CITATION: CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) *v.* LI, 2009 FCA 85, [2010] 2 F.C.R. 433 A-642-08

The Minister of Citizenship and Immigration (*Appellant*)

v.

Dong Zhe Li and **Dong Hu Li** (*Respondents*)

INDEXED AS: CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v. LI (F.C.A.)

Federal Court of Appeal, Létourneau, Desjardins and Trudel JJ.A.—Vancouver, February 23; Ottawa, March 17, 2009.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Appeal from Federal Court decision dismissing judicial review of Immigration and Refugee Board Immigration Division decision ordering release of respondents from detention — Respondents, inadmissible to Canada, arrested, detained, ordered removed from Canada — Division determining respondents unlikely to appear for removal if released, high flight risk — Detention continued, reviewed periodically — Division ultimately ordering release under electronic surveillance as continued detention contrary to Canadian Charter of Rights and Freedoms, s. 7 — Federal Court certifying question as to whether lengthy detention becoming indefinite where tribunal estimating future length based on anticipated pursuit of all available processes under Immigration and Refugee Protection Act, Immigration and Refugee Protection Regulations — Division erring in grounding assessment of anticipated future length of detention on preliminary pre-removal risk assessment when final decision to come shortly thereafter, review of detention held every month — Unnecessary, unreasonable for Division to make assumptions based on speculation regarding potential but as yet non-existing proceedings — Basis of estimation of anticipated future length of detention: proceedings as existing at time of monthly review, not anticipation of available processes not yet underway — Appeal allowed.

Constitutional Law — Charter of Rights — Life, Liberty and Security — Respondents, inadmissible to Canada, arrested, detained, ordered removed from Canada — Detention continued, reviewed periodically as required by Immigration and Refugee Protection Act — Immigration and Refugee Board Immigration Division ultimately ordering release under electronic surveillance as continued detention contrary to Charter, s. 7 — Resort to alternatives to detention only if effective, appropriate — Alternatives must be proportionate to threat, risk of flight — Charter trumping risk of flight, danger to public when length of detention constituting cruel, unusual treatment, or inconsistent with principles of fundamental justice — Prevention of Charter breach not requiring same remedy as actual breach — Expedition of proceedings not alternative to detention, but available preventive measure — Division not considering this recourse, whether recourses unreasonable or could have been prosecuted more diligently, thereby unnecessarily contributing to actual length of detention.

This was an appeal from a decision of the Federal Court dismissing an application for judicial review of the Immigration and Refugee Board Immigration Division's decision ordering the release of the respondents from detention. The respondents entered Canada legally on temporary resident visas as visitors, but remained in Canada without authorization after their expiry. After arrest warrants issued against them by the Chinese authorities for alleged fraud, the Canada Border Services Agency issued reports that the respondents were inadmissible to Canada. They were arrested, placed in detention, and an exclusion order was issued against them. The Division determined that they were unlikely to appear for removal if released and that they were a high flight risk. Therefore, their detention was continued, and reviewed every 30 days as required by the *Immigration and Refugee Protection Act* (IRPA). The Division ultimately ordered the release of the respondents

under electronic surveillance as continued detention would be contrary to section 7 of the *Canadian Charter of Rights and Freedoms* (Charter). The Division held it was no longer reasonable to estimate the respondents would be removed from Canada immediately after a final pre-removal risk assessment (PRRA) decision was made, and that any time estimate must include judicial review and appeal processes. The appellant's challenge of this decision was dismissed by the Federal Court. The Court certified the question as to whether lengthy detention becomes indefinite detention in breach of section 7 of the Charter where the tribunal estimates future length based on a detainee's anticipated pursuit of all available processes under the IRPA and the *Immigration and Refugee Protection Regulations*, including Federal Court proceedings. Another issue included whether the Division failed to consider alternatives to detention.

Held, the appeal should be allowed.

It was not appropriate for the Division to ground an assessment of the anticipated future length of detention on a mere preliminary opinion on the PRRA when the final decision would come only a month later and a review of the detention is held every month. The Division was led by this opinion to assume that judicial review and appeal proceedings would be authorized and felt justified to review its previous time estimate. The assumption was based on speculation. Considering that another review had to be held a month later, it was unnecessary and unreasonable for the Division to speculate and make this kind of assumption.

The concept of anticipated future length of detention requires an estimation of what the expected duration of the future detention will be. According to subsection 57(2) of the IRPA, there has to be a review at least once during each 30-day period following each previous review. This short delay allows for an estimation based on actual facts and pending proceedings as the reviewing authority obtains an accurate picture of the detention situation. It was a reviewable error of law and unreasonable for the Division to speculate on the Minister's forthcoming decision, on potential but as yet non-existing proceedings, and to assume that such proceedings would be authorized by the Federal Court and reach the Federal Court of Appeal. It was also a reviewable error for the Federal Court to endorse this speculative approach. The basis of the estimation of anticipated future length of detention should be the proceedings as they exist at the time of each monthly review and not an anticipation of available processes not yet underway.

Resorting to available alternatives to detention only makes sense if they are effective and appropriate. When applied to a lengthy detention, the rule attracts Charter considerations, i.e. the alternatives must not be a disproportionate response to the threat and the risk of flight. Here, electronic monitoring had been acknowledged by expert evidence to be insufficient to ensure the appearance of the respondents for removal. Despite this impediment, the Division felt compelled to intervene to prevent a breach of the Charter. Its approach was in error. This error was enough to allow the appeal. The issue of alternatives to detention was nonetheless addressed as it was likely to come up at another detention review hearing. The Charter trumps the risk of flight or danger to the public when the length of detention reaches the stage where it constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice. There will be instances where nothing short of release from detention will remedy a Charter breach. However, the prevention of a Charter breach does not necessarily require the same remedy as an actual breach. One available preventive measure consists in expediting the proceedings. The Division's decision does not consider this recourse in its speculation as to the anticipated future length of detention. Nor does it contain an assessment of whether the recourses were unreasonable in the circumstances or could have been prosecuted more diligently, thereby unnecessarily contributing to the actual length of the detention. Also, no consideration was given to Canada's international undertakings to assist in the enforcement of criminal law.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 7, 9, 10(*c*), 12.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 29(2), 36(1)(*c*), 41(*a*), 57, 112(1),(3), 113(*d*).
Immigration and Refugee Protection Regulations, SOR/2002-227, ss. 160(1), 248.

