Federal Court  Cour fédérale

Date: 20091030

Docket: IMM-4335-08

Citation: 2009 FC 1114

Toronto, Ontario, October 30, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

HAMID PANAHI-DARGAHLLOO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Panahi-Dargahloo, the Applicant, applies for judicial review of the Immigration Division detention review decision wherein the presiding panel member (the "Member") determined the Applicant is unlikely to appear for removal to Iran, is a danger to the public, and, therefore, must remain in detention. The Applicant has been continuously detained since June 15, 2007.

[2] The Applicant is a citizen of Iran. He arrived in Canada in July 1998 and made a claim for refugee status in August 1998. He was found to be a convention refugee in February 1999. He applied for permanent residence status in May 1999 which was refused in October 2002 due to his criminal record in Canada. The Applicant did not apply for judicial review of that decision.

[3] The Applicant has been convicted of a number of criminal offences and has served periods of incarceration. In 2004 immigration officials commenced an application for a danger opinion under paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (*IRPA*). The Minister's Delegate issued a Danger Opinion in December 2006, stating the Applicant is a danger to the public. The Applicant did not apply for judicial review of that decision either.

[4] The Applicant was taken into immigration detention on four occasions. The first time he was held for eight days; the second time he was held for three months. He was released, with conditions to abstain from alcohol and to not commit any criminal offence, on a $3,000.00 security bond posted by his sister. While on release, the Applicant breached the conditions by committing a criminal offence. He was convicted and sentenced to term of incarceration. Because of the Applicant's criminal breach, his sister's security bond $3,000.00 was forfeited and the Toronto Bail Program withdrew from an agreement to supervise the Applicant while he was on release.

[5] The Applicant was again taken into immigration detention in November 2006 following completion of his last criminal sentence. The Applicant was in detention for seven months until May 25, 2009, when the presiding ID member approved his release on a $5,000.00 security deposit

and performance bond posted by a Mr. Mansour Ezatti. On June 15, 2007, when the Applicant reported to Immigration at the Greater Toronto Enforcement Centre (GTEC) Reporting Centre, he was re-taken into custody because Mr. Ezatti wrote that he wished to be relieved of his responsibility as a bondsperson. The Canadian Border Service Agency (CBSA) officials contended that Mr. Ezatti did not know the Applicant contrary to what had been represented to the ID member. Charges were considered under subsection 127(a) of IRPA for misrepresentation or withholding material facts but the CBSA abandoned the issue.

[6] The Applicant promised to cooperate with the process of his removal to Iran. He provided documentation and completed a travel application for return to Iran. Iranian officials required the Applicant be personally interviewed before issuing a travel document. The Applicant was taken to the Iranian embassy in Ottawa in December 2007 for a personal interview and completion of arrangements for travel to Iran. Iranian embassy officials required the Applicant to sign a letter stating he was voluntarily returning to Iran. The Applicant refused since his return to Iran was not voluntary. Consequently Iranian officials did not issue a travel document for the Applicant.

[7] The Applicant remains in detention.

DECISION UNDER REVIEW

[8] The Immigration Division has held periodic reviews of the Applicant's detention. On September 19, 2008, the presiding Member held a 30 day review of the Applicant's detention. On

October 16, 2008 the Member delivered her written decision. She ordered the Applicant remain in detention.

[9] The Member noted the Applicant was a citizen of Iran and no other country; he was a Convention refugee; he was denied permanent resident status because of his criminal convictions; and he was subject to a deportation order.

[10] The Member noted the Applicant had not challenged, by way of judicial review, the rejection of his permanent residence visa application nor had he challenged the danger opinion made by the Minister's delegate. The Member reviewed the Applicant's criminal record in detail.

[11] The Member also reviewed the Applicant's previous periods of detention and the circumstances leading to the forfeiture of the first $3,000 security bond because of new criminal charges against the Applicant while he was on release.

[12] The Member reviewed the circumstances leading to the posting and subsequent withdrawal of the $5,000 security deposit and performance bond and the Applicant's return to immigration detention. The Member noted the CBSA began an investigation into possible misrepresentations but it was abandoned and no charges were laid.

[13] The Member noted that a travel application had been submitted to the Iranian embassy and the Applicant had been brought to the Iranian Embassy where he refused to sign a letter stating he was

voluntarily returning to Iran. As a result, the Iranian authorities refused to issue a travel document for the Applicant. The Member noted a second attendance by the Applicant to the Iranian Embassy did not materialize and no further arrangements to take the Applicant to Iranian Embassy were made.

[14] The Member considered the proposal by Mrs. Farahnaz Golesorkhi to post a security deposit of $5,000. The Member found neither the bond and supervision offered by Mrs. Golesorkhi nor the assistance offered by two other individuals, Pastor Suzette Maciel and Mr. Huran Golsorkhi, offset concerns about the Applicant's credibility and trustworthiness.

