Federal Court  Cour fédérale

Date: 20110401

Docket: IMM-3566-10

Citation: 2011 FC 405

Ottawa, Ontario, April 1st, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MOHAMUD AHMED ISSE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a citizen of Somalia, seeks judicial review of a decision made on June 8, 2010 by a Member of the Immigration Division of the Immigration and Refugee Board to impose terms and conditions in ordering his release from detention. The applicant contends that the Immigration Division lacked jurisdiction to make such an order as he had been found to require protection in a pre-removal risk assessment. For the reasons that follow, I find that the jurisdiction to impose conditions as part of a release order was preserved, notwithstanding the change in the applicant's status. The application is, therefore, dismissed.

BACKGROUND:

[2] Mr. Isse has a serious drug and alcohol problem and suffers from a number of medical problems related to injuries he has received. Since arriving in Canada and being granted permanent residence status as a member of the family class, he has accumulated a lengthy criminal record. As a result, he was found to be inadmissible under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), lost his permanent resident status and was issued a deportation order on May 3, 2004. A stay of deportation was granted in 2005 pending an appeal to the Immigration Appeal Division. The appeal was dismissed in February 2006. In November 2006, Mr. Isse received a positive determination on a pre-removal risk assessment and became a protected person subject to the principle of *non-refoulement*. The applicant subsequently incurred additional charges and convictions. He has a history of failing to comply with the terms and conditions of release orders in relation to his criminal and immigration proceedings.

[3] On May 8, 2010, the applicant was detained by immigration authorities following the completion of a criminal sentence. On May 11, 2010, at a 48-hour detention review, the Board Member ("Member") ordered that the applicant remain in detention, finding he constituted a danger to the public in Canada as well as a flight risk. The Minister's Counsel informed the Member at that hearing that the case was being reviewed to determine whether a danger opinion would be sought.

[4] At the seven day review on May 18, 2010, the Minister's Counsel advised that a danger opinion would not be pursued and recommended that the Member order Mr. Isse's release on terms

and conditions. The Member declined to release the applicant due to his history of non-compliance with prior release orders, his drug addiction and the absence of a concrete treatment plan.

[5] The transcripts of these hearings include statements by the applicant that he suffers from a brain injury from having been hit with a hammer, is partially paralysed and has seizures which cause him to lose his memory. While it is not entirely clear from the record, it appears that this information was offered to account for his failures to comply with prior release orders. The applicant also indicated that he was undergoing treatment for his drug addiction.

[6] At the thirty day detention review hearing on June 8, 2010, the Minister's Counsel again urged the Member to order Mr. Isse's release stating:

> He is detained for a purpose that the Minister cannot legally carry out. At this time there is no prospect of removal. The Minister is fully cognizant of Mr. Isse's previous transgressions, but we cannot keep Mr. Isse detained for a purpose that there is no possibility of executing as things stand to-day, and the point of reference for today's determination is to-day. The Minister is not seeking a danger opinion, and a danger opinion is required to remove Mr. Isse because he is a protected person.

DECISION UNDER REVIEW:

[7] Prior to rendering her decision, the Member expressed concern for the danger Mr. Isse may pose to the Canadian public from his drug related criminal lifestyle and his history of failures to appear within the immigration system. She noted that he had previously violated release orders issued by the Immigration Division and had convictions for failing to comply with court orders

within the criminal justice system. He had breached the terms of the Toronto Bail Supervision Program. The Member thus determined that he was unlikely to appear for removal from Canada.

[8] In referring to the position taken by the Minister, the Member stated:

> Now the fact that no danger opinion will be sought does not in some way make the deportation order that is against you of no effect. What I mean is that it does not nullify the removal order. That removal order is still valid and it is still in force so you are properly detained for removal. However, it is definitely a mitigating factor that the condition that is required to be in place before a protected person is not in place, and so removal at this point is in a sense elusory.
>
> Having said that the Panel would also like to point out that it would be irresponsible of it to give the impression that because your removal from Canada is not reasonably foreseeable then the element of danger to the public which was avidly argued by the Minister at prior detention reviews, and found legitimate by the Board Members, suddenly loses its reality or its potency. The danger still persists, and does flight risk.
>
> It is in this case that a structured plan of release is not only required, but absolutely necessary in the circumstances of your case.

