Federal Court  Cour fédérale

Date: 20160614

Docket: IMM-2385-15

Citation: 2016 FC 661

Ottawa, Ontario, June 14, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

And

MAKADOR ALI

Respondent

JUDGMENT AND REASONS

[1] The Applicant, the Minister of Public Safety and Emergency Preparedness, seeks judicial review of a decision of the Immigration Division [ID] of the Immigration and Refugee Board [IRB] dated May 21, 2015, wherein ID member O. Nupponen, ordered the Respondent, Makador Ali, released from detention on a number of conditions.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Respondent was born in Somalia. He arrived in Canada on April 15, 1996 and was granted refugee status by the IRB on April 18, 1997. He became a permanent resident on November 16, 2001.

[4] On December 15, 2009, Canada Border Services Agency [CBSA] issued a report under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] which stated that it was the officer's opinion that the Respondent was inadmissible for reasons of serious criminality under paragraph 36(1)(*a*) of the IRPA as a result of his June 24, 2008 convictions for assault and mischief as per sections 266 and 430(1)(*d*) of the *Criminal Code*, RSC 1985 c C-46. A deportation order was issued against the Respondent on May 25, 2010.

[5] On September 15, 2011, CBSA issued another section 44 report against the Respondent based on its belief that the Respondent was inadmissible under paragraph 37(1)(*a*) of the IRPA for organized criminality as he was a part of a criminal street gang known as the "Bloods". On September 16, 2011, CBSA arrested and detained the Respondent pending his removal pursuant to subsection 55(1) of the IRPA. A detention review was held on October 28, 2011, and the Respondent was released from immigration detention on November 1, 2011, with his father acting as the bondsperson.

[6] On November 10, 2011, the Respondent was arrested by CBSA for failure to comply with his condition of release that required him to reside with his father. A detention review was

held on November 14, 2011, and again on November 21, 2011. The Respondent was released on essentially the same conditions as those set out in the October 28, 2011 detention review.

[7] In July 2012, a warrant was issued by CBSA and the Respondent was arrested.

[8] On July 31, 2012, the ID found the Respondent to be inadmissible under paragraph 37(1)(*a*) of IRPA and a deportation order was issued against him. The Respondent was further advised on October 22, 2012, that CBSA would be pursuing a danger opinion against him under paragraph 115(2)(*a*) of the IRPA.

[9] On November 2, 2012, a detention review was held by the ID and the Respondent was released to his mother. One of the Respondent's conditions of release was that his mother post a bond in the amount of three thousand five hundred dollars ($3,500.00) and his sister in the amount of five hundred dollars ($500.00).

[10] On July 21, 2013, the Respondent was arrested by CBSA for breaching certain conditions of his November 2012 release. Following a detention review conducted by ID member O. Nupponen, the Respondent was released from detention on July 30, 2013, based upon certain conditions. As in November 2012, the Respondent's mother and sister were required to post the same amount of bond. However, the ID member ordered that the deposits made in relation to the November 2012 release order be carried over and as a result, the bondspersons were not required to make new deposits.

[11] On November 27, 2013, while on immigration bail, the Respondent was arrested and detained by the police and charged with attempted murder, aggravated assault, forcible confinement and being unlawfully in a dwelling, in relation to events that allegedly occurred on November 17, 2013. According to the police, a group of people severely assaulted an individual, causing life threatening injuries and leaving him unconscious in a park. The police allege that the Respondent was a member of the group assault.

[12] On November 29, 2013, an arrest warrant was issued by CBSA on the ground that the Respondent had breached his July 30, 2013 conditions of release. The Respondent was notified by CBSA on December 12, 2014, that a danger opinion was being sought against him under paragraph 115(2)(*b*) of IRPA.

[13] The Respondent remained incarcerated until he was released on bail on March 12, 2015, by the Ontario Court of Justice, based on a number of conditions including that he resides with his mother, that she acts as his surety and that she provides the sum of one thousand five hundred dollars ($1,500.00) as a bond.

