Federal Court  Cour fédérale

Date: 20230119

Dockets IMM-12690-22
IMM-13316-22

Citation: 2023 FC 85

Toronto, Ontario, January 19, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

DAUD DUT ATEM

Applicant

and

MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The Applicant has filed a Motion seeking interlocutory relief of two separate underlying Applications for Leave and for Judicial Review [ALJR] challenging two Immigration Division [ID] decisions that confirmed his continued detention. I dismissed the Motion from the bench, promising Reasons to follow. These are those Reasons.

I. Background

[2] The Applicant arrived in Canada in May 2004 as a Sudanese refugee along with his mother and siblings. Shortly after arriving in Canada, the Applicant was convicted of a series of criminal offences. In 2010, he was convicted of possessing and trafficking cocaine. This conviction resulted in a finding of inadmissibility for serious criminality and the issuance of an order in October 2012, to remove the Applicant to South Sudan. The removal order remains in force.

[3] In July 2014, a Danger Opinion from a delegate of the Minister of Citizenship and Immigration found that the Applicant was a danger to the Canadian public based, in part, on his lengthy criminal history. Even after the issuance of the Danger Opinion, the Applicant was convicted of additional criminal offences.

[4] In February 2022, the Applicant was released from criminal custody and placed in immigration detention, where he has remained since. He has had regular 30 days detention review hearings, as the legislation requires. The Applicant's last criminal conviction was in December 2022.

[5] The Applicant now challenges the immigration nexus because he claims that he is not a South Sudanese citizen and he alleges that the Minister has not proven – or has failed to disclose evidence supporting – his contention that he is a South Sudanese citizen.

[6] At the November 29, 2022 detention review hearing, the ID ordered the continued detention of the Applicant, and the disclosure of some – but not all – of the documents and information requested by the Applicant at the hearing [November Decision].

[7] On December 13, 2022, the Applicant filed an ALJR of the November Decision (Court file IMM-12690-22) challenging the ID order for continued detention, as well as the limited disclosure of the documents and information requested.

[8] A subsequent detention review took place on December 19, 2022 [December Decision]. Once again, the ID ordered the continued detention of the Applicant.

[9] On December 21, 2022, the Applicant filed an ALJR of the December Decision (Court file IMM-13316-22) challenging the order for continued detention. I note as an aside that the Applicant's next detention review (after the January 12, 2023 hearing of the urgent motion) had previously been scheduled for January 16, 2023.

[10] On December 21, 2022, the Applicant's Counsel sent the Court a letter [R35 Letter] requesting a special hearing on an urgent basis, pursuant to Rule 35(2) of the *Federal Court Rules*, SOR/98-106 [*Rules*] for the matter in IMM-12690-22. On December 23, 2022, the Applicant's Counsel sent the Court a second R35 Letter, this time requesting a special hearing on an urgent basis for the matter in IMM-13316-22.

[11] The Respondent sent the Court two detailed response letters on December 22 and 23, 2022 respectively, opposing the Applicant's two requests for a special hearing. These letters opposed the hearing of the urgent motion largely on procedural grounds, raising various issues with respect to the manner in which this Motion was brought before the Court, and why it should not be heard and/or relief sought should not be granted. Briefly summarized, the Respondent asserted that:

i. the Applicant brought a single Motion pertaining to two separate ALJRs and has not asked, nor made any submissions, for the deviation from the *Rules*.

ii. the matters are or will shortly be moot per *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], given the scheme of the 30 day detention review system;

iii. the Applicant is requesting that the Court invalidate the detention order, but this Court can only send the matter back for redetermination, which again will be futile given (ii);

iv. the timeframe for the hearing is highly prejudicial to the Respondent, because the excessively short timelines over the holiday period limited the government's ability to respond and prepare an adequate record, particularly given that the Applicant had known about the evidentiary issues since the November Decision; and

v. the relief sought by the Court would grant the relief in the underlying judicial reviews, that there was no urgency in the matter, and the Applicant had not satisfied Rule 362(2)(b) to truncate the Respondent's response time.

[12] On January 4, 2023, the Applicant filed a single Motion Record for both the matters in IMM-12690-22 and IMM-13316-22, seeking (i) an order vitiating the detention due to inadequate disclosure; and (ii) further or in the alternative, an order for the disclosure of the documents and information not disclosed with the November Decision.