TREATIES AND OTHER INSTRUMENTS CITED

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36.
Convention on Psychotropic Substances, 21 February 1971, [1988] Can. T.S. No. 35.
Convention on the Transfer of Sentenced Persons, 21 March 1983, [1985] Can. T.S. No. 9.
Inter-American Convention against Corruption, 29 March 1996, [2000] Can. T.S. No. 21.
Inter-American Convention on Serving Criminal Sentences Abroad, 9 June 1993, [1996] Can. T.S. No. 23.
Protocol amending the Single Convention on Narcotic Drugs, 1961, 25 March 1972, [1976] Can. T.S. No. 48.
Rome Statute of the International Criminal Court, 17 July 1998, [2002] Can. T.S. No. 13.
Single Convention on Narcotic Drugs, 1961, 30 March 1961, [1964] Can. T.S. No. 30.
Treaty between Canada and the People's Republic of China on Mutual Legal Assistance in Criminal Matters, 1 July 1995, [1995] Can. T.S. No. 29, Art. 2.
United Nations Convention against Corruption, 31 October 2003, [2007] Can. T.S. No. 7.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, [1990] Can. T.S. No. 42.
United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 U.N.T.S. 209.

CASES CITED

CONSIDERED:

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350, 276 D.L.R. (4th) 594, 54 Admin. L.R. (4th) 1; *Canada (Minister of Public Safety and Emergency Preparedness) v. Li*, A7-00188/89, Member King, reasons and decision dated January 10, 2008 (I.R.B.); *Canada (Minister of Citizenship and Immigration) v. Li*, 2008 FC 949, 331 F.T.R. 68; *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (1994), 24 C.R.R. (2d) 276, 85 F.T.R. 99 (T.D.); *Canada (Minister of Citizenship and Immigration) v. Romans*, 2005 FC 435, 272 F.T.R. 48, 44 Imm. L.R. (3d) 165.

REFERRED TO:

Canada (Minister of Public Safety and Emergency Preparedness) v. Li, [2007] I.D.D. No. 21; *Li v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 941, 319 F.T.R. 14, 65 Imm. L.R. (3d) 234; *Canada (Minister of Citizenship and Immigration) v. Li*, 2009 FCA 7.

APPEAL from a decision of the Federal Court (*Canada (Minister of Citizenship and Immigration) v. Li*, IMM-4038-08, IMM-4039-08, Heneghan J., endorsement and order dated December 29, 2008, 2008 CarswellNat 5419) dismissing an application for judicial review of the Immigration and Refugee Board Immigration Division's decision (*Canada (Minister of Public Safety and Emergency Preparedness) v. Li*, A7-00188/89, Member King, reasons and decision dated September 11, 2008 (I.R.B.)) ordering the release of the respondents from detention. Appeal allowed.

APPEARANCES

Cheryl D. E. Mitchell and *Helen Park* for appellant.
Douglas R. Cannon for respondents.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.
Elgin, Cannon & Associates, Vancouver, for respondents.

The following are the reasons for judgment rendered in English by

[1] LÉTOURNEAU J.A.: For ease of reference, I include a table of contents of these reasons for judgment.

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Issues on appeal

[2] This thorny appeal demonstrates the delicate balancing act required when issues of criminality, long-term detention and human rights collide under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) and the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C. (1985), Appendix II, No. 44] (Charter).

[3] Under Canadian law, alleged foreign criminals who illegally enter or remain in Canada after their visitor status expires are entitled to the same constitutional protection of the Charter as Canadian citizens or permanent residents: see *Charkaoui v. Canada (Citizenship and Immigration)*,

2007 SCC 9, [2007] 1 S.C.R. 350, at paragraph 90. In the present instance, the Immigration Division of the Immigration and Refugee Board of Canada (the Division) was called upon to determine whether and when a legitimate long detention becomes an indefinite detention in breach of section 7 of the Charter. As put by the appellant's counsel, when is enough enough? Unfortunately, there is no single, simple and satisfactory answer. It all depends on the facts and circumstances of the case.

[4] The Federal Court dismissed an application by the appellant for a judicial review of the Division's decision that ordered the release of the respondents from detention. In the order that it issued on December 29, 2008 [*Canada (Minister of Citizenship and Immigration) v. Li*, IMM-4038-08, IMM-4039-08, Heneghan J., endorsement and order dated December 29, 2008, 2008 CarswellNat 5419], the Federal Court certified the following question:

> Does lengthy detention become "indefinite" detention, and consequently a breach of section 7 of the Charter, where the tribunal estimates future length of detention based on a detainee's anticipated pursuit of all available processes under IRPA and the Regulations including Federal Court proceedings?

Hence the appeal to this Court where, in addition to the certified question, the appellant raises the following grounds of complaint:

(1) The applications Judge applied the wrong standards of review;

(2) She failed to review an erroneous finding by the Division that there was a new fact justifying a review of the previous time estimate of the respondents' detention pursuant to warrants issued under the IRPA;

(3) She committed a reviewable error when she approved a finding of fact made by the Division which was premature, speculative, perverse and capricious regarding the detention of the respondents;

(4) She committed a reviewable error by failing to consider whether the detention of the respondents amounted to an indefinite detention contrary to section 7 of the Charter; and

(5) She erred in ruling that the Division had provided clear and compelling reasons for departing from its prior decision that electronic monitoring was not an alternative to the detention of the respondents as it would not adequately reduce their flight risk.