[14] The next day, March 13, 2015, CBSA arrested the Respondent on the grounds that he was a danger to the public and that he was unlikely to appear for his removal from Canada. Detention reviews were held on March 16, 2015 by ID member D. Tordoff, on March 23, 2015 by ID member Y. Dumoulin and on April 22, 2015 by ID member S. Morin. In each case, the ID member maintained the Respondent's detention on the basis that he was found to be a potential danger to the public and there was a serious flight risk.

[15] On May 21, 2015, a fourth detention review was conducted by ID member O. Nupponen. He ordered that the Respondent be released on a number of conditions, one of which required that he reside with his mother, who would also serve as bondsperson. On May 22, 2015, prior to the Respondent's release, the Applicant sought judicial review of the May 21, 2015 decision and was granted an interim stay on May 24, 2015. On May 29, 2015, the Applicant was granted a stay pending this judicial review application.

[16] At the time of hearing this matter, the Respondent had been subject to further detention reviews on June 18, 2015, July 10, 2015, August 10, 2015, September 9, 2015 and October 7, 2015, all of which maintained his detention.

II. Decision under Review

[17] In his decision of May 21, 2015, ID member O. Nupponen acknowledged that, like his colleagues, he believed that the Respondent posed both a flight risk and a danger to the public. He concluded, however, that the bail plan he would order addressed both flight risk and danger. He stated that the terms and conditions of release would essentially be a "melange of terms and conditions which [he] had previously issued in July of 2013, taking in to (sic) account the fact that Mr. Ali has been released by the Criminal Courts on some important terms and conditions."

[18] The ID member underlined that while the Respondent was facing outstanding charges in relation to the events of November 17, 2013, he had not been convicted of any of the charges. He also noted that there appeared to be serious questions regarding the viability of the Crown's case against the Respondent, particularly due to the recanting of a key witness and the delay between

the events in question and his arrest. The ID member was of the view that there was insufficient credible and trustworthy evidence to point to a breach of any of the terms and conditions that had been previously applied. He further found that although there were reports of the Respondent participating in incidents of misconduct while in detention, there was not enough evidence to conclude whether he was a victim or a perpetrator, especially considering the difficult environment in jail. The ID member concluded that the Respondent had "relatively well complied with the terms and conditions which [he] had previously imposed."

[19] The ID member then turned his mind to the terms and conditions of release he deemed suitable in the circumstances of the case. In particular, he found that the Respondent's mother was still a suitable surety as he was not convinced that the Respondent had actually breached his conditions. He accepted that the Respondent's mother provide a cash bond of one thousand five hundred dollars ($1,500.00) and that his sister provide a cash bond of seven hundred dollars ($700.00).

III. Issues

[20] Although framed differently by the Applicant, the issues in this case are:

1) Is the application for judicial review moot as a result of the subsequent detention review decisions maintaining the Respondent's detention? If so, should this Court exercise its discretion and render a decision even though the matter is moot?

2) If the matter is not moot, or if the Court decides to exercise its discretion, did the ID member commit a reviewable error in his decision?

IV. Analysis

A. *Affidavits of the Respondent's Counsel*

[21] As a preliminary matter, the Applicant raised the issue of the admissibility of the Respondent's affidavits dated July 10, 2015 and October 29, 2015, signed by one of the Respondent's Counsel in these proceedings. The Applicant argued that the affidavits should be struck on two grounds. First, the affidavits do not conform with Rule 82 of the *Federal Courts Rules*, SOR/98-106 [Federal Courts Rules], which requires that a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit except with leave of the Court. Second, the affidavits include opinion and hearsay evidence. In oral submissions, the Applicant indicated that he was willing to withdraw his first objection should the Counsel in question not appear on the merits of the judicial review application, however he would maintain his second objection with regards to paragraphs three (3) and four (4) of the July 10, 2015 affidavit and paragraphs six (6) to fifteen (15) of the October 29, 2015 affidavit.

[22] The Respondent submitted that the affidavits in question contain relevant new evidence that seeks to correct errors contained in the record. While the Respondent conceded that the affidavits may contain some opinion evidence, he argued that they are relevant as they contain important updates on the Respondent's criminal matters to which only his Counsel can attest to.

