Federal Court Cour fédérale

Date: 20121123

Docket: IMM-11131-12

Citation: 2012 FC 1357

Ottawa, Ontario, November 23, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ABDURAHMAN IBRAHIM HASSAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

APPLICATION

[1] This is an application by the Minister of Public Safety and Emergency Preparedness (Applicant) asking the Court to quash the decision of member Funston (Member Funston) dated October 30, 2012 (Decision) that ordered the release of Mr. Abdurahman Ibrahim Hassan (Respondent) from immigration detention.

BACKGROUND

[2] I think the background to this application is fairly set out by the Applicant and the Respondent in their submissions and I will reproduce relevant aspects of both their summaries here.

[3] The Respondent came to Canada from Somalia in December of 1992, accompanied by his aunt, Fadumo Osman, and claimed refugee protection. In August of 1993 he was granted refugee protection.

[4] The Respondent suffers from bipolar disorder, as well as other medical problems such as asthma, insulin-dependent diabetes and high blood pressure, and addictions to alcohol and crack cocaine.

[5] The Respondent has a thirteen year history of violent criminality in Canada which started in 1999:

a. On April 13, 1999, the Respondent was convicted of assault and sentenced to 12 months probation;

b. Two subsequent assault charges were withdrawn on terms and conditions. On May 5, 2000 the Respondent was convicted of failing to comply with those terms and conditions and given a 12 month suspended sentence;

c. On April 4, 2001, the Respondent was again convicted of assault. The victim was his brother. The Respondent entered his brother's room and attempted to wake his

brother. When the brother did not wake the Respondent threw a glass bottle at his brother's head, causing injury;

d. On September 6, 2001, the Respondent was convicted of assault and uttering threats. The victim of the assault was his mother. The Respondent threatened to kill both his mother and his brother if they did not give him money. In the course of this altercation the Respondent telephoned his aunt and repeated the threat;

e. On October 10, 2001, the Respondent was convicted of uttering threats and mischief. He had gone to his mother's house in the middle of the night and asked to stay there. When she refused he threatened to burn the house down and strangle her. The police were called and he subsequently threatened to kill the arresting officers and kicked out the rear window of the police car;

f. On November 1, 2004, the Respondent was convicted of two counts of robbery and uttering threats, arising out of a series of incidents. The Respondent approached several individuals on different dates, threatened to shoot them, and robbed them. The Respondent also threatened a private security officer and the arresting police officer.

[6] In December of 2005 a report on inadmissibility was prepared under section 44 of the IRPA addressing the November 2004 robbery convictions. An admissibility hearing was held, resulting in the issue of a deportation order that was stayed under paragraph 114(1)(*b*) of IRPA.

[7] The Respondent's criminality continued: in January of 2007, he accosted an individual on the street in downtown Toronto and asked the victim for money. The Respondent threatened to get a

gun and kill the victim and punched the victim in the head three times. On September 7, 2007 the Respondent was convicted of robbery and failure to comply with a recognizance and probation order. Another report on inadmissibility under section 44 was prepared, addressing this conviction.

[8] In May of 2007 the Respondent was sent a warning letter by CBSA, indicating that if he received any further convictions CBSA would consider pursuing action to enforce the deportation order.

[9] Once again, the Respondent's criminality continued. Since the letter of May 2007, in addition to the September 2007 robbery conviction noted above, the Respondent has been convicted as follows:

a. On March 17, 2009 the Respondent was convicted of theft, assault with the intent to prevent arrest, and failure to comply with a recognizance;

b. On November 26, 2010 the Respondent was convicted of robbery and threatening death and sentenced to four months imprisonment. The Respondent robbed an individual with two accomplices, threatening to shoot him if the victim did not give them money. The Respondent smashed the victim repeatedly against a wall and threatened to kill the victim if he reported the incident to the police;

c. On January 10, 2012, the Respondent was convicted of assault causing bodily harm and sentenced to 18 months imprisonment. He was charged with aggravated sexual assault, robbery and breach of probation. The victim had agreed to go to the Respondent's apartment for the purpose of consuming illicit drugs. After the respondent consumed the drugs he demanded sex and, when the victim refused, he

> jumped on top of her, choking her and banging her head against the floor. The victim agreed to sex in an attempt to stop the assault, but later refused and the assault continued. She was able to escape by pulling a refrigerator on the Respondent.