The facts and proceedings

(a) The facts concerning the detention of the respondents

[5] It is not necessary to review the facts in detail although the summary cannot be as short as I would like because of the multiplicity of detention review hearings. Dong Zhe Li and Dong Hu Li (referred hereinafter as the Li brothers or the respondents) are the subject of arrest warrants issued by the Chinese authorities for an alleged fraud estimated at over C$136 million through negotiable instruments, of which C$100 million remain unaccounted for: see affidavit of R. Hyland, appeal book, Vol. 1, page 50, at paragraph 4. The alleged fraud involved the transfer of funds from bank

accounts of victim companies to bank accounts of companies controlled by the Li brothers. The transfers were done with the assistance of a Chinese banker, Mr. Shan Gao, who is also currently in Canada and subject to immigration proceedings.

[6] The Li brothers entered Canada legally on December 31, 2004 on temporary resident visas as visitors. The visas were for six months. They expired on June 30, 2005. The Chinese arrest warrants were issued on January 24, 2005. The Li brothers did not seek a renewal of their visitor status and they remained in Canada without authorization.

[7] After the arrest warrants issued by the Chinese authorities were brought to the attention of the Canadian officials, the Canada Border Services Agency (CBSA) issued reports in November 2006 that the Li brothers were inadmissible to Canada pursuant to subsection 29(2) and paragraph 41(*a*) of the IRPA. Subsection 29(2) requires a temporary resident to leave the country by the end of the period authorized for the stay. Paragraph 41(*a*) renders inadmissible a foreign national who contravenes a provision of the IRPA.

[8] The Li brothers were arrested by Canadian authorities on February 23, 2007. An exclusion order was issued against them on February 27, 2007. At the same time, they were notified that they could apply for a pre-removal risk assessment (PRRA): *ibidem*, at paragraph 11. The application was made pursuant to subsection 112(1) of the IRPA and subsection 160(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations).

[9] Upon their arrest, the Li brothers were placed in detention. On March 2, 2007, at the resumption of the February 26, 2007 review detention hearing, postponed at the request of the respondents, the Division determined that the Li brothers were unlikely to appear for removal if released. Therefore, their detention was continued.

[10] On March 9, April 5 and 23, 2007, the respondents' detention was reviewed. These reviews led to the same result as the first review.

[11] On July 6, 2007, the Division ordered continued detention for the Li brothers. It found that they were a high flight risk, would likely not appear for removal and would make efforts to avoid Canadian authorities: see appeal book, Volume IV, page 731, at paragraphs 14–25 [see also *Canada (Minister of Public Safety and Emergency Preparedness) v. Li*, [2007] I.D.D. No. 21 (QL)]. They possessed and used false identity documents that they ripped up shortly before their arrest after refusing to open the door to their hotel suite at the request of the police: *ibidem*, at paragraph 26.

[12] As required by the IRPA, the detention was reviewed every 30 days: see section 57. On August 7, 2007, the Division once again came to the same conclusion while noting this time that the Li brothers faced potentially long-term detention, but not indefinite detention.

[13] On September 6, 2007, continued detention of the respondents was ordered as there was no new evidence or change in circumstances. The same result occurred after the review hearings on October 4 and 30, November 27 and December 20, 2007.

[14] In a January 10, 2008 decision [*Canada (Minister of Public Safety and Emergency*

Preparedness) v. Li, A7-00188/89, Member King], the Division estimated that the Li brothers' detention would continue for another 8 to 10 months until removal. This estimation was based on the assumption that the respondents would be denied leave to apply for judicial review of the PRRA. If the estimation was correct, then the respondents would have been detained for an estimated total length of time of 18 months. While the Division characterized that period of time as a "long-term" detention, it was still of the view that electronic surveillance would not adequately respond to the flight risk posed by the respondents. Thus, it maintained the detention order.

[15] No new evidence or alleged change in circumstances was submitted at the February 6, March 5 and April 2, 2008 detention review hearings.

[16] At the May 22, 2008 detention hearing, however, there was speculation that a positive PRRA decision had been rendered, meaning that the Li brothers would be subject to torture if deported to China. I say speculation because no clear answer was provided at the time. The various understandings were that a decision had been reached but the result was unknown, a positive PRRA had been rendered or that there had been no PRRA decision.

[17] On June 11, 2008, the Division ordered the release of the Li brothers under electronic surveillance because it concluded that they were now facing indefinite detention due to the number of outstanding steps required for the complete processing of the PRRA applications.

[18] The appellant challenged the release orders by way of judicial review. On June 30, 2008, he sought and obtained from the Federal Court a stay of the execution of the release orders.

[19] On August 15, 2008, the Federal Court allowed the appellant's application for judicial review. It set aside the release orders and required that its reasons be considered at the next detention review hearing. It also found that, at the time the Division rendered its decision, the PRRA applications had not been completed [*Canada (Minister of Citizenship and Immigration) v. Li*, 2008 FC 949, 331 F.T.R. 68].

[20] On August 11, 2008, the Li brothers were served with a preliminary PRRA opinion. The opinion stated that there is a risk that they would be tortured upon their return to China. The opinion resulted from an assessment made by a PRRA officer, which assessment was then sent to a Minister's delegate for a decision to be made by the Minister: see appeal book, Vol. 1, at pages 126–141.

[21] The disclosure letter of August 11, 2008, delivered by hand to the respondents, clearly stated that the Minister is the authority making the final decision. The respondents were informed that they had 15 days to make final written representations or arguments or submit evidence to the Minister: *ibidem*, at page 142. It also unequivocally reminded the respondents that the Minister or his delegate is "not bound by any previous decisions, assessments or recommendations": *ibidem*. There cannot be any doubt, in my view, that the preliminary assessment disclosed to the respondents was not the final decision on the matter and that the respondents knew it.

[22] At the August 28, 2008 detention hearing, it was submitted that a final decision on the PRRA application would be made by mid-October 2008. It was also mentioned that assurances regarding

the death penalty had been received from China.

[23] The Division issued its decision on September 11, 2008 [*Canada (Minister of Public Safety and Emergency Preparedness) v. Li*, A7-00188/89, Member King]. It ordered the release of the respondents under electronic surveillance with additional conditions. This decision is at the core of this appeal and is summarized below under a different heading.

