Date: 20030710

Docket: IMM-831-03

Citation: 2003 FC 865

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Applicant,

- and -

STEPHEN MICHAEL JAMES AMBROSE,

Respondent.

REASONS FOR ORDER

LAYDEN-STEVENSON J.

[1] At the conclusion of the hearing of this matter on July 8, 2003, I allowed, from the bench, the application for judicial review. These are my reasons for so doing.

[2] In a decision dated January 27, 2003, a member of the Immigration Division of the Immigration and Refugee Board (the tribunal member) determined that the respondent, Stephen Ambrose, was a flight risk and that his presence in Canada was likely to endanger the public. Seven days later, on February 3, 2003, the same tribunal member ordered the respondent

released from detention despite concluding that he had not changed his mind regarding the likelihood of danger and the unlikelihood of appearance. The applicant Minister took issue with the decision of February 3, 2003, and sought judicial review of it.

[3] The respondent filed a notice of appearance on February 20, 2003. On February 27th, he was served at the Westmorland Institution, by facsimile and by courier, with the applicant's application record. He did not file a respondent's record. He appeared at the hearing with the intention of making representations. While counsel for the Minister advanced a formal objection to the respondent's status to address the court, the objection was not strenuously argued. The respondent indicated that he had discussed his proposed attendance with the case presenting officer in the Halifax regional office. Counsel did not suggest that the Minister would be prejudiced in any way if the respondent were permitted to make oral representations. I was satisfied with the respondent's explanation for his failure to file a motion record and I determined that in the interests of justice, Mr. Ambrose should be permitted to address the court. I also indicated that if he raised issues that counsel felt required further submissions, I would grant time for the preparation and filing of them. In the end, counsel did not feel that any further submissions were necessary. The respondent, in many respects, agreed with the position taken by the Minister.

[4] The respondent is one of five British subjects convicted on October 16, 2001, of conspiring to commit an indictable offence contrary to paragraph 465 (1)(c) of the ***Criminal Code***, R.S.C. 1985, c. 46. They conspired to import 2.5 tons of cannabis resin into Canada

contrary to subsection 6(1) of the ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19. The offence carries a maximum sentence of life imprisonment. The respondent pleaded guilty and was sentenced to seven years and eight months in a federal institution.

[5] A report, pursuant to section 27 of the former ***Immigration Act***, R.S.C. 1985, c. I-2 (the Act) regarding the respondent, was forwarded to the deputy minister and on June 11, 2002, the respondent was ordered detained pursuant to subsection 105(1) of the Act. On June 28, 2002, the ***Immigration and Refugee Protection Act***, S.C. 2001, c. 17 (IRPA), came into force. A removal order was issued on October 31, 2002. Subsection 50(b) of IRPA prohibits the applicant from effecting removal of the respondent until his sentence is completed.

[6] The respondent became eligible for day parole on January 25, 2003, but remained in detention pursuant to the subsection 105(1) order. A 48 hour detention hearing was held on January 27, 2003. It was at this hearing that the tribunal member determined that the respondent constituted a danger to the public and a flight risk and ordered his continued detention. The tribunal member also indicated that the respondent could not be eligible for day parole due to amendments to the ***Corrections and Conditional Release Act***, S.C. 1992, c. 20 (CCRA) and that it would not be necessary to have further review hearings.

[7] The applicant Minister's case presenting officer requested a 7 day detention review hearing. The hearing occurred on February 3, 2003. It was at the latter hearing that the tribunal member found that Mr. Ambrose posed a threat to Canadian society and was a flight risk, but

ordered his release. The tribunal member did so based on his interpretation of amendments to the CCRA, specifically section 128, subsection (4). He concluded that the "day parole has become inoperative". On February 20, 2003, the decision of the tribunal member was stayed by order of this court, pending determination of the within application.

[8] The first task for a reviewing judge on a judicial review application is to determine the applicable standard of review: ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, (2003) 223 D.L.R. (4th) 599. In the circumstances of this particular matter, the decision was based on an erroneous finding of fact made in a perverse or capricious manner and without regard to the material that was before the tribunal member. Thus, it must be set aside whether the applicable standard is patent unreasonableness, reasonableness simpliciter, or correctness.

[9] Section 128 of the CCRA was amended by section 242 of IRPA. The amendments extinguished eligibility for day parole or unescorted temporary absence with respect to those individuals subject to removal orders made pursuant to IRPA. Under the former Act, if an individual subject to a subsection 105(1) order was released by the National Parole Board on day parole, the subsection 105(1) order would then become operative to continue the detention and the detention would be reviewable under subsection 103(6)(c): ***Chaudry v. Canada (Minister of Citizenship and Immigration)***, [2000] 1 F.C. 455 (C.A.). IRPA came into effect on June 28, 2002. Correctional Services Canada (CSC) and Citizenship and Immigration Canada (CIC) took the position that section 128 could not apply to those individuals sentenced before June 28, 2002,

absent changed circumstances such as the imposition of an additional sentence on or after June 28th. In short, CSC and CIC proceeded on the basis that the amendments did not apply retroactively. A case management bulletin from CSC dated June 28, 2002, states that:

> Offenders who are serving a sentence at the time of coming into force of this new Immigration and Refugee Protection Act will not be immediately affected by the amendments to section 128 of the CCRA.

[10] The tribunal member interpreted the amendments differently. He stated as follows:

> Contrary to the interpretation that might have been given to these dispositions by Correctional Services or by Immigration, I am of the opinion that what triggers the application of these sections is the date at which the removal order is made.

[11] In the concluding paragraphs of his decision, the tribunal member made the following findings:

> ... You are considered to be an undesirable alien who is to be removed from Canada because of your wrongdoings. So, you have no right to rehabilitation from within Canada, you have no right to reinsertion into the Canadian community. So, I have not changed per se my mind on the likelihood and the unlikelihood of appearance.
>
> I have however, as I stated earlier, given it a second thought. In the perspective that you are presently not to be released due to the simple operation of the law. My reading of these Sections again is that the removal order is what triggers the coming into play of these Sections and their application to your case. So, again saying that day-parole has become inoperative and considering you are an inmate in a federal penitentiary, I now decide that you do not pose, at this point in time, a danger to the public in Canada nor is there any unlikelihood of appearance due to your status of inmate and consequently, detention is not maintained in your case, as you are again a person who is detained and who is serving a sentence. So, today's hearing is now terminated and it will be true now that there will not be any further hearings.

[12] In my view, I need not deal with the interpretation of section 128 of the CCRA. It is clear that the tribunal member did not order continued detention because he was of the view that the respondent would be detained in a federal penitentiary in any event. That was not the case.

In arriving at his finding, the tribunal member ignored the initial approval of the respondent's day parole. He ignored the January 25, 2003 day parole eligibility document. He chose to ignore the evidence as to the manner in which CSC approached the issue of day parole for those sentenced prior to June 28, 2002. He ignored the contents of the case management bulletin that was before him. He ignored the fact that, despite his own views as to the interpretation of section 128 of the CCRA, the respondent would be day paroled on January 25th. He erroneously concluded that the respondent would be detained by CSC despite the overwhelming evidence to the contrary that was before him.

[13] Having reached this erroneous finding of fact, the tribunal member then based his decision upon it. I conclude that the finding was patently unreasonable and was made in a perverse or capricious manner. The finding taints the decision. I therefore allowed the application for judicial review and remitted the matter back for redetermination before a different member of the Immigration Division of the Immigration and Refugee Board by order dated July 8, 2003.

<<Carolyn Layden-Stevenson>>
Judge

Fredericton, New Brunswick
July 10, 2003

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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