[10] The Respondent was incarcerated following this incident and remained in provincial custody until June 11, 2012 when, on completion of his sentence, he was transferred to immigration custody under a warrant for removal. The Respondent has been continuously incarcerated since approximately February 28, 2011 (on immigration hold since June 2012).

[11] The Respondent has, over the years, failed to comply with criminal recognizances, but he has asserted at his detention reviews that his criminality stems from his addiction to drugs and alcohol.

[12] In July of 2009 CBSA sought the opinion of the Minister under paragraph 115(2)(*a*) of the IRPA that the Respondent was a danger to the public ("danger opinion") to permit the Respondent to be removed from Canada.

[13] Both CBSA and the Respondent have provided submissions to the Minister on the danger opinion, and now await a decision.

[14] The Respondent has remained on immigration hold since June 11, 2012. At his first five detention reviews, he was ordered detained.

[15] At his 48-hour detention review on June 12, 2012 the member found that it was unlikely that the Respondent, if released, would control his impulses towards violent criminal behaviour. The member noted his thirteen-year history of criminal violence and past failures to control the factors aggravating this behaviour, including addiction and mental health issues. The member also found that he was unlikely to appear given that his family is in Canada and given his past record of failing to comply with directions under the law.

[16] The member at this first detention review found that, if any alternative to detention were to be considered, such an alternative would have to protect the public and make it likely that the Respondent would appear for removal. There would have to be sufficient evidence of a likelihood of rehabilitation, so that the Respondent's addiction and mental health issues could be controlled, and conditions that would prevent the public from being at risk.

[17] The member at the second detention review on July 17, 2012 adopted the reasons of the first member. The Respondent indicated that he had a place in a withdrawal management program and had been attending Alcoholics Anonymous. The member, however, found insufficient evidence that the Respondent had reached a point where he was no longer vulnerable to the impulses towards violence and substance abuse.

[18] The member at the third detention review on August 14, 2012 adopted the previous findings and considered the Respondent's proposal of residential withdrawal management. The member found that the Respondent showed a "lack of meaningful progress along your recovery" and referred to "strict supervision" to ensure compliance with any terms and conditions and to offset the

significant danger to the public. The member encouraged the Respondent to pursue treatment for his addiction, but found that nothing in his plan would offset his flight risk or the danger to the public given the lack of supervision in the proposed plan.

[19] At the fourth detention review on September 7, 2012 the Respondent proposed a plan whereby he would attend a withdrawal management program at Toronto East General Hospital and would then complete a three month program at Harbourlight. The member ordered the Respondent's detention to continue, finding that he had attended addiction programming in the past and that did not stop his criminal behaviour. The member adopted the previous reasons and stated that it was not sufficient for the Respondent to attend a withdrawal management program.

[20] At the time of the fifth detention review on October 4, 2012, Respondent's counsel indicated that they were working on a detailed release plan. The member agreed with the previous findings that the Respondent is a danger to the public and is unlikely to appear, and noted that the Respondent had been given chances in the past to change his behaviour. The Respondent was again ordered detained.

[21] The Respondent came into immigration hold on June 11, 2012 and has been held at the Don Jail on the grounds that he poses a danger to the public, and that he would be unlikely to appear for removal from Canada. One previous alternative to detention was proposed on June 19, 2012. That proposal was for his mother to post a $3000 cash deposit and that the Respondent attend the residential withdrawal treatment program through the Toronto East General Hospital. No information about that treatment program was provided at that time.