[23] I find that paragraphs three (3) and four (4) of the July 10, 2015 affidavit and paragraphs six (6) to fifteen (15) of the October 29, 2015 affidavit should be struck as they contain hearsay, opinion and new evidence. As set out by Rule 81of the *Federal Courts Rules*, affidavits must be

confined to facts within the deponent's personal knowledge. Moreover, as established in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [Access Copyright], as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the decision-maker, save for a few specific exceptions. The impugned paragraphs do not meet these exceptions, nor is their content confined to the personal knowledge of the deponent. As such, I find that paragraphs three (3) and four (4) of the July 10, 2015 affidavit and paragraphs six (6) to fifteen (15) of the October 29, 2015 affidavit should be struck.

B. *Mootness*

[24] While somewhat unusual, the Applicant submits that its application for judicial review is now moot on the basis that the subsequent detention review decisions maintaining the Respondent's detention have superseded the May 21, 2015 decision, rendering it inoperative.

[25] The Respondent, on the other hand, disagrees with the Applicant. He argues that, due to the pending judicial review application and the limited availability of legal aid to fund additional detention reviews, he specifically requested at subsequent detention reviews that no findings be made concerning the suitability of his release plan. He further argues that the subsequent decisions to detain the Respondent were tainted by errors made in the April 2015 detention review decision.

[26] The leading case on mootness is *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. At paragraph 16 of the decision, the Supreme Court of Canada outlined a two-

step analysis for determining whether an issue is moot. The first step consists of determining whether there remains a live controversy. If the controversy no longer exists, the issue will be considered moot. Second, if the issue is moot, the Court must decide whether it should exercise its discretion to hear the case in any event. The following three (3) factors are relevant to the exercise of this Court's discretion: 1) the existence of an adversarial relationship between the parties; 2) concern for judicial economy; and 3) awareness of the Court's proper law-making function (*Borowski*, at paras 31, 34 and 40).

[27] Pursuant to section 55 of the IRPA, an enforcement officer may arrest and detain a permanent resident or a foreign national, with or without warrant, when there are reasonable grounds to believe that he or she is inadmissible, and is either a danger to the public or unlikely to appear for an examination, for an inadmissibility hearing, for removal or at a proceeding that could lead to a removal order.

[28] Under section 57 of the IRPA, the ID must review the reasons for continued detention: 1) within forty-eight (48) hours after the individual is taken into detention; 2) at least once during the seven (7) days following the forty-eight (48) review; and 3) at least once during each thirty (30) day period thereafter. For each review, the ID must "decide afresh whether continued detention is warranted" (*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at para 8 [*Thanabalasingham*]; *Kippax v Canada (Citizenship and Immigration)*, 2014 FC 429 at para 16 [*Kippax*]; *Bruzzese v Canada (Public Safety and Emergency Preparedness*), 2014 FC 230 at para 45 [*Bruzzese*]).

[29] While I recognize that some applications for judicial review of detention review decisions have been held by this Court not to be moot even though further detention reviews were conducted (*Canada (Citizenship and Immigration) v B046*, 2011 FC 877), I agree with the Applicant that in the particular circumstances of this case, the application for judicial review is moot. The June 18, 2015 decision maintaining the Respondent's detention superseded the May 21, 2015 decision, as did each detention review that followed thereafter (*Canada (Public Safety and Emergency Preparedness) v Ismail*, 2014 FC 390 at para 22; *Canada (Minister of Citizenship and Immigration) v Chen*, (2000) 186 FTR 263 (FC) at para 27; *Kippax*, at para 7). The May 21, 2015 decision no longer has any effect.

[30] My conclusion that the application for judicial review is moot is further supported by the fact that in the event I were to find that the May 21, 2015 decision was reasonable, I would nevertheless have to order that a new detention review be conducted on the basis of the most up-to-date facts regarding the Respondent's current situation. Information which was not available or in existence at the time of the May 21, 2015 detention review could now very well be relevant and would have to be considered by the ID member in deciding the matter afresh as to whether the Respondent should remain detained or be released.