II. Analysis

[13] I agree with the Respondent that there are several fundamental problems with the manner in which the November and December ID Decisions have been challenged through this Motion, the granting of which would accord the remedy sought in the underlying two claims.

A. *The issue of mootness in the underlying ALJRs to this Motion*

[14] With respect to the point of mootness that the Respondent raises, to determine whether an application is moot, and whether the Court should nonetheless hear the application, *Borowski* set out a two-step process (*Ritch v Canada (Attorney General)*, 2022 FC 1462 at para 14).

[15] First, the Court must determine whether the tangible and concrete dispute has disappeared and whether only a hypothetical or abstract question remains, in which case the proceedings are moot.

[16] Here, the first file – the November Decision challenged in Court file IMM-12690-22 – still has a live issue, with respect to evidentiary issues. That matter is not moot. The ID's decision to continue to detain the Applicant in November 2022 was subsequently overtaken by

the December 2022 decision, which resulted in the same outcome – to continue detention of the Applicant. As I noted to the Parties at the time of the hearing of this motion, the ID's December decision was not moot either.

[17] Given that I found the matters not to be moot at the time of the Motion, there is no need to consider the second step of the *Borowski* test.

B. *Failing to follow procedures set out in the FC Consolidated Immigration Guidelines*

[18] While I do not agree with the Respondent on the first issue of mootness, I entirely agree that the Applicant has failed to follow the procedures set out in the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings*, dated June 24, 2022 [*Consolidated Practice Guidelines*], resulting in significant prejudice. Before explaining why, some background on those guidelines is helpful.

[19] The *Consolidated Practice Guidelines* incorporated several of this Court's practice directions in the area of immigration law that had been published over a period of many years. This was intended to aid counsel in finding the required Court procedures in a one-stop shop of practice directives, such that counsel would not have to comb through a trove of individually published and disparate instructions.

[20] A working group of the Citizenship, Immigration and Refugee Law Bar Liaison Committee [IMM Working Group] developed the *Protocol for seeking urgent expedited proceedings of Immigration Division detention Orders* [*Detention Review Protocol*], first

published by this Court on November 30, 2020. It had a narrow focus, only applying to motions for stay of release from detention (i.e., cases brought by the government). This original version of the Protocol explained:

> This protocol addresses the procedure to be followed where the Minister of Public Safety and Emergency Preparedness ("Minister") intends to seek an order in the Federal Court ("Court") staying an order for release from detention made by the Immigration Division ("ID") of the Immigration and Refugee Board of Canada. In particular, this protocol addresses the steps when seeking an urgent interim stay of a release order, and an interlocutory stay of the release order, pending the determination of the Minister's application for leave and for judicial review.

[21] The IMM Working Group then re-constituted itself in 2021 to develop a wider protocol that also addressed expedited judicial reviews, typically brought by detainees, rather than only stay motions, such as that brought by the current Applicant. This wider protocol was published on June 24, 2022, as one of various practice directives incorporated into the *Consolidated Practice Guidelines*. It includes the following description of why it was issued:

> This protocol addresses the procedure to be followed where the Immigration Division ("ID") of the Immigration and Refugee Board of Canada makes a detention order and the Applicant (detainee or counsel acting on their behalf) seeks to challenge that order in the Court by way of an urgent expedited judicial review proceeding. Applications for leave and judicial review typically take many months to be adjudicated. When the decisions under review are Immigration Division orders for continued detention, it may be in the interests of justice to permit an application to be fully litigated in a substantially abridged timeline, given the liberty interests at issue.
>
> (*Consolidated Practice Guidelines* at page 8)

[22] The relevant steps of the *Detention Review Protocol* relating to expediting an ALJR of an ID decision ordering continued detention have been reproduced at Annex A to these Reasons.

The Applicant has not followed the steps set out in this Protocol. In failing to comply with the Court's guidance, the Applicant has fundamentally prejudiced the ability of the Respondent to respond to the underlying ALJRs.

[23] Indeed, the Applicant admitted in his submissions that if this Court granted him the relief requested in the Motion, it would resolve the underlying two judicial reviews, despite the fact that neither records were perfected and no Application Record had been filed for the underlying two judicial reviews at the time of this Motion. The Certified Tribunal Records have not been obtained. The leave decision has not been made, and given the state of the Court docket, even deciding leave would be premature at this stage of the proceedings.