[22] The Respondent's counsel presented an alternative to detention at his detention review October 30, 2012. Member Funston considered the proposed alternative to detention, including disclosure from the Respondent of 12 pages describing the residential addictions treatment program, Turning Point, where the Respondent had been conditionally accepted. The Respondent also proposed that his aunt be a bondsperson and that she post a $5000 cash deposit to help ensure that the Respondent complied with immigration requirements and the conditions of release.

[23] The Respondent proposed that he not only be required to do the 28-day Turning Point addictions treatment program, but that he also be ordered to do other, sequential residential addictions treatment programs provided by the Salvation Army: the Harbourlight program for 3 1/2 months or the Hope Acres residential addictions program on a farm outside of Barrie, Ontario, for 6 months.

[24] The Respondent was also amenable to a condition that he must continue addictions treatment/counselling on a day treatment basis after the approximately 10 months of residential addictions treatment are concluded.

[25] At the October 30, 2012 detention review, the Member Funston ordered the Respondent's release from detention, with several conditions, including:

a. Weekly, or more frequent, telephone reporting to CBSA;

b. No use or possession of illegal drugs;

c. No consumption of alcohol;

d. Successful completion of the Turning Point residential treatment program;

e. Application to and successful completion of the Harbourlight residential treatment program;

f. Application to and successful completion of the Hope Acres residential treatment program;

g. Notice provided by the Respondent to CBSA 48 hours in advance of his completion of one stage of treatment and prior to commencing the next stage;

h. A $5000 cash deposit to be posted by his aunt, Fadumo Osman; and

i. He continue day addictions treatment/counseling after his residential rehabilitation is completed at Hope Acres, and provide proof of such treatment to CBSA upon request.

[26] At each stage of residential treatment, the Member Funston ordered, as a condition of release, that the Respondent must provide the CBSA with 48 hours notice before ending and commencing the next step in his residential addictions treatment. Member Funston stated that if the Respondent did not attend and complete each program, this would be a breach of the bond and the release order.

[27] On November 9, 2012, this Court ordered the Respondent's release order stayed until the final determination of this application for leave and judicial review or until the next scheduled detention review.

ISSUES

[28] The Applicant raises the following issue:

1. Is the Decision reasonable?

STANDARD OF REVIEW

[29] The parties agree that the applicable standard of review is reasonableness and the Court concurs.

[30] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[31] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

[32] The Applicant says that Member Funston:

a. Failed to consider whether the Respondent is unlikely to appear;

b. Erred in concluding that the Respondent is not a danger to the public;

c. Erred in deciding that the bondsperson (the Respondent's aunt) was appropriate;

[33] The Respondent says that Member Funston:

a. Reasonably considered whether the Respondent is likely to appear;

b. Reasonably concluded that the Respondent is not a danger to the public;

c. Reasonably found that the Respondent's aunt was an acceptable bondsperson.

ANALYSIS

Danger to the Public

[34] The rationale for the Decision on this issue is transparent and intelligible. Member Funston says that "Today I'm satisfied that your aunt is a suitable bonds person and that there is more extensive treatment adequately addressing the issue of danger to the public."

[35] This conclusion is based upon Member Funston's findings that

a. "[I]t is more likely than not that if your abuse, your substance abuse issues were properly addressed then it would lessen any concerns that you would pose a present and future danger to others. I am persuaded that the addiction issue is a significant contributing factor to your criminality and that of course involved the issue of danger to others";

b. "Your aunt is coming forward as well to offer a significant financial guarantee to ensure that you comply with immigration requirements and she intends to maintain daily contact with you in order to monitor and ensure that it is all working out for you, I'm satisfied that this is a change in your circumstances."

[36] So the new information to justify a departure from previous orders is the "more extensive treatment" that is proposed and that will, combined with the aunt's supervision, adequately address the issue of danger to the public.

[37] The question for the Court is whether this finding is reasonable within the range posited in paragraph 47 of *Dunsmuir*.