[9] The Member ordered the applicant's release from detention on the following conditions:

a. To present himself when required to do so to comply with any obligation imposed under the *Act*;
b. To provide CBSA, prior to release, with his address and advise CBSA in person prior to the change being made;
c. To report to an officer at the CBSA Office at GTEC once every two (2) months;
d. To reside at all times with his sister, Hannah Isse;
e. To fully cooperate with CBSA with respect to obtaining travel documents;
f. To not engage in any activity subsequent to release which results in a conviction under any Act of Parliament;
g. To enrol in a drug rehabilitation program as soon as practicable and provide evidence of efforts being in made in that regard to CBSA within two (2) months of release;
h. To fully participate in, and complete, the drug rehabilitation program, and furnish evidence of completion to CBSA within one (1) month of completion;
i. To not possess or use any drugs or controlled substances not prescribed by a physician.

[10] The applicant seeks relief by way of an order quashing the Member's decision to impose terms and conditions on his release from detention.

ISSUES:

[11] The issues raised in this application are:

1. Does the Immigration Division retain jurisdiction to detain or impose conditions on a foreign national once the foreign national has been found to be a refugee or a protected person and the Minister has not issued a danger opinion?

2. If the answer to the first issue is affirmative, was the Member's decision to impose conditions reasonable?

RELEVANT STATUTORY PROVISONS:

[12] Section 115 of the IRPA outlines the principle of *non refoulement*:

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	*b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

[13] Section 58 of the IRPA sets out the framework applicable to the Immigration Division's granting of release:

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that	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*) they are a danger to the public;	*a*) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;
(*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);	*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);
(*c*) the Minister is taking necessary steps to inquire into a reasonable suspicion that they	*c*) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de

are inadmissible on grounds of security or for violating human or international rights; or

soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;

(*d*) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.

(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 the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

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

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

[14] Pursuant to section 248 of the *Immigration and Refugee Protection* Regulations, SOR/2002-227 ("*Regulations*"), where it has been determined that there are grounds for detention, the Immigration Division must consider a number of factors prior to deciding on detention or release:

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:	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*) the reason for detention;	*a*) le motif de la détention;
(*b*) the length of time in detention;	*b*) la durée de la détention;
(*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;	*c*) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	*d*) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(*e*) the existence of alternatives to detention.	*e*) l'existence de solutions de rechange à la détention.

STANDARD OF REVIEW:

[15] Detention release orders are decisions made by members of the Immigration Division who have considerable expertise: *Canada (Minister of Citizenship and Immigration) v.*

Thanabalasingham, 2003 FC 1225 at paragraph 42, aff'd at 2004 FCA 4. As they are questions of mixed fact and law, they are to be judicially reviewed on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v. Li*, 2008 FC 949, 331 F.T.R. 68 at para. 15.

ANALYSIS:

Does the Immigration Division retain jurisdiction to detain or impose release conditions on a foreign national once the foreign national has been found to be a refugee or a protected person and the Minister has not issued a danger opinion?

[16] The applicant argues that in the particular circumstances of this case the Immigration Division lacked jurisdiction to detain Mr. Isse or impose conditions upon his release from detention. The applicant points to subsections 115(1) and 115(2) of the IRPA to highlight that protected persons cannot be removed from Canada to a country where they face a risk of persecution or a risk of cruel or unusual treatment or punishment, absent a finding of inadmissibility and the issuance of a danger opinion by the Minister. Pursuant to subsection 58(2), the Immigration Division has the jurisdiction to detain a refugee or a protected person pending the resolution of an examination or an admissibility hearing. Once a foreign national is found to be a refugee or a protected person, the Immigration Division no longer has the jurisdiction to continue the detention or impose conditions *for removal*, the applicant asserts.

[17] Here, once the Minister's investigation into the applicant's inadmissibility was complete, and the Minister concluded that the applicant was not a danger to the public or susceptible for

removal from Canada under paragraph 115(2)(a), there were no further grounds for detention, in the applicant's submission. Because he was not subject to an examination, an admissibility hearing or an enforceable removal order, the Immigration Division was obligated to release Mr. Isse without conditions, it is argued.

[18] The Member reasoned that the removal order remains valid. The applicant submits that this implicitly means that he could be indefinitely detained, or, alternatively, indefinitely subject to the strict supervision of the Immigration Division. Indefinite detention or control where there is no meaningful process of on-going review would be contrary to s. 7 of the *Charter*: *Charkaoui v. Canada* [2007] 1 S.C.R. 350 at para. 107.

[19] The respondent contends that the Immigration Division retained jurisdiction to continue detention or to release on conditions where they believed it to be necessary on the grounds of danger to the public or of flight risk. The respondent says that the applicant continues to be subject to a removal order and the jurisdiction to order his detention or release is not dependent on the Minister's determination of when, if ever, to pursue enforcement. Should the Immigration Division decide to release the foreign national, subsection 58(3) of the IRPA provides that it may impose any conditions it considers necessary.