[31] I now turn to the second step of the *Borowski* mootness analysis. The Applicant argues that there are no grounds that would justify this Court exercising its discretion because there are no collateral consequences for the Applicant since the subsequent decisions of the ID remain operative and will not be impacted by the outcome of this application for judicial review. In relation to the concern for judicial economy, the Applicant argues that the circumstances which

favour the exercise of discretion are not present in the case at hand and finally, that there is no meaningful adversarial context to this application.

[32] The Respondent argues that the Court should exercise its discretion because the matter is one in which the public has an interest in its resolution since the Respondent remains in custody. The Respondent submits that it would be inherently unfair to deny him the right to have the judicial review heard on its merits on the basis that statutorily prescribed detention reviews have subsequently occurred, particularly given that he was initially granted release. Finally, the Respondent is of the view that to deny him the opportunity to have this matter adjudicated, where it is the Applicant who contested the ID's findings, runs afoul to the principles of fundamental justice.

[33] I have considered the principles set out in *Borowski* and have decided to address the merits of the application for judicial review notwithstanding its mootness. I agree that there is still an adversarial relationship between the parties. The Respondent remains in detention and the suitability of the Respondent's mother as a bondsperson appears to still be an issue before the ID in its ongoing detention reviews. While this Court has not been provided with a transcript of the September 9, 2015 and October 7, 2015 decisions, the decision dated June 18, 2015 rejected the Respondent's mother as a suitable bondsperson and the July 10 and August 10, 2015 decisions indicate that the Respondent requested that the ID member refrain from determining whether or not his mother is a suitable bondsperson until this Court decides the application for judicial review.

C. *Did the ID member commit a reviewable error in his decision?*

[34] The Applicant submits that the ID member's May 21, 2015 decision was incorrect as well as unreasonable as it failed to provide clear and compelling reasons for departing from previous detention review decisions, and in particular the April 22, 2015 decision which found: 1) the Respondent posed a danger to the public; 2) he was a flight risk; 3) his mother was not an appropriate bondsperson; 4) the Respondent had breached his conditions of release; and 5) the amount of two thousand two hundred dollars ($2,200.00) was insufficient to ensure the Respondent's compliance with conditions of release. The Applicant argues that ID member O. Nupponen completely reversed these findings without referring to the April 22, 2015 decision or providing any reason for his divergence.

[35] The Respondent argues that the May 21, 2015 decision was reasonable and accurately reflected the ID member's knowledge of the Respondent's case and the fact that counsel was not present at the three (3) prior detention reviews which maintained his detention. With respect to the April 22, 2015 detention review, the Respondent argues that this decision also disregarded previous detention reviews, contained factual and prejudicial errors and ignored previous findings and relevant information. The Respondent submits that the ID member was entitled to rely on his own previous findings of July 2013 in assessing the suitability of the Respondent's mother as a bondsperson. The Respondent also argues that the ID member did not deviate from previous rulings without providing compelling reasons for doing so.

[36] As stated earlier, each ID member must decide the matter afresh and take all existing factors into account including the reasons for previous detention review decisions. However, the law is clear that while prior detention review decisions are not binding, the ID member must not

depart from prior decisions without providing clear and compelling reasons for doing so. The subsequent decision maker must give a clear explanation of why the previous ID member's detention review decision should not stand (*Thanabalasingham*, at paras 8 and 10; *Bruzzese*, at para 45; *Kippax*, at para 17).

[37] As the Federal Court stated in *Thanablasingham*, at paras 12-13:

> [12] The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current Member disagrees.
> [13] However, even if the Member does not explicitly state why he or she has come to a different conclusion than the previous Member, his or her reasons for doing so may be implicit in the subsequent decision. What would be unacceptable would be a cursory decision which does not advert to the prior reasons for detention in any meaningful way.

[38] This Court has recognized that the issue as to whether or not a member erred by failing to provide clear and compelling reasons for departing from previous detention review decisions is a question of mixed fact and law and is therefore reviewable on a reasonableness standard of review (*Kippax*, at paras 13-15; *Bruzzese*, at paras 42-45; *Canada (Citizenship and Immigration) v Li*, 2008 FC 949 at paras 12-16).