[24] The September 11, 2008 decision was challenged in the Federal Court by way of judicial review by the appellant. A stay of execution of the Division's release orders was granted by the Federal Court on October 1, 2008.

[25] In the meantime, the Li brothers filed a motion in the Federal Court to prohibit the Minister's delegate from considering the PRRA applications pending disposition of their leave applications challenging the delegate's authority to make such a decision. The motion was granted on October 8, 2008. The Minister's delegate was prohibited from considering the PRRA applications pursuant to paragraph 113(*d*) of the IRPA until the application for leave and judicial review was considered on the merits.

[26] The appellant's challenge to the September 11, 2008 decision of the Division was heard by the Federal Court on December 23, 2008. The appellant's application for judicial review was dismissed. On December 29, 2008, the Federal Court certified the question that is now submitted to us. On that same day, the Minister appealed the decision of the Federal Court.

[27] On January 14, 2009, our Chief Justice stayed the execution of the release orders and the decision of the Federal Court until the final determination of the appeal or the respondents' next statutorily required detention review hearing. Steps were taken to expedite the appeal process and hearing.

(b) The chronology of events and proceedings

[28] It is not denied that the Li brothers have and will continue to fight tooth and nail every adverse decision and resort to every single proceeding available to oppose their return to China. The following chronology of events and judicial proceedings illustrate the on-going saga. In the chart, the letters ID refer to the Immigration Division, AB to the appeal books, AM to the appellant's memorandum and RM to the respondents' memorandum:

December 31, 2004: Respondents enter Canada (reasons, at page 2)

January 24, 2005: China issues arrest warrant for the respondent Dong Zhe Li (AM, at page 5; AB, Vol. VII, Tab 86, at page 1408)

February 6, 2005: China issues arrest warrant for the respondent Dong Hu Li (AB, Vol. VII, Tab 86, at page 1391)

June 30, 2005: Respondents' visitor visas expire (reasons, at page 2)

November 2006: Inadmissibility reports issued pursuant to paragraphs 36(1)(*c*) and 41(*a*) and subsection 29(2) of the IPRA (AM, at paragraph 6)

November 16, 2006: Immigration warrants for the respondents' arrest issued (AB, Vol. I, Tab 7,

page 51, at paragraph 6)

February 23, 2007: Respondents are arrested and detained; inadmissibility reports referred to the Minister (AB, Vol. I, Tab 7, page 51, at paragraph 7; AB, Vol. VI, Tab 84, pages 1255–1256)

February 26, 2007: ID detention review hearing scheduled; is adjourned to March 2, 2007 (AB, Vol. V, Tab 62, page 918)

February 27, 2007: Exclusion order issued; respondents barred from refugee protection. Gives rise to an application for judicial review (AB, Vol. I, Tab 7, page 52, at paragraphs 8–9)

March 2, 2007: ID detention review resumed; continued detention ordered (AB, Vol. V, Tab 62, page 926)

March 9, 2007: ID 7-day detention review; respondents consent to remain detained (AB, Vol. V, Tab 61, pages 915–916)

March 13, 2007: PRRA application made and deferred at the request of the respondents pending result of their application for judicial review (AM, at page 13; AB, Vol. I, Tab 7, page 53)

April 5 and 23, 2007: ID detention review; respondents consent to remain detained (AB, Vol. V, Tab 60, pages 912–913; Tab 59, pages 909–910)

July 7, 2007: ID detention review; continued detention ordered (AB, Vol. IV, Tab 52, pages 728–739)

July 11, 2007: Leave for judicial review (regarding a request for *mandamus* to compel an officer to process respondents' claim for refugee protection and refugee eligibility determination) (IMM-1025-07, IMM-1027-07, AM, at paragraph 17)

August 9, 2007: ID detention review; continued detention ordered (AB, Vol. III, Tab 48, pages 605–621)

September 6, 2007: ID detention review; continued detention ordered (AB, Vol. III, Tab 47, pages 600–604)

September 21, 2007: Judicial review application dismissed regarding exclusion orders (2007 FC 941, 391 F.T.R. 1 [*Li v. Canada (Minister of Citizenship and Immigration)*])

October 4 and 30, November 27, 2007: ID detention review; continued detention ordered (AB, Vol. III, Tab 47, pages 600–604; Tab 46, pages 596–599; Tab 45, pages 593–595)

December 19–20, 2007: ID detention review (AB, Vol. III, Tab 43, pages 542–587; Tab 42, pages 527–540)

January 10, 2008: ID detention review; continued detention ordered (AB, Vol. III, Tab 37, pages 467–476)

February 6, March 5 and April 2, 2008: ID detention review; continued detention ordered (AB, Vol. III, Tab 36, pages 464–466; Tab 35, pages 456–463; Tab 34, pages 453–455)

May 7 and 22, 2008: ID detention review; evidence that PRRA applications were given priority processing (AB, Vol. II, Tab 32, pages 409–443; Vol. III, Tab 30, pages 372–397)

June 11, 2008: ID detention review; release ordered with terms and conditions (AB, Vol. II, Tab 29,

pages 350–371)

June 13, 2008: Appellant files application for judicial review of release orders (IMM-2682-08, IMM-2683-08)

June 19, 2008: ID detention review; release terms and conditions maintained (AB, Vol. II, Tab 28, pages 332–349; Tab 28, pages 296–349)

June 23, 2008: Appellant files application for judicial review of release and motion to stay release orders (IMM-2819-08, IMM- 2820-08)

June 30, 2008: Motion allowed; release orders stayed (IMM-2819-08, IMM-2820-08)

July 3, 2008: Assurances from China sought regarding the issue of death penalty (AB, Vol. I, Tab 9, pages 71 and 78; Tab 10)

July 9, 2008: Appellant is granted leave for judicial review of release orders. Consolidated proceedings under IMM-2682-08 (IMM-2682-08; see 2008 FC 949, at paragraph 5)