[20] The jurisprudence supports the Minister's position. *Canada (Minister of Public Safety and Emergency Preparedness) v. Samuels*, 2009 FC 1152, 85 Imm. L.R. (3d) 226, decided by Justice Danielle Tremblay-Lamer, is almost directly on point. The respondent in that case also had a long history of criminal convictions, abused drugs, frequently breached supervision conditions and was

subject to a removal order. While in immigration detention, he applied for a pre-removal risk assessment which found him to be in need of protection due to mental health issues. The effect of allowing the application for protection was to stay the removal order pursuant to section 232 of the *Regulations* until such time as a decision with respect to the person's application to remain in Canada as a permanent resident had been made or the time for making an application for such status had expired.

[21] Mr. Samuels sought to be released. Unlike in the present matter, the Minister expressed his intention to seek a danger opinion. The Immigration Division decided to release Mr. Samuels pending the outcome of that process as it was likely to take a considerable time and the result could be negative. The Minister sought judicial review of the decision.

[22] Justice Tremblay-Lamer considered whether the tribunal had the jurisdiction to maintain the respondent in detention notwithstanding the positive outcome of his pre-removal risk assessment. The respondent had argued that section 58 of the IRPA and the related regulations contained all of the criteria applicable to detention and release by the tribunal. Properly construed, the respondent submitted, detention or release with appropriate conditions may be ordered whether or not a person can be removed. The protection under subsection 115 (1) of the IRPA is protection against refoulement where the individual would be at risk if returned. It does not preclude a detention or conditional release determination in the case of the protected person even if the removal order has been stayed.

[23] Moreover, the scheme of the Act as a whole has to be taken into consideration, the respondent argued in *Samuels*. If the Immigration Division lacked jurisdiction to detain an individual or a permanent resident subject to a removal order that cannot be executed, there would be no legal authority to detain or release such a person with conditions who was a danger to the public. That would be contrary to Parliament's statement of objectives in the Act, notably the safety of Canadians. In enacting section 51 of the IRPA, Parliament has provided that a removal order that has not been enforced becomes void if the foreign national becomes a permanent resident. But this does not apply in the case of a person who has lost that status by reason of serious criminality.

[24] Justice Tremblay-Lamer agreed with the Minister stating, at paragraph 27 of her reasons, that a removal order that is stayed is not void:

> Although it cannot be executed pending a ruling on a protected person's application for permanent residence or the passing of the deadline to file such an application, it still exists and is valid and, in my opinion, the person against whom it was issued is still "subject to it."

[25] In *Kalombo v. Canada (Minister of Citizenship and Immigration),* 2003 FCT 460, 28 Imm. L.R. (3d) 40, Justice Luc Martineau examined whether a removal order could still be considered valid where the Minister had no intention of giving effect to the order. That case concerned judicial review of a decision sustaining a removal order made by an adjudicator of the Immigration Appeal Division. The applicant was a Convention refugee and citizen of a country to which Canada did not remove individuals.

[26] At paragraph 24 of his decision, Justice Martineau held that "the Act does not make a removal order contingent upon its execution or enforceability". Noting that validity and

enforceability gave rise to two distinct processes under the former *Immigration Act,* R.S.C. 1985, c. I-2. Justice Martineau, stated that "[o]nce the IAD upholds a removal order, the issue of where and when an individual will be removed is a matter for the Minister", citing *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 74. See also: *Argueles v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1477 at para. 23; and *Wajaras v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 200 at paras. 12-13, and 2009 FC 252, aff'd 2010 FCA 41, 399 N.R. 31.

[27] I agree with the respondent that the Immigration Division retains jurisdiction to determine whether a foreign national should be detained or released on conditions so long as there is a valid removal order in existence, even if removal is stayed and can't be effected because of the Minister's decision not to issue a danger opinion. Respect for the principle of *non refoulement* and the Immigration Division's jurisdiction to detain an individual who faces a valid removal order and is found to be a danger to the public are not mutually exclusive concepts.

[28] To construe the Act as the applicant submits would, as Justice Tremblay-Lamer noted in *Samuels*, above, require that the word *enforceable* be read into subsection 58 (2) of the Act. Accordingly, I find that the Member was correct to assert that "the removal order is still valid and it is still in force so you are properly detained for removal".