[24] As can be gleaned from the two passage cited above, both the original and expanded versions of the *Detention Review Protocol* are intended to tailor the *Rules* to a specific procedural context in order to facilitate access to justice. The Protocol does not replace the Rules or create a vehicle to circumvent them.

[25] As explained to Counsel at the hearing of this Motion, the *Detention Review Protocol* was carefully drafted over an extended period of time through the Court's Immigration Liaison Committee, after having obtained significant input from various stakeholders including specialized members of both sides of the bar, the ID, the Court's Registry, as well as from members of the Court.

[26] It is crucial that counsel on both sides comply with the Court's directions that now comprise the *Consolidated Practice Guidelines*. Certainly, the Court's jurisprudence has consistently stressed the need to do so with analogous practice directions and protocols, including those relating to (i) stay of removals and (ii) allegations against former counsel, found at paragraphs 9-15 and 46-54 of the *Consolidated Practice Guidelines*, respectively.

[27] While the Court's guidelines such as the *Detention Review Protocol* are not strictly binding, given that they are not rules or otherwise legislated, even if parties do not follow the guidelines, they are bound by the *Rules* (subject to case managed proceedings). Either way, parties cannot ignore both. To permit such practice would permit an end-run around the guidelines and *Rules*, and allow parties to enter through a back door to the judicial review set out in sections 72-74 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the various rules that flow from those foundational provisions.

[28] Applying these observations to the case at hand, in failing to comply with the *Detention Review Protocol*, and nonetheless seeking to obtain the same remedy as sought in the underlying two ALJRs through this Motion, the Applicant, if successful, would entirely circumvent the various steps required in the ordinary judicial review process. He would also short-circuit even the special processes created to expedite judicial review for detention reviews given its 30-day scheme, as prescribed in the *Detention Review Protocol*.

[29] Were he to be successful in his effort, the Applicant would thereby achieve through alternate means (i.e. a motion) the ultimate ends that he sought to obtain in his underlying

judicial reviews. He would achieve this remedy contrary to the processes and procedures set out in the IRPA and the *Federal Courts Act*, RSC 1985 c F-7 [*Act*], the *Rules*, the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, and the Court's *Consolidated Practice Guidelines*. The Applicant even conceded that the relief he seeks in this Motion would eliminate the need for him to continue to pursue his underlying judicial reviews.

[30] It is clear the Court cannot countenance such a collateral attack of the ID decisions. The procedures set out in the legislation, rules and court guidance exist for numerous reasons, and one of those is to facilitate an orderly adversarial process – one in which both sides have a fair chance to advance their positions, and to respond. Eliminating the steps within that process, including obtaining a full tribunal record, requisite affidavits, and full arguments from both sides, would detract from the integrity of the established process, and the ability of the Respondent to properly advance its position. Ultimately, this would undermine the rule of law, and the interest of justice.

[31] While the Applicant served and filed R35 Letters requesting urgent proceedings of ID detention orders in accordance with the first step of the *Detention Review Protocol*, he failed to follow the other prescribed steps, which include the filing of records on both sides, obtaining of Leave, production of a Certified Tribunal Record, and filing of the Parties' legal submissions. Without these foundational elements of an ALJR, even with an expedited proceeding, the Court cannot properly adjudicate the matter.

[32] I note that Counsel argued that if he had followed the normal process, he would not have had time to argue the merits of his judicial review in a timely basis, relying on *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130, [2021] 1 FCR 53 [*Brown*].

[33] I disagree. This Court has expedited the judicial review process in detention matters both prior to the Federal Court of Appeal decision in *Brown* (see, for instance, *Canada (Public Safety and Emergency Preparedness) v Hamdan*, 2019 FC 1129, and *Canada (Public Safety and Emergency Preparedness) v Arook*, 2019 FC 1130, both referenced in *Brown*). Indeed, *Brown*, which was published on August 7, 2020, prior to this Court's release of its *Detention Review Protoco*l on Nov 30, 2020, held (at para 159):