August 11, 2008: Notice of disclosure of PRRA assessment and restriction assessment served on the respondents (subsection 112(3) and subparagraph 113(*d*)(i) of the IRPA) (AB, Vol. I, Tabs 12, pages 126 and 142)

August 15, 2008: Application for judicial review allowed by F.C., release orders set aside (2008 FC 949, 331 F.T.R. 68 [*Canada Minister of Citizenship and Immigration v. Li*])

August 26, 2008: Respondents' application for leave and judicial review against a decision "to halt the proceedings being conducted by the Minister's Delegate to determine them to be a danger to the public" (subparagraph 113 (*d*)(i)) (IMM-3787-08)

September 11, 2008: Immigration Division detention review; release order granted (AB, Vol. I, page 21)

September 12, 2008: Appellant files applications for leave and judicial review (AM, at page 36)

September 16, 2008: Respondents' file motion to prohibit consideration of PRRA applications pending disposition of their leave application (IMM-3786-08, IMM-3787-08)

October 1, 2008: Release orders stayed (IMM-4038-08)

October 8, 2008: Respondents' motion to prohibit consideration of PRRA is allowed (AM, at page 39; RM, at page 24; IMM-3786-08, IMM-3787-08)

December 23, 2008: Application for judicial review dismissed; release orders granted (IMM-4038-08, IMM-4039-08 [see 2008 CarswellNat 5419])

December 29, 2008: Question of general importance certified; appeal filed by the Minister (IMM-4038-08, IMM-4039-08 [see 2008 CarswellNat 5419])

January 14, 2009: Release orders stayed by F.C.A. (2009 FCA 7 [*Canada (Minister of Citizenship and Immigration) v. Li*])

[29] These proceedings were conducted at a heavy cost to taxpayers and have had an impact on the length of the respondents' detention. I next address the legal quagmire that the Division, the Federal Court and this Court face when addressing the issue of detention. Thereafter, I will summarize and

analyse the decisions of the Division and the Federal Court.

c) The legal quagmire faced by the Immigration Division, the Federal Court and this Court in assessing the legality of the respondents' detention

[30] The Division complains that its task of determining and quantifying in terms of months and days what constitutes an acceptable long-term detention has not been facilitated by the Federal Court's use of undefined and unqualified words such as "long term detention", "indefinite detention", "removal not imminent" or "will not occur within a reasonable time" and "lengthy detention": see appeal book, Volume 1, at pages 26 and 27, the September 11, 2008 decision.

[31] In embarking upon that exercise, the Division, the Federal Court and our Court are confronted with a number of legal constraints often pulling in different, if not opposite, directions. The present case illustrates this legal quagmire.

[32] First, the IRPA empowers the CBSA to enforce its provisions and, to that end, to arrest and detain foreign nationals illegally entering or remaining in Canada. However, the IRPA also affords the foreign nationals a wide array of proceedings to challenge the arrest, the detention, the Minister's refusal to refer a claimant's refugee claim for a refugee eligibility determination, the Minister's decision to refer the matter to the Division for an inadmissibility hearing, the Minister's delegate's decision to consider whether they are a danger to the public, the Minister's delegate's authority to make a decision on the PRRA, the decision on the PRRA and the exclusion orders or the deportation orders which may ensue at the end of this long process.

[33] For example, the respondents sought leave for an application for a writ of *mandamus* to compel the Minister's delegate at Citizenship and Immigration to refer their refugee claim to an officer responsible for processing claims for refugee protection and to require that officer to make a refugee eligibility determination with respect to their claims: see *Li v. Canada (Minister of Citizenship and Immigration)*, IMM-1025-07, IMM-1027-07, July 12, 2007 (F.C.).

[34] They applied for a stay to prevent the Minister's delegate from considering whether they were a danger to the public in accordance with subparagraph 113(*d*)(i) of the IRPA: see *Li v. Canada (Minister of Citizenship and Immigration)*, IMM-3787-08 (F.C.).

[35] They also sought by way of judicial review to have their exclusion order set aside: *Li v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 941, 319 F.T.R. 14.

[36] On the other hand, the appellant also sought redress against the detention release orders issued by the Division. Judicial review proceedings and stay applications were brought before the Federal Court: see *Canada (Minister of Citizenship and Immigration) v. Li*, IMM-4038-08, IMM-4039-08, December 23, 2008 [2008 CarswellNat 5419]; *Canada (Minister of Citizenship and Immigration) v. Li*, 2009 FCA 7; *Canada (Minister of Citizenship and Immigration) v. Li*, IMM-2819-08, IMM-2820-08, June 30, 2008; and *Canada (Minister of Citizenship and Immigration) v. Li*, 2008 FC 949.

[37] In short, whether the decision bears on detention, exclusion, deportation, referral to an admissibility hearing, refusal to refer a refugee claim to the Division, a danger opinion or PRRA,

there is at each stage of the process a possibility of challenging the decision by way of judicial review and appealing to the Federal Court of Appeal when a question is certified.

[38] Obviously, the multiplicity of challenges increases the length of the foreign nationals' detention. However, to the extent that detainees or the Government are diligently exercising recourses under the IRPA that are reasonable in the circumstances or resorting to reasonable Charter challenges, the ensuing delays should not count against either party: see *Charkaoui*, above, at paragraph 114.

[39] Moreover, detainees cannot, as a general rule, be deported to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture: see Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, [1987] Can. T.S. No. 36 signed by Canada. It is acknowledged that there are situations where deportation is difficult or impossible: see *Charkaoui*, above, at paragraph 124. This results in further detention of alleged foreign criminals like the respondents.

[40] While the detention of foreign nationals or foreign alleged criminals without warrant does not infringe the guarantee against arbitrary detention found in section 9 of the Charter, there has to be a meaningful process of ongoing review of the detention as well as meaningful opportunities given to detainees to challenge their continued detention or the conditions of their release: *ibidem*, at paragraph 107. Otherwise, violations of section 7 (right to liberty and security of the person) and section 12 (protection against cruel and unusual treatment) might ensue: *ibidem*, at paragraph 110.

