Federal Court  Cour fédérale

Date: 20240507

Docket: IMM-4049-23

Citation: 2024 FC 693

Ottawa, Ontario, May 7, 2024

PRESENT: Madam Justice St-Louis

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SALIM KAYGISIZ

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Public Safety and Emergency Preparedness [Minister] applies for judicial review of the decision rendered by the Immigration Division that ordered the release of the Respondent, Mr. Salim Kaygisiz, from detention without much more than conditions to report.

[2] The Respondent has not appeared or responded to the Minister's Application for judicial review. On the eve of the hearing before the Court, hence on May 18, 2024, the Respondent appointed a solicitor, who presented himself at the hearing on March 19, 2024, but presented no legal arguments.

[3] As detailed below, I find the matter is moot and that it is not necessary for the Court to exercise its discretion to hear the matter nonetheless. I find the reason raised by the Minister to try and convince the Court to hear the matter runs contrary to the binding case law from the Federal Court of Appeal on the issue (*Brown v Canada (Minister of Citizenship and Immigration*), 2020 FCA 130 [*Brown*]).

II. Discussion

A. *Context and impugned decision*

[4] As context, on March 7, 2023, Mr. Kaygisiz, a citizen of Turkey requested entry to Canada using a Danish passport bearing another identity. Upon examination, Mr. Kaygisiz claimed refugee protection and provided a Turkish identity card and a driving licence. During an interview, Mr. Kaygisiz declared that he had been convicted and sentenced to 12 years and 6 months of imprisonment because he was a member of the Revolutionary People's Liberation Army/Front (DHKP/C). Mr. Kaygisiz admitted that he had been a member of the DHKP/C and that he had been hiding weapons and explosives. Before coming to Canada, he was able to obtain a fraudulent passport in Serbia and he was able to travel illegally in other countries.

[5] Mr. Kaygisiz was detained and on March 10, 2023, the Immigration Division maintained detention on the ground of security and the fact that Mr. Kaygisiz would be unlikely to appear for examination. On March 17, 2023, the Minister sought Mr. Kaygisiz's continued detention before the Immigration Division. In the reasons leading to the release order, the Immigration Division did not consider Mr. Kaygisiz a danger for the public in Canada, essentially because of the time elapsed since the events, the facts that Mr. Kaygisiz himself provided the information, and that there is no evidence he was convicted of other offences since. On the issue of the flight risk, the Immigration Division found the risk was the same as the one for all other refugee claimants, except "a bit heightened" by the fact that he may be found inadmissible. Finally, on the last ground, despite that a criminality inquiry was ongoing, the Immigration Division did not allow more time for the Minister to complete the inquiry, having found that, since there was already an inadmissibility report, the ongoing criminality inquiry would bring no added value.

[6] The Immigration Division made Mr. Kaygisiz an offer to release on the conditions that he confirmed his address, informed the Canadian Border Service Agency [CBSA] of any changes, and of the details of his employer once he has a work permit and an employment. The Immigration Division also required Mr. Kaygisiz to report to CBSA within 2 working days of his release and once every 2 weeks subsequently, and to surrender travel documents if a removal order was made against him.

B. *The Minister's position*

[7] First, the Minister submits that the issue is not moot and that a live controversy remains despite Mr. Kaygisiz's release (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 35).

The Minister also submits that he has no reason to believe that Mr. Kaygisiz has left Canada. He adds that, unless the Court intervenes, in the event that Mr. Kaygisiz is arrested, the present decision of the Immigration Division, notably concerning security and danger, will stand and another member of the Immigration Division would be entitled to follow a similar line of reasoning, so that the Court's intervention would thus have concrete results.

[8] The Minister adds that the Immigration Division's Decision is unreasonable, but as described below, I do not need to address this issue.