> The Federal Court is accessible 24 hours a day, 365 days a year, from coast to coast for urgent applications, in both official languages. Interim stay orders are frequently issued (*Federal Courts Act*, section 18.2). Time frames are routinely abridged (see, e.g., *MPSEP v. Mustafa Abdi Faarah* ((IMM-1347-19); *MPSEP v. Martin Sevic* (IMM-1375-20*); Canada (Public Safety and Emergency Preparedness) v. Ahmed*, 2019 FC 1006; *MPSEP v. Baniashkar*, 2019 FC 729; *Hamdan* and *Arook*). Hearing dates are routinely expedited. Hearings may be by teleconference, or in person, in Federal Court facilities across Canada. Cases are heard and disposed of as quickly as the parties request or circumstances require (see, e.g., *MPSEP v. Malkei*, IMM-2466-20; *MPSEP v. Shen*, IMM-1626-20). Federal Court judges assigned to hear judicial review applications of detention decisions understand that liberty interests are at stake. The remedies can be innovative and creative (see, e.g., *Fond du Lac First Nation v. Mercredi*, 2020 FCA 59 at para. 5; *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167). <u>Further, and unlike many superior courts, there is a standing liaison committee between the Federal Court and representatives of the specialized immigration bar. This committee, including the sub-committee on immigration detention, serves as a vehicle for addressing any matter of concern relating to the efficient and expeditious disposition of immigration proceedings.</u>
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> [Emphasis added]

[34] In short, this Court's *Detention Review Protocol*, included in the *Consolidated Practice Guidelines*, has continued to ensure that detainees are able to secure expedited judicial reviews of their matters, with the objective of obtaining – consistent with Rule 3 of the *Rules* – the just, most expeditious and least expensive determination of their proceedings on their merits. However, to ensure this, litigants must respect and adhere to the procedures they stipulate.

III. Conclusion

[35] For all the reasons explained above, the Motion is dismissed. No costs will issue.

ORDER in IMM-12690-22 and IMM-13316-22

THIS COURT ORDERS that:

1. The Motion is dismissed.

2. There are no costs awarded.

"Alan S. Diner"
Judge

ANNEX A

***Protocol for seeking urgent expedited proceedings of Immigration Division detention Orders*, originally published on the Federal Court Web Site on November 30, 2020**

Incorporated in whole into the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* on June 24, 2022

***Protocole de demande de procédure en accéléré et en urgence des ordonnances de détention de la section de l'immigration* initialement publié sur le site Web de la Cour fédérale le 30 novembre 2020.**

Incorporé en totalité dans les *Lignes directrices consolidées pour les instances d'immigration, de statut de réfugié et de citoyenneté* le 24 juin 2022

[…]	[…]
28. The Rule 35(2) letter will include relevant facts, including the date of the detention order and the date of the next ID detention review, and provide a brief summary of the arguments that might justify expediting the judicial review proceeding, addressing factors such as the interests of justice, the procedural fairness rights owed to both parties, the Applicant's diligence in pursuing an urgent judicial review, and the availability of the Applicant for a hearing to be scheduled on an expedited basis. The Applicant's Rule 35(2) letter must also indicate that the Applicant consents, pursuant to section 74(b) of the IRPA, to an expedited judicial review hearing.	**28.** La lettre en vertu du paragraphe 35(2) comprend les faits pertinents, y compris la date de l'ordonnance de détention et la date du prochain contrôle de la détention par la SI, et fournit un bref résumé des arguments qui pourraient justifier l'accélération de la procédure de contrôle judiciaire, portant sur les facteurs tels que les intérêts de la justice, les droits d'équité procédurale dus aux deux parties, la diligence du requérant à poursuivre un contrôle judiciaire en urgence, et la disponibilité du requérant pour une audience à fixer de manière accélérée. La lettre du requérant en vertu du paragraphe 35(2) doit également indiquer que le requérant consent, conformément à l'alinéa 74(b) de la Loi sur l'immigration et la protection des réfugiés, à l'audition du contrôle judiciaire en accéléré.

29. The Minister shall inform the Court and the Applicant as soon as reasonably possible of the Minister's position on the request for an urgent expedited judicial review proceeding and their availability for both the urgent remote conference sought in the Applicant's Rule 35(2) letter and for an urgent hearing of the judicial review should the Court so order. If the Minister does not oppose the request, the Minister also shall expressly consent, pursuant to section 74(b) of the IRPA, to an expedited judicial review hearing.

29. Le ministre informe la Cour et le requérant dès que possible de sa position sur la demande de contrôle judiciaire en accéléré et de sa disponibilité pour la téléconférence urgente demandée dans la lettre du requérant en vertu du paragraphe 35(2) et pour l'audition en urgence du contrôle judiciaire si la Cour l'ordonne. Si le ministre ne s'oppose pas à la demande, il doit également consentir expressément, en vertu de l'alinéa 74(b) de la Loi sur l'immigration et la protection des réfugiés, à l'audition du contrôle judiciaire en accéléré.

