to be
10 unlikely to appear for you admissibility hearing in that the consequences of being found as
11 described could have a great impact on you, and as I mentioned before could also lead to
12 criminal charges. This is a very different circumstance you find yourself in here from
13 simply being a passenger on the boat.

14
15 Therefore, I find that your incentive to appear for your admissibility hearing is not as great
16 as it would be as it was in the other proceedings in other countries because of the
17 consequences there were somewhat different than they could be here if found as described.

18
19 Now, under 245(g) I do find that you have ties to Canada in the form of your brother and
20 your uncle. I note that I have been advised that your brother tried to sponsor you to come
21 to Canada, and that application failed. Now, while in normal circumstances this alternative
22 to detention would be considered very strong by both the Board, and I would suggest by
23 the Minister's [sic], in the particular circumstances of your case, I do not find that the
24 existence of this alternative and the relatively small amount of a \$3,000 bond is sufficient
25 enough to weigh in favor of your release on unlikely to appear when I consider all the
26 other factors that weigh against you globally.

27
28 Now, having made a finding that there are definitely grounds for your continued detention
29 on unlikely to appear, and here I'll note that I've respectfully again deviated from the
30 finding of my colleague in this regard based on what I feel are clear and compelling
31 reasons which I have set out in this decision here today, I well note that I have considered
32 factors under s. 248, which is a Regulation that I must consider whenever I make a finding
33 that there is grounds for detention.

34
35 Now, I have considered the reason for you detention is unlikely to appear, and I've
36 considered this ground in the context of the serious allegations that you will be facing with
37 respect to being reported under the previously mentioned sections of the *Immigration Act*.
38 I note that the reporting referral is imminent, as submitted by the Minister's representative,
39 and so I don't find that there will be an unreasonable delay in going -- moving forward to
40 an admissibility hearing.

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22 DECEMBER 2010

B0-00997

1 Thus, I do not find that your detention is indefinite on this ground, though I do note that
2 your detention thus far has been significant.

3
4 And, finally, I note that the alternative to detention again is just not sufficient enough,
5 given the evidence that the length that you can and have gone to to avoid removal to Sri
6 Lanka, I don't find that these individuals at this time with the information I have today, that
7 they could mitigate any of the risks at this time.

8
9 So, as a result of these findings, I will be ordering your continued detention on the ground
10 of unlikely to appear. As this investigation progresses, the Minister will have to continue
11 to demonstrate to the members that the process is moving forward and is not stalled, and
12 that detention is not overly long o unreasonably long on this ground.

13
14 Now, having made this determination, I will be pausing to secure a new review date for
15 you as you are entitled to under the Immigration laws.

16
17 --- PROCEEDINGS ADJOURNED

18 --- PROCEEDINGS RECONVENED

19
20 MEMBER MERAI-SCHWARTZ: We are resumed. Sir, your next detention review is
21 scheduled for January the 20th, 2011. This hearing is concluded.

22
23
24 --- PROCEEDINGS CONCLUDED (NEXT DETENTION REVIEW SCHEDULED FOR
25 20 JANUARY 2011)

26
27
28 I, the undersigned, hereby certify that the preceding
29 constitutes a transcript of proceedings, transcribed from
30 taped proceedings, to the best of my skill and ability, of a
31 Detention Review hearing held at Vancouver, British
32 Columbia

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37 _____
38 Christine Peart
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