[15] Finally, the Member concluded the Applicant's refusal at the Iranian Embassy to sign the declaration he is returning voluntarily to Iran was uncooperative and showed the Applicant was unlikely to appear for removal. The Member continued the detention.

LEGISLATION

[16] The relevant portions of sections 57 and 58 of *IRPA* provides:

57. (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.	57. (1) La section contrôle les motifs justifiant le maintien en détention dans les quarante-huit heures suivant le début de celle-ci, ou dans les meilleurs délais par la suite.
(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review,	(2) Par la suite, il y a un nouveau contrôle de ces motifs au moins une fois dans les sept jours suivant le premier contrôle, puis au moins tous les trente jours suivant le contrôle précédent.

the Immigration Division must review the reasons for the continued detention.

…

58. (1) The Immigration Division shall order the release of a permanent resident or foreign national unless it is satisfied, taking into account prescribed factors, that

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

…

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that he permanent resident or foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any condition that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with conditions.

…

58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :

a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;

b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

…

(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

[17] Part 14 of the *IRPA Regulations* (the "*Regulations*") sets out factors to be considered by the ID when determining an individual is unlikely to appear. Sections 244 to 246 and section 248 provide:

244. For the purposes of Division 6 of Part I of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person (a) is unlikely to appear for examination, an admissibility hearing, removal form Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act; (b) is a danger to the public; …	244. Pour l'application de la section 6 de la partie 1 de la Loi, les critères prévus à la présente partie doivent être pris en compte lors de l'appréciation : *a*) du risque que l'intéressé se soustraie vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi; *b*) du danger que constitue l'intéressé pour la sécurité publique; …
Flight Risk 245. For purposes of paragraph 244(a), the factors are the following: ... (b) voluntary compliance with any previous departure order; (c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding; (d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal; ... (g) the existence of strong ties to a community in Canada.	Risque de fuite 245. Pour l'application de l'alinéa 244*a*), les critères sont les suivants: … *b*) le fait de s'être conformé librement à une mesure d'interdiction de séjour; *c*) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle; *d*) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi; … *g*) l'appartenance réelle à une collectivité au Canada.
Danger to the Public 246. For purposes of paragraph 244(b), the factors are the	

following:
(a) the fact that the person constitutes, in the opinion of the Minister, a danger to the public in Canada or a danger tot eh security of Canada under paragraph 101(2)(b), subparagraph 113(d)(i) or (ii) or paragraph 115(2)(a) or (b) of the Act;
…
(d) conviction in Canada under an Act of Parliament for
…
(ii) an offensive weapon involving violence or weapons;
…

Other factors

248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:
(a) the reason for detention;
(b) the length of time in detention;
(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so that length of time;
(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and
(e) the existence of alternatives to detention.

Danger pour le public

246. Pour l'application de l'alinéa 244*b*), les critères sont les suivants:
a) le fait que l'intéressé constitue, de l'avis du ministre aux termes de l'alinéa 101(2)*b*), des sous-alinéas 113*d*)(i) ou (ii) ou des alinéas 115(2)*a*) ou *b*) de la Loi, un danger pour le public au Canada ou pour la sécurité du Canada;
…

d) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des infractions suivantes:
…

(ii) infraction commise avec violence ou des armes;
…

Autres critères

248. S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
a) le motif de la détention;
b) la durée de la détention;
c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
e) l'existence de solutions de rechange à la détention.

ISSUES

[18] The Applicant submits that the Member erred by:

(d) ignoring evidence favourable to the Applicant in relation to flight risk and danger to the public;

(di) ignoring evidence relating to unexplained delay by CBSA in the Applicant's removal;

(dii) ignoring evidence relating to the length of detention and by failing to conclude that the Applicant's detention is indefinite; such failures resulting in a violation of the Applicant's section 7 and 12 *Charter of Rights and Freedoms* rights; and

(diii) rejecting the Applicant's proposed alternative to detention.

[19] The Respondent submits the application is moot because the Applicant has had three subsequent detention reviews. The Respondent further questions whether the Applicant has raised an arguable issue.

STANDARD OF REVIEW

[20] The standard of review for most questions of law is correctness. The standard of review for questions of fact, and for questions of mixed fact and law, is reasonableness as set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir)*. Where previous jurisprudence has established the standard of review for a particular matter, then that standard of review will be applied having regard to *Dunsmuir* at para. 57.

[21] In *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2003 FC 1225 at paras. 38 to 59, Justice Gauthier considered the standard of review for immigration detention reviews by the Immigration Division. She conducted a pragmatic and functional analysis and found the standard of patent unreasonableness applied. Justice Rothstein writing for the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, at para. 10 (*Thanabalasingham* FCA) confirmed that detention review decisions are fact-based decisions which attract deference.