30. The Court will endeavor to hold a remote conference to determine whether to grant the request to expedite the judicial review proceeding. Where it is not possible to schedule a remote conference at a mutually convenient time for the parties (or their respective counsel) and the Court, the Court may decide the matter on the basis of the parties' written submissions.

30. La Cour s'efforce de tenir une conférence à distance pour déterminer s'il y a lieu d'accueillir la demande d'accélération de la procédure de contrôle judiciaire. S'il n'est pas possible de tenir une conférence à distance à un moment qui convienne aux parties (ou à leurs avocats respectifs) et à la Cour, cette dernière peut trancher la question sur la base des observations écrites des parties.

31. If the Court grants the request for an urgent expedited judicial review proceeding, it may vary the time limits prescribed by the FCCIRPR, to grant leave in the underlying Application for Leave and for Judicial Review, or reserve the leave decision for disposition at the

31. Si la Cour fait droit à la demande de contrôle judiciaire en accéléré, elle peut modifier les délais prescrits par les Règles de la Cour fédérale en matière de citoyenneté, d'immigration et de protection des réfugiés, DORS/93-22, pour accorder l'autorisation dans la demande

time of the expedited judicial review hearing.

d'autorisation et de contrôle judiciaire sous-jacente, ou réserver la décision d'autorisation pour qu'elle soit rendue au moment de l'audience de contrôle judiciaire en accéléré.

32. The Court will provide a date for the judicial review hearing, set out the due dates for the parties' written submissions and affidavits, and make other orders or directions as necessary on any other matter, including the production of a certified tribunal record, that would facilitate the just and expeditious determination of the proceeding. If the Court hears the judicial review application prior to the Applicant's next detention review, this would be with a view to judgment being issued, if possible, before the ID makes a decision at that next detention review.

32. La Cour fixe la date de l'audience de contrôle judiciaire, établit les dates d'échéance des observations écrites et des affidavits des parties, et rend d'autres ordonnances ou directives nécessaires sur toute autre question, y compris la production d'un dossier certifié du tribunal, qui facilitera la détermination juste et rapide de l'instance. Si la Cour entend la demande de contrôle judiciaire avant le prochain contrôle de la détention du requérant, ce sera en vue de rendre un jugement, si possible, avant que la SI ne prenne une décision lors de ce prochain contrôle de la détention.

33. Upon being informed by the Court Registry of an Applicant's urgent request to expedite the judicial review proceeding, within 24 hours the ID will provide the Court and the parties with an audio recording of the ID proceedings,1 and within four business days the ID will provide a transcript of the decision portion of its proceedings. The Registry of the ID or of the Federal Court will set up a Sharepoint folder

33. Dès que le greffe de la Cour l'informe de la demande urgente d'un requérant d'accélérer la procédure de contrôle judiciaire, la SI fournit à la Cour et aux parties, dans les 24 heures, un enregistrement audio de la procédure de la SI,1 et dans les quatre jours ouvrables, la transcription de la partie décisionnelle de sa procédure. Le greffe de la SI ou de la Cour fédérale crée un dossier Sharepoint pour la circulation

for circulation of the audio recording and transcript.

de l'enregistrement audio et de la transcription.

34. Service and Filing. To facilitate the efficient and expeditious disposition of the matters addressed herein, the parties' submissions and other communications between and among the parties and the Court may be served and filed electronically. Documents for the Court should be filed via the Court's e-filing portal,2 or in special situations, at the electronic address3 provided by the Registry.

34. Signification et Dépôt. Pour faciliter le règlement efficace et rapide des questions examinées dans le présent document, les observations des parties et les autres communications entre les parties et la Cour peuvent être signifiées et déposées par voie électronique. Les documents destinés à la Cour doivent être déposés via le portail de dépôt électronique de la Cour2 ou, dans des cas particuliers, à l'adresse électronique fournie par le greffe.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-12690-22 AND IMM-13316-22
STYLE OF CAUSE:	DAUD DUT ATEM v MINISTER OF PUBLIC SAFETY, AND EMERGENCY PREPAREDNESS
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APPEARANCES:

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Galina Bining	FOR THE RESPONDENT

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