[39] Upon review of the transcripts of the various detention review decisions, I agree with the Applicant that in ordering the release of the Respondent on May 21, 2015, ID member O. Nupponen failed to provide clear and compelling reasons for departing from the previous detention review decision of April 22, 2015, by ID member S. Morin.

[40] In considering whether the Respondent's continued detention was justified, ID member S. Morin noted during the April 22, 2015 detention review that at the forty-eight (48) hour detention review on March 16, 2015, the ID member had afforded the Respondent the benefit of the doubt with respect to whether or not he had breached his conditions of release because CBSA had not yet seized the bonds of the bondspersons. ID member S. Morin noted that CBSA had since taken the official step of seizing the bonds and thus he concluded that the conditions of release had been breached by the Respondent. ID member S. Morin found two (2) major flaws with the alternatives to detention proposed by the Respondent. First, he found that the Respondent's mother was not a "suitable" bondsperson as she had not been able to ensure that the Respondent respect his conditions of release. He also found that the amount of two thousand two hundred dollars ($2,200.00) proposed for a new bond was insufficient to ensure the Respondent's compliance with conditions of release given that he previously had been released on a bond of four thousand dollars ($4,000.00) that had eventually been seized due to a breach.

[41] At the May 21, 2015 detention review, ID member O. Nupponen agreed with his colleagues that there was a danger to the public and a flight risk in releasing the Respondent. While he provided a number of reasons why he was satisfied that the proposed alternative to detention addressed both flight risk and public safety, he failed to acknowledge the existence of previous detention review decisions and in particular, the April 22, 2015 decision, which addressed these same risks and identical alternatives to detention.

[42] In his memorandum of fact and law, the Respondent relies on the following excerpt of the May 21, 2015 decision to support the argument that ID member O. Nupponen clearly referred to the decisions of his colleagues:

> [4] Taking into account the submissions of counsel; Mr. Makador Ali's testimony and the Minister's counsel's submission; the additional evidence that was received my conclusion is that there is a danger to a public, and there is a flight risk. So in that regard, I do agree with my colleagues who have continued detentions in the past.
>
> [5] However, I am satisfied with the alternative which is proposed today. In my view the alternative suitably does address both flight risk and danger.
>
> …So when I released Mr. Ali in July 2013 I made certain determinations as to alleged breaches of terms of conditions.
>
> …So it was pointed out by colleagues in the past that in Canada a person is innocent until proven guilty.

[43] I disagree with the Respondent's interpretation of this passage. In my view, the references noted by the Respondent are not meaningful references and do not meet the requirement of providing "clear and compelling reasons" for departing from previous detention review decisions. The reference to "the past" does not reveal whether the ID member is referring to detention review decisions pre-July 2013, or after the Respondent's November 28, 2013 arrest. Moreover, the ID member does not explain what previous decisions stated or what specifically has given rise to his diverging opinion, whether it is new evidence or changed circumstances. This does not in my opinion constitute a meaningful reference to the prior detention review decisions, nor can it be said that the ID member's reasons for departing from the previous detention review decisions are implicit in the decision. His failure to explain why he was diverging from the April 22, 2015 assessment of continued detention constitutes a failure to

provide "clear and compelling reasons" for departing from previous decisions as required in law. In failing to do so, ID member O. Nupponen committed a reviewable error (*Canada (Citizenship and Immigration) v B046*, 2011 FC 877 at para 50) that renders the decision unreasonable, in the sense that it falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[44] For these reasons, I am satisfied that the application for judicial review should be allowed and that the May 21, 2015 decision of the ID releasing the Respondent from detention should be quashed. Since the Respondent will almost immediately have a new detention review, as required by subsection 57(2) of the IRPA, no purpose would be served by remitting this matter to a different member of the ID for re-consideration.

JUDGMENT

THIS COURT'S JUDGMENT is that :

1. The application for judicial review is allowed;
2. Paragraphs three (3) and four (4) of the Respondent's July 10, 2015 affidavit and paragraphs six (6) to fifteen (15) of the Respondent's October 29, 2015 affidavit are struck;
3. The Immigration Division decision dated May 21, 2015 is quashed;
4. No question of general importance is certified.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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