[22] Other than questions of law, the standard of review applicable to this case is that of reasonableness.

ANALYSIS

[23] The Respondent submits this application for judicial review is moot. It argues three detention review hearings were held after the application for judicial review and prior to this judicial review during which the Applicant could have raised any issues material to his request for detention release.

[24] A case is moot when the decision will not resolve an issue affecting the rights of parties when the court is called upon to make a decision. *Canada (Minister of Citizenship and Immigration) v. Romans*, 2005 FC 435 at para. 35.

[25] This application is not moot. Immigration detention reviews are neither *de novo* hearings nor without regard to previous detention reviews. *Thanabalasingham* FCA at paras. 6, 11. The issues have not changed and they are no less relevant because of subsequent hearings.

Did the Member ignore evidence favourable to the Applicant in relation to flight risk and danger to the public?

[26] The Applicant submits the Member did not have regard to evidence relevant to the flight risk and danger assessment. The Applicant cites an email from a volunteer who met with him for bible studies and a letter from the proposed bondsperson who both believe him to be rehabilitated.

[27] The Applicant says he did nothing to indicate he was a flight risk after his last, albeit brief, release and says he was tried arranging treatment for his addictions.

[28] The Applicant argues *Salilar v. Canada*, [1995] 3 F.C. 150, para.18 and *Sittampalam v. Canada*, [2006] F.C.J. No 1412 para. 15 require the Member to consider indications of change.

[29] The Member took the Applicant's pattern of criminal activity while on previous releases as evidence that the Applicant did not show progress towards rehabilitation. The Member also considered the Applicant's breach of his conditions of release leading to forfeiture of the Applicant's sister's security bond in this regard. The Member referred to the proposal for security and supervision by the Applicant's supporters. In the Member's view, these factors did not offset the concern about the Applicant's credibility and trustworthiness.

[30] I find the Member considered the evidence concerning rehabilitation. The failure to refer to the Applicant's conduct during his last brief release does not, in itself, negate the Member's assessment of the Applicant's flight risk or danger to the public.

Did the Member err by ignoring material evidence relating to unexplained delay in the Applicant's removal as required by Regulation 248(d)?

[31] The Applicant submits the Member must consider whether the Applicant or Respondent caused any delay or failed to be as diligent as possible. The Applicant submits the Respondent did not take the Applicant to the Iranian Embassy for some nineteen months or explore the possibility of removal of the Applicant to a third country.

[32] The Applicant submits the member failed to consider his cooperation in obtaining and signing a travel document application, in obtaining a copy of the voluntary return letter for the hearing, in providing, via his sister, an Iranian identity document and in providing information on his family relationships.

[33] The Applicant attacks the Member's focus on the Applicant's unwillingness to state he will go back voluntarily, emphasizing his position accords with his status as a Convention refugee from Iran.

[34] The Applicant challenges the notion he should be forced to sign a declaration of voluntary repatriation. He argues the proposition is inherently contradictory and it ignores Canada's international obligations respecting non-refoulement.

[35] Iranian officials require the declaration of voluntary return. It is not a condition imposed by the CBSA officials.

[36] The question before the Member is whether the Applicant is to be released or remain in detention. Decisions concerning refoulement of a Convention refugee are for other forums and not an immigration detention review.

[37] The delay the Applicant complains of relates to the fact that he is only a citizen of Iran. By his own admission the only impediment to the Applicant's removal is his refusal to sign the declaration of voluntary return imposed by Iranian officials. This delay cannot be ascribed to weigh against the Minister.

[38] In *Canada (Minister of Citizenship and Immigration) v. Kamail*, [2002] F.C.J. No. 490 at para. 35 Justice O'Keefe held where Immigration officials are required by law to deport an Iranian Citizen to Iran and the detention could end as soon as the deportee decided to sign the necessary Iranian documents, the deportee was the cause of the detention.

The Member erred by ignoring evidence relating to the length of detention, failing to conclude that the Applicant's detention is indefinite, and by making an order that infringed the Canadian Charter of Rights and Freedom ("*Charter*").

[39] The Applicant submits at the time of the hearing he had been detained for more than two years with the exception of the two week period after his last release. The Applicant submits s. 248(c) of the *Regulations* require the Member to consider elements showing the length of time detention is

likely to continue as well as s. 248(b) that relates to the length of time an individual has spent in detention.

[40] Since the Applicant is unwilling to state his return to Iran is voluntary and Iranian officials are unlikely to issue his travel documents, he submits his detention has become indefinite.