[38] Previous detention reviews have emphasized the Respondents "long history of willingness to use violence against others and an inability to control his behaviour". (Laut). Previous reviews have also considered the contribution of the Respondent's addictions and mental health to his criminal record and submissions that he will now take rehabilitation more seriously because he has had time to reflect. (Laut). Member Laut concluded that:

> It is likely true that his addictions and mental health issues have contributed, but there is no evidence that he can control them. He has

> been released under supervision in the past, including just prior to his most recent conviction which involved using drugs and violence. At the time he committed that offence the criminal justice system had been trying to reform him for more than a decade. He had already received a warning from CBSA in 2007 which had no effect. I find his long term behaviour more persuasive than his words and find that he continues to pose a danger.

[39] Member McCabe adopted the findings of Member Laut and found further that the Respondent had not "internalized" the treatment processes and therapies he had tried, although he encouraged him "to continue along this path". Member McCabe concluded that:

> …because of your lack of any meaningful progress along your recovery, you are someone that requires some form of strict supervision to ensure that you can comply with terms and conditions including your removal rebooked …. including your eventual removal from Canada towards Somalia and also to offset the very significant danger to the public that you pose.

[40] The previous assessments speak of someone who poses a very significant danger to the public and whose actions over the years speak louder than his words that he has changed.

[41] No one denies that the Respondent's criminal activities are connected to his addictions and his health, but previous members have questioned his willingness or ability (as a very dangerous man) to change and commit himself to reform.

[42] My review of the record suggests that this element is not reasonably considered by Member Funston. She believes that the more extensive treatment regime that is proposed will address the public danger element because she concludes that the Respondent's criminality is a function of his addictions and mental health issues. It may be that, at some time in the future, after the Respondent successfully goes through rehabilitation, that the danger will be lessened or obviated. At present,

however, the evidence suggests that the Respondent is a very dangerous man who has not internalized past therapies and whose actions over time are more persuasive than his words.

[43] I am not saying that a treatment plan along the lines proposed could not provide what Member McCabe meant by "some form of strict supervision". But Member McCabe also adopted the reasons of his colleagues at previous detention reviews, and these reasons included an assessment of the Respondent's likelihood of responding to rehabilitation given his extreme violence and actions over the years. This has to be taken into account when assessing the danger the Respondent would pose to the public if he is released into a residential rehabilitation program. Member Funston's failure to weigh and balance this factor renders her Decision unreasonable.

Flight Risk

[44] Member Funston's findings on flight risk are that it is not an immediate concern because no danger decision is in sight and, even if the danger decision goes against the Respondent, there is also the time it will take to acquire travel documents:

> The prospect of your removal in my view is likely sometime down the road yet and so it is a factor that warrants a serious consideration when there is in my view a liable (*sic*) alternative being proposed.

[45] The question for the Court is whether this finding is reasonable within the range posited in paragraph 47 of *Dunsmuir*.

[46] My view is that Member Funston does not adequately address flight risk and this renders the Decision unreasonable.

[47] I can see that the length of time in detention is a factor to be looked at when considering alternatives to detention. However, this is not in itself sufficient.

[48] Each previous member has found the Respondent to be a serious flight risk. For example, Member Laut goes into considerable detail about some of the factors at play in this case at pages 86-87 of the CTR.

[49] Member Funston just does not pick up on and address these factors at all. In fact, she comes to no clear conclusions that I can see on this issue and my reading of the record does not disclose to me why she thought that matters had changed since, for example, Member Laut's analysis and decision. Also, there are relevant factors under Regulation 245 that are not mentioned or considered.

[50] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted. The Decision of Member Funston is quashed and set aside and the matter is referred back for reconsideration;
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11131-12
STYLE OF CAUSE:	**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
	- and -
	ABDURAHMAN IBRAHIM HASSAN
PLACE OF HEARING:	Ottawa, Ontario
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