[41] Because the IRPA provides for an effective review process that meets the requirements of Canadian law, it does not authorize indefinite detention: *ibidem*, at paragraph 127.

[42] However, notwithstanding all these procedural safeguards, it remains possible "that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter*": *ibidem*, at paragraph 123.

[43] Finally, in assessing the length of detention and the availability of alternatives to it, the reviewing authority must also be cognizant of the international obligations undertaken by Canada to co-operate in the international enforcement of criminal law. Canada is signatory to the following treaties:

1. *Single Convention on Narcotic Drugs, 1961*, [30 March 1961, [1964] Can. T.S. No. 30] (amended by the Protocol of 25 March 1972), [1976] Can. T.S. No. 48

2. *Convention on Psychotropic Substances*, 21 February 1971, [1988] Can. T.S. No. 35

3. *United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, [1990] Can. T.S. No. 42

4. *United Nations Convention against Corruption*, 31 October 2003, [2007] Can. T.S. No. 7

5. *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 U.N.T.S. 209

6. *Rome Statute of the International Criminal Court*, 17 July 1998, [2002] Can. T.S. No. 13 (relating to international crimes)

7. *Convention on the Transfer of Sentenced Persons*, 21 March 1983, [1985] Can. T.S. No. 9 (allows a person serving a custodial sentence outside their home state to return to their home state to serve out their sentence)

8. *Inter-American Convention against Corruption*, 29 March 1996, [2000] Can. T.S. No. 21

9. *Inter-American Convention on Serving Criminal Sentences Abroad*, 9 June 1993, [1996] Can. T.S. No. 23 (provides a person serving a custodial sentence the chance to serve it in a country in which the sentenced person is a national)

[44] It also signed a treaty with China promising to provide mutual legal assistance in criminal matters: *Treaty between Canada and the People's Republic of China on Mutual Legal Assistance in Criminal Matters*, 1 July 1995, [1995] Can. T.S. No. 29. Although the scope of mutual legal assistance expressed in Article 2 of the Treaty does not refer to the detention of alleged criminals, the list of topics therein mentioned is not limitative. In the context of an agreement to mutually assist each other in the enforcement of criminal law, ensuring that the alleged foreign criminals, arrested at the request of the foreign country which issued arrest warrants, will still be available for deportation when the time comes is no doubt a gesture of mutual assistance.

[45] In the context of all these international obligations, what should a reviewing authority do at a detention review hearing when it is satisfied that there is an almost certain risk the detainee will not appear for removal and yet the detention to that point has been lengthy and removal is not in sight for quite some time? How does the reviewing authority measure the length of the anticipated future detention? What weight should be given to the efficiency of the alternatives to detention when confronted with a risk or a certainty of flight? This was the dilemma faced by the Division with the Li brothers. This brings me to the September 11, 2008 decision of the Division and its subsequent review by the Federal Court.

The September 11, 2008 decision of the Immigration Division

[46] The Division's decision was rendered by Member King. Reversing her earlier ruling of January 10, 2008, she ordered the Li brothers released with conditions as she felt that continued detention would be contrary to section 7 of the Charter. Due to the PRRA opinion that the Li brothers may be tortured upon returning to China, she held it was no longer reasonable to estimate the Li brothers would be removed from Canada immediately after the final PRRA decision. She concluded that any time estimate must include Federal Court judicial review and Federal Court of Appeal processes: see appeal book, Vol. 1, at paragraph 14 [decision, at paragraph 15].

[47] In calculating her time estimate, Member King made a comparative analysis of other cases and the length of time required, referring to the method of estimation used by the Federal Court in

cases where there was a potential for a breach of the right to liberty under section 7 of the Charter. She concluded it was possible the Li brothers could be detained for another 18 months, meaning their total detention time could be up to three years. However, she also noted that their case was at a point where "any number of possible steps could be taken by either side" and the time for each step was unknown. As such, this continued detention until their removal would be an indefinite amount of time constituting a breach of their right to liberty under section 7 of the Charter: *ibidem*, at paragraphs 16–23 [decision, at paragraph 22].

[48] She then considered, for the purpose of a potential section 7 Charter breach, the weight to be given to the respondents' high flight risk as compared to a detainee's danger to the public. She interpreted Justice Rothstein's [as he then was] comment in *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (T.D.) [at page 231] that "there is a stronger case for continuing a long detention when an individual is considered a danger to the public" to mean that detention based on a concern that a person would not appear for removal should be less than when a person is considered a danger to the public: *ibidem*, pages 27–31, at paragraphs 24–37 [decision, at paragraph 27].

[49] Next, she examined the terms and conditions of release. She balanced the degree of flight risk, the length of time until removal and the available alternatives to detention. In light of the decision to release the Li brothers to prevent a Charter breach, she imposed conditions that: *ibidem*, page 32, at paragraph 43 [decision, at paragraph 43]:

> . . . are intended only to reduce as much as possible the Li brothers' opportunity to flee, while at the same time not being so restrictive that they unduly impair the Li brothers' liberty. . . .

[50] The conditions imposed aimed at providing the Li brothers with sufficient liberty, while allowing the CBSA to monitor their movements. The conditions included:

1. strict geographic restrictions on movement (within Vancouver);

2. electronic monitoring;

3. paying for electronic monitoring;

4. prohibited from obtaining false identity documents;

5. prohibited from contact with Ho, Pak Hung who helped them obtain the fraudulent documents;

6. reside at an address provided to CBSA in advance and at no other address without CBSA's written approval;

7. provide to CBSA copies of any residential tenancy agreements executed and all telephone records;

8. allow CBSA to access their residence at any time to ensure compliance with the conditions; and

9. report as directed for removal from Canada.

The Li brothers were ordered released subject to the above-noted terms and conditions.