[29] In arriving at these conclusions I am mindful of the position stated by the Minister's counsel at the hearings before the Immigration Division on May 18 and June 8, 2010. The Minister is not bound by the position taken by counsel at that time. In any event, I note that counsel made it clear

that the point of reference for the Member's determination was as of that particular day and did not preclude a subsequent determination by the Minister that the applicant could constitute a danger to the public. The Member properly considered the fact that the Minister was not seeking a danger opinion to be a mitigating factor. However, she was not bound by it nor would she have been bound by a contrary intention. At best, the information she received on that subject was evidence to be weighed with all of the other evidence relevant to detention: *Wishart v. Canada (Minister of Citizenship and Immigration) (C.A.)*, 2001 FCA 235 at para. 44.

Was the Member's decision to impose conditions reasonable?

[30] The applicant's argument that the conditions imposed by the Member were unreasonable because they were not "necessary" is not persuasive. In light of the applicant's drug addiction and substantial criminality, it is not unreasonable to think that a more structured plan would be necessary in this particular case. It was suggested during the hearing that the criminal justice system would have to deal with the problems presented by the applicant's behaviour. This does not, however, address the concern expressed by the Member about the Division's mandate to protect the public. It would have been irresponsible for the Member to have simply left it to the police and criminal courts to respond after the next offence.

[31] The respondent has rightly noted that the condition requiring the applicant to reside with a family member and the reporting obligations were advocated by the applicant's counsel at the June 8, 2010 detention review hearing. The other obligations not to engage in illicit activity which would result in a conviction under any Act of Parliament and not to possess or use controlled substances

not prescribed by a physician are conditions that apply to everyone in Canada. The condition of completing a drug rehabilitation program was a constructive alternative to detention given the circumstances of this applicant, notably his admitted addiction, medical injuries and his clear need for community support. The conditions requiring the applicant to notify CBSA of a change of address and requiring cooperation with CBSA with respect to obtaining travel documents are not unreasonable given the fact the Member had ongoing concerns about flight.

[32] While I understand that the applicant may have difficulty abiding by these conditions given his addictions and history of non-compliance, I do not agree that the effect of the Member's decision is indefinite detention. As the respondent notes, several conditions are of a determinable duration – i.e. completion of the drug rehabilitation program ends when the applicant completes the program and provides evidence of its completion in one month. If the reporting obligations prove to be too onerous over time, the applicant can apply to the Immigration Division to modify or terminate the terms and conditions of the release order. As was found by Justice Tremblay-Lamer in *Samuels*, above, at paragraph 29, IRPA provides a meaningful process for ongoing review in keeping with the liberty interests protected by s. 7 of the *Charter* and the decision of the Supreme Court of Canada in *Re Charkaoui*, above.

CERTIFIED QUESTION:

[33] In *Samuels*, above, Justice Tremblay-Lamer certified the following question:

> Does the Immigration Division retain jurisdiction to detain a foreign national once the foreign national has been found to be a refugee or a protected person?

The applicant proposes that the Court certify the same question. It appears that it has not been addressed by the Federal Court of Appeal.

[34] In *Kalombo*, above, a similar question was proposed for certification, among others. However, Justice Martineau found that the former *Act* and law conclusively resolved this matter. He held, at paragraphs 27-30, that it did not raise a question of general importance:

> The issuance of a removal order and its enforceability or execution are two distinct concepts that are not interchangeable. Removal orders arise from the operation of law and are not premised on intent. […] [T]he Act does not contemplate that the issuance of that deportation order depends on the intention to execute it…

[35] The Federal Court of Appeal has recently reiterated this same principle. In *Wajaras*, above, it noted, at para. 3, that "it is not improper for the Minister to seek a deportation order for the purpose of depriving a permanent resident of this status as a result of serious criminality, even where there are impediments to removal".

[36] The test for certification is set out in paragraph 74(d) of the IRPA and Rule 18(1) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, as amended. It has been articulated as whether there a serious question of general importance which would be dispositive of an appeal: *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89; 318 N.R. 365. Certification is not necessary where the question is not a live issue and the Court has consistently accepted a prior authority: *Thurasingham v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1332, 39 Imm. L.R. (3d) 74.

[37] In my view, the reasoning in *Kalombo* and *Wajaras* applies to the case at bar and sufficiently responds to the question certified in *Samuels* and proposed again here. In light of the clear distinction between the issuance of a removal order and its enforceability, and taking into account that under section 115 of the IRPA a protected person is not immune from removal, it follows that the Immigration Division retains jurisdiction to detain a foreign national who is subject to a removal order, even if that individual holds protected status and can't be removed barring a danger opinion. Therefore, no question of general importance will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3566-10
STYLE OF CAUSE:	MOHAMUD AHMED ISSE and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 20, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	April 1, 2011

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