[41] The Applicant argues indefinite detention violates section 7 of the *Charter* having regard to *Sahin v. Canada*, [1995] 1 F.C. 214, para. 30. The Applicant also refers to *Charkaoui v. Canada*, [2007] 1 S.C.R. 350 (*Charkaoui*) citing para. 123 in part:

> I conclude that extended periods of detention pending deportation under the certificate provisions of the *IRPA* do not violate s. 7 or s. 12 of the *Charter*, provided that reviewing courts adhere to the guidelines set out above. However, this does not preclude that a particular detention constitutes cruel and unusual treatment or is inconsistent without the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter*.

[42] The Applicant submits the Member failed to take into account the past and future length of detention as well as evidence demonstrating the Applicant's detention is indefinite.

[43] In *Sahin* Mr. Justice Rothstein (as he then was) acknowledged adjudicators of the Immigration Division have jurisdiction to decide questions of detention and applicable provisions of the *Charter* that arise. He listed four factors that may trigger section 7 of the *Charter*. At paragraph 30, he states:

> I expect that as precedents develop, guidelines will emerge which will assist adjudicators in these difficult decisions. To assist adjudicators I

> offer some observations on what should be taken into account by them. Both counsel for the applicant and respondent were helpful in suggesting a number of considerations. The following list, which, of course, is not exhaustive of all considerations, seems to me to at least address the more obvious ones. Needless to say, the considerations relevant to a specific case, and the weight to be placed upon them, will depend upon the circumstances of the case.
>
> (1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.
>
> (2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.
>
> (3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party.
>
> (4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.

[44] The first factor listed weighs against the Applicant. He insists his return to Iran is involuntary and the Member considered this an indication he would not appear when the time came for his removal to Iran. The Member also reviewed and noted the Applicant's record of escalating criminality and found he would be a danger to the public. This last consideration weighs in favour of a longer period of detention. The third factor also weighs against the Applicant since he is the cause of the delay by refusing to sign the declaration of voluntary return.

[45] The second and fourth factors enumerated by Justice Rothstein, length of detention and alternatives to detention, are factors that are now reflected in section 248 of the *Regulations* which states:

> 248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:
> (a) the reason for detention;
> (b) the length of time in detention;
> (c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so that length of time;
> (d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and
> (e) the existence of alternatives to detention.

[46] The regulatory direction requires the Member, after finding there are grounds for detention, to consider the length of detention and alternatives to detention. The Member considered the proposed alternative to detention and found the Applicant's proposal inadequate.

[47] Justice O'Keefe found four months is a reasonable period of detention in a case involving very similar circumstances where an uncooperative Iranian foreign national was being held in custody in *Kamail v. Canada (Minister of Employment and Immigration)*, [2002] FCJ 490. In this case, however, the Applicant has been detained for a significantly longer period. He has been in detention from June 15, 2007 to September 19, 2008, a period of 15 months. Prior to June 15, 2008 and before his brief period of release, he had been in detention for six months. The amount of time the Applicant has been in immigration detention is 21 months. The length of his immigration detention needs to be assessed along with the other relevant considerations.

[48] In considering the length of detention, the Member referred to *Kamail* citing:

> The court in M.C.I. Kamail [sic] the Court held as follows:
> …
> 37. The adjudicator recognized following Sahin, supra, that the respondent's lack of cooperation must count against him and not the Minister. The adjudicator proceeded to decide the case in the respondent's favour on the basis that the detention is indefinite. This is an error of law.
> 38. It is my view that the decision of the adjudicator was unreasonable. To hold otherwise would be to encourage deportees to be as uncooperative as possible to circumvent Canada's refugee and immigration system. The decision of the adjudicator cannot be allowed to stand.

[49] The Member went on to conclude the Applicant was unlikely to appear for removal given his lack of cooperation in obtaining a travel document. In my view, the Member did not consider the question of the length of detention choosing instead to focus on the cause for the continuing detention.

[50] Section 248 adds the length of detention as a consideration after determining the likelihood the detainee will appear for removal. The length of the Applicant's detention has to be considered against other factors besides his refusal to sign the letter required by Iranian authorities. This would include his status as a Convention refugee, the fact he reported to Immigration Officials during his last release, the passage of time since his last criminal conviction, whether or not the Applicant had an opportunity to receive rehabilitative treatment for his addictions while in the GTEC and the fact he has support in his rehabilitation proposal.

CONCLUSION

[51] I conclude the Member's failure to consider the length of the Applicant's detention in her assessment of whether or not to continue his detention is unreasonable.

[52] I grant the application for judicial review and remit the matter for reconsideration by a different member.

[53] The Applicant has proposed several questions for certification as questions of general importance. The Respondent opposes certification. In view of my conclusion that this matter turns on the failure to have regard to the length of detention as required by section 248 of the *Regulations*, I do not consider it necessary to certify a question of general importance.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4335-09
STYLE OF CAUSE:	HAMID PANAHI-DARGHALLOO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 30, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Mandamin J.
DATED:	October 30, 2009

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