The Federal Court decision

[51] The Federal Court reviewed Member King's decision for reasonableness, accepting the respondents' argument that the member was experienced in weighing the evidence and reviewing detention in accordance with the relevant statutory provisions. She thus deserved a high degree of deference: see endorsement for order, appeal book, Vol. 1, pages 8 and 9 [2008 CarswellNat 5419, at paragraphs 5–14].

[52] The Court concluded Member King committed no error of law. In its view, Member King considered the relevant issues, notably estimating the time required for future legal processes in dealing with questions of "long-term" detention, a question that is necessarily speculative. Further, the Court accepted Member King's decision that there was now evidence (the PRRA opinion served August 11, 2008) that was not available at prior detention reviews. According to the Court, Member King's finding of fact that continued detention for the additional time required until removal could be indefinite was reasonable.

[53] The Court also held Member King provided clear and convincing reasons for going against prior decisions regarding the continued detention and the adequacy of electronic monitoring of the respondents.

[54] The application for judicial review was dismissed and on December 29, 2008, the Federal Court certified the question on appeal.

Analysis of the decisions of the Immigration Division and the Federal Court

[55] Relying on a statement of Rothstein J. in the *Sahin* case, above, the Division concluded that detention on the basis that the detainee would not appear for removal should not be for as long as when a person is considered a danger to the public: see reasons for decision, appeal book, Vol. 1, page 30, at paragraph 34 [decision of the Division, at paragraph 34]. This approach of Rothstein J. was endorsed by the Supreme Court of Canada in *Charkaoui*: see reasons for judgment at paragraphs 108 and 109 where [at paragraph 111] the Chief Justice said that "[w]hile the criteria for release under s. 83 of the *IRPA* also include the likelihood that a person will appear at a proceeding or for removal, a threat to national security or to the safety of a person is a more important factor for the purpose of justifying continued detention." It is an important consideration to keep in mind when assessing the factors in support of continued detention.

[56] While the list is not exhaustive and all relevant factors have to be taken into account, the *Charkaoui* case, at paragraphs 108 to 117 of the reasons for judgment, put emphasis on the following: the reasons for detention, the length of detention, the reasons for the delay in deportation, the anticipated future length of detention and the availability of alternatives to detention. These factors have been legislated in section 248 of the Regulations.

[57] The appellant and the respondents agree as to the relevancy of these factors. The dispute bears on their interpretation, their application and the weight that they should be given.

(a) Whether there was a new fact justifying a review of the previous time estimate of the respondents' detention

[58] The appellant takes issue with paragraph 14 of the reasons for the decision issued by the Division. The paragraph reads:

> The PRRA process in this case, as it turns out, is not going to be a straight-forward negative decision. At one step of this process a decision-maker has reached an opinion there is a risk the Li brothers would be tortured upon their return to their home country. That decision was served on the Li brothers on August 11, 2008 [Exh. P13, p. 33]. The Minister submits that this opinion is only an interim part of a larger process and is not binding with respect to the final decision. The Minister alleges the final decision will be made in mid-October. I have to conclude, however, that the existence of the opinion about a risk of torture does mean it is likely that my original time estimate until the Li brothers will be removable is no longer valid. My estimations of time made in January must now be revised.

The fact that the Minister's final decision on the PRRA would be made in mid-October was not, on September 11, 2008, a new fact. Member Dyck who conducted an earlier review of the detention (the June 19, 2008 review) expressly mentions it in his decision. See reasons for decision, appeal book, Vol. 2, at pages 332–333.

[59] Counsel for the respondents submits that what constituted a new fact on September 11, 2008 was the content of the preliminary opinion disclosed to the Li brothers.

[60] Although there was speculation at the May 22, 2008 detention hearing that a PRRA decision had been rendered, it is true that the preliminary opinion came after the June 19 hearing.

[61] However, this preliminary opinion was not a final decision. As previously mentioned, the respondents were invited to make final representations to the Minister before he made a final decision. We were informed at the hearing that a decision on the PRRA still has not been rendered by the Minister because he was prevented from doing so as a result of respondents' proceedings.

[62] With respect, I do not think that it was appropriate for the Division, at the September 11, 2008 review hearing, to ground an assessment of the anticipated future length of detention on a mere preliminary opinion when the final decision would come only a month later and a review of the detention is held every month. The Division was led by this opinion to assume that judicial review proceedings would be authorized by the Federal Court and that an appeal would necessarily be heard by the Federal Court of Appeal. It then felt justified to review its previous time estimate to include the additional time which would result from its assumption.

[63] The assumption was based on speculation as to the eventual PRRA decision of the Minister. Considering that another review had to be held a month later, it was neither necessary nor reasonable at that time to engage in this kind of speculation and make this kind of assumption. As we shall see below, the ensuing assess-ment of the future length of detention was speculative and premature.

(b) The anticipated future length of detention

[64] By definition, the concept of anticipated future length of detention requires an estimation of what the expected duration of the future detention will be. In *Charkaoui*, above, at paragraph 94, the Supreme Court found that the lack of timely review of the detention of foreign nationals violated section 9 and paragraph 10(*c*) of the Charter and could not be saved by section 1.

[65] At the time, the detention provisions precluded a review of the detention of foreign nationals until 120 days after the security certificate had been deter-mined to be reasonable. This long delay would invite speculation as to potential challenges and their effect on the length of detention.

[66] Now, however, according to subsection 57(2) of the IRPA, there has to be a review "at least once during each 30-day period following each previous review". This short delay of 30 days or less between each review allows for an estimation based on actual facts and pending proceedings instead of an estimation based on speculation as to potential facts and proceedings.

[67] Every 30 days, the reviewing authority obtains an accurate picture of the detention situation. It can look at the actual length of detention served and at the pending proceedings. It may also review the state of these proceedings, their progress over time and make a realistic estimation of the expected future length of detention based on existing facts rather than assumptions. Then it may count the length of time served and add to it the time needed to deal with the current pending proceedings. Should there be an overestimation or an underestimation of the anticipated future length of detention, it can be quickly corrected at the next review hearing, held at most 30 days later.