C. *The issue is moot*

[9] Generally, courts will not decide an issue that has become moot. As Mr Justice Peter Pamel outlined in paragraphs 39 and 40 of *Canada (Public Safety and Emergency Preparedness) v Boampong* 2021 FC 1187, in situations such as this one, the immediate issues between the parties tend to become moot the requisite tangible and concrete dispute between the parties having disappeared, thus rendering the issues before the court academic (*Borowski* v Canada *(Attorney General)*, [1989] 1 SCR 342 at pp 353 to 363 [*Borowski*]). Justice Pamel also reminded us that where the matter is moot, it is necessary to decide whether the court should nonetheless exercise its discretion to hear the case, guided by three policy imperatives: first, whether an adversarial context continues to exist between the parties; second, concern for judicial economy; and third, whether in rendering its decision, the court would be encroaching upon the legislative sphere rather than fulfilling its role as the adjudicative branch of government (*Borowski* at pp 358 to 363).

[10] In this case, the Minister asks the Court to intervene; he stresses that unless the Court intervenes, in the event that Mr. Kaygisiz is arrested, the present decision of the Immigration Division, notably concerning danger, will stand and another member would be entitled to follow a similar line of reasoning. The Minister thus stresses that this Court's intervention would thus have concrete results.

[11] I disagree as I find that the Minister's premise is contradicted by the recent decision of the Federal Court of Appeal in *Brown* that addresses the relevance of previous detention decisions, and whereby the Federal Court of Appeal clarified its position previously stated in Canada (*Minister of Citizenship and Immigration)* v *Thanabalasingham*, 2004 FCA 4.

[12] At paragraphs 130 to 135 of *Brown*, the Federal Court of Appeal outlines the applicable principles, and at paragraphs 132 to 134, it states, in particular that:

> In *Thanabalasingham*, Rothstein J. expressly and unequivocally rejected the argument that the findings of previous members "should not be interfered with in the absence of new evidence" and held that "at each hearing, the Member must decide afresh whether continued detention is warranted" (at paras. 7-8). Guidelines issued on April 1, 2019, by the Chair of the Immigration and Refugee Board pursuant to paragraph 159(1)(h) of the IRPA reinforce this point and align with the instructions of the Federal Court to the ID in Canada (Public Safety and Emergency Preparedness) v. Hamdan, 2019 FC 1129 (Hamdan) (see Immigration and Refugee Board of Canada, Chairperson Guideline 2: Detention (Ottawa: Immigration and Refugee Board of Canada, April 1, 2019)).
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> Members of the ID are obligated, under their oath and by law, to consider the circumstances of the particular individual whose detention or liberty is in issue in a fair and open-minded way. Each member is required to undertake their own independent assessment of the case for and the case against detention. Abella J. returns to this point in *Chhina*, noting that "[t]he integrity of the IRPA process is dependent on a fulsome review of the

> lawfulness of detention, including its Charter compliance, at every review hearing" (at para. 127). Abella J.'s dissenting reasons, which were not contradicted by the majority on the point mentioned here, were foreshadowed in Federal Court jurisprudence (see, e.g., *Sahin* at 228-230; *Thanabalasingham* at para. 14).
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> *Thanabalasingham* creates no special rule for ID reviews. The requirement to give reasons when departing from a prior decision is directed to the well-understood requirement, essential to the integrity of administrative and judicial decision-making, that if there is a material change in circumstances or a re-evaluation of credibility, the ID is required to explain what has changed and why the previous decision is no longer pertinent. This reinforces the values of transparency, accountability and consistency. As was explained by the Supreme Court of Canada in *Vavilov*, the primary purpose of reasons is to demonstrate justification, transparency and intelligibility (at para. 81). To promote "general consistency", any administrative body that departs from its own past decisions typically "bears the justificatory burden of explaining that departure in its reasons" (at paras. 129-131). Moreover, reasons are the primary mechanism by which affected parties and reviewing courts are able to understand the basis for a decision (at para. 81; see also *Canada (Public Safety and Emergency Preparedness) v. Berisha*, 2012 FC 1100, [2014] 1 F.C.R. 574 at para. 52).

[13] Given this clarification by the Federal Court of Appeal, I am satisfied the issue is moot and that I should not exercise my discretion to hear the matter nonetheless, particularly in light of the reason advanced by the Minister to convince me otherwise and of the binding case law on the issue.

III. Conclusion

[14] Given my conclusion on the first issue, I need not consider whether the Decision is otherwise unreasonable. The Minister's application for judicial review will be dismissed.

JUDGMENT in IMM-4049-23

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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