[68] To summarize, section 57 of the IRPA provides what the Supreme Court of Canada termed a robust detention review based on actual information reviewable every 30 days. In my respectful view, it was a reviewable error of law as well as unreasonable for the Division to speculate on the Minister's forthcoming decision, on potential but as yet non-existing proceedings, and to assume from that speculation that such proceedings would be authorized by the Federal Court and reach this Court. It was also a reviewable error of law for the Federal Court to endorse the speculative approach taken by the Division.

(c) The alternatives to detention

[69] As a general rule, resorting to available alternatives only makes sense if they are effective and appropriate: see *Sahin*, above, at page 231. However, when applied to a lengthy detention, the rule attracts Charter considerations: the alternatives must not be a disproportionate response to the threat and I should add the risk of flight: see *Charkaoui*, above, at paragraph 116.

[70] Until the September 11, 2008 decision, the release of the Li brothers under electronic monitoring was found insufficient to prevent or reduce the risk of flight. The Li brothers have liquidated their assets in Canada, were evading the Canadian authorities and, when arrested, were found in possession of forged identities and documents. In fact, one of the conditions of their release prohibits them from contacting a Mr. Ho, Pak Hung who helped them obtain the fraudulent documents. It is naïve to believe that forged documents cannot be easily obtained from sources other than Mr. Ho, Pak Hung by well-funded individuals in dire need of them to avoid a return to their country to face prosecution. While there are nine conditions of release, it is fair to say that electronic monitoring is the primary one, yet acknowledged by expert evidence to be insufficient to ensure the

appearance of the respondents for removal.

[71] At paragraphs 42 and 43 of its reasons for decision, the Division writes:

> When I considered the proposal of electronic monitoring in January 2008, I rejected it because I did not believe it would sufficiently reduce the flight risk to an acceptable level in the context of the time I was estimating it would take until removal.
>
> Now, 7 months later, since I am ordering the Li brothers' release to prevent a *Charter* breach, the imposition of terms and conditions is not at this stage for the purpose of attempting to neutralize or overcome the flight risk. Any terms and conditions that I impose now are intended only to reduce as much as possible the Li brothers' opportunities to flee, while at the same time not being so restrictive that they unduly impair the Li brothers' liberty, taking into consideration the indefinite length of time that the Li brothers may continue to be subject to terms and conditions in Canada. [Emphasis added.]

[72] The appellant complains that the Division is, in fact, resorting to an alternative to detention that is inefficient to secure appearance for removal. I believe the Division recognizes that in its paragraph 43.

[73] Despite this impediment, pursuant to the approach that it took in assessing the anticipated length of future detention, the Division felt compelled to intervene to prevent a breach of the Charter. I have already concluded that its approach was in error. There is thus no need to address the issue of the efficiency of the alternatives proposed by the Division to allow the appeal and set aside the release order. However, as the very same issue is likely to come up at another detention review hearing, I will say a word about it.

[74] The case law dictates that the Charter trumps the risk of flight or danger to the public when the length of the detention reaches the stage where it "constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under subsection 24(1) of the *Charter*": see *Charkaoui*, above, at paragraph 123. In *Canada (Minister of Citizenship and Immigration) v. Romans*, 2005 FC 435, the Federal Court endorsed the release of the respondent because his immigration detention on the basis that he was a danger to the public had become indefinite and contravened the Charter.

[75] There will be instances where nothing short of release from detention, with or without conditions, will remedy a Charter breach. That being said, the prevention of a Charter breach, however, does not necessarily require the same remedy as an actual breach. In other words, preventive measures may be and, depending on the circumstances, shall be different from corrective measures.

[76] One available preventive measure consists in expediting the proceedings: see *Sahin*, above. I hasten to add that expediting proceedings is not an alternative to detention. Shortening the future length of detention does not eliminate detention. It is a method for controlling or reducing the length of what the detention would be if nothing is done. It is, however, an appropriate recourse to prevent a breach of the Charter.

[77] This recourse has been taken in the present case. Motions have been made and granted to

expedite the proceedings. The September 11, 2008 decision of the Division does not consider this available recourse in its speculation as to the anticipated future length of detention. Nor does it contain an assessment of whether some of the recourses were unreasonable in the circumstances or could have been prosecuted more diligently, thereby unnecessarily contributing to the actual length of the detention. There is also no consideration of Canada's international undertakings to assist in the enforcement of criminal law.

[78] In conclusion, the Division proceeded on a basis that is both unreasonable and erroneous in law when it determined the anticipated future length of detention of the Li brothers. It speculated on potential proceedings that the parties could bring rather than making its estimation on actual pending proceedings. In addition, the speculation was too far reaching, unwarranted, unreasonable and unnecessary since there is a review at least once every 30 days. It was also an error to assume that the Federal Court and this Court would entertain these speculated remedies.

[79] Finally, the Division failed to take into account and assess relevant factors as well as the impact of another appropriate available and less drastic recourse to prevent a breach of the Charter, i.e. expediting the proceedings. The Federal Court should have intervened to remedy these errors of law.

(d) The other grounds of appeal

[80] In view of the conclusion that I have reached, it is not necessary to consider the other grounds of appeal.

(e) The certified question

[81] The certified question as framed does not lend itself to a simple yes or no answer. What is in issue in the certified question is the appropriateness of making estimates of anticipated future length of detention on a mere anticipation of available processes under the IRPA and the Regulations, including Federal Court proceedings. I have concluded that the basis of the estimation of anticipated future length of detention should be the proceedings as they exist at the time of each monthly review and not on an anticipation of available processes but not yet underway. This conclusion with others disposes of the appeal and provides an answer to the question.

Conclusion

[82] For these reasons, I would allow the appeal and set aside the decision of the Federal Court. Proceeding to render the judgment that should have been rendered, I would allow the appellant's application for judicial review, set aside the September 11, 2008 release decision of the Immigration Division and refer the matter back to a different member of the Immigration Division for a redetermination in accordance with these reasons.

DESJARDINS J.A.: I concur.

TRUDEL J